UNIVERSITY OF KWAZULU-NATAL

SCHOOL OF LAW, HOWARD COLLEGE

A psycho-legal analysis of the selection of gamete donors by intended parents

Dominique Manias

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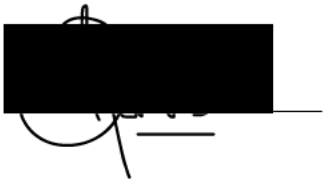
This thesis is submitted in pursuance of the requirements for the degree of Doctor of Philosophy.

Supervisor: Professor Donrich W Thaldar

2025

DECLARATION

I, Dominique Manias, hereby declare that except where specified otherwise, this project is an original piece of work by me. I declare that this article was prepared with some iterative drafting/language assistance from ChatGPT, an AI language model developed by OpenAI.

Signed: 

FUNDING

I declare that financial support for the language editing of my doctoral thesis was provided by three South African fertility clinics: Aevitas, Medfem and Vitalab (Umhlanga). While interview data were collected from staff at these clinics as part of the study, the clinics had no influence on the study design, data analysis, or the preparation of this study. Some funding for editorial revisions was also provided by the University of KwaZulu-Natal.

ACKNOWLEDGEMENTS

First, I would like to express my gratitude to the School of Law for giving me the opportunity to do my PhD at the University of KwaZulu-Natal.

Embarking on this doctoral journey has been an enriching experience, and I am deeply indebted to many individuals who have supported me along the way. First and foremost, I extend my heartfelt gratitude to my supervisor, Professor Thaldar. His mentorship has been instrumental in shaping my research and his insights, guidance, and unwavering support have been a cornerstone of this thesis. Professor Thaldar's dedication to fostering my academic growth has been both inspiring and invaluable.

I am also immensely grateful to the fertility clinics and banks (Vitalab-Umhlanga, Vitalab-Johannesburg Nurture, Medfem, and Aevitas) who have been part of this journey. Their contributions have been an invaluable resource and I deeply appreciate their willingness to participate and support this study.

Finally, to my family, I offer my deepest appreciation for your unwavering support and patience. This journey has been long and demanding and required sacrifices that have been felt by all of us. Your love and willingness to make these sacrifices so freely have been my anchor throughout this process. I am profoundly grateful to have such devoted loved ones by my side, which made this achievement possible.

ABSTRACT

This thesis presents a comprehensive psycho-legal analysis of gamete donor selection by intended parents in the rapidly evolving landscape of South African assisted reproductive technology (ART). The research investigates the nuanced interplay between the psychological and legal dimensions that inform the decision-making processes of intended parents, and critically examines how personal desires and societal norms intersect with legal frameworks.

The study contextualises the emotional and psychological challenges faced by intended parents, who often grapple with grief and identity issues when using donor gametes. The research further explores the legal landscape, and focuses on the National Health Act, the Children's Act, and the Regulations Relating to Artificial Fertilisation of Persons, which govern ART practices in South Africa. These Regulations emphasise donor anonymity, informed consent, and the rights of all parties involved, and yet present challenges of balancing privacy with the psychological needs of donor-conceived families.

Empirical findings of the research are that intended parents prioritise medical and genetic factors alongside personal and cultural values in their donor selection criteria, and often seek donors who reflect their own identity and familial aspirations. This preference is influenced by societal pressures and the desire for offspring to 'pass' as being genetically related. The research underscores the complexity of donor selection in a diverse cultural context, where legal anonymity provisions can conflict with the psychological well-being of donor-conceived children, so necessitating a re-evaluation of these frameworks.

This thesis advocates policy reforms that align reproductive rights with the diverse needs of individuals and families, so ensuring equitable access to ART services while protecting the interests of prospective children. The research contributes to a deeper understanding of the psycho-legal dynamics in donor selection, supports intended parents in their fertility journey, and promotes the well-being of all the parties involved. By highlighting the complex interplay between psychological impacts and legal frameworks, the study calls for a balanced and compassionate approach to reproductive law in South Africa.

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Table of Abbreviations

AID	Artificial insemination by donor
AIH	Artificial insemination by husband
ANOVA	Analysis of variance
AR	Assisted reproduction
ART	Assisted reproductive technology
ASRM	American Society for Reproductive Medicine
BMI	Body mass index
CF	Cystic fibrosis
CRC	Convention on the Rights of the Child
CRISPR	Clustered regularly interspaced short palindromic repeats
DCP	Donor-conceived people
DCSG	Donor Conception Support Group
DI	Donor insemination
ECS	Expanded carrier screening
EHR	Electronic health records
FDA	Food and Drug Administration
HFEA	Human Fertilisation and Embryology Authority
HPCSA	Health Professions Council of South Africa
ICPD	International Conference on Population and Development
IUI	Intrauterine insemination
IVF	In-vitro fertilisation
LGBTQ	Lesbian, gay, bisexual, transgender, and queer (or questioning)
LMIC	Low- and middle-income countries
MAR	Medically assisted reproduction
NHA	National Health Act
NRT	New reproductive technologies
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
PGT	Preimplantation genetic testing
PII	Personally Identifiable Information
POPIA	Protection of Personal Information Act
RDBMS	Relational Database Management System
RTAC	Reproductive Technology Accreditation Committee

(a)	SASREG Southern African Society of Reproductive Medicine and Gynaecological Endoscopy
SRHR	Sexual and reproductive health and rights
STD	Sexually transmitted disease(s)
UK	United Kingdom
US	United States
WHO	World Health Organization

CHAPTER 1

INTRODUCTION

I. BACKGROUND

Infertility is a deeply personal and challenging journey that affects numerous individuals and couples worldwide. In the intricate tapestry of assisted reproductive technology (ART), intended parents often find themselves at a crossroads, navigating the emotional complexities of needing gamete donors to fulfil their dreams of parenthood. This poignant journey is marked by a profound sense of grief and a cascade of feelings that are linked to the inability to use their own gametes.[1] The prospect of relying on a donor's genetic material can evoke a range of emotions, including frustration, sorrow, and a lingering sense of loss.[2] Beyond the physical aspect, the psychological impact of this process is profound, as intended parents grapple with questions of identity, connection, and the intricate interplay between biology and family. When faced with difficulties in conceiving, individuals often explore various options to realise their dreams of parenthood. In some cases, individuals choose to use their own gametes, either sperm or eggs, to maintain a biological connection with their future child. This choice allows them to experience the profound bond that comes from sharing genetic material with their offspring. However, for others, the use of donor gametes becomes necessary because of certain medical conditions, same-sex couples wanting children, or infertility that prevents the production of viable sperm or eggs.[3] While it may involve relinquishing the genetic connection, the use of donor gametes is an opportunity for these individuals to fulfil their desire to be parents, and offers hope and an opportunity to build a family when conventional methods are insufficient.

Wong explains how the 'current market for donor gametes reproduces normative conceptions of the nuclear family, kinship, and relatedness by facilitating "matching" donors to recipients by phenotype and cultural affinities'.[4] Many intended parents seek a confidential process and Quiroga adds that 'donor matching' allows the family to 'maintain secrecy about

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1 A Pedro 'Coping with Infertility: An Explorative Study of South African Women's Experiences' (2015) 5 *Open Journal of Obstetrics and Gynecology* 49.

2 Ibid

3 B Shozi, R Hazarilall & D Thaldar 'Blood is thicker than water, but is it thicker than ink? An analysis of parenthood and sperm donor agreements in the wake of *QG v CS* (32200/2020) 2021 ZAGPPHC 366 (17 June 2021)' (2022) 33 *Stellenbosch Law Review* 529 at 529.

4 K A Wong 'Donor conception and "passing"' (2017) *Journal of Bioethical Inquiry* 14.

the use of a donor by ensuring that the child could "pass" as a genetic child'.[5] Furthermore, Hershberger and Klock explain that 'oocyte donor recipients often feel vulnerable, powerless, anxious, and insecure due to their infertility, contributing to their anxiety to create a family through ovum donation'.[6] Furthermore, 'Their active role in donor screening and selection alleviates some of this anxiety, enabling recipients to feel as if they are "taking control over their destiny", allowing them to experience some sense of maternal sovereignty.'[7] Ultimately, however, the decision to use one's own gametes or rely on a donor is a deeply personal and complex choice that is driven by individual circumstances and aspirations to have a fulfilling and loving family life.

With the rapid progression of technology that has made ARTs more readily available to individuals in South Africa,[8] the country's legal landscape has, over the past ten years, experienced a surge in legislative measures that address medically assisted reproduction. Reproductive law has emerged as a distinct field in the legal domain. This flourishing field of law necessitates an in-depth analysis of its intricate facets and implications. South Africa has witnessed a rise in legislation and case law on medically assisted reproduction in the past decade. This area of law is a developing area in South African law, and is in need of in-depth analysis. South Africa's reproductive law generally adopts a permissive stance to the use of ARTs, thereby reflecting the state's acknowledgement and support of reproductive health rights. Nevertheless, certain aspects of the country's reproductive law are subject to rigorous regulation, in an attempt to balance reproductive health rights and state interests. However, according to Thaldar, this 'has failed to strike that balance well'.[9]

The key legislation guiding ART practices in South Africa includes the National Health Act,[10] the Children's Act,[11] and the Regulations Relating to Artificial Fertilisation of Persons of 2012.[12] These laws establish a regulatory framework that ensures the protection and well-being of all parties involved in ART procedures. The Regulations emphasise the importance of

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5 S S Quiroga 'Blood is thicker than water: Policing donor insemination and the reproduction of whiteness' (2007) 22 *Hypatia* 143.

6 P Hershberger, S Klock & R Barnes 'Disclosure decisions among pregnant women who received donor oocytes: A phenomenological study' (2007) 87 *Fertil Steril* 288.

7 S Stuart-Smith, J A Smith & E J Scott 'To know or not to know? Dilemmas for women receiving unknown oocyte donation' (2012) 27 *Human Reproduction* 2067.

8 S Dyer, P Archary, L Potgieter et al 'Assisted reproductive technology in Africa: A 5-year trend analysis from the African Network and Registry for ART' (2020) 41 *Reproductive BioMedicine Online* 604, 607.

9 B Shozi, Aliki Edgcumbe & D Thaldar 'New frontiers for reproductive health rights: Contemporary developments in the regulation of assisted reproductive technologies in South Africa' (2023).

10 61 of 2003.

11 38 of 2005.

12 GN 175 *GG* 35099 of 2 March 2012.

informed consent, confidentiality, and comprehensive medical and genetic screening for gamete donors and recipients. They also provide guidelines for the storage, use, and disposal of gametes and embryos, thereby ensuring their ethical and responsible management. The framework promotes equitable access to ART services, prohibits commercialisation and exploitation, and upholds the rights of individuals and families who are involved in the process. Furthermore, in compliance with data protection and privacy, the Protection of Personal Information Act 4 of 2013 (POPIA)[13] adds an essential layer of regulation, emphasises the safeguarding of personal data, and ensures confidentiality in the gamete donation process. By addressing the various legal, ethical, and medical considerations, the South African framework seeks to foster safe, responsible, and ethical ART practices, while protecting the rights and welfare of all individuals involved.

Gamete donation involves ethical, social and psychological issues that require careful consideration. ART is highly regulated in South Africa.[14] Bridging the gap between an intended parent's desires and ethical rights in the gamete selection process – legitimate interests that the law should accommodate – is a complex and delicate task. The selection process involves intended parents having specific preferences or desires; however, this does not necessarily translate into a valid right that the law should accommodate. It is therefore necessary to investigate which rights are being affected and whether they warrant serious consideration. It is crucial for the law to establish a framework that balances these desires with the broader interests of society and the child's well-being. This includes considering the principles of reproductive autonomy, non-discrimination, privacy, and decision-making.

South Africa has recognised the need for regulation, as discussed above, and has taken some steps to address the complex issues associated with the use of donor gametes. However, no relevant empirical study has been done in the fertility healthcare sector in South Africa to assess the efficacy of such regulations. For instance, anonymity provisions are in place to protect the identities of donors, recipients, and children born from donor gametes, thereby maintaining confidentiality and safeguarding the privacy of all parties. However, this is an example of how the legal policies are possibly not as supportive as was initially intended for all the parties involved. According to South African law, there are three types of gamete donation: anonymous, known, and open-identity. These are now discussed in turn.

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13 Protection of Personal Information Act 4 of 2013.

14 D Thaldar, 'New Frontiers for Reproductive Health Rights: Contemporary Developments in the Regulation of Assisted Reproductive Technologies in South Africa' (2023).

Anonymous gamete donation: This involves the use of gametes (sperm or eggs) from a donor who remains unknown to the recipient. The identities of both the donor and recipient are typically kept confidential, and there is no direct contact or interaction between them. This type of donation is often facilitated by fertility clinics or sperm/egg banks. The primary implication is that the donor's identity is not disclosed to the recipient or any resulting children. The recipient may receive limited information about the donor's physical characteristics and medical history.

Known gamete donation: This occurs when a friend, family member or acquaintance of the recipient willingly donates their gametes. In this case, the donor and recipient have a pre-existing relationship or connection. The arrangement may be informal or is facilitated by a fertility clinic, depending on legal requirements and medical considerations. Unlike anonymous donation, the recipient and donor are aware of each other's identities. This type of donation can involve more openness and ongoing contact between the donor, recipient, and any resulting child. However, it also can lead to emotional and social complexities in the relationships involved.

Open-identity donation: This allows for potential future contact between the donor and any resulting child. With this type of donation, the donor agrees to have their identity disclosed to the child conceived with their gametes once the child reaches a certain age or upon request. The intention is to give the child with the opportunity to connect with their genetic heritage and possibly to establish contact with the donor later in life. Open-identity donation emphasises transparency and the right of the child to access information about their biological origins. Thaldar and Shozi however suggest that 'it would be lawful for SA gamete banks and donation agencies to follow the international trend and offer open-identity donors with adult photos'.[15]

By implementing these regulations, South Africa aims to strike a balance between facilitating access to donor gametes for those in need, while upholding the rights and well-being of everyone involved, thereby ensuring ethical practices and promoting the best interests of individuals and families in the realm of assisted reproduction. However, whether this framework protects or hinders the selection process in the fertility journey is questionable.

The legal regulations associated with gamete donor selection undoubtedly have a significant psychological impact on intended parents embarking on the journey of assisted

[15] D Thaldar & B Shozi 'Is open-identity gamete donation lawful in South Africa?' (2022) 112(6) *S Afr Med J* (409).

reproduction. This includes the process of choosing a donor and involves navigating a multitude of complex emotions and considerations,[16] such as relinquishing the genetic connection to their child and grappling with the concept of 'genetic strangers'.[17] The existing regulations, including those related to anonymity and limited information about donors, can further amplify these psychological challenges. Intended parents may experience feelings of loss, grief, or uncertainty as they face the reality of using donor gametes and they have to consider the potential implications for their family dynamics.[18] Rubin et al revealed how recipients employ 'both rational and non-rational strategies to manage the information' received for their selection process, and further 'highlighted the ways that information about donors can both support and undermine recipients' ability to navigate the process of selection psychologically'.[19]

According to Thaldar,[20] a salient aspect of South Africa's gamete donation regulatory regime is donor anonymity. The generally accepted belief in the South African fertility industry seems to be that gamete donation in South Africa must by law be anonymous and that it is unlawful to disclose the identity of a gamete donor.[21] The donor's personal information in respect of gamete selection is protected by POPIA.[22] What is important according to Thaldar, however, is ensuring that consent in terms of POPIA is *specific,* as discussed above. Therefore, in principle, POPIA allows for open-identity gamete donations.[23]

The infertility journey is peppered with many decisions that need to be made by the intended parents. Although decision-making is a widely studied process, little is known about how this occurs in the 'natural' context. According to psychologists Kahneman and Tversky, when a person makes a decision, they put in place heuristic strategies.[24] However, the question is whether this also applies when decision-making takes place in real life. Heuristic strategies are simple, quick judgements and decisions for complex problems. In developing countries,

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16 M Konrad 'Nameless Relations: Anonymity, melanesia and reproductive gift exchange between British ova donors and recipients' (2005) 7 *Fertility, Reproduction and Sexuality* 22

17 D Beeson, P Jennings & W Kramer 'Offspring searching for their sperm donors: How family type shapes the process' (2011) 26(9) *Human Reproduction* 2415–2424.

18 W Kramer 'Parents of donor-conceived people' (2023) *Psychology Today*.

19 L R Rubin I de Melo-Martin, Z Rosenwaks et al 'Once you are choosing nobody is perfect' (2015) 30(3) *Reproductive Biomedicine* 315.

20 D Thaldar 'Egg donors' motivations, experiences, and opinions: A survey of egg donors in South Africa' (2020) 15(1) *PLoS ONE* 1.

21 D Thaldar & B Shozi 'Is open-identity gamete donation lawful in South Africa?' (2022) 112(6) *S Afr Med J* 1.

22 Protection of Personal Information Act 4 of 2013.

23 Ibid.

24 J Johnson *Human Decision-Making is Rarely Rational: Designing with the Mind in Mind* 3 ed (2021).

the family's rejection of the person experiencing infertility, and social pressures are among the factors affecting the decision to seek a method of treatment, and the choice of treatment is made under the heavy influence of family members.[25] Making decisions about gamete selection is a complicated social and interactive process that is influenced by various individual, social, economic, cultural, psychological, and ethical factors.

Based on the limited studies conducted to date in other countries, Pennings argues that the criteria used by recipients are rather diffuse and muddled.[26] It is therefore currently impossible to deduce general priorities and tendencies.[27] By bridging the gap between empirical research and the legal context, the current study can contribute to the development of a more compassionate, patient-focused, and ethically sound system that supports individuals and families throughout their fertility journey.

II. STATEMENT OF PURPOSE

The purpose of this study is to investigate the alignment between South African laws on gamete donor selection, their implementation in practice, the rights of intended parents, and the interests of prospective children. This underexplored area is vital for addressing the paternalism and inconsistencies that are reported in medical practice, and for remedying the dearth of data on South African intended parents' decision-making in gamete donor selection. To achieve this, this thesis includes an empirical analysis.

III. RATIONALE

The privilege of having one's own biological child is not available to everyone, and some individuals have to resort to using donor gametes because of specific medical conditions, same-sex partnerships, or infertility issues that hinder the generation of viable sperm or eggs. Despite the potential relinquishment of a genetic link, the use of donor gametes allows these individuals to pursue parenthood, thereby providing a ray of hope and an avenue for establishing a family when traditional methods fail.

By opting to use donor sperm or eggs, individuals can overcome limitations in their own reproductive capabilities and increase the chances of a successful pregnancy through the use of ARTs like in-vitro fertilisation (IVF) or intrauterine insemination (IUI). The careful

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25 D Seybold 'Choosing therapies: A Senegalese woman's experience with infertility' (2002) 23(6-7) *Health Care Women Int* 540.

26 G Pennings 'The right to choose your donor' (2000) 15(3) *Human Reproduction* 508.

27 Ibid.

consideration of various factors in donor gamete selection, such as medical history, genetic traits, and physical attributes, is driven by the goal of creating a family while also aligning with the values and preferences of recipients. The current assumption is that intended parents' self-reported preferences and experiences are valuable and worthy of being considered in the legal development context. In South Africa, a country that is known for its democratic and open society, the Constitution seeks to uphold principles of freedom, dignity, and equality. However, for this study, it is not assumed that a preference or desire automatically equates to a valid legal consideration.

Democracy and human rights work best when it is evidenced-based public policy. Similarly, gamete donor selection governed by evidence-based public policy would therefore optimally consider the ethical dimensions of the issue, including the rights and interests of all parties involved – such as the donors, recipients, and potential offspring. By conducting an empirical study on the experiences of individuals involved in gamete donation, policymakers can make informed decisions that prioritise the protection of human rights and the best interests of all those affected. Furthermore, by understanding how intended parents select their gamete donors, further guidance or reform can be offered to bridge the gap between their needs and the extant legal framework. According to Thaldar et al, for example, 'the court has endeavoured to strike a balance between reproductive health rights and countervailing state interests but has failed to strike that balance well'.[28]

Reproductive health rights are fundamental human rights that protect individuals' autonomy to make choices related to their reproduction. These rights encompass the freedom to decide the number, spacing, and timing of their children, as well as access to necessary information and the means to make informed reproductive decisions.[29] Furthermore, positive reproductive decisions, such as the selection of gamete donors for ARTs, are an integral part of these rights. The Constitution of South Africa, 1996, in section 12(2)(a), explicitly recognises the importance of reproductive health rights by safeguarding the freedom of all individuals to make decisions about reproduction.[30]

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28 B Shozi, A Edgcumbe & D Thaldar 'New frontiers for reproductive health rights: Contemporary developments in the regulation of assisted reproductive technologies in South Africa' in O S Adelakun & E Ndoni (eds) *Reproductive Health and Assisted Reproductive Technologies in sub-Saharan Africa: Issues and Challenges* (2023) 193–195.

29 Ibid.

30 C Albertyn 'Abortion, reproductive rights and the possibilities of reproductive justice in South African courts' (2019) *University of Oxford Human Rights Hub Journal* 87.

South Africa has established a legal framework for the regulation of medically assisted reproduction (MAR) in humans, and this comprises the National Health Act, the Children's Act, and the Regulations Relating to the Artificial Fertilisation of Persons. However, concerns have emerged about the interpretation and implementation of these Regulations, in particular in the context of gamete donation. One key issue pertains to donor anonymity in South African sperm banks and egg donation agencies, where it is widely assumed to be a legal requirement. The 2012 Regulations[31] prohibit the disclosure of the identity of gamete donors, individuals who underwent MAR, or individuals born as a result of MAR, in order to safeguard their privacy.[32] This regulation, however, poses challenges as it is formulated too broadly, so potentially preventing those involved in MAR from disclosing their own identities, and leading to litigation against the state. A separate set of regulations, the General Control Regulations, under the National Health Act,[33] permits gamete donor identity disclosure but only with the consent of the donor.

The existing regulations in South Africa's reproductive law seem to create a tension between the protection of donor anonymity and the broader reproductive health rights of intended parents and donor-conceived individuals. This conflict raises important questions about the practical experiences of intended parents in selecting gamete donors, their expectations, and how these align with their rights under section 12 of the Constitution. It also raises questions about the adequacy of current regulations in terms of addressing these complexities and potential shortcomings.

In the intricate landscape of ARTs, this empirical investigation investigates the nuanced interplay between South African laws governing gamete donor selection, their practical implementation, the rights of intended parents, and the welfare of prospective children. Despite the profound implications for individuals grappling with infertility, this realm of legal inquiry is largely uncharted. Perturbingly, narratives of paternalism and inconsistency with the interpretation and application of the relevant laws persist in the medical community. Compounding this void, scant attention has been paid to understanding how South African intended parents navigate the complex decision-making process of selecting a gamete donor, and the potential consequences of such choices for the well-being of the future child. This study

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31 Regulations Relating to Artificial Fertilisation of Persons, GN R175 GG 35099 of 2 March 2012.

32 D Thaldar & B Shozi 'Is open-identity gamete donation lawful in South Africa?' (2022) 112 *South African Medical Journal* 1.

33 Regulations Relating to General Control of Human Bodies, Tissue, Blood, Blood Products and Gametes, GN R9699 GG 35099 of 2 March 2012, under the National Health Act 61 of 2003.

fills these critical gaps in knowledge, and sheds light on a crucial yet underexplored dimension of reproductive law and ethics.

This thesis aims to contribute to the academic literature, policy reform, and the improvement of reproductive healthcare practices in South Africa. By examining the experiences and expectations of intended parents in gamete donor selection and by assessing the alignment with reproductive health rights and regulations, this research seeks to bridge the gap between practical realities and legal requirements. The study may ultimately inform policy recommendations and legal reforms that better balance reproductive autonomy and the protection of donor anonymity with the reproductive rights of individuals, thereby creating a more equitable and just framework for assisted reproduction in South Africa.

Although research on the current topic is limited, several international studies[34] have investigated the perspectives of recipients, namely the intended parents of donor gametes. These investigations have highlighted the factors influencing the recipient's selection of a donor, and these factors have been reasonably well defined. What is lacking, however, is a South African investigation, especially given that the country is so culturally diverse. To date, the international studies have revealed that non-genetic parents place great importance on choosing a donor whose offspring could plausibly pass as their own biological children.[35] For instance, a 2012 study by Frith et al. found that when selecting sperm donors, recipients often considered factors such as ethnicity (83 per cent matching rate), skin colour (70 per cent matching rate), and shared interests (53 per cent matching rate). In addition, height and build were also deemed significant criteria by intended parents in the same study.[36] It is worth noting that physical health appeared to be equally if not more important than physical characteristics in all the UK studies conducted by Frith, Sawyer and Kramer (2012), Sawyer et al (2013), Hershberger (2004), and Rubin et al (2015). In fact, Sawyer et al found that most parents identified the donor's personal and family health as being one of the most crucial attributes when making a selection. Approximately half of the participants indicated that they would reject potential donors who met their criteria but who had health issues in their personal or

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34 G Pennings 'The Right to Choose Your Donor: A Step Towards Commercialization or a Step Towards Empowering the Patient?' (2000) 15 *Human Reproduction* 508 at 508. A Indekeu 'Parent's expectations and experiences of resemblance through donor conception' (2015) 34 *New Genetics and Society* 398 at 398. S Whyte, B Torgler & K L Harrison 'What women want in their sperm donor: A study of more than 1000 women's sperm donor selections' (2016) 23 *Economics & Human Biology* 1.

35 L Frith, N Sawyer & W Kramer 'Forming a family with sperm donation: A survey of 244 non-biological parents' (2012) 24(7) *Reproductive BioMedicine Online* 709–718.

36 Ibid.

family histories.[37] The Sawyer and Kramer study participants were especially concerned about the health of the donors, and emphasised the significance of donor medical screening practices.

Conducting an empirical study on how intended parents select donor gametes in South Africa could contribute to knowledge in various ways, including advancing our understanding of reproductive choices, addressing ethical and legal considerations, considering cultural and societal factors and, ultimately, improving support services and policies in the field of assisted reproduction.

This contribution is framed through *The Four Node Conceptual Framework*, which provides an analytical lens for examining the interrelationship between statutory provisions, their practical implementation, the rights of intended parents, and the prospective interests of the child.

a). Four Node Conceptual Framework

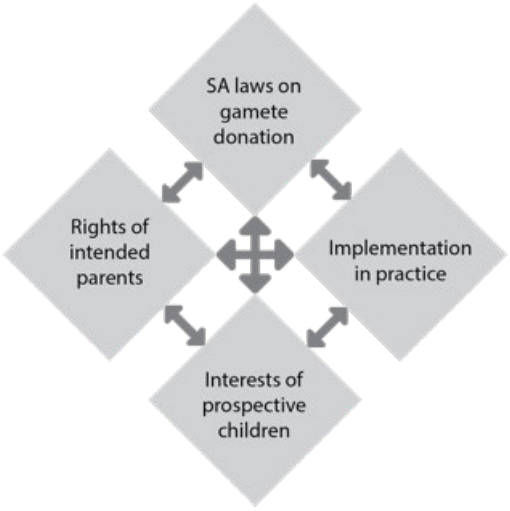


Figure 1: Four Node Conceptual Framework illustrating alignment between South African law, implementation in practice, interest of prospective child and rights of intended parents

This study explores the four-way alignment (see diagram, above) between (a) South African laws on gamete donor selection, (b) the implementation of these laws in practice, (c) the rights of intended parents, and (d) the interests of prospective children. The effect that this choice may have on the eventual child has also not received any attention. My study intends to address

[37] N Sawyer, E Blyth, W Kramer et al 'A survey of 1700 women who formed their families using donor spermatozoa' (2013) 27(4) *Reproductive BioMedicine Online* 436–447.

these issues by – first and foremost – building a solid empirical foundation from a survey of South Africans who required the use of donor gametes.

IV. PROBLEM STATEMENT

This study is important because, according to Thaldar, 'although there has been much research on egg donors' motivations, experiences, and opinions in other areas of the world – especially in the United States (US) and the United Kingdom (UK)[38]– no such research has thus far been conducted in South Africa.[39] It seeks to remedy the alignment or potential misalignment of South African laws governing gamete donor selection, their practical implementation, the rights of intended parents, and the interests of prospective children in the context of reproductive assistance. This effort is prompted by several pressing issues in South African reproductive law. First, the field remains largely unexplored, so creating gaps in the understanding of vital aspects of assisted reproduction. In addition, reports of paternalism and inconsistency among medical practitioners highlight concerns related to individual autonomy and fair access to reproductive services. A notable lack of data on how South African intended parents navigate the gamete donor selection process further impedes the development of effective policies. Furthermore, the potential impact of these choices on the well-being of the eventual child has not been adequately explored, so emphasising the need for comprehensive investigation and regulatory development in South African reproductive law.

V. RESEARCH QUESTIONS

Main Research Question: To what extent is there an alignment or potential misalignment between South African laws on gamete donor selection, their practical implementation, the rights of intended parents, and the interests of prospective children?

Sub-questions: To address the main research question and provide a comprehensive psycho-legal analysis, the following sub-questions are asked:

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38 S Purewal & O B A van den Akker 'Systematic review of oocyte donation: Investigating attitudes, motivations and experiences' (2009) 15(5) *Hum Reprod Update* 499–515.

39 D Thaldar 'Egg donors' motivations, experiences, and opinions: A survey of egg donors in South Africa' (2020) 15(1) *PLoS One* e0226603.

1. *Exploration of Reproductive Law*:
    - How extensive is the existing body of literature and legal research on South African laws governing gamete donor selection by intended parents?
    - What are the specific gaps in the current understanding of reproductive law in South Africa pertaining to gamete donor selection?
    - What are the public policy objectives that are served by the extant law?
2. *Implementation in Practice*:
    - What are the reported instances of paternalism and inconsistency among medical practitioners in the implementation of laws related to gamete donor selection?
    - How do these reported instances affect individual autonomy and equitable access to reproductive services?
    - What are the current challenges experienced by medical practitioners or patients in the system of gamete donor selection?
3. *Decision-Making by Intended Parents*:
    - What is the intended parents' own subjective criteria when selecting a gamete donor?
    - Do these interests qualify for protection under the scope of any constitutional rights?
    - What factors influence the choices made by intended parents, and to what extent are these factors considered in current legal frameworks?
4. *Interest of Prospective Child*:
    - How much attention has been given to understanding the potential impact of gamete donor selection on the well-being and interests of the eventual child in South African reproductive law?
    - What ethical and legal considerations should be considered when assessing the impact on children, and how can these be incorporated into regulatory frameworks?

By addressing these sub-questions through primary research methods such as surveys, interviews, and legal analysis, the study aims to provide a comprehensive understanding of the issues in South African reproductive law and contribute to the development of effective policies in this domain.

Relevance and importance of the research

This research is paramount for elucidating the alignment of South African reproductive laws governing gamete donor selection, their practical implementation, the rights of intended parents, and the interests of prospective children. Its importance lies in its potential to address significant gaps in existing knowledge, in particular regarding the reported instances of paternalism and inconsistency in the fertility healthcare sector. While problems with implementation are widely acknowledged, there has been no in-depth investigations into these issues. This research aims to fill this crucial void by investigating the complexities of South African reproductive law and unravelling the challenges in its practical application, so offering insights that can inform policies, practices, and ultimately contribute to the enhancement of ethical and equitable reproductive healthcare for individuals and families.

By investigating the intricate dynamics of intended parents' experiences and expectations in the selection of gamete donors, while scrutinising the alignment of these dynamics with existing reproductive health rights and regulations, this research aspires to bridge the gap between pragmatic realities and legal imperatives. The insights gleaned from this study may pave the way for informed policy recommendations and legal reforms that are aimed at achieving a more equitable and just balance between safeguarding donor anonymity, reproductive autonomy and upholding the reproductive rights of individuals, so fostering a fairer framework for assisted reproduction in South Africa. Alternatively, this study could serve as a rigorous evaluation for validating and affirming the effectiveness of our current reproductive laws in certain areas, so ensuring that our governance is substantiated by evidence-based research.

VI. LITERATURE REVIEW

The decision to create your family with the assistance of gamete donors is a difficult one. Choosing this family-building option ultimately involves grieving the loss of having a child who is genetically related to both or either of the intended parents. Once an individual or couple feels comfortable with moving forward with the notion of gamete donation, the next decision involves whether to use a known or unidentified/previously unknown gamete donor. A known gamete donor is a family member, friend, or acquaintance with whom the recipients or intended parents have a pre-existing relationship and the unknown gamete donor is an anonymous donor.

New reproductive technology gives rise to complex situations that need to be negotiated. Research into this process lags well behind the technological advancements themselves. It has been observed that psychosocial research on oocyte donation is still in its infancy,[40] and although there is some existing research there is a need for further studies.[41] Little has been published on the factors that could influence the choice of unknown donation or on the impact of donor information on recipients.[42]

Understanding the experiences and decision-making processes of intended parents in the context of assisted reproductive technologies requires not only clinical insight but also careful consideration of the legal and regulatory frameworks that govern donor gametes.

a). Extant legal framework on donor gametes and intended parents

The global demand for oocytes is rising, as an increasing number of couples are turning to this option to address their infertility challenges. However, practices related to oocyte use vary across countries. For example, some Islamic countries do not permit any form of gamete donation,[43] whereas, Denmark, China and Israel permit only excess oocytes that are retrieved from women undergoing IVF to be donated.[44] In contrast, gamete donation in the UK, US and South Africa is widely practised and, consequently, there is an acute shortage of oocyte donors in the UK and globally.[45] Based on the legal framework that governs ART, the main themes that relate to donor gamete selection include: i) anonymity, ii) disclosure, iii) reproductive autonomy, and iv) privacy/personal information. These themes are now discussed in turn.

i) Anonymity

Regarding the choice between an anonymous and identifiable oocyte donor, most research indicates a preference among recipients for anonymous donors.[46] In a recent UK study, those

40 Ibid.
41 Ibid.
42 S Stuart-Smith, J A Smith & E J Scott 'To know or not to know? Dilemmas for women receiving unknown oocyte donation' (2012) 27 *Human Reproduction*.
43 M C Inhorn 'Making Muslim babies: IVF and gamete donation in Sunni versus Shi'a Islam' (2006) 30 *Cult Med Psychiatry* 427–450.
44 J Klein & M V Sauer (2002) 16 'Oocyte donation. Best Practice' *Res Clin Obstet Gynaecol* 277–291.
45 C Murray & S Golombok 'Oocyte and semen donation: A survey of UK licensed centres' (2000) 15 *Human Reproduction* 2133–2139.
46 M Bertrand-Servais, H Letur-Ko¨nirsch, A Raoul-Duval et al 'Psychological considerations of anonymous oocyte donation' (1993) 8 *Hum Reprod* 874–879.

selecting anonymous donation cited a desire to ‘mark explicit boundaries and roles between the two parties involved’ as the main motivation to select this donor type.[47]

In recent years, international gamete banks and gamete donation agencies acknowledge an increasing prevalence of donors opting to be 'identity-release' or 'open-identity' donors. This is evident in the publication of adult photographs of these donors on certain agency websites. The term 'open-identity' implies that donors consent to revealing their identities upon request by the donor-conceived child once they reach adulthood. On the contrary, in South Africa, gamete banks and donation agencies generally only disclose early childhood photographs of donors and explicitly state that all donors remain anonymous. ‘The legal position in South Africa is that gamete donors ... must be anonymous and it is an offence to reveal the identity of a gamete donor’.[48] However, according to a thorough analysis of South African statutory instruments and case law in 2022 by Thaldar and Shozi, ‘the position in SA law is that gamete donation can be anonymous, completely open to the public, or anywhere in between – depending on the election of the individual gamete donor.’ [49] Therefore, South African gamete banks and donation agencies could legally align with the global pattern by providing open-identity donors with adult photographs. Compliance with the legal mandate necessitates *specific consent* by the donors and written consent from the donors to ensure legal adherence and prudence.

ii) Disclosure

Disclosure can be analysed from two perspectives: the decision to inform family and friends and the decision to inform the resultant offspring. Most UK studies found that the majority of known donors had informed their friends or family, to avoid secrecy.[50] With regard to donor offspring, studies[51] consistently report that most recipients intended to tell their child of the

47 T Bracewell-Milnes, S Saso, S Bora et al ‘Investigating psychosocial attitudes, motivations and experiences of oocyte donors, recipients and egg sharers: A systematic review’ (2016) 22(4) *Hum Reprod Update* 450–465.

48 South African Law Reform Commission, Issue Paper 32, Project 140, ‘The right to know one’s own biological origins’ (20 May 2017).

49 D Thaldar & B Shozi ‘Is open-identity gamete donation lawful in South Africa?’ (2022) 112(6) *S Afr Med J* 1.

50 S Yee, J A Hitkari, E M Greenblatt ‘A follow-up study of women who donated oocytes to known recipient couples for altruistic reasons’ (2007) 22 *Hum Reprod* 2040–2050.

51 J Readings , L Blake, P Casey, V Jadva, S Golombok. Secrecy, disclosure and everything in-between: decisions of parents of children conceived by donor insemination, egg donation and surrogacy. Reprod Biomed Online. 2011 May;22(5):485-95.

nature of conception.[52] The main reasons for disclosure were the feeling the child had the right to know and the desire to have no secrets in the family. Quantitative studies found that 19–26 per cent of recipients intended to tell their offspring of their nature of conception.[53] Baetens et al[54] found no significant relationship between the use of anonymous or known oocyte donors and the decision to tell the child, while Greenfeld et al[55] found that known donors were less willing to disclose information to the child compared with anonymous donors. Given the rich cultural diversity in South Africa, it would be intriguing to explore the country's position on the issue of disclosure of donor gamete usage.

iii) Reproductive Autonomy

Reproductive autonomy refers to the freedom to make choices about whether to have children. Individuals exercise their reproductive autonomy when determining the timing, frequency, and partners used for reproduction. Over the past four decades, advancements in technology have considerably broadened the boundaries of reproductive autonomy. Initial literature on reproductive autonomy focused on the importance of enabling women to decide 'whether or not to have sex, whether or not to have children, the number and spacing of children, and whether or not to carry a pregnancy to term'.[56]

Reproductive autonomy requires consideration beyond clinical settings and recognising the various societal, financial, familial, and cultural factors that limit individuals' reproductive choices. In others words, how intended parents select their gametes could be influenced by decision-making factors beyond personal preference. To establish true reproductive autonomy, it is crucial to consider the broader context, including societal norms, policies, and support systems. For instance, in regions where gender discrimination is pervasive, choices influenced by social pressure, such as selecting a male embryo, may not reflect genuine autonomy. By identifying how intended parents decide will inform whether reproductive autonomy is indeed

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52 P Baetens, P Devroey, M Camus et al 'Counselling couples and donors for oocyte donation: The decision to use either known or anonymous oocytes' (2000) 15 *Hum Reprod* 476–484.

53 T Bracewell-Milnes, S Saso, S Bora et al 'Investigating psychosocial attitudes, motivations and experiences of oocyte donors, recipients and egg sharers: A systematic review' (2016) 22(4) *Hum Reprod Update* 450–465.

54 P Baetens, P Devroey, M Camus, AC Van Steirteghem & I Ponjaert-Kristoffersen 'Counselling couples and donors for oocyte donation: The decision to use either known or anonymous oocytes' (2000) 15 *Human Reproduction* 476 at 476.

55 D A Greenfeld, C M Mazure, D L Olive et al 'Similarities and differences between anonymous and directed candidates for oocyte donation' (1995) 12 *J Assist Reprod Genet* 118–122.

56 Fitnat Naa-Adjeley Adjetey 'Reclaiming the African woman's individuality: The struggle between women's reproductive autonomy and African society and culture' (1994) 44 *Am UL Rev* 1351 at 1352.

protected by the law. Sex selection is generally prohibited in the absence of achieving a therapeutic benefit. Data provided by the Centre for Genetics and Society shows that, currently, 36 countries have adopted national laws (or policies having the force of law) on sex selection.[57] Individuals seeking preimplantation sex selection often travel to countries such as the US, Mexico, Italy and Thailand, where there is no ban on non-therapeutic sex selection. The controversy about non-therapeutic sex selection is whether it is a choice that should be respected because it is an element of reproductive autonomy, or whether it should be prohibited because it is a form of discrimination against women when it is exercised on the basis of the so-called 'son preference'.

iv) Personal Information/Privacy

Despite changes in legislation on donor identity-release, most oocyte recipients in the UK receive limited information about their donor. This typically includes physical traits, marital status, religion, health history, and occupation. Similarly, in Australia, recipients generally receive basic information, with no specific guidelines on what should be stored or released.[58] In contrast, the US commonly provides more comprehensive background information.

A study conducted in the US examined the most significant characteristics requested by recipients, and found that medical history (62 per cent), race (49 per cent), smoking/alcohol/narcotics use (44 per cent), intelligence (39 per cent), and physical appearance (29 per cent) were the most sought after.[59] South Africa's selection criteria continue to warrant investigation, and it will be intriguing to uncover the specifics of local preferences.

b). Public policy objectives for donor gametes and intended parents

The current legal framework governing ARTs in South Africa aims to serve several important public policy objectives, reflecting the country's commitment to human rights, equality, and the well-being of its citizens. Some of the key public policy objectives include:

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57 M Darovsky 'Countries with laws or policies on sex selection' (2009) available at *https://nanopdf.com/download/countries-with-laws-or-policies-on-sex-selection_pdf*

58 I S Rodino, P J Burton, K A Sanders 'Donor information considered important to donors, recipients and offspring: An Australian perspective' (2011) 22 *Reprod Biomed Online* 303–311.

59 S R Lindheim, J Chase, M V Sauer 'Assessing the influence of payment on motivations of women participating as oocyte donors' (2001) 52 *Gynecol Obstet Invest* 89–92.

i). Access to Reproductive Health Services: The legal framework aims to ensure equitable access to reproductive health services, including ART, for all individuals, regardless of their socioeconomic status, race, or other characteristics. This objective aligns with South Africa's commitment to providing comprehensive healthcare services to all its citizens. Whether this objective has been achieved is questionable since ART is predominantly available only in private healthcare and due to the high costs invoivled, it is not financially viable for the majority of South Africans.

ii). Protection of Individual Rights and Autonomy: The legal framework seeks to protect the individual rights and autonomy of those seeking ART. It recognises that individuals have the right to make informed decisions about their reproductive health and family planning, including the use of donor gametes. However, the quest to strike a balance between the extent of information and the precise nature of data that is necessary to safeguard individual rights, all the while upholding autonomy, is an ongoing conundrum.

iii). Non-Discrimination and Equality: South African law prohibits discrimination on various grounds, including race, gender, and sexual orientation. The legal framework for ART aims to uphold these principles, ensuring that individuals have equal access to services such that discrimination does not hinder their reproductive choices. However this is questionable with increased gender selection and discrimination against preferred genders in certain communities. Gender selection used for non-medical reasons could potentially reinforce harmful gender stereotypes and perpetuate gender-based discrimination.

iv). Child's Best Interests and Well-being: The legal framework prioritises the best interests and well-being of children born through ART. It establishes regulations and safeguards to ensure that the rights of children conceived through assisted reproduction are protected and that their upbringing is conducive to a safe and supportive environment.

v). Ethical and Informed Practices: The legal framework promotes ethical and informed practices in the field of ART. It outlines guidelines and requirements for fertility clinics, healthcare providers, and intended parents, ensuring that procedures are conducted responsibly and transparently. However, do the guidelines support the process for intended parents in its attempts to promote ethical practices?

vi). Regulation and Oversight: The legal framework establishes regulatory oversight of ART to ensure that clinics and practitioners adhere to established standards of practice. This oversight aims to safeguard the health and safety of individuals undergoing ART procedures.

vii). Recognition of Parental Rights: The legal framework clarifies the legal parentage of children born through ART to ensure that intended parents are recognised as legal guardians. This recognition is essential for providing stability and legal protection for families that are formed through assisted reproduction.

viii). Privacy and Confidentiality: The legal framework protects the privacy and confidentiality of individuals involved in ART. It establishes provisions to safeguard sensitive information, including the identities of donors and recipients, while respecting the rights of all parties.

ix). International Obligations: The legal framework aligns with South Africa's international obligations and commitments to human rights treaties and conventions. This attempts to ensure that the country's ART practices are consistent with global standards and principles.

The current legal framework governing ART in South Africa serves to uphold individual rights, promote equality, ensure the best interests of children, and establish ethical and responsible practices. These public policy objectives aim to reflect the nation's dedication to creating a just and inclusive society that respects the autonomy and well-being of all individuals involved in assisted reproduction.

c). Criteria used when selecting a gamete donor

The process of selecting a gamete donor is a complex and deeply personal journey that involves meticulous consideration of various criteria, ranging from medical and genetic factors to deeply held values and beliefs. In this context, the concept of eugenics, which pertains to improving the genetic quality of offspring, can play a role, so raising ethical questions about the boundaries between informed choice and potentially discriminatory practices. The US fertility industry's core approach involves embracing eugenic selection ideals and leveraging the genetic potential of gametes to promote egg donation services globally. Selection of egg donors hinges on a variety of factors such as physical features, racial background, and personality traits,[60] all of which are carefully curated to appeal to intended parents, as seen through the lens of clinics and agencies. Exploring the multifaceted criteria that come into play when intended

[60] A Furnham, N Salem & D Lester 'Selecting egg and sperm donors: The role of age, social class, ethnicity, height and personality' (2014) 5 *Psychology* 220 at 220.

parents make decisions about gamete donor selection, while also highlighting the ethical and moral dimensions intertwined with this process, are important aspects.

Historically, the scientific racism and eugenic misconceptions that contributed to the Holocaust are currently rejected by present-day individuals in the human genetics and genomics communities. While most focus in these circles is on immediate ethical inquiries arising from new biomedical advancements – such as concerns about physical safety, informed consent, and equitable sharing of research benefits and burdens – beneath these discussions lies a deeper reflection on the Holocaust's legacy. This reflection gives rise to more profound ethical considerations regarding the trajectory of this research and the possibility that we might inadvertently repeat the historical error of establishing genetic hierarchies based on societal biases. There is a concern that we could once again endeavour to reshape our species while operating against a backdrop of fundamentally unjust notions of human well-being.[61]

Eugenics is the concept of promoting specific desirable traits while discouraging or eradicating those considered to be unfavourable. However, eugenics has a deeply troublesome past, which is intertwined with unethical and coercive practices and is marked by egregious infringements of human rights. What was wrong with eugenics practices was unrelated to the aspiration of making biological changes that benefit future generations (such as by freeing individuals of genetic diseases), and was problematic because the means used to achieve this suppressed liberty by depriving individuals of reproductive choice.

A stark illustration of the malevolent influence of eugenics can be seen in the Nazi regime's relentless quest of ‘racial purity’ during World War II. This disturbing pursuit culminated in the genocide of millions, including those with disabilities, who were labelled as undesirable under Nazi doctrine. Because of its entwinement with harmful practices and violations, the concept of eugenics has largely lost its standing in contemporary society. According to Thaldar and Shozi, ‘while these events were undoubtedly reprehensible, it is important not to conflate state-enforced, unethical practices in the name of “eugenics”, like forced sterilisation, with the agenda of promoting human well-being through genetic interventions, which are freely chosen by prospective parents.’[62]

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61 E T Juengst ‘''Prevention' and human gene editing governance’ (2021) 23(1) *AMA Journal of Ethics* E49–54.

62 D Thaldar & B Shozi ‘An imbalanced approach to governance? An analysis of the WHO's position on human genome editing’ (2023) 37(7) *Bioethics*.

The realm of genetics has progressed in scientific comprehension, and ethical perspectives have pivoted towards upholding individual rights, celebrating diversity, and championing the autonomy of individuals in shaping their own reproductive decisions. The ethical concerns about eugenics emphasise the importance of respecting human dignity, promoting inclusivity, and preventing harmful practices that violate individual autonomy and human rights.

Another area of contention is gender selection in ART, which allows parents to choose their child's sex for diverse reasons. However, it echoes historical eugenic practices, so prompting a complex intersection of reproductive choice and ethical contemplations. This ethical quandary is rooted in finding equilibrium between individual autonomy and the potential reinforcement of gender biases or perpetuation of detrimental societal norms. The discourse on gender selection in ART underscores the imperative to navigate this intricate territory while upholding fundamental tenets of human rights, non-discrimination, and the broader impact on societal values and gender parity.

In the realm of gender selection, MicroSort is as a sperm-sorting technology that can segregate X-bearing and Y-bearing gametes, so offering clinicians a degree of control over offspring gender. The Food and Drug Administration (FDA) authorises this technology for parents seeking to avert sex-linked genetic disorders in their children, and ensures its safety and effectiveness. However, a point of contention arises when the fertility clinic is barred from extending its use to parents aiming to shape their families in a specific manner, citing a lack of 'public health benefit'.[63] This raises the question of whether such regulations hinder or compromise the rights of those involved and society at large. According to Soni, 'most jurisdictions have prohibited sex selection in the absence of genetic disease'.[64] Therefore, they prohibit the selection of an embryo based on its sex, where that choice is based on non-therapeutic social reasons or a pure desire to have a child of a particular sex.

In the early 1980s, philosopher Michael Bayles argued that 'a preference for one sex over the other, for its own sake, is simply sexism: It implies that one sex is intrinsically more valuable than another and this preference is "irrational"'.[65] Bayles believes that children of any

63 E Dahl 'FDA bans gender selection procedure' Institute for Ethics and Emerging Technologies (2011).

64 S Soni '*Prêt-à-porter* procreation: Contemplating the ban on preimplantation sex selection' (2019) 22 *PER/PELJ* 1.

65 M D Bayles *Reproductive Ethics* (1984) 35.

sex and in any birth order are good enough for what people need in pursuit of growing families and relationships.[66]

The task of intended parents in selecting gamete donors is an intricate and multi-dimensional voyage encompassing many factors. Ranging from physical characteristics to medical lineage, educational experience to personality attributes, the inclinations and wishes of intended parents have a pivotal influence in shaping the donor selection process. There is also the issue of resemblance which not only indirectly affirms the idea of a genetic connection between parent and child, but also resemblances are viewed among family members as concrete proof of kinship. Consequently, discussions about resemblance validate the child's place in the family and play a role in shaping the child's identity in the familial context. According to studies in the US, conversations about using prenatal interventions to guide offspring traits often focus on selecting attributes that enhance intelligence, athleticism or physical prowess, resilience against illnesses, and longevity.[67]

There are some concerns that the act of selecting children's traits through pre-conception interventions could commodify them, and transform them into commodities or so-called 'designer babies'. According to this viewpoint, children are cherished and valued solely within the confines of their parents' predetermined expectations. However, granting substantial credence to this argument is challenging given the post-birth reality: parents invest considerable efforts in moulding children, influencing their language, social skills, relationships, political beliefs, and religious convictions.

This leads us to ponder: How can we embrace this level of parental influence after birth while dismissing the use of prenatal interventions that could potentially bestow comparable and equally significant benefits? Some commentators have argued that intervening against chance usurps the choices ahead for children, by locking them into futures of their parents' design. [68] Nevertheless, all individuals grapple with enough choices and circumstances to shape a purposeful existence, irrespective of their parents' original intentions – this would remain true even if parents opted for trait selection before birth.

Currently, children's traits result largely from a genetic lottery, but it prompts us to inquire why this should stand as the benchmark by which parents are expected to adhere. When we have the opportunity to embrace secure and effective interventions that are capable of

66 T F Murphy 'Selecting the traits of children prior to birth' (2012) 14(2) *Virtual Mentor* 158–161.
67 Ibid.
68 J Habermas *The Future of Human Nature* (2003).

bestowing advantages upon children, it raises the question of why the current status quo should remain unchallenged.

The psychological impact of requiring gametes for intended parents serves as a common stressor, albeit with differing underlying causes. In heterosexual partnerships, men might feel a blow to their self-esteem, as they may perceive a misalignment with prevailing notions of reproductive attributes linked to prominent forms of masculinity. Furthermore, both men and women could share concerns about the child's potential difficulty in establishing a connection with the non-genetic parents.[69] In fact, 'Some lesbian couples feel anxious about whether the child will acknowledge the non-genetic mother and some worry about the challenges of raising children within a culture that is unsupportive of non-traditional families.'[70] Most single women express concerns about the child missing out on a male role model and that they would have preferred to have raised their child within a relationship.[71]

From a legal standpoint, the evaluations of parental status have been influenced by three key factors.[72] The first factor focuses on biological ties, an aspect that may initially hold significance. However, legal narratives and psychological anecdotes frequently demonstrate that genetic connections alone do not adequately define a parent–child relationship. The second facet in delineating parental status rests on the overt intention of assuming a parental role. The third factor pertains to the social, relational, and emotional bond forged between a care-giver and a child.[73] Both assisted reproduction (AR) and adoption rely on the second and third factors and require the intervention of a third party to establish and legitimise filiation: the medical institution in the case of AR, and legal and government authorities in the case of adoption.[74] For non-genetically connected parents, disclosing information about the child's conception and origin to their extended family may be an important dilemma. However, there are significant differences between whether the child has been adopted or was born following gamete donation.

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69 T M Cousineau & A D Domar 'Psychological impact of infertility' (2007) 21(2) *Best Practice and Research: Clinical Obstetrics and Gynaecology* 293–308.

70 N Gartrell, A Banks, J Hamilton et al (1999) 'The national lesbian family study: 2. Interviews with mothers of toddlers' (1999) 69 *American Journal of Orthopsychiatry* 362–369.

71 V Jadva, S Badger, M Morrissette et al ''Mom by choice, single by life's circumstance …' Findings from a large scale survey of the experiences of single mothers by choice' (2009) 12(4) *Human Fertility* 175–184.

72 M H Casonato & S Habersaat 'Parenting without being genetically connected' (2005) (3) *Cairn.Info* 289.

73 A Campbell 'Conceiving parents through law' (2007) 21(2) *International Journal of Law, Policy and the Family* 242–273.

74 M H Casonato & S Habersaat 'Parenting without being genetically connected' (2015) 3 *Cairn.Info* 289–306.

In adoptive households, the lack of a biological pregnancy makes it challenging for parents to conceal the child's origins from extended family members. Moreover, in cases of international adoption, noticeable racial or ethnic disparities in physical appearance between parents and child are clear indicators of the absence of genetic ties. As a result, revealing the child's origins to them is a common occurrence.[75] However, this disclosure can pose a difficult challenge for certain adoptive parents. On the other hand, with gamete donation, the mother's pregnancy gives her the choice to disclose or not disclose her partial genetic relationship to the child.[76]

As per Golombok's findings, comparative research has indicated that the strength of the desire to have children holds greater significance in family dynamics than considering whether a genetic connection exists between parent and child.[77] A review of the existing literature reveals that, overall, minimal distinctions are observed in parenting approaches and parental perceptions among families formed through surrogacy, gamete donation, and natural conception. Nevertheless, it is important to note certain limitations.

The desires and preferences of intended parents in the selection process of gamete donors can vary widely based on individual circumstances, cultural factors, personal beliefs, and medical considerations. The process of choosing gamete donors by intended parents encompasses a range of intricate considerations. From physical attributes to medical history, educational achievements to cultural alignment, the preferences of intended parents' guide the selection process. These parents seek a harmonious blend of traits that reflect their own values and aspirations. Factors such as the donor's health, appearance, educational background, and even motivations for participating in the donation process are meticulously considered. In addition, decisions about anonymity or the openness of the arrangement and adherence to fertility clinic guidelines play crucial roles in this process.

As ART evolves, intended parents are empowered with an expanding pool of information, so allowing them to make informed decisions that will shape the future of their intended family. Assessing what influences the desires and decision-making process of

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75 M Baccara, A Collard-Wexler, L Felli & L Yariv 'Child-adoption matching: Preferences for gender and race' (2014) 6 *American Economic Journal: Applied Economics* 133 at 133.

76 H Widdows, & F MacCallum 'Disparities in parenting criteria: An exploration of the issues, focusing on adoption and embryo donation' (2002) 28(3) *Journal of Medical Ethics* 139–142.

77 S Golombok, R Cook, A Bish et al 'Families created by the new reproductive technologies: Quality of parenting and social and emotional development of the children' (1995) 66 *Child Development* 285–298.

intended parents will be carefully investigated in order to bridge the gap between these desires and the relevant ethical rights in order to determine whether any legal reform is necessary.

d). Trivers' Parental Investment Theory – Decision-making

The Trivers' parental investment theory proposes a framework that informs much of mate selection research.[78] Robert Trivers proposed that the investment in offspring by the parent increases the offspring's chances of surviving and hence of reproductive success.[79] Therefore, this understanding gives insight into the evolutionary approach with which parents generally tend to select their donors; however, this cannot be assumed in all cases.

According to the expert opinion of Rodrigues in the *AB* case, 'selection of a gamete donor bears similarities with the selection of a life partner',[80] specifically 'donor conception by the way of a theory of mating by proxy whereby women vicariously "mate" with men selected on the basis of donor characteristics outlined in clinic proforma'.[81] Trivers' Parental Investment Theory helps us understand how different species, including humans, make choices about whom they have children with. It explains that the amount of time and effort that a parent (usually the female) invest in raising a child is vitally important, and therefore why males and females might choose their mates and behave in certain ways. In our contemporary Western world, men demonstrate their 'resources' by their level of occupation, education, and lifestyle (e.g., hobbies and interests). This preference for resourceful men reflects an evolutionarily determined drive to ensure the well-being of any offspring and ultimately to maximise reproductive success. [82] According to a study conducted in Australia in 2011 on the importance of donor characteristics, health and physical characteristics were valued the highest of all the items.[83] This is consistent with the Trivers' parental investment model, in that 'good genes' trump 'good character' and the notion that intended parents value characteristics in a donor that reflect a long-term mating strategy is consistent with the findings of Scheib et al.[84]

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78 F Pazhoohi 'Parental investment theory' in TK Shackelford (ed) *The Cambridge Handbook of Evolutionary Perspectives on Sexual Psychology* (2022) 137 at 137 (Cambridge University Press).

79 Ibid.

80 *AB v Minister of Social Development* (CCT155/15). 2016.

81 IS Rodino, PJ Burton & KA Sanders 'Mating by proxy: A novel perspective to donor conception' (2011) 96 *Fertility and Sterility* 998 at 998.

82 Ibid.

83 I S Rodino, P J Burton & K A Sanders 'Mating by proxy: A novel perspective to donor conception'(2011) 96(4) *Fertil Steril* 998–1001.

84 J E Scheib 'Sperm donor selection and psychology of female mate choice' (1994) 15 *Ethol Sociobiol* 113–129.

Rodrigues, in the *AB* case, referred to a recent empirical investigation undertaken in the US by Zeifman and Ma, which compared women's choices of anonymous sperm donors to selecting life partners.[85] The study observed that, practically, it is important to emphasise the significant similarity between women's preferences for sperm donors and life partners. This discovery offers reassurance that offspring conceived by donor insemination are unlikely to display significant differences compared to those conceived by traditional methods. Such studies reveal that, to some degree, donor selection commonly mimics partner selection but not in all cases. Based on the fact that there are often similarities this potentially offers more insight into intended parent's decision-making process in respect of gamete donors, which is supported by Trivers' Theory.

According to the literature, each country has its own criteria preferences that are specific to its unique values and desires. However, there are no empirical studies in South Africa that indicate the specific criteria of preference in this unique and culturally diverse nation. There is an international and growing body of research that questions the assumption that more information and options are always better, revealing that sometimes more options make a choice less and not more attractive.[86] This also resonates with findings from a recent qualitative study conducted in the UK which explored intended parents' feelings and wishes about donor information, which found that, in some cases, respondents felt that a lack of information was protective.[87] According to a recent study in the US, it was suggested that further research is required to tailor information that recipients choose to receive for their individual needs and preferences, and identifying the relevance of information-seeking to their general decision-making.[88]

Every day, we engage in a variety of decision-making processes. While some hold more weight than others, medical choices can carry the gravity of life or death. Understanding the mechanisms behind these decisions and their influencing factors is crucial. In reproductive medicine, a multitude of decisions await intended parents, and these wield substantial influence over the trajectory of their fertility journey and the potential future of their child.

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85 D Zeifman & J Ma 'Experimental examination of women's selection criteria for sperm donors versus life partners' (2013) 2 *Personal Relationships* 311–327.

86 B Schwartz 'Self-determination: The tyranny of freedom' (2000) 55 *Am Psychol* 79–88.

87 S J Stuart-Smith, J A Smith & E J Scott ''To know or not to know?' Dilemmas for women receiving unknown oocyte donation' (2012) 27 *Hum Reprod* 2067–2075.

88 L R Rubin, I de Melo-Martin, Z Rosenwaks et al 'Once you're choosing, nobody's perfect: Is more information necessarily better in oocyte donor selection?' (2015) 30(3) *Reprod Biomed Online* 311–318.

New reproductive technology gives rise to complex situations that need to be negotiated. Little has been published on the factors that could influence the choice of unknown donation or which could affect impact of donor information on recipients.[89] Stuart-Smith et al found that during the pre-conception stage of treatment certain participants sought additional information about the donor, while others opted for a stance of not wanting to know, which shielded them from the emotional impact of requiring a donor. Nevertheless, as soon as a baby was born curiosity intensified, and the prospect of disclosing to the child became more challenging when there was limited knowledge about the donor. In addition, all participants who had given birth expressed a strong desire for siblings from the same donor.[90]

The reality of the UK oocyte share programmes is that recipients are given basic biometric information, such as the donor's height, eye colour, hair colour, weight, and age. Given the shortage of donors, there is not much scope for choice. Large surveys have however found a majority opting for anonymously donated oocytes.[91] It is increasingly recognised in the field of health psychology that decision-making about medical technology has a strong emotional component. Potentially life-changing decisions are often not made rationally.[92] A pattern of defensive denial in oocyte recipients has been identified in other studies.[93] However, this is not the case for all for the participants and anxieties about donor matching mean that some wanted access to more information than was available. Ahuja et al found that 67 per cent of UK oocyte recipients had concerns about donor screening and matching[94] and other studies have also reported the wish to know more about an unknown donor.[95]

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89 S Stuart-Smith, J A Smith & E J Scott 'To know or not to know? Dilemmas for women receiving unknown oocyte donation' (2012) 27 *Human Reproduction* 2067–2075.

90 Ibid.

91 A Kirkland, M Power, G Burton et al 'Comparison of attitudes of donors and recipients to oocyte donation' (1992) 7 *Hum Reprod* 355–357.

92 J A Smith, S Michie, M Stephenson et al 'Risk perception and decision-making processes in candidates for genetic testing for Huntington's disease: An interpretative phenomenological analysis' (2002) **7** *J Health Psychol* 131–144.

93 S Golombok, R Scott, J B Appleby et al *Regulating Reproductive Donation* (2016).

94 K K Ahuja, B J Mostyn & E G Simons 'Egg sharing and egg donation: Attitudes of British egg donors and recipients' (1997) 12 *Hum Reprod* 2845–2852.

95 P P Mahlstedt & K A Probasco 'Sperm donors: Their attitudes toward providing medical and psychological information for recipient couples and donor offspring' (1991) 56 *Fertil Steril* 747–753.

VII. CONTRIBUTION OF KNOWLEDGE

By scrutinising the alignment between legal provisions, their implementation in practice, the rights of intended parents, and the interests of prospective children, the study unveils nuanced insights into the intricate dynamics of ARTs in this legal framework.

Moreover, the research addresses a critical gap in the literature by investigating the decision-making processes of South African intended parents when selecting a gamete donor. This empirical investigation not only elucidates the factors influencing their choices but also contributes practical knowledge to the regulatory discourse. Understanding how prospective parents navigate this complex decision-making terrain is vital for refining existing policies and ensuring that they are attuned to the diverse needs and perspectives of individuals seeking assisted reproduction.

VIII. METHODOLOGY

Participants

A mixed-method design was used for this study to gather qualitative and quantitative data. The qualitative data collection process included both primary and secondary data collection. Primary data collection included semi-structured interviews with twenty healthcare professionals who worked with gamete selection, including fertility specialists, psychologists, nurses and sperm/egg donor bank coordinators. Responses were recorded and transcribed. This research adhered to the Protection of Personal Information Act (POPIA), with all personal data collected, stored, and reported in compliance with its provisions. Qualitative data were audio-recorded and transcribed for thematic analysis, while quantitative data were managed via Google Forms, with all digital data stored on password-protected and encrypted platforms. Secondary data collection included existing literature from previous studies and gamete donor websites to pinpoint the parameters for the survey.

The quantitative study component was a representative sample of at least 380 respondents who completed the constructed survey. The estimated number of participants was advised by the consulting statistician, based on the current number of donor agencies and fertility clinics in South Africa and the estimated active couples seeking donor gametes annually. The survey was made available to intended parents through specific donor agency and fertility clinic websites and social media opportunities.

For the quantitative study, the largest fertility clinics and gamete donor banks in South Africa were included: Vitalab (JHB), Vitalab (UMHL), Nurture, Medfem, and Aevitas. Since there is already an established and long-standing working relationship with Vitalab, it was used to assess a purposive sample of existing patients requiring gamete donors. This technique was chosen to ensure that only individuals meeting specific, relevant criteria were included—specifically current intended parents actively seeking gamete donors. It allowed the study to target a representative sample based on the availability of participants at South Africa's largest and most well-known fertility clinics, including Vitalab, Medfem, Nurture, and Aevitas, ensuring the data was grounded in the specific 'natural' context of the study. Nurture, an egg donor clinic associated with Vitalab, was also included in this study as it is one of South Africa's largest egg donor banks. Both clinics have numerous branches throughout South Africa. For this research, a purposive sampling technique was adopted to ensure that only patients that meet the criteria are included in the study. This includes only current intended parents seeking gamete donors.

Using an internet-based questionnaire, recipients were asked to rate the importance of a number of donor criteria on a 5-point Likert scale (from 1 = not important at all, to 5 = extremely important). This 5-point Likert scale was selected to quantify the subjective importance intended parents place on various donor criteria. This enabled a statistical ranking of preferences (such as physical traits vs. medical history), which facilitated clear comparisons across demographic groups like gender and race. The items included importance ranking about the donor adult photograph, physical characteristics, skin tone, health, educational level, IQ, career, athleticism, personality, talents, access to the identity of the donor, and number of previous donations or live births. Respondents remained anonymous, completion of the questionnaire was voluntary and participants were recruited by existing donor websites and donor agency social media platforms.

An inductive research methodology allows one to move from more specific observations to broader generalisations and theories. It is also referred to as the bottom-up approach. The concept is to start with specific observations and measures, identify patterns, and generate tentative hypotheses. Finally, some general conclusions and theories can be reached.

Semi-structured interviews

The following questions were posed to respondents during the interviews. Semi-structured interviews allow for deviations and provide flexibility for real-time adjustments, thereby

fostering richer data collection, participant engagement, and exploration of unforeseen themes. This enhances the nuanced understanding of the research topic. The main purpose of using semi-structured interview questions for healthcare professionals in this study was to gather comprehensive insights into their experiences and perspectives on the implementation of South African laws on gamete donor selection. These questions aimed to explore the alignment between legal provisions and practical application, understand the challenges and ethical considerations faced by healthcare workers, and unveil any patterns of discrimination or inconsistencies in the context of ARTs. The flexibility of semi-structured interviews allowed for in-depth exploration, thereby ensuring a nuanced understanding of the decision-making processes and of the potential impact on the rights and well-being of intended parents and prospective children.

Interview questions

1. What are the typical challenges you face when dealing with patients selecting donor gametes?
    a. If you have challenges, how do you deal with them?
2. Are there specific ethical dilemmas (when dealing with patients selecting donor gametes)?
    a. If there are, how do you deal with these ethical dilemmas?
3. Do you have any concerns about how patients make decisions when selecting their gamete donors?
4. Consider the following hypothetical: A single woman of about 30 years old approaches your clinic. She wants to be a single mother by choice and to use donor sperm. She reports that she has no medical infertility problems. Also, she wants to use donor eggs. She reports that there is no medical problem with her own eggs, but she would rather use the eggs of a beautiful, intelligent egg donor who she identified on an American agency's website. Would you be happy to assist this woman with her plans?
5. Also consider the following hypothetical: A husband and wife approach your clinic. The husband is completely infertile. They want to use his only brother's sperm. His brother is willing to assist.
    a. Would you insist on performing a full battery of genetic tests on the brother?
    b. (If so, or assume genetic tests are performed:) The genetic tests show that the brother has Huntington's disease. However, the husband and wife still insist on using the brother's sperm. Who would you deal with the situation?

6. Does your clinic/sperm bank offer ‘identity-release’ donors, or only anonymous donors?
    a. If the respondent does not elaborate on why, pose the question: Why?
7. Are there any legal rules or restrictions which you find are either empowering or hindering?
    a. (If hindering:) How do you improve on these?

Below I discuss the relevance of each question:

1. *Identify challenges and coping strategies*: Explore the healthcare professional’s experiences by uncovering the typical challenges encountered when assisting patients select donor gametes. In addition, inquire about the strategies used by healthcare professionals to effectively navigate and address these challenges.
2. *Examine specific ethical dilemmas*: Investigate specific ethical dilemmas faced by healthcare professionals in the context of patients selecting donor gametes. Gain insights into the ethical considerations involved and understand how healthcare professionals manage and resolve these dilemmas in their practices.
3. *Assess concerns about patient decision-making*: Explore healthcare professionals’ concerns about the decision-making processes of patients when selecting gamete donors, thereby aiming to understand potential ethical considerations and challenges with ARTs.
4. *Evaluate application and interpretation of reproductive law:* Present a hypothetical scenario involving a single woman seeking assisted reproduction, so aiming to gauge healthcare professionals’ attitudes and willingness to assist in situations where patients prefer certain donor characteristics based on personal preferences.
5. *Probe genetic testing practices*: Investigate healthcare professionals’ perspectives on genetic testing in the context of assisted reproduction, specifically in scenarios involving the use of a brother's sperm. Assess whether genetic testing practices align with ethical considerations and enquire about responses to complex situations, such as positive test results for genetic conditions.
6. *Explore donor identity policies*: Inquire about the identity-release policies of the clinic/sperm bank, in order to understand the rationale behind offering either 'identity-release' or anonymous donors and encouraging respondents to elaborate on their reasoning.

7. *Assess impact of legal rules*: Explore healthcare professionals' perspectives on legal rules or restrictions related to gamete donor selection, discerning whether these regulations empower or hinder their practices. If there is hindering, enquire about strategies used to improve compliance or to advocate changes in the legal framework.

Data collection instrument: Survey

The questionnaire is divided into three sections. Section 1 is the demographic profile of the intended parent: '*About Yourself'* includes questions about the intended parent and their background. Section 2 is *'Selection Criteria'*, comprising 29 questions. Data collected from these questions are ranked in order of importance to ascertain the criteria that intended parents most value and other preferences. Section 3: *'Selection Experience'* comprises six questions to assess the experience of the selection process from the perspectives of intended parents. The survey is an online one that takes only about a minute to complete and was made accessible as a pop-up invitation on the various participating gamete donor websites and social media platforms.

Inclusion criteria included all current intended parents actively seeking donor gametes and who have registered on any of the selected donor agency websites. The data collection time-frame ran for about four to six months. A mixed-method analysis was used to analyse the data. This involved both qualitative and quantitative data obtained, in order to integrate and interpret findings from both types of data.

Section 1: Demographic profile – about yourself

A basic demographic profile of the respondents with reference to age, gender, sexual orientation, relationship status, educational level, race, employment status, type of employment, talents, athletic ability, and type of gamete required was established. Regarding educational level, the respondents were asked to indicate their highest educational qualification from five options: 'No formal education', 'Some schooling', 'Grade 12 / Matric', 'Post-matric certificate', 'Undergraduate degree/diploma', and 'Postgraduate degree/diploma'. With race, the South African standard classifications of 'Black African', 'Coloured', 'Indian', 'White' and 'Other' were used. Employment status included: 'Employed full-time', 'Employed part-time', 'Unemployed' , 'Full-time student', or 'Self-employed'. Respondents were also asked to indicate whether they possessed any specific talents or abilities, for example: 'artistic, musical, handy work, dancing, nature (green-fingers)'. Their athletic ability or sporting preferences

were also assessed ('Not sporty', 'Happy participant', 'First team (A/B) level sport', 'Provincial-level sport', 'National-level sport', and 'International sport).

Section 2: Selection criteria

Participants rated the importance of each item on a 5-point Likert scale, ranging from 'Not important at all' (1) to 'Extremely important' (5).

Physical characteristics:

1. How important is it for the donor to physically resemble you or your partner?
2. How important is it for the donor to have a specific eye colour?
3. How important is it for the donor to have a specific hair colour?
4. How important is it for you to see adult photographs of the donor?
5. How important is it to have access to voice clips from the donor?
6. How important is it for the donor to be of a specific race?
7. How important is it for the donor to have a specific skin tone/complexion?
8. How important is it for the donor to have superior physical features?
9. How important is it for the donor to be a specific height? (e.g., tall)
10. How important is it for the donor to have been a beautiful baby/child?
11. How important is it for the donor to be a physically attractive adult?
12. How important is it for the donor to have a sporty physique?

Medical and genetic factors:

13. How important is it that the donor has a clear medical history?
14. How important is it for the donor to be genetically tested to screen for any inheritable genetic disorders?
15. How important is it to know whether the donor has successfully donated before?
16. How important is it to know whether the donor has previously had children?

Education and career:

17. How important is it for the donor to have completed tertiary education?
18. How important is it for the donor to have a high IQ?
19. How important is it for the donor to have a successful career?

Personality and interests:

20. How important is it for the donor's personality to match yours or your partner's?
21. How important is it for the donor to exhibit artistic or cultural abilities?
22. How important is it for the donor to have athletic abilities or talents? (e.g., be sporty).

Lifestyle and habits:

23. How important is it that the donor has never abused drugs and/or alcohol?

Ethnicity and cultural background:

24. How important is the donor's ethnicity? (e.g., Greek heritage).

Age and physical health:

25. How important is the age of the donor?
26. How important is the donor's BMI/weight? (e.g., healthy weight)

Identity:

27. How important is it for you that the donor must *not* know your identity?
28. How important is it for you to know the donor's identity?
29. How important is it for you that your child will have the right to find out the identity of the donor?

Reproductive choices:

30. How important is the opinion of your nurse and/or doctor regarding the choice of your donor?

Below, I discuss the relevance of each survey section:

Physical characteristics

Importance of resemblance: The aim of this question was to ascertain how important resemblance of the donor to the intended parents is. It has been said that 'for parents of children conceived with donor eggs or sperm, resemblance talk represents the ongoing threat that comments about physical appearance could stigmatise their children or cast doubt on the legitimacy of their family structure'.[96] According to a 2005American study, it was found that all participants were concerned about resemblance regardless of whether a sperm or egg donor had been used. 'Further studies of donor insemination in the US also have found resemblance to the husband to be a primary criterion for selecting donors in some studies but not in others',[97] and therefore it will be interesting to investigate whether this is consistent in a South African context.

Importance of eye colour and hair colour: All gamete donor websites include eye colour and hair colour which seems to indicate that this is valuable information and therefore it is included to investigate how important it is in the selection process for intended parents. In a recent survey, 85 per cent of Danish and Swedish couples indicated that they speculated about the physical appearance of the donor and about the chance that the child would resemble them.[98] It was reported that the reason behind the wish for resemblance was secrecy.

Importance of seeing adult photographs: In South Africa, intended parents have access only to childhood photographs of donors. Abroad, particularly in the US, adult photographs are made available which more clearly indicates physical appearance. The aim of this question is to investigate whether there is a gap in the desires of South African intended parents or possibly even a lack of the full comprehension of the law by intended parents or the various role players.

Importance of access to voice clips or personal letter: While there is no previous research on access to voice clips or notes from the donor, this question aims to ascertain whether it could

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96 G Becker, A Butler & R D Nachtigall 'Resemblance talk: A challenge for parents whose children were conceived with donor gametes in the US' (2005) 61 *Social Science & Medicine* 1300–1309.

97 F A Hanson 'Donor insemination: Eugenic and feminist implications' (2001) 15 *Medical Anthropology* Quarterly 287–311.

98 A F Nielsen, B Pedersen & J G Lauritsen 'Psychosocial aspects of donor insemination: Attitudes and opinions of Danish and Swedish donor insemination patients to psychosocial information being supplied to offspring and relatives' (1995) 74 *Acta Obstet Gynecol Scand* 45–50.

be important for recipients as it offers a more comprehensive understanding of the donor beyond physical characteristics. Donor agencies abroad are known to offer this kind of exceptionally intimate information that reveals more about the donor's character than their genes.

Importance of race: Race is crucial for a substantial portion of recipients seen in previous studies, especially among the dominant White Caucasian/European population; this is potentially to ensure a sense of similarity and to avoid societal challenges.[99] The UK continues to offer ethnic matching of gamete donors and recipient parents. Ethnic matching in gamete donation has also been a standard practice in other countries, including Spain, Norway, Finland and the US.[100] This questions aims to assess whether this is also the case in South Africa with its rich racial diversity. South Africa is a compelling location to explore the relationship between race and ARTs, and yet only a handful of social science scholars have examined ARTs in this context.[101]

Importance of skin tone/complexion: while not explicitly discussed, skin tone and complexion may be important considerations for some recipients in selecting a donor, possibly for aesthetic preferences or seeking physical resemblance. This questions aims to acknowledge the societal importance of this visible characteristic in shaping perceptions and experiences. Aesthetic characteristics were also assessed in a study by Thaldar et al in 2022,[102] where skin tone was not ranked highly as point of importance. However, a 2016 study in Cape Town found that 'greater value was often placed on light skin as an attribute of beauty, wealth and intelligence'.[103]

Importance of superior physical features: This question investigates the importance of the donor having superior physical features to the intended parent. In addition to objections to the possibility that parents may determine certain characteristics of their children like hair colour and eye colour, there is the possibility that 'better' or 'superior' features are preferred. The

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99 A Furnham, N Salem & D Lester 'Selecting egg and sperm donors: The role of age, social class, ethnicity, height and personality' (2014) 5 *Scientific Research Journal: Psychology* 220–229.

100 B Campbell 'Racialization, genes and the reinventions of nation in Europe' in P Wade *Race, Ethnicity and Nation: Perspectives from Kinship and Genetics* (2007) 95–124.

101 V Namberger 'The South African economy of egg donation: Looking at the bioeconomic side of normalization' in M Lie & N Lykke (eds) *Assisted Reproduction Across Borders: Feminist Perspectives on Normalizations, Disruptions and Transmissions* (2017) 72–83.

102 D Thaldar, B Shozi, M Steytler, et al. 'A deliberative public engagement study on heritable human genome editing among South Africans: Study results' (2022) 17(11) *PLoS ONE* e0275372.

103 S Mbatha *Understanding Skin Colour: Exploring Colourism and its Articulation among Black And Coloured Students* (2016).

Repository of Germinal Choice (which favours spermatozoa from Nobel prize winners) is the ideal illustration.[104]

Importance of donor height: In the survey by Scheib et al, 'other frequently reported criteria included donor height'.[105] Therefore, this criterion was included.

Importance of donor's attractiveness as a child &/adult: Physical attractiveness seems to be important on all websites and therefore it was included in this investigation.

Importance of donor's athleticism/sporty physique: This question aims to ascertain whether a sporty physique is importance to recipients, as suggested by previous international studies that revealed an increasing preference for donors with an athletic ability.[106] However, is a sporty physique sufficient or is it interest in sporting ability?

Medical and genetic factors

Importance of a clear medical history: Studies that go as far back as 1998 to 2012 have shown that the top-ranked categories of importance were medical history and ethnicity.[107] A decade later it is important to determine whether this is still the case. Included in the medical arena is genetic screening, which South Africa does not require for donor gametes. However, in the US all donor gametes are genetically screened, so offering the families and possible child further protection.

Importance of genetic testing: A European study found that 21.7 per cent of intended parents in the cohort group 'had a family/personal history or an anomalous laboratory result, stressing the importance of performing pre-donation genetic screening and counseling'.[108] Therefore, the important of genetic carrier screening is included.

Importance of donor's donation history: Knowing whether the donor has successfully donated or had children is moderately important to recipients in the US and may influence their decision, as suggested by evolving preferences in recent years.[109] This question seeks to ascertain whether the same holds true in South Africa.

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104 L J Kaplan & R Tong *Controlling Our Reproductive Destiny* (1994).

105 JE Scheib, A Kristiansen & A Wara 'A Norwegian note on sperm donor selection and the psychology of female mate choice' (1997) 18 *Evolution and Human Behavior* 143 at 143.

106 H Flores, J Lee, J Rodriguez-Purata et al 'Beauty, brains or health: Trends in ovum recipient preferences' (2014) 23(10) *Journal of Woman's Health* 830–833.

107 S R Lindheim & M V Sauer 'Expectations of recipient couples awaiting an anonymous oocyte donor match' (1998) 15(7) *J Assist Reprod Genet* 444–446.

108 C A Soares, N Tkachenko, E Vale-Fernandes et al. 'Genetic counseling and carrier screening in candidates for gamete donation at a Portuguese center' (2023) 27(2) *JBRA Assist Reprod* 180–184.

109 H Flores, J Lee, J Rodriguez-Purata et al 'Beauty, brains or health: Trends in ovum recipient preferences' (2014) 23(10) *Journal of Woman's Health* 830–833.

Education and career

Importance of donor's education: According to the expert opinion of Rodrigues in the *AB* case, 'prospective parents place a particularly high value on donors' level of education'. Furnham concurred that having a donor from recognised professions or with tertiary education implies that this could serve as a proxy for intelligence and resource acquisition. A ten-year Australian study done on sperm selection found 'that younger donors, and those who hold a higher formal education compared to those with no academic qualifications are more quickly selected for reservation by women'.[110] Is education a priority and do donors tend to match up beyond their own education in an attempt to give their child an advantage? South Africa's low socioeconomic status and low levels of education do not necessarily imply anything about IQ; however, the criterion may unfairly exclude suitable candidates.

Importance of donor's IQ: This question aims to ascertain whether a donor with a high IQ might be considered highly by some recipients, potentially for the perceived heritability and implications for the child's abilities. Previous studies have shown that women favour intelligent men because it is seen as a cue for provisioning abilities.[111]

Importance of donor's successful career: A successful career could imply that the donor's attributes will be valuable in terms of career success. Donors with a reputable career imply a higher level of functioning and social stature that intended parents could value and give the impression that the gametes are 'reputable'. Torgler found that 'donor age and income play a significant role in donor success as measured by the number of times selected, even though there is no requirement for ongoing paternal investment'.[112]

Personality and interests

Importance of donor's personality match: According to Torgler, matching the donor's personality with the recipient's or partner's personality is important to recipients, as indicated by the emphasis on character values.[113] It was also found that 'female recipients care more about a donor's inner values than exterior traits, with reliability being the most important,

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110 S Whyte & B Torgler 'Selection criteria in the search for a sperm donor: Behavioural traits versus physical appearance' (2015) 17(2) *J Bioeconomics* 151.

111 A Furnham, & A McClelland 'What women want in a man: The role of age, social class, ethnicity, and height' (2015) 6 *Psychology* 278–290.

112 S Whyte & B Torgler 'Determinants of online sperm donor success: How women choose' (2016) 23(8) *Applied Economics Letters* 592–596.

113 S Whyte & B Torgler 'Selection criteria in the search for a sperm donor: Behavioural traits versus physical appearance' (2015) 17(2) *Journal of Bioeconomics* 151–171.

followed by openness and kindness'.[114] Does this Australian finding however match South African values?

Importance of artistic ability or talents: This question moves beyond physical traits to consider whether personal gifts and talents are perceived as genetically transferable, and whether intended parents seek to replicate their own abilities or rather to construct the notion of an 'ideal child'. Therefore, in the 'About me' section, intended parents are asked whether they possess any special talents or abilities to ascertain whether there is a link. The importance of **'**matching' regarding similar gifts and talents of the intended parent is investigated to assess whether there is a desired trend to resemblance match or to create designer babies.

Lifestyle and habits

Importance of avoiding drugs and alcohol: Aimed at assessing the importance of drug and alcohol use or abuse for recipients, aligning with preferences for donors to have good health and healthy habits.

Ethnicity and cultural background

Importance of ethnicity: Ethnicity is one of the top-ranked categories of importance.[115] Ranking how important ethnicity is will indicate whether language, culture and categories relating to shared identity are significant.

Age and physical health

Importance of age: As indicated above, this question also aims to investigate whether being younger is necessarily better?

Importance of weight/BMI: In the most recent study by Lindheim and Sauer, 'women who were presented with a possible ovum donor gave a variety of reasons to reject them: weight, too short, too tall, education'.[116] Therefore, weight was included as a criterion as it was highlighted as a reason for the rejection of donors.

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114 Ibid.

115 Ibid.

116 S R Lindheim & M V Sauer 'Expectations of recipient couples awaiting an anonymous oocyte donor match' (1998) 15 *J Assist Reprod Genet* 444–446.

Identity

Importance of identity-release & anonymity: This question investigates whether intended parents would prefer to know the identity (i.e. name) of their donor. In the survey by Scheib et al,[117] the two most mentioned criteria for the selection of the semen donor were his willingness to release his identity when the child reached eighteen years old and the physical resemblance to the recipient's partner (if she had one).[118]

Reproductive choices

Importance of medical professionals' opinion: The opinion of medical professionals on the donor may be valuable for prospective parents, as trust is developed between the prospective parent and the professionals involved. A South African study conducted interviews where an intended parent reported that 'I trust (the doctor) with my life'. It would be relevant to investigate how much of a role this trust is exercised in decision-making.[119]

Section 3: Selection experience

1. **The process of searching a suitable donor has been time consuming**

   Questions are rated as follows: 1 – Strongly disagree to 5 – Strongly agree

   According to the expert opinion of Rodrigues, 'prospective parents invested significant time in searching through online databases, studying and comparing the profiles of potential donors, and carefully considering their options'.[120] This question aims to assess whether gamete selection is an impulsive decision-making process or one that takes considerable thought and time.

2. **There are enough donors to choose from for me/us to find what I/we were looking for**

   Questions are rated as follows: 1 – Strongly disagree to 5 – Strongly agree

   Choice could be affected by supply and demand issues which could affect the satisfaction of the selection experience. According to Daniels, with an increase in ART the demand

117 J Scheib, M Riordan & S Rubin 'Choosing identity-release sperm donors: The parents' perspective 13–18 years later' (2003) 18 *Human Reproduction* 1115 at 1115.

118 Ibid.

119 T Moll 'Making a match: Curating race in South African gamete donation' (2019) 38 *Medical Anthropology* 588 at 588.

120 *AB vs Minister of Social Development* (CCT155/15). 2016.

for donor gametes has surpassed the supply.[121] This question assesses whether the supply of donor gametes is affecting the decision-making process.

3. **There is enough information available on the donor profiles of South African websites/donor agencies to ensure a well-informed decision**

   Questions are rated as follows: 1 – Strongly disagree to 5 – Strongly agree

   International websites tend to offer a wider range of criteria, including adult photographs and voice clips that are not offered in South Africa.

4. **Would you have liked to see adult photographs of the donor included in the donor profile?**

   Questions are rated as follows: 1 – Strongly disagree to 5 – Strongly agree

   Currently, only some international websites offer adult photographs of the donor and South African profiles only offer childhood photographs.[122] This question assesses whether the experience of intended parents is lacking and whether there is a need for possible reform since adult photographs portray a more realistic image of the similarities to the intended parent and possible genetic features that will present in the child.

5. **I am satisfied with the input or guidance from my fertility team (doctor/nurses) during the gamete selection process**

   Questions are rated as follows: 1 – Strongly disagree to 5 – Strongly agree

   This question aims to assess how heavily the input from medical professionals influences intended parents' decision-making. In some countries, the influence of the doctors plays a major role.

6. **I would prefer the fertility team to do the selection matching for me**

   Questions are rated as follows: 1 – Strongly disagree to 5 – Strongly agree

   This question assesses whether South African intended parents prefer to maintain their reproductive autonomy or not in this regard.

IX. CHAPTER OUTLINE

Chapter 1: Introduction

This chapter lays the foundation for the thesis by exploring the background and significance of gamete donor selection in the context of South African reproductive law. It underscores the

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121 K R Daniels 'To give or sell human gametes – the interplay between pragmatics, policy and ethics' (2000), 26 *Journal of Medical Ethics* 206–211.

122 D Thaldar & B Shozi 'Is open-identity gamete donation lawful in South Africa?' (2022) 112(6) *S Afr Med J* 1.

importance of understanding the intersection of legal frameworks and personal choices in assisted reproduction. The chapter outlines the primary purpose and objectives of the study, emphasising its aim to bridge the gap between empirical research and legal analysis. In addition, it introduces the novel Four Node Conceptual Framework, which serves as a guiding structure for examining the alignment between laws, practices, and the interests of all parties involved in gamete donation.

Chapter 2: Legal framework: Reproductive law

In this chapter, a comprehensive review of the existing literature and legal research on South African laws governing gamete donor selection is presented. It identifies critical gaps in the current understanding of reproductive law, and highlights areas where further exploration is needed. The chapter also provides an analysis of the public policy objectives served by existing laws, and evaluates their effectiveness in balancing individual rights with societal interests. This examination sets the stage for understanding the legal landscape that influences gamete donor selection.

Chapter 3: Empirical analysis

This chapter details the methodology used in the empirical study, which combines qualitative and quantitative approaches to gather data on donor selection processes. It presents and analyses data collected from semi-structured interviews with healthcare professionals and surveys of intended parents. Insights and patterns emerging from the empirical investigation are discussed, thereby offering a rich understanding of the decision-making criteria and experiences of those involved in gamete donation. This empirical evidence serves to inform the subsequent chapters.

Chapter 4: Best interest of the prospective child

This chapter reviews the attention given to the impact of gamete donor selection on the well-being and interests of the child. It explores ethical and legal considerations in assessing the potential effects on children conceived through donor gametes. Recommendations are made for incorporating child interests into regulatory frameworks, so ensuring that the rights and welfare of prospective children are prioritised in legal and policy decisions.

Chapter 5: Decision-making by intended parents

The chapter investigates the subjective criteria used by intended parents in selecting gamete donors, considering the influence of personal values and societal norms. It examines the constitutional rights and protections available to intended parents, and assesses how these interests are reflected in legal frameworks. The chapter also explores the controversial topics of eugenics and designer babies, and analyses how these issues intersect with donor selection choices and ethical considerations.

Chapter 6: Conclusion

The concluding chapter integrates findings from the exploration of reproductive law, practical implementation, decision-making by intended parents, and the interests of prospective children. It summarises key findings and offers recommendations for legal and policy reforms to enhance alignment and address challenges identified throughout the study. The chapter discusses the contributions to the field and implications for future research. It concludes with reflections on the four-way alignment in South African gamete donor selection laws and practices.

CHAPTER 2

LEGAL FRAMEWORK

I. INTRODUCTION

Reproductive law primarily focues on the pre-birth process. It encompasses the passage from gamete to delivery and the spectrum of choices individuals can enact, so shaping the course of this journey. This is for both the potential offspring (the prospective child) and the individual whose decisions may give rise to a child they plan to nurture (the prospective parent).

ARTs encompass a range of techniques facilitating human reproduction through artificial means, so distinguishing them from natural reproductive processes. These technologies challenge established societal norms and values, thereby disrupting traditional perspectives. Although the concept of 'test tube babies' faced scepticism during the early stages of IVF, it has since become normalised in contemporary society. Yet, as ARTs progress and incorporate insights from the human genome this evolution raises questions about the future implications of manipulating genetic composition, where children conceived through ARTs may not only be conceived but also be intentionally crafted, so signifying a transformative shift in our understanding of human existence. According to Thaldar,[123] 'children produced by ARTs will not only be *conceived* but will also be *made* and may ultimately be *designed*. Humanity may change from being a natural phenomenon – the product of evolution – to being a cultural artifact.'

Historically (pre-1980s), sperm donors were almost always anonymous and were selected by the couple's physician, unless a family member or friend volunteered or was enlisted. The initial acronyms used were 'AIH' for artificial insemination by the husband and 'AID' for artificial insemination by a donor.[124]

Long before the introduction of IVF, both common law and statutory law had, of course, addressed issues of paternity, legal parentage, and inheritance rights and also obligations to protect both parents and children globally. Reproductive law, however, was not prepared for the profound and widespread impact of IVF. The introduction of IVF initially challenged three

[123] D Thaldar 'Building a progressive reproductive law in South Africa' (2023) 25(2) *Health and Human Rights* 43.

[124] A M Braverman 'How the internet is reshaping assisted reproduction: From donor offspring registries to direct-to-consumer genetic testing' (2010) 11(2) *Minnesota Journal of Law, Science & Technology* 477.

core legal principles. First, by enabling fertilisation outside of a woman's body, IVF redefined the concept of 'conception'. The creation of embryos 'ex utero' brought about new legal and constitutional questions about bodily integrity and reproductive privacy. Second, the ability to freeze embryos extended the time-frame from fertilisation to birth indefinitely, so rendering traditional legal assumptions about gestation outdated. This introduced complex legal disputes over embryo access, custody, and parentage, as well as issues in the law of delict, contract, and malpractice law. Third, the use of reproductive tissue donors and surrogates introduced numerous conflicting legal rights and duties among the involved parties, with little existing legal precedent available to address these disputes. Collectively, these aspects of IVF and ART necessitated significant legal adjustments across various fields.[125]

Sperm and egg donation raise several legal issues beyond parentage issues that are explored in this chapter. Today, gamete banks offer extensive online catalogues that allow recipients to 'shop' for physical characteristics and traits, and review handwriting samples, photographs and even voice recordings. Frozen gametes are routinely shipped both nationally and internationally.

In the dynamic landscape of assisted reproduction, the international legal framework governing gamete donor selection plays a pivotal role in shaping ethical practices and safeguarding the rights of the individuals involved. With advancements in reproductive technologies and the increasing global demand for assisted conception, a complex web of legal standards and regulations has emerged. Despite international efforts to standardise regulations, there is significant variability in the approaches adopted by individual countries. National laws play a pivotal role in shaping the gamete donor selection process, with some countries implementing strict anonymity rules to protect donor privacy, while others advocate greater transparency and disclosure.

In the Western world, governance of donor gamete selection is diverse and dynamic. The US uses a combination of federal and state laws, addressing issues such as donor anonymity and recipient rights. The UK's Human Fertilisation and Embryology Act 2008 sets rules for donor gamete use, emphasising anonymity and information disclosure. In Canada, provincial laws regulate assisted reproduction, and are complemented by the federal Assisted Human Reproduction Act. Australia's regulation varies by state, and is guided by the National Health and Medical Research Council. The European Union lacks uniform legislation, but

[125] S Crockin, A B Altman & M A Edmonds 'History and future trends of ART law and medicine' (2021) 59(1) *Family Court Review* 1.

common guidelines do exist, with individual countries having their own laws. These regulations reflect a commitment to ethical considerations and adapting to advancements in reproductive technologies.

II. FOREIGN LAW GOVERNING GAMETE DONOR SELECTION

Global estimates between 1990 and 2021 indicate that about one in six people experience infertility in their lifetime.[126,127] Worldwide, at least 50 million men and women are unable to have a genetically related child,[128] as a result of issues ranging from intending parents having a high risk of transmission of genetic disease to offspring, absent or abnormal sperm cells secondary to developmental abnormalities, reproductive organ disease, and the effects of environmental factors, chemotherapy and radiotherapy.[129] Furthermore, single parents and same-sex couples have turned to gamete donation to realise their desire to have a family. The acquisition and use of gametes present significant ethical and legal dilemmas. Ongoing discussions among scientists and stakeholders worldwide focus on various pertinent factors, including anonymity, genetic screening, informed consent, risk disclosure, and considerations for child welfare.

Infertility is reported to be high in South Asia, sub-Saharan Africa, North Africa and the Middle East and Central/Eastern Europe and Central Asia.[130] A meta-analysis of infertility in Africa conducted in 2020 reported that the pooled proportion of primary infertility in Africa was 49.91 per cent, with 70.56 per cent in North Africa, 41.57 per cent in West Africa, 40 per cent in southern Africa, and 30.37 per cent in East Africa.[131]

An online research analysis by Mthembu[132] in 2020 revealed the state of the law on assisted reproduction regulation in eighteen African Anglophone countries: Botswana,

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126 World Health Organization 'Infertility prevalence estimates, 1990–2021' (2023) available at *https://www.who.int/publications/i/item/978920068315*

127 C M Cox, M E Thoma, N Tchangalova et al 'Infertility prevalence and the methods of estimation from 1990 to 2021: A systematic review and meta-analysis' (2022) *Hum Reprod Open* hoac051.

128 M N Mascarenhas, S R Flaxman, T Boerma et al 'National, regional, and global trends in infertility prevalence since 1990: A systematic analysis of 277 health surveys' (2012) 9(12) *PLoS Med* e1001356.

129 E E Puscheck 'Infertility' (30 January 2020) *Medscape* available at *https://emedicine.medscape.com/article/274143*

130 M N Mascarenhas, S R Flaxman, T Boerma et al 'National, regional, and global trends in infertility prevalence since 1990: A systematic analysis of 277 health surveys' (2012) 9 *PLoS Med* e1001356.

131 T Mashaah, M Muziringa, E Gomo et al 'Traditional management of female infertility in Africa: A scoping review protocol' (2023) 13 *BMJ Open* e079201.

132 N N Mthembu *A Comparative and Human Rights Analysis of the Regulation of Assisted Reproduction in African Anglophone Countries* (unpublished LLM dissertation, School of Law, University of KwaZulu-Natal, 2020).

Burundi, eSwatini, The Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Namibia, Nigeria, Rwanda, Sierra Leone, South Africa, Tanzania, Uganda, Zambia, and Zimbabwe. The results revealed that of the eighteen countries, five did not have any ART activities or fertility clinics.[133] This finding is confirmed by the International Federation of Fertility Societies' Surveillance (IFFS) 2019: *Global Trends in Reproductive Policy and Practice*.[134] Twelve countries did not have any specific legislation that dealt with ART.[135] This means that many African countries are still lagging behind in terms of promulgating laws to directly regulate ART,[136] with eleven countries having ART activity but no national legislation to regulate it.[137] However, in South Africa, the legal position is quite the opposite and it boasts what seems to be considered comprehensive legislation to deal with ART.[138]

The laws and legislation on gamete donor selection exhibit considerable variation from one country to another, so highlighting a lack of uniform governance of this complex matter. The regulatory framework governing ARTs in the US, in particular gamete donation, remains notably limited. The absence of a comprehensive federal law results in a decentralised landscape. The US FDA indirectly addresses gamete donations through eligibility regulations for Donors of Human Cells, Tissues, and Cellular and Tissue-Based Products (2007).[139] These regulations stipulate a review of 'relevant medical records' and mandate screening for communicable diseases such as HIV and Hepatitis C, with a six-month quarantine and retesting requirement for anonymous donations. The American Society of Reproductive Medicine merely recommends the recording and preservation of donor information. Regulation at the state level for private fertility clinics and gamete banks is inconsistent, with variations in the

133 These countries are Lesotho, Liberia, Malawi, Sierra Leone, and eSwatini.

134 This surveillance reported six countries as having recorded no ART activities: The Gambia, Lesotho, Liberia, Malawi, Sierra Leone, and eSwatini. My online research revealed that there is a fertility clinic in The Gambia named Dimbayaa Fertility for Africa and it is located at the AfricMed Clinic.

135 These countries are Botswana, The Gambia, Ghana, Kenya, Namibia, Nigeria, Rwanda, Tanzania, Uganda, Zambia, and Zimbabwe.

136 M Khuhlman 'Legislators caught flatfooted as Batswana women rent out their wombs' available at *https://www.sundaystandard.info/legislators-caught-flatfooted-as-batswana-women-rent-out-their-wombs/,* accessed on 5 August 2024.

137 These countries are Botswana, The Gambia, Ghana, Kenya, Namibia, Nigeria, Rwanda, Tanzania, Uganda, Zambia, and Zimbabwe.

138 National Health Act; Regulations Relating to the Artificial Fertilization of Persons (*Government Gazette* 35099 GN R175 2 March 2012).

139 FDA 'Guidance for Industry: Eligibility Determination for Donors of Human Cells, Tissues, and Cellular and Tissue-Based Products' (HCT/Ps), 2007.

collection, preservation and release of donor information[140] among those states that have established regulations.

Certainly, gamete donation is not universally permitted, and the specific protocols for its implementation exhibit significant variation[141] across countries.[142] Similar to other aspects of ARTs, such as surrogacy, laws and policies governing gamete donation encompass a multitude of moral, legal, and cultural considerations. Different countries strike diverse balances between safeguarding the privacy interests of donors and recipient parents, promoting reproductive freedom, and prioritising the rights and best interests of the resulting child. However, in countries allowing gamete donation, in particular sperm donation, the US market stands out in terms of its distinctiveness. Several countries have different regulations on sperm donation anonymity and recipient eligibility. Seven countries, including Japan, France, Spain, Canada and Bulgaria, allow donors to remain fully anonymous. In the US, Belgium, and Denmark, anonymity policies vary, while Portugal and Finland permit donor-conceived individuals to learn their donor's identity upon turning eighteen. Nine nations, including the UK, Germany, Sweden, and the Netherlands, do not provide anonymity to donors.[143]

International reproductive law on sperm donation is summarised for three of the largest researched English speaking countries in the world – the UK, US and Australia – and this is later compared with South Africa's legislation.

Table 1: Summary of restrictions on sperm donation laws in UK, USA, AU

	Allowed recipients	Donor anonymity	Donor limits
United Kingdom	Anyone	No	10 families. Exports subject to national limits
United States	Anyone	Varies	No enforced limit. Guidelines suggest 25 births per population of 850,000
Australia	Anyone	No	Varies (NSW & Western Australia = 5 families, Victoria & South Australia = 10 families)

140 V L Pi 'Regulating sperm donation: Why requiring exposed donation is not the answer' (2009) 16 *Duke J Gender L & Pol'y* 379.

141 M C Inhorn '"He won't be my son": Middle Eastern Muslim men's discourses of adoption and gamete donation' (2006) 20 *Med Anthropol Q* 94.

142 *SH and others v. Austria*, Application No. 57813/00, Grand Chamber, ECHR; 2011.

143 See: https://worldpopulationreview.com/country-rankings/sperm-donation-laws-by-country

a). United Kingdom

The UK is the first country to have passed legislation that extensively regulates reproductive technology[144] via the Human Fertilisation and Embryology Act 1990 (HFE Act of 1990).[145] Prior to the HFE Act of 1990, it was common practice for donor anonymity to be enforced. As of 1 April 2005, however, all donors are identity-release donors, as their identities can be legally accessed by their adult donor-conceived offspring. According to analysis of section 33A(2)(h) of the HFE Act 1990,[146] in conjunction with section 33B,[147] if a gamete donor has given consent their non-identifying information may be disclosed. Therefore, the provision of detailed donor information is at the discretion of gamete agencies and banks, as there is no legal prohibition of it.[148] This approach has both positive and negative implications for donors, recipients, and donor-conceived children. On the positive side, it ensures greater transparency without compromising donor anonymity, thereby providing donor-conceived individuals with access to valuable genetic and medical information which can support their health and identity development. It also offers recipients a clearer understanding of the donor's background, which helps with informed decision-making.

However, the above discretion could lead to inconsistencies across agencies, where some could provide more detailed information than others, so creating unequal access to donor information for donor-conceived children. This variability could frustrate individuals who wish to learn more about their genetic origins but are limited by the agency's policies. From a donor's perspective, while their identity remains protected, they may be concerned about the degree of non-identifying information being shared and how it could affect their privacy in future. Furthermore, with the rise of advanced AI-driven identity-tracking technologies, there is an increasing risk that non-identifying information could be cross-referenced with other data, so potentially leading to the unintended identification of donors – further complicating issues of privacy and anonymity. Stricter regulations should include mandatory data encryption

144 J Speirs 'Anonymous semen donation: Medical treatment or medical kinship?' (2013) 9(1-2) *Cargo* 76.

145 L R Rubin, I de Melo-Martin, Z Rosenwaks et al. 'Once you're choosing, nobody's perfect: Is more information necessarily better in oocyte donor selection?' (2015) 30(3) *Reproductive BioMedicine Online* 315.

146 Section 33A(2)(h) 127 of the HFE Act states: 'Subsection (1) does not apply where the disclosure is of information other than identifying donor information and is made with the consent required by section 33B.'

147 Section 33B states: 'Subject to subsection (5), the consent required by this section is the consent of each individual who can be identified from the information.'

148 I de Melo-Martin 'How best to protect the vital interests of donor-conceived individuals: Prohibiting or mandating anonymity in gamete donations?' (2016) 3 *Reproductive BioMedicine and Society Online* 101-102.

protocols for all non-identifying donor information shared by gamete agencies and banks, along with clear limitations on the type and amount of data disclosed. Agencies should also be required to update privacy policies in response to advances in AI technology and provide explicit informed consent forms to donors that outline the potential future risks of identification through technology. Therefore, it is important to consider that while the law promotes flexibility and transparency, it also introduces challenges related to consistency and donor privacy, which may be further strained by future technological advances.

A 2018 South African study by Baharth analysed the varying approaches of UK gamete donor agencies and banks in providing information to prospective parents.[149] Seven popular UK websites were randomly selected and reviewed, and revealed diverse practices. New Life Egg Donation Agency offers personalised matching but does not provide detailed donor profiles online;[150] instead, prospective parents specify their requirements and the agency matches them. Altrui Egg Donation emphasises providing the most non-identifying donor information without requiring additional payment, so setting it apart from competitors.[151] Nurture UK offers comprehensive donor information without additional fees.[152] London Sperm Bank Donors and London Egg Bank Donors provide basic donor descriptions, with extended profiles available upon request from the Human Fertilisation and Embryology Authority (HFEA).[153] Fairfax Cryobank (UK branch) offers various information for free, but requires additional information packages to be purchased.[154] Complete Fertility allows selection based on basic characteristics without the option to purchase extra information.[155]

The study indicates a lack of uniformity in the provision of detailed information by UK gamete agencies and banks. While some provide extensive information at no extra cost, others offer additional information for a fee. This contrasts with South African practices, where most agencies provide limited information. Despite legal constraints on donor anonymity, many UK agencies still provide detailed non-identifying information, so suggesting a willingness to trade

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149 D Bharath *A Legal Analysis of Trade in Personal Information Regarding Human Gamete Donors* (LLM dissertation, University of KwaZulu-Natal, 2018).

150 Egg Donation UK, New Life Egg Donation Agency, available at: *https://eggdonation-uk.com/uk_recipients.html,* accessed in September 2024.

151 Altrui Agency, available at: *http://www.altrui.co.uk/receiving-eggs/donor-information/info-about-your-egg-donor,* accessed in September 2024.

152 *Nurture Donors UK, Nuture Donors Global, available at: https://www.nurture.co.za/nurture-global/,* accessed in September 2024.

153 London Sperm Bank, Donors, available at: https://www.londonspermbank.com/, accessed in October 2024.

154 Fairfaxcryo Bank UK, available at: https://fairfaxcryobank.com/uk, accessed in October 2024.

155 Complete Fertility, available at: *http://www.completefertility.co.uk/index.php*, accessed in October 2024.

such information in the system. In a UK journal article examining the effectiveness of prohibiting or requiring donor anonymity to safeguard the interests of donor-conceived offspring, it is argued that many gamete agencies and banks in the UK collect a significant amount of non-identifying donor information, although they are not legally obliged to do so, in order to help prospective parents with their choice of gamete donors.[156]

The export of sperm from the UK is tightly regulated, and involves notification to the HFEA and donor consent. Donations are typically exported only once the UK's ten-family limit is met. Strict export restrictions ensure that shipments go to approved clinics, with traceability measures in place. Compliance with regulations, especially the EU Tissues Directive for exports to EU states, determines the number of resulting offspring, with UK sperm banks rarely adding further limits.

b). United States of America

The American Society for Reproductive Medicine (ASRM) and other authoritative bodies such as the American Association of Tissue Banks[157] offer recommendations and guidelines. While the ASRM guidelines set limits, they are not legally mandated and there is no centralised monitoring system. It has been approximated that only about 40 per cent of births are documented.

The US fertility industry lacks comprehensive federal and state regulation:

> Unlike the United Kingdom and Canada, oversight of ART in the United States is not led by a dedicated regulatory body. Rather, the industry relies primarily on self-regulation in the form of voluntary guidelines issued by two professional associations—the American Society for Reproductive Medicine (ASRM) and the Society for Assisted Technology (SART) ... Fertility clinics in the United States are also subject to state regulation, but few states have chosen specifically to regulate this industry and none has created a central oversight body similar to the HFEA or ARHC.[158]

The ASRM suggests that donor information should ideally be recorded and retained indefinitely. [159] However, given the limited number of states overseeing gamete agencies and

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156 I de Melo-Martín 'How best to protect the vital interests of donor-conceived individuals: Prohibiting or mandating anonymity in gamete donations?' (2016) 3 *Reprod Biomed & Soc Online* 100.

157 *http://aatb.org/content*

158 A D Levine 'The oversight and practice of oocyte donation in the United States, United Kingdom and Canada' (2011) 23(1) *HEC Forum* 20.

159 M Sabatello 'Disclosure of gamete donation in the United States' (2014) 11(1) *Ind Health L Rev* 54-55; ibid at 1285.

banks there is no consistent approach to the acquisition, verification and release of donor information.

Therefore, the US has not banned donor anonymity – a tradition persisting for over a century. Although most gamete donations are anonymous, as in South Africa, the US also allows known donations. In addition, some gamete agencies and banks offer identity-release donors, but it is not legally required.[160] Although fundamental donor information is consistently supplied, the provision of comprehensive donor details is left to the discretion of the gamete agency or bank. The donor agencies enjoy freedom in the trade of donor information, and many opt to furnish detailed profiles – so responding to consumer demand.[161] Furthermore, the US stands out as a significant hub for reproductive tourism, and attracts numerous individuals from around the world who opt to undertake fertility treatment there instead of in their home countries.[162]

The analysis by Baharth, examined the websites of six US gamete agencies and banks to investigate their practices in the provision and trade of donor information.[163] Cryos International offers detailed profiles for egg donors and basic or detailed profiles for sperm donors, with no extra fee for accessing detailed profiles.[164] Fairfax Cryobank provides summary donor profiles for free but charges for further detailed non-identifying donor information through package options.[165] Fairfax Egg Bank offers detailed information on each egg donor for free when browsing, with no option to purchase additional packages.[166] Donor Egg Bank USA presents varying amounts of donor information for both anonymous and identity-release donors, with no charge for viewing profiles.[167] Seattle Sperm Bank provides basic donor information for free but charges for detailed information through individual purchases or an all-access membership.[168] The Sperm Bank of California offers basic donor

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160 S Allan 'Donor conception and the search for information: From secrecy and anonymity to openness' (2016) 144.

161 J Benward, A M Braverman & B Galen 'Maximizing autonomy and the changing view of donor conception: The creation of a National Donor Registry' (2009) 12 *DePaul J Health Care L* 227.

162 J Gregorio 'Hatching a plan towards comprehensive regulations in egg donation' (2017) 65(4) *DePaul L Rev* 1283.

163 D Bharath *A Legal Analysis of Trade in Personal Information Regarding Human Gamete Donors* (LLM dissertation, University of KwaZulu-Natal, 2018).

164 Cryos International Sperm and Egg Bank, available at: *https://usa.cryosinternational.com/resources*, accessed in October 2024

165 Fairfaxcryobank, available at: *https://fairfaxcryobank.com/donor-unlimited-access-packages*, accessed in October 2024

166 Fairfax Egg Bank, available at: *https://www.fairfaxeggbank.com/advantage/*, accessed in October 2024

167 Donor Egg Bank USA, Available at: *https://donoreggbankusa.com/our-program*, accessed in October 2024

168 Seattle Sperm Bank, available at: *https://www.seattlespermbank.com*, accessed in October 2024

profiles, with detailed information and baby pictures available for purchase.[169] These agencies and banks offer mostly anonymous and identity-release donors, with detailed donor information available either freely or for a fee. This demonstrates that even in an anonymous donor programme, agencies and banks can provide detailed information to prospective parents.

Regarding donor information, donors often bear the responsibility of disclosing personal information, so prompting concerns about maintaining honesty and integrity, especially given troubling data from the US. A 2008 survey, encompassing 50 per cent of all US fertility clinics, showed that more than one in five clinics were implicated in instances of misdiagnosis, mislabelling, or mishandling of reproductive materials.[170] Furthermore, a 2009 case study profiled a Virginia donor with a hereditary heart condition that was passed on to at least 8 of his 22 offspring, resulting in the tragic death of a toddler owing to cardiac failure.[171] In 2016, the *New York Times* reported a surge in lawsuits against US sperm banks and urged consumers to exercise caution in the industry. Despite recommendations from professional societies overseeing the fertility sector to screen donors for infectious diseases, neither public nor private entities mandate such analyses or reporting by sperm banks. This lack of oversight raises concerns, in particular regarding the heavy reliance on unverified information provided by the donors themselves.[172]

The US and South Africa take different approaches to donor anonymity and information preservation in ART, and yet both face similar challenges in balancing privacy with the rights of donor-conceived individuals. In the US, regulations vary by state, with the ASRM merely recommending the recording and preservation of donor information, so leaving inconsistent practices across clinics. This fragmented system can result in unequal access to genetic and medical information for donor-conceived individuals. In contrast, South Africa's Regulation 10(2)(a) mandates donor anonymity, but debates about this regulation reflect growing concerns about the rights of donor-conceived individuals to know their genetic origins. Both countries grapple with how to protect donor privacy while addressing ethical concerns related to identity and medical access, thereby highlighting the global complexity associated with regulating ART

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169 The Sperm bank of California, 'Choose a Donor', available at *https://www.thespermbankofca.org/choosing-donor-0* , accessed in October 2024.

170 S Baruch, D Kaufman & K L Hudson 'Genetic testing of embryos: Practices and perspectives of US in vitro fertilization clinics' (2008) 89 *Fertil Steril* 1053.

171 B J Maron, J R Lesser, N B Schiller et al 'Implications of hypertrophic cardiomyopathy transmitted by sperm donation' (2009) 302 *J Am Med Ass'n* 1681.

172 'Lost samples, poor screening: Sperm bank industry oversight examined' *CBS News* (3 Oct 2016), available at *http://www.cbsnews.com/news/advocates, accessed in October 2024.*

in ways that serve all the parties involved. A more consistent, nationally regulated framework in the US, similar to the evolving discussions in South Africa, could help align these systems with international trends toward greater transparency in donor information.

The recommended approach taken by the ASRM, combined with inconsistent state regulations for private fertility clinics, presents several issues. The lack of uniform standards leads to confusion and unequal practices across states, so leaving donors, intended parents, and donor-conceived individuals uncertain about the availability and preservation of critical genetic and medical information. Inconsistent regulations create legal ambiguity and can result in donor information being lost or mishandled, so depriving donor-conceived individuals of important knowledge about their genetic origins and health.

This patchwork approach raises significant ethical concerns, in particular about the right of donor-conceived individuals to access information about their biological origins, which can be crucial for making medical decisions. Without a national mandate, donor-conceived individuals face inequities depending on where and how they were conceived, and clinics may prioritise financial considerations over ethical obligations. The lack of stringent regulation may also lead to exploitation or negligent record-keeping in some states.

The implications of this fragmented system extend beyond the US, as other countries have moved toward open-identity donation systems where donor-conceived individuals can access identifying information once they reach adulthood. The US's inconsistent regulations place it at odds with these international trends, thereby contributing to potential psychological distress for those unable to access information about their genetic background. Moving toward a nationally regulated framework that mandates the preservation and potential release of donor information would better protect the rights and well-being of all parties involved, so aligning the US with evolving global standards.

A nationally regulated framework for ART and donor information would ensure consistency across all fertility clinics and gamete banks in the US. It would mandate the standardised collection of donor information, requiring comprehensive medical, genetic, and personal details from all donors. This would include uniform forms and procedures to ensure that all clinics gather the same level of information. To safeguard this data, the framework would enforce long-term storage of donor records in a centralised national registry, which is securely maintained by a federal authority.

The framework would also introduce conditional access to donor information. Donor-conceived individuals could access identifying information once they reach adulthood, provided the donor consented to open-identity donation. Even in cases of anonymous donation, access to non-identifying medical information would be guaranteed to address health needs. The system would include clear consent guidelines for donors and recipients, outlining their rights and future access to information. Mechanisms for medical updates from donors could also be implemented.

Privacy protections would be a cornerstone of this framework, safeguarding both donor and recipient privacy. Donors who opt for anonymity would have legal protections against involuntary disclosure, while clinics would be required to adhere to strict data protection measures. A federal oversight body would enforce compliance, conduct audits, and impose penalties for non-compliance, so ensuring accountability and uniform practices across the country.

Finally, the framework would include education initiatives to raise awareness among donors, recipients, and donor-conceived individuals about their rights and the ART process. This approach would create a fair, consistent, and ethically sound system, balancing the rights of donors with the needs of donor-conceived individuals to access critical information about their origins.

Both the US and South Africa should move towards implementing more consistent and transparent frameworks. South Africa should consider ensuring more accurate implementation of the law in practice. This could involve creating more awareness and understanding of the law among fertility healthcare workers. According to Thaldar, 'the generally accepted belief in the SA fertility industry seems to be that gamete donation in SA must by law be anonymous and that it is unlawful to disclose the identity of a gamete donor.'[173] This belief is further supported by the South African Law Reform Commission, which stated that 'The legal position in South Africa is that gamete donors ... must be anonymous and it is an offence to reveal the identity of a gamete donor .'[174] However, this is a misinterpretation and 'the position in SA law is that gamete donation can be anonymous, completely open to the public, or anywhere in between – depending on the election of the individual gamete donor. Furthermore,

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[173] D Thaldar & B Shozi 'Is open-identity gamete donation lawful in South Africa?' (2022) 112 *S Afr Med J* 409.

[174] South African Law Reform Commission, Issue Paper 32, Project 140, 'The right to know one's own biological origins' (20 May 2017).

it is required that '*specific consent* by the donors is provided, and to err on the side of caution, such consent must be in *writing*.'[175]

Intended parents should be given the choice between a known donor or anonymous or open-identity donation with prior donor consent, where donor-conceived individuals can access identifying information when they reach adulthood, while still allowing donors the option of initial anonymity. Therefore, this exercises their right to reproductive freedom. It is crucial to recognise that any option chosen by intended parents will carry its own set of consequences. Grasping the potential outcomes will empower them to make an informed decision that they are best equipped to handle. Using a known donor offers the benefit of a personal connection and direct access to the donor's genetic and medical history, which can be valuable for both the intended parents and the child. The ongoing relationship with the donor may provide transparency about the child's origins. However, this arrangement can lead to emotional complexity, with potential conflicts over roles or boundaries. Legal issues can also arise, especially if there is any ambiguity in the agreement, and the child may face challenges in navigating their relationship with the donor over time. An unknown (anonymous) donor provides clear boundaries, as the donor's role is entirely separate from that of the intended parents, so minimising personal or emotional complications. This option allows for privacy and avoids potential conflicts, so offering a straightforward process for both parties. However, the downside is the lack of detailed medical or genetic history, which could be important for the child later in life. The child may also, in the future, experience feelings of curiosity about their origins.

An identity-release donor offers the child the option to access identifying information about the donor when they reach adulthood. This allows for transparency and the possibility of obtaining a genetic history, if needed. However, it introduces an element of uncertainty, as both the donor and child may face emotional complexities when contact becomes possible. The donor's circumstances may change over time, and they may not be prepared to introduce a donor-conceived child into their life, especially if they go on to start their own family years after the donation. Although this option provides flexibility, it can still lead to future legal or emotional complications if the expectations for the relationship are not clearly communicated.

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175 D Thaldar & B Shozi 'Is open-identity gamete donation lawful in South Africa?' (2022) 112 *S Afr Med J* 409.

Although concerns persist about the lack of transparency in relation to the prevalence of anonymity in South Africa, some parents feel more secure keeping their use of a donor a secret. However, the truth could still emerge later because of unexpected medical issues, genetic testing, or advancements in AI technology, which then reveal the use of a donor. This therefore raises the question of whether donor anonymity will even be guaranteed or even possible in the future.

c). Australia

Regulations governing assisted reproduction vary across states, operating within the framework established by federal and state governments. While there is no centralised national authority or legislation overseeing ART services in Australia, all ART clinics must adhere to the Code of Practice for Reproductive Technology Units formulated by the Reproductive Technology Accreditation Committee (RTAC) of the Fertility Society of Australia.[176] The RTAC conducts annual accreditation assessments at ART clinics. In addition, the National Health and Medical Research Council (NHMRC) issues Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research, which form part of the regulatory framework.[177] Four states have enacted specific ART legislation: the Assisted Reproductive Technology Act 2007 (NSW)[178]; the Assisted Reproductive Treatment Act 1988 (SA, also applicable to the Northern Territory)[179]; the Assisted Reproductive Treatment Act 2008 (Vic)[180]; and the Human Reproductive Technology Act 1991 (WA).[181]

The fundamental principles guiding third-party reproduction prioritise altruism, the right of donor-conceived individuals to access information about their biological origins, and comprehensive counselling encompassing social, psychological, ethical, and legal considerations. These principles aim to ensure that donors are not motivated by financial

176 Fertility Society of Australia. *Reproductive Technology Accreditation Committee. Code of Practice for assisted reproductive technology units* (2010), available at *http:// wwwfertilitysocietycomau/rtac/*, accessed in November 2024.

177 NHMRC. Ethical guidelines on the use of assisted reproductive technology in clinical practice and research. Canberra: Australian Government; 2007.

178 Assisted Reproductive Technology Act 2007 (NSW) New South Wales Government. Available from: http://www.legislation. nsw.gov.au, accessed November 2024.

179 Assisted Reproductive Treatment Act 1988 (SA) South Australian Government. Available from: http://www.legislation. sa.gov.au/index.aspx

180 Assisted Reproductive Treatment Act 2008 (Vic) Victorian Government. Available from: http://www.legislation.vic.gov. au

181 Human Reproductive Technology Act 1991 (WA) Western Australian Government. Available from: http://www.slp.wa.gov.au/legislation/statutes.nsf/default.htm

incentives,[182] that donor-conceived individuals can ascertain their biological heritage, and that potential donors and recipients are fully informed about the potential implications of third-party reproduction. Donors and recipients must undergo counselling and be provided with information on the medical, social, psychological, and legal implications of donation.[183] Donors are screened for infectious diseases, and recipients are entitled to information about the donor's medical history, physical features, and the number and sex of donor-conceived offspring.[184]

Given the ethical and social complexity of donor conception, Australian law and professional guidelines place strong emphasis on counselling.[185] For donors, counselling covers medical procedures, potential psychosocial effects, legal issues including the possibility of future contact with donor-conceived offspring, and the impact on relationships with partners, existing children, or known recipients.[186] Counsellors also assess donor suitability in light of medical, psychological, and motivational factors. Recipients are counselled on the implications of using a donor, including the absence of genetic ties, the psychosocial and relational consequences, and the importance of disclosure to the child.[187] Studies suggest counselling is regarded as beneficial by both donors and recipients, as it assists them in navigating the complexities of donor conception.[188]

Historically, secrecy was encouraged in donor conception,[189] [190] but a marked cultural and legal shift has occurred towards openness, driven by advocacy from donor-conceived

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182 T C Appleton, Embryo donation. In: Boivin J, Kentenich Heditors, editors. ESHRE Monographs: Guidelines for counselling in infertility. Oxford: Oxford University Press; 2002. pp. 35–36.

183 P Baetens 'Oocyte donation' in J Boivin & H Kentenich (eds) *ESHRE Monographs: Guidelines for Counselling in Infertility* (2002) 33–34.

184 K R Daniels 'Donor insemination' in J Boivin & H Kentenich (eds) *ESHRE Monographs: Guidelines for Counselling in Infertility* (2002) 31–32.

185 T C Appleton, Embryo donation. In: Boivin J, Kentenich Heditors, editors. ESHRE Monographs: Guidelines for counselling in infertility. Oxford: Oxford University Press; 2002. pp. 35–36.

186 P Baetens 'Oocyte donation' in J Boivin & H Kentenich (eds) *ESHRE Monographs: Guidelines for Counselling in Infertility* (2002) 33–34.

187 K R Daniels 'Donor insemination' in J Boivin & H Kentenich (eds) *ESHRE Monographs: Guidelines for Counselling in Infertility* (2002) 31–32.

188 K Hammarberg, M Carmichael, L Tinney & A Mulder 'Gamete donors' and recipients' evaluation of donor counselling: a prospective longitudinal cohort study' (2008) 48 *Australian and New Zealand Journal of Obstetrics and Gynaecology*601.

189 K Daniels 'Is blood really thicker than water?' (2005) 26 *Journal of Psychosomatic Obstetrics and Gynaecology* 265.

190 A J Turner & A Coyle 'What does it mean to be a donor offspring?' (2000) 15 *Human Reproduction* 2041.

adults and support groups.[191] Current law and professional guidance strongly encourage parents to disclose donor conception to their children.[192]

Victoria has been a global pioneer, being the first jurisdiction to abolish donor anonymity and establish a mandatory donor register.[193] Since 2010, an addendum to the birth certificates of donor-conceived children in Victoria signals the availability of further information about their conception, thereby promoting disclosure.[194] Other states, including Western Australia,[195] New South Wales,[196] and South Australia,[197] have introduced central registers, though access conditions vary.

Where state legislation is absent, RTAC Guidelines since 2006 require clinics to only accept donors who consent to the release of identifying information to offspring upon reaching adulthood.[198] The NHMRC Guidelines similarly affirm that donor-conceived persons have a right to know their genetic parents.[199] Nevertheless, in states without donor registers, access to donor information remains inconsistent, leaving donor-conceived individuals reliant on voluntary registers or online platforms such as the Donor Sibling Registry.[200]

In Western Australia, amendments to the Human Reproductive Technology Act 1991 allow donor-conceived adults to apply for information about their donors if they donated after December 2004.[201] In specific Australian states such as Victoria, New South Wales, Western Australia, and South Australia, legislation has been enacted to prohibit anonymous gamete donation.[202] In New South Wales, the Assisted Reproductive Technology Act 2007 makes provision for a central register to enable applications for information from donor-conceived

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191 Donor Conception Support Group (DCSG) *Let the offspring speak: discussions on donor* (Australia, Donor Conception Support Group of Australia Inc 1997).

192 Victorian Government. 2008. Available from: http://www. parliament.vic.gov.au/hansard/daily-hansard

193 Assisted Reproductive Treatment Act 2008 (Vic) Victorian Government. Available from: http://www.legislation.vic.gov. au

194 Assisted Reproductive Treatment Act 2008 (Vic) Victorian Government. Available from: http://www.legislation.vic.gov. au

195 Human Reproductive Technology Act 1991 (WA) Western Australian Government. Available from: http://www.slp.wa.gov.au/legislation/statutes.nsf/default.html

196 Assisted Reproductive Technology Act 2007 (NSW) New South Wales Government. Available from: http://www.legislation. nsw.gov.au

197 Assisted Reproductive Treatment Act 1988 (SA) South Australian Government. Available from: http://www.legislation. sa.gov.au/index.aspx

198 Fertility Society of Australia, Reproductive Technology Accreditation Committee *Code of Practice for Assisted Reproductive Technology Units* (2010).

199 NHMRC. Ethical guidelines on the use of assisted reproductive technology in clinical practice and research. Canberra: Australian Government; 2007.

200 T Freeman, V Jadva, W Kramer & S Golombok 'Gamete donation: parents' experiences of searching for their child's donor siblings or donor' (2009) 24 *Human Reproduction* 505.

201 Human Reproductive Technology Act 1991 (WA) Western Australian Government.

202 Ibid.

adults.[203] Children born through gamete or embryo donation are legally entitled to access donor information, including identifying details once they reach maturity.[204] ART clinics are obliged to maintain both identifying and non-identifying records indefinitely, and in some states this information must also be submitted to a central register.[205] Donors are not legally regarded as parents of donor-conceived children, and limits are imposed on the number of families that can be created using a single donor's gametes.[206]

Recruitment of gamete donors remains a persistent challenge. Most sperm donors are recruited by clinics, but shortages have been reported due to expanded eligibility for ART among single women and same-sex couples and the abolition of anonymity.[207] Oocyte donation is rarer, often relying on known donors such as relatives or friends.[208] There is considerable demand for donor sperm, and regulations diverge across states on the maximum number of families to which a donor's sperm can be provided. For instance, in Victoria there is a cap of ten families per donor, while in Western Australia the Human Reproductive Technology Act of 1991 (HRT Act) restricts the number of families to five per donor.[209]

Despite state-level differences, the Australian framework for gamete and embryo donation is built on three shared principles: (i) donation and surrogacy must be altruistic; (ii) extensive counselling is mandatory for both donors and recipients; and (iii) donor-conceived children have a paramount right to know their origins. While Victoria remains the most progressive jurisdiction, the absence of a national register and ongoing donor shortages mean that access to genetic origin information remains uneven.

Therefore, the analysis of these major countries across the globe reveals that although countries like the UK, US and Australia share some similar legal principles with South Africa, they handle the provision of donor information differently. Many gamete banks and agencies

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203 Assisted Reproductive Technology Act 2007 (NSW) New South Wales Government, available at *http://www.legislation. nsw.gov.au*

204 ESHRE Taskforce on Ethics and Law 'Gamete and embryo donation' (2002) 17 *Human Reproduction* 1407.

205 American Society for Reproductive Medicine 'Psychological assessment of gamete donors and recipients' (2004) 82 *Fertility and Sterility* S18–S19.

206 K Hammarberg, M Carmichael, L Tinney & A Mulder 'Gamete donors' and recipients' evaluation of donor counselling: a prospective longitudinal cohort study' (2008) 48 *Australian and New Zealand Journal of Obstetrics and Gynaecology*601.

207 M Kirkman, D Rosenthal & L Johnson 'Families working it out: adolescents' views on communicating about donor-assisted conception' (2007) 22 *Human Reproduction* 2318.

208 J Blood, P Pitt & HGW Baker *Parents' decision to inform children of their donor (sperm) conception and the impact of a register which legislates to enable identification of donors* (Melbourne, Royal Women's Hospital Melbourne and the University of Melbourne 2000) 9–12.

209 HRT Act 1991 (WA).

in these countries, operating within the framework of donor anonymity like South Africa, voluntarily provide prospective parents with detailed donor information. This information may be offered freely or for a fee. These examples demonstrate that gamete banks and agencies can offer detailed donor information without substantially undermining donor anonymity. Therefore, it appears that South African gamete banks and agencies could adopt similar practices. However, their more conservative stance on anonymity prevents that.

The term 'reproductive rights' was first coined in 1984,[210] according to the International Conference on Population and Development (ICPD) Programme of Action:[211]

> 'Reproductive rights embrace certain human rights that are already recognised in national laws, international human rights documents and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free from discrimination, coercion and violence, as expressed in human rights documents.'[212]

These existing rights include (but are not limited to) the right to make decisions about reproduction (or reproductive freedom), the right to non-discrimination and equal treatment, the right to information, and the right to the highest standard of health.[213] The ICPD framework continues to influence global reproductive health policies and laws. The Programme of Action emphasises the importance of reproductive rights, gender equality, and access to reproductive health services as essential components of sustainable development and population policies.

III. SOUTH AFRICAN LAW GOVERNING GAMETE DONOR SELECTION

In South Africa, ART, with a specific focus on egg donation, is subject to rigorous regulation, so ensuring the promotion of ethical practices and safeguarding the rights of all involved parties. These regulations are primarily outlined in: (i) chapter 8 of the National Health Act, which establishes overarching principles and guidelines for the provision of reproductive health services; (ii) specific sections of the Children's Act,[214] which address issues related to

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210 This took place at the 1st International Meeting on Women and Health in Amsterdam. See Davis Mattar 2008 SUR - *International Journal on Human Rights* 63.

211 van Niekerk, Carmel. (2017). Assisted reproductive technologies and the right to reproduce under South African law. *Potchefstroom Electronic Law Journal (PELJ)*, *20*(1), 1-31.

212 UN Population Fund 2014 http://www.unfpa.org/sites/default/files/pub-pdf/programme_of_action_Web%20ENGLISH.pdf para 7.3.

213 C Shalev 'Rights to sexual and reproductive health: The ICPD and the Convention on the Elimination of All Forms of Discrimination Against Women' (2000) *Health & Human Rights* 40.

214 Section 26(2)(*b*), 40 & 41 (gamete donation).

parentage, consent, and the rights of children born through ART procedures; and (iii) the Regulations Relating to the Artificial Fertilisation of Persons,[215] which provide detailed specifications and requirements for the implementation of ART procedures, including gamete donation, and these include the Regulations on the General Control of Human Bodies, Tissue, Blood, Blood Products, and Gametes. The final legal consideration is POPIA.[216] Together, these legislative instruments are the backbone of the legal framework governing gamete donor selection and the broader landscape of ART in South Africa, so ensuring adherence to ethical standards and the protection of individuals' rights throughout the process. However, it has been argued that the existing legislative framework presents a challenge given the unclear and confusing nature of both the Acts and the regulations, which appear to be incompatible in some respects:[217]

(i) *National Health Act (NHA) – Chapter 8*. The NHA regulates human biological material, which includes gametes and embryos.[218] It recognises that gametes and embryos may be used for reproductive purposes provided that the relevant requirements are adhered to, such as informed consent must be given in writing prior to gametes being removed from a living person.[219]

(ii) *Children's Act* – This regulates three specific areas where MAR intersects with the interests and well-being of the prospective child: (a) the acquisition of parental responsibilities and rights related to children conceived via MAR;[220] (b) the rights of children conceived via MAR;[221] and (c) surrogacy.[222] Another notable facet of South Africa's gamete donation regulatory framework is donor anonymity. According to the Children's Act,[223] while children conceived through donation have the right to access all medical information concerning their genetic parents – the gamete donors – the donors' identities are to remain undisclosed.

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215 Ibid.

216 C Staunton, R Adams, D Anderson et al 'Protection of Personal Information Act 2013 and data protection for health research in South Africa' (2020) 10 *Int Data Privacy L* 160.

217 C van Niekerk 'Strange (and incompatible) bedfellows: The relationship between the National Health Act and the Regulations Relating to Artificial Fertilisation of Persons, and its impact on individuals engaged in assisted reproduction' (2017) 10 *S Afr J Bioethics Law* 32.

218 National Health Act, s 1.

219 Ibid s 55(a).

220 Children's Act, s 19(3), s 26(2)(b), s 40(3).

221 Ibid s 40, s 41.

222 Ibid s 296.

223 South Africa. Children's Act, available at *http://www.saflii.org/za/legis/num_act/ca2005104.pdf*

According to Thaldar,[224] the South African Law Reform Commission[225] is currently conducting an inquiry into whether donor-conceived children should be granted the right to ascertain the identities of their donors, a provision already acknowledged in other jurisdictions such as the UK.

(iii). *Regulations Relating to the Artificial Fertilisation of Persons* – The 2012 Regulations provide for various aspects relating to 'the withdrawal of gametes from and for use in living persons',[226] including the removal or withdrawal of gametes and their storage,[227] practices related to gamete donation,[228] and general requirements for the provision of MAR services.[229] More specifically, the Regulations limit the number of children that may be conceived from a single donor to six, there is no limit on the number of eggs that she can donate. Notably, the Regulations impose a limit of six children per donor, while no such restriction exists on the number of eggs a donor may contribute. Accordingly, because not all fertilised eggs will be viable or will lead to a successful pregnancy, it is conceivable that egg donors may be donating multiple times. As outlined in chapter 8 of the NHA, donors are legally prohibited from donating more than six times. Thereafter a proposed amendment to the limit of six live births was submitted, suggesting an increase to twelve live births. However, this has not been concluded to date.

The proposed regulation 7 of the Draft Regulations, 2016, reads as follows:[230]

'Restriction on donation of gametes

a) 7. (1) A competent person –
(a) may not remove or withdraw a gamete, or cause a gamete to be removed or withdrawn, from the body of a gamete donor for a new recipient if the competent person has information or suspects that a maximum of 12 live births have been reached through the artificial fertilisation using the gametes of that gamete donor;
(b) must, where the gamete donor has been used and resulted in 12 live births as contemplated in paragraph (a), inform that gamete donor that he or she may not make any further donation of gametes to a new recipient unless the provisions of sub-regulation (2) apply; and
(c) must, immediately relay all the information relating to such gamete donor, the removal or

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224 D Thaldar 'Egg donors' motivations, experiences, and opinions: A survey of egg donors in South Africa' (2020) 15 *PLoS One* e0226603.
225 South African Law Reform Commission, Issue Paper 32, Project 140, 'The right to know one's own biological origins' (20 May 2017).
226 Ibid reg 2.
227 Ibid reg 3.
228 Ibid regs 6, 7, 8.
229 Ibid regs 9, 10, 11, 12.
230 National Health Act.

withdrawal of a gamete and the artificial fertilisation, to the central data bank contemplated in regulation 6;

(2) Where the maximum number of 12 live births have been reached using the gametes of a specific donor, the Minister may allow a family to use the gametes from that donor to have an additional sibling.
(3) The competent person and the central data bank must ensure that gametes from a single donor are not used for more than 12 live births.'

Regarding age restrictions for egg donation, the NHA stipulates a minimum age of eighteen years, with no maximum age specified. However, guidelines from the South African Society of Reproductive Medicine and Gynaecological Endoscopy (SASREG) suggest a minimum age of eighteen and a maximum of 36, but with exceptions permitted. In addition, SASREG guidelines recommend that egg donors ideally fall within the age range of 20 to 35 years.

(iv). The Protection of Personal Information Act (POPIA)[231] – This is the final legal aspect to consider. In general, POPIA governs the handling of personal information, encompassing details such as an individual's name, identifying information, and acknowledgement of their gamete donor status. Therefore, if a gamete bank, donation agency or fertility clinic holds a donor's personal data, POPIA typically applies. However, provided that the donor gives consent, preferably in writing (as per section 11), POPIA does not prohibit the disclosure of the donor's identity. However, consent in the context of POPIA is 'any voluntary, specific and informed expression of will in terms of which permission is given for the processing of personal information'. As a result, if gamete donors consent to the processing of their information in a manner determined by a sperm or egg bank without specifying the details, such consent would be considered invalid under POPIA. Gamete donors must explicitly consent to certain actions, such as the disclosure of their identities to potential recipients who have registered on the sperm bank's website. Therefore, in principle, POPIA allows for open-identity gamete donation.[232]

South Africa's fertility healthcare sector has a regulatory and accreditation framework that ensures the quality, safety, and ethical standards of fertility treatments. While this framework has its strengths, it also has weaknesses. The NHA and Regulations provide high-level regulation but lack detailed guidance for day-to-day clinical applications. To fill this gap, voluntary associations like SASREG provide clinical guidelines, advice, and accreditation to

231 C Staunton et al 'Protection of Personal Information Act 2013 and data protection for health research in South Africa' (2020) 10 *Int Data Privacy L* 160.

232 D Thaldar & B Shozi 'Is open-identity gamete donation lawful in South Africa?' (2022) 112 *S Afr Med J* 409.

fertility clinics. SASREG plays a crucial role in upholding high standards of care and ethical practices, but its limitations include lack of statutory power to enforce guidelines, a lack of representation of the entire sector, and resource constraints.[233] There is a need for a comprehensive regulatory body with statutory authority to ensure uniform standards across all clinics. Such a body should enforce guidelines and accreditation standards, provide consistent oversight, and take corrective actions when necessary. It would also require a representative board and government involvement, thereby ensuring robust decision-making and effective enforcement of standards throughout the sector.

In the intricate landscape of regulating human reproductive materials, rules overseeing gamete donation embody a delicate balance. While Regulation 24(1)(c) allows for the disclosure of a gamete donor's identity with consent, Regulation 19 takes a contrasting stance, and advocates against such a revelation. This contrast reflects a fundamental aim: safeguarding the privacy of individuals navigating MAR, which is a principle that harmonises with the constitutional right to privacy, notably enshrined in section 12. Section 12 champions the freedom and security of individuals, explicitly acknowledging reproductive decision-making as being a vital component. It affirms: 'Everyone has the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction.'[234] According to Thaldar,[235] this recognition of reproductive health rights as fundamental human rights was affirmed at the 1994 ICPD.[236] These rights encompass individuals' freedom to determine the number, spacing, and timing of their offspring, coupled with access to information and resources for promoting informed reproductive choices.

Traditionally, South Africa's discourse on reproductive rights focused on individuals' rights to abstain from procreation.[237] However, Van Niekerk highlights a notable shift towards emphasising individuals' rights to pursue non-coital reproduction and the breadth of their

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233 D Thaldar & N Mthembu *Report on the Competitive Dynamics of the South African Fertility Healthcare Sector* University of KwaZulu-Natal (2024).

234 Section 12(2)(*a*) of the Constitution.

235 D Thaldar 'Building a progressive reproductive law in South Africa' (2023) 25 *Health & Human Rights* 43.

236 UN Population Fund, 'Report of the International Conference on Population and Development' (1994) 1995 UN Doc A/CONF.171/13/Rev.1 117.

237 J Birenbaum (1996) *SAJHR* 485–503; Centre for Reproductive Rights (1998), Termination-of-Pregnancy Rights and Fetal Interests in Continued Existence in South Africa: The Choice on Termination of Pregnancy Act 92 of 1996' [2012] *Potchefstroom Electronic Law Journal / Potchefstroomse Elektroniese Regsblad* 57, IG Cohen & S Sayeed 'Fetal pain, abortion, viability, and the Constitution' (2011) 39 *Journal of Law, Medicine and Ethics* 235; Meyerson (1999) *SALJ* 50–59; Ngwena (2004) *J Law Med Ethics* 708–717; M O'Sullivan 'Reproductive Rights' in Woolman S *et al* (eds) *Constitutional Law of South Africa* (Juta Cape Town Revised Service 3 2011) 37-1 – 3728.

reproductive autonomy.[238] This shift finds resonance in significant legal milestones, such as the landmark Constitutional Court ruling in *AB v Minister of Social Development*.[239] While this case recognised reproductive health rights in the context of ARTs, the contours of these rights, as delineated by the Constitutional Court, have faced considerable scrutiny and debate, so sparking reflections on their boundaries and implications.[240]

Van Niekerk's analysis highlights South Africa's landscape of reproductive rights, in particular underscoring the broad relevance of the right to reproductive autonomy delineated in section 12(2)(a) of the Constitution, contingent upon individuals actively participating in the reproductive process. Two primary concerns however emerge: the preservation of psychological integrity and the insistence on using one's own gametes. On the former issue, section 12(2) states that everyone has the right to bodily and psychological integrity, which includes the right 'to make decisions concerning reproduction'. This was demonstrated in *VJV and RT v Minister of Social Development*,[241] where the Constitutional Court ruled that section 40 of the Children's Act is unconstitutional because it unfairly discriminates against unmarried and same-sex couples by granting parental rights only to married couples using artificial fertilisation. The Court emphasised that modern family structures should be recognised based on commitment and care, and not marital status. The ruling mandates changes to the law, ensuring that permanent life partners, regardless of marital status or sexual orientation, are given equal parental rights. Autonomy, in this context, emphasises individuals' authority in decision-making, without dictating the substance of those decisions. In addition, it was asserted that the state should refrain from adjudicating individuals' lifestyles, unless they pose harm to others.

Advancements in medical science and the increasing prevalence of non-coital reproduction have prompted a re-evaluation of conventional understandings of reproductive rights. Internationally, this emerging right may find protection in the framework of personal and familial existence rights. Domestically, it could align with the right to make reproductive choices or the right to privacy, although the ruling by the majority of the Constitutional Court

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238 C van Niekerk 'Assisted reproductive technologies and the right to reproduce under South African law' (2017) 20 *Potchefstroom Electron L J* 1.

239 *AB v Minister of Social Development* 2017 (3) SA 570 (CC) (*AB* Constitutional Court judgment).

240 See, Donrich Thaldar 'Post-truth jurisprudence: The case of *AB v Minister of Social Development*' (2018) 34 *South African Journal on Human Rights* 231; Denise Meyerson 'Surrogacy, geneticism and equality: The case of *AB v Minister of Social Development*' (2019) 9 *Constitutional Court Review* 317; Catherine Albertyn 'Abortion, reproductive rights and the possibilities of reproductive justice in South African courts' [2019] *University of Oxford Human Rights Hub Journal* 87.

241 *VJV and RT v Minister of Social Development*, CCT94/22 (2023) ZACC21

in *AB v Minister of Social Development* suggests a contrary interpretation. Similarly, in *Minister of Home Affairs v Fourie*,[242] the Constitutional Court held that 'South Africa has a multitude of family formations that are evolving rapidly as our society develops, so that it is inappropriate to entrench any particular form as the only socially and legally acceptable one.'[243] According to Thaldar, '*AB* is a reminder that constitutional rights, in this case the best interests of the child and dignity, acquire their meaning through interpretation by the courts. Determining the meaning of a right inevitably requires value judgements that are informed by prevailing societal and cultural norms.'[244] Therefore, in a nation as culturally diverse as South Africa, the imperative for legal flexibility becomes evident, serving to safeguard the foundational tenets of our Constitution – namely, freedom and security for all the parties involved.

Based on the legal framework that governs ART, the main themes that relate to donor gamete selection include: i) Anonymity, ii) Disclosure, iii) Reproductive autonomy, and iv) Privacy/Personal information. These cornerstones are now each discussed in more detail below:

i. Anonymity

Gamete donor anonymity has become an increasingly active area of legislative, bioethical, and empirical interest over the past decade. South African sperm banks and egg donation agencies only offer anonymous gamete donors, as it is generally assumed that donor anonymity is a legal requirement in South Africa.[245] In fact, gamete donation in SA can be anywhere on the spectrum between anonymous and known. The challenge in applying the flexible provisions of the law lies in its implementation. Many healthcare professionals operate under the assumption that anonymity is a strict legal requirement, so creating the perception that the law prioritises protecting donors above all else and overlooks the needs of other parties. However, the law actually allows for different types of donation, including known donors, anonymous donors, and identity-release donors (with prior written consent). This flexibility is designed to accommodate the interests of all three parties involved: the donor, the recipient, and the child. The reform needed is not in the law itself but rather in its practical application and in educating healthcare professionals about the full scope of options that the law provides.

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242 [2005] ZACC 19, 2006 (1) SA 524 (CC) ('Fourie').
243 Ibid para 59.
244 D Thaldar 'The Constitution as an instrument of prejudice: A critique of *AB v Minister of Social Development*' (2019) 9 *Constitutional Ct Rev* 343.
245 D Thaldar & B Shozi 'Is open-identity gamete donation lawful in South Africa?' (2022) 112 *S Afr Med J* 1.

The 2012 Regulations provide that it is unlawful to disclose the identity of (a) a person who has donated gametes for use in MAR, (b) a person who underwent MAR, or (c) a person who was born as a result of MAR.[246] The clear purpose of this provision is to protect the privacy of persons in (a) to (c).[247]

Thaldar and Shozi conducted a thorough review of ART regulations in South Africa and stated that the 2012 Regulations contrast with another set of regulations[248] made in terms of the NHA – the General Control Regulations – stating that the gamete donor's identity can indeed be disclosed, subject only to his or her consent.[249] The litigation that is currently sub-judice promises to resolve this conflict between various sets of regulations and will provide legal certainty.[250]

In a study conducted in southeast Nigeria, over 80 per cent of participants noted that parents should not reveal the method of conception to children conceived via donor gametes.[251] In Nigeria, where there is no national policy on sperm donation, parents who conceive through artificial insemination by donor (AID) often choose to keep this information private, even from the child conceived by the procedure. This preference is influenced by cultural differences in family values between African and Western societies. In many African contexts, male infertility is seen as taboo, so leading to stigmatisation and the perception that an infertile man is not fully masculine.[252]

The UK law, as it stands, allows anonymous gamete donation, and donor offspring cannot be given information that would identity the individual whose gametes were used (HFE Act, 1990, section 31 (5)), meaning that the identity of the donors remains with the authorities.[253] In the US, there is no legislation at either federal or state level that either prohibits or enforces anonymous gamete donation. The matter is regulated by non-legally binding

246 2012 Regulation (footnote 54), reg 19.
247 D Thaldar & B Shozi 'Is open-identity gamete donation lawful in South Africa?' (2022) 112 *S Afr Med J* 1.
248 Regulations regarding the General Control of Human Bodies, Tissue, Blood, Blood Products and Gametes GN R180, *GG* 35099 (2 March 2012).
249 Ibid reg 24(1)(c).
250 B Shozi, Aliki Edgcumbe & D Thaldar 'New frontiers for reproductive health rights: Contemporary developments in the regulation of assisted reproductive technologies in South Africa' in South Africa' in O S Adelakun & E Ndoni (eds) *Reproductive Health and Assisted Reproductive Technologies in sub-Saharan Africa: Issues and Challenges* (2023) 193.
251 E C Ezugwu, G U Eleje, C A lyoke et al 'Preference for anonymity in sperm donation for artificial insemination: An experience from low resource settings in Nigeria' (2018) 12 *Patient Preference & Adherence* 499.
252 T Freeman, V Jadva, W Kramer et al 'Gamete donation: Parents' experiences of searching for their child's donor siblings and donor' (2009) 24 *Hum Reprod* 505.
253 L Frith 'Debate: Gamete donation and anonymity. The ethical and legal debate' (2001) 16 *Hum Reprod* 818.

professional guidelines, which recommend the anonymity of the gamete donor (American Society for Reproductive Medicine;[254] American Association of Tissue Banks[255]).[256] A large majority of countries endorse anonymous gamete donation and some countries such as France, Denmark and Norway, do not allow donor offspring any information about their conception (Council of Europe).[257] According to Pennings, there does however seem to be a discernible recent trend towards allowing children access to identifying information about their gamete donor.[258] Two Australian jurisdictions have recently reviewed their legislation on reproductive technologies and have abolished donor anonymity. Victoria passed the Infertility Treatment Act 1995 that allows children access to the identity of their gamete donor.[259] Since the abolition of donor anonymity in Victoria, under this Act, several key implications have emerged. Donor-conceived individuals now have the legal right to access identifying information about their gamete donor, which has significantly enhanced their ability to explore their genetic origins and understand their biological background. Furthermore, to increase the chance of donor-conceived people finding out about the way they were conceived, even in the absence of parental disclosure, the recently introduced Victorian Assisted Reproductive Treatment Act 2008[260] stipulates that from 2010, children born as a result of donor treatment have an addendum to their birth certificate informing them that additional information about their birth is in fact available.

For donors, the change has brought mixed reactions. Some donors are open to being contacted by their biological offspring, while others may feel discomfort or have privacy concerns as their anonymity is no longer guaranteed. As a result, the pool of willing donors may have decreased, as potential donors may be deterred by the loss of anonymity. The requirement to use only donors who are willing to provide identifying information to any offspring has led to a shortage of sperm donors in some clinics, according to a 2011 Australian study.[261] For intended parents, this legislative change has created a new dynamic in terms of

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254 American Society for Reproductive Medicine 'Guidelines for Gamete and Embryo Donation' (1998) 70 *Fertility and Sterility* 1S.

255 American Association of Tissue Banks (AATB USA 1992).

256 L Frith 'Debate: Gamete donation and anonymity. The ethical and legal debate' (2001) 16 *Hum Reprod* 818.

257 Council of Europe. Human Artificial Reproduction. Strasbourg, Germany; 1989.

258 G Pennings 'The double track policy for donor anonymity' (1997) 12 *Hum Reprod* 2839.

259 E Blyth 'Access to genetic origins information in donor-assisted conception – international perspectives' in E Blyth, M Crankshaw & J Spiers (eds) *Truth and the Child 10 Years On: Information Exchange in Donor Assisted Conception* (1998) 69.

260 Assisted Reproductive Treatment Act 2008 (Vic), Victorian Government. Available at *http://www.legislation.vic.gov.au*

261 K Hammarberg, L Johnson & T Petrillo 'Gamete and embryo donation and surrogacy in Australia: The social context and regulatory framework' (2011) 4 *Int J Fertil Steril* 176.

selecting a donor. Parents must now consider the possibility of future contact between the donor and the child, which could complicate family dynamics, in particular if parents had planned to keep the donor conception confidential. Overall, the abolition of donor anonymity in Victoria has fostered a more open and transparent system, but has also introduced complexities associated with donor privacy, family relationships, and the willingness of individuals to donate.

Cahn advocates the prohibition of anonymous gamete donation in the US, arguing that children conceived by gamete donation have a vested interest in constructing their identity and should have access to donor information once they reach adulthood.[262] However, the latest psychological evidence confirms that donor-conceived surrogate children are well adjusted and exhibit high self-esteem, despite lacking a biological and gestational link to their parent.[263] Advocates of these prohibitions emphasise the importance of allowing donor-conceived children to develop their identities, to access their family medical history, and to avoid accidental incest with another offspring of the donor.[264] Evaluations of these systems consider various factors such as the privacy and procreative liberty of parents, the privacy of donors, and the impact on the supply of donor gametes. The impact of prohibiting donor anonymity on the availability of donor gametes and its consequences for ART adoption, reportedly results in possible gamete shortages. These shortages could exacerbate infertility, affect psychological well-being, and hinder efforts to address low birth rates in European countries.

A 2010 study by Berstein, which examined the impact of prohibitions on gamete donor anonymity in respect of gamete donor supplies from Sweden, Australia and the UK, revealed that prohibitions on compensation combined with prohibitions on gamete donor anonymity played a role in creating gamete donor shortages in other jurisdictions. Nevertheless, in Sweden and Victoria prohibitions on anonymity affected donor supplies even in the absence of prohibitions on compensation.[265] Conversely, a 2020 study by Thaldar in South Africa on donor anonymity found that most respondents indicated they would still have donated – even if legally required to disclose their identities.[266] Accordingly, possible changes in the practices of

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262 N Cahn 'Necessary subjects: The need for a mandatory national donor gamete databank' (2009) 12 *DePaul J Health Care L* 203.

263 A Edgcumbe 'Is the writing on the wall for the genetic link requirement in surrogacy agreements?' (2023) *PER/PELJ.*

264 G Bernstein 'Unintended consequences: Prohibitions on gamete donor anonymity and the fragile practice of surrogacy' (2001) 10 *Indiana Health Law Rev* 300.

265 Ibid.

266 D Thaldar 'Egg donors' motivations, experiences, and opinions: A survey of egg donors in South Africa' (2020) 15 *PLoS One* e0226603.

the fertility healthcare sector away from its current imposition of donor anonymity seem unlikely to significantly affect the supply of donated eggs.

While Thaldar's study suggests continued willingness to donate, I question whether the respondents fully considered the long-term implications of their choice. Given the nature of Thaldar's study – a quantitative survey – it is possible that participants did not fully consider the long-term consequences of their decision. Many may have been primarily focused on their immediate altruistic motivations rather than the potential effects this decision could have at different stages of their lives. For instance, the ramifications of donating as a single young adult could differ significantly from those experienced after marriage and having children, so highlighting the need for deeper reflection on how their circumstances may evolve over time. It is plausible that, upon further reflection, the same number of respondents could be less willing to donate if donor anonymity could not be assured. Therefore, further research is necessary to assess the extent to which considerations of future life stages might affect donor willingness in the absence of anonymity. Furthermore, in Australia, the impact of using only identity-release donors has been assessed. According to Hammarberg et al. the mandate to use only donors who agree to provide identifying information to offspring has resulted in a shortage of sperm donors in some clinics.[267]

Unknown vs known donors

A known gamete donor is someone whose identity is disclosed to the intended parents of the gametes (sperm or eggs). This means that the donor's personal information, such as their name, medical history, and sometimes even their photographs or other identifying details, are shared with the individuals or couples receiving the donation. Known donors may be friends, family members or individuals chosen through a donor programme and who agree to be identified to any resulting offspring. However, it is important to note that a known donor is different to an identity-release donor. Identity-release donors are anonymous to the intended parents although the parents may receive some non-identifying information about the donor. Upon request from a donor-conceived child that has reached mature age, the donor's identity is however released to the child.[268]

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267 K Hammarberg, L Johnson & T Petrillo 'Gamete and embryo donation and surrogacy in Australia: The social context and regulatory framework' (2011) 4 *Int J Fertil Steril* 176.

268 S Skoog Svanberg, G Sydsjö et al 'Psychosocial aspects of identity-release gamete donation – perspectives of donors, recipients, and offspring' (2020) 125 *Ups J Med Sci* 175.

With known donors, the onus on gamete banks and fertility clinics to keep identifying information secret falls away because the prospective parent and the gamete donor are known to each other. Most commonly, this will be because the gamete donor is either 'donating' gametes for their own MAR — such as where the 'gamete donor' is a man who is the husband or life partner of a woman who intends to be the recipient of his sperm via artificial insemination. Known donors must provide written confirmation that they are known to one another, and both the donor and the recipient must undergo psychological evaluations before gamete removal can occur.[269] It is also advisable for known gamete donors who are not a spouse or life partner to provide informed consent, in writing, to being a known donor, as well as arranging for if, when and what identifying information about them is shared with the donor-conceived child.[270]

On the other hand, an unknown gamete donor is someone whose identity is not disclosed to the recipient(s) of the gametes. In many cases, the recipient(s) may have access to limited information about the donor, such as their physical characteristics, medical history, and perhaps some basic demographic details. However, the donor's identity remains anonymous, and they typically do not have contact with any resulting children. The choice between a known and unknown gamete donor often depends on the preferences and circumstances of the individuals or couples seeking assisted reproduction. Known donors may offer the opportunity for more transparency and potential future contact between the donor and any resulting offspring, while unknown donors may provide a greater sense of privacy and separation for all parties involved.

Typically, unknown donors are individuals recruited by a gamete donor bank or fertility clinic whose gametes have been removed and stored by the gamete donor bank or fertility clinic. In such cases, a person seeking to have children using donor gametes will have the opportunity to select from the donor gametes the gamete bank or fertility clinic has available. In such cases, the gamete bank or fertility clinic offering the donor gametes is not permitted to reveal identifying information about the gamete donor to prospective parents.[271] However, they may have non-identifying information – including the gamete donor's race, religion, hair colour, eye colour and level of educational qualification – which prospective parents may use when choosing a donor.[272] Even after the birth of a child, gamete banks and fertility clinics do

269 2012 Regulations (Footnote 54), reg 7(j)(i) (ii).
270 D Thaldar & B Shozi 'Is open-identity gamete donation lawful in South Africa?' (2022) 112 *S Afr Med J* 1.
271 2012 Regulations (Footnote 54), reg 19.
272 Ibid reg 14(1)(a)(iii), reg 11(c)(ii).

not to reveal any information to the donor-conceived child or their legal guardian that would reveal the identity of an unknown donor.[273]

Gametes, sperm and ovaries are the 'building blocks in assisted reproduction'.[274] The Regulations on the General Control of Human Bodies, Tissue, Blood, Blood Products, and Gametes[275] provide the most definitive answer to the question of the legality of open-identity gamete donation in South Africa. As outlined in Regulation 24(1)(c), the disclosure of a gamete donor's identity is allowed, but subject to the donor's explicit consent. This challenges the commonly held belief that gamete donation in South Africa must always maintain anonymity.

As stated by de Melo et al, 'anonymity is perceived by donors and recipients as serving dual purposes: safeguarding the well-being of all involved parties (recipients, donors, and donor-conceived offspring) while also generating a source of contention.' A recent study in the US highlighted three significant domains where both donors and recipients attributed significance to anonymity: alleviating concerns about family dynamics and responsibilities, upholding their own and the donor-conceived children's interests (even when conflicting), and effectively handling prospective scenarios.[276]

Regarding the decision between an anonymous or identifiable oocyte donor, most research indicates a preference among recipients for anonymous donors.[277] In a recent UK study, those selecting anonymous donation cited a desire to 'mark explicit boundaries and roles between the two parties involved' as the main motivation to select this donor type.[278]

In recent years, international gamete banks and gamete donation agencies acknowledge a noticeable trend of increasing prevalence of donors opting to be 'identity-release' or 'open-identity' donors. This is evident in the publication of adult photographs of these donors on certain agency websites. The term 'open-identity' implies that donors consent to revealing their identities upon request by the donor-conceived child once they reach adulthood. On the contrary, in South Africa, gamete banks and donation agencies generally disclose only early

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273 Children's Act (n 14), s 41(2).

274 I Ezeome 'Gamete donation – a review of ethical and legal issues' (2022) 26(3) *Afr J Reprod Health* 124.

275 Regulations Regarding the General Control of Human Bodies, Tissue, Blood, Blood Products and Gametes, GN R180 GG 35099 of 2 March 2012.

276 I de Melo-Martín & L R Rubin '"I want us to be a normal family": Toward an understanding of the functions of anonymity among U.S. oocyte donors and recipients' (2018) 9(4) *AJOB Empirical Bioethics* 235.

277 M Bertrand-Servais, H Letur-Könirsch, A Raoul-Duval et al 'Psychological considerations of anonymous oocyte donation' (1993) 8 *Hum Reprod* 874.

278 T Bracewell-Milnes S Saso, S Bora et al 'Investigating psychosocial attitudes, motivations and experiences of oocyte donors, recipients and egg sharers: A systematic review' (2016) 22(4) *Hum Reprod Update* 450.

childhood photographs of donors and explicitly state that all donors remain anonymous. Accordingly, 'The legal position in South Africa is that gamete donors ... must be anonymous and it is an offence to reveal the identity of a gamete donor'.[279] However, according to a thorough analysis of South African statutory instruments and case law by Thaldar and Shozi in 2022, 'the position in SA law is that gamete donation can be anonymous, completely open to the public, or anywhere in between – depending on the election of the individual gamete donor'.[280] Therefore, South African gamete banks and donation agencies could legally align with the global pattern by providing open-identity donors with adult photographs. Compliance with the legal mandate necessitates *specific consent* by the donors and written consent from the donors to ensure legal adherence and prudence.

Individuals seeking gamete donors are often compelled to engage in fertility tourism because of prolonged waiting lists resulting from shortages in their home countries. Some recipients may also have a preference for their child not to be conceived by an identifiable donor. For instance, in Denmark, with its anonymous donor system, has emerged as a prominent fertility sperm centre for residents of neighbouring countries like Sweden, Switzerland, and the Netherlands,[281] where donor anonymity is prohibited. Similarly, following a change in the law in the UK, locals are exploring options for using donor gametes in European countries that maintain anonymous systems.

ii. Disclosure

The ability of donor-conceived children to access information about their genetic origins initially depends on their awareness of the nature of their conception.[282] If children are unaware of the truth, they are likely to believe that their current mother or father are their biological parents. This places the responsibility on intended parents to share the details of the child's conception. If it is unclear that the parent is not the biological parent (e.g., with a lesbian couple) and the information is not disclosed, the child may never learn the truth.

The South African Children's Act provides that while donor-conceived children have the right to access all medical information about their genetic parents, the identity of the donors

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279 South African Law Reform Commission, Issue Paper 32, Project 140, 'The right to know one's own biological origins' (20 May 2017).

280 D Thaldar & B Shozi, 'Is open-identity gamete donation lawful in South Africa?' (2022) 112 (6) *S Afr Med J* 1.

281 L Alvarez 'Spreading Scandinavian genes, without Viking boats', *N.Y. Times* online, 30 Sep. 2004, available at *http://www.nytimes.com/2004/09/30/international/europe/30sperm.html*; see, also, Guido Pennings 'Legal harmonization and reproductive tourism in Europe' (2004) 19 *Hum Reprod* 2689, 2691.

282 R Probert 'Families, assisted reproduction and the law' (2004) 16 *Child & Fam LQ* 273.

may not be released. Donor-conceived children often do not know the identity of their biological parents, unlike adopted and naturally conceived children who generally have such rights. This disparity may conflict with the Bill of Rights, which guarantees equality and access to information. The issue is further complicated by advancements in genetic testing, which now allow individuals to trace biological relatives through online databases, so challenging the anonymity traditionally associated with gamete donation. There is no formal policy on the legal requirement of child disclosure that has so far been established, which leaves the information at the discretion of the parents.

Historically, the advice from the experts was to keep the fact that one's child was donor-conceived a complete secret. Non-disclosure was not presented as a moral option but rather as something like a moral requirement, grounded in claims about the welfare of the child and the privacy of the parents:[283]

> 'Nondisclosure has traditionally been employed to achieve several goals. It is seen as a way to ensure that the non-genetic parent be perceived as equally connected to the child, to ensure that the child grows as strong a bond with that parent as with the genetic parent, to maintain the appearance of a "normal" family, to avoid distressing the child with the truth of his/her origin, and to allow the nongenetic parent's infertility—a condition that usually carries a negative stigma with it—to remain unknown to other people.'[284]

Times have, however, changed. Disclosure is now increasingly recommended. The Ethics Committee of the American Society for Reproductive Medicine, for example, states that '[w]hile ultimately the choice of recipient parents, disclosure to offspring of the use of donor gametes in encouraged'.[285] However, some heterosexual couples can realistically keep the child's donor conception a secret and, according to Golombok, most still do: In the European Study of Assisted Reproduction Families, none of the 111 donor insemination parents from Italy, Spain, the Netherlands, and the UK disclosed the donor conception to their children by the time they had reached early school age. Less than 10 per cent of parents had done so by early adolescence. A follow-up study of the UK participants revealed that no additional children had been informed about their donor conception by the time they were eighteen years old.[286]

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283 D Groll *Conceiving People: Identity, Genetics and Gamete Donation* (2021).

284 G McGee, S-V Brakman & A D Gurmankin 'Gamete donation and anonymity: Disclosure to children conceived with donor gametes should not be optional' (2001) 16(10) *Hum Reprod* 2034.

285 Ethics Committee of the American Society for Reproductive Medicine 'Informing offspring of their conception by gamete donation' (2004) 81(3) *Fertil Steril* 527.

286 S Golombok *Modern Families: Parents and Children in New Family Forms* (2015) 99.

However, Africa and in particular South Africa are culturally diverse and not necessarily directly comparable to other countries. Therefore, we need to consider studies conducted in Africa to reach more conclusive deductions. In a study in southeast Nigeria, more than 80 per cent indicated that parents should not disclose the mode of conception to donor-conceived children. The results revealed:

> 'The majority of the respondents indicated their preference for secrecy and anonymity in sperm donation. Approximately 84% of the respondents indicated that the mode of conception should never be disclosed to the donor-conceived child, and 92% of them indicated that the identity of the sperm donor should never be revealed to the donor-conceived child. Fear of adverse effect of such disclosure on the child and the possible of rejection of the father in order to seek for the donor were the major reasons for their preference for anonymity.'[287]

Therefore, although it may be slightly more popular to disclose the use of donor gametes than before, it appears that it is still not the preferable choice both internationally and in the African context.

In countries that have moved towards anti-anonymity policies in ART, the approach to non-disclosure varies, and it often does not involve direct state intervention to override parental authority. Instead, these countries typically establish legal frameworks that prioritise the child's right to know their genetic origins, while also providing mechanisms that encourage or require disclosure by the parents. If the law required parents to inform their children about the circumstances of their conception, or mandates that the child be notified at a certain age, this could amount to an unjustified breach of the privacy rights of these parents. Instead, fostering tolerance, openness, and gradually normalising this method of conception over time are possible ways to establish the idea of greater disclosure.

In some countries, such as Sweden and the UK, laws in place require parents to inform their children about their donor origins. However, enforcement of these laws is generally based on a moral and legal obligation rather than on direct state intervention. There are no systems in place where the state directly informs the child if the parents choose not to.[288] Countries with anti-anonymity laws, such as the Netherlands and Australia, have systems that allow children conceived via donor gametes to access identifying information about their donors once they reach a certain age, typically eighteen. The law grants the child the right to know, but it does not force the parents to disclose this information beforehand. If parents choose not to tell the

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287 E C Ezugwu, G U Eleje, C A lyoke et al 'Preference for anonymity in sperm donation for artificial insemination: An experience from low resource settings in Nigeria' (2018) 12 *Patient Prefer Adherence* 499.

288 B Clark 'A balancing act? The rights of donor-conceived children to know their biological origins' (2012) 40(3) *Ga J Int'l & Comp L*.

child, the state does not intervene, the child can still seek out this information independently once they reach the age of majority.

Many countries encourage disclosure through counselling services that support parents in discussing donor conception with their children. These services help parents understand the importance of openness and help with handling the conversation in a way that benefits the child's well-being. The goal is to promote voluntary disclosure without needing direct state involvement.

Countries such as the UK and Sweden have been at the forefront of promoting transparency in ART through educational campaigns. In the UK, the HFEA runs awareness programmes that emphasise the importance of openness in donor conception, and provide resources and counselling to assist parents in discussing donor origins with their children. Sweden, which was the first country to abolish donor anonymity in 1985, supports similar initiatives through its healthcare system, and offers guidance to parents on how to approach the subject with their children. Australia also promotes transparency through state-funded counselling services and educational materials, and encourages early disclosure. In New Zealand, the Fertility Associates clinics offer workshops and resources for parents to navigate the complexities of donor conception disclosure. Canada and the Netherlands have implemented national guidelines that stress the importance of informing children about their donor origins, supported by campaigns from organisations like the Canadian Fertility and Andrology Society and the Dutch Donor Data Foundation. These examples highlight a growing international shift towards fostering transparency in donor conception.

While anti-anonymity countries uphold the child's right to know their genetic origins, they typically do not undermine parental authority by directly disclosing donor information to the child. Instead, they rely on legal frameworks, registries, counselling, and education to encourage or facilitate disclosure by the parents.

Sabatello's analysis of gamete donation in the US was based on four primary arguments that were highlighted by disclosure proponents: (1) emphasising the detrimental impact of secrecy and the value of honesty in shaping family dynamics; (2) emphasising the importance of genetic details in shaping one's sense of identity; (3) stressing the relevance of genetic heritage in defining kinship; and (4) underlining the crucial role of genetic information for medical reasons.[289] She proposed that these arguments are not universal truths but rather

[289] M Sabatello 'Disclosure of gamete donation in the United States' (2014) 11(1) *Ind Health L Rev* 29.

cultural constructs of child welfare and 'best interests', and that they lack support from existing studies conducted in the US. However, advocates of disclosure argue that a child's inherent and universal 'right to know' operates on two levels: the right to know the circumstances of their conception and the right to access information about the donor.[290] These four core arguments about disclosure are discussed further.

First, the detrimental impact of secrecy and the value of honesty were further supported by Kramer in 2022, an expert in the field. She explained that 'not telling (lying by omission) might be harmful to donor-conceived people (DCP) and unhealthy for their families'.[291] From a psychological perspective, secrecy implies that shame and healthy relationships are built on foundations of trust and honesty. Secrets can be damaging to relationships, dangerous, and uncontrollable. Kramer's findings show that early disclosure is crucial for building a happy and healthy family. To quote Shapiro, 'the secret' (parents not disclosing to their child that they are donor-conceived) 'corrodes the parent–child relationship all on its own, quite apart from whether it manifests in other ways'.[292] Although honesty is universally regarded as a core value, revealing the truth could however have profoundly negative consequences. This is particularly true in some African cultures where the use of gamete donors is considered to be taboo, so making the disclosure of such information even more sensitive and even potentially damaging. In a study in southeast Nigeria, more than 80 per cent indicated that parents should not disclose the mode of conception to donor-conceived children.[293] As Carol Smart stipulates, 'both "telling" and "not telling" will have consequences and the idea that the keeping of secrets is detrimental, whereas openness is innocuous, is itself problematic'.[294]

Second, genetic information plays a crucial role in shaping one's identity, so influencing both physical traits and medical history. For example, if a child experiences a delayed growth spurt during adolescence but knows that their biological parents are tall, understanding their genetic background can reassure them that they will likely reach a reasonable height, so helping to prevent unnecessary teenage distress. Medical information could indicate possible inheritable genetic conditions. However, if you are unaware of your

290 L Frith 'Beneath the rhetoric: The role of rights in the practice of non-anonymous gamete donation' (2001) 15 *Bioethics* 473.

291 W Kramer 'Truth and honesty in families of donor-conceived children: Early disclosure is crucial for building a happy and healthy family' *Psychology Today* (2022).

292 D Shapiro *Inheritance: A Memoir of Genealogy, Paternity, and Love* (2020).

293 E C Ezugwu, G U Eleje, C A lyoke et al 'Preference for anonymity in sperm donation for artificial insemination: An experience from low resource settings in Nigeria' (2018) 12 *Patient Prefer Adherence* 499.

294 C Smart 'Law and the regulation of family secrets' (2010) 24 *Int'l J L Pol'y & Fam* 397.

genetic origins, you could mistakenly assume that you are at risk of conditions based on your non-biological parents. This misunderstanding could lead to unnecessary worry owing to the secrecy related to your actual genetic background.

Third, the role of genetic heritage in defining kinship is often overstated. The assumption that a genetic connection naturally fosters a deep sense of attachment is not always rooted in reality. Also, it is unclear whether children place the same importance on genetic ties as adults do. Research shows that for children's sense of familial attachment, genetics is not paramount; rather, it includes household members, pets, a range of relatives, and individuals from other households.[295] Parentage is determined not so much by biological connection but by the way they were raised and, especially, the fact that they were planned and wanted all along.[296] In Jadva's expert opinion in *AB vs Minister of Social Development*, she concluded that 'Not knowing one's genetic origins does not appear likely to impact negatively on one's psychological well-being.'[297] Golombok further qualified that 'the quality of family relationships has a greater influence on children's psychological well-being than the presence or absence of a biological connection (genetic) between mother and child'.[298] Golombok's expert opinion in the *AB* case reinforced that the 'absence of a genetic and/or gestational link between parents and their child does not appear to have a negative impact on parent–child relationships or the psychological well-being of mothers, fathers or children'.[299]

Subsequently, some critics have blatantly accused non-disclosing parents of neglecting their child's best interest by selfishly putting their own rights to privacy and reproductive freedom ahead of their child's rights.[300] Sabatello acknowledges the importance of access to information for donor-conceived children but challenges the universal applicability of disclosure proponents' claims. She argues that while some children may benefit from knowing their genetic origins, not all share this interest and there are broader implications regarding privacy, cultural beliefs, and societal norms. She proposes regulations focusing on medical screenings of donors and allowing parental choice in disclosure, so aligning with the principles

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295 J Mason & B Tipper 'Being related: How children define and create kinship' (2008) 15 *Childhood* 453.

296 D Moyal & C Shelley 'Future child's rights in new reproductive technology: Thinking outside the tube and maintaining the connections' (2010) 48 *Fam Ct Rev* 431; S Golombok, R Cook, A Bish et al 'Families created by the new reproductive technologies: Quality of parenting and social and emotional development of children' (1995) 66 *Child Dev* 285.

297 Jadva's expert opinion in *AB vs Minister of Social Development*. Case no. 40658/13.

298 L Blake, P Casey, V Jadva et al '"I was quite amazed": Donor conception and parent–child relationships from the child's perspective' (2013) *Children & Society* 1.

299 Golombok expert opinion in *AB vs Minister of Social Development*. Case no. 40658/13

300 O van den Akker 'A review of family donor constructs: Current research and future directions' (2006) 12 *Hum Reprod Update* 91.

of familial privacy in the US. However, she stresses that these recommendations are not definitive and must adapt to the evolving landscape of gamete donation, considering societal shifts and individual needs.[301]

The expert psychological opinion of Jadva that was shared in *AB vs Minster of Social Development* stressed that disclosure is associated with both positive and negative emotions and that disclosure during childhood or adolescence appears to decrease negative experiences. Such knowledge is said to be incorporated in identity formation. Therefore, Jadva noted that 'late disclosure causes more negative feelings than disclosure during childhood'. However, 'insufficient research exists to make a conclusive statement whether the challenge to a person's identity caused by late disclosure generally results in a positive, negative or neutral effect on a person's psychological well-being'.[302] Therefore, although earlier disclosure appears more beneficial than late disclosure, it does not have a direct bearing on the child's psychological well-being.

However, the expert opinions of both Van Boggaert and Vellerman are quite the opposite and stress the importance of genetic ties. Van Boggaert's opinion can be summarised broadly as follows: 'One's genetic origins are an important aspect of one's identity, not knowing one's genetic origins therefore causes identity problems, negatively impacting one's psychological well-being'.[303] Similarly, Vellerman argues that 'meaning in life is importantly influenced by biological ties'. He maintains that 'knowing one's parents provides a kind of self-knowledge that is of irreplaceable value in the life task of identity formation'.[304] This opinion however was disqualified by empirical research that that found this claim to be false. Jadva's intimate knowledge and experience on the topic was able to disqualify Prof. Boggaert's argument by clarifying that the source of his findings was based on research by Tuner and Coyle which was inaccurately interpreted. The results were based on a small, biased group that is unrepresentative of donor-conceived offspring in general and therefore it cannot be assumed that it is the attitude of all donor-conceived offspring. Further extensive research was conducted by the Centre for Family Research (includes Jadva) and Shelton, in particular. Shelton's study aimed to examine whether there is variation in psychological adjustment problems among children conceived through ART. The results showed that 'children do not differ in levels of

301 M Sabatello 'Disclosure of gamete donation in the United States' (2014) 11(1) *Ind Health L Rev* 29.
302 Jadva expert opinion in *AB vs Minister of Social Development* Case no. 40658/13.
303 Van Bogaert's expert opinion in *AB vs Minister of Social Development* Case no. 40658/13.
304 J D Velleman 'Family history' (2005) 34(3) *Philosophical Papers* 357.

psychological adjustment compared to children from natural conception'.[305] This was also confirmed by the Centre for Family Research's salient findings, which concluded that 'not knowing one's genetic origins does not appear likely to impact negatively on one's psychological well-being'.[306]

In South Africa, the governance of disclosing the identity of gamete donors is delineated by both The Children's Act and Regulation 19. Nonetheless, a notable conflict emerges between these regulatory frameworks. Section 41(2) of the Children's Act imposes an unequivocal prohibition on divulging the identity of gamete donors, whereas the Regulations introduce exceptions to this restraint. As subordinate legislation, the Regulations are subject to the overarching principle that in cases of conflict with primary legislation the latter should prevail. Therefore, the primacy of the Children's Act is invoked to resolve this discord.[307]

The Children's Act provides for the donor-conceived child to access biographical and medical information on genetic parents. Section 41 provides:

> '(1) A child born as a result of artificial fertilisation or surrogacy or the guardian of such a child is entitled to have access to –
>
> 1. (a) any medical information concerning that child's genetic parents; and
> 2. (b) any other information concerning that child's genetic parents but not before the child reaches the age of 18 years.'

The Children's Act further guarantees the identity protection of the gamete donors, as section 41 further provides:

> '(2) The information disclosed in subsection (1) may not reveal the identity of the person whose gamete was or gametes were used for such artificial fertilisation or the identity of the surrogate mother.'

Furthermore, Regulation 19 provides that 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, except where a law provides otherwise or a court so orders.[308] Based on the above provisions, it can be inferred that gamete donation in South Africa is typically carried out anonymously. Consequently, unless the involved parties opt for disclosure voluntarily, donor-conceived children may not obtain access to information disclosing the identity of the gamete donor.

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305 K H Shelton, J Boivin, D F hay et al 'Examining differences in psychological adjustment problems among children conceived by ART' (2009) 33 *Int J Behav Dev* 385.

306 Jadva expert opinion para 27, *AB vs Minister of Social Development* Case No. 40658/13.

307 C Botha *Statutory Interpretation: An Introduction for Students* 5 ed (2012) 28.

308 GN 175 in *GG* 9699 of 2012-03-02.

If donor-conceived children are never informed about the nature of their conception and either remain unaware or discover it later through AI or other means, does this have any significant impact on the parent–child relationship or the psychological well-being of the child? Parent–child relationships and donor conception were examined from the perspective of the child by Golombok et al. When the data were examined from this perspective, no differences emerged in perceptions of their family relationships among children in disclosing, non-disclosing, and natural conception families.[309] The Centre for Family Research have conducted extensive research on the psychological well-being of donor-conceived children. The results show that children maintained positive relationships with their parents and their psychological well-being was not negatively affected by being donor-conceived and in fact showed the same psychological well-being as the non-donor-conceived control group.[310]

However, health-wise, the lack of knowledge about their donor status could result in missing important genetic and medical history that is critical for managing their health, as a result increasing the risk of hereditary diseases or conditions. If they later uncover health-related issues linked to their genetic background, this could lead to delayed medical treatment or intervention.

From a legal and ethical standpoint, this situation raises questions about the rights of donor-conceived individuals to know their origins, thereby highlighting a potential lack of consent in decisions made on their behalf. This underscores the need for clearer policies and regulations on donor conception, including requirements for informing donor-conceived individuals about their status to prevent similar situations in future. As societal norms evolve and transparency becomes more valued, there may also be a growing push for policies that support disclosure or open-identity donations and which prioritise the rights of donor-conceived individuals to access information about their origins. Australia has taken an active effort to enhance the likelihood of donor-conceived individuals learning about their conception, even if their parents choose not to disclose it. Measures (e.g. birth certificate addendum's) are intended to encourage parents to inform their children about their donor origins by providing a formal prompt, so making it more difficult to keep the truth from them.[311]

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309 S Golombok, J Readings, L Blake et al 'Children conceived by gamete donation: Psychological adjustment and mother–child relationships at age 7' (2011) 25 *J Fam Psychol* 230.

310 T Freeman & S Golombok 'Donor insemination: A follow-up study of disclosure decisions, family relationships and child adjustment at adolescence' (2012) 25 *Reprod Biomed Online* 193.

311 K Hammarberg, L Johnson & T Petrillo 'Gamete and embryo donation and surrogacy in Australia: The social context and regulatory framework' (2011) 4(4) *Int J Fertil Steril* 176.

The debate about informed consent and donor-conceived individuals' rights to know their origins is fraught with paradoxes. In South Africa, disclosure is voluntary, whereas in Australia disclosure is enforced, with addendums to birth certificates forcing parents to reveal the truth or the truth will be revealed later. Both approaches raise concerns about informed consent, as they either deny the child the right to know their origins or force parents to disclose potentially sensitive information without their consent. This paradox highlights the complexities of balancing the rights of all parties involved, so underscoring the need for a more nuanced approach that respects the autonomy of donor-conceived individuals and their parents.

iii. Reproductive autonomy

Human dignity stands as a pivotal notion in biolaw and bioethics, gaining significance as humanity navigates progressive biological advancements. Embedded in the Bill of Rights chapter of the Constitution, human dignity emerges as a fundamental principle. The Constitutional Court consistently underscores the interconnectedness and symbiotic nature between human dignity and other highly regarded rights, including freedom, privacy, equality, and the right to life.[312] Haysom also suggests autonomy as a supplementary positivist aspect of human dignity.[313]

Autonomy – the ability to regulate one's own affairs and to choose how to live one's life within the overall framework of a broader community. This implies that there should be a choice of a reasonable array of different life plans available to members of society. Essentially, autonomy should not be used to compromise itself; prospective parents' autonomy to use genetic engineering should be limited by the prospective child's future capacity for autonomy.[314]

Autonomy, or the ability for individuals to make their own choices, is connected to the idea of human dignity, which is about recognising the worth of each person. This connection suggests that respecting people's ability to make their own decisions is a way of valuing their worth as individuals. While the exact reasons for this connection are not fully explained, it is suggested that looking at traditional political theories could help clarify it. Essentially, autonomy relies on two important values: 1) acknowledging that each person has value, which

312 R L Haysom 'Dignity' in M H Cheadle, D M Davis & N R l Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2002) 123 at 131.

313 Ibid.

314 D Thaldar 'Autonomy as an element of human dignity in South African case law' (2009) 9 *J Philos Sci & Law* 1 at 15.

means that their well-being matters, and 2) understanding that individuals are best able to pursue what is good for them when they are given the freedom to make their own choices.

AB v Minister of Social Development is a seminal case in South African case law that highlights reproductive autonomy concerns. The broad strokes of AB's legal argument were that the impugned provision (section 294 of the Children's Act) was arbitrary and that it discriminated against the woman concerned based on her infertile status. AB was legally prohibited from using donor gametes. AB submitted that this constituted discrimination based on her infertility. She further argued that the impugned provision infringed her procreative freedom (expressed in the rights to dignity, privacy, and bodily and psychological integrity) and her right to access reproductive healthcare services. In conclusion, AB's legal endeavours to exercise reproductive freedom culminated in an adverse ruling, and she lost her case. According to expert insight, however, Thaldar reiterated the principle that harm to the prospective child constitutes a legitimate reason to limit the procreative freedom of the prospective parents.[315] Thaldar, however, coined the term 'procreative non-maleficence',[316] and emphasised that the range of reproductive choices available to parents using new reproductive technologies excludes decisions that could harm the future child. This principle offers a way to fairly balance the recognised interests of prospective parents' reproductive rights and the state's obligation to safeguard child welfare in liberal democracies.

This freedom of parental choice is also reflected in other South African law. Section 12(2) of the South African Bill of Rights provides: 'Everyone has the right to bodily and psychological integrity, which includes the right—(a) to make decisions concerning reproduction'.[317] This right to reproductive autonomy has been held to include a person's right to use artificial reproductive technologies.[318] This general right includes, among others, (i) a woman's right to use artificial reproductive technologies if she so wishes, irrespective of whether there is a medical indication, (ii) a woman's right to elect to use male and female donor gametes, and (iii) a woman's right to select the gamete donor(s) based on a range of personal characteristics, such as race, hair colour, eye colour, and educational attainment, that must

315 D Thaldar 'Building a progressive reproductive law in South Africa' (2023) 25(2) *Health Hum Rights* 43 at 52.

316 D Thaldar & B Shozi 'Procreative non-maleficence: A South African human rights perspective on heritable human genome editing' (2020) 3(1) *CRISPR Journal* 32–36.

317 Constitution of the Republic of South Africa.

318 *AB v Minister of Social Development* 2017 (3) SA 570 (CC). See: B Shozi 'Something old, something new: Applying reproductive rights to new reproductive technologies in South Africa' (2020) 36(1) *S Afr J Hum Rights*.

legally be accessible to her.[319] Therefore, the observation above that prospective parents in South Africa intentionally practise eugenics when selecting gamete donors is not only a cultural phenomenon, but also the exercise of a legal right.[320]

Eugenics can be defined as 'the practice or advocacy of controlled selective breeding of human populations to improve the population's genetic composition'[321]. It encompasses both the technical aspect of managing genetic traits and the broader societal implications of influencing human reproduction. Modern medical genetics is centred on supporting individuals and families to make voluntary, informed choices that align with their own reproductive goals. This stands in stark contrast to historical eugenics, which was characterised by discriminatory state policies and attempts to control population traits.[322] Whereas eugenics prioritised collective social agendas, contemporary genetics is guided by principles of autonomy, health, and individual well-being.[323]

Historically, infamous eugenic practices involved enforcing selective breeding by allowing those deemed to be 'genetically superior' to reproduce, while at the same time restricting those considered to be 'genetically inferior'.[324] The objective was to eliminate traits perceived to be undesirable – such as disabilities, mental illness, and specific racial or ethnic characteristics – to create a more 'fit' and 'pure' population.[325] These practices were inherently harmful owing to their coercive nature, their violation of human rights, and an association with flawed pseudoscience. They disproportionately targeted marginalised groups, including racial minorities, the poor, and people with disabilities, and led to forced sterilisations, segregation, and even euthanasia.[326] These actions reinforced systemic inequalities, racism, and oppression, and stripped individuals of their autonomy and dignity, so resulting in some of history's most egregious human rights abuses.[327]

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319 Regulations Relating to the Artificial Reproduction of Persons GN 175 of *GG* 35099, 2/3/2012.

320 B Shozi, D Thaldar & T Kamwendo 'Culture and context: Why the global discourse on heritable genome editing should be broadened from the South African perspective' (2021) 4 *BioLaw Journal* 409–416.

321 https://www.merriam-webster.com/dictionary/eugenics

322 W Veit, J Anomaly, N Agar, P Singer, D S Fleischman and F Minerva 'Can "eugenics" be defended?' (2021) 39(1) *Monash Bioethics Review* 60.

323 Ibid.

324 A Spektorowski and L Ireni-Saban *Politics of Eugenics: Productionism, Population, and National Welfare* (Routledge London 2013) 24.

325 J Glad *Future Human Evolution: Eugenics in the Twenty-First Century* (Hermitage Publishers 2008).

326 S A Wilkinson, 'On the distinction between positive and negative eugenics' in M Häyry (ed), *Arguments and Analysis in Bioethics* (Rodopi Amsterdam 2010) 115–128.

327 D McConnell and S Phelan, 'The devolution of eugenic practices: Sexual and reproductive health and oppression of people with intellectual disability' (2022) 298 *Social Science & Medicine* 114877.

Public health, on the other hand, focuses on promoting the well-being of populations by preventing disease and improving overall health outcomes through ethically sound practices. Modern public health policies are guided by principles of equity, consent, and respect for individual autonomy, so sharply distinguishing them from the coercive nature of historical eugenics.[328] However, it is important to recognise that some contemporary public health policies incorporate eugenic principles in a non-coercive manner, in particular in the realm of genetic screening and disease prevention.[329]

In many democratic societies, including South Africa, public health initiatives may use genetic screening to prevent the transmission of serious hereditary conditions.[330] These measures aim to improve the population's genetic composition by reducing the prevalence of genetic diseases. However, unlike historical eugenics, these contemporary practices prioritise informed consent, individual autonomy, and non-discrimination.[331] They are implemented in an ethical framework that ensures that decisions are made voluntarily and without coercion.[332]

For example, the Regulations Relating to the Artificial Fertilisation of Persons (2012), in South Africa, highlight this ethical approach:

> 'Regulation 7: 'A competent person intending to remove or withdraw a gamete, or cause a gamete to be removed or withdrawn from a donor, must ensure that the donor has undergone medical tests for sexually transmissible diseases and a semen analysis (for male donors). Additionally, the donor must be questioned about their family history concerning genetic conditions or mental illness.'[333]
>
> 'Regulation 8: 'The competent person must record information related to genetic tests and psychological evaluations of the gamete donor before removal or withdrawal of gametes.'[334]

These regulations aim to prevent the transmission of serious genetic disorders while respecting donor autonomy and informed consent. By focusing on health outcomes rather than on controlling reproduction based on social or racial criteria, these policies embody a modern, ethical application of eugenic principles.

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328 J Anomaly 'Race, Eugenics, and the Holocaust' in S Gallin and I Bedzow (eds) *Bioethics and the Holocaust* (Springer New York 2021).

329 F Collins and V McKusick 'Implications of the Human Genome Project for medical science' (2001) 285 *JAMA* 540.

330 L Dive and A J Newson 'Reproductive carrier screening: responding to the eugenics critique' (2022) 48 *Journal of Medical Ethics* 1060.

331 Ibid.

332 Ibid.

333 Reg 7 of the Regulations Relating to the Artificial Fertilisation of Persons, GN R175 GG 35099 of 2 March 2012.

334 Reg 8 of the Regulations Relating to the Artificial Fertilisation of Persons, GN R175 GG 35099 of 2 March 2012.

Historical eugenics operated in a coercive and discriminatory system that was grounded in flawed pseudoscience. It violated basic human rights, often targeting marginalised groups such as racial minorities and those with disabilities[335]. In contrast, modern public health is rooted in an ethical framework that prioritises informed consent, individual autonomy, and the principle of non-discrimination, thereby ensuring that individuals make voluntary decisions about their health without coercion.[336]

The primary goal of historical eugenics was to create a 'superior' population through selective breeding, often by suppressing or eliminating what were deemed to be 'inferior' traits.[337] This approach enforced social hierarchies and perpetuated inequality. Modern public health, on the other hand, focuses on improving overall health outcomes by preventing genetic diseases and promoting well-being.[338] Its intent is to enhance public health without endorsing any form of social or genetic superiority.

In historical eugenics, laws and policies were coercive, often stripping individuals of their reproductive rights and forcing sterilisations. These measures were designed to control the population by eliminating undesirable traits. Modern public health, however, uses regulations that emphasise informed decision-making and voluntary participation.[339] Programmes like genetic screening are offered to support personal and familial health, so ensuring that participation is entirely voluntary and that rights are protected.[340]

Therefore, modern eugenics proposes the improvement of the human population's genetic composition. While its historical applications were marred by coercion and discrimination, contemporary public health policies can incorporate eugenic principles ethically by prioritising informed consent, individual autonomy, and non-discrimination. In democratic societies like South Africa, modern public health initiatives that include genetic screening aim to prevent hereditary diseases and enhance population health[341] without the oppressive and violent practices associated with past eugenics movements. Therefore, it is

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335 D J Kevles, 'Eugenics and human rights' (1999) 319 *BMJ* 435, National Library of Medicine.
336 A L Caplan, G McGee and D Magnus 'What is immoral about eugenics?' (1999) 319 *BMJ* 1284.
337 A Spektorowski and L Ireni-Saban *Politics of Eugenics: Productionism, Population, and National Welfare* (Routledge London 2013) 24.
338 A L Caplan, G McGee and D Magnus 'What is immoral about eugenics?' (1999) 319 *BMJ* 1284.
339 L Dive and A J Newson 'Reproductive carrier screening: responding to the eugenics critique' (2022) 48 *Journal of Medical Ethics* 1060.
340 Ibid.
341 L Naidoo and P Reddy 'Stakeholder knowledge and attitudes toward the use of predictive genetic testing in South Africa' (2022) 13 J Community Genet 567 at 567–577.

inaccurate to state that the concept of eugenics is entirely rejected today; rather, its application has evolved to align with ethical standards and human rights considerations.

Autonomy: Preimplantation Genetic Testing (PGT)

In addition, another area in ART where reproductive autonomy can be seen to be exercised is selecting preimplantation genetic testing (PGT) for in-vitro embryos, whereby parents are essentially able to choose the gender of their future children. The court's judgment on the issue of sex selection was extensive.[342] Although it 'held that sex selection is inherently sexist because it relies on stereotypes of what it means to be a girl or boy child',[343] it held that this issue is overshadowed by a woman's right to procreative freedom.[344] This approach highlights how South African law on sex selection, although it can be regarded as controversial, still upholds parents' autonomy in reproductive decisions. The court's reasoning in this judgment reflects a delicate balancing act between the ethical concerns associated with sex selection and the fundamental right to reproductive autonomy. By recognising that sex selection is inherently sexist, as it reinforces traditional gender stereotypes about what it means to have a boy or girl child, the court acknowledges the problematic social implications of the practice. However, the decision to prioritise a woman's right to procreative freedom demonstrates the strong emphasis that South African law places on individual autonomy in reproductive matters. This approach underscores a legal framework where personal choice, especially in matters as intimate as family planning, is given precedence over broader societal concerns about reinforcing gender biases.

Critically, this judgment raises questions about the implications for gamete donor selection. The principle of procreative freedom is upheld to the extent that it permits sex selection,[345] and it also extends to other forms of donor preference, thereby opening the door to more selective criteria based on genetic traits like physical appearance, intelligence, or ethnicity. Such practices could lead to ethical dilemmas about eugenics or discriminatory preferences, so reinforcing societal inequalities and stereotypes. Allowing broad freedom in gamete donor selection could also create disparities in access to certain types of donors, in particular if certain traits become more desirable.

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342 Surrogacy Advisory Group v Minister of Health (31385/2010, South Gauteng High Court, 5 November 2010).

343 *Surrogacy Advisory Group v Minister of Health,* para. 157.

344 Ibid, paras 158, 159.

345 Soni S "*Prêt-à-Porter* Procreation: Contemplating the Ban on Preimplantation Sex Selection" *PER / PELJ* 2019(22)

The judgment also highlights a tension between respecting parental autonomy and addressing societal concerns about the commodification of human life. While allowing for sex selection may align with procreative freedom, it risks commodifying gender as a 'choice' rather than being a natural outcome of reproduction. This could have wider societal impacts, normalising a market-driven approach to donor selection that prioritises personal preferences over ethical considerations. In conclusion, while the court's reasoning is consistent with a rights-based legal framework, it raises complex ethical and social questions that could have significant consequences for the future of gamete donor selection in South Africa in the absence of clear boundaries. These boundaries should encompass selection criteria 'choices' that result in the best interest of the child overall.[346]

iv. Privacy/Personal information

The privacy and personal information concerns about gamete selection for intended parents highlight issues of concern in South African reproductive law. While the NHA prohibits the trade in gametes, it remains silent on the trade in gamete donor information. This regulatory oversight leaves a grey area in which gamete agencies operate without clear legal boundaries. SASREG provides influential, albeit non-binding guidelines that stipulate no identifying information about donors can be disclosed to prospective parents. However, these guidelines do allow non-identifying details, such as photographs of egg donors up to the age of ten, to be shared.[347] This allowance suggests that other non-identifying information could potentially be disclosed or sold, so further complicating the landscape of donor privacy.

The recent *Nurture Egg Donors CC v Minister of Health* case exemplifies the legal ambiguities in this area.[348] Nurture, an egg donation agency, sought a court ruling on whether gamete banks could sell additional donor information to prospective parents, highlighting either the industry's interest in monetising such data or its efforts to offer an array of options depending on the amount of information desired. The withdrawal of the case before a judgment could be issued leaves the issue unresolved, and perpetuates uncertainty and potential risks to donor privacy. This situation underscores the urgent need for comprehensive regulations to protect donor anonymity and guide gamete agencies in handling donor information ethically and legally. Clear legal frameworks are essential to balance the rights and privacy of donors

346 D Thaldar 'Building a Progressive Reproductive Law in South Africa' (2023) 25 Health and Human Rights 43.

347 IFAASA "Guidelines on egg donation in South Africa', available at *https://ifaasa.co.za/fertility-treatment/newsletter_02_2015_egg_donation_guidelines/*, accessed on 19 May 2024.

348 (82891/15) [2016] ZAGPPHC 185.

with the informational needs of intended parents, thereby ensuring ethical practices in gamete donation and selection.

Prospective parents have historically received insufficient information about donors,[349] a trend particularly evident in South Africa until recent years. Over the last two decades, there has been a rising global demand for more detailed donor information and greater selection options.[350] This surge in demand has led to the increased popularity of identity-release gamete donors globally. Consequently, numerous international gamete banks and agencies now provide extensive personal details about donors, including photographs, audio recordings, and video recordings.[351] In the US, various models for sharing donor information have been in place for over twenty years, and these offer prospective parents everything from basic medical history and physical descriptions to comprehensive profiles that include adult photographs and audio clips.[352]

A study by Frith et al. provides insight into how gamete donor characteristics are prioritised by prospective parents when selecting a gamete donor. It suggests that prospective parents seek as detailed and informed engagement as possible during the gamete donor selection process. Although there is significant diversity in how donor characteristics are prioritised by prospective parents, the study found areas of common ground: concern for finding a healthy donor; the importance of matching the donor to the non-biological partner; and the amount of thought that went into selecting the donor.[353] Rodrigues' expert opinion noted that 'prospective parents place a particularly high value on donors' level of education'.[354]

Regulation 5 provides that the Director-General will establish an 'electronic central data bank'[355] into which all information on gamete and embryo donation is stored. However, the electronic central data bank has not yet been established. Furthermore, Regulation 6(c)

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349 L R Rubin, I de Melo-Martin, Z Rosenwaks et al 'Once you're choosing, nobody's perfect: Is more information necessarily better in oocyte donor selection?' (2015) 30(3) *Reproductive BioMedicine Online* 312.

350 A Ravelingien, V Provoost & G Pennings 'Open-identity sperm donation: How does offering donor identifying information relate to donor-conceived offspring's wishes and needs?' (2015) 12(3) *J of Bioethical Inquiry* 503.

351 J Benward, A M Braverman & B Galen 'Maximizing autonomy and the changing view of donor conception: The creation of a National Donor Registry' (2009) 12 *DePaul J Health Care L* 227.

352 L R Rubin, I de Melo-Martin, Z Rosenwaks et al 'Once you're choosing, nobody's perfect: Is more information necessarily better in oocyte donor selection?' (2015) 30(3) *Reproductive BioMedicine Online* 312.

353 L Frith, N Sawyer & W Kramer 'Forming a family with sperm donation: A survey of 244 non-biological parents' (2012) 24(7) *Reprod Biomed Online* 709 at 718.

354 Rodrigues' expert opinion in *AB v Minister of Social Development*, Case No. 40658/13.

355 Reg 1 of GN 175 in *GG* 9699 of 2012-03-02: 'Electronic Central Data Bank' means an electronic bank in which all information on artificial fertilisation treatment outcome is stored and managed.

requires that a competent person must immediately relay all the information relating to such a gamete donor, the removal or withdrawal of a gamete or artificial fertilisation, to the central data bank – as contemplated in Regulation 5. Regulation 8 requires that all the personal information on a gamete donor must be recorded in the gamete donor file before any donation is made by a competent person.[356] The fertility clinics keep their own records; therefore, currently, information on artificial fertilisation is self-regulatory in the fertility clinics.

The South African Register of Assisted Reproductive Techniques (SARA), which is a subcommittee constituted under SASREG, together with the fertility clinics affiliated under SASREG, currently keep records of gamete donation is South Africa.[357] The submission of data to SARA by individual assisted reproductive techniques centres is voluntary, and is a holistic representation of the entire fertility industry in South Africa.

IV. IDENTIFYING ISSUES OF CONCERN IN THE CURRENT UNDERSTANDING OF REPRODUCTIVE LAW

Reproductive law in South Africa is currently regulated by a variety of legislation and case law, including, most pertinently, the following: the NHA[358] and the Regulations Relating to Artificial Fertilisation of Persons,[359] which form the framework legislation for assisted reproduction. This legislation, along with the Children's Act,[360] aims to provide legal certainty and clarity. However, according to Van Niekerk, it seems to have had the opposite effect – being described as 'unclear and confusing' and even 'incompatible in some respects'. [361]

Although the NHA and the accompanying Regulations appear to be generally supportive of ARTs, the specific area of donor gamete selection constitutes one of the domains less affected by regulatory ambiguity, though it still requires some refinement. Globally, there is significant variation in legal frameworks, resulting in inconsistencies in donor information

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356 Reg 1 of GN 175 in *GG* 9699 of 2012-03-02 defines a 'competent person' in relation to artificial fertilisation as a person registered as such in terms of the Health Profession Act 56 of 1974; who is – (a) A medical practitioner practising in gynaecology with training in reproductive medicine; (b) a medical scientist; medical technologist; clinical technologist; with training in reproductive biology and related laboratory procedures.

357 SARA report 2009, SARA report 2010, SARA report 2011, SARA report 2013, available at *www.fertilitysa.org.za*, accessed on 3 November 2024.

358 South Africa. National Health No. Act 61 of 2003.

359 *Government Gazette* No. 40312, 30 September 2016.

360 Children's Act No. 38 of 2005.

361 C van Niekerk 'Strange (and incompatible) bedfellows: The relationship between the National Health Act and the Regulations Relating to Artificial Fertilisation of Persons, and its impact on individuals engaged in assisted reproduction' (2017) 10(1) *SAJBL* 32.

standards and practices across different countries.[362] In South Africa, while the law addresses some ethical considerations, there are still some concerns in practice. Issues of concern in the law pertaining to gamete donor selection by intended parents, include:

a). Insufficient donor screening and selection criteria

The law stipulates that it is the donor's legal responsibility to declare their medical history truthfully and accurately and to maintain a healthy lifestyle during the donation period. The NHA and its Regulations provide minimal guidance on the criteria for selecting gamete donors. This includes a lack of detailed standards on the medical, genetic, and psychological evaluation of donors. The absence of clear criteria can result in inconsistencies in donor selection practices across different fertility clinics, so potentially compromising the safety and suitability of donors. The voluntary nature of donor participation in providing information can lead to incomplete or inaccurate medical and genetic histories. This lack of reliable information poses risks to the health of both the offspring and the intended parents, as critical medical details may be missing or incorrect. There is also a lack of empirical studies in South Africa that assess the reliability and validity of donor information and therefore donor screening is based largely on the subjective opinion and honesty of the donor. Currently, the only medical screening of donor gametes is a blood test for sexually transmitted diseases (STDs), drug screening, and a psychological evaluation. There is no mandatory genetic screening required by law. Heritable disorders are screened purely by information offered by the donor (if they are aware of such).

b). Limitations on live births and effects on donor siblings

A donor may legally not have more than twelve live births, excluding the donor's own children. Section 6 of the 2012 Regulations, which imposed a limit of six children conceived using the same donor, was problematic and out-of-date. It failed to clarify whether the limit applied to the conception or the live births of six children.[363] Moreover, the arbitrary nature of this restriction contradicted international norms. The provision has now been replaced by section 7 of the 2016 Regulations, which allows up to twelve live births and even exceeding this limit in specific cases, so marking an advance in the legislation. Although this restriction does attempt to limit the possible risk of inadvertent consanguinity, it fails to accommodate the need for

362 M Sabatello 'Disclosure of gamete donation in the United States' (2014) 11(1) *Indiana Health Law Review* 29.

363 A Dhai 'Editorial: Limiting donor conceptions to six: Time for change' (2014) 7(1) *South African Journal of Bioethics and Law* 2.

parents to access a genetic donor sibling for their existing donor-conceived child from donors that have reached their donor limits.

c). Lack of enforcement of a Central Donor Registry

The law relies solely on the honesty of the donor and does not have measures in place to adequately cross-reference donor details. The current process relies on the donor's transparency. There is also insufficient regulation of gamete banks, which can lead to ethical violations.[364] Regulation 5 provides that the Director-General establish an 'electronic central data bank' in which all information on gamete and embryo donation is stored.[365] The electronic central data bank has, however, not yet been established. Regulation 6(c) requires that a competent person immediately relay all the information relating to such a gamete donor, the removal or withdrawal of a gamete or artificial fertilisation, to the central data bank[366] contemplated in Regulation 5. These regulations could have been a means for cross-referencing to reduce unlawful practices. Regulation 8 requires that all the personal information on a gamete donor be recorded in the gamete donor file before any donation is made by a competent person.[367] The fertility clinics keep their own records; therefore, currently, information on artificial fertilisation is self-regulatory in the fertility clinics, without an external central authority ensuring consistency. However, SARA, which is a subcommittee constituted under SASREG, together with the fertility clinics affiliated under SASREG, currently keep records of gamete donation is South Africa. The submission of data to SARA by individual assisted reproductive techniques centres is voluntary.[368] The voluntary nature of participation raises doubts about the reliability of donor information.

Therefore, it is suggested that an independent body would be valuable for objectively assessing which new developments in ART should be permitted, free from any vested interests. The ideal entity to draft legislation for ARTs in South Africa would be a multidisciplinary committee that includes legal experts in health law, medical professionals, ethicists, human rights representatives, government agencies, judiciary representatives, patient advocacy groups, and academics. This committee would ensure that the legislation is comprehensive, ethically sound, medically accurate, and aligned with existing legal frameworks, so addressing

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364 L G Mpedi 'As technology speeds ahead, South African law on sperm donation needs an overhaul' *Daily Maverick* (11 May 2023).

365 Regulations Relating to Artificial Fertilisation of Persons GN R1165 *GG* 40312, 30 September 2016.

366 Ibid.

367 Ibid.

368 SARA report 2009, SARA report 2010, SARA report 2011, SARA report 2013, available at www.fertilitysa.org.za.

the real-world needs and concerns of those using ART services. In addition, an independent regulatory body could oversee compliance and adapt the laws to emerging technologies. The evident issues in current laws highlight the need for a collaborative approach in the legislative process. It has been suggested that 'the importance of interdisciplinary co-operation in the drafting, interpretation and implementation of legislation in this area cannot be overemphasised'.[369]

d). Anonymity and donor information

South African law, particularly the NHA and its associated Regulations, provides limited guidance on the extent of information that intended parents can access about gamete donors. While the law emphasises donor anonymity, ensuring that identifying information is not disclosed to recipients or children born from the donation, it does allow the sharing of certain non-identifying details. This typically includes physical traits, educational background, and medical history, with the intent of helping intended parents make informed decisions without compromising the donor's privacy.

Interestingly, while the law primarily protects donor anonymity, it does permit the sharing of childhood photographs of donors. This provision is meant to offer intended parents a sense of the donor's early characteristics – without revealing their current identity. However, with rapid advances in AI, this practice raises significant privacy concerns. AI technology now makes it possible to 'forward engineer' adult images from childhood photographs, so potentially compromising the anonymity of the donor. This capability could lead to unintended identification, and undermine the very privacy that the Regulations aim to protect.

The rationale behind limiting access to identifying information, such as adult photographs or personal anecdotes, is to protect donors from potential future contact or claims, thereby preventing legal or personal complications. The law also seeks to manage the ethical and social implications of assisted reproduction by avoiding the development of emotional attachments or expectations that could arise from knowing too much about the donor. However, the allowance of childhood photographs, and given the potential for AI-driven identification, challenges this protective framework and raises new ethical questions and concerns.

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369 M S Pepper 'Medicine and the law: Partial relief from the regulatory vacuum involving human tissues through enactment of chapter 8 of the National Health Act and regulations thereto' (2012) 102(9) *South African Medical Journal* 736–737.

These issues highlight a broader debate about the balance between the rights of donors, the needs of intended parents, and the long-term interests of children born from such donations. While the legal framework is designed to protect all the parties involved, advances in technology may necessitate a re-evaluation of existing regulations to ensure that donor anonymity is genuinely preserved in the face of new risks.

Globally, the level of donor information available ranges from extensive profiles to minimal details, thereby affecting the ability of prospective parents to make informed decisions and also the rights of donor-conceived individuals.[370] In fact, the question of how much donor information should be provided to prospective parents is a highly contested debate in the field of reproduction.[371] A significant debate in reproductive donation is how much information about gamete donors should be shared with recipients. This issue is complex given the limited empirical research available to support different policies. In addition, there is more research on sperm donation recipients than on oocyte donation recipients, further complicating the analysis. Rubin et al have contributed new evidence with the publication of their qualitative study that is aimed at a better understanding of 'how donor oocyte recipients relate to information provided about potential oocyte donors, how they use this information to select donors, and their preferences for, and reactions to, various types of information provided to them'.[372] Evidence indicates that the information needs of oocyte recipients and sperm recipients may differ, and these needs are also patient-specific.

In South Africa, the Children's Act governs various aspects of child welfare, including the sensitive issue of donor gamete selection. Section 41 (Rights of Children Conceived by Artificial Fertilization**)** deals with the right of a child conceived by artificial fertilisation to know the identity of the donor when they reach the age of eighteen, provided that the donor consents to such a disclosure. However, this section does not address what happens if the donor dies before the child reaches eighteen or if the donor withdraws consent for the disclosure. The law is also silent on the implications of anonymous donation in cases of posthumous reproduction. This lack of clarity can lead to legal disputes and emotional distress for the child and the donor's family.

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370 J Benward, A M Braverman & B Galen, 'Maximizing autonomy and the changing view of donor conception: The creation of a National Donor Registry' (2009) 12 *DePaul Journal of Health Care Law* 227.

371 J B Appleby & S Franklin, 'Oocyte donor information – how much is enough?' (2015) 30(3) *Reproductive BioMedicine Online* 209.

372 L R Rubin, I de Melo-Martín, Z Rosenwaks et al 'Once you're choosing, nobody's perfect: Is more information necessarily better in oocyte donor selection?' (2015) *Reproductive BioMedicine Online*.

According to Thaldar, the general accepted belief in the South African fertility industry is that gamete donation in South Africa must by law be anonymous and that it is unlawful to disclose the identity of a gamete donor.[373] This belief is shared by the South African Law Reform Commission, a state agency that does legal research and makes proposals for legal reform to the legislature. It stated in a recent publication that 'The legal position in South Africa is that gamete donors … must be anonymous and it is an offence to reveal the identity of a gamete donor'.[374] However, Thaldar was able to critically dispel this myth and assert 'that the legal position in SA is more nuanced than generally accepted, and highlights how open-identity gamete donations may be carried out lawfully in SA'.[375] Therefore, it is merely an assumption that the fertility industry in South Africa has adopted and which enforces anonymous gamete donation. South Africa has traditionally maintained donor anonymity; however, there are recent global shifts towards greater transparency. That said, according to Thaldar, the legal framework has not fully been integrated in understanding and practice in South Africa, so leading to ambiguities and uncertainties.[376] The view that gamete donation in South Africa must remain anonymous, with disclosure being unlawful, is based on Regulation 10(2)(a) of the 2012 Regulations. While his reasoning aligns with current legal practices that mandate donor privacy, it overlooks conflicting regulations under the NHA, which allow for identity disclosure with consent. This highlights unresolved legal ambiguities. Moreover, the South African perspective may not fully account for global trends toward transparency in donor identity, which are driven by ethical concerns about the rights of donor-conceived individuals. It is critical to note that the current law may not be sustainable in the light of these broader shifts and advances in AI that may make donor anonymity unfeasible.

Ethical guidelines in South Africa for gamete donation and donor selection are governed by the Health Professions Counsel of South Africa (HPCSA) and SASREG, as well as by several other bodies that play roles in regulating and influencing ART practices in South Africa, including legal, governmental, research, and ethical review organisations. These entities collectively help shape the standards and ethical guidelines governing gamete donation and reproductive technologies.

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373 D Thaldar & B Shozi 'Is open-identity gamete donation lawful in South Africa?' (2022) 112(6) *South African Medical Journal* 1.

374 South African Law Reform Commission, Issue Paper 32, Project 140, 'The right to know one's own biological origins' (20 May 2017).

375 D Thaldar & B Shozi 'Is open-identity gamete donation lawful in South Africa?' (2022) 112(6) *South African Medical Journal* 1.

376 Ibid.

The HPCSA provides ethical guidelines for gamete donation through its 'Ethical Rules and Guidelines for Practitioners'. These guidelines emphasise the need for informed consent from donors and recipients, so ensuring that all parties understand the implications of gamete donation and ARTs. They stress the importance of maintaining donor anonymity unless the donor has consented to disclosure. The guidelines also address the ethical management of donor information and the responsibility of practitioners to ensure that donors are not exploited or coerced. The lack of a Central Donor Registry, however, has left intended parents reliant on the honesty of donors, who may exaggerate their positive traits or minimise any potential risks to appear more attractive as choices. They also highlight the necessity for transparency in the donor selection process and the need for rigorous screening to prevent genetic and infectious diseases.

SASREG provides specific guidelines for gamete donation and donor selection through its 'Code of Practice'. It emphasises that donor agencies in South Africa must adhere to the SASREG gamete donation guidelines and the NHA's Chapter 8 on Artificial Fertilization. Donors should be fully informed about the donation process and its risks, with the treating specialist ultimately responsible for the treatment. Psychological assessments are required before initial donations or if there are significant life changes. Donors can make up to six donations in total and no more than four times within a year, and with no back-to-back donations. Donations are anonymous, with agencies allowed only to show childhood photographs of donors, but no adult photographs or direct contact between donor and recipient. Donors must be mentally and physically healthy, under 35 years old, with a BMI under 30, and ideally should be at least 21 years old. Agencies must ensure donor health and provide accurate information to recipients, and no matching between recipients and donors is allowed while the donor is actively donating.[377]

Access to ART and gamete donation services in South Africa is often limited by socioeconomic factors, so creating disparities in who can afford and access these technologies. Globally, access to ART is influenced by economic status, healthcare infrastructure and cultural attitudes, with legal frameworks frequently failing to address these inequities adequately.[378] A recent study by Njagi et al found that 'governments in low- and middle-income countries (LMICs) should devise appropriate ART regulatory policies and implement

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377 South African Society of Reproductive Medicine and Gynaecology (SASREG), 2008.

378 G D Adamson 'Global cultural and socioeconomic factors that influence access to assisted reproductive technologies' (2009) 5(4) *Women's Health* 351.

effective mechanisms for public financing of fertility care to improve equity in access'.[379] It was underscored that the findings should inform advocacy for ART regulatory frameworks in LMICs and the integration of infertility treatment as an essential service under universal health coverage.

V. ANALYSIS OF PUBLIC POLICY OBJECTIVES SERVED BY EXISTING LAWS

Public policy objectives for donor gametes and intended parents

The current legal framework governing ARTs in South Africa aims to serves several important public policy objectives, so reflecting the country's commitment to human rights, equality, and the well-being of its citizens. Some of the key public policy objectives[380] include:

Objective No. 1: Equip all people to make informed decisions about their sexual and reproductive health and rights and ensure that these rights are respected, protected, and fulfilled

The first objective of South Africa's sexual and reproductive health and rights (SRHR) policy focuses on equipping all individuals to make informed decisions about their SRHR and to ensure that their SRHR are respected, protected, and fulfilled. This objective is focused on empowering individuals with the knowledge and resources needed to make autonomous, informed decisions about their reproductive health. It also seeks to create a legal and social environment where these decisions are respected and protected by law.

The primary aim of this objective is to ensure that all individuals, including intended parents seeking donor gametes, have access to accurate information, appropriate counselling, and support systems to make informed choices about their reproductive options. This includes understanding the legal, ethical, and medical implications of selecting gamete donors, and ensuring that their decisions are made free from coercion or discrimination.

In terms of legal statutes and regulations, this objective is supported by several key pieces of legislation in South Africa. The NHA provides a framework for the protection of individual rights in healthcare settings, including the right to make informed decisions about

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379 P Njagi, W Groot, J Arsenijevic et al 'Financial costs of assisted reproductive technology for patients in low- and middle-income countries: A systematic review' (2023) 2023(2) *Human Reproduction Open* 2023(2) hoad007.

380 National Department of Health, Republic of South Africa (2019), National Integrated Sexual and Reproductive Health and Rights policy, ED.1.

reproductive health. Specifically, the NHA mandates informed consent for medical procedures, so ensuring that individuals fully understand the risks, benefits, and alternatives before proceeding. This is particularly relevant in the context of gamete donation, where intended parents must be fully informed about the genetic and medical background of potential donors, as well as any ethical considerations involved in the selection process.

In addition, the Children's Act emphasises the best interests of the child in all matters concerning their care and protection. This Act is crucial in the context of gamete donor selection, as it ensures that the future child's rights and welfare are considered in the decision-making process. For example, the Act supports the child's right to know their genetic origins, which can influence decisions about donor anonymity and the selection of gametes based on genetic compatibility. This objective, however, faces several potential problems and areas of competition with other provisions. These challenges arise from the inherent complexities in balancing individual rights, societal values, and legal frameworks.

One significant challenge is ensuring that all individuals have access to accurate, comprehensive, and unbiased information about their reproductive health options. In reality, disparities in education, literacy, and access to healthcare services can limit the effectiveness of this objective. Informed decision-making requires not only the availability of information but also the ability to understand and critically assess it. In cases where language can be a barrier, information is incomplete, misleading, or difficult to comprehend, and individuals may struggle to make fully informed choices.

Cultural and social norms can act as barriers to the realisation of this objective. In some communities, discussing or seeking information about reproductive health may be stigmatised, so leading individuals to make decisions without adequate information or support. This can be particularly problematic in the context of ARTs, where societal pressures or cultural expectations may influence the choices of intended parents, so potentially leading to decisions that do not fully align with their true preferences or best interests.

Implementing comprehensive SRHR services, including those related to ART, requires significant resources. Healthcare systems may struggle with funding limitations, so leading to disparities in the availability of services, counselling, and information. This can result in unequal access to the necessary support for informed decision-making, particularly for individuals in rural or underserved areas.

The push for informed decision-making can also raise ethical concerns, in particular regarding the balance between providing information and respecting the autonomy of intended parents. There is a risk that the emphasis on informed choices could lead to overly prescriptive counselling or pressure to conform to certain ethical standards, which can potentially infringe individual autonomy.

At times, public policy objectives may appear to conflict with various statutory provisions, making the relevant provisions a careful exercise in balancing competing interests. This tension is particularly evident in reconciling the child's best interests with the autonomy of parents. The principle of acting in the child's best interests, as emphasised in the Children's Act, can sometimes compete with the autonomy of intended parents. For instance, the child's right to know their genetic origins could conflict with the parents' desire for donor anonymity. Balancing the best interests of the future child with the parents' rights to make autonomous decisions about gamete donor selection is a delicate and often contentious issue.

Second, non-discrimination versus personal preferences can be conflictual. The Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)[381] prohibits discrimination in all areas, including reproductive health services. However, this can compete with the personal preferences of intended parents in selecting gamete donors. While the law seeks to prevent discriminatory practices, intended parents may have specific preferences based on race, ethnicity, or other characteristics. This creates a tension between upholding non-discrimination principles and respecting the personal choices of individuals.

Another disparity can been witnessed between resource allocation and universal access. The goal of providing universal access to SRHR services, including those related to ART, competes with the practical limitations of resource allocation. Ensuring that all individuals can make informed decisions requires substantial investment in healthcare infrastructure, education, and counselling services. However, limited resources may necessitate prioritising certain services or populations, so potentially compromising the universality and equity of access.

Last, confidentiality and transparency are often in conflict. Confidentiality is a key component of protecting individual rights in healthcare, including the privacy of donors and recipients in gamete donation. However, this can compete with the need for transparency, particularly when it comes to informed decision-making. Intended parents may require detailed

[381] Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA).

information about donors to make fully informed choices, but this information must be balanced with the donor's right to privacy. Addressing these challenges requires ongoing dialogue, legal refinement, and a nuanced approach to policy implementation.

Objective No. 2: Increase the quality of and access to comprehensive and integrated sexual and reproductive health and rights care and treatment services access for all life stages

The second objective of South Africa's SRHR policy aims to ensure universal access to comprehensive sexual and reproductive health services. This objective strives to guarantee that all individuals, regardless of their socioeconomic status, race, gender, or location, have the right and ability to access healthcare and, in this particular case, fertility services. This objective aligns with South Africa's commitment to providing comprehensive healthcare services to its citizens. Whether this objective has been achieved or not is questionable, since ART is mainly available only in private healthcare and is not financially viable for most South Africans. Globally, about one in ten couples face infertility. In high-income countries, ART often provides a solution. However, in poorer nations, ART services are scarce and the high cost of treatment makes it accessible only to the wealthiest. Access to ART in sub-Saharan Africa is particularly limited, especially with prevalent low socioeconomic populations.[382]

The policy's goal is to make these services widely available so that anyone wishing to start or expand their family can do so without undue barriers. However, the implementation of this objective faces several potential downfalls that could affect intended parents. Resource constraints, such as limited financial and medical resources, can lead to unequal access to fertility services, in particular in rural or underserved areas, so making it challenging for intended parents to access fertility treatment. In addition, inefficiencies in the healthcare system, including insufficient infrastructure and a shortage of trained professionals, can result in long waiting times and inadequate service provision, further complicating the process for those seeking gamete donors.

Cultural and social barriers also play a significant role, as deeply ingrained norms may inhibit the use of certain fertility services such as gamete donation. This resistance can prevent some individuals or couples from accessing these services, even when they are available. Moreover, inconsistencies between national policies and local practices may create confusion and limit the effectiveness of the SRHR initiatives, so potentially restricting access.

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382 K Hammarberg, A Trounson, J McBain et al 'Improving access to ART in low-income settings through knowledge transfer: A case study from Zimbabwe' (2018) 2018(4) *Human Reproduction Open* hoy017.

While the SRHR policy's objective of universal access is crucial for supporting intended parents in their pursuit of donor gametes, practical challenges such as resource limitations, healthcare inefficiencies, cultural resistance, and the balance between access and practical limitations could hinder the achievement of this goal. Addressing these challenges is essential for ensuring that all intended parents have equitable access to high quality fertility services.

Section 2 (a) of the NHA sets out the objectives, which include promoting the provision of health services that are equitable, accessible, and effective. Infertility treatments, including the use of ART and donor gametes, fall under these health services. This section underpins the public policy objective of ensuring that these services are available to all individuals, regardless of their socioeconomic status. However, in South Africa, the public policy objective is limited by the lack of financial resources to uphold this objective in respect of infertility healthcare services. Section 2's objects are to regulate national health and to provide uniformity in respect of health services across the nation by establishing a national health system that encompasses public and private providers of health services and which equitably provides the population of South Africa with the best possible health services that available resources can provide. However, this has not been achieved.

Objective 3: Ensure access to respectful and non-judgemental sexual and reproductive health and rights services for priority groups

The aim of this objective in South Africa's SRHR policy is to ensure that all individuals, in particular those from priority or marginalised groups, have access to sexual and reproductive health services that are delivered in a respectful, non-judgemental, and equitable manner. Priority groups often include people living with HIV/AIDS, LGBTQ+ individuals, people with disabilities, and those from low-income backgrounds. This objective seeks to eliminate barriers that these groups may face in accessing SRHR services, including stigma, discrimination, and judgmental attitudes, so ensuring that they receive the care and support they need without fear of prejudice or bias.

In the context of gamete donor selection by intended parents, this objective emphasises the importance of providing equitable access to fertility services to all individuals, regardless of their background or circumstances. It seeks to create an environment where intended parents from priority groups can make decisions about gamete donor selection without encountering discriminatory practices or judgemental attitudes from healthcare providers or society at large.

Several legal statutes in South Africa support the implementation of SRHR objectives, in particular in ensuring equitable and non-discriminatory access to reproductive health services. The NHA provides a framework for universal access to healthcare, emphasising equity and respect for human dignity. PEPUDA prohibits discrimination based on race, gender, sexual orientation, disability, and other characteristics, so ensuring that SRHR services, including gamete donation, are provided fairly to all. The Choice on Termination of Pregnancy Act,[383] while focused on abortion rights, reinforces the broader principle of offering reproductive health services that respect individual autonomy and which are delivered in a non-judgemental and supportive manner. This is applicable to all SRHR services, including fertility treatments.

While Objective 3 aims to ensure respectful and non-judgemental access to SRHR services for priority groups, there are several potential downfalls and areas of competition with other provisions. Ensuring that SRHR services are available to all priority groups in a respectful and non-judgemental manner requires significant resources, including training for healthcare providers, the development of inclusive policies, and the allocation of financial resources to underserved areas. In a resource-constrained environment, there may be competition between the need to provide specialised services for priority groups and the broader goal of universal access to healthcare.

While the objective emphasises the importance of non-judgemental care, it must also balance this with the need to respect the autonomy of intended parents. For example, while healthcare providers are required to support all intended parents equally, they must also respect the preferences and choices of parents in selecting gamete donors, even when those choices may not align with broader societal goals of non-discrimination. This balancing act can create tension, as providers may need to navigate between supporting parental autonomy and upholding non-judgemental, equitable practices (for example, selecting a gamete from a donor of a different race to both intended parents).

Objective 4: Strengthen the health system to deliver integrated sexual and reproductive health and rights services at the lowest possible level in the healthcare system

The primary aim of this objective in South Africa's SRHR policy is to enhance the capacity and efficiency of the health system to provide comprehensive and integrated SRHR services at the most accessible level in the healthcare system. This means delivering services closer to

[383] The Choice on Termination of Pregnancy Act 92 of 1996.

where people live, such as at primary healthcare facilities, to ensure broader access, especially in rural and underserved areas. The objective is to create a more efficient and responsive healthcare system that can meet the diverse SRHR needs of the population, including services related to fertility and gamete donation, in a coordinated and accessible manner.

In the context of gamete donor selection by intended parents, this objective seeks to ensure that these services are not centralised in a few urban centres but rather are available at lower levels of the healthcare system. This would allow intended parents to access necessary information, counselling, and medical services related to gamete donation, without needing to travel long distances or navigate complex healthcare systems.

Several legal statutes and regulations support this objective, namely the NHA. However, this intention fails on delivery and in practicality where funding in government healthcare facilities is lacking for fertility treatment. A significant challenge is the disparity in resources and infrastructure across different regions of South Africa. Rural and underserved areas often lack the necessary healthcare facilities, trained personnel, and technological resources to provide integrated SRHR services, including gamete donation. This can result in unequal access and potentially lower quality services at the primary care level, so undermining the objective's aim. Within a resource-constrained healthcare system, there is often competition between different health priorities. While SRHR services are crucial, they may compete with other pressing health needs such as infectious diseases, maternal and child health, and chronic diseases. This competition can lead to insufficient resources being allocated to SRHR services at lower levels of care, so limiting the objective's effectiveness.

Objective 5: ***Promote multisectoral engagement and shared accountability for a sustainable and rights-based service delivery***

The aim of this objective in South Africa's SRHR policy is to foster collaboration among various sectors – government, healthcare providers, civil society, the private sector, and community organisations – to ensure sustainable and rights-based delivery of SRHR services. This objective emphasises the importance of shared responsibility in providing comprehensive and equitable SRHR services, thereby ensuring that all stakeholders are involved in the planning, implementation, and monitoring of these services. By promoting multisectoral engagement, the objective seeks to create a more coordinated and effective approach to delivering SRHR services, so ensuring that they are accessible, high quality, and aligned with human rights principles.

The NHA lays the foundation for a coordinated health system in South Africa, and promotes collaboration between public and private healthcare providers. It also emphasises the need for accountability in delivering healthcare services, so ensuring that all stakeholders adhere to established standards and protocols. While this Act demands that all sectors involved in SRHR services operate in a non-discriminatory manner, it can also challenge the autonomy of different sectors to make decisions based on their own operational priorities. For instance, the private sector might resist regulations that impose strict equality measures if they perceive these as limiting their business operations. For example: A private fertility clinic could prioritise profitability and client preferences in gamete donor selection, which could conflict with the Act's emphasis on preventing discrimination, thereby challenging the shared accountability that Objective 5 promotes.

Protection of individual rights and autonomy

With an increase in the use of ARTs, there has been a shift in the focus on reproductive rights[384] from avoiding procreation to an emphasis on the rights of individuals to reproduce non-coitally[385] and the extent of their reproductive freedom. The legal framework seeks to protect the individual rights and autonomy of those seeking ART. It recognises that individuals have the right to make informed decisions about their reproductive health and family planning, including the use of donor gametes. However, the quest to strike a balance between the extent of information and the precise nature of data necessary to safeguard individual rights, all the while upholding autonomy, is an ongoing conundrum.

There have been various legal cases where applicants have relied on several constitutional rights, one being the right to privacy, in order to safeguard their reproductive autonomy. The decision by the Pretoria High Court to strike out the statutory ban on non-medical preimplantation sex selection may seem like the next logical step in vindicating reproductive autonomy. The Court held that while preimplantation sex selection for non-medical reasons is inherently sexist, it should be available as part of a woman's right to procreative freedom.[386]

The protection of individual rights and autonomy is a critical public policy objective because it ensures that individuals have the freedom to make decisions about their own bodies

384 This was because of cases such as the recent decisions in *AB v Minister of Social Development* 2016 2 SA 27 (GP) (hereafter AB High Court case); and *AB v Minister of Social Development* 2017 3 BCLR 267 (CC) (hereafter AB Con Court case).

385 'Noncoital' is defined by the *Collins Dictionary* as reproduction 'not involving sexual intercourse'.

386 *Surrogacy Advisory Group v. Minister of Health.*

and healthcare. Protecting individual rights means ensuring that people have access to all the necessary information to make informed decisions about their healthcare. In the context of ART and gamete donation, informed consent is essential. Individuals must fully understand the procedures, risks, and implications of their choices. Section 6 of the NHA stipulates that healthcare providers must obtain informed consent from patients before providing any medical treatment. Therefore, individuals must be fully informed about the procedures, including any risks or ethical considerations, before consenting to participate. This ensures that the autonomy of the individual is respected.

Public policy seeks to ensure that all individuals have equal access to reproductive healthcare services, regardless of their background. Protecting individual rights and autonomy includes preventing discrimination in the provision of these services, so ensuring that everyone can make decisions about their reproductive health.

Section 7 of the NHA further emphasises the importance of voluntary and informed consent, in particular when it comes to medical treatments involving significant decisions, such as those related to ART. By requiring explicit consent, the NHA protects the rights of individuals to make autonomous decisions about their reproductive health.

Section 55 of the NHA regulates the use of human tissue and gametes, so ensuring that these are used in a manner that respects the rights of the donor and the recipient. The NHA requires that gamete donation and ART procedures be conducted ethically, with the donor's autonomy and rights protected throughout the process. The regulation ensures that there is no coercion or exploitation, thereby reinforcing the importance of autonomy.

Section 56(1) of the NHA pertains to the Removal and Use of Tissue and Gametes. This section mandates that the removal and use of gametes must be done with the donor's informed and voluntary consent. It protects the autonomy of individuals by ensuring that their decision to donate gametes is made freely and with full awareness of all the implications.

Section 60 of the NHA, the Regulations Relating to Artificial Fertilisation, empowers the Minister of Health to create regulations that protect the rights of individuals undergoing ART, including regulations about the ethical use of donor gametes. This ensures that the rights of all parties involved in ART procedures are respected, including their right to make autonomous decisions.

The protection of individual rights and autonomy is a fundamental public policy objective because it ensures that individuals can make informed, voluntary decisions about

their healthcare – including the use of ART and donor gametes. The NHA in South Africa supports this objective through its emphasis on informed consent, ethical practices, and the protection of individual rights in the context of reproductive healthcare. By doing so, the NHA ensures that reproductive health services are provided in a manner that respects the autonomy and dignity of all individuals involved.

Non-discrimination and equality

South African law prohibits discrimination on various grounds, including race, gender, and sexual orientation. The legal framework for ART aims to uphold these principles, ensuring that individuals have equal access to services and that discrimination does not hinder their reproductive choices. However, this is questionable with the rise in gender selection and race-matching in certain communities. Gender selection, used for non-medical reasons, could potentially risk reinforcing harmful gender stereotypes and perpetuate gender-based discrimination. It is argued that international human rights law phrases rights in a manner that supports reproductive choice, and this could well include a right to select the sex of one's offspring. Other rights provide a basis for recognising discrimination that may underlie sex selection.[387] With regard to race-matching, there is a deep irony that the demand for whiteness in the transnational fertility industry is filled by women from South Africa, a country that is majority Black.[388] For most South Africans who cannot afford basic healthcare and lack insurance coverage, assisted reproduction remains a 'luxury'.[389] This situation highlights the inequality and discrimination in access to ART. Despite these disparities, South Africa has become a global hub for reproductive travel, sustaining a thriving industry in IVF and egg provision.[390]

Discrimination between sperm donation and egg donation processes often highlights disparities that can affect both donors and recipients. In many countries, including South Africa, there are distinct differences in how these processes are regulated and perceived. First, in terms of regulation, sperm donation tends to be more straightforward and widely accepted. Sperm banks typically have less stringent requirements for donors compared to egg donation. Sperm donors do not require a psychological assessment of any kind. This can lead to a

387 S Soni 'Prêt-à-porter procreation: Contemplating the ban on preimplantation sex selection' (2019) 22 *PER/PELJ* 1.

388 A Pande '"Mix or match?": Transnational fertility industry and white desirability' (2021) 40(4) *Med Anthropol* 335–347.

389 V Namberger *The Reproductive Body at Work: The South African Bioeconomy of Egg Donation* (2019).

390 T Moll, T Gerrits, K Hammarberg, L Manderson & A Whittaker, 'Reproductive travel to, from and within sub-Saharan Africa: A scoping review' (2022) 14 *Reprod Biomed Soc Online* 271.

perception that sperm donation is a simpler and less burdensome process, potentially leading to differences in how donors are compensated and treated under the law. Conversely, egg donation involves more complex medical procedures and carries higher health risks for donors. The process often requires extensive medical screening, psychological screening, hormonal treatments, and invasive procedures such as egg retrieval. Furthermore, legal frameworks governing egg donation may be more stringent, and these are aimed at protecting the health and rights of donors and recipients.

The child's best interests and well-being

Public policy objectives prioritise the best interests and well-being of children born through ART. It establishes regulations and safeguards to ensure that the rights of children conceived through assisted reproduction are protected and that their upbringing occurs in a safe and supportive environment.

The best interest of the child to be born is given careful consideration by the courts[391] and is a constitutional imperative in all matters affecting children. Section 28(2) of the Constitution provides that '[a] child's best interests are of paramount importance in every matter concerning the child'.[392] The best interest principle has not, however, been given an exhaustive content, but rather the standard is flexible, allowing courts to take an individualised approach based on the specifics of the situation.[393] The decision to inform the child of his or her biological origin lies with the persons to whom parental responsibilities and rights have been assigned; this is so because the Children's Act neither differentiates between social or legal parents and biological or genetic parents, nor provides a definition of 'parent'.[394]

From a study conducted in the Netherlands in 2022, Takes explains that the 'best interest of the child' could be viewed from the perspective initially as the 'autonomous child', which focused on individual rights and citizenship. However, this was later further developed into the 'embedded child', which goes beyond individual autonomy and focuses on dependency, care, and relationship.[395] In the context of gamete donation, this view puts the interests of the child, parents and donor against each other, often leading to a conflict of

391 Children's Act, s 295(e).
392 Constitution of South Africa (Footnote 3).
393 *Ex Parte WH* (Footnote 145), [61].
394 A M Skelton 'Parental responsibilities and rights' in C J Davel and A M Skelton (eds) *Commentary on the Children's Act* (2012) 3–50.
395 F Takes 'The child's best interest in gamete donation' (2022) 36(1) *Bioethics* 10-17.

interests. The 'embedded child's' perspective values interdependence over independence and suggests that addressing the child's best interests should involve understanding their specific context and needs. This approach aims to create a more balanced and compassionate framework for considering children's best interests in gamete donation.[396]

Ethical and informed practices

The legal framework promotes ethical and informed practices in the field of ART. It outlines guidelines and requirements for fertility clinics, healthcare providers, and intended parents, so ensuring that procedures are conducted responsibly and transparently. However, do the guidelines support the process for intended parents in their attempts to promote ethical practices?

The NHA (as amended) provides the regulatory framework for donor agencies and fertility clinics. It mandates that donors accurately disclose their medical history and maintain a healthy lifestyle throughout the donation period. Donors can choose to remain anonymous and are not held responsible for any offspring conceived, thereby waiving parental rights. Furthermore, a donor is legally restricted to no more than twelve live births, not including their own children. Although the law addresses some ethical issues, significant issues of concern remain, warranting increased oversight of ART. For instance, donor screening is often insufficient, particularly regarding genetic testing and mental health evaluations, and heavily relies on the donor's honesty. In addition, sperm bank regulations are inadequate, so potentially leading to ethical breaches. There are also concerns about the availability of donor sperm and eggs, which could result in discrimination and inequity in the system.

Although the current legal framework governing ART in South Africa serves to uphold individual rights, promote equality, ensure the best interests of children, and establish ethical and responsible practices, Van Niekerk argues that the current legislation is 'flawed law'. Her assertion is that 'the legislation that exists is not comprehensive enough to adequately address the concerns raised, or to deal with newer developments in this field. What is therefore needed is a review of all legislation.'[397]

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396 Ibid.

397 C van Niekerk 'Strange (and incompatible) bedfellows: The relationship between the National Health Act and the regulations relating to artificial fertilisation of persons, and its impact on individuals engaged in assisted reproduction' (2017) 10(1) *S Afr J Bioethics Law* 32–35.

VI. CONCLUSION

Undoubtedly, the field of reproductive medicine, genetics, and technology will continue to advance at a remarkable pace, often outstripping legal regulations. Individuals seeking to create biologically connected families through the assistance of donors, surrogates, and medical professionals will drive the ongoing expansion of legal definitions of 'family' and related concepts. This evolution will prompt a necessary re-evaluation of reproductive rights and their boundaries for both embryos and individuals. As the reproductive and genetic sciences progress, it becomes imperative to grasp their unique contributions, historical context, and potential implications. Such an understanding is essential for lawmakers and policymakers to effectively shape the legal frameworks needed to oversee and guide these transformative possibilities for society. The history of ARTs serves as a poignant reminder that what was once deemed implausible can swiftly become not only possible but also widely accepted in mainstream society.

In conclusion, while the legal framework governing ART in South Africa is designed to uphold crucial public policy objectives, so reflecting the nation's commitment to human rights, equality, and the well-being of its citizens, it often struggles to keep pace with the progressive nature of the industry and effectivity in practice. An eloquent affirmation of this principle is found in the 2005 judgment that legalised same-sex marriage in South Africa:

> 'Indeed, rights by their nature will atrophy if they are frozen. As the conditions of humanity alter and as ideas of justice and equity evolve, so do concepts of rights take on new texture and meaning. The horizon of rights is as limitless as the hopes and expectations of humanity.'[398]

Therefore, it is essential for rights to grow and develop alongside humanity's progress and aspirations, thereby underscoring the need for a dynamic legal framework that adapts to the evolving needs and values of society.

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[398] *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC) para 60.

CHAPTER 3

EMPIRICAL ANALYSIS

I. INTRODUCTION

This chapter presents the empirical analysis of data collected through semi-structured interviews with healthcare professionals and from an extensive survey of intended parents who were seeking donor gametes. The qualitative component of this study involved interviews with twenty healthcare professionals from five of the leading fertility clinics and donor gamete banks in South Africa. These professionals provided essential insights into the implementation of laws governing gamete donor selection, and their impact on both medical practice and patient autonomy. Complementing this, the quantitative aspect of the study included 397 surveys that were completed online by intended parents, and which offer a personal and diverse perspective on their preferences and experience during the donor selection process.

The aim of this analysis was to investigate the alignment or potential misalignment of South African laws on gamete donor selection, their practical implementation, the rights of intended parents, and the interests of prospective children. In particular, I examined reported potential instances of paternalism and inconsistency among medical practitioners in applying these laws, and explored how such practices affect individual autonomy and equitable access to reproductive services. I also assessed the challenges faced by medical professionals and patients in the gamete donor selection system. Furthermore, the study considered the subjective criteria used by intended parents when selecting a donor, and examined whether these preferences align with any constitutional rights. Lastly, I investigated the factors that influence the choices made by intended parents and the extent to which these factors are recognised and accounted for in the current legal frameworks.

This study also incorporates a psychological perspective on the subjective criteria used by intended parents when selecting a donor, and examined how these personal preferences may align with constitutional rights. The choices parents make are often driven by psychological factors such as a desire for physical resemblance, shared cultural or ethnic backgrounds, and perceived intelligence or health attributes, so reflecting deeper emotional and identity-based motivations. These preferences raise important legal questions about whether they qualify for protection under constitutional rights such as autonomy or equality. By integrating this

psychological dimension, the study explores how personal motivations intersect with broader ethical and legal considerations related to fairness, non-discrimination, and the rights of prospective children in the context of reproductive assistance.

Through this exploration, this chapter provides an in-depth understanding of the complex relationship between law, medical practice, and patient autonomy in the realm of reproductive assistance in South Africa. This analysis will elucidate the evolving dynamics in the regulatory environment and have practical implications for both healthcare providers and those seeking reproductive assistance.

II. METHODOLOGY

a). Research design

For the qualitative component of the study, I designed a custom survey using Google Forms to gather data from intended parents. The survey sought to examine the demographic profile of intended parents in South Africa, their subjective criteria when selecting a gamete donor, and the factors that influenced their decision-making process. In addition, semi-structured interviews were conducted with healthcare professionals to explore key issues such as reported instances of paternalism and inconsistency in the application of laws governing gamete donor selection. These interviews also aimed to investigate how such practices affect individual autonomy and equitable access to reproductive services, and the challenges faced by medical practitioners and patients in the donor selection system.

In strict adherence to the Protection of Personal Information Act 4 of 2013 (POPIA), this study prioritized the safeguarding of personal data and the maintenance of absolute participant confidentiality. Quantitative data gathered through the custom Google Forms survey was anonymized at the point of collection, ensuring that no personally identifiable information (PII) was recorded for intended parents. Qualitative data from semi-structured interviews conducted via Zoom and WhatsApp were digitally recorded and subsequently transcribed for analysis. All digital files, including audio recordings and transcriptions, were stored on password-protected, encrypted devices with access restricted solely to the primary researcher to prevent unauthorized disclosure and ensure the long-term privacy of the participating healthcare professionals.

b). Data gathering

A mixed-method design was used to gather both qualitative and quantitative data. The qualitative data collection process included both primary and secondary data collection. The primary data collection included both semi-structured interviews and surveys.

A purposive representative sample was chosen to investigate the decision-making criteria intended parents use when selecting their donor gametes. The rationale for selecting this sampling technique was based on the availability of participants seeking donor gametes at some of the most well-known infertility clinics and gamete banks across South Africa. The five institutions used were Vitalab-Johannesburg, Vitalab-Umhlanga, Medfem, Nurture, and Aevitas. The online survey was uploaded onto the fertility clinic and donor bank websites and social media pages, and was emailed to patients who were seeking donor gametes. The survey was made available to participants from the end of May 2024 and was removed at the end of July 2024. A pop-up banner on their websites was used to invite any intended parents seeking donor gametes to voluntarily participate in the study with a short explanation and which highlighted that their participation would be anonymous. Ethical considerations were adhered to, with informed consent obtained through a pop-up banner on clinic websites and social media platforms informing prospective participants that participation was voluntary and anonymous; this information was also reiterated on the opening page of the survey, where consent was clearly explained and explicitly required by clicking to begin the survey. The aim from the onset of the study was to obtain 350–380 participants over the sampling months. Fortunately, 397 survey responses were completed.

Participants completed an internet-based questionnaire in which they were asked to evaluate the importance of various donor criteria on a 5-point Likert scale, ranging from 1 (not important at all) to 5 (extremely important). The use of this scale allowed for a detailed statistical analysis of the criteria most valued by respondents, providing the basis for the ranking and demographic comparisons presented in Section IV of this chapter. The criteria assessed included the significance of donor adult photographs, physical traits, skin tone, health, educational background, IQ, career, athleticism, personality, talents, access to the donor's identity, and the number of previous donations or live births. Respondents participated anonymously and questionnaire completion was entirely voluntary. Recruitment was carried out through existing donor websites and the social media platforms of donor agencies and fertility clinics.

The semi-structured interview component of the study was designed to provide flexibility, allowing for deviations and real-time adjustments during conversations with respondents. This approach fostered richer data collection, greater participant engagement, and the exploration of unexpected themes, so ultimately leading to a deeper understanding of the research topic. The primary goal of these interviews with healthcare professionals was to gain comprehensive insights into their experiences and perspectives on the implementation of South African laws governing gamete donor selection. The interviews sought to examine the alignment between legal frameworks and practical application, explore the challenges and ethical considerations healthcare professionals face, and identify any patterns of discrimination or inconsistencies in ARTs. By using a semi-structured format, the interviews allowed for in-depth exploration based on the observations and experiences of healthcare professionals regarding the decision-making processes of intended parents, thereby highlighting potential impacts on the rights and well-being of all the role players involved.

The main themes which were delineated were:

Theme 1: *Challenges* faced by intended parents selecting donor gametes, which focused on managing expectations and navigating emotional complexities.

Theme 2: *Ethical dilemmas* associated with maintaining ethical standards while addressing the diverse and complex needs and desires of intended parents.

Theme 3: *Subjective criteria* reflecting the most important factors for intended parents when choosing a donor.

Theme 4: Risk of *designer babies* versus medically necessary ART.

Theme 5: *Anonymity and identity-release* to identify what the experiences are in practice.

Theme 6: Legal *paternalism or autonomy* experienced by healthcare professionals.

This study employed an inductive research methodology, which moves from specific observations to broader generalisations and theories. Often referred to as a bottom-up approach, it begins by identifying patterns from specific data and then generating tentative hypotheses. Ultimately, this method leads to the development of broader conclusions and theoretical insights.

c). Research participants (healthcare professionals and intended parents)

Each of the participating fertility clinics and donor agencies was asked for volunteers from their healthcare professional staff complement who were willing to participate in the interviews. They remained anonymous and no personally identifiable information was revealed about them. Each institution offered four voluntary participants. This was a random mix of males and females of various ages and years of experience. Most professionals had well over five years of experience in the field of ART. Their professional roles included being: specialist gynaecologists, nurses, fertility coordinators, embryologists, and psychologists.

i). Healthcare professionals

The healthcare professionals interviewed were recruited from leading fertility clinics and gamete banks across South Africa (Nurture, Medfem, Aevitas, Vitalab), reflecting a diverse range of expertise in the fertility healthcare sector. These professionals operate in environments where clinics serve as central hubs, offering a variety of fertility treatments. The clinics vary in structure; independent clinics tend to provide personalised care that is tailored to individual patient needs, while network clinics leverage shared resources but may sacrifice some degree of individualised attention. In addition, the presence of in-house sperm and egg banks facilitates (e.g., Vitalab and Aevitas) streamlined services, although independent banks (e.g., Nurture) often provide a wider variety of donor options.[399]

The primary data collection included semi-structured interviews with twenty healthcare professionals who worked with gamete selection, including fertility specialist gynaecologists, psychologists, nurses and sperm/egg donor bank coordinators. Healthcare professionals participated in the interviews on a voluntary basis and were assured that no personally identifiable information would be disclosed, with professional roles reported in aggregated form to protect participant confidentiality. Responses were recorded and transcribed. The healthcare professionals interviewed were highly experienced, with years of practice in helping intended parents seeking donor gametes. These professionals have been integral to supporting patients through various stages of the fertility journey. Their roles included advising on donor selection, managing medical treatments, and providing emotional support, so giving them a

[399] D Thaldar and N Mthembu *Report on the Competitive Dynamics of the South African Fertility Healthcare Sector* University of KwaZulu-Natal (2024).

comprehensive understanding of the practical and ethical challenges faced by intended parents. Secondary data collection included existing literature from previous studies and gamete donor websites to pinpoint the parameters for the survey created for intended parents.

ii). Intended parents

The intended parents who completed the survey were current patients who were actively seeking donor gametes. They were recruited either when they visited the fertility clinics and their respective social media platforms or when they registered on their respective donor websites to browse through donor profiles. The patients originated from various regions throughout South Africa, and were receiving treatment at clinics in the prominent cities of Cape Town, Johannesburg, and Durban. These individuals were needing to select a suitable donor, and their insights provide valuable perspectives on the factors influencing their choices and experiences during their fertility journey. This quantitative study component had a representative sample of 397 respondents who completed the constructed survey. The targeted number of paricipants was based on the advice of the consulting statistician, based on the current number of donor agencies and fertility clinics in South Africa and the estimated number of active couples seeking donor gametes annually.

For this research, a purposive sampling technique was adopted to ensure that only patients that met the criteria were included in the study. Using an internet-based questionnaire, recipients were asked to rate the importance of a number of donor criteria on a 5-point Likert scale (from 1 = not important at all *to* 5 = extremely important). The items included importance ranking about the donor adult photograph, physical characteristics, skin tone, health, educational level, IQ, career, athleticism, personality, talents, access to the identity of the donor, and number of previous donations or live births. Respondents remained anonymous and the completion of the questionnaire was voluntary.

d). Instruments (semi-structured interview and survey)

i). Semi-structured interview for healthcare professionals

Each fertility clinic and donor bank was contacted, and approximately four healthcare professionals from each of the five institutions volunteered to participate in the study, with their identities being kept confidential. Given that these institutions are located in different

provinces across South Africa and considering the demanding schedules of the healthcare professionals concerned, all interviews were conducted virtually via Zoom and WhatsApp calls. Each interview lasted 20 to 30 minutes. The participants were asked the same set of questions, with time being allocated for them to elaborate on their responses. The interviews were recorded and later transcribed.

Semi-structured interviews allowed for deviations, and provided flexibility for real-time adjustments, so fostering richer data collection, participant engagement, and the exploration of unforeseen themes. By utilizing this semi-structured format, the study was able to move beyond a mechanical application of legal rules to uncover the patterns of discrimination or inconsistencies in clinical practice as observed by healthcare professionals. This enhanced the nuanced understanding of the research topic. The main purpose of using semi-structured interview questions for healthcare professionals in this study was to gather comprehensive insights into their experiences and perspectives on the implementation of South African laws on gamete donor selection. The questions explored the alignment between legal provisions and practical application to understand the challenges and ethical considerations faced by healthcare professionals, and unveil any patterns of discrimination or inconsistencies in the context of ARTs. The flexibility of semi-structured interviews also allowed for in-depth exploration, so ensuring a nuanced understanding of the decision-making processes and the potential impact on the rights and well-being of intended parents and prospective children.

ii). Data collection instrument: Survey for intended parents

The questionnaire was divided into three sections:

Section 1: The demographic profile of the intended parent: '*About Yourself'* included questions relating to the intended parent and their background.

Section 2: *'Selection Criteria'* comprised 30 questions. Data collected from these questions were ranked in order of importance to ascertain the criteria that intended parents most value and also other preferences.

Section 3: *'Selection Experience'* comprised six questions to assess the experience of the selection process from the perspective of intended parents.

The survey was done online and took only about two minutes to complete. Inclusion criteria included all current intended parents who were actively seeking donor gametes at the time and who had registered on any of the selected donor agency websites.

Survey breakdown:

Section 1: Demographic profile – About Yourself

A basic demographic profile of the respondents with reference to age, gender, sexual orientation, relationship status, educational level, race and employment status, type of employment, talents, athletic ability, and type of gamete required was established. Regarding educational level, the respondents were asked to indicate their highest educational qualification from six options: 'No formal education', 'Some Schooling', 'Grade 12 / Matric', 'Post-Matric Certificate', 'Undergraduate degree/diploma', and 'Postgraduate degree/diploma'. With race, the South African standard classifications of 'Black African', 'Coloured', 'Indian', 'White', and 'Other' was used. Employment status included: 'Employed full-time', 'Employed part-time', 'Unemployed' , 'Full-time student' or 'Self-employed'. Respondents were also asked to indicate whether they possessed any specific talents or abilities, for example: 'artistic, musical, handy work, dancing, nature (green-fingers)'. Their athletic ability or sporting preferences were assessed ('Not sporty', 'Happy participant', 'First team (A/B) level sport', 'Provincial-level sport', 'National-level sport', and 'International sport). This section helped highlight the dominant profile of most intended parents in this sample group.

***Section 2: Selection Criteria*:** Participants rated the importance of each item on a 5-point Likert scale, ranging from 'Not important at all' (1) to 'Extremely important' (5).

Physical characteristics:

31. How important is it for the donor to physically resemble you or your partner?
32. How important is it for the donor to have a specific eye colour?
33. How important is it for the donor to have a specific hair colour?
34. How important is it for you to see adult photographs of the donor?
35. How important is it to have access to voice clips from the donor?
36. How important is it for the donor to be of a specific race?
37. How important is it for the donor to have a specific skin tone/complexion?
38. How important is it for the donor to have superior physical features?
39. How important is it for the donor to be a specific height? (e.g., tall)
40. How important is it for the donor to have been a beautiful baby/child?
41. How important is it for the donor to be a physically attractive adult?
42. How important is it for the donor to have a sporty physique?

Medical and genetic factors:

43. How important is it that the donor has a clear medical history?
44. How important is it for the donor to be genetically tested to screen for any inheritable genetic disorders?
45. How important is it to know whether the donor has successfully donated before?
46. How important is it to know whether the donor has previously had children?

Education and career:

47. How important is it for the donor to have completed tertiary education?
48. How important is it for the donor to have a high IQ?
49. How important is it for the donor to have a successful career?

Personality and interests:

50. How important is it that the donor's personality match yours or your partner's?
51. How important is it for the donor to exhibit artistic or cultural abilities?
52. How important is it for the donor to have athletic abilities or talents? (e.g., being sporty).

Lifestyle and habits:

53. How important is it that the donor has never abused drugs and/or alcohol?

Ethnicity and cultural background:

54. How important is the donor's ethnicity? (e.g., Greek heritage).

Age and physical health:

55. How important is the age of the donor?
56. How important is the donor's BMI/weight? (e.g., healthy weight)

Identity:

57. How important is it for you that the donor must *not* know your identity?
58. How important is it for you to know the donor's identity?
59. How important is it for you that your child will have the right to find out the identity of the donor?

Reproductive choices:

60. How important is the opinion of your nurse and/or doctor on the choice of your donor?

Section 3: Selection experience

Questions were rated as follows: 1 – Strongly disagree to 5 – Strongly agree

1. The process of searching for a suitable donor has been time consuming.
2. There are enough donors to choose from for me/us to find what I/we were looking for.
3. There is enough information available on the donor profiles of South African websites/donor agencies to ensure a well-informed decision.
4. I would have liked to have seen adult photographs of the donor included in the donor profile.
5. I am satisfied with the input or guidance from my fertility team (doctor/nurses) during the gamete selection process.
6. I would prefer the fertility team to do the selection matching for me.

III. PRESENTATION AND ANALYSIS OF DATA: SEMI-STRUCTURED INTERVIEWS WITH HEALTH PROFESSIONALS

Next, I answer my original research questions which pertain to insights gathered from the semi-structured interviews with health professionals about their experiences and implementation in practice. These are:

1. What are the current challenges experienced by either medical practitioners or patients in the system of gamete donor selection?
2. What are the reported instances of paternalism and inconsistency among medical practitioners in the implementation of laws related to gamete donor selection?
3. How do these reported instances affect individual autonomy and equitable access to reproductive services?

Theme 1: *Most common challenges*

According to health professionals, the common theme in the challenges faced by intended parents who are selecting donor gametes relates to managing expectations and navigating emotional complexities. Intended parents often arrive at this stage after a long and painful process involving grief about not using their own genetic material. This emotional context influences their decision-making and adds to the difficulty of the process. Many intended parents decide about using donor gametes after many of their own failed attempts, often involving grief about the loss of their own genetic contribution. This emotional burden can make the decision-making process more challenging.

One of the significant challenges healthcare professionals have observed in the gamete selection process is the limited availability of donors, which often forces intended parents to compromise on their preferences. This issue is particularly pronounced for those seeking Indian, Asian, or Mediterranean-looking donors, who are notably scarce. As a result, parents from these ethnic backgrounds frequently find themselves having to settle for what is available rather than what they ideally hoped to find. While some intended parents are not selective and simply prioritise viable gametes, others are overly specific and struggle to find a perfect match, sometimes owing to a misunderstanding of how genetics work, and so leading to unrealistic expectations. In addition, healthcare professionals expressed concerns when they saw the same

donor being used repeatedly for different patients – a reflection of the limited donor pool – and which raises further ethical and medical concerns.

Many parents have high and sometimes unrealistic expectations about the donor's attributes, such as intelligence, physical appearance, and talents. This can lead to a dissonance between what they seek and what is realistically available. This can lead to challenges in finding a suitable match, as not all desired traits can realistically be met and all traits are not necessarily found in one donor. At times, intended parents want a donor with traits superior to their own. It is important to note that some intended parents are focused primarily on having a healthy baby, so highlighting how donor selection is highly individualised. Each case is unique, and there is no single approach or preference that applies universally.

The anonymity of donors creates a significant challenge. Parents must make a decision based on limited information, which can feel like choosing ‘blindly’. This is compounded by the desire to find a donor who resembles them, both physically and in traits, which is often unrealistic. The lack of adult photographs and extensive background information can lead to uncertainty and anxiety about the decision, and therefore there is often heavy reliance on health professionals’ influence. Although healthcare professionals expressed that they valued anonymity laws, as they offer the donors privacy, they noted that it is a balancing act to ensure that the intended parents have adequate information to make an informed decision.

Limited information provided about donors can lead to frustration. Some parents may want detailed information, such as family medical history or personal traits, which is not always available, especially in certain cultural contexts. Others find that sifting through the possibilities of multiple donors and pages of information can be overwhelming and too laborious and therefore rely on health professionals to limit the options. Donor profiles often include subjective information that relies on the donor's self-reporting, such as personality traits, interests, and lifestyle habits. While this personal insight can be valuable for intended parents, it is potentially problematic, as there is no reliable way to verify the accuracy of certain claims. This lack of confirmation can lead to discrepancies between the information provided and the donor’s actual characteristics, so potentially complicating the selection process for intended parents. Relying on self-reported information in donor profiles is risky because it introduces the possibility of inaccuracies or intentional misrepresentations. Without any verification, intended parents may base their selection on traits or qualities that are not entirely truthful, so leading to potential disappointment or mismatches between expectations and reality. In some cases, critical factors such as health history or lifestyle behaviours might be

understated or exaggerated, which could have long-term implications for the child's well-being and for the trustworthiness of the fertility process.

Different cultural and social expectations play a significant role in the selection process. For example, some cultures may have more stigma about using donor gametes, so affecting the level of openness about the process. Shame is often associated with using donor gametes, thereby leading to secrecy and additional emotional stress. The challenge arises when women feel fear or shame and try to sign consent on behalf of their husbands in order to conceal their need for donor gametes to avoid being exposed or shunned.

A further challenge noted by healthcare professionals was cost. The financial cost of using donor gametes is a significant barrier for many, so adding another layer of complexity and stress to the process. Financial considerations can limit options or delay the process, adding to the stress and complexity of the decision-making process. Legal restrictions, such as the number of children a donor can have, can limit availability and choice. In addition, processes for securing access to specific donors or ensuring future access for siblings can be complex and costly. There is often a concern about the availability of donors, especially if the parents want to have siblings with the same genetic donor. This can create pressure to make decisions quickly or secure additional donor material upfront, so adding to the financial and emotional burden.

Theme 2: ***Most common ethical dilemmas***

The common theme in the ethical dilemmas associated with intended parents seeking donor gametes relates to the challenges of maintaining ethical standards while addressing the diverse and complex needs and desires of the intended parents. There are ethical concerns when intended parents bring in known donors, especially family members, such as a daughter donating eggs for her mother. While it is not strictly prohibited, it raises ethical questions about boundaries, consent, and potential coercion.

Another ethical issue arises when intended parents, in particular women, wish to use donor gametes without disclosing it to their partners. This can be driven by cultural pressures or personal desires. Ethically, clinics require both partners to consent, so ensuring transparency and mutual agreement. The need for informed consent is emphasised, and the clinic must explain the need for the partner's knowledge and agreement, especially when the partner's sperm is involved in creating embryos. Healthcare professionals have highlighted this as a gap

in the legal process, noting that when consent forms are signed online rather than in person, there is no reliable way to verify whether the signatures are truly those of both parties involved. This lack of verification raises serious legal and ethical concerns, as it leaves room for the possibility of a wife signing on behalf of her husband without his knowledge or without fully disclosing her need for donor gametes. The issue is especially critical in African culture, where the stigma associated with donor gametes often leads patients to go to great lengths to hide their situation, so further increasing the potential for legal and ethical ramifications.

The ethical debate about whether donors should remain anonymous or have their identities released when the child reaches adulthood is significant. Some intended parents prefer identity-release donors, while others, in particular in cultures where fertility is closely tied to status, prefer anonymity in order to maintain privacy and avoid social stigma. The current legal framework mandates anonymity, but there is a growing discussion about allowing both donors and recipients to choose identity-release options.

Religious beliefs can pose ethical dilemmas, such as when certain religions oppose the use of donor gametes. Clinics must navigate these situations carefully, respecting the individuals' beliefs while providing all necessary information and support without pressuring them into decisions that conflict with their values. Informed consent laws require that patients receive all relevant information in order to make autonomous decisions, and any failure to consider or respect religious objections could result in legal challenges or accusations of coercion. Balancing the duty to provide comprehensive care with the need to respect religious beliefs is a complex legal and ethical requirement for fertility clinics.

The ethical dilemma about psychological screening only being mandatory for donors and not intended parents could be a significant oversight of the law, as it raises questions about fairness and the comprehensive well-being of all parties involved in the reproductive process, in particular the future child. Ensuring that intended parents are also psychologically prepared for the challenges of using donor gametes could provide a more balanced and ethically sound approach to the process.

Unlike donors, who undergo rigorous psychological screening, there is no similar requirement for intended parents. This raises ethical concerns, in particular when there are doubts about the suitability of certain individuals as parents. However, clinics generally do not have the authority to prevent people from proceeding with the process based on these concerns. The lack of screening for intended parents can be troubling, especially when there are

indications of unrealistic expectations or attitudes that may not be conducive to a healthy parenting environment.

An ethical dilemma also arises when patients, often facing last-minute disappointments about their chosen donor, feel pressured to select a new donor at short notice. After extensive preparations for embryo transfer, including medical treatments and, in some cases, travelling long distances, patients may feel a sense of urgency to 'rescue' the situation. This can lead to rushed decisions, where they choose a donor after minimal research or consideration, so potentially overlooking important medical, psychological, or genetic factors. Healthcare professionals face the challenge of balancing the need to support the patient through this time-sensitive situation while ensuring that ethical standards, such as informed consent and thorough screening are not compromised during the rush to find a replacement donor.

Another ethical dilemma is when some intended parents put significant pressure on healthcare professionals to choose a donor for them – relying heavily on their expertise and seeking definitive guidance. This situation is problematic because it conflicts with the principles of patient autonomy and informed consent. Healthcare professionals, despite the pressure, remain steadfast in their ethical stance, offering extensive counselling and support but insisting that the decision must be made by the parents themselves. This dilemma highlights the challenge of maintaining professional boundaries while ensuring that the decision reflects the parents' values and preferences. It underscores the ethical need to respect patient autonomy and prevent the undue transfer of decision-making responsibilities from the patients to the professionals.

Theme 3: ***Subjective criteria for decision-making***

The decision-making process is highly personal and varies widely among individuals, with each person's unique priorities and preferences playing a significant role. A common starting point is finding a donor with physical characteristics that match the intended parents, such as eye colour or race. This is often the initial criterion used to narrow down options. Beyond physical traits, intended parents often look for a connection with the donor through shared interests or talents, such as musical abilities or athletic skills.

The speed of decision-making varies greatly. Some intended parents make quick decisions, possibly due to urgency or decisiveness, while others take longer and carefully consider their options over time. Clinics provide specific guidelines and protocols to assist

intended parents with making informed decisions. This includes providing comprehensive donor profiles and encouraging consideration of all available information. They often have a donor coordinator who supports the intended parents through the donor programme journey.

There are concerns about cases where one partner dominates the decision-making process, thereby potentially excluding the other, or where language barriers might limit full understanding. Counselling is often encouraged to ensure that both partners are fully informed and comfortable with the decision. The importance of counselling is highlighted, especially for discussing the implications of using donor gametes, such as disclosure to the child and family dynamics. There is also a concern about ensuring that intended parents have fully processed and accepted the need for donor gametes.

Selecting a donor involves evaluating various criteria such as medical history, genetic traits, and personal characteristics to find the best match. Interviews revealed that in the South African context, particularly in Durban, this process can be challenging for some patients who lack reliable internet access or the intellectual resources to navigate and assess online donor profiles effectively. These limitations force patients to rely heavily on donor coordinators to help them consider all available options and to make an informed selection. This reliance presents an ethical challenge as it places the burden on coordinators to ensure that patients' choices align with their needs and preferences while navigating potential disparities in access and information. The situation highlights the need for equitable support mechanisms to help all patients make well-informed decisions, regardless of their access to technology or their information literacy.

Intended parents prioritise different characteristics or ideals for their donors, so reflecting the diverse range of considerations that are important to them. Overall, the decision-making process for selecting donor gametes is complex and is influenced by a variety of personal, cultural, and situational factors.

Theme 4: ***Risk of designer babies versus medically necessary ART***

There is a moral question about whether intended parents are seeking a child or aiming for an idealised version of a child. This concern touches on the broader ethical debate about ‘designer babies’ and the potential for parents to prioritise specific traits over the unconditional acceptance of their child. Health professionals reported that while some intended parents may have idealised notions of finding the ‘perfect donor’, their motivations are generally driven by

having a successful pregnancy. They seek to provide their child with the best possible start in life through healthy, advantageous traits, rather than aiming to create a so-called ‘super baby’ or pursuing eugenic goals. If, however, there are concerns about the patient's motivations or understanding of the process, they are reportedly referred to a psychologist. This step is crucial for addressing underlying issues and ensuring that decisions are made from a healthy and balanced frame of mind.

The use of donor gametes is governed by strict guidelines, so requiring a medical need rather than a mere desire for specific characteristics or convenience. Healthcare professionals emphasised that they approach the use of donor gametes as a last-resort treatment, which is reserved for patients who truly need this option rather than those who merely want it to fulfil personal desires.

Theme 5: ***Anonymity and identity-release***

The opinions expressed provide a clear answer to the question about the availability of ‘identity-release’ donors versus anonymous donors at a clinic or sperm/egg bank. The clinic/bank offers only anonymous donors, in accordance with South African law, which mandates that all gamete donations remain anonymous. Donors and recipients are not permitted to identify each other. While donors are asked whether they would be open to having their information released if the law changes, most prefer to remain anonymous. The clinics currently do not facilitate identity-release donations because of the legal requirements and practical challenges. The only exception to anonymity is when recipients use a known donor, such as a friend or family member. In such cases, the clinics follow specific protocols, including joint psychological assessments and legal agreements.

The clinics expresses concerns about the logistical and legal challenges of managing identity-release donations, such as maintaining records for eighteen years. This is seen as a significant burden and risk, in particular given the lack of a central registry in South Africa. Overall, the clinics operate strictly within the current legal framework, and offer only anonymous donations and known donor arrangements. Healthcare professionals expressed satisfaction with the existing law on anonymity in South Africa, and found it supportive and beneficial for all parties involved.

Theme 6: ***Legal limitations or helpful regulations/Legal paternalism or autonomy***

There is a strong emphasis on maintaining donor anonymity, as required by South African law. However, advancements in technology, such as reverse image searching, have raised concerns about preserving this anonymity, in particular when photographs are involved. Some professionals suggest limiting the availability of photographs to avoid compromising anonymity. The use of baby or toddler photographs is still offered, and some clinics show these only in person to reduce the risk of online AI future-computation resulting in the production of adult images.

There is a concern about the absence of a legal requirement for genetic testing of donors. Some professionals advocate mandatory genetic testing to provide recipients with more comprehensive information and to ensure the safety and health of potential offspring. However, currently, there is no legal requirement for genetic testing of donors in South Africa, as is the case in some international countries such as the US. This remains a costly addition, and given South Africa's current socioeconomic climate it presents a significant challenge.

In South Africa, the law that governs donor gamete regulations, including the restriction on the number of live births per donor, is outlined in the National Health Act. Specifically, the regulation concerning the number of live births per donor is detailed in the Regulations Relating to the Use of Human Gametes and Embryos, which were published in the *Government Gazette* on 23 July 2014. The current restriction states that a gamete donor can contribute to no more than six live births. This regulation is intended to prevent overuse of any single donor's gametes and to minimise the potential genetic risks to offspring resulting from a high number of births from the same donor. However, there is an ongoing debate and there are calls to revise this rule to reflect current technological and social realities, such as the need for biological siblings. The current restriction of six live births per donor is seen as limiting, especially when families seek biological siblings. There is a push for regulations to be based on the number of families rather than the number of live births, to better accommodate sibling requests. The consensus is that this aspect of the law is outdated and needs to be revised to keep up with advancements in technology and societal changes.

The issue of discrimination in gamete donation arises when male donors are used more frequently than female donors, so reflecting an imbalance that can highlight underlying biases and inequities in the donor selection process. In South Africa, the disparity often stems from a higher demand for male gametes and challenges with recruiting and retaining female donors,

which may be influenced by cultural preferences or the perceived complexity and invasiveness of egg retrieval procedures.

Currently, South African law does not specifically address the gender disparity in donor use. The legal framework primarily focuses on anonymity, consent, and ethical practices in gamete donation, rather than ensuring equal representation between male and female donors. As a result, there are no legal limitations explicitly designed to address or rectify the imbalance between male and female donor usage. This gap can perpetuate inequities in the donor pool and may require further legal and ethical scrutiny to promote a more balanced approach in the use of ARTs. In South Africa, the legal limitations on the number of donations for male and female gamete donors are established to ensure ethical practices and safeguard donor and offspring welfare. Male donors are permitted to donate sperm up to twenty times, which is a limit set to prevent potential issues related to genetic diversity and to maintain donor anonymity, thereby reducing the risk of offspring from different donors becoming closely related. In contrast, female egg donors can donate up to six times because of the more invasive and complex nature of the egg retrieval process. This prioritises the donor's health and well-being. These legal limits aim to strike a balance between meeting the needs of ARTs and addressing ethical considerations relating to donor health and genetic risks.

The regulation disparity between male and female gamete donations links closely to the survey findings in the study, where 70 per cent of the 397 participants were males seeking sperm. This high percentage of male participants highlights a significant demand for sperm donors, which is consistent with the legal limit that allows males to donate up to twenty times. The imbalance in donation limits may possibly contribute to the overrepresentation of males in donor pools and, consequently, a higher number of males seeking sperm. This finding underscores how the legal limitations on donor numbers could influence the availability and demand for gametes, so potentially reinforcing gender-based disparities in donor recruitment and use. The survey data reflect the practical implications of these regulations, and demonstrate how they affect both donor availability and patient needs in the context of ARTs.

Most professionals revealed that they appreciated the existing legal framework, finding it empowering as it provides clear guidelines and safety protocols. They believe that these rules protect both donors and recipients adequately and this prevents unethical practices such as exploiting vulnerable donors for financial gain or misusing genetic material without proper consent. However, they noted that some oversights could be addressed to further refine the current legal framework to fit the challenges of the South African landscape.

While most professionals find the current legal framework adequate and support its provision of structure and safety, they did highlight some issues of concern in the law – suggesting the need for updates to address emerging ethical, technological, and social issues. Therefore, the experiences of healthcare professionals in South Africa's fertility industry highlight the strengths and challenges of the current reproductive laws on gamete selection. While the legal framework provides essential guidelines, in particularly on donor anonymity and informed consent, some gaps remain in addressing practical issues like limited donor availability for some groups, cultural pressures, and the rising ethical dilemmas posed by lack of a Central Donor Registry to ensure more transparency and the tracking of donor activity. These professionals emphasise that the law, although effective in protecting both donors and recipients, may require updates in order to better regulate donor selection practices, enforce genetic testing, and manage the evolving complexities brought by technological advancements which threaten to compromise anonymity laws. To ensure the continued integrity and fairness of the process, South Africa's reproductive laws must evolve to align more closely with the practical realities faced by healthcare providers and intended parents.

IV. PRESENTATION AND ANALYSIS OF DATA: SURVEY FOR INTENDED PARENTS

The analysis of the data collected from the survey completed by intended parents aims to answer my original research question about decision-making, which was:

- What are the intended parents' own *subjective criteria* when selecting a gamete donor?

Then, I follow this analysis with application to the following questions:

- Do these interests *qualify for protection* under the scope of any constitutional rights?
- What *factors* influence the choices made by intended parents, and to what extent are these factors considered in current legal frameworks?
- How much attention has been given to understanding the potential impact of gamete donor selection on the well-being and interests of the eventual *child* in South African reproductive law?

- What *ethical and legal considerations* should be considered when assessing the impact on children, and how can these be incorporated into regulatory frameworks?

In my study, descriptive statistics such as means and standard deviations were used to summarise the central tendencies and variability in the data. To further analyse the findings, several statistical tests were used. ANOVA (Analysis of Variance) was used to compare the means across multiple independent groups, so determining whether there are any statistically significant differences between them. Spearman's correlations were applied to assess the strength and direction of relationships between ordinal variables or rank-ordered data. A one-sample t-test was used to test whether the mean score of a sample was significantly different from a specific scalar value, thereby providing insight into how the sample compares to a known or hypothesised value. In addition, independent samples' t-tests were conducted to compare the means between two distinct groups, so identifying whether any significant differences exist between them. These statistical tools enabled a comprehensive understanding of the data and helped with interpreting the relationships and differences observed.

a). Demographic Profile and Gamete Preferences of Intended Parents

The following section presents an analysis of the data obtained from the surveys, and focuses on the demographic profile of the intended parents and the dominant type of gamete sought in the sample group. This analysis provides insights into the key trends and patterns observed among the participants, which are discussed in detail.

Table 2.1: Donor gametes required by intended parents

		Frequency	Per cent
Valid	sperm	292	73.6
	oocyte	79	19.9
	both	26	6.5
	Total	**397**	**100.0**

Table 2.1 (above) depicts the gamete requirements by intended parents in the sample. It is clear that most intended parents were seeking sperm gametes (73.6 per cent), although intended parents were pooled from both sperm and egg donor agencies. The data revealed that 73.6 per cent of intended parents were seeking sperm gametes while only 19.9 per cent were seeking

oocytes. This difference can be attributed to several factors: sperm donation is typically less expensive and less invasive than oocyte donation, which involves more complex procedures and higher costs.

Table 2.2 (below) presents the demographic information of intended parents, so offering insights into their age, gender, marital status, education level, and other relevant factors. This information offers a clearer understanding of who the intended parents are and how their backgrounds may shape their preferences and priorities in selecting donors.

Table 2.2: Demographics of intended parents seeking donor gametes

Variable	Categories	N (%)
Gender	*Female*	117 (29.5)
	Male	279 (70.3)
	Unspecified /non-binary	1 (0.3)
Age	*<25*	97 (24.4)
	25–29	110 (27.7)
	30–34	65 (16.4)
	35–39	62 (15.6)
	40+	63 (15.9)
Race group	*Black*	303 (76.3)
	Coloured	28 (7.1)
	Indian	12 (3.0)
	White	53 (13.4)
	Other	1 (0.3)
Sexual orientation	*Heterosexual*	162 (40.8)
	Homosexual	90 (22.7)
	Bisexual	17 (4.3)
	Other	128 (32.2)
Education	No formal education	37 (9.3)
	Some schooling	56 (14.1)
	Grade 12	169 (42.6)
	Post-matric certificate	42 (10.6)
	Undergraduate degree/diploma	41 (10.3)
	Postgraduate degree/diploma	52 (13.1)
Employment status	*Employed full-time*	123 (31.0)
	Employed part-time	42 (10.6)
	Unemployed	150 (37.8)
	Full-time student	26 (6.5)
	Self-employed	56 (14.1)

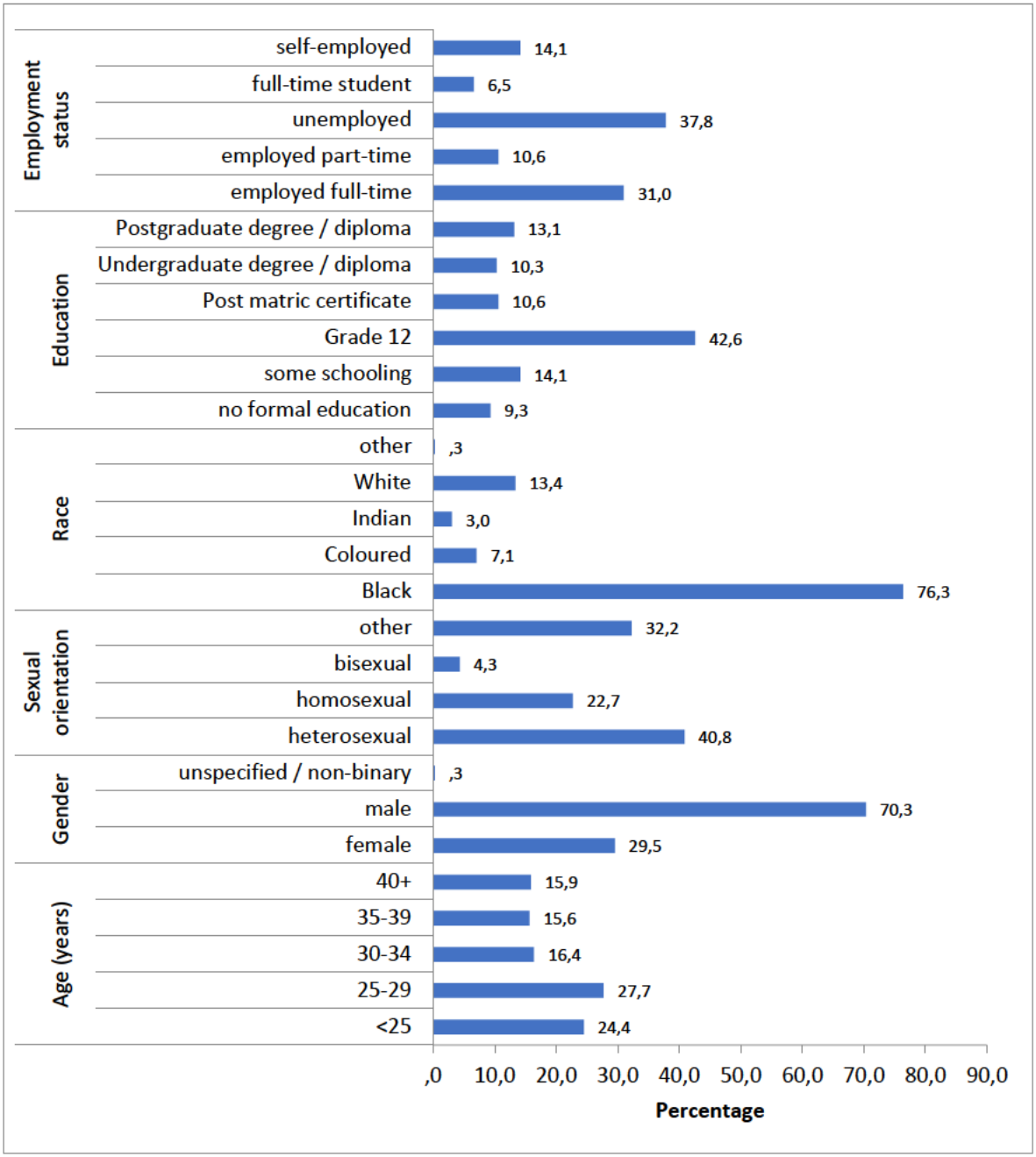


Figure 2. 1 Demographics of intended parents seeking donor gametes

Section 1: Demographics of intended parents

Figure 2.1 depicts the various demographic factors (employment status, education, race, sexual orientation, gender, and age) of intended parents seeking donor gametes. It shows how the proportion of intended parents scored each factor.

Race

Figure 2.1 shows that most of the population is Black (76.3 per cent). Intended parents may consider racial and ethnic matching when selecting a donor, in particular if they wish the child to reflect their own racial background. South Africa's demographic makeup is predominantly Black, and the majority Black intended parents may reflect the broader population distribution in the country.

Education level

The most common educational attainment among this population is a Grade 12 qualification (42.6 per cent), followed by those with some schooling (14.1 per cent) and those with no formal education (9.3 per cent). Those with higher levels of education (Undergraduate: 10.3 per cent, Postgraduate: 13.1 per cent) are less represented. Educational attainment is often correlated with socioeconomic status. Intended parents with lower levels of education may have fewer financial resources, so influencing their ability to afford more expensive or higher quality donor options. This economic limitation could affect the range of donors they can consider, possibly leading them to prioritise cost over other factors such as advanced genetic testing or the donor's educational background. Given this demographic profile, donor matching services and fertility clinics may need to tailor their communication and support services to accommodate the varying educational levels of intended parents. Providing more accessible information, offering personalised guidance, and ensuring that all parents, regardless of educational background, can make well-informed decisions, are crucial steps. This could include using plain language in donor profiles, offering additional counselling sessions, and emphasising the availability of expert advice throughout the selection process.

Employment status

The data shows that 37.8 per cent of the population is unemployed, while 31.0 per cent are full-time employed. Employment status could be a factor in the selection process, as it might reflect

stability and social standing. The high unemployment rate could influence the socioeconomics of intended parents' donor package options. Also interesting in that parents are possibly trying to conceive without adequate employment to support a child. South Africa has a high unemployment rate (around 32 per cent).[400] This significant percentage of unemployed intended parents may mirror the broader economic challenges in the country, where structural unemployment is prevalent. The fact that a substantial portion of unemployed individuals are still seeking fertility treatments suggests that fertility services might be prioritised, even among those who are not currently employed. It could indicate that some intended parents are willing to make significant financial sacrifices to access these services, despite their unemployment. The fact that unemployed individuals are still seeking fertility treatments in South Africa could also be attributed to a communal approach to childbearing as seen in African communities, where the extended family and broader community often contribute resources and support. This collective involvement can help offset financial barriers, so making fertility treatments a viable option even for those who are not currently employed. In Africa, pregnancy is highly valued because children are seen as wealth, lineage progenitors, and a retirement investment.[401] Therefore, producing a child is a priority for many South Africans. Cultural competence is a prerequisite for culturally congruent care and is defined as the ability of an individual to bridge cultural gaps in caring, working with cultural differences, and enabling the clients and families to achieve meaningful and supportive care.[402] Therefore, understanding the challenges that are unique to South African communities is essential for policymakers.

Alternatively, the fact that a substantial portion of the population is unemployed may simply reflect that the unemployed respondents who participated in the survey had more available time, while employed intended parents could be underrepresented because they were too busy with work to complete the survey.

Sexual orientation

The sexual-orientation profile of intended parents reveals a diverse representation, with heterosexual individuals constituting the largest group at 40.8 per cent, followed by homosexuals at 22.7 per cent, and a notable 32.2 per cent identifying as 'other'. The presence

400 Unemployment in South Africa (2024) available at https://www.gov.za/news/media-statements/statistics-south-africa-official-unemployment-rate-third-quarter-2024-12-nov#:~:text=The%20official%20unemployment%20rate%20was,persons%20to%208%2C0%20million.

401 N B Chimbatata & C Malimba 'Infertility in sub-Saharan Africa: A female's issue for how long? A qualitative review of literature' (2016) 4(8) *Open Journal of Social Sciences* 96–102.

402 M M Leininger *Transcultural Nursing: Concepts, Theories, Research and Practices* (1995).

of a large ‘other’ category, which constitutes 32.2 per cent of the sample, raises questions about the understanding of the terms used in the survey. It is possible that respondents who identified as ‘other’ may not fully grasp the definitions of ‘heterosexual’ and ‘homosexual’. This could be particularly relevant given that a significant portion of the respondents have a maximum education level of Grade 12, which may limit exposure to comprehensive sexual-orientation education. To enhance clarity, the survey could have benefited from providing definitions or examples (e.g., including ‘straight’ in parentheses next to heterosexual and ‘same-sex’ next to homosexual). This may have helped respondents feel more confident about their selection and may have reduced the size of the ‘other’ category. In addition, in the gender identification results, only 0.3 per cent identified as non-binary, indicating that almost all respondents classified themselves as either male or female. This further reinforces the possibility that such a large ‘other’ group is invalid, as the lack of respondents identifying outside the binary categories points to a predominantly traditional understanding of gender and sexual orientation within this population.

When I calculated the percentages of sexual-orientation categories excluding the ‘other’ group, the total number of respondents who identified as heterosexual, homosexual or bisexual was 269. In this group, 60.2 per cent identified as heterosexual, 33.5 per cent as homosexual, and 6.3 per cent as bisexual. This revised percentage distribution underscores the significant proportion of respondents who identify as heterosexual – so providing a more realistic representation of sexual orientation in the surveyed population, and this is more representative of South Africa at large.

Gender

It is known that 50 per cent of infertility cases are male factor-related, which is largely determined by semen parameters with reference to WHO reference material.[403] However, the data from this study reveal a significant gender imbalance among intended parents seeking donor gametes, with 70.3 per cent being male and 29.5 per cent being female. This imbalance is further reflected in the type of gametes sought after, with 73.6 per cent of intended parents seeking sperm donors, compared to 19.9 per cent seeking oocytes and 6.5 per cent seeking both. The fact that most respondents are men seeking donor sperm likely points to a high proportion of same-sex male couples or single men pursuing parenthood through sperm donation or, alternatively, male partners in heterosexual couples with fertility issues. However,

403 WHO. *WHO Laboratory Manual for the Examination and Processing of Human Semen* (2021).

only 22.7 per cent of participants identified as homosexual, indicating that sexual orientation is not the primary factor driving the decision to seek donor sperm. This finding is interesting as it highlights the demand for sperm donors in reproductive assistance by heterosexual men. The significant skew towards male intended parents reflects a specific demographic group whose needs are driving trends in gamete selection.[404]

High male infertility in South Africa is primarily driven by deteriorating semen parameters, including reduced progressive motility and abnormal sperm morphology.[405] Studies have documented a significant decline in these factors in recent years, exacerbated by aging which leads to degenerative changes in the reproductive system and increased oxidative stress.[406] Most of this sample group was relatively young which means that age is not fully responsible for infertility among these men. Environmental factors such as pollution and pesticide exposure are said to further compound the issue, thereby contributing to lower sperm quality. These combined biological and environmental influences underscore the complexity of male infertility in South Africa, so highlighting the need for comprehensive approaches to address and mitigate these challenges.

Furthermore, the males are mostly Black men. The high percentage of Black male intended parents could reflect societal norms or economic factors where men are more likely to seek gametes or be willing to participate in the study than women. Cultural and societal norms in the Black South African community could encourage men to take a more active role in family planning and reproductive decisions. Women traditionally play a more submissive role and are often not involved in healthcare decisions in the household and men are often the primary or final decision-makers, in particular when those decisions have financial implications.[407]

Traditional views on masculinity and family responsibilities could lead Black South African men to be more engaged in seeking gamete donation services and to participate in related studies. Traditional norms of masculinity require men to be the breadwinners, the head

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404 C L R Barratt, L Björndahl, C J De Jonge et al 'The diagnosis of male infertility: An analysis of the evidence to support the development of global WHO guidance – challenges and future research opportunities' (2017) 23(6) *Human Reproduction Update* 660–680.

405 N Kumar & A K Singh 'Trends of male factor infertility, an important cause of infertility: A review of literature' (2015) 8 *Journal of Human Reproductive Sciences* 191–196.

406 E N Akang, C S Opuwari, S Enyioma-Alozie et al 'Trends in semen parameters of infertile men in South Africa and Nigeria' (2023) 13(1) *Scientific Reports* 6819.

407 S Chace Dwyer, S Mathur, K Kirk et al '"When you live in good health with your husband, then your children are in good health…." A qualitative exploration of how households make healthcare decisions in Maradi and Zinder Regions, Niger' (2022) 22(1) *BMC Public Health* 1350.

of the household and the ultimate decision-maker,[408] which may be the driving force behind their active approach in this study.

According to healthcare professionals that participated in the interviews, it was confirmed that many of their patients are Black males and fertility coordinators reported that they often deal directly with the male counterparts during the fertility journey.

Age

The age distribution is skewed towards younger individuals, with the largest group being aged 25–29 years (27.7 per cent), followed by those under 25 (24.4 per cent). Considering that most participants seeking donor gametes were less than 29 years of age is interesting in that the younger intended parents may turn to donor gametes as part of fertility treatments, especially if they face challenges such as early-onset infertility, genetic conditions that could be passed on to children, or if they are same-sex couples who require a donor.

The general profile of a South African intended parent seeking donor gametes is characterised by several key demographic factors. Most intended parents are young Black males, so reflecting the racial composition of the broader population, with Black individuals constituting 76.3 per cent. This majority suggests a significant focus on racial and ethnic matching, as many intended parents may wish the child to mirror their own racial background. The younger age profile, in particular among those aged 25–29, indicates that many intended parents could be dealing with early-onset fertility challenges or are proactively seeking fertility assistance owing to genetic concerns or same-sex partnerships requiring opposite-gender gametes. In addition, the relatively low educational attainment – where most hold only a Grade 12 qualification – suggests that while educational achievement may not be a top priority, economic stability is likely a concern – as evidenced by the high unemployment rate (37.8 per cent). This economic strain may influence their decision-making, so pushing them to consider affordability in their donor selection process. The fact that most intended parents are male (70.3 per cent) could reflect societal norms where men are more involved in fertility decisions, or it could indicate a higher willingness among men to seek fertility solutions. Moreover, the emphasis on heterosexual identification (40.8 per cent) alongside a notable proportion of homosexual individuals (22.7 per cent) suggests that the primary motivator for seeking donor gametes is infertility, although there is also significant demand in the LGBTQ+ community.

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408 H P Khosa-Nkatini, W Buqa & N Machimana 'Gender role changes in African households: A challenge to theology and psychology' (2023) 57(1) *In die Skriflig* 1–7.

Overall, this profile reflects the intersecting influences of race, age, gender, education, and economic factors in shaping the preferences and challenges faced by South African intended parents in the gamete donation process.

It can therefore be concluded that the data on the demographics of intended parents in South Africa suggests that intended parents selecting donor gametes seem to reflect the relative proportions of race groups in South Africa at large. I was expecting affluent White females to be the dominant patient group; however, this was clearly not the case. Studies indicate that male factors alone account for approximately 30 per cent of infertility cases, while around 50 per cent of couples experience infertility owing to male factors.[409] Therefore, it is possible that more men struggle with infertility than was initially assumed to be the case at the start of this study.[410] The dominant racial group, education levels and gender distribution may all play significant roles in shaping donor selection choices.

Table 2.3: Type of gamete by gender of intended parent

Gender	Responses as Frequency (%)			X^2	df	p-value
	sperm	**oocyte**	**both**			
Female	39 (33.3)	63 (53.8)	15 (12.8)	141.972	2	<.001
Male	252 (90.3)	16 (5.7)	11 (3.9)			
TOTAL	291 (73.5)	79 (19.9)	26 (6.6)			

The analysis of the relationship between gender and the type of gametes intended parents seek (Table 2.3) reveals distinct gender-based preferences and underlying reasons for these patterns. There is a significant relationship between gender and type of gametes required ($p<.001$) with a significant proportion of female intended parents seeking either oocytes (53.8 per cent) or

409 B Huang, Z Wang, Y Kong et al, 'Global, Regional and National Burden of Male Infertility in 204 Countries and Territories Between 1990 and 2019: An Analysis of Global Burden of Disease Study' (2023) 23 BMC Public Health 2195.

410 P Diaz, A Dullea, K Y Chu et al 'Future of male infertility evaluation and treatment: Brief review of emerging technology' (2022) 169 *Urology* 9–16.

both oocytes and sperm (12.8 per cent). Furthermore, a significant proportion of male intended parents seek sperm (90.3 per cent).

In contrast, with male intended parents overwhelmingly seeking sperm it likely reflects the reproductive roles where males, in particular those who have no viable sperm of their own, are seeking to find sperm donors. This scenario is common in cases of severe male infertility, same-sex relationships, or situations where sperm is needed for surrogacy arrangements.

The data underscores strong gender-specific trends in gamete preferences, with females predominantly seeking oocytes to compensate for a lack of viable eggs, and males predominantly seeking sperm owing to infertility or the nature of their reproductive circumstances.

Table 2.4: Type of gamete by educational level

Education	Responses as Frequency (%)			X^2	df	p-value
	sperm	**oocyte**	**both**			
Tertiary Education	87 (64.4)	43 (31.9)	5 (3.7)	19.522	2	<.001
Secondary/Primary Education	205 (78.2)	36 (13.7)	21 (8.0)			
TOTAL	292 (73.6)	79 (19.9)	26 (6.5)			

Table 2.4 (above) provides insights into the types of gametes that intended parents are seeking, categorised by their educational level. For respondents with tertiary education, 64.4 per cent identified as seeking sperm, 31.9 per cent expressed a preference for oocytes, and only 3.7 per cent were interested in both types of gametes. This indicates a relatively strong inclination towards sperm among this group while showing a lesser interest in oocyte procurement. Conversely, among those with secondary or primary education, a higher percentage, 78.2 per cent, identified as seeking sperm, followed by 13.7 per cent for oocytes, and 8.0 per cent for both.

The analysis reveals a statistically significant relationship between educational level and the type of gametes sought, with a p-value of less than 0.001. This suggests that as educational levels increase the interest in oocytes also rises, albeit modestly. Notably, the

higher number of individuals with secondary or primary education seeking sperm may reflect traditional gender roles and understandings of fertility and reproduction that are prevalent in less-educated demographics.

This comparison indicates that education may play a critical role in shaping the preferences of intended parents regarding gamete acquisition. Higher educational attainment seems to correlate with a more nuanced understanding of reproductive options, so potentially leading to greater openness in considering both sperm and oocyte procurement. Furthermore, those with tertiary education might be more informed about the implications and options in reproductive technologies, thereby diversifying their preferences. These findings highlight the significance of education in influencing reproductive choices and suggest that educational interventions could help broaden the perspectives of individuals in lower educational brackets regarding reproductive assistance and associated choices.

Section 2: Selection criteria

This section of the survey aimed to identify which criteria and traits were most important to intended parents when selecting a donor. This included physical characteristics, medical and genetic factors, education and career, personality and interests, ethnicity and culture, age and physical health, and identity. How recipients choose donors and which donor attributes are important has been a prime concern of many scholars.[411,412]

Physical criteria: Intended parents often consider a range of donor attributes when making selection decisions. These attributes can be grouped into several key categories, each encompassing specific factors that influence preferences and choices.

2.1 PHYSICAL CHARACTERISTICS (PHYS 1-12)

2.2 MEDICAL AND GENETIC FACTORS (MEDGEN 1-4)

2.3 EDUCATION AND CAREER (ED 1-3)

2.4 PERSONALITY AND INTERESTS (PERS 1-3)

2.5 LIFESTYLE AND CULTURE (LIFEHAB1 & CULT1)

2.6 AGE AND PHYSICAL HEALTH (HEALTH 1-3)

2.7 IDENTITY (IDENT 1-3)

411 C Jones 'Looking like a family: Negotiating bio-genetic continuity in British lesbian families using licensed donor insemination' (2005) 8(2) *Sexualities* 221–237.

412 K A Wong 'Donor conception and "passing," or; why Australian parents of donor-conceived children want donors who look like them' (2017) 14(1) *Bioethical Inquiry* 77–86.

2.1 PHYSICAL CHARACTERISTICS

The data from the survey shed light on the physical attributes that intended parents prioritise when selecting a gamete donor. The mean scores provide crucial insights into which characteristics are deemed to be significant and which are less so, revealing a nuanced hierarchy of preferences among intended parents. The Likert scale used is 1 – not at all important *to* 5 = extremely important. This aimed to provide further insight into the profile for intended parents.

Table 2.5: Importance of physical characteristics for intended parents

How important is it ...	for the donor to physically resemble you or your partner?	3.17
	for you to see adult photographs of the donor?	2.99
	for the donor to be a physically attractive adult?	2.95
	for the donor to be of a specific race?	2.91
	for the donor to have been a beautiful baby/child?	2.88
	for the donor to have a sporty physique?	2.80
	for the donor to have a specific skin tone/complexion?	2.78
	for the donor to have superior physical features to you and/or your partner?	2.77
	for the donor to have a specific eye colour?	2.66
	for the donor to be of a specific height? (e.g., tall)	2.64
	to have access to voice clips or notes from the donor?	2.61
	for the donor to have a specific hair colour?	2.60

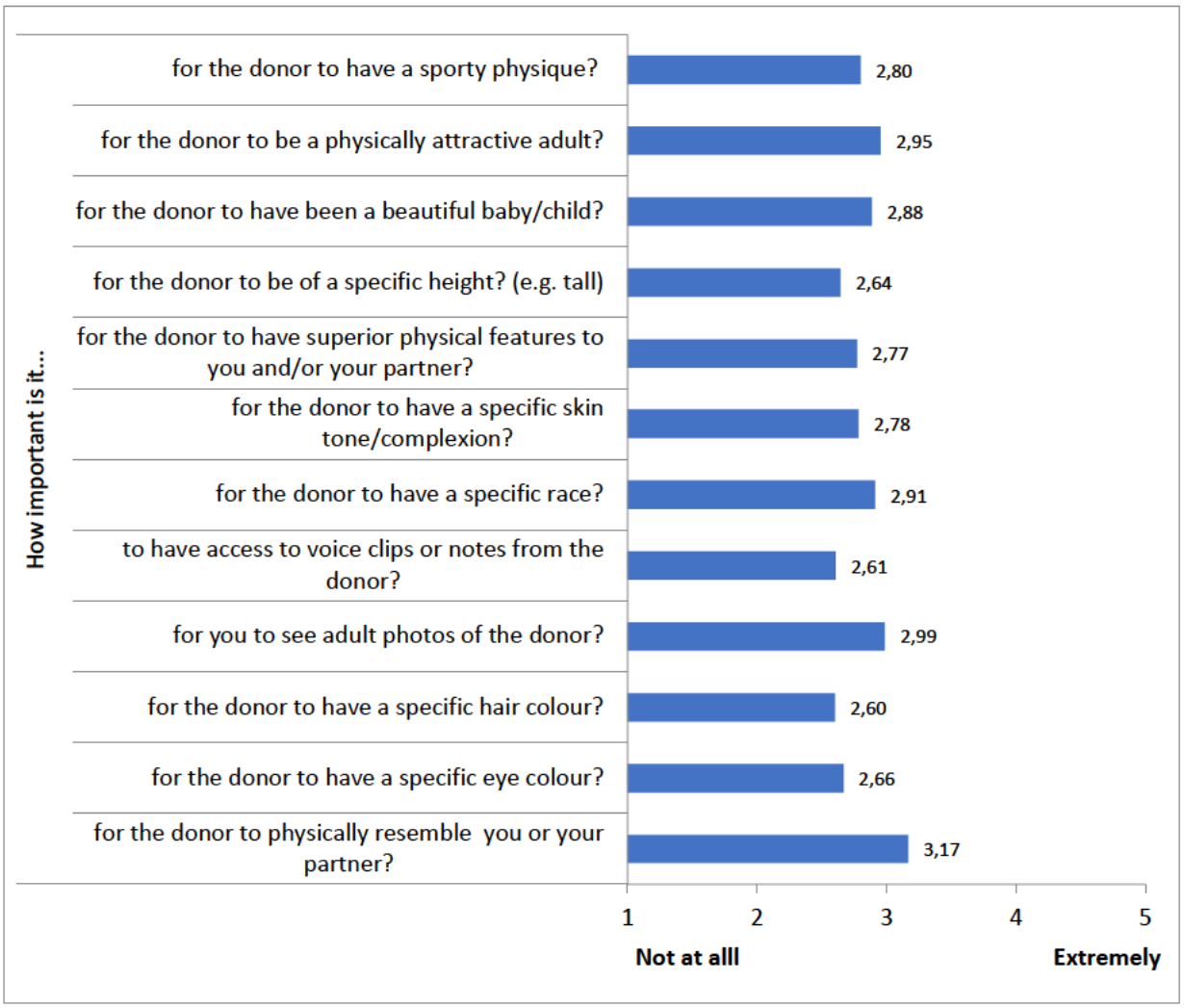


Figure 2.2: Importance of physical characteristics for intended parents

The mean score of 3.17 for the importance of *physical resemblance* to the intended parents or their partner stands out as the only score significantly above 3.00, so emphasising its slightly greater importance in the gamete donor selection process. This reflects a slight preference among intended parents for their child to have physical traits similar to their own or their partner. This desire for continuity in appearance likely stems from a wish to create a sense of familial connection and a genetic link. The emphasis on physical resemblance suggests that many parents view a child's appearance as a crucial aspect of their identity and familial heritage. This preference for similarity may also stem from a broader desire to maintain a coherent family image and to enhance the feeling of a shared genetic legacy. According to Klock and Maier, physical and personality resemblance are prominent concerns for parents and the reason behind the wish for resemblance is secrecy.[413] The significant focus on physical

[413] S C Klock & D Maier 'Psychological factors related to donor insemination' (1991) 56 *Fertility and Sterility* 489–495.

resemblance highlights how deeply appearance influences parental decision-making on gamete donation, so underscoring the role of genetics in the envisioned family dynamic.

In contrast, attributes with scores below 3 are viewed as significantly less important. Factors like specific eye colour (2.66), height (2.64), and access to voice clips or notes from the donor (2.61) fall into this lower range, so indicating that while these details are considered, they do not play a critical role in the decision-making process. The lowest score, 2.60, for the donor's hair colour, highlights that this attribute is the least influential in the selection criteria. This lower prioritisation suggests that while some details are factored into the decision, they are overshadowed by more prominent concerns such as physical resemblance and overall attractiveness. The data illustrates a slight distinction between attributes that are prioritised, in particular physical resemblance and aesthetic qualities, and those that are deemed less critical, emphasising that intended parents place more weight on factors that directly affect the child's visual connection to the family.

Attributes related to the donor's physique, such as having a sporty build (2.80) and a specific skin tone or complexion (2.78) are somewhat important, reflecting a preference for certain physical qualities that align with the parents' ideals. The desire for the donor to have superior physical features to the intended parents (2.77) indicates that some parents are looking for traits that may enhance their child’s appearance – but most are not. The results reflect that physical appearance and similarity to the intended parents are important considerations in donor selection, with aesthetic qualities and continuity in looks being the most prioritised attributes.

Table 2.6: Significant mean scores of physical characteristics of importance to intended parents by gender

Construct	Category	n	Mean (SD)	t	df	p-value
PHYS6 How important is it for the donor to be of a specific race?	Female	117	3.48 (1.664)	4.426	394	<0.001
	Male	279	2.68 (1.635)			
PHYS7 How important is for the donor to have a specific skin tone/complexion?	Female	117	3.16 (1.497)	3.168	233.988	0.002
	Male	279	2.63 (1.617)			

The data in the table (above) highlights significant differences in preferences between female and male intended parents when selecting a gamete donor. The preferences are broken down by various attributes, with the independent t-test used to determine the statistical significance of these differences.

Race and skin tone/complexion

PHYS 6: Race - Females regard the race of the donor to be significantly more important (mean = 3.48) compared to males (mean = 2.68) ($p<0.001$). This suggests that women are more likely to prioritise racial congruence with the donor.

PHYS 7: Skin Tone/Complexion - Similarly, females regard the donor's skin tone or complexion (mean = 3.16) to be more important than males (Mean = 2.63) ($p=0.002$), with the difference also being significant.

The gender preference differences may be driven by a desire for the child to resemble the parents more closely, particularly in cases where the mother may be more concerned with maintaining a cultural or familial connection through physical appearance.[414] Women may also be more sensitive to societal pressures or the cultural significance of racial and skin tone congruence in their communities, which could influence their preferences.[415]

Table 2.7 (below) presents relationships between race and donor selection criteria, and offers insight into how racial background influences the priorities and preferences of intended parents in choosing gamete donors. Understanding these correlations is necessary to ensure that fertility services can cater to the diverse needs and values of different racial groups, so allowing for more culturally sensitive and personalised reproductive care. In addition, these insights can help policymakers and fertility clinics address potential disparities and ensure equitable access to reproductive assistance across various racial communities.

414 A Indekeu 'Parent's expectations and experiences of resemblance through donor conception' (2015) 34(4) *New Genetics and Society* 398–416.

415 T Moll 'Making a match: Curating race in South African gamete donation' (2019) 38(7) *Medical Anthropology* 588–602.

Table 2.7: Relationship between race and physical characteristics of donors by intended parents

Construct	Category	n	Mean (SD)	F	df1; df2	p-value
PHYS6 How important is it for the donor to be of a specific race?	Black	303	2.83 (1.664)	8.005	3;392	0.000
	Coloured	28	1.96 (1.319)			
	Indian	12	3.25 (1.485)			
	White	53	3.74 (1.654)			
PHYS10 How important is it for the donor to have been a beautiful baby/child?	Black	303	2.98 (1.560)	2.673	3;392	0.047
	Coloured	28	2.79 (1.500)			
	Indian	12	3.17 (1.193)			
	White	53	2.36 (1.331)			

The analysis of gamete donor selection criteria reveals notable differences based on the race of the intended parents. For the importance of a donor's specific race, White intended parents place the highest value on racial similarity (mean = 3.74), followed by Indian (mean = 3.25), Black (mean = 2.83), and Coloured (mean = 1.96) parents. This suggests that White and Indian parents might prioritise racial identity more because of cultural or identity-related reasons, while Black and Coloured parents place less emphasis on race. When it comes to the donor's beauty as a child, Indian intended parents rate this criterion the highest (mean = 3.17), whereas White intended parents rate it the lowest (mean = 2.36). This variation may reflect different cultural standards of beauty and varying levels of importance placed on physical appearance.

Table 2.8: Importance of medical and genetic factors for intended parents

It is important ...	n	Mean	Standard deviation	t	df	p-value
MedGen1 How important is it for the donor to have a clear medical history?	397	3.75	1.553	9.600	396	<0.001
MedGen2 How important is it for the donor to be genetically tested to screen for any inheritable genetic disorders?	397	3.76	1.524	9.978	396	<0.001
MedGen3 How important is it to know whether the donor has successfully donated before?	397	3.23	1.594	2.865	396	0.004
MedGen4 How important it to know whether the donor has previously had children?	397	3.19	1.621	2.322	396	0.021

The data reveal that intended parents place a strong emphasis on certain medical and genetic factors when selecting a gamete donor. Among the surveyed criteria, two factors emerged as being particularly critical: the donor's clear medical history and the need for genetic testing for inheritable genetic disorders, with mean scores of 3.75 and 3.76, respectively. These scores indicate that parents are significantly concerned about the health and genetic background of the donor, so underscoring a profound understanding of the implications that these factors have for the well-being of their future child.

The importance of a clear medical history is paramount for intended parents, as it is a foundational aspect of informed decision-making. A comprehensive medical history allows parents to assess potential health risks that may be inherited by their child. Concerns about genetic predispositions to diseases, chronic conditions, or other hereditary health issues are prevalent among prospective parents who want to mitigate risks. The emphasis on medical history is not only about the potential immediate health of the child but also reflects an overarching concern for long-term well-being and quality of life. By ensuring that the donor has a documented and transparent medical history, intended parents can align their choices with their fundamental desire to provide a stable, healthy environment for their child.

Similarly, the importance of genetic testing highlights intended parents' proactive approach to addressing inherited disorders. With a mean score of 3.76, this criterion underscores the need to ensure that the donor should be screened for inheritable genetic disorders. Genetic testing can uncover a range of potential health issues, from carrier status of common conditions to rare genetic disorders. In an era of advanced medical science, intended parents recognise the value of genetic insights as being crucial in pursuing informed parenting. Individuals with a tertiary education rated this need even more highly compared to those with secondary or primary education, so likely reflecting a deeper understanding of genetics and a greater appreciation for the implications of hereditary disorders. Access to genetic testing results would equip them with the knowledge necessary to make educated choices about donor selection, so creating a sense of security regarding the child's future health. This consideration not only speaks to individual well-being but also carries societal implications, as informed choices can potentially reduce the prevalence of genetic disorders in future generations.

While the focus on medical history and genetic testing stands out, the importance of knowing whether the donor has successfully donated before (mean = 3.23) and whether the donor has previously had children (mean = 3.19) also reflect nuanced concerns among intended parents. These factors can influence the perceived viability and reliability of the donor. A history of successful donations could suggest that a donor is fertile and in good health, so reassuring intended parents of a likely successful outcome. Similarly, knowing whether a donor has children can provide insights into the donor's reproductive capability and overall health profile. It may also ease concerns about the impact of a donor’s genetic contributions to future children, thereby offering a form of validation of genetic compatibility.

The results suggest that the emphasis placed on medical and genetic factors in the donor selection process has significant implications. It not only shapes the immediate choices that intended parents make but also affects the long-term outcomes for the child. As prospective parents weigh these considerations, they are actively participating in a responsible parenting framework that prioritises health and well-being from the outset. Furthermore, this focus on medical and genetic factors reflects broader societal trends towards precision in reproductive choices, where informed decisions are increasingly valued. As the field of reproductive technology continues to evolve, the integration of comprehensive medical and genetic evaluations will likely play an even more prominent role in donor selection processes, so ultimately enhancing the overall health narratives of future families.

Table 2.9: Significant mean scores of medical and genetic factors of importance to intended parents by gender

Construct	Category	n	Mean (SD)	t	df	p-value
MedGen1 How important is it for the donor to have a clear medical history?	Female	117	4.43 (1.124)	6.721	307.610	<.001
	Male	279	3.47 (1.616)			
MedGen2 How important is it for the donor to be genetically tested to screen for any inheritable genetic disorders?	Female	117	4.44 (1.070)	6.984	317.775	0.000
	Male	279	3.48 (1.595)			
MedGen3 How important is it to know whether the donor has successfully donated before?	Female	117	3.75 (1.479)	4.310	394	0.000
	Male	279	3.01 (1.595)			
MedGen4 How important it to know whether the donor has previously had children?	Female	117	3.62 (1.553)	3.409	394	0.001
	Male	279	3.01 (1.620)			

MedGen1: Clear Medical History – Females value a clear medical history in a donor significantly higher (mean = 4.43) than males (mean = 3.47) ($p<0.001$). This indicates that women are more cautious about the donor's health background than men.

MedGen2: Genetic Testing for Disorders – Females also show a stronger preference for the donor being genetically tested for inheritable disorders (mean = 4.44) compared to males (mean = 3.48), with a significant difference ($t=6.984$),($p<0.001$) The heightened medical concern among females could be attributed to a greater focus on the health and well-being of the future child, so potentially reflecting an instinctive drive to minimise health risks. Women may also feel more responsible for ensuring the genetic integrity of the child, so leading to a more cautious approach in selecting a donor.

It is noteworthy that men are less concerned about the genetic screening of donors than women. Genetic screening is a critical aspect of selecting a donor because it helps identify potential hereditary disorders or health issues that could affect the child. If men are not placing as much emphasis on this aspect, they may be underestimating the importance of ensuring the long-term health and well-being of the child. This could lead to choosing a donor with unknown or undisclosed genetic risks, so potentially resulting in significant medical challenges for the child in the future.

One possible reason for this difference could be a lack of awareness or understanding of the importance of genetic factors in reproductive health.[416] Men may not be as familiar with the implications of genetic inheritance or could assume that the chances of inheritable disorders are low, so leading to a more relaxed approach.

In addition, societal roles and expectations could play a part. Traditionally, women have been more involved in reproductive health decisions, which might make men feel less responsible for or engaged in the intricacies of donor selection.[417]

[416] M Alotaibi 'Parental genetic knowledge and attitudes toward childhood with genetic disorders' (2024) 15 *Frontiers in Genetics* 1434322.

[417] C J de Jonge, SA Gellatly, MH Vasquez-Levin et al 'Male attitudes towards infertility: Results from a global questionnaire' (2023) 41(1) *World Journal of Men's Health* 204–214.

Table 2.10: Medical and genetic factors of importance to intended parents by gametes sought

		N	Mean	Std. Deviation	t	df	p-value
MedGen1 How important is it for the donor to have a clear medical history?	Sperm	292	3.57	1.603	9.600	396	<0.001
	Oocyte	79	4.37	1.211			
	Both	26	3.88	1.451			
	Total	397	3.75	1.553			
MedGen2 How important is it for the donor to be genetically tested to screen for any inheritable genetic disorders?	Sperm	292	3.59	1.578	9.978	396	<0.001
	Oocyte	79	4.42	1.139			
	Both	26	3.69	1.436			
	Total	397	3.76	1.524			
MedGen3 How important is it to know whether the donor has successfully donated before?	Sperm	292	3.12	1.578	2.865	396	0.004
	Oocyte	79	3.66	1.584			
	Both	26	3.15	1.642			
	Total	397	3.23	1.594			
MedGen4 How important it to know whether the donor has previously had children?	Sperm	292	3.07	1.616	2.322	396	0.021
	Oocyte	79	3.76	1.512			
	Both	26	2.77	1.657			
	Total	397	3.19	1.621			

Importance of donor having a clear medical history (MedGen1)

Respondents rated the donor having a clear medical history as being significantly important (mean = 3.75, p<.001). Those seeking oocytes rated this as significantly more important (mean = 4.37) than those seeking sperm (mean = 3.57, p<0.001). Respondents likely rated a donor's clear medical history as significantly important because it provides assurance about the potential risks of genetic disorders, medical conditions, and infectious diseases being passed on to their future child. A clear medical history allows intended parents to make informed decisions about their reproductive choices, so minimising the likelihood of unexpected health issues arising in their child. This concern is particularly relevant in the context of gamete donation, where the donor's medical history is not personally known to the intended parents,

and a lack of transparency could lead to unforeseen consequences. By prioritising a donor's clear medical history, respondents seek to mitigate these risks and ensure the best possible outcomes for their child's health and well-being.

Importance of donor being genetically tested for inheritable disorders (MedGen2)

Respondents rated the donor being genetically tested to screen for any inheritable genetic disorders to be significantly important (mean = 3.76, p<.001). Those seeking oocytes rated this as significantly more important (mean = 4.42) than those seeking sperm (mean = 3.59, p=.000). Respondents rated genetic testing of the donor to be significantly important because it helps identify potential genetic disorders that could be passed on to their child. This concern is driven by the desire to minimise the risk of their child inheriting a genetic condition that could affect the child's quality of life, health, and well-being.

Importance of knowing whether the donor has successfully donated before (MedGen3)

Respondents rated the importance of knowing whether the donor had successfully donated before as being significantly important (mean = 3.23). Respondents rated the importance of knowing whether the donor had successfully donated before as highly important because prior successful donations may indicate the donor's fertility and ability to contribute viable gametes. This assurance can provide intended parents with the confidence that the donor's genetic material has previously resulted in healthy offspring, so potentially increasing the likelihood of a successful pregnancy. In addition, previous successful donations can reduce uncertainties about the donor's medical and genetic viability, thereby helping intended parents feel more secure about the outcome of their assisted reproduction journey.

Importance of knowing whether the donor has previously had children (MedGen4)

Respondents rated knowing whether the donor had previously had children as being significantly important (mean = 3.19, p=0.021). Those seeking oocytes rated this as significantly more important (mean = 3.76) than those seeking sperm (3.07). Respondents rated it significantly important to know whether a donor had previously had children because this information provides reassurance about the donor's proven fertility, which can be seen as an indicator of genetic and reproductive health. Also, knowing that a donor has had healthy children could alleviate concerns about potential genetic risks or unforeseen health issues that could affect offspring. For intended parents, the knowledge of the donor's prior successful

reproduction can boost confidence about the likelihood of achieving a successful outcome with the donor gametes, so aligning with their goal of having a healthy child.

Table 2.11 (below) illustrates the relationship between race and the importance placed on a donor's clear medical history, and elucidates how racial background shapes the priorities and preferences of intended parents when selecting gamete donors.

Table 2.11: Relationship between race and medical criteria by intended parents

Construct	Category	n	Mean (SD)	F	df1; df2	p-value
MedGen1 How important is it for the donor to have a clear medical history?	Black	303	3.68 (1.590)	5.415	3;392	0.001
	Coloured	28	3.11 (1.524)			
	Indian	12	3.83 (1.403)			
	White	53	4.43 (1.135)			

Regarding the importance of a clear medical history, White intended parents place the greatest emphasis (mean = 4.43), followed by Indian (mean = 3.83), Black (mean = 3.68) and Coloured (mean = 3.11) parents. This trend indicates that White parents are particularly concerned about the donor's health background, potentially owing to a heightened awareness of genetic risks, while Indian and Black parents also value medical history but may prioritise other aspects more.

2.3 EDUCATION AND CAREER

Table 2.12: Importance of education and career factors for intended parents

It is important ...	n	Mean	Standard deviation	t	df	p-value
ED1 How important is it for the donor to have completed a tertiary education?	397	2.79	1.538	-2.774	396	.006
ED2 How important is it for the donor to have a high IQ?	397	3.06	1.507	.766	396	.444
ED3 How important is it for the donor to have a successful career?	397	2.86	1.456	-1.896	396	.059

The data on the importance of education and career factors in the selection of a gamete donor reveals a nuanced perspective from intended parents. None of the three variables –completion of tertiary education, having a high IQ, and having a successful career – emerge as distinctly important or unimportant. Instead, their mean scores indicate a middle ground, so suggesting that intended parents do not regard these factors as being pivotal in their decision-making process.

The mean score for the donor having completed tertiary education stands at 2.79, which is notably below the significant threshold of 3. This score reflects that, while there may be some acknowledgement of the value of higher education, it does not hold considerable weight with intended parents. The relatively low mean score suggests that intended parents may prioritise other traits over educational background, so indicating that their primary concern lies more with medical and genetic factors than formal education credentials. This preference may stem from a belief that parenting capabilities and the nurturing environment are not dictated solely by educational attainment, but rather by emotional, social, and psychological competencies that can foster a child's development.

Conversely, the criterion of having a high IQ received a mean score of 3.06, which near the threshold of significance but does not decisively land above it. This score indicates that while some intended parents may value cognitive abilities, there is no overwhelming consensus on its importance. The lack of significance here may reflect a broader understanding among parents that intelligence is a multifaceted construct that is influenced by numerous factors, including upbringing and life experiences. Even though most intended parents have not pursued higher education themselves, they could associate IQ with inherent ability rather than academic achievements, which could explain why some respondents consider it a slightly more desirable trait. Consequently, the remainder of intended parents might consider personality traits, emotional intelligence, and interpersonal skills as equally important or more critical indicators of potential parenting effectiveness.

Lastly, the factor of a successful career received a mean score of 2.86, which is similarly positioned below average significance. This score suggests that while career achievements may be viewed as a positive attribute, they do not strongly influence the decision-making process on donor selection. Intended parents may perceive a successful career as only one aspect of a person’s overall character. Therefore, they seem to adopt a more holistic approach that prioritises other characteristics that are more aligned with fostering well-being and health in their future children.

The impression derived from the data is that intended parents maintain a balanced view of education and career factors in donor selection. While these elements may have some appeal, they do not emerge as critical determinants that guide their choices. This indicates a potential prioritisation of traits that directly affect the child's health and genetic lineage over educational and professional backgrounds. Such an approach highlights an understanding of parenting that transcends academic or career accomplishments, and instead focuses on attributes that foster emotional support, stability, and overall family dynamics.

Table 2.13: Importance of tertiary education and high IQ to intended parents by gender

Construct	Category	n	Mean (SD)	t	df	p-value
ED1 How important is it for the donor to have completed a tertiary education?	Female	117	3.16 (1.468)	3.244	394	0.001
	Male	279	2.62 (1.538)			
ED2 How important is it for the donor to have a high IQ?	Female	117	3.33 (1.358)	2.413	394	0.016
	Male	279	2.94 (1.551)			

Tertiary education: Females place significantly more importance on the donor having completed tertiary education (mean = 3.16) than males (mean = 2.62) (p=0.001).

High IQ: Females are more likely to prioritise the donor having a high IQ (mean = 3.33) than males (mean = 2.94) (p=0.016), with the difference being statistically significant.

This preference could reflect women's interest in the donor's intellectual capabilities, perhaps driven by an understanding that these traits can be heritable and contribute to the future child's cognitive development. Women may also value education and intelligence as indicators of the donor's potential to contribute positively to the child's genetic endowment, aligning with their overall concern for the child's future well-being.[418]

[418] S Whyte, B Torgler & K L Harrison 'What women want in their sperm donor: A study of more than 1000 women's sperm donor selections' (2016) 23 *Economics & Human Biology* 1–9.

Table 2.14 (below) presents significant differences in donor selection preferences based on sexual orientation. This analysis highlights how intended parents' sexual orientation influences their criteria when choosing a gamete donor. By examining key variables, the Table reveals patterns and trends in donor selection that reflect unique reproductive goals and considerations among different sexual-orientation groups. The findings offer insights into how personal identity factors in reproductive decision-making during assisted fertility processes. This analysis is particularly relevant for fertility clinics and policymakers, as it could guide more inclusive tailored support and policies that better meet the diverse needs of intended parents.

Table 2.14: Relationship between education and sexual orientation for intended parents

Construct	Category	n	Mean (SD)	F	df1; df2	p-value
ED1 How important is it for the donor to have completed tertiary education?	Heterosexual	162	2.91 (1.509)	4.496	3; 393	0.004
	Homosexual	90	3.08 (1.567)			
	Bisexual	17	3.00 (1.323)			
	Other	128	2.39 (1.518)			
ED2 How important is it for the donor to have a high IQ?	Heterosexual	162	3.23 (1.424)	2.801	3; 393	0.040
	Homosexual	90	3.13 (1.530)			
	Bisexual	17	3.35 (1.498)			
	Other	128	2.75 (1.562)			

Table 2.14 presents significant differences in preferences in donor selection across different sexual orientations, excluding the ‘other’ group. For heterosexual, homosexual and bisexual groups, four key areas of donor selection were analysed: educational background (ED1), IQ (ED2), substance abuse history (LifeHab1), and medical professional opinion (Health3). In terms of the donor's education (ED1) there is a significant difference across groups, ($F = 4.496$, $p=.004$). In particular, heterosexuals (mean = 2.91) and homosexuals (mean = 3.08) place significantly more importance on donor education than the ‘other’ sexual-orientation group (mean = 2.39), $p=.020$ and .006, respectively.

From a South African perspective, the prioritisation of tertiary education by homosexual and heterosexual individuals in donor selection, despite many intended parents

being unemployed and holding only a Grade 12 level of education, highlights the deep societal value placed on education as a factor in upward mobility. In a country where socioeconomic disparities are significant and access to higher education is often seen as a pathway to a better life, intended parents may prioritise a donor's educational background as a way to ensure that their child has access to opportunities that they may not have had themselves. This aspirational emphasis on education, rather than intrinsic cognitive traits like IQ, reflects broader societal values and hopes for social advancement through educational achievement.

This preference raises critical questions about equity and access. As fertility clinics might cater to these preferences by prioritising donors with higher education, there is a risk of reinforcing existing social inequalities, where only a certain demographic of donors is deemed to be desirable. Donor clinics may need to address these biases to ensure that donor selection processes remain fair and do not inadvertently perpetuate social stratification. Moreover, the emphasis on education in a context where many intended parents are unemployed points to the need for broader societal interventions to address the root causes of educational and employment disparities, which in turn could influence reproductive decisions and outcomes.

There was a clear consensus among respondents (heterosexual, homosexual and bisexual): a desire for exceptionally intelligent children. However, individuals from the ‘other’ sexual-orientation group – who likely lacked a full understanding of the terms – expressed a preference for donors with a high IQ that fell below the average. This observation allows for an intriguing conclusion: respondents who grasped the distinctions among ‘heterosexual’, ‘homosexual’, and ‘bisexual’ were inclined to prioritise a high IQ in potential donors, while those who may not have fully comprehended these concepts placed markedly less emphasis on the donor's intellectual capabilities. This aligns with the overarching narrative that individuals with higher intelligence aspire to have equally intelligent offspring, whereas those with comparatively lower intelligence seem to regard the donor's IQ as being less critical.

2.4 PERSONALITY AND INTERESTS

Table 2.15: Importance of personality and interest factors for intended parents

It is important ...	n	Mean	Standard deviation	t	df	p-value
PERS1 How important is it for the donor's personality to match yours or your partner's?	397	2.80	1.460	-2.680	396	.008
PERS2 How important is it for the donor to exhibit artistic or cultural abilities?	397	2.73	1.412	-3.767	396	.000
PERS3 How important is it for the donor to have athletic abilities or talents? (e.g., being sporty)	397	2.86	1.409	-1.908	388	.057

The examination of personality-related factors in the donor selection process reveals that intended parents do not place significant importance on these attributes. The mean scores for the assessed personality traits – matching personalities, artistic or cultural abilities, and athletic abilities – indicate that these characteristics are not viewed as major determinants in selecting a gamete donor. Instead, the scores reflect a tendency among intended parents to prioritise other factors, in particular health and genetics, over these softer traits.

Starting with the importance of the donor's personality matching that of the intended parents, the mean score is 2.80. This marginally lower rating suggests that while some parents may appreciate a degree of personality alignment, it is not a major factor in their decision-making. The fact that the p-value is significant (<0.01) indicates that the score is statistically relevant; however, the overall mean indicates that it does not drive the decision heavily. This could suggest that intended parents view personality compatibility as secondary to the more pressing concerns about genetic health and wellness. While personality traits can contribute to relationships and nurturing styles, intended parents may believe that the fundamental capacities for love, support, and guidance are not strictly dictated by personality similarity to the donor.

Similarly, the criterion assessing the importance of artistic or cultural abilities received a mean score of 2.73, which further illustrates the limited emphasis placed on these characteristics by intended parents. The statistical significance of this score (<0.001) reveals that responses were consistent among participants, and yet the average score still indicates that such abilities are not prioritised in the selection process. This could reflect a belief that artistic or cultural skills, while valuable, do not fundamentally influence a child's upbringing or health.

Intended parents may be more focused on creating a stable and loving environment than on fostering artistic talent or engagement with cultural activities.

The assessment of athletic abilities yielded a mean score of 2.86, so indicating a similarly tempered view on the importance of sports or physical skill in a donor. The score falls just below the threshold of statistical significance (p-value = 0.057), so reinforcing the notion that while some intended parents may acknowledge the value of athleticism, it is not enough to steer their donor choice decisively. This could signify an understanding that physical abilities can be cultivated independently of genetic predisposition and therefore they are not perceived as being essential criteria in the gamete selection process.

2.5 LIFESTYLE AND CULTURE

Table 2.16: Importance of lifestyle and cultural factors for intended parents

It is important ...	n	Mean	Standard deviation	t	df	p-value
LifeHab1 How important is it that the donor has never abused drugs and/or alcohol?	397	3.76	1.477	10.297	396	<0.001
CULT1 How important is the donor's ethnicity? (e.g., Greek heritage)	397	2.88	1.537	-1.535	396	.126

Examination of lifestyle and cultural factors revealed significant insights into the priorities of intended parents when selecting a donor for gametes. Among the assessed factors, the importance of the donor's history of substance use shows is notably important for intended parents, while the significance placed on the donor’s ethnicity reveals a more nuanced attitude. This analysis provides an understanding of why these factors matter to intended parents and the implications of these preferences for the donor selection process and family dynamics.

The mean score for the importance of a donor having never abused drugs and/or alcohol is highlighted (mean = 3.76), thereby indicating a strong consensus among intended parents regarding this characteristic. This scoring, coupled with a highly significant p-value (<0.001), suggests that the absence of substance abuse is not only relevant but indeed a paramount consideration for those seeking a donor. The implications of this finding are profound; intended

parents often associate a history of substance abuse with potential health risks and negative behavioural traits that could be inherited or manifest in their future children. They may perceive a donor's lifestyle choices as indicators of overall well-being, stability, and suitability for contributing to the genetic legacy of their family.

Moreover, this emphasis on the absence of substance abuse reflects broader societal values in relation to health and wellness. Intended parents may place significant importance on creating a secure and healthy environment for their children and believe that selecting a donor with a clean lifestyle can contribute to this goal. Such a belief may stem from concerns about the potential for addiction, mental health issues, or other complications related to drugs and alcohol, which could pose challenges for family dynamics and the child's upbringing. The awareness and focus on these risks underscore a proactive approach to parenting, where intended parents seek to mitigate potential challenges by careful donor selection.

Conversely, the mean score on the importance of the donor's ethnicity is recorded at 2.88, which indicates a more tempered perspective among intended parents. Although this score is not statistically significant (p-value = 0.126), it still suggests that ethnicity does hold some relevance for a segment of intended parents. The mild interest in ethnicity can be attributed to varying motivations, including cultural identity, the desire to maintain certain familial legacies, or an appreciation for diverse heritages. However, the lack of a higher mean score and statistical significance indicates that this factor does not dominate decision-making as strongly as lifestyle choices do.

The implications of a lower emphasis on ethnicity suggest an evolving perception among intended parents who may prioritise health and behavioural factors over cultural backgrounds. This perspective reflects a broader societal trend toward inclusivity and acceptance, where the potential child's health and well-being are viewed as being more critical than specific ethnic identities. Such an approach can foster a more diverse family dynamic, so potentially enriching the child's experience and worldview by celebrating a range of cultural backgrounds – regardless of the donor's ethnicity.

Table 2.17: Importance of lifestyle and cultural factors for intended parents by gender

Construct	Category	n	Mean (SD)	t	df	p-value
LifeHab1 How important is it that the donor has never abused drugs and/or alcohol?	Female	117	4.26 (1.168)	4.927	284.938	<0.001
	Male	279	3.56 (1.547)			
CULT1 How important is the donor's ethnicity? (e.g., Greek heritage)	Female	117	3.18 (1.557)	2.514	394	0.012
	Male	279	2.76 (1.517)			

Substance abuse: The donor's history of drug and/or alcohol abuse is more important to females (mean = 4.26) than to males (mean = 3.56) ($p<0.001$). This significant difference could be attributed to a heightened concern among women about the potential long-term effects of substance abuse on both the donor's genetic material and the health of the future child.[419] Women may also be more inclined to prioritise a healthy lifestyle in their donor selection process, viewing it as being essential for ensuring that the future child does not grow up to develop the same lifestyle habits of substance abuse.[420] Unhealthy lifestyles, such as smoking and alcohol consumption, also have detrimental effects on male reproductive function and disrupt fertility through various mechanisms.[421] For example, 'Smoking and heavy drinking have been shown to negatively impact sperm quality, with alcohol consumption having a more pronounced effect on reducing sperm maturity and causing DNA damage compared to smoking.'[422]

Culture: In terms of the importance of a donor's ethnicity, females again show a higher mean score of 3.18 compared to males (mean = 2.76). This suggests that while both genders consider

419 A M Baratta, R S Rathod, S L Plasil et al 'Exposure to drugs of abuse induce effects that persist across generations' (2021) 156 *Int Review Neurobiol* 217–277.

420 S C Roberts & A C Little 'Good genes, complementary genes and human mate preferences' (2008) 132 *Genetica* 309–321.

421 H E Virtanen, N Jørgensen & J Toppari 'Semen quality in the 21st century' (2017) 14(2) *Nat Rev Urol* 120–130.

422 H Amor, M E Hammadeh, I Mohd et al 'Impact of heavy alcohol consumption and cigarette smoking on sperm DNA integrity' (2022) 54(7) *Andrologia* e14434.

ethnicity when choosing a donor, females place relatively more importance on this factor. These findings highlight significant gender differences in donor selection criteria, with women expressing greater concerns about both the donor's substance use and ethnic background, so reinforcing the notion that cultural values and priorities in reproductive decision-making may differ based on gender.

Table 2.18: Lifestyle factors of importance to intended parents by gametes sought

Construct	Gamete	N	Mean	Std. Deviation	t	df	p-value
LifeHab1 How important is it that the donor has never abused drugs and/or alcohol?	Sperm	292	3.63	1.515	10.297	396	<0.001
	Oocyte	79	4.25	1.171			
	Both	26	3.73	1.614			
	Total	397	3.76	1.477			

Importance of donor's history of drug and alcohol abuse (LifeHab1)

Respondents rated the donor's history of drug and alcohol abuse to be significantly important (mean = 3.76). Those seeking oocytes rated this as significantly more important (mean = 4.25) than those seeking sperm (mean = 3.63, $p<0.001$). Respondents rated the donor's history of drug and alcohol abuse as significantly important because such a history can directly affect the health and safety of the recipient. Concerns about potential infectious diseases, the quality of organ or tissue viability, and the overall reliability of the donor's lifestyle choices contribute to the impact on donor gametes.

2.6 AGE AND PHYSICAL HEALTH

Table 2.19: Importance of age and physical health factors for intended parents

It is important ...	n	Mean	Standard deviation	t	df	p-value
Health1 How important is the age of the donor?	397	3.11	1.547	1.363	396	.174
Health2 How important is the donor's BMI/weight? (e.g., healthy weight)	397	3.19	1.504	2.537	396	.012
Health3 How important is the opinion of your nurse and/or doctor regarding the choice of your donor?	397	3.26	1.509	3.493	396	.001

The analysis of age and physical health factors concerning donor selection reveals significant insights into the priorities of intended parents. While there is a nuanced perspective on the importance of the donor's age, there is a clearer emphasis on the donor's weight (BMI) and the influence of healthcare professionals in the decision-making process.

The mean score for the importance of the donor's age is 3.11, suggesting that intended parents have a moderate regard for this factor. Despite this moderate score, the p-value of 0.174 indicates a lack of statistical significance, so suggesting that age does not play a decisive role in the donor selection process. This may be attributed to a variety of considerations; while some intended parents may acknowledge that younger donors can be associated with better reproductive health and success rates, others may prioritise factors such as genetic health or specific traits over age alone. In addition, advances in reproductive technologies have broadened perceptions of donor viability across age ranges, which may contribute to the lesser emphasis placed on this factor. Therefore, while age may hold some importance, it appears that it does not weigh as heavily in the minds of intended parents as other health-related attributes do.

In contrast, the donor's BMI or weight receives a mean score of 3.19, coupled with a statistically significant p-value of 0.012. This suggests that intended parents tend to view a donor's weight as a key consideration in their choice. Intended parents place importance on a donor's BMI because it is viewed as a critical factor influencing fertility success. A donor with a BMI within a healthy range is generally associated with enhanced reproductive outcomes, as extreme BMI values can negatively affect hormone regulation and ovulation.[423] By selecting donors with an appropriate BMI, intended parents aim to optimise their chances of a successful conception and a healthy pregnancy, so reflecting their desire to create the best possible conditions for their future child. Intended parents may also associate higher BMIs with increased risk for various health issues, including diabetes and heart disease, which could have potential implications for the child's future health. Consequently, this heightened focus on BMI reflects a broader understanding of the importance of physical health in the fertility journey.

Furthermore, the importance that intended parents place on the opinions of healthcare professionals regarding donor choice is underscored by the mean score of 3.26 and a highly significant p-value of 0.001. This remarkable consensus indicates that the guidance and advice of healthcare providers are deemed to be critical in the donor selection process. Intended

[423] D Mavrelos & B Khoshnood 'The impact of body mass index on fertility: A review of the literature' (2017) 35(2) *Reproductive BioMedicine Online* 162–167.

parents may rely on medical professionals for insights into the health risks associated with various donor attributes, including age and BMI, thereby reinforcing a collaborative approach to reproductive decision-making. The implication of this finding is twofold: not only do intended parents seek to ensure the best possible health outcomes for their future children, but they also value the expertise of healthcare professionals in navigating the complex choices. This reliance on medical guidance points to a trend toward informed decision-making in reproductive health.

Table 2.20: Importance of health factors to intended parents by gender

Construct	Category	n	Mean (SD)	t	df	p-value
Health2 How important is the donor's BMI/weight? (e.g., healthy weight)	Female	117	3.50 (1.317)	2.808	256.117	0.005
	Male	279	3.06 (1.563)			
Health3 How important is the opinion of your nurse and/or doctor regarding the choice of your donor?	Female	117	3.62 (1.357)	3.019	394	0.003
	Male	279	3.12 (1.549)			

BMI/weight: Females place more emphasis on the donor's BMI or healthy weight (mean = 3.50) than males (mean = 3.06) (p=0.005). Females tend to place more emphasis on a donor's BMI or healthy weight compared to males, likely because of their heightened awareness of the connection between weight and reproductive health. Research indicates that women often have a more significant concern about factors that may affect pregnancy and childbearing outcomes, so leading them to more strongly prioritise a donor's BMI in decision-making.[424] In addition, women place more emphasis on the donor's BMI or healthy weight possibly owing to concerns about the donor's overall health and the potential impact of physical health on the quality of the genetic material or the potential for the child to suffer from weight problems in the future. According to research by Huang et al, diseases associated with male infertility primarily include obesity, hypogonadotropic hypogonadism, reproductive system infections, and

[424] J Xu, H S Hipp, S M Capelouto et al. 'The effects of oocyte donor and recipient body mass index on live birth rates and pregnancy outcomes following assisted reproduction' (2020) 2(1) *Fertility and Sterility Reports* 58–66.

systemic diseases.[425] Therefore, women seeking donor sperm are concerned about the donor's BMI having a significant impact on the quality of the sperm she may require.

Opinion of nurse/doctor: Females value the opinion of their nurse or doctor on donor choice more (mean = 3.62) than males (mean = 3.12) (p=0.003). This difference could reflect a greater reliance on medical expertise among women when making decisions that affect their reproductive health. Women may be more likely to seek and trust professional guidance to ensure that they are making the best possible choice for their future child's health and well-being.

The fact that females place more importance on the opinions of doctors and nurses when selecting a gamete donor than on those of their close friends and family, raises several concerns. First, healthcare professionals, while knowledgeable in medical and genetic aspects, may lack the deep understanding of a woman's personal values, cultural background, and unique preferences that friends and family would have. This could lead to recommendations that, while medically sound, may not align with the woman's broader life goals or emotional needs.

Moreover, relying heavily on medical opinion could suggest a lack of confidence in one's own judgement or a deference to perceived authority, which could limit the woman's autonomy in making such a personal decision. It is possible that women may feel pressured to prioritise medical criteria over other important factors, like shared values, cultural continuity, or personal connection, which friends and family could prioritise.

Last, this trust in medical opinion may also reflect a societal trend where scientific expertise is given precedence over personal intuition and the advice of those close to one. While medical professionals are crucial for assessing health risks and genetic compatibility, the decision about selecting a donor is deeply personal and multifaceted. Ideally, it should incorporate a balance between professional advice and the insights of those who know the individual best, thereby ensuring that the choice aligns with both health considerations and the individual's holistic life context.

It is notable that the females exhibited significantly higher preferences for a range of factors compared to males when selecting a gamete donor. This includes a greater emphasis on

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425 B Huang, Z Wang, W Kong et al. 'Global, regional and national burden of male infertility in 204 countries and territories between 1990 and 2019: An analysis of global burden of disease study' (2023) 23:2195 *BMC Public Health*.

racial and physical attributes, a clear medical history, genetic testing, educational background, and lifestyle habits. These differences could suggest that females are more detail-oriented or risk-averse in their selection process, which is potentially because of a higher level of concern about the health, appearance, and future well-being of the child. These differences are statistically significant across multiple factors, so indicating that gender plays a substantial role in the preferences of intended parents in gamete donation.

Table 2.21: Significant health factors of importance to intended parents by gametes sought

Construct	Gamete	N	Mean	Std. Deviation	t	df	p-value
Health3 How important is the opinion of your nurse and/or doctor about the choice of your donor?	Sperm	292	3.09	1.538	3.493	396	<0.001
	Oocyte	79	3.77	1.281			
	Both	26	3.65	1.441			
	Total	397	3.26	1.509			

Importance of nurse/doctor's opinion about donor choice (Health3)

Respondents rated the nurse/doctor's opinion about donor choice to be significantly important (mean = 3.26). Those seeking oocytes rated this as significantly more important (mean = 3.77) than those seeking sperm (mean = 3.09, p=0.001). Respondents rated the nurse/doctor's opinion about donor choice as significantly important because it could be assumed that medical professionals have the expertise to assess a donor's suitability based on health history, genetic factors, and potential risks to recipients. Their guidance can help alleviate concerns and ensure that decisions are grounded in medical evidence rather than subjective judgements. However, the professionals do not necessarily know the respondents at a deeper, more personal level and therefore is their opinion necessarily what is best for the respondents?

Intended parents seeking oocytes generally place higher importance on health-related criteria and professional opinions compared to those seeking sperm. This emphasis reflects the greater complexity, cost, and risks associated with oocyte donation, which make the health and background of the donor critical considerations.

Table 2.22: Relationship between health factors and sexual orientation of intended parents

Construct	Category	n	Mean (SD)	F	df1; df2	p-value
Health3 How important is the opinion of your nurse and/or doctor about the choice of your donor?	Heterosexual	162	3.46 (1.397)	2.632	3; 393	0.0497
	Homosexual	90	3.31 (1.612)			
	Bisexual	17	3.41 (1.543)			
	Other	128	2.97 (1.537)			

The importance of healthcare professionals' opinions (Health3) in donor selection was similar among heterosexuals (mean =3.46), bisexuals (mean = 3.41) and homosexuals (mean = 3.31), with a p-value just below the threshold of significance (0.0497). This implies that while all groups value medical input, with only 'other' (mean = 2.97) showing less importance, it is likely that this group may not have fully understood the question.

Heterosexual, bisexual and homosexual respondents placing importance on medical professionals' opinions could be because of a trust in the expertise and objectivity of healthcare providers. These groups may believe that medical professionals are better equipped to assess the health and suitability of a donor, so ensuring the best possible outcome for their child. This reliance on professional opinion could also reflect a more traditional or conservative approach to decision-making. Furthermore, if the proportions of sexual-orientation distributions are considered without the 'other' group, the general consensus would be that professionals' opinions about donor selection are important to most respondents.

2.7 IDENTITY

Table 2.23: Importance of identity factors for intended parents

It is important ...	n	Mean	Standard deviation	t	df	p-value
Ident1 How important is it for you that the donor must not know your identity?	397	3.15	1.638	1.838	396	.067
Ident2 How important is it for you to know the donor's identity?	397	2.85	1.557	-1.902	396	.058

Ident3 How important is it for you that your child will have the right to find out the identity of the donor?	397	2.76	1.560	-3.055	396	.002

The exploration of identity factors reveals important insights into the preferences and concerns of intended parents when selecting a donor. The analysed data show that intended parents place varying degrees of importance on the donor's knowledge of the parents' identity, the parents' desire to know the donor's identity, and the potential for future contact between the donor and the child. The nuances in these perspectives shed light on the motivations behind donor selection and the implications for family identity and dynamics over time.

The mean score for the importance of the donor not knowing the intended parents' identity is 3.15. Although this value suggests a moderate significance, the p-value of 0.067 indicates that the result approaches, but does not achieve, statistical significance. This moderately positive view indicates that many intended parents value anonymity in the donor–recipient relationship. This desire for anonymity could be driven by a range of factors, including the need for privacy and the fear of future complications arising from potential relationships with the donor. Intended parents may believe that an anonymous arrangement can allow them to structure their family without external interference or complications, so fostering a sense of security in their family dynamics.

In contrast, the desire to know the donor's identity receives a mean score of 2.85, and is accompanied by a p-value of 0.058. This indicates a trend toward a lesser but still relevant interest in knowing the donor's identity. Many intended parents may find value in having access to genetic and health information that comes with knowing the donor's background. However, this lower mean suggests that while intended parents may appreciate the insights gained from knowing the donor's identity, it is not imperative for everyone. This ambivalence reflects a broader discussion about the balance between the perceived benefits of transparency and the comfort associated with anonymity. Indeed, this finding raises questions about how intended parents prioritise the need for privacy against the potential for richer familial connections through a known lineage.

Significantly, the importance placed on the child's right to learn the donor's identity is underscored by a mean score of 2.76 and a highly significant p-value of 0.002. This finding indicates a notable recognition of the importance of a child's right to access information about their donor's identity and to have the option to discover their biological origins if they wish to

do so. This perspective reflects a growing cultural emphasis on transparency and the notion that individuals should have agency over their knowledge about personal ancestry and health background.

2.8 OTHER PREFERENCES

This section presents the findings on the other information about intended parents, as well as their preferences when selecting a donor. The analysis considers the traits and characteristics that parents possess, including talents, gifts, and athletic abilities. These preferences provide valuable insights into how intended parents envision the genetic and epigenetic contributions of donors to their future children, so reflecting broader cultural and societal values. By examining these trends, the data highlight the interplay between personal aspirations, perceived heritability of traits, and the psychological dynamics of donor selection.

Talents or gifts

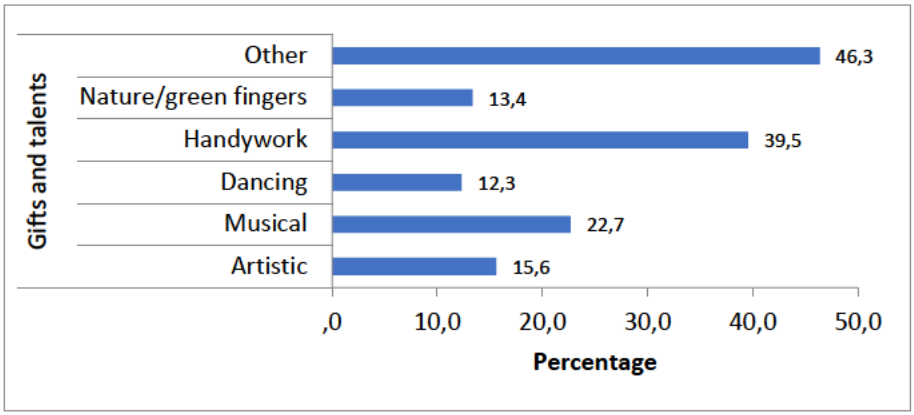


Figure 2.3 Gifts and talents of intended parents

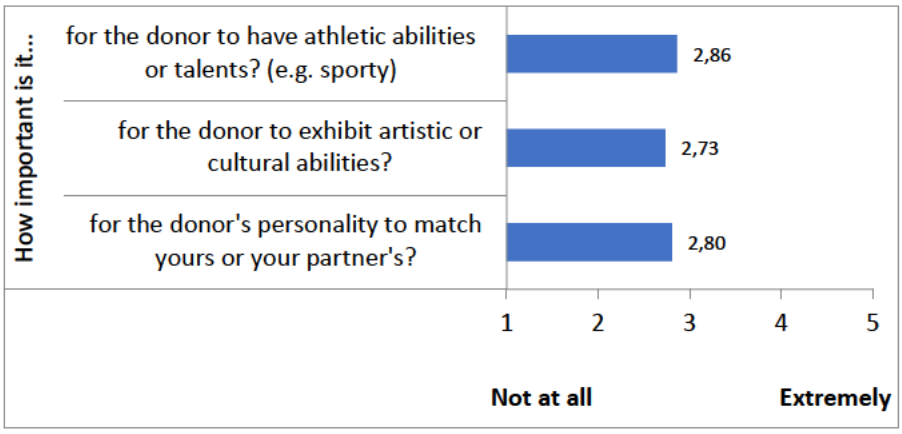


Figure 2.4: Importance of gifts and talents in a donor

Figure 2.3 reflects that intended parents themselves place some value on practical and creative talents. More than a third (39.5 per cent) have handywork skills, so indicating resourcefulness and talents. Musical talent is also prevalent among intended parents (22.7 per cent), so highlighting their creativity and gifts. In addition, 15.6 per cent of parents have artistic abilities, so showcasing their appreciation for visual creativity and imagination. Artistic or cultural abilities as a desired trait in a donor was ranked low with a mean of 2.73, suggesting that creative talents are appreciated but are not prioritised. This may imply that intended parents appreciate the uniqueness of their future child and are not trying to create a clone of themselves, thereby allowing for differences in expression. A smaller percentage of intended parents (13.4 per cent) have a connection to nature or gardening skills. The importance of dancing is a small portion of parents (12.3 per cent) and this reflects their physical coordination and expressive movement. Importantly, a large group (46.3 per cent) identifies with 'other', potentially more specific or niche talents, so underscoring the diverse and personalised abilities that these parents bring to building their families. The donor's personality matching that of the intended parents has a similar low level of importance (mean = 2.80), which indicates that while personality traits matter, they are also not a primary consideration. It therefore could be deduced that gifts and talents and personality are considered desirable, but are not decisive factors in the donor selection process.

Figure 2.4 reveals how important it is to the intended parents for the donor to exhibit certain gifts and talents. Respondents rated both athletic abilities and cultural abilities in a donor as being neutral, with a mean score of 2,86 and 2,73, respectively. Similarly, the important of the donor's personality matching the intended parent also scored a neutral score (mean = 2,80), which reveals that intended parents are not trying to create a 'super baby', but rather have valued a healthy baby.

Athletic ability

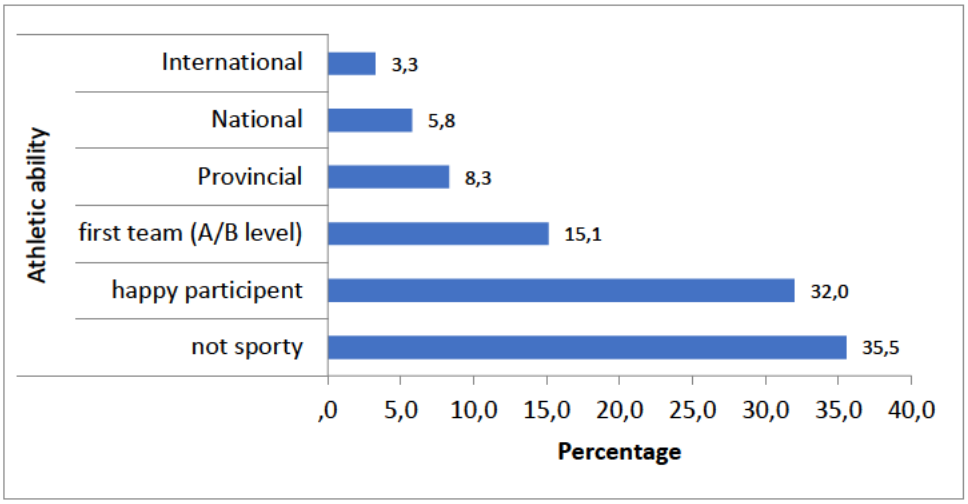


Figure 2.5: Athletic ability of the intended parent

The results reflect the athletic abilities of intended parents, showing that most do not exhibit high levels of athleticism themselves. The largest group (35.5 per cent) identifies as 'not sporty', suggesting that many intended parents may focus more on other strengths, such as intellectual or artistic abilities, rather than physical skills. This is echoed in terms of athletic ability of a donor, where the mean score is 2.86, indicating that intended parents consider this moderately important, but it is not a top priority. The score suggests that while some intended parents value athleticism in a donor, the overall importance is relatively low compared to other factors that could be considered during donor selection.

A large proportion (32.0 per cent) considers themselves to be 'happy participants' in sports, so indicating that while they may not excel in athletics, they enjoy engaging in physical activities for fun and well-being. Only a smaller percentage of intended parents have higher levels of athletic achievement, such as playing at the 'first team' level (15.1 per cent) or competing at provincial (8.3 per cent), national (5.8 per cent), or international (3.3 per cent) levels. This distribution suggests that while some intended parents have strong athletic abilities, most do not have a keen athletic ability themselves, focusing instead on other personal qualities and talents.

SECTION 3: Selection experience

The objective of section 3 is to explore intended parents' experiences with the donor selection process. These questions aimed to assess how time consuming the search for a suitable donor was, whether there is a sufficient variety of donors to meet their needs, and whether the available donor information on South African platforms is adequate for making informed decisions. The section also investigated preferences for seeing adult photographs of donors, satisfaction with guidance from fertility professionals, and whether intended parents would prefer the fertility team to handle the donor selection for them. Analysis was done to determine whether there was significant agreement or disagreement to each of the statements measuring their experiences. Each item was measured on a 5-point scale, where 1 = strongly disagree and 5 = strongly agree.

The next analysis pertains to intended parents' experiences with the donor selection process, highlighting their satisfaction, challenges, and overall perceptions. This provides valuable insights into the efficiency and accessibility of the selection system.

Table 2.24 Intended parents' experience of the selection process

	n	Mean	Standard deviation	t	df	p-value
The process of searching for a suitable donor was time consuming.	397	3.34	1.450	4.638	396	<0.001
There were enough donors to choose from for me/us to find what I/we were looking for.	397	3.05	1.384	.689	396	0.491
There is enough information available on the donor profiles of South African websites/donor agencies to ensure a well-informed decision.	397	3.40	1.394	5.690	396	<0.001
I would have liked to see adult photographs of the donor included in the donor profile.	397	3.29	1.492	3.868	396	<0.001
I am satisfied with the input or guidance from my fertility team (doctor/nurses) during the gamete selection process.	397	3.55	1.360	8.046	396	<0.001
I would prefer the fertility team to do the selection matching for me.	397	3.22	1.546	2.888	396	0.004

Time-consuming process

There was a fairly neutral attitude to the process of searching for a suitable donor being time consuming (mean= 3.34, p <0.001). Some respondents felt it was and some did not. For those that did, the time-consuming nature of the selection process likely reflects the complexity and emotional investment required in selecting a donor. Intended parents may spend considerable time reviewing profiles, assessing various criteria, and making a decision that aligns with their needs and preferences. The importance of finding the 'right' donor, considering factors such as physical resemblance, medical history and genetic testing, adds to the length of the process. However, the consensus was that it is neither exceptionally time consuming nor not time consuming, which may suggest that it is case-specific and varies from person to person.

Availability of information on donor profiles

Respondents only marginally considered that there was sufficient information available on donor profiles to make a well-informed decision (mean = 3.40, p <0.001). The current donor profiles appear barely sufficient to make an informed choice. This result is cause for a deeper investigation into what information appears to be lacking on the profiles. For improved patient care, making a well-informed decision is important in the donor selection process, and therefore may suggest re-evaluation of current limitations in practice.

Desire for adult photos of donors

Respondents marginally considered that the inclusion of adult photographs of the donor in the profile was important to make a well-informed decision (mean = 3.29, p <0.001). The marginal desire to see adult photographs may stem from the parents' wish to better visualise the donor's physical appearance and what it would mean for their potential child. However, it does not appear to be critical and is not the main determining factor in donor selection decision-making. Adult photographs can provide additional reassurance about the donor's physical traits, which is important for those prioritising physical resemblance in their selection criteria, and this therefore calls for an evaluation of policy and possible reform.

Satisfaction with fertility team's guidance

Respondents were only marginally satisfied with the guidance from their fertility team during the selection process (mean = 3.55, p-<0.001). The nearly neutral level of satisfaction reported suggests that while respondents appreciate the professionals' expertise in guiding them through the intricate and often daunting journey of donor selection, there is significant potential for

enhancement. Fertility teams, encompassing both doctors and nurses, play an essential role in supporting parents by elucidating medical intricacies, genetic risks, and the far-reaching implications of their decisions, so ultimately fostering greater confidence and informed choices. The underwhelming score of 3.55, although satisfactory, raises some concern. It would be crucial to explore the specific areas of guidance that may have fallen short, thereby preventing respondents from recording a markedly higher satisfaction rating.

Preference for fertility team to handle donor matching

Respondents only marginally considered that the fertility team should handle the selection matching (mean = 3.22, p = 0.004). This slight preference may arise from both the complexity and emotional strain associated with the donor selection process. By entrusting the selection to professionals, some intended parents may feel more at ease knowing that experienced practitioners are making choices that align with their medical and personal criteria. It may also be perceived as being a reduced burden on parents, so allowing them to focus on other aspects of their journey. However, this was only a very slight preference and respondents were somewhat neutral in this regard – suggesting that they had other ways to complete their donor matching beyond the input from their fertility team.

The level of agreement about the preference for the fertility team to handle the donor selection process varies significantly based on the respondent's education levels, as indicated by an analysis of variance, $F(5, 391) = 2.883$, $p = .014$. Specifically, Tukey's post hoc analysis reveals that individuals with a Grade 12 education (mean score of 3.44) express significantly greater agreement compared to those with postgraduate degrees (mean score of 2.58), with a p-value of .005. This disparity may reflect differing levels of trust or understanding of the medical system, where those with higher education may feel more competent to engage in the decision-making process themselves.

Furthermore, the preference for the fertility team to manage the selection process also significantly varies according to employment status, as shown by a Welch ANOVA, Welch ($F= 5.293$, $p = .001$). Games-Howell post hoc analysis indicates that unemployed individuals (mean score of 3.60) demonstrate a significantly higher level of agreement than those employed full-time (mean score of 2.80), with a p-value of less than .001. This trend may stem from a heightened sense of reliance on medical professionals among the unemployed, who may perceive the fertility team as being a more supportive and authoritative source during a complex and emotional decision-making process.

The mean score of 3.05 for the availability of donors reflects a neutral satisfaction level among intended parents (neither significant agreement nor significant disagreement) seeking donors, which could be attributed to several factors. First, the specificity of criteria that parents often have – such as race, physical resemblance, medical history, or genetic background – can make finding an ideal match challenging. When these criteria are highly specific, the available pool of donors may seem limited, leading to a perception that there are not enough options. In addition, the diversity in the donor pool may not fully capture the variety of preferences and needs of all parents. If the donor pool lacks sufficient diversity in terms of ethnicity or physical traits, some parents may feel their options are constrained. Regional limitations may also play a role, as certain areas may have fewer donors or less diverse profiles, so further narrowing the available choices. Certain groups, such as Indian, Chinese, and Jewish communities, often have religious and cultural beliefs that do not align with IVF treatment, so leading to a limited pool of donors from these backgrounds, which may contribute to lower satisfaction with the availability of donor options among intended parents. Finally, the gap between expectations and reality could be a factor. Parents could enter the selection process with high hopes for a broad array of options, and when this does not occur, it can lead to a more neutral or slightly positive perception of donor availability.

V. CONCLUSION

The data reveal important demographic patterns and preferences among intended parents seeking donor gametes in South Africa. The majority of respondents are Black males, with the most common age group being under 30 years of age. This reflects the broader population distribution in the country and highlights the racial and gender dynamics at play in reproductive assistance. A significant finding is the overwhelming preference for sperm gametes (73.6 per cent) over oocytes (19.9 per cent), in particular among men, which is likely driven by the lower cost and less invasive nature of sperm donation compared to egg donation. The fact that most intended parents were males seeking sperm suggests that male infertility may be more prevalent than was initially anticipated. The current WHO statistics on infertility state that 33 per cent of cases are due to male infertility, 33 per cent to female infertility and 33 per cent to either male and female infertility or entirely unknown reasons.[426]

[426] Centers for Disease Control and Prevention *Infertility FAQs* (2009), available at *http://www.cdc.gov/reproductivehealth/infertility*, accessed on 11 June 2012.

The high preference for sperm over oocytes among South African intended parents therefore differs from trends in other countries, where egg donation may be more common owing to various factors, including advanced reproductive technologies and differing cost structures. This preference in South Africa however likely stems from the lower cost and less invasive nature of sperm donation, which may indicate economic barriers and a preference for more affordable options.

In this study it is evident that intended parents navigate a complex landscape of preferences that are shaped by both personal values and legal frameworks. The data indicate that while many physical traits, such as hair colour, eye colour, height, and skin tone, are not prioritised in the donor selection process, the resemblance to the intended parents holds significant importance. The findings indicate that while the preference for resemblance among all respondents leans towards neutrality (3.17), female respondents express a stronger preference for a donor with a high IQ (3.33). This suggests that, contrary to the assumption that South Africans prioritise familial continuity and cohesive family identity, women are more focused on the potential intellectual capabilities of their offspring. This shift in preference highlights the importance of cognitive traits over mere physical resemblance in the decision-making process during donor selection. Therefore, females are striving to give their prospective child the best chances in life.

However, the stronger preferences for race, in particular among White and Indian intended parents, raise intriguing questions about societal influences, historical contexts, and perhaps lingering biases about lineage in a country that is still grappling with the legacy of apartheid. Overall, this study indicates that intended parents prioritise creating healthy children, so reflecting a commitment to fulfilling their dreams of family through responsible and informed decision-making.

Medical and genetic factors emerged as crucial considerations in donor selection, so highlighting the respondents' commitment to ensuring the well-being of their future children. The emphasis on genetic screening, a clear medical history, and screening for substance abuse reflects a proactive approach to mitigating any potential hereditary risks and health concerns associated with the donor's background. In addition, preferences regarding the donor's age and BMI further underscore the parents' desire for a successful pregnancy and healthy offspring, as these factors can independently influence future health outcomes. These considerations

generally align with the broader medical discourse on reproductive health, so emphasising the importance of informed decision-making in the framework of genetic inheritance – but not completely. Despite the significant emphasis placed on genetic screening in this study and the clear value indicated by respondents for ensuring the health of their future children, South African law currently fails to mandate such screening in donor selection processes, so highlighting a gap between best practices in reproductive health and existing legal frameworks. Gamete donor carrier testing raises important legal questions about the rights of donors regarding testing and result disclosure, the possible conditions for donation, enforcement of these conditions, and which tests to prioritise.[427]

The debate about expanded carrier screening (ECS) in gamete donation presents compelling arguments on both sides. Proponents advocate ECS as a valuable tool for identifying genetic risks, in particular in the context of gamete donation where recipients often lack knowledge of donors' genetic backgrounds. ECS can reassure prospective parents, so ensuring that ethical and legal responsibilities are met by clinics and gamete banks. However, opponents highlight significant drawbacks, including psychological distress from unexpected findings, financial burdens associated with increased screening requirements, and potential discrimination against individuals with genetic conditions. They argue that the minimal risk reduction achieved through expanded screening does not justify these drawbacks, and instead advocate a more limited and proportional approach to screening. The conversation suggests a shift from questioning the appropriateness of ECS to focusing on its optimal implementation to ensure equitable access and effective matching processes in gamete donation cycles.[428]

The experience of the selection process by intended parents revealed that it is perceived as being neutrally time consuming, and therefore neither a fast nor a particularly slow process. This reflects the complexity and emotional investment involved in choosing a donor that could be unique to each case. Participants reported a slightly positive view of the availability of donor information, suggesting that they want more information in order to select a donor. This implies that there is insufficient information on the donor profiles to exercise autonomy and to make informed decisions.

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427 S Crockin & W Gibbons, 'Genetic carrier screening in donors: A challenging frontier' (2023) 4(1) *Fertility and Sterility Reports* 20–21.

428 A Capalbo, J Pla, S Janssens et al 'Should we use expanded carrier screening in gamete donation?' (2024) 122(2) *Fertility and Sterility* 220–227.

The study also reveals that anonymity is slightly important to respondents, as indicated by slightly higher than neutral mean scores in preferences for: the donor not to know the parents, the parents not knowing the donor, and the child not knowing the donor. This desire for privacy can be understood in several ways: it may alleviate concerns about potential future encounters, help maintain autonomy, and enable intended parents to craft their family narratives without interference. In addition, anonymity is particularly relevant in the South African legal context, where the Children's Act emphasises the importance of protecting the identity of donors to prevent potential claims for parental rights and responsibilities. This legal framework plays a crucial role in facilitating anonymity in donor-conceived families, so allowing parents to navigate their parenting journey with a sense of security and freedom from external pressures.

The slight preference for anonymity in donor selection highlights the need for psycho-education for intended parents as they navigate the complexities of donor conception. However, the legal framework that upholds this anonymity raises significant questions about the future identity and rights of donor-conceived children, which can influence their psychological development and sense of belonging. This situation places a considerable responsibility on both parents and the legal system to balance the rights of donors, parents, and children in a framework that aims to protect privacy while fostering healthy family relationships. Furthermore, with advancements in technology and artificial intelligence, donor-conceived children increasingly face the risk of discovering their origins independently, so underscoring the need for transparent discussions about their conception. Accordingly, it is essential to navigate these evolving dynamics thoughtfully to ensure that all parties' rights and needs are respected.

Furthermore, these subjective preferences align with several constitutional rights, in particular the right to dignity (section 10) and the right to family (section 28) under the South African Constitution. The right to dignity ensures that intended parents have the autonomy to make reproductive decisions that reflect their personal and cultural values, including the selection of a donor based on criteria that are important to them. The right to family is also implicated, as decisions about reproduction are central to forming and maintaining a family. However, these rights must be balanced against legal protections for donors, including their rights to privacy and anonymity. In South Africa, the Constitution enshrines various rights that intersect significantly with the preferences of intended parents for gamete donors, in particular concerning issues of bodily autonomy, privacy, and freedom of choice. Section 12 of the

Constitution guarantees the right to bodily integrity, which encompasses the autonomy of individuals to make informed choices about their reproductive health. Intended parents seeking donors with specific characteristics, such as low BMI, high IQ, and a healthy lifestyle may argue that these preferences reflect their constitutional right to choose what they deem to be appropriate for the health and well-being of their future children. This aligns with the idea that prospective parents have a legitimate interest in ensuring that the genetic material they use adheres to certain health and lifestyle standards, as a means of maximising the potential for healthy offspring.

However, upon careful consideration it reveals potential ethical and constitutional dilemmas. While parents have the right to inform their reproductive choices, imposing narrow criteria for donor selection can inadvertently perpetuate societal biases and discrimination. Such preferences may implicitly prioritise physical and intellectual traits that align with certain socioeconomic or cultural ideals, so reinforcing inequality under section 9 of the Constitution, which guarantees the right to equality and prohibits discrimination on various grounds, including health status and physical appearance. This raises concerns about a commodified view of gamete donation, where donors may be valued more for their physical attributes than for their inherent worth as individuals. Such dynamics could lead to the marginalisation of those who do not fit these idealised criteria, therefore challenging the ethical foundation of what should be an inclusive and equitable reproductive process. Ultimately, any policies or practices related to donor selection must strike a balance between respecting constitutional rights and fostering a more nuanced understanding of diversity, health, and equality in the context of assisted reproduction.

The National Health Act and its regulations govern reproductive healthcare services in South Africa, including the use of ARTs and donor gametes. While the Act emphasises the protection of donor anonymity and the ethical management of ARTs, it does not explicitly address the cultural and socioeconomic factors that influence intended parents' choices. Cultural norms, financial constraints, and available donor profiles significantly shape these choices. For instance, the cost of fertility treatments can lead intended parents, in particular those from economically disadvantaged backgrounds, to opt for less expensive options such as sperm donation over oocyte donation. This can limit those in need of oocyte donation and treatment. Among Black communities, the use of donor gametes may be viewed as being culturally sensitive or even humiliating, so influencing their decision-making process.

The Children's Act places emphasis on the best interests of the child, but South African reproductive law, as it stands, has not fully explored the impact of donor selection on the eventual child. The focus remains largely on ensuring ethical donor practices and maintaining anonymity under the National Health Act. The Regulations Relating to the Artificial Fertilisation of Persons further reinforce the confidentiality of donors and the legal status of intended parents, but they do not address how the selection criteria may affect the child's future well-being. The absence of genetic testing is an example of this issue of concern. While some clinics recommend genetic testing for donors, there is no legal requirement mandating it, so leading to inconsistent practices across different fertility centres and between patients. Although healthcare professionals advocate mandatory genetic testing to ensure the health and safety of potential offspring, it is not currently required by law and is therefore not routinely offered. This inconsistency affects equitable access to reproductive services, as intended parents who opt for more comprehensive genetic screening (at their own extra cost) may have better outcomes compared to those patients who receive only the usual screening – which excludes genetic tests.

Limitation

In analysing the demographic responses from my survey, I noted that 162 participants identified as being heterosexual (40.8 per cent), 90 identified as homosexual (22.7 per cent), and 17 identified as bisexual (4.3 per cent). However, a striking 128 respondents – representing 32.2 per cent of the total – selected the 'other' category in response to the question on sexual orientation. This is unexpectedly high and warrants critical reflection.

In a society such as South Africa, where the vast majority of people identify as being heterosexual, it would be highly surprising if nearly a third of respondents genuinely identified with a sexual orientation outside the categories of heterosexual, homosexual, or bisexual. While sexual orientation is indeed a broad and evolving spectrum, the high proportion of 'other' responses suggests that the issue may not lie in actual orientation diversity alone. Rather, it is likely that there was a disconnect between the language used in the survey and participants' understanding of those terms.

The most plausible explanation is that the terms 'heterosexual', 'homosexual', and 'bisexual', although technically accurate, are relatively formal, and may not be familiar to many in the general South African population. In contrast, terms such as 'straight', 'gay' and 'bi' are more commonly used and understood. Participants who were unsure of what terms like

‘heterosexual’ meant may instead have selected ‘other’ – simply because they did not want to associate with a label they did not fully understand.

To address this limitation in future research, I recommend using more accessible and widely recognised terminology such as ‘straight’ and ‘gay’. Doing so would likely reduce ambiguity, enhance inclusivity, and yield more accurate self-identification. This reflection highlights the importance of using accessible language in survey design to ensure that the data collected genuinely reflect the identities and experiences of all participants.

This investigation demonstrates that while intended parents in South Africa consider a range of factors in selecting donor gametes, cultural, medical, and legal constructs significantly shape their preferences and decisions. The interplay of these elements underscores the importance of understanding donor selection not only as a personal choice but also as a complex process that is influenced by broader societal dynamics and legal frameworks. Continued research in this area will be essential for informing policy and improving practices in the reproductive health sector, to ensure that the rights and preferences of all stakeholders are respected and upheld in the evolving landscape of ARTs.

CHAPTER 4

BEST INTERESTS OF THE PROSPECTIVE CHILD

I. INTRODUCTION

In the South African legal landscape, the concept of the *Best Interests of the Child* has become a cornerstone of family law, in particular concerning family separation, custody disputes, and child protection. Its significance cannot be overstated, and yet beneath its seemingly straightforward expression lies a nuanced and complex principle that warrants thorough examination. At its core, this principle, enshrined in section 28(2) of the South African Constitution, asserts that a child's best interests are of paramount importance in all matters concerning them. The Children's Act further reinforces this principle, and emphasises that the child's best interests must be the primary consideration in all decisions affecting them. Therefore, the best interest principle is a child-focused approach aimed at protecting the needs and entitlements of children.[429] The specific circumstances of each individual child will dictate the various factors that need to be taken into account to ensure that their best interests are met.

The principle of the best interests of the child, as outlined in South Africa's Children's Act and affirmed by international conventions like the United Nations Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child, is a foundational guideline for legislation and policy affecting children. This principle asserts that the welfare, rights and needs of children must be the primary consideration in matters concerning them, and recognises children as being vulnerable individuals who require special protection. This principle is embedded in South African law and aligns with constitutional provisions that uphold children's rights to dignity, equality, life, education, and protection. The principle compels societies to recognise children's rights, starting with the obligation to ensure birth registration and access to citizenship. It also underpins processes like adoption, which aims to provide stable family environments for children lacking proper care, and promotes non-discrimination among children regardless of their parentage, language, or nationality, thereby reinforcing their equal rights.

The principle of the best interest of the child is particularly significant for individuals conceived through donor gametes, as it addresses the unique needs and rights of these children.

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429 Centre for Child Law, *Best Interests of the Child*, Issue 19 (2019).

This principle aims to ensure that their rights, well-being, and emotional development are prioritised in decision-making processes associated with their conception and upbringing. For a child conceived with donor gametes, this means recognising their inherent right to know their biological origins, thereby fostering a sense of identity and ensuring access to relevant medical histories.[430] It also advocates the creation of nurturing environments that support their emotional stability and psychological health.[431] By emphasising the best interests of children conceived through ART, the principle encourages a holistic approach that respects their perspective and promotes their potential, so ensuring that they grow up in a context that values their unique identity and connection to their heritage.[432]

Before the enactment of the Children's Act of 2005, the courts relied on a comprehensive set of criteria established in the landmark case of *McCall v McCall.*[433] In this case, the judge articulated thirteen factors that are essential for determining the best interests of the child:

a) 'the love, affection and other emotional ties which exist between parent and child and the parent's compatibility with the child;
b) the capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;
c) the ability of the parent to communicate with the child and the parent's insight into, understanding of and sensitivity of the child's feelings;
d) the capacity and disposition of the parent to give the child the guidance which he requires;
e) the ability of the parent to provide for the basic physical needs of the child, the so-called 'creature comforts', such as food, clothing, housing and the other material needs generally speaking, the provision of economic security;
f) the ability of the parent to provide for the education, well-being and security of the child, both religious and secular;
g) the ability of the parent to provide for the child's emotional, psychological, cultural and environmental development;
h) the mental and physical health and moral fitness of the parent;
i) the stability or otherwise of the child's existing environment, having regard to the desirability of maintaining the status quo;
j) the desirability or otherwise of keeping siblings together;
k) the child's preference, if the Court is satisfied that in the particular circumstances the child's preference should be taken into consideration;
l) the desirability or otherwise of applying the doctrine of same-sex matching;
m) any other factors which are relevant to the particular case with which the Court is concerned.'

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430 C McGowan & A McGowan 'The rights of donor-conceived children: A global perspective' (2021) 35(2) *International Journal of Law, Policy, and the Family* 162–176.

431 S Golombok, J Readings, L Blake, P Casey, L Mellish, A Marks and V Jadva, 'Children conceived by gamete donation: psychological adjustment and mother-child relationships at age 7' (2011) 25 *Journal of Family Psychology* 230.

432 E Blyth & L Frith 'The best interests of the child and donor conception: The role of the family' (2018) 24(1) *Journal of Family Studies* 2–15.

433 *McCall v McCall* 1994 (3) SA 201 (C).

Section 7 of the Children's Act provides a similar but more detailed list of factors:

(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 parents, towards- (i) the child; and (ii) the exercise of parental responsibilities and rights in respect of the child;
(c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;
(d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child or any separation from- (i) both or either of the parents; or (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;
(e) the practical difficulties and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;
(f) the need of the child- (i) to remain in the care of his or her parent, family and extended family; and (ii) to maintain a connection with his or her family, extended family, culture or tradition;
(g) the child's- (i) age, maturity and stage of development; (ii) gender; (iii) background; and (iv) any other relevant characteristics of the child;
(h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;
(i) any disability that a child may have;
(j) any chronic illness from which a child may suffer;
(k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;
(l) the need to protect the child from any physical or psychological harm that may be caused by- (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behavior; or (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behavior towards another person;
(m) any family violence involving the child or a family member of the child; and
(n) which action or decision would avoid or minimize further legal or administrative proceedings in relation to the child.
(2) In this section 'parent' includes any person who has parental responsibilities and rights in respect of a child.'

The Constitutional Court recently held that the principle of the best interest of a child should not be applied to a 'predetermined formula'.[434] The court must consider all the relevant factors, including but not limited to, those listed in section 7 when determining the best interest of a child. Cultural differences can significantly affect the interpretation of the guidelines concerning the best interest of the child in court, in particular when a judge comes from a different cultural and traditional background than the intended parents. Judges may hold varying beliefs and values regarding family dynamics, child-rearing practices, and the importance of extended family involvement. These differences can lead to subjective interpretations of what constitutes the best interest of the child, so potentially skewing decisions

[434] *S v M* 2008 (3) SA 232 (CC) para 24.

in ways that may not align with the parents' perspectives or cultural norms. For instance, in some cultures, collectivism and community support are emphasised, while others may prioritise individual autonomy and parental rights. Consequently, this divergence can affect rulings on custody, guardianship, or gamete donor selection, which may not fully reflect the values or needs of the child as understood by their intended parents.

In the realm of ART and gamete donation, several significant South African cases have underscored the paramount principle of the 'best interests of the child'. These cases serve as pivotal examples that illustrate how this principle is not merely a legal standard, but also a guiding ethos that shapes judicial decisions. Below, eleven salient instances encapsulate the essence of prioritising the child's welfare in legal deliberations associated with ART, gamete donation, and childcare. These instances are now discussed in turn:

i. AV v DC

In *AV v DC*,[435] the court considered a custody dispute involving a child conceived through artificial fertilisation. The applicants, a lesbian couple, sought a declaration under the Children's Act that the first respondent, a known sperm donor, had no parental obligations and requested the removal of his surname from the child's birth certificate. By contrast, the first respondent claimed that an agreement with the applicants entitled him to parental rights.

The court ruled in favour of the applicants, recognising them as the child's legal parents and confirming the first respondent's status as a gamete donor without parental rights or responsibilities. This decision links strongly to the principle of the 'best interest of the child', so ensuring a stable and clear parental structure for the child, and thereby prioritising her welfare and emotional stability. It is important to note that the Children's Act does not define a parent, but instead 'excludes any person who is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilization'.[436]

Recent research from King's College (London), published in the *British Journal of Obstetrics and Gynaecology*,[437] explored the psychological effects of donor conception on both children and adults in the largest systematic review to date. The findings indicate that donor-

435 *AV v DC* (40522/19) [2024] ZAGPJHC 626; [2024] 3 All SA 724 (GJ).

436 T Skosana 'A donor-conceived child's right to know its genetic origin: A South African perspective' (2017) *Obiter* 261–274.

437 The Bronfenbrenner Center for Translational Research 'The Psychology Impacts of Donor Conception' (2024) *Psychology Today*.

conceived individuals have equal or even better psychological outcomes compared to those conceived without donor assistance, and reported higher levels of well-being, self-esteem, and relationship warmth.[438] Therefore, donor-conceived families often exhibit characteristics of well functioning family systems. When a couple makes the deliberate choice to have a child, they typically do so with a shared vision and mutual goals for the child's future. However, the introduction of a third parental figure – the donor – can complicate the already intricate dynamics of parenting. While the notion of involving a donor may appear idealistic and appealing in theory, it can, in practice, create challenges that may adversely affect the child's well-being. For instance, the presence of a donor can lead to potential conflicts in parenting philosophies and approaches. Parents may find themselves navigating differing expectations regarding involvement, communication and decision-making related to the child. This complexity can result in confusion for the child, who may struggle to understand their relationships with each parent and the donor. According to Golombok's findings, 'commitment to parenthood may be more important than genetic relatedness for positive father–child relationships'.[439]

Furthermore, the emotional implications of having a donor can add another layer of complexity. Children may grapple with feelings of curiosity or even insecurity regarding their identity and connection to the donor. This can place additional emotional burdens on the family unit and may require careful management to ensure that the child feels secure and understood. Therefore, while the idea of a donor as an additional parent may seem beneficial at first, the practical realities of such an arrangement can introduce significant challenges that may ultimately hinder the child's development and sense of stability. It is crucial for families to thoughtfully consider these dynamics when navigating the complexities of donor conception.

In a thorough study[440] of the psychological and identity formation effects on donor-conceived children in fatherless families, the following was revealed. Adolescents who were conceived without a father through donor methods exhibit varying psychological outcomes based on their attachment styles with their parents. Those with secure-autonomous attachment patterns tend to be more curious about their donor conception, which is beneficial for their

438 The Bronfenbrenner Center for Translational Research 'The Psychology Impacts of Donor Conception' (2024) *Psychology Today*.

439 P Casey, V Jadva, L Blake et al 'Families created by donor insemination: Father–child relationships at age 7' (2013) 75(4) *Journal of Marriage and Family* 858–870.

440 J Slutsky, V Jadva, T Freeman et al 'Integrating donor conception into identity development: Adolescents in fatherless families' (2016) 106(1) *Fertility and Sterility* 202–208.

identity formation process. In contrast, adolescents with insecure-dismissing attachment[441] patterns are less likely to express interest in their donor origins, often avoiding the topic altogether. In addition, those with insecure-disorganised attachment[442] patterns may harbour negative feelings such as anger and shame about their conception. These findings suggest that the quality of parent–child relationships significantly affects how donor-conceived adolescents perceive and integrate their donor status into their identities. The study emphasises the importance of fostering open communication in families to support healthy identity development for donor-conceived children.

Therefore, it may be considered that excluding the biological father may not necessarily deprive the child of a broader sense of identity or support. The research suggests that stable and supportive parental relationships (in this case from the recipients) can provide a strong foundation for a child's sense of self, regardless of the legal status of a biological parent. In this light, the ruling may protect the child's immediate emotional welfare by ensuring a clear and consistent family structure, even if it does come at the cost of a connection to their biological heritage. However according to Velleman, biological ties and ancestral roots are essential for identity construction; consequently, he argues that donor conception is immoral because a portion of genetic heritage will be unknown, so resulting in a 'disadvantaged' individual.[443] Despite concerns articulated by Velleman, however, more contemporary studies have shown that new donor-assisted families are healthy ones. Parke reports that 'the children and their parents who form these new families are thriving and flourishing just as well as naturally conceived families'.[444]

While the decision to recognise the applicants as the 'child's' legal parents aligns with the principle of the 'best interest of the child', it raises questions about the potential implications of excluding the biological father from any legal connection. A more nuanced approach that acknowledges the intricate interplay between the legal and emotional dimensions of familial relationships could foster a more supportive environment for the child's identity development. However, it is crucial to recognise that potential conflicts between the biological father and the intended parents may create a contentious atmosphere that could detrimentally

441 L E Berger, K M Jodl, J P Allen et al 'When adolescents disagree with others about their symptoms: Differences in attachment organization as an explanation of discrepancies between adolescent, parent, and peer reports of behaviour problems' (2005) 17 *Development and Psychopathology* 509–528.

442 E Hesse & M Main 'Disorganized infant, child, and adult attachment: Collapse in behavioral and attentional strategies' (2000) 48 *Journal of the American Psychoanalytic Association* 1097–1127.

443 J D Velleman 'Family history' (2005) 34 *Philosophical Papers* 357–378.

444 R D Parke *Future Families: Diverse Forms, Rich Possibilities* (2013).

affect the child's well-being. Moreover, the involvement of the biological father is not necessarily positive influence; rather, it may introduce complexities and challenges that outweigh any potential benefits. Including the biological donor in the child's life, especially in a contentious context, could ultimately prove to be more harmful than beneficial. Therefore, striking a delicate balance between these interests is essential for ensuring that the child can flourish in a nurturing environment that is free from the strains of parental disputes.

ii. EJ v Haupt

In the case of *EJ v Haupt*,[445] the court considered the rights and responsibilities of a same-sex couple regarding their daughter, A, who was conceived through artificial insemination using a known sperm donor. The applicants, who were married under the Civil Union Act,[446] sought declaratory relief to establish that they both held parental rights over the child, as the existing provisions of the Children's Act did not automatically confer these rights to the second applicant – who was not the biological parent. The legal issues revolved around whether section 40 of the Children's Act allows a spouse in a civil union to acquire parental rights for a child born during that marriage, despite not being genetically related to the child. The court ruled in favour of the applicants, and confirmed that both parties would be recognised as the legal parents of the child from the moment of her birth, thereby granting them full parental rights and responsibilities.

This ruling is closely linked to the principle of the 'best interest of the child'. The court's decision emphasised the need for a stable and supportive environment for A, affirming that the child's welfare and emotional needs were paramount. By recognising both applicants as parents, the court ensured that A would benefit from the love, care, and support of both individuals, therefore reinforcing the importance of the best interest principle in shaping family law, in particular regarding non-traditional family structures. If adoptive parents are granted full parental rights to a non-biological child, it does raise questions about the inconsistency in legal frameworks that deny similar rights to unmarried (same-sex recipients) non-biological parents, who often must navigate complex legal barriers to gain recognition as a child's parent unless they enter into marriage. This highlights a disparity in how society views family structures and parental roles.

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445 *EJ v Haupt* 2022 (1) SA 514 (GP).
446 17 of 2006.

It is crucial to recognise that when a child has developed a strong emotional bond with a non-biological parent who has served as a primary care-giver and played a vital role in their upbringing, the loss of that parent's rights following the couple's relationship breakup can have profoundly detrimental effects on the child. Denying the non-biological parent's rights not only jeopardises the integrity of the parent–child relationship but also threatens the child's overall well-being by disrupting their established family dynamics. This situation underscores the necessity of acknowledging parental roles based on the child's needs and the quality of the relationship, rather than relying solely on biological ties. According to a recent article by Bekink on the best interest of the child and non-biological parents, 'the removal of such a central interested third party from a child's life may have an adverse impact on the child'.[447] She used a recent High Court case, *RC v SC*[448] and its appeal, namely, *RC v HSC*,[449] to provide valuable insight into this and specifically the approach taken by the courts in respect of an application for parental rights and responsibilities to a non-biological child by an interested third party in terms of the Children's Act. Therefore, both cases (*EJ v Haupt* and *RC v SC)* stress how the best interest of the child should 'always be from a child-centred approach'.[450]

Therefore, *EJ v Haupt* and *RC v SC* underscore the paramount importance of the best interest of the child principle in family law, in particular for non-traditional families. By affirming parental rights for non-biological parents, the courts recognised the vital role of emotional bonds and stable caregiving environments in promoting a child's well-being. These rulings highlight the necessity of adapting legal frameworks to ensure that all caring relationships are acknowledged and protected, so emphasising that parental roles should be determined by the quality of the relationship and the child's needs – rather than solely by biological ties. Ultimately, a child-focused approach is essential for safeguarding the emotional and developmental welfare of children in diverse family structures.

iii. QG v CS

Similarly, in *QG v CS*,[451] the court addressed a custody dispute involving a child conceived through artificial insemination. The applicants, QG, sought to establish their parental rights over the child following a breakdown in their relationship with the biological father, CS. The primary legal issue was whether the applicants, who were in a same-sex relationship, had the

447 M Bekink 'The best interests of the child and the right of interested third parties to parental responsibilities and rights: *RC v HSC* 2023 4 SA 231 (GJ)' (2024) 57(1) *De Jure* 1–16.
448 2022 4 SA 308.
449 2023 4 SA 231.
450 Ibid.
451 (32200/2020) [2021] ZAGPPHC 366.

right to be recognised as the child's legal parents despite the biological father's claim to parental involvement.

The court ruled in favour of the applicants, and recognised them as the child's legal parents, so affirming their parental rights and responsibilities. Although there was a sperm donor agreement in place, enforceability of the agreement is clearly subject to the best interests of the child concerned.[452] The judgment emphasised that the best interest of the child is of paramount importance in determining custody arrangements. The court further highlighted that the environment provided by the applicants was stable and nurturing, which was crucial for the child's emotional and psychological well-being. This case strongly links to the principle of the best interest of the child, as the court's decision was fundamentally rooted in ensuring the child's welfare and stability. It was argued that being a *de facto* parent ought to be the benchmark when gamete donors approach the court in terms of sections 23 or 24 of the Children's Act.[453] The court took a broad approach and held that an applicant should be required to show 'some tangible and clearly demonstrable interest and connection to the child', and 'a fleeting, incidental interest may not be sufficient'.[454]

Research indicates that donor-conceived children typically do not need to know or have a relationship with their biological parents to promote their best interests. The psychosocial literature shows that the impact of not knowing one's genetic origins does not necessarily harm these children. Therefore, fostering their well-being can occur without direct contact with their biological parent(s).[455] In saying so, the donor-conceived child still has the right to access information about their biological origins, including medical history, upon reaching the age of eighteen. Therefore, this ruling does not hinder the child's future autonomy in terms of understanding their biological background. But it does protect family unity in order to provide stability and security for the young child. By recognising the applicants as legal parents, the ruling supports the notion that diverse family structures should be acknowledged and protected

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452 B Shozi, R Hazarilall & D Thaldar 'Blood is thicker than water, but is it thicker than ink? An analysis of parenthood and sperm donor agreements in the wake of *QG v CS* (32200/2020) 2021 ZAGPPHC 366 (17 June 2021)' (2022) 33 *Stellenbosch Law Review* 529–547.

453 *QG v CS* (32200/2020) [2021] ZAGPPHC 366 para 39.

454 Ibid.

455 B Shozi, R Hazarilall & D Thaldar 'Blood is thicker than water, but is it thicker than ink? An analysis of parenthood and sperm donor agreements in the wake of *QG v CS* (32200/2020) 2021 ZAGPPHC 366 (17 June 2021)' (2022) 33 *Stellenbosch Law Review* 529–547.

under the law, thereby fostering an inclusive environment for the child's growth and development.

iv. VJV v Minister of Social Development

In *VJV v Minister of Social Development*,[456] the court addressed significant legal shortcomings concerning parental rights in the context of ART. According to the contested provisions, the minor children were solely recognised as the children of the second applicant, who had given birth to them. Consequently, she alone possessed the established rights, responsibilities, and obligations towards the children. The first applicant, despite being a permanent life partner and having jointly decided to have children with the second applicant, was denied any rights and responsibilities because the law only recognised married couples as being legal parents of children conceived through artificial fertilisation. This legal shortfall highlighted the inadequacy of the existing framework, which failed to extend parental rights to those in committed relationships outside of marriage, such as in the case of the applicants.

The Constitutional Court ruled in favour of the applicants, declaring that the existing legal framework which only recognised married couples as being the legal parents of children born through artificial fertilisation was unconstitutional. The court found that this exclusion violated the rights of the first applicant, who, despite being in a permanent life partnership and having contributed genetically to the children, was denied any parental rights simply because of her marital status. The ruling emphasised that the best interests of the child should be paramount and that legal recognition must extend to all forms of family structures, thereby ensuring that both parents can participate in raising their children. The court called for legislative reform to rectify the existing disparities and to ensure that the rights of all parents, regardless of their marital status, are acknowledged and protected. The court sufficiently considered the legal framework's reliance on marriage as a criterion for parental recognition so aligning with modern family dynamics. The court adequately considered this aspect by recognising that family structures have evolved and that the existing legal framework, which only recognised married couples as legal parents, was outdated. The ruling highlighted the need for the law to reflect contemporary societal norms and the importance of including all committed relationships in parental rights. However, in order to avoid legal ambiguities for non-traditional families, including co-parenting arrangements, it would be important to provide clear guidance on how these familial structures are be recognised under the law. A lack of

456 2023 (6) SA 87 (CC).

clarity could result in differing interpretations of parental rights and responsibilities in various contexts.

v. RS v JS

Another compelling instance where the principle of the best interests of the child prominently manifests is *RS v JS*.[457] While not directly pertaining to ART, the court in this instance deliberated on a contentious matter concerning custody and parenting arrangements for a child in the wake of the parents' separation. The facts of the case involved allegations of parental alienation and domestic violence, with the mother claiming that the father's behaviour had negatively affected her ability to maintain a healthy relationship with the child. The legal issue focused on the best arrangements for the child's upbringing and which parent could provide the most stable and nurturing environment. In its ruling, the court emphasised the principle of the best interest of the child as the guiding factor in determining custody arrangements. The court assessed the evidence presented by both parents, considering the emotional and psychological well-being of the child as being paramount. The court ultimately ruled in favour of the mother, and granted her primary custody while outlining specific visitation rights for the father. The judgment highlighted the need for parents to foster a positive relationship with each other for the sake of the child and emphasised the importance of maintaining stability and continuity in the child's life.

This case links directly to the principle of the best interest of the child, as the court's decision was rooted in ensuring that the child's emotional and psychological needs were prioritised. The ruling reinforces the idea that custody decisions must be made with careful consideration of the child's welfare, in particular in cases involving complex family dynamics such as allegations of domestic violence and parental alienation. To ensure a balanced perspective that transcends the immediate parental conflict and potential influences or manipulations by one parent, it is essential to regularly assess the overall well-being of the children involved. By consistently reviewing the situation and the status quo, we can better understand the children's needs and experiences, thereby fostering a nurturing environment that prioritises their emotional and psychological health. This proactive approach allows for timely interventions and support, and ultimately promotes the best interests of the children in ongoing parental dynamics. This view is supported by the Children's Act, which stipulates that plans must be 'reviewed regularly'.

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457 (A25/2024) [2024] ZAWCHC 154; 2024 (6) SA 609 (WCC).

vi. AB v Minister of Social Development

The case of *AB v Minister of Social Development*[458] addressed the constitutionality of a provision in the Children's Act that restricted surrogacy agreements to those involving the gametes of at least one commissioning parent, ultimately highlighting the intersection of reproductive rights and the best interests of the child. The first applicant, AB, who was unable to conceive for medical reasons, challenged this provision after being informed she could not legally enter into a surrogacy agreement. The High Court had previously declared the section unconstitutional, and stated that it unjustifiably limited AB's rights to equality, dignity, and reproductive autonomy. However, the Constitutional Court, in a majority judgment, upheld the validity of section 294, and argued that the genetic link requirement served a rational purpose in fostering a bond between the child and the commissioning parents. The majority emphasised the focus of reproductive autonomy on individual women and concluded that the law offered options for infertile parents to have children. Conversely, the minority judgment found that section 294 violated reproductive rights and equality principles, and argued that it discriminated against those who are both conception and pregnancy infertile. The minority would have confirmed the declaration of invalidity, allowing time for legislative amendments. Having a genetic link in this case is said 'to 'protect' children from being in a position where they do not know their genetic origins, and do not have a relationship with a biological parent. This, the majority held, was in the child's best interests.[459]

Throughout the judgments, both the majority and minority opinions considered how the provisions of the Children's Act, in particular section 294, affected children's welfare. The majority argued that the genetic link requirement was rational and served to create a bond between the child and commissioning parents, which they viewed as being beneficial for the child's emotional and developmental needs. Conversely, the minority highlighted that denying access to surrogacy for those who are both conception and pregnancy infertile could harm the psychological integrity of these individuals and their potential children. It argued that the best interests of the child should also include consideration of varied family structures and not be restricted solely to genetic ties.

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458 *AB v Minister of Social Development* CCT155/15 [2016] ZACC 43; 2017 (3) BCLR 267 (CC); 2017 (3) SA 570 (CC).

459 *AB v Minister of Social Development* 2017 3 SA 570 (CC) para 291.

Experts presented the court with overviews of numerous empirical studies on the psychological well-being of such children.[460] The results consistently showed that a parent–child genetic link is not required for the psychological well-being of the child.[461] Therefore, in the light of the absence of empirical evidence demonstrating that a genetic link serves the child's best interests, one could argue that this ruling may be founded more on assumption than on concrete fact. Consequently, it risks unnecessarily constraining reproductive freedom in situations where no harm has been demonstrated. This raises important questions about the balance between legal frameworks and individual rights, so suggesting that decisions affecting reproductive choices should be grounded in evidence rather than in unfounded beliefs.

vii. Ex Parte JCR

In *Ex Parte JCR*,[462] the Pretoria High Court proposed new requirements for surrogacy applications, mandating psychological assessments of existing children from both surrogate and commissioning parents. The court aimed to consider the psychological effects of surrogacy on these children to determine their best interests. The principle of best interest of the child played a central role in the court's reasoning, as it sought to ensure that the emotional and psychological well-being of children involved in the surrogacy process was prioritised. However, this approach was criticised for shifting decision-making power towards the existing children, so potentially infringing the commissioning parents' rights to dignity, equality, and reproductive autonomy. Critics argued that the mandatory evaluations could ultimately undermine the interests of all parties involved by placing undue influence in the hands of the existing children regarding family expansion.

The analysis presented in Holness et al reveals the delicate interplay between preserving family dynamics and respecting reproductive autonomy.[463] While involving existing children in parental decisions may be well intentioned, it is vital to consider the potential ramifications on parental rights and the emotional well-being of all family members. A nuanced approach that prioritises both the best interests of children and the autonomy of parents is essential for fostering healthy family relationships, without imposing undue burdens. It is said that this

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460 [2015] ZAGPPHC 580, 2016 (2) SA 27 (GP) ('*AB HC*'); [2016] ZACC 43, 2017 (3) SA 570 (CC) ('*AB CC*') para 86; Golombok expert opinion (*AB* record at 737–745); Jadva expert opinion (*AB* record at 1794–1824).

461 Ibid.

462 2022 5 SA 202 (GP).

463 W Holness, B Clark, A Edgcumbe et al 'A "parenting licence" granted by one's existing children? Critical analysis of the judgment in *Ex Parte JCR* 2022 5 SA 202 (GP)' (2023) 26(1) Potchefstroom Electronic Law Journal 1–32.

criterion further underscores and supports sections 6(5) and 10 of the Children's Act, which promote child participation in matters affecting them, according to their 'age, maturity and stage of development.'[464]

viii. BR v LS

In *BR v LS*,[465] the KwaZulu-Natal High Court examined the validity of a 'known sperm donor agreement' where the donor was not anonymous. The case involved a known sperm donor who had a prior agreement with the recipient regarding the donation. After the child was born, questions arose about the donor's legal rights and responsibilities toward the child, in particular because the donor did not sign an agreement relinquishing his parental rights.

The primary legal issue here was whether the known sperm donor agreement was legally valid and enforceable, and whether the donor could be granted parental rights and responsibilities despite the absence of a formal relinquishment of those rights. The court recognised the importance of the best interests of the child as being the paramount principle in determining the outcome. It assessed various factors, including the donor's involvement before, during, and after the child's birth, as well as the timeline of requests related to the donation. The court ultimately granted the donor parental rights and responsibilities, including the right to maintain contact with the child, so emphasising that the child would benefit from having the donor involved in their life.

This case illustrates that while legal agreements in the context of ART may pose complexities, the overarching principle of the best interests of the child remains central. The court acknowledged the need for a balance between legal frameworks and the emotional and developmental needs of the child, reinforcing that parental involvement can contribute positively to a child's well-being. However, it also highlighted the need for greater legal clarity on the rights and responsibilities of sperm donors to ensure that children's best interests are adequately protected.

The court recognised the legal weight of the known sperm donor agreement, which outlined the intentions of both parties regarding the donor's role and responsibilities. However, it emphasised that the paramount consideration must always be the best interests of the child. In this case, the court assessed whether the donor's involvement would provide emotional, financial, and social benefits to the child. Ultimately, the court found that while the agreement

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464 Ibid.
465 2018 (5) SA 308 (KZD).

was significant, the well-being of the child was the overriding factor, so leading to a nuanced decision that sought to honour the agreement while prioritising the child's needs and stability.[466]

ix. T S F v S C D

In *T S F v S C D*,[467] the Johannesburg High Court addressed a custody dispute involving a child conceived through ART. The facts of the case involved two parties who had a child together but subsequently separated, so leading to disagreements about custody and parental responsibilities. The primary legal issue was whether the existing arrangements were in the best interests of the child, in particular in terms of emotional and psychological stability. The court applied the best interests of the child principle by closely examining the emotional and psychological needs of the child in the context of the custody dispute. It emphasised that the child's well-being should take precedence over the desires of the parents. The ruling underscored the importance of maintaining a stable and supportive environment for the child, taking into account the relationships with both parents. Prior to the Children's Act, the wishes and feelings of the child were not prioritised.[468] However, section 10 of the Children's Act states that the court must give due consideration to the views expressed by the minor child if they are of an age, maturity and stage of development where they can meaningfully participate in the proceedings. In this case, the child was only seven years old and by South African standards when the child is twelve years old or older and is of sufficient maturity, then it has the mental capacity to understand the benefits, risks, social, and other implications.[469] However, the child's view should be reviewed at a later stage as they mature, bur in the interim the court appointed a parenting coordinator to facilitate the parenting plan.[470]

Unconscious biases can subtly affect custody decisions, often leading courts to favour traditional family structures without adequately considering individual circumstances. Courts should focus on the specific needs and circumstances of each family rather than relying on generalised assumptions about family structures. This approach requires a thorough evaluation of each parent's capacity to meet the child's needs, rather than defaulting to traditional norms. In this case, while the court did recommend psychological evaluations and counselling for both

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466 *BR v LS* 2018 (5) SA 308 (KZD) para 9.
467 (2019/15250) [2022] ZAGPJHC 758.
468 B Clark 'The shackled parent? Disputes over relocation by separated parents – is there a need for statutory guidelines?' (2017) 134(1) *South African Law Journal* 100.
469 H Kruger 'The protection of children's right to self-determination in South African law with specific reference to medical treatment and operations' (2018) 21 *PER/PELJ.*
470 *T S F v S C D* (2019/15250) [2022] ZAGPJHC 758 para 111.

parents at a later stage,[471] it did not mandate these measures from the outset. This oversight prevented the establishment of a foundation of psychological stability for the parents from the beginning of the proceedings. By not prioritising these evaluations early on, the court missed an opportunity to base its findings on empirical evidence, rather than solely on subjective opinions and selective observations of interactions. Such a proactive approach could have significantly contributed to a more informed decision-making process, thereby ultimately serving the best interests of the child.

This case teaches us that the best interests of the child principle is fundamental in family law and should guide decisions about custody and parental responsibilities. It illustrates that courts must prioritise the child's emotional and psychological welfare, so ensuring that their needs are met above all else, and particularly in cases involving complex family dynamics.

x. DR v NM

In *DR v NM*,[472] a biological father sought to assert his rights regarding his child conceived through ART. The mother had been making decisions about the child's upbringing without involving the father, so leading to a legal dispute over parental rights and responsibilities. The legal issue focused on the father's rights in the context of reproductive technology and whether the court should grant him parental rights that would allow him to participate in decisions about the child's welfare.

The court applied the principle of the best interests of the child by emphasising that the child's emotional and psychological well-being must be the primary consideration in determining parental rights. The judge ruled in favour of granting the father certain parental rights, including contact with the child, in order to foster a meaningful relationship and ensure that the child's best interests were upheld. This case illustrates that the best interests of the child principle is foundational in family law, in particular in matters involving ART. It reinforces the notion that both parents have a role in the child's life and that legal frameworks must adapt to recognise the contributions and rights of biological parents, thereby ensuring that children's well-being is prioritised in all decisions.

Although the rights of the biological father were respected in this case, it needs to be questioned whether the involvement of both parents is always best for the child if it disrupts

471 Para 91.
472 *DR v NM* (3358/2024) [2024] ZAWCHC 165.

the child's stable environment. Parental rights are not absolute,[473] and the court may terminate them but they should consider the best interests of the child.[474] As evidenced by section 36 of our Constitution, no right is absolute, and rights are subject to limitation if there is a compelling good reason to do so.[475]

When a biological parent's assertion of rights can disrupt a child's stable environment, the court must prioritise the child's best interests. This involves conducting comprehensive assessments, considering gradual integration strategies, fostering clear communication, and adhering to legal principles that protect the child's well-being. By taking a thoughtful and measured approach, the court can navigate these complex cases effectively, thereby ensuring that the child's stability and emotional health remain the focal points of any decision.

xi. S v M

Finally, in *S v M*[476] the court emphasised the importance of adopting a child-focused approach when determining the best interests of children, especially regarding the sentencing of primary caregivers. It stated that laws should be interpreted in ways that promote and protect children's interests and rights. While acknowledging that the broad nature of the best interest principle can lead to challenges, the court recognised that this flexibility is a strength, so allowing for tailored considerations based on the specific circumstances of each child. Ultimately, the best interest principle serves as a framework to protect the entitlements and needs of children, focusing on their individual situations to ensure that their welfare is prioritised.

In *S v M*, the court emphasised the need to balance various purposes of punishment – deterrent, preventive, reformative, and retributive – while also considering the quality of mercy. Correctional supervision was offered as a multifaceted approach to sentencing comprising elements of rehabilitation, reparation[477] and restorative justice. While the court offered a framework for considering these aspects, the effectiveness of this guidance ultimately depends on its application in individual cases. Courts must balance the need to protect children and ensure their rehabilitation with the need to hold offenders accountable for their actions.

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473 C Jacobs 'Realising the right to reproduce with assistance in South Africa: A constitutional perspective', available at *https://hdl.handle.net/1887/3239122*

474 M Mushonga 'Parental and grandparental rights and responsibilities in light of the best interests of the child principle' (2018) School of Law, University of KwaZulu-Natal 15.

475 C Jacobs 'Realising the right to reproduce with assistance in South Africa: A constitutional perspective', available at *https://hdl.handle.net/1887/3239122*

476 (2008) (3) SA 232.

477 In the SALC *Report on a New Sentencing Framework* at para 2.31, it was recognised that this is a sentencing option that needs to be developed vigorously. The SALC submits that increased emphasis should be placed on reparation for victims of crime in any new sentencing arrangement.

a). Case Law Conclusion

These cases collectively illustrate the evolving interpretation and application of the best interests of the child principle, underscoring the courts' commitment to ensuring that children's rights and well-being are central to legal decisions in the context of ART and gamete donation. The South African courts are increasingly adopting a holistic view of children's rights, prioritising their emotional well-being, identity, and stability in the face of evolving family dynamics brought about by ART and donor conception. This approach not only sheds light on the current legal landscape but also sets a precedent for future legislation and judicial decisions that seek to protect and promote the best interests of children in similar contexts.

To bridge the evolving application of the best interests of the child principle with the need for legislative reform, it is essential to recognise the dynamic interplay between judicial interpretation and legislative action. As South African courts continue to embrace a comprehensive view of children's rights, there is a parallel need to refine legal frameworks to accommodate the complexities introduced by ART and gamete donation. This evolving landscape requires not only judicial foresight but also legislative agility to ensure that family structures, in all their diversity, are supported and protected. As we consider the balancing of competing rights, it becomes clear that the best interests of the child principle must guide both judicial and legislative processes, so ensuring that the welfare of the child is harmonised with the legitimate interests of intended parents and donors.

b). Balancing competing rights

The courts have also attempted to address shortcomings in existing legal frameworks, in particular in cases involving ART. This shift underscores the necessity for legislative reform to ensure that all forms of family structures are acknowledged and protected under the law. In this context, the best interests of the child principle serves as a crucial guideline, so ensuring that the child's welfare remains paramount while balancing the rights and interests of all parties involved, namely the intended parents and the donor. The discussion that follows explores how South African courts have approached competing interests in ART by balancing the rights and interests of the unborn child, defining the scope and limitations of parental autonomy, and addressing the regulation of reproductive technologies and their inherent constraints.

i). Balancing rights and interest of the unborn child

While the best interests principle serves as a guiding framework for child welfare, it necessitates a delicate balancing act when considering the rights of unborn children. These rights are intrinsically linked to the legal capacity of parents, as the notion of the 'child to be born' is a mental construct and does not refer to the physical embryos.[478] This distinction is crucial in discussions about the best interests of the unborn child, in particular in contexts like gamete donation and assisted reproduction. The legal framework currently does not grant direct recognition to the unborn child until birth.[479] Extending the best interests principle to prospective children introduces complex considerations, especially concerning reproductive autonomy. While the principle emphasises child welfare, it is traditionally applied to existing children. Applying it to prospective children requires potential parents to navigate hypothetical scenarios about the future child's well-being in their reproductive decision-making, so necessitating careful consideration and balancing of rights.

ii). Parental autonomy limitation

Section 12 of the South African Constitution guarantees individuals the freedom to make choices about reproduction without interference. If the best interests principle were to dictate reproductive choices, it could lead to intrusive state interventions that assess and regulate parental decisions based on perceived future needs of the prospective child. This could contradict the fundamental right of individuals to make autonomous choices about their reproductive health, as it may compel them to weigh factors that should not interfere with their personal and family planning decisions. Parental autonomy is a crucial aspect of family law, and allows parents to make decisions based on their values, circumstances, and desires for their children. If the best interests principle extends to prospective children, it may undermine this autonomy by prioritising hypothetical child interests over the actual rights and preferences of parents. As Van Niekerk articulates, while the welfare of children is paramount, a careful balance must be struck to ensure that the rights and autonomy of prospective parents are not unduly compromised.[480] It is essential for legal frameworks to respect individual freedoms

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478 *Ex Parte KAF* [14]. The court held that ‘not one of these embryos can be legally equated with the child that is to be born’, and that ‘the embryos are merely the human biological material that may give rise to the child that is to be born’.

479 N Ndlovu 'Are there limitations on the "child's best interests" principle?' (2020) *De Rebus*.

480 C van Niekerk 'Assisted reproductive technologies and the right to reproduce under South African law' (2017) 20 *Potchefstroom Electronic Law Journal* 1–31.

while providing adequate protections for children's welfare, thereby avoiding contradictions in legal principles that could undermine both parental rights and reproductive autonomy.

This distinction is crucial when applying the best interests principle to the unborn child, as it raises complex questions about legal recognition and the extent of rights afforded to embryos or foetuses in the context of ART. For instance, in many jurisdictions, including South Africa, the unborn child lacks direct legal recognition until birth, which means that their rights are essentially subordinate to the rights and decisions of the parents. This creates a legal framework that can limit the extent to which the best interests of the unborn child can be independently advocated for, as their welfare is often relegated to the decisions made by those who possess legal capacity.

In legal considerations related to gamete donation, stakeholders – including donors, intended parents, and medical professionals – are urged to evaluate how their decisions may influence the future child's welfare. This includes implications for the child's physical and emotional health, relationships, and social circumstances. The emphasis on the best interests of the unborn child underscores the need for responsible practices in reproductive health. This principle drives the need for regulations that not only protect the rights of parents and donors but also prioritise the potential child's future well-being, thereby ensuring that decisions made during the gamete donation process align with the ethos of fostering a safe and supportive environment for the eventual child.

In *AB v Minister of Social Development*, the assumption that the principle of the best interest of the child applies to prospective children was neither seriously challenged by the parties nor scrutinised by the judges. The court's decision reflected a nuanced balance between reproductive rights and state interests, but it was not without controversy and criticism, so indicating the inherent complexities when extending such principles to unrecognised entities.[481] The broad application of the best interests principle does, however, risk becoming overly subjective. Judicial discretion, while necessary, could lead to decisions that reflect personal moral values rather than a consistent legal standard. This subjectivity may result in inconsistent applications of the law, in particular in cases involving ARTs where moral and ethical considerations are deeply personal and varied.[482]

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481 B Shozi, A Edgcumbe & D Thaldar 'New frontiers for reproductive health rights: Contemporary developments in the regulation of assisted reproductive technologies in South Africa' in O S Adelakun & E Ndoni (eds) *Reproductive Health and Assisted Reproductive Technologies in Sub-Saharan Africa* (2023) 193–230.

482 Ibid.

However, this applied subjectivity is not without its legal challenges. Opponents may argue that the application of the best interest principle to prospective children is problematic because it raises questions about the legal status of children before birth. For instance, in *Ex Parte KF*,[483] the court indicated that while the best interests of the child are paramount, the unborn child does not have independent legal rights until birth.[484] This raises a critical question: if the unborn child lacks legal standing, how can the best interest principle be invoked? Critics may contend that prioritising the interests of prospective children could infringe the rights and autonomy of the parents, in particular in matters of reproductive choice and family planning. There is also a risk of judicial overreach, where courts could impose ethical standards that are not universally accepted, so infringing personal freedoms.[485] An example of this was when the court found that the provision prohibiting non-medical preimplantation sex selection infringed the right to bodily and psychological integrity.[486]

Furthermore, while the Children's Act mandates that courts consider the best interests of the child in surrogacy cases, it does not automatically extend this obligation to prospective children outside of surrogacy contexts. The legal framework is primarily designed to protect the rights of children who are already born or are in the process of being born through established parental arrangements. The distinction between ‘children’ and ‘prospective children’ complicates the application of the best interest principle, as the law generally does not afford the same protections to individuals who have not yet been born. This nuance challenges the assumption that the best interests principle should apply universally to all prospective children.

While the assumption that the best interest principle applies to prospective children is rooted in a commitment to safeguarding children’s welfare, it raises significant legal and ethical questions. The lack of independent legal status for unborn children, as highlighted in *Ex Parte KF*, and the potential conflicts with parental rights suggest that this assumption may require more rigorous examination and justification in the legal framework. Therefore, while it is important to advocate the interests of prospective children, the legal community must also recognise and navigate the complexities inherent in this assumption.

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483 (2013) [2013] ZAGPPHC 2.

484 D Thaldar 'Building a progressive reproductive law in South Africa' (2023) 25(2) *Health and Human Rights* 43–52.

485 Ibid.

486 *Surrogacy Advisory Group v Minister of Health* 2023 (1) SA 241 (GP).

In the South African context, this assumption has been largely accepted without rigorous challenge, as seen in cases like *AB v Minister of Social Development*, where the majority attempted to recognise the principle of procreative non-maleficence – that 'harm' to the prospective child can limit the procreative freedom of prospective parents.[487] However, whether this assumption is legally justified requires critical analysis. Proponents of this assumption argue that there is precedent in legal interpretations where rights and protections have been extended to individuals not yet in existence, but who are likely to be affected by current decisions. This is akin to environmental law, where future generations' interests are considered, thereby aligning with preventive justice principles.[488] Furthermore, international norms, such as those from the Convention on the Rights of the Child, advocate the protection of future children's rights, so influencing domestic interpretations. Ethically, there is a societal value in protecting potential life to prevent harm before it occurs, which aligns with the broader principle of non-maleficence in medical ethics.

iii). Reproductive technologies and limitations

The principle of the best interests of the child is a vital consideration in the legal and ethical discourse on reproductive technologies and parental choices. This principle emphasises that a child's welfare should be the primary concern in all decisions affecting them. With advancements in genome editing technologies such as CRISPR and prime editing, prospective parents can potentially determine the genetic traits of their future children. However, this capability introduces complex legal and ethical challenges regarding how such choices align with the child's best interests and whether existing laws sufficiently protect children from potential harm. The Constitutional Court has affirmed that decisions made during artificial reproduction should not inflict harm on the future child, so aligning with the broader child welfare principle recognised in international frameworks such as the United Nations Convention on the Rights of the Child.[489]

The ability of prospective parents to select specific traits or characteristics for their children is now more feasible with advancements in genome editing. These choices can range from selecting advantageous traits like intelligence or physical attributes to preventing genetic

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487 D Thaldar 'Building a progressive reproductive law in South Africa' (2023) 25(2) *Health and Human Rights* 43–52.

488 D Thaldar & B Shozi 'Procreative non-maleficence: A South African human rights perspective on heritable human genome editing' (2020) 3(1) *CRISPR Journal* 32–36.

489 B M Knoppers & E Kleiderman 'Heritable genome editing: Who speaks for "future" children?' (2019) 2 *CRISPR Journal* 285–289.

diseases. While selecting for advantageous traits raises ethical concerns about societal values and inequalities, preventing genetic disorders often aligns with the best interests of the child, as it aims to alleviate potential suffering.[490]

The legal system plays a crucial role in safeguarding the best interests of the child in the context of genome editing, and yet it faces significant challenges. On the one hand, laws can restrict certain uses of genome editing to prevent harm, as demonstrated by South Africa's principle of procreative non-maleficence. On the other hand, overly restrictive laws risk infringing the reproductive rights of parents, which is a concern that is highlighted in global discussions on reproductive technologies.[491] As discussed, the *AB* case exemplifies the tension between protecting prospective children and respecting parental reproductive autonomy. The court's decision to maintain the requirement that commissioning parents in surrogacy arrangements use their own gametes was predicated on the assumption that knowing one's genetic origins is in the child's best interests. However, this decision has been criticised for being based more on cultural assumptions than on empirical evidence of harm.[492]

Balancing the best interests of the child with the reproductive rights of parents requires a nuanced approach that integrates ethical principles with empirical evidence. As genome editing technologies continue to develop, legal frameworks must evolve to protect children from harm while respecting parental autonomy. The principle of procreative non-maleficence offers a promising foundation for such frameworks, ensuring that the welfare of future children remains central in reproductive decision-making. Nonetheless, ongoing dialogue and research are essential for refining these legal principles and addressing the ethical complexities of genetically designing children.

The best interests principle, while central to child welfare decisions, has faced criticism given its inherent subjectivity and lack of clear guidelines, so leading to inconsistent applications. Sormunen notes that the principle can be 'vague'[493] and often reflects the biases and values of decision-makers, and resulting in varied outcomes in similar cases. Furthermore, a critique of the *Ex Parte JCR* judgment highlights a significant limitation of the best interests

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490 D Thaldar & B Shozi 'Procreative non-maleficence: A South African human rights perspective on heritable human genome editing' (2020) 391) *CRISPR Journal* 32.

491 Nuffield Council on Bioethics 'Genome editing and human reproduction' available at *http://nuffieldbioethics.org/wp-content/uploads/Genome-editing-and-human-reproduction-FINAL*, accessed on 9 January 2025.

492 D W Thaldar 'Post-truth jurisprudence: The case of *AB v Minister of Social Development'* (2018) 34 *South African Journal on Human Rights* 231–253.

493 M Sormunen *The Best Interests of the Child in Human Rights Practice': An Analysis of Domestic, European and International Jurisprudence* (doctoral dissertation, University of Helsinki, 2021).

of the child principle: its potential to become overly child-centric, thereby overlooking the legitimate interests of parents and other family members.[494] By imposing psychological assessments on the existing children of families engaged in surrogacy, the court effectively shifted decision-making power away from parents, and undermined their autonomy and judgment. This focus on child-centricity failed to adequately balance the rights of prospective commissioning parents, thereby infringing their reproductive autonomy and perpetuating discrimination against those opting for surrogacy owing to infertility. Moreover, the decision ignored relevant precedents such as *Ex Parte KAF 2*, which offer a more balanced approach by considering both the emotional needs of children and the rights of surrogate mothers. From a policy perspective, these requirements are unnecessary and undesirable as they disrupt family autonomy and set a concerning precedent where children could be perceived as being gatekeepers of their parents' reproductive choices. The judgment exemplifies the need for a more nuanced application of the best interests principle that respects the rights of all parties involved, thereby ensuring justice and equity in family law.[495]

The critique of the best interests principle, in particular in the *Ex Parte JCR* judgment, highlights the need for a balanced approach that respects both child welfare and parental autonomy. This concern naturally transitions into examining whether the principle functions as an optimising or sufficing guideline in South African law, in particular in ART and gamete donation cases. By clarifying this distinction, we can better navigate how the principle is applied, so ensuring it supports not only children's well-being but also the legitimate rights of parents and other involved parties.

c). Optimising versus sufficing principle

Finally, it is essential to question whether the best interests principle operates as an optimising or sufficing principle in the context of South African law, in particular regarding ART and gamete donation. An optimising principle seeks to maximise a child's well-being, whereas a sufficing principle aims to ensure that a child's fundamental needs are adequately met, therefore preventing harm. In South African law, the best interests principle functions primarily as a sufficing principle. This indicates that the law aims to provide an adequate standard of well-being for children rather than striving solely to maximise outcomes.

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494 W Holness, B Clark, A Edgcumbe et al 'A "parenting license" granted by one's existing children? Critical analysis of the judgment in *Ex Parte JCR* 2022 5 SA 202 (GP)' (2023) 26 *Potchefstroom Electronic Law Journal* 1.

495 Ibid.

This perspective is reflected in the language of the Constitution and the Children's Act, which emphasise the importance of ensuring conditions that allow for children's healthy development and protection. For instance, section 28 of the Constitution recognises children's rights not only to protection and care but also to an environment that is conducive to their physical, emotional, and social well-being. The Children's Act outlines various factors to be considered in determining the best interests of the child, including the significance of maintaining meaningful connections with family and providing appropriate care and support.

While the sufficing principle is favoured, it is essential to acknowledge that the legal framework also incorporates elements of harm prevention. In practice, courts may assess cases with a dual focus: they strive to ensure that children's fundamental needs are met while also safeguarding against potential harms. This dual focus reflects the complexity of family law and child protection in South Africa, where the courts must navigate various competing interests and rights in their decisions. Therefore, the focus on ensuring that children's basic needs are met characterises South African law's approach to the best interests principle.

The best interests principle, in particular as applied in South African law, is a critical component of family law and child protection. Couzens,[496] in the *Constitutional Court Review* explores this principle in the framework of section 28(2) of the Constitution, which stipulates that 'a child's best interests are of paramount importance in every matter concerning the child'. Couzens articulates that while the Constitutional Court has established a child-friendly jurisprudence, concerns have arisen about the potential overuse of the best interest principle, which may overshadow other essential children's rights.[497]

The sufficing nature of the best interests principle can significantly influence decisions, in particular as these decisions often arise in contexts that differ from traditional family structures. The primary goal of the sufficing principle is to ensure that a child's fundamental needs, such as safety, health, and emotional support, are met. This framework allows for a more inclusive understanding of family dynamics, recognising that children conceived through ART may be raised in diverse family configurations, including single-parent families, same-sex couples, or blended families.

For instance, when evaluating the best interests of a child born through ART, decision-makers can focus on sufficing factors like providing a stable home environment, access to

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496 M Couzens 'The best interests of the child and the Constitutional Court' (2019) 9 *Constitutional Court Review* 363–386.

497 Ibid.

healthcare, and emotional support. This sufficing approach could validate non-traditional family structures, thereby ensuring that children are not disadvantaged merely because they do not conform to conventional family norms. Rather than seeking to optimise every aspect of a child's life – such as striving for ideal genetic traits or socioeconomic status – the sufficing principle emphasises that meeting basic needs is sufficient for ensuring the child's welfare.

The application of the sufficing principle can lead to more practical and realistic decision-making in ART contexts. For example, when assessing the suitability of prospective parents, the focus could be on whether they can provide a loving and stable environment, rather than on whether they can meet an idealised set of conditions. This perspective supports the idea that children can thrive in various family arrangements, as long as their fundamental needs are addressed.

Conversely, an optimising approach could create unrealistic expectations for parents, as it may push them to strive for outcomes that are not always achievable. For instance, if regulations or societal norms dictate that only certain family types or structures are acceptable, prospective parents may feel pressured to conform to these ideals, which may not align with their realities or capabilities. This could lead to unnecessary barriers for individuals seeking to become parents through ART, so ultimately limiting the opportunities for children to be born into loving families.

While the sufficing principle could foster inclusivity and acceptance of various family structures, it also presents challenges. For instance, in situations where a child's needs are assessed based solely on sufficing criteria, there is a risk that some unique needs associated with non-traditional families may be overlooked. For example, children raised in families created through ART may face societal stigma or identity issues that traditional assessments may not adequately address. Therefore, while sufficing focuses on basic needs, decision-makers must also consider the broader implications of a child’s social and emotional well-being.

Furthermore, the sufficing principle may not always align with the aspirations of parents who wish to provide optimised conditions for their children. In contexts where parents have the means to enhance their child's opportunities through education, health, and lifestyle choices, there may be tension between sufficing for basic needs versus striving for optimal outcomes.

Therefore, it is essential to remain vigilant to ensure that the unique challenges faced by children in non-traditional families are addressed and that the sufficing approach does not inadvertently limit the potential for optimised outcomes when circumstances allow. Balancing these considerations is key to ensuring that all children's best interests are genuinely served in an increasingly diverse societal landscape.

The sufficing principle aims to ensure that children's fundamental needs and rights are met, thereby safeguarding them from harm, rather than striving to maximise every conceivable benefit. This sufficing nature is reflected in the analysis of landmark cases, such as (a) *J v National Director of Public Prosecutions*[498] and (b) *Raduvha v Minister of Safety and Security*:[499]

i). J v National Director of Public Prosecutions

In this case, the court emphasised the importance of protecting the rights of a child who had been a victim of a crime. The ruling highlighted the necessity of safeguarding the child's dignity and welfare, and showcased the sufficing principle by ensuring that the basic rights of the child were upheld. The court did not seek to maximise the outcomes for the child in terms of punitive measures against the offender but rather focused on ensuring that the child was protected from further harm, thereby aligning with the sufficing approach.[500]

ii). Raduvha v Minister of Safety and Security

Similarly, in *Raduvha*, the court addressed the need for the state to protect children from harm in the context of illegal detention. The judgment demonstrated the sufficing nature of the basic interests principle by prioritising the immediate well-being and safety of the child above all other considerations. The court's approach illustrated that while there may be broader implications for justice, the immediate focus was on ensuring that the child's basic rights and protections were not violated.[501]

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498 (2014) ZACC 13, 2014 (2) SACR 1 (CC) ('J v NDPP').
499 (2016) ZACC 24, 2016 (2) SACR 540 (CC) ('Raduvha').
500 M Couzens 'The best interests of the child and the Constitutional Court' (2019) 9 *Constitutional Court Review* 363–386.
501 Ibid.

d). Application of the Best Interests Principle

The two cases exemplify the harmonious coexistence and complementary roles of the best interests principle in the legal framework. They suggest a subsidiary application of section 28(2) of the Constitution, functioning both as an independent right and as a guiding constitutional principle in instances where the rights outlined in section 28(1) are not directly applicable. This interpretation not only renders the application of section 28(2) more predictable but also serves to prevent the normative expansion of this section, which could ultimately undermine the rights enshrined in section 28(1).

In *Le Roux v Dey*,[502] the court addressed the issue of bullying and the resultant emotional trauma inflicted on a child, so underscoring the need for protecting children's dignity and rights. Similarly, in *J v National Director of Public Prosecutions*,[503] the focus was on the rights of a child who had been a victim of a crime, so emphasising the need to safeguard the child's welfare during the judicial process. Both cases exemplify a direct application of the best interests principle, with Justice Skweyiya emphasising the need for the judicial process to prioritise the specific needs and rights of children when they are directly implicated in legal disputes.

In contrast, cases such as *M v S*[504] and *AB v Pridwin Preparatory School*[505] demonstrate a more indirect concern for children's welfare. In *M v S*, which involved parental rights and responsibilities during a divorce, the court considered the implications of parental choices on the child's well-being, while in *AB v Pridwin Preparatory School*, the focus was on the rights of parents concerning the school's policies, so affecting children indirectly. Justice Sachs acknowledged the risk of section 28(2) being 'spread too thin', which could dilute its protective function. He highlighted that if the application of this section becomes too broad, it risks losing its effectiveness in safeguarding children's rights. However, Sachs did not propose a definitive solution to mitigate this risk; instead, he suggested that the scope of section 28(2) should be determined on a case-by-case basis. This approach underscores the complexity of balancing the rights of children with those of parents and institutions in broader legal contexts.

This distinction between direct and indirect concerns is particularly relevant for prospective children conceived through donor conception. While the immediate rights and

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502 (2011) ZACC 4, 2011 (3) SA 274 (CC).
503 (2014) ZACC 13, 2014 (2) SACR 1 (CC) ('J v NDPP').
504 *M v S (Centre for Child Law Amicus Curiae)* (2007) ZACC 18, 2008 (3) SA 232 (CC).
505 (2018) ZASCA 150, 2019 (1) SA 327 (SCA).

welfare of these children may not always be the focal point in legal discussions, their best interests must still be considered indirectly through the lens of parental rights and responsibilities. As the legal landscape continues to evolve, ensuring that the best interests principle adequately addresses the unique needs of these prospective children remains vital.

In South African jurisprudence, while the best interests principle traditionally operates in a sufficing framework – ensuring that the minimum needs of the child are met – there are emerging signs of a shift to an optimising approach, in particular in the context of ARTs. This shift is evident in cases where courts take a more proactive stance in considering the unique circumstances of children born through ART – moving beyond merely meeting basic needs to actively enhancing the child's welfare and future prospects. For instance, in the landmark case of *S v M*,[506] the Constitutional Court emphasised the importance of considering the broader implications of family structures and the quality of relationships in determining a child's best interests, thereby suggesting a more nuanced understanding that prioritises the child's holistic development. Furthermore, the Children's Act encourages a more comprehensive evaluation of family dynamics and individual circumstances, so reflecting a growing recognition of diverse family forms and the need for judicial flexibility in optimising outcomes for children. These developments indicate a gradual evolution in South African law towards optimising child welfare, even within an established sufficing framework.

Furthermore, this analysis also notes that while the Constitutional Court has refrained from providing a rigid definition of the best interest principle, this flexibility is crucial for its application in diverse contexts. The Court's reluctance to tightly define the principle possibly allows for adaptive interpretations that can cater to the unique circumstances of each case, thereby enhancing the sufficing nature of the principle. This adaptability is essential in navigating the complex realities of child welfare, in particular in cases involving reproductive law, where the best interests of prospective children must be carefully balanced with the rights and interests of parents and donors. However, it could also be argued that 'the reluctance to define the content of s 28(2) is due to an insufficient unpacking of the concept, both judicially and academically'.[507]

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506 *S v M* 2008 (3) SA 232 (CC).

507 M Couzens 'The best interests of the child and the Constitutional Court' (2019) 9 *Constitutional Court Review* 363–386.

II. REVIEW OF ATTENTION GIVEN TO THE IMPACT OF GAMETE DONOR SELECTION ON THE BEST INTERESTS OF THE CHILD

The selection of gamete donors is an intricate process that is influenced by a multitude of factors, including genetic compatibility, physical characteristics, and personal values. However, this process extends beyond reproductive efficiency and ventures into the territory of ethical responsibility and child welfare. While regulations ensure that donors are healthy and genetically suitable, there is a significant gap in addressing how these selections could affect the overall well-being of children conceived through donor gametes.

The best interests of the child principle, established in section 28(2) of the South African Constitution and mirrored in international law, asserts that a child's well-being should be the primary concern in all matters affecting them. This principle is reinforced by various legal frameworks, including the African Charter on the Rights and Welfare of the Child and the Children's Act. It establishes a child's rights to housing, medical treatment, adoption, and maintenance, among others.[508] While traditionally viewed as paramount, recent court rulings indicate that this principle must be balanced against the rights of others, subject to constitutional limitations. Courts have emphasised the need for a contextual, case-by-case determination of a child's best interests, rather than relying on a fixed formula. In discussions about donor-conceived children, research suggests that knowing their biological parents does not significantly affect their psychological well-being, thereby complicating the argument for the right to access information about their genetic origins. Therefore, while the best interests principle is vital, it may not decisively support such access in the absence of proven benefits. Against this legal backdrop, it is also important to consider the psychological dimensions of donor conception and how these may intersect with the best interests of the child. The following sections examine the potential identity and emotional implications for donor-conceived children, as well as the role of disclosure in shaping their understanding of family and genetic origins.

a). Psychological implications of donor conception and identity

Emerging literature emphasises the psychological implications for donor-conceived children, including potential identity issues and questions about familial connections. Concerns about

[508] *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

the potential negative impact of gamete donation on child well-being have been explored through psychological research. Studies indicate that the absence of genetic relatedness between a child and their parents in donor conception families does not adversely affect child adjustment or family dynamics.[509] Children in these families perform as well as those from other family structures, with some evidence suggesting better parenting quality in sperm donation families compared to natural conception or adoption.[510] In fact, researchers at King's College in London published a systemic review of studies investigating the psychological experiences of donor-conceived people. They found that donor-conceived people have equal or better psychological outcomes than individuals conceived without using a donor. On average, donor-conceived participants scored higher on measurements of well-being and reported higher levels of self-esteem and relationship warmth compared with people not conceived using a donor.[511] Importantly, it has also been established that the quality of parenting and family environment play a more significant role in child well-being than the structure of the family itself.[512] Despite these reassuring findings, it is essential to recognise that many children in earlier studies were unaware of their donor conception, thereby raising questions about the psychosocial implications of informing them about their origins. In addition, the cultural context of these studies, characterised by a prevailing norm of non-disclosure, influences interpretations of the significance of genetic relatedness. As societal attitudes evolve towards greater openness, the implications of disclosure in donor conception families warrant further examination, so highlighting the ongoing relevance of quality parenting amid diverse family forms.

Psychologist Mandy Rodrigues's expert opinion in the *AB v Social Development* case, similar to that of Golombok and Jadva, emphasised the psychological implications in matters of gamete conception. She stated: 'Not knowing one's genetic origins does not appear likely to impact negatively on one's psychological well-being.' She explained that in her experience 'donor-conceived children did not manifest any discernible higher incidence of psychological problems than children in the general population'.[513] Similarly, Jadva's expert opinion

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509 S Golombok, R Cook, A Bish et al 'Families created by the new reproductive technologies: Quality of parenting and social and emotional development of the children' (1995) 64 *Child Development* 285–298.

510 S Golombok, A Brewaeys, R Cook et al. 'The European study of assisted reproduction families: Family functioning and child development' (1996) 11 *Human Reproduction* 2324–2331.

511 C Talbot et al 'Comparing the psychological outcomes of donor and non-donor conceived people: A systemic review' (2024) BJOG 1747–1759.

512 S Golombok, C Murray, P Brinsden et al 'Social versus biological parenting: Family functioning and the socioemotional development of children conceived by egg or sperm donation' (1999) 40 *Journal of Child Psychology & Psychiatry* 519–527.

513 M Rodrigues Expert opinion in *AB v Social Development*. Case No: 40658/13.

concurred, furthermore stating that 'identity formation happens gradually throughout childhood and especially during adolescence. Multiple factors in a child's environment impact on his process.'[514] Consequently, a child's well-being is not solely contingent on knowledge of their genetic origins.

b). Disclosure of donor conception

A growing number of parents from various family structures, especially same-sex couples and single parents, are expressing intentions to disclose their children's donor conception. In contrast, research from 2002 reveals that a substantial proportion of heterosexual couples chose not to share this information with their offspring, even when they had openly discussed it with others.[515] Those who oppose disclosure often raise concerns about potential negative impacts on the child, the parents' privacy, the dynamics between the non-genetic parent and the child, societal stigma, risk of family disruption, and the possibility that the child could seek out the donor.[516] Many parents are motivated by a desire to normalise their family situations and diminish the significance of the donor, thereby aiming to be perceived as 'real' parents. However, studies indicate that children who are not informed about their donor conception generally thrive developmentally and psychologically, and show no adverse effects from such non-disclosure.[517] This issue is especially pertinent in which South Africa's culturally diverse environment, with varied races, family dynamics and differing religious backgrounds regarding donor conception, can significantly influence parental decisions about disclosure.

In South Africa, the law governing gamete donation prioritises the best interests of the child, emphasising the need for transparency and access to information about donor identity to support the child's understanding of their origins and to promote their emotional and psychological well-being. The Children's Act provides for the donor-conceived child to access biographical and medical information concerning genetic parents. Section 41 provides:

> '(1) A child born as a result of artificial fertilisation or surrogacy or the guardian of such a child is entitled to have access to –

514 V Jadva, Expert opinion in *AB v Social Development*. Case No: 40658/13.

515 S Golombok A Brewaeys, M T Giavazzi et al 'The European Study of assisted reproduction families: The transition to adolescence' (2002) 17 *Human Reproduction* 830–840.

516 K Hammarberg, C Wilson, J McBain et al 'Age when learning about mode of conception and well-being among young adults conceived with ART' (2015) 33(5)*Journal of Reproductive and Infant Psychology* 466–477.

517 S Golombok A Brewaeys, M T Giavazzi et al 'The European Study of assisted reproduction families: The transition to adolescence' (2002) 17 *Human Reproduction* 830–840.

(a) any medical information concerning that child's genetic parents; and

(b) any other information concerning that child's genetic parents but not before the child reaches the age of 18 years.'

The Children's Act further guarantees the identity protection of the gamete donors, as section 41 further provides:

'(2) The information disclosed in subsection (1) may not reveal the identity of the person whose gamete was or gametes were used for such artificial fertilisation or the identity of the surrogate mother.'

Therefore, gamete donation is done anonymously in South Africa and the donor-conceived child may not have access to information which reveals the identity of the gamete donor, unless the parties voluntarily provide for such disclosure.

The approach to disclosing donor conception to children has evolved from a culture of secrecy to one encouraging openness. Initially, parents were advised not to inform their children about their donor origins, but advocacy from donor-conceived adults and organisations such as the Donor Conception Support Group (DCSG) have shifted public attitudes,[518] and highlighted the right of donor-conceived individuals to know about their conception.

Legislative changes, such as the abolition of anonymous donation in Australia and the establishment of donor registers, has bolstered this transparency. Parents are now encouraged to disclose donor information, supported by resources from the Victorian Assisted Reproductive Treatment Authority. Despite these changes, many parents still hesitate to share this information; an Australian study revealed that only 37 per cent had informed their children of their donor status.[519] Meanwhile, a shortage of sperm and oocyte donors persists, influenced by stricter donor requirements and broader access to reproductive treatment. Australia has committed to providing identifying information to any offspring who wish to receive

518 K Hammarberg, M Carmichael, L Tinney et al 'Gamete donors' and recipients' evaluation of donor counselling: A prospective longitudinal cohort study' (2008) 48(6) *Australian & New Zealand Journal of Obstetrics & Gynecology* 601–606.

519 J Blood, P Pitt & H G W Baker 'Parents' decision to inform children of their donor (sperm) conception and the impact of a register which legislates to enable identification of donors' (2000) Royal Women's Hospital Melbourne and the University of Melbourne 9–12.

information about them on reaching adulthood and to have policies and procedures in place to support the offspring's right to know their genetic origins.[520]

It is important to define the meaning of the concept of the right to know one's genetic origin. According to Mosikatsana, the 'right to an identity has important psychological and emotional content because a name connects a child to his or her family'.[521] Similarly, Besson defines 'the right to know one's origins as the right to know one's parentage, i.e., one's biological family and ascendance, and one's conditions of birth'.[522] However, the right to know a genetic parent is not recognised or protected in South African law. This raises potential concerns about the limitations imposed on donor-conceived children's rights to know their genetic parents, so potentially leading to incestuous relationships and violating the equality and best interest standards upheld in the Constitution. Conversely, these apprehensions may be unfounded and lack substantial empirical evidence to support them.

Furthermore, it is important to note that understanding one's genetic background has not been proven to be essential for the well-being of donor-conceived individuals in terms of building strong family ties, maintaining health, and developing a healthy self-identity.[523] Therefore, if the right to know one's genetic parentage is based on the protection of these interests, current justifications for this right may be flawed. De Melo-Martin argues that a person can have their genome sequenced and analysed, and this would provide 'information about relevant genetic risks without the need to access genetic information about their progenitors'.[524] She contends that there is insufficient empirical evidence to support claims that donor-conceived individuals experience specific harms. Furthermore, even when such harms do occur, they do not offer a compelling rationale for establishing the right to know one's genetic origins.[525] Given the increasing emphasis on the idea that genetics can explain all kinds

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520 Fertility Society of Australia 'Reproductive Technology Accreditation Committee: Code of Practice for Assisted Reproductive Technology Units' (2010).

521 Mosikatsana 'Children's rights and family autonomy in the South African context: A comment on children's rights under the Final Constitution' (1998) *Michigan Journal of Race & Law* 370. See, also, Besson 'Enforcing the child's right to know her origins: Contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights' (2007) *International Journal of Law, Policy and of Family* 138.

522 Besson 'Enforcing the child's right to know her origins: Contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights' (2007) *International Journal of Law, Policy and of Family* 140.

523 T Copp & K Hammarberg, 'Most donor-conceived people have good psychological health' (2024) 131 *BJOG: An International Journal of Obstetrics & Gynaecology* 1760.

524 I D de Melo-Martin 'The ethics of anonymous gamete donation: Is there a right to know one's genetic origins?' (2014) 44(2) *Hastings Center Report* 31.

525 South African Law Reform Commission, Issue Paper 32, Project 140, 'The right to know one's own biological origins' (20 May 2017).

of things about human beings,[526] stressing the importance of genetic information may promote problematic beliefs about genetic essentialism (the tendency to reduce the self in all of its complexity to genes). Furthermore, the intention to protect strong family relationships and health can be recognised as extremely important, but there is no evidence that they are set back by anonymous gamete donations.[527] Ravitsky, on the other hand, argues that the right to know one's genetic origins is not based solely on empirical evidence. While some donor-conceived individuals may experience significant harm from a lack of information, others may not care about their genetic origins. Regardless, she contends that all donor-conceived individuals are wronged when they are denied access to this information.[528]

As the prevalence of gamete donation increases, the ethical implications of parental disclosure about donor conception have been scrutinised. More recent research shows that children's psychological well-being is not negatively affected by awareness of their donor conception, with families that practice openness being demonstrated to function as well as non-disclosing families.[529] Studies indicate that positive parent–child relationships are often found in disclosing families, although many parents do not follow through on their initial intentions to disclose. The findings suggest that disclosure during early childhood is generally beneficial, as it allows donor conception to be integrated into the family narrative.[530] However, the impact of disclosure may change over time, in particular during adolescence when children's understanding evolves. While empirical evidence supports the benefits of disclosure, it is important to consider that differing cultural, religious, and societal contexts can influence parents' decisions about disclosure, and further research is needed to explore these complexities, in particular in diverse populations. In addition, with shifts towards identity-release donation, the dynamics of disclosure may continue to evolve, so necessitating a reconsideration of the implications of revealing a donor's identity.[531]

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526 I Dar-Nimrod & S J Heine 'Genetic essentialism: On the deceptive determinism of DNA' (2011) 137 *Psychological Bulletin* 800–818.

527 South African Law Reform Commission, Issue Paper 32, Project 140, 'The right to know one's own biological origins' (20 May 2017).

528 V Ravitsky 'Autonomous choice and the right to know one's genetic origins' (2012) 44 *Hastings Center Report* 36–37.

529 S Golombok, L. Blake, P. Casey et al 'Children born through reproductive donation: A longitudinal study of child adjustment' (2013) 54 *Journal of Child Psychology and Psychiatry* 653–660.

530 S Golombok, L. Mellish, S. Jennings et al 'Adoptive gay father families: Parent–child relationships and children's psychological adjustment' (2014) 85 *Child Development* 456–468.

531 L Blake, S Zadeh, H Statham et al 'Families created by assisted reproduction: Children's perspectives' in T. Freeman. S Graham, F Ebtehaj et al (eds) *Relatedness in Assisted Reproduction: Families, Origins and Identities* (2014).

Furthermore the early disclosure of donor conception is linked to more positive outcomes for children, as it prevents the shock of later discovery. A report from the Nuffield Council on Bioethics indicated that while early disclosure is often in a child's best interests, the timing and context of revealing such information should be a family decision.[532] When children are informed from a young age, donor conception can be integrated into the family narrative using age-appropriate books. In contrast, those who learn about their donor origins later in life, especially during challenging circumstances like after parental death or divorce, may experience negative psychological effects and feel harmed by their parents' secrecy.[533] Also, factors such as individual personality, identity issues, and family communication dynamics play a role in how well donor-conceived children adjust to this information.[534]

Public perceptions about donor conception, in particular in the UK, have shifted significantly, and have moved from concerns about disclosing donor information to emphasising the importance of openness. This change reflects a growing consensus that parental disclosure is in a child's best interests, leading to a re-evaluation of donor anonymity in favour of identity-release donation in several regions, including the UK.[535] This underscores a cultural focus on 'genetic identity', with individuals increasingly recognised as having a right to know their genetic origins.[536]

Notably, there is a divergence of opinions on disclosure, with some advocating it while others prefer non-disclosure, especially in cases where cultural or religious perspectives may lead to stigma. Furthermore, most existing studies have focused on predominantly White populations, necessitating further research on how different ethnic and religious groups understand and respond to gamete donation, including dealing with associated taboos. There is a growing call for empirical research on the psychosocial implications of donor identification, especially regarding information exchange and potential relationships among donor-conceived offspring, donors, and families sharing the same donor. In jurisdictions like the UK, where

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532 Nuffield Council on Bioethics *Donor Conception: Ethical Aspects of Information Sharing* (2013).

533 A J Turner & A Cole '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.

534 V Jadva, T Freeman, W Kramer et al 'The experiences of adolescents and adults conceived by sperm donation: Comparisons by age of disclosure and family type' (2009) 24 *Human Reproduction* 1909–1919.

535 T Freeman & S Golombok 'Donor insemination families: A follow-up study of disclosure decisions, family relationships and child adjustment at adolescence' (2012) 25 *Reproductive BioMedicine Online* 193–203.

536 J B Appleby, L Blake & T Freeman 'Is disclosure in the best interests of children conceived by donation?" in M Richards, G Pennings & J Appleby (eds) *Reproductive Donation: Practices, Policies and Bioethics* (2012) 231–249.

donor anonymity has been abolished, the shift towards identifiable donors has occurred, but with limited understanding of its actual consequences.

The debate about gamete donation and the child's best interests has been shaped by two main perspectives according to a European analysis by Takes: the *liberation perspective* which emphasises the importance of child autonomy and the right to know one's biological parents, and the *developmental perspective* which views children as developing individuals who require protection and guidance. However, Takes argues that these perspectives overlook the child's dependence on others and the importance of care and relationships.[537] Instead, a *care perspective* and the *embedded child view* needs to be considered, which prioritises the child's needs and well-being, recognising that children are developing individuals who require attentive and responsive adults.

This care perspective can provide a more nuanced understanding of the child's best interest, taking into account the individual child's needs, growth stage, and special context. It emphasises the importance of human interdependence and recognises that children grow up within and through relational networks.[538] Rather than simply assuming that openness is always in the child's best interest, secrecy and anonymity may be justifiable in certain circumstances. Policymakers should prioritise accessibility of donor information, but with sensitivity to individual family situations. The care perspective does not advocate a one-size-fits-all approach, but rather recognises that each child's needs are unique.[539] By prioritising the child's needs and well-being, we can ensure that their best interests are served, regardless of whether they have access to biological or donor information. Ultimately, a care perspective offers a more compassionate and nuanced approach to the gamete donation debate, one that acknowledges the complexity and richness of human relationships. This is particularly pertinent in South Africa, which has diverse cultural backgrounds.

The embedded child view, on the other hand, is a philosophical perspective that understands children as being deeply embedded in relationships and networks of care, rather than as being autonomous individuals with inherent rights. According to this view, children are not separate entities from their caregivers, but rather are integral parts of a web of relationships that shape their development and well-being.[540] This perspective rejects the idea that children

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537 F Takes 'The child's best interest in gamete donation' (2022) 36(1) *Bioethics* 10–17.
538 Ibid.
539 Ibid.
540 Ibid.

are independent individuals with a right to self-determination, and instead emphasises the importance of care and the responsiveness from others. The embedded child view acknowledges that children are dependent on others for their survival, nurturance, and socialisation, and argues that this dependence is not a weakness, but rather a fundamental aspect of human development. In the context of gamete donation, the embedded child view suggests that children should not be seen as having an inherent right to know their biological parents or to have access to information about their genetic heritage. Instead, decisions about disclosure should be made with sensitivity to the child's developing needs and relationships, and should prioritise their well-being and sense of security. The embedded child view offers a more nuanced and relational understanding of childhood, one that acknowledges the complex interdependencies between children and their caregivers, and which prioritises the development of healthy and secure relationships over individual rights and autonomy. While there is some overlap between the two perspectives, the care perspective is a broader framework for thinking about ethics and decision-making in situations involving children, while the embedded child perspective is a more specific theory that focuses on understanding childhood and the role of caregivers in shaping children's development.[541]

Therefore, the best interests of the child remains a guiding tenet in discussions about the welfare and rights of children, and yet its application can vary significantly depending on individual circumstances. The care perspective and the embedded child perspective both offer valuable insights into this complexity, and emphasise that children's well-being is deeply intertwined with their relationships and contexts. Decisions made in the name of a child's best interests must account for not only the child's immediate needs but also the intricate web of social, emotional, and familial dynamics that shape their lives. Recognising that each child's situation is unique allows for a more nuanced understanding of what constitutes their best interests, ultimately leading to more informed and compassionate decision-making that is tailored to their specific circumstances. By embracing this case-dependent approach, caregivers, policymakers, and society can better ensure that children's needs are met in a manner that is both relationally and contextually sensitive. The case-dependent view of the best interests of the child is particularly well suited to the South African context, where a rich tapestry of cultures, religions, and races coexist. This diversity necessitates a nuanced approach that respects the unique values, beliefs, and practices of different communities, recognising that what may be considered in the child's best interests in one cultural or familial setting may

[541] Ibid.

not hold the same significance in another. This offers a more culturally sensitive perspective and promotes the welfare of children while also honouring the rich diversity of South African society. This ultimately leads to more equitable and inclusive practices in child welfare and protection. Under the current South African legal framework, parents are afforded the discretion to determine whether to disclose the circumstances of their child's conception, thereby aligning with a case-by-case approach to this sensitive matter.

c). Sex selection

In this context of the ethical complexity of donor conception, it is pertinent to draw parallels with the discourse on sex selection, where there is a similar ethical landscape that is marked by complex considerations of the child's future well-being. In *Surrogacy Advisory Group*,[542] the court underscored the paramount importance of the child's best interests: an ethos that resonates with the questions associated with donor selection. The court's remarks highlighted the imperative to prioritise the welfare of the child over the desires of prospective parents, a notion that should similarly apply to decisions about gamete donation. The underlying concern with both sex selection and gamete donor selection revolves around the potential for creating children who may be marginalised or face stigmatisation owing to their method of conception.

The issue of sex selection in ARTs directly affects the best interests of the child, prompting a necessary examination of how parental preferences and procreative freedom can influence the child, so potentially compromising their well-being from the very beginning of life. The evolution of procreative freedom concerning ARTs in South African law is evident in these key legal cases. In *AB v Minister of Social Development*,[543] a minority opinion of the Constitutional Court affirmed that the constitutional right to procreative freedom encompasses ARTs, and emphasised the principle of procreative non-maleficence, which limits parental freedom if it poses harm to the prospective child. Secondly, in *Surrogacy Advisory Group v Minister of Health*,[544] the court addressed the contentious topic of preimplantation sex selection for non-medical reasons, and stated that ARTs are included in procreative freedom. Though the court deemed such sex selection to be inherently sexist, it concluded that a woman's right to procreative freedom – including her choice of embryo sex – takes precedence over other

542 Surrogacy Advisory Group NPC v Minister of Health [2022] ZAGPPHC 558; [2022] 4 All SA 187 (GP); 2023 (1) SA 241 (GP).
543 2017 (3) SA 570 (CC.
544 2022 (4) SA 187 (GP).

considerations. These pivotal cases contribute to laying the foundation for progressive reproductive law in South Africa.[545] As we advance into an era of increasingly complex reproductive options, it is imperative to examine gamete donor selection through a multifaceted lens that prioritises the child's best interests. Legal bodies, policymakers, and medical professionals must come together to create frameworks that foster a more comprehensive understanding of how these decisions affect the overall well-being of children. Drawing on lessons from surrogacy and sex selection contexts can help cultivate an ethical approach to gamete donor selection, ensuring that all practices align with the best interests of the child, so promoting their dignity, identity, and emotional health for years to come.

Two cases *(QG v CS* and *EJ v Haupt*) both vividly illustrate the principle of prioritising the best interests of the child. In *QG v CS* [546] concerning the rights of sperm donors, it was highlighted that any claims related to contact or care under section 23 of the Children's Act must be based on specific criteria outlined in the legislation. The court emphasised the importance of legal certainty in the context of artificial reproduction, particularly when considering the rights of children conceived through donor gametes. Notably, the court maintained that the genetic link to the child, although acknowledged, should not undermine the established legal frameworks that prioritise the child's best interests. Both section 40 and section 26(2)(b) of the Children's Act state that a gamete donor (except a spouse) is not legally regarded as being the parent of any child born using their gametes and therefore does not acquire any parental rights and responsibilities relating to the donor-conceived child because of their genetic link. In the above case, the sperm donor was unable to prove that involvement in the child's life was in the child's best interests. Therefore, an interest in the care, well-being or development of a child needs to be based on facts other than genetic relatedness caused by gamete donation. The court acted as a guardian for the child's welfare, and reinforced its constitutional duty to place the child's best interests at the forefront of any decision. The ruling clarified that pre-existing agreements between the donor and receiving parties, such as known donor agreements, could be disregarded if they do not serve the child's welfare. The court's primary focus was not on the contractual terms but rather on whether allowing contact would enhance the child's well-being. This indicates that, even with donor agreements in place, the

545 D Thaldar 'Building a progressive reproductive law in South Africa' (2023) 25(2) *Health and Human Rights* 43–52.

546 (32200/2020) [2021] ZAGPPHC 366 (17 June 2021).

court retains the authority to make decisions based solely on what is deemed to be best for the child.

This judgment illustrates the potential risks associated with known donor agreements, and emphasises that the well-being of the child remains the primary concern even in the face of legal agreements. Individuals entering into such arrangements must be aware that personal agreements can be overlooked if they conflict with the child's best interests, and they should exercise caution in selecting who they enter these agreements with.

Similarly, the case of *EJ v Haupt*[547] involved a dispute about the rights of a sperm donor and his claim for contact and parental responsibilities concerning a child conceived by his donation. This is another example where the applicants sought to have visitation rights, arguing that the existing donor agreement should grant them legal recognition. The Gauteng High Court examined whether the sperm donor's relationship with the child and the specific circumstances supported his claim for contact. The judgment underscored the principle that the best interests of the child should be the primary consideration in such matters, regardless of private agreements between the donor and the receiving parties. Ultimately, the court determined that the donor's genetic link did not automatically confer rights, and emphasised that any decisions made about contact should prioritise the child's welfare and circumstances, which may not in fact align with existing agreements.

d). Genetic screening

Genetic testing and screenings are introducing new complexities in medical practice and health law, especially concerning liability issues related to genetic testing. Screening of the gamete donor refers to the comprehensive evaluation of individuals who provide sperm or eggs for ARTs, including IVF and artificial insemination. This process involves a series of tests designed to assess the genetic health and overall suitability of the donor – aiming to identify any genetic disorders, infectious diseases, or other health risks that could potentially affect the resulting offspring. By conducting thorough genetic and medical screenings, fertility clinics can provide prospective parents with critical information about the donor's health, thereby reducing the chances of hereditary conditions and so ensuring healthier outcomes for children conceived through donor gametes. This proactive approach is essential for promoting safety

547 (63756/2020) [2021] ZAGPPHC 556; 2022 (1) SA 514 (GP).

and transparency in assisted reproduction. Carrier testing and screening identify individuals who carry harmful recessive genes that could affect offspring if both parents are carriers. While the likelihood of both parents carrying the same mutation is generally low, specific autosomal recessive disorders are more common in certain ethnic groups. Common conditions include cystic fibrosis, sickle cell anaemia, and Tay-Sachs disease, with varying carrier rates across different populations. Carrier testing often involves high-risk individuals, while carrier screening is broader, and targets those without a known family history.

There are 4 000 and 6 000 recognised genetic disorders, with approximately one in 25 children affected by such conditions.[548] While some genetic disorders manifest at birth, others may be diagnosed at various stages throughout childhood, and in some cases they may not be identified until adulthood. According to the South African Inherited Disorders Association, the five most common genetic conditions include cystic fibrosis, Down syndrome, haemophilia, Marfan syndrome, and muscular dystrophy.[549] However, genetic testing for gamete donors in South Africa is not currently mandated by law. The absence of gamete donor carrier testing could be attributed to additional legal concerns, such as whether donors can refuse testing and how to enforce compliance with testing and disclosure requirements. Further to this, the possible varying legal standards among independent and medical-affiliated gamete banks could further complicate matters, so potentially affecting the accessibility and cost of gamete donation. Current contradictions in American genetic screening for gamete donors include the decision to limit testing to recessive conditions despite the value of comprehensive genetic information for recipients, and the inconsistency of requiring donor testing without guaranteed reciprocation from recipients, thereby highlighting the need to redefine the ultimate goal of testing from recipient empowerment to the prevention of heritable diseases, which raises additional ethical and practical challenges.[550]

Advocates for genetic screening (CS) in gamete donation emphasise its transformative impact on reproductive medicine, empowering individuals and couples to make informed family-planning decisions while ensuring equitable access to screening across diverse populations. With the burden of severe recessive disorders significantly affecting infant mortality rates, universal carrier screening enables prospective parents and gamete recipients

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548 South African Government 'National Inherited Disorders day 2022' available at *https://www.gov.za/NationalInheritedDisordersDay2022*

549 Government of South Africa, *Statement on the Declaration of National Inherited Disorders Day* (1 October 2024).

550 M J Bayefsky, D L Keefe A K Caplan et al 'Determining the right 'dose' of genetic testing for gamete donors' (2023) 120(5) *Fertility and Sterility* 1042–1047.

to mitigate risks associated with inherited conditions that could otherwise go undetected, so ultimately safeguarding the health of future offspring. Numerous studies reveal that almost all healthy individuals are carriers of autosomal recessive pathogenic gene variants.[551] This obstacle can be readily circumvented by implementing genetic matching protocols. Such protocols involve selecting a gamete donor who does not carry recessive mutations in the same gene as the recipient, therefore reducing the reproductive risk without rejecting donors.

Furthermore, the argument against screening based on ethical concerns about donor privacy or potential discrimination is becoming increasingly outdated, as established screening protocols ensure that genetic information is treated as another form of health data and is not uniquely invasive. By implementing dynamic matching protocols and offering the option for donors to opt in or out of receiving results, genetic screening can provide reassurance while still respecting donor autonomy. The focus should shift from questioning the appropriateness of genetic screening to optimising its implementation to enhance patient education, improve matching criteria, and promote fair access to CS, thereby maximising its social and economic benefits in preventing genetic disorders. It can lead to a reduction in healthcare costs associated with managing genetic disorders and improve quality of life for individuals and families.[552]

Counter-arguments to the expanded use of genetic screening (ECS) for gamete donation by Accoe and Pennings[553] focus on the inherent limitations and potential harms associated with such screening practices. While the intent of ECS is to prevent the transmission of genetic conditions to offspring, it is impractical to completely eliminate genetic risk, and the psychological distress generated by unexpected test results is argued to outweigh the potential benefits.[554] ECS serves as a comprehensive method to validate an already recognised issue: the presence of genetic risk. Consequently, dismissing all donors who test positive on a specific panel may lead to a false sense of security or deplete the donor pool entirely.[555] Furthermore, the risk of misunderstanding the implications of screening results may cause additional harm, so leading individuals to over- or under-estimate their health status. Increased screening costs

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551 A Capalbo, R A Valero & J Jimenez-Almazan 'Optimizing clinical exome design and parallel gene-testing for recessive genetic conditions in preconception carrier screening: Translational research genomic data from 14,125 exomes' (2019) 15 *PLOS Genetics* e1008409.

552 A Capalbo, J Pla, S Janssens et al 'Should we use expanded carrier screening in gamete donation?' (2024) 122(2) *Fertility and Sterility* 220–227.

553 G Pennings 'Expanded carrier screening should not be mandatory for gamete donors' (2020) 35 *Human Reproduction*1256.

554 D Accoe 'Disclosing reproductive genetic carrier status: What about the donor?' (2023) 23 *American Journal of Bioethics* 126–128.

555 Ibid.

can also create financial barriers for recipients and may discourage potential donors from participating, so leading to a reduced supply of available gametes. A proposed more effective strategy for mitigating genetic risk involves screening recipients as well, thereby ensuring that gametes from carriers of the same autosomal recessive condition are not paired.

Critics also argue that expanded screening reinforces discriminatory attitudes to individuals with genetic conditions and undermines the autonomy of both donors and recipients. The emphasis on reducing genetic risks may inadvertently stigmatise disabilities and narrow the societal perception of acceptable lives. Instead of mandating thorough genetic screening, it may be more beneficial to educate recipients and allow for informed decision-making without disqualifying donors based solely on their carrier status. Ultimately, the benefits of ECS in gamete donation may not justify the associated drawbacks, suggesting that screening should remain proportional and focused on conditions that are both severe and prevalent rather than expanding to a wide array of genetic risks.

The debate about genetic screening in gamete donation directly intersects with the principle of the best interests of the child. Proponents argue that ECS empowers prospective parents to make informed decisions, thereby enhancing the chances of a healthy future for their children by preventing the transmission of severe genetic disorders. By using genetic matching protocols that avoid pairing carriers of the same autosomal recessive condition, the risks of inherited disorders can be minimised, ultimately promoting the overall health and well-being of potential offspring. Currently, the information gathered from donors about their hereditary disease risks is predominantly dependent on their own knowledge, comprehension, and honesty. This reliance poses considerable risks as a screening method for safeguarding the future health of the potential child. A more cautious approach that focuses on a limited, targeted panel of conditions, and supported by education and informed decision-making, may be more effective in safeguarding health without unnecessarily complicating the donor selection process or perpetuating negative attitudes to disabilities. Therefore, while ECS holds the promise of protecting future generations, its implementation must be carefully considered to ensure that it truly aligns with the best interests of the child, so balancing the need for risk mitigation with ethical considerations and the preservation of donor and recipient rights.

III. ETHICAL AND LEGAL CONSIDERATIONS IN ASSESSING IMPACT ON CHILDREN

a). Overview of Ethical and Legal Considerations

The use of donor gametes in ARTs has garnered considerable attention in South Africa, so raising vital ethical and legal considerations regarding the implications for donor-conceived children. As this practice becomes more prevalent, it prompts a critical examination of the rights of all parties involved, particularly the children who emerge from such arrangements. The intersection of ethics and law in this context necessitates an exploration of issues such as identity, consent, and the potential psychological impact on donor-conceived individuals. Moreover, existing legal frameworks inadequately address the complex dynamics of donor anonymity, parental responsibilities, and the rights of donors to know their biological offspring. Consequently, a comprehensive understanding of these issues is imperative, as it shapes both policy development and societal perspectives on donor-assisted reproduction, so aiming to safeguard the welfare and rights of donor-conceived children in South Africa's evolving landscape.

The increasing reliance on donor gametes in South Africa underscores a significant shift in reproductive practices, which is driven largely by advancements in ARTs. As diverse family structures gain recognition, including those involving single parents and same-sex couples, the demand for egg and sperm donors grows, so reflecting broader societal changes. This trend, however, presents multifaceted ethical and legal challenges concerning the identity, rights, and well-being of donor-conceived children. Central to this discourse is the need for transparency about donor anonymity and the implications for children who may later seek information about their biological origins. The South African legal framework, particularly the Children's Act, aims to safeguard the rights of all parties involved, and yet ongoing discussions reveal that substantial regulatory gaps persist. These complexities necessitate a thorough examination of the socio-ethical implications of using donor gametes and their long-term repercussions on familial and societal constructs.

The use of donor gametes presents complex ethical implications that extend beyond intended parents to include donor-conceived children and the donors themselves. Central to these issues is the fourth node of my Four Node Conceptual Framework, which focuses on the interests and rights of children conceived through gamete donation. This framework aims to

foster a holistic approach to donor conception, as it prioritises the needs and well-being of donor-conceived individuals in legislative, medical, and social contexts.

b). Child-Centric Ethics

The selection process for gamete donors has profound ramifications for the future child. Intended parents often evaluate various donor characteristics, such as background, health, and personality traits. However, it is essential to acknowledge that a child's identity will evolve independently of these factors. Therefore, ethical frameworks governing donor selection must consider not only the desires of intended parents but also the long-term consequences for the children conceived through these choices. Informed decision-making in this area can better align with the best interests of the future child. In the South African context, ethical frameworks associated with gamete donor selection must be particularly sensitive to cultural diversity and varying familial structures. Furthermore, it is critical to consider the broader societal impact of these decisions to create an accepting environment for donor-conceived individuals and to promote awareness in the community.

One of the most pressing interests for donor-conceived children is their right to know about their genetic origins, which is closely tied to identity formation and personal integrity. Knowledge of one's biological background can significantly influence an individual's understanding of family, heritage, and identity. Advocacy groups and ethical frameworks increasingly support the idea that children should have access to information about their donors. Although longitudinal studies indicate that donor-conceived offspring are generally well adjusted and psychologically stable, the ongoing debate about the necessity for and implications of disclosure remains unresolved.[556] While research suggests that disclosure can have neutral or positive effects, the need for transparency in these sensitive matters is paramount. However, on the other hand, theorists have also suggested that protecting the couple and child from existing negative societal attitudes about gamete donation is a valid rationale for non-disclosure.[557] Psychological research supports the viewpoint that 'a genetic relationship is not essential for good social parenting or satisfactory emotional development of children'.[558] Research shows that donor-conceived children who do not know about their donor

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556 M A Duff & S Goedeke 'Parents' disclosure to their donor-conceived children in the last 10 years and factors affecting disclosure: A narrative review' (2024) 30 *Human Reproduction Update* 488–527.

557 R D Nachtigall, J M Tschann, S S Quiroga et al 'Stigma, disclosure, and family functioning among parents of children conceived through donor insemination' (1997) 68 *Fertility and Sterility* 83–89.

558 K R Daniels, H L Ericsson & I P Burn 'The views of sperm semen donors regarding the Swedish Insemination Act 1984' (1998) 3 *Medical Law International* 117 at 124.

status are thriving in their family environments, so suggesting that there is minimal cause for concern about their well-being. Given these findings, policymakers needs to assess the potential risks associated with mandatory disclosure for these families.[559]

The qualitative research of Shehab et al[560] with 254 recipient parents highlights a concerning trend among non-disclosing parents who often avoid discussing gamete donation, and opt for passive responses like 'we don't think about [the donation]' or 'we've decided to deal with it by not dealing with it'. Such attitudes suggest a critical need for mental health practitioners to address how the emotional complexities of infertility can influence decisions about gamete donation and, consequently, the well-being of offspring.

The moral implications of donor anonymity versus disclosure present a significant ethical dilemma. As ARTs evolve, questions arise regarding the rights of donor-conceived children to understand their genetic heritage and the responsibilities of parents to support transparency. Many ethical frameworks advocate disclosure as a means to empower children with information that is essential for their identity development and psychological well-being. Conversely, the preservation of donor anonymity raises concerns about relational tensions and consent dilemmas. Achieving a balance between respecting donor privacy and acknowledging the rights of donor-conceived children is essential, so indicating a need for policies that consider the interests of all parties involved in ARTs.

Ultimately, prioritising the psychological well-being of donor-conceived individuals is crucial. This includes providing access to resources and support that help them navigate their feelings about their origins. Furthermore, sensitively conveying the circumstances of their conception enhances their understanding of family dynamics and can foster a healthy sense of identity and belonging. Encouraging social acceptance of donor conception can help alleviate stigma and foster a culture of openness and education related to the topic. Effective communication about donor conception in family, educational, and social settings can support children in feeling accepted and valued, regardless of their conception method. By addressing these ethical considerations comprehensively, we can better serve the interests and welfare of children conceived through ARTs. Resources such as counselling services, support groups, and educational materials that are designed for donor-conceived individuals can help address the

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559 B Clark 'A balancing act? The rights of donor-conceived children to know their biological origins' (2012) 40 *Georgia Journal of International and Comparative Law* 645.

560 D Shehab, J Duff, P Lauri et al 'How parents whose children have been conceived with donor gametes make their disclosure decision: Contexts, influences, and couple dynamics' (2008) 89 *Fertility and Sterility* 179–187.

unique challenges they may face. This support is essential for helping children to develop a positive self-concept and to navigate complex feelings about their origins. According to Schriivers et al 'peer support and counselling by professionals for donor-conceived offspring should be available for those who need it'.[561]

By considering these aspects of the interests of prospective children, the fourth node of the Four Node Conceptual Framework emphasises the need to place children at the forefront in discussions about gamete donation. This focus helps advocate rights, ethical considerations, and psychological needs, so ensuring that donor-conceived individuals are respected, valued, and supported throughout their lives. Addressing this node not only enhances the discourse associated with gamete donation but also contributes to developing laws and practices that ultimately benefit all parties involved, particularly the children.

c). South Africa's Legal Framework: Ambiguities and Refinement

The legal framework governing the use of donor gametes in South Africa is complex and multifaceted, necessitating a thorough examination to address ethical and social implications. The current legislative framework in South Africa on gamete donation and donor-conceived children needs refinement, as it creates ambiguities that can have far-reaching consequences for the well-being of these individuals. Specifically, there is a need for clearer regulations that address the status and rights of donor-conceived children, which would help to mitigate the uncertainties they may face in terms of their ancestry, medical history, and autonomy. The regulation of donor gametes in South Africa is primarily governed by the National Health Act and the Children's Act, which provide a comprehensive framework for parental rights and the ethical considerations associated with ARTs. As outlined in the Children's Act, the use of donor gametes necessitates informed consent from donors, thereby emphasising the importance of transparency and voluntariness in the donation process, which ultimately safeguards the rights of donor-conceived children. While these laws aim to protect the interests of all parties, including intended parents and donors, they may not fully address the complexities of anonymity and future parental rights. The legal ambiguities present challenges regarding the child's access to information about their genetic heritage, thereby

[561] A Schrijvers, H Bos, F van Rooij et al 'Being a donor-child: Wishes for parental support, peer support and counseling' (2017) 40(1) *Journal of Psychosomatic Obstetrics & Gynecology* 29–37.

raising questions about the balance between donor anonymity and the child's right to know their origins, as supported by existing ethical discussions in this field.[562]

Furthermore, the storage and management of medical information related to donor gametes currently operate in a largely unregulated framework, which raises serious concerns about the future accessibility and accuracy of these records for donor-conceived individuals. As we look ahead in time, we must question whether a centralised authority will be adequately equipped to ensure that this critical information is both retrievable and accurately maintained. To address these concerns, it is imperative that legal mechanisms are introduced and enforced to uphold existing regulations on the safeguarding of medical records. The law must play a pivotal role in enforcing compliance with stipulated guidelines, so ensuring that donor-conceived individuals can access their biological information with confidence and security. Such legal measures would not only protect the rights of these individuals but also enhance the overall integrity and accountability of the systems in place for managing sensitive donor information. This dynamic framework demands ongoing assessment to prioritise the welfare of donor-conceived children.

The ethical imperative to ensure equitable access to donor services and protect the welfare of children underscores the urgent need for robust legal frameworks that promote informed consent and transparency in ARTs. Such frameworks are essential for creating a secure environment that acknowledges and respects the unique needs of donor-conceived children.

d). Key Legal Provisions and Regulations

Under the Children's Act, a clear legal distinction is established regarding the non-parentage of gamete donors. This legislation ensures that gamete donors do not acquire any parental rights or responsibilities concerning children conceived through their donated gametes. By mandating that donors relinquish any claims to parenthood, the Act fosters a sense of clarity and stability in the upbringing of these children, thereby minimising the potential for legal disputes about parental status.

A notable South African case that highlights the enforcement of the legal framework associated with donor gametes and the best interests of the child is *AV* and *ZN v DC*.[563] This

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562 N P Gumede *The Rights and Regulation of Saviour Siblings in South Africa: An Ethical and Jurisdictional Comparative* (Unpublished LLM thesis, University of KwaZulu-Natal, 2020).

563 Case nr: 40522/19 (2024).

case involved a dispute over parental rights and responsibilities concerning a donor-conceived child. In the dispute involving AV, NZ and DC, the court addressed the complexities of parental rights under the Children's Act. AV and NZ, a lesbian couple, sought to determine the parental status of DC, a sperm donor for their child, Z. After Z was born, conflicts arose when DC, registered as the father on Z's birth certificate, opposed AV's plan to travel with Z, and pushed for a co-parenting arrangement. The court had to interpret section 40(3) of the Children's Act, which stipulates that a gamete donor has no rights or responsibilities unless a formal parenting agreement exists. The court concluded that while DC is a biological father, he does not have legal parental rights without such an agreement, thereby affirming that AV and NZ retain full parental rights over Z. Key to the judgment was the distinction made between biological and legal parenthood, which was encapsulated in the statement, 'He may be a biological father but he is not a parent'.

In alignment with protecting the interests of children, the Children's Act also affirms the right of donor-conceived individuals to access medical information about their genetic origins on reaching adulthood at the age of eighteen. However, it preserves the anonymity of donors, restricting the disclosure of their identities unless explicit written consent is provided. This delicate balance aims to honour a child's fundamental right to understand their medical history while simultaneously safeguarding the privacy of donors.

Lastly, the National Health Act and its related regulations mandate that gamete donation be altruistic, and institutes limits on the number of offspring that can result from a single donor's gametes: capped at twelve live births. These provisions are designed to safeguard genetic diversity and mitigate the risks associated with consanguinity among donor-conceived individuals. Collectively, these legal frameworks not only protect the rights of donor-conceived children but also reinforce the overarching commitment to their best interests in the realm of assisted reproduction.

IV. RECOMMENDATIONS FOR INCORPORATING THE CHILD'S BEST INTERESTS INTO REGULATORY FRAMEWORKS

The following recommendations aim to enhance the regulatory framework for gamete donation in South Africa, thereby fostering a more responsive environment that is dedicated to the welfare of children.

a). Mandatory medical and psychological screening for gamete donors

Recommendations include mandating that all gamete donors undergo extensive genetic testing to identify potential hereditary conditions, which would significantly reduce risks to offspring. Frequently, the prohibitive cost of screening leads to the unfortunate omission of this crucial step in the process. To make genetic screening more affordable for recipient parents in South Africa, a multifaceted approach can be adopted. This includes negotiating bulk pricing agreements between fertility clinics and genetic testing companies, advocating for government subsidies and expanded insurance coverage, and implementing sliding-scale fees based on income. Moreover, by focusing exclusively on the most prevalent hereditary disorders endemic to South Africa, we could significantly mitigate unnecessary expenses.

Heritable genome editing could revolutionise the ability to select genetic traits for future children with remarkable accuracy. Initially, the primary applications of this technology may revolve around health-related corrections, such as repairing genetic disorders and enhancing resistance to certain illnesses. Over time, however, it may extend to non-medical enhancements – often described in academic literature as 'enhancements' – so enabling choices related to traits like intelligence, skin complexion, and eye colour.[564] If heritable genome editing proves to be both safe and effective, it is anticipated that the principle of reproductive autonomy enshrined in South African law will evolve to encompass this innovative technology. Limitations on its application would likely only be warranted in scenarios where its use could lead to harm to the child, such as instances where it is improperly used to intentionally produce disabilities.[565]

The question of whether prospective parents have a moral duty to avoid disabilities in their children has become a prominent topic, especially in the light of cases such as that of American lesbian couple, Sharon Duchesneau and Candace McCullough,[566] who intentionally sought to have deaf children. This scenario prompted legal revisions in England and Wales, that prohibited the selection of traits linked to disabilities with ARTs. Increasingly, societal attitudes reflect a preference for avoiding disability, as seen in responses towards those who knowingly conceive children who are at risk for genetic conditions. In a comprehensive

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564 B Shozi 'A critical review of the ethical and legal issues in human germline gene editing: Considering human rights and a call for an African perspective' (2020) 13 *South African Journal of Bioethics and Law* 62 at 63; A McGee 'Using the therapy and enhancement distinction in law and policy' (2020) 34 *Bioethics* 70.

565 D Thaldar & B Shozi 'Procreative non-maleficence: A South African human rights perspective on heritable human genome editing' (2020) 3 *CRISPR Journal* 32.

566 M Spriggs 'Lesbian couple create a child who is deaf like them' (2002) 28 *Journal of Medical Ethics* 283.

examination by Williams on this matter, while parents may willingly embrace the potential harms that their reproductive choices could inflict upon themselves, they ought to refrain from imposing burdens on others. This includes siblings, other dependents, taxpayers, and individuals whose access to public assistance may be adversely affected by such choices.[567]

Recommendations further entail the enhancement of clinical practices focused on child welfare, with efforts directed at standardised psychological and genetic screening tools that are applicable across all clinics. Such initiatives necessitate collaboration among medical genetics specialists, fertility experts, and ethics committees to form practical protocols that reflect contemporary research and technology. A robust network of family support programmes should also be established, providing resources for parents and training for health providers in cultural competency; these programmes may be developed in partnership with existing healthcare entities.

b). Pre-conception counselling for donors and recipients

To enhance the gamete donation system, it is imperative to reinforce the legal framework by ensuring that pre-conception counselling is readily available to both donors and recipients on a voluntary basis. This approach allows parents to access vital support and information according to their individual needs and preferences. Such counselling should focus on the implications of choosing to disclose or withhold information about the child's conception and on addressing the psychological needs of future children.

Currently, there are no broad mandates requiring psychological evaluations for all recipients using donor gametes, nor for the donors themselves. However, Regulation 7(j)(i) and (ii) requires that a recipient who knows the donor, and the gamete donor who knows the recipient, undergo a psychological evaluation.[568] To implement these changes, amendments to the National Health Act may be necessary, accompanied by the creation of standardised counselling protocols that are developed collaboratively by psychologists, fertility specialists, and cultural experts.

While regulations advocate medical and psychological evaluations for gamete donors by qualified professionals, there are significant gaps in consistent enforcement and clarity on

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[567] N J Williams 'Harms to "others" and the selection against disability view' (2017) 42(2) *Journal of Medical Philosophy* 154.

[568] *Surrogacy Advisory Group v Minister of Health* (50683/2020) [2022] ZAGPPHC 558; [2022] 4 All SA 187 (GP); 2023 (1) SA 241 (GP).

psychological intervention. Furthermore, fertility treatment providers should actively ensure that counselling services are available to discuss the emotional, psychological, and social implications of using donor gametes, so empowering recipients with the knowledge to navigate their unique circumstances. As highlighted by Hammarberg et al, effective counselling can help couples understand the distinctive psychosocial aspects of gamete donation and encourage a perspective that considers the child's viewpoint.[569] Although current regulations emphasise the need for informed consent, they lack comprehensive guidelines for counselling, so highlighting the need for improvement in this vital area.

c). Guidelines for parental disclosure of donor conception

Alongside counselling that is designed to prepare couples for gamete donation, it is crucial to also provide post-donation support.[570] This is particularly important, as parents often navigate the complexities of disclosure in markedly different ways after the birth of their child compared to their perspectives prior to conception.[571] Therefore, it is recommended that counselling protocols encompass specific modules on disclosure timing, identity development, and cultural considerations, along with immediate pre-conception sessions and ongoing support at critical developmental stages for the donor-conceived child. A study by Visser et al[572] has highlighted the need for clearer guidance on the timing and content of counselling to bolster couples' confidence in the disclosure process.

d). Creation of a centralised national database for gamete donation

To support an improved counselling framework, a centralised information management system should be established for collecting and managing data on gametes, thereby enhancing traceability and consent compliance. Drawing on successful models from countries such as Australia, the South African system should be tailored to local contexts, ensuring that it incorporates both medical/genetic information and socio-cultural data pertinent to a child's

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569 K Hammarberg, M Carmichael & L Tinney 'Gamete donors' and recipients' evaluation of donor counselling: A prospective longitudinal cohort study' (2008) 48 *Australian and New Zealand Journal of Obstetrics and Gynecology* 601.

570 M Visser, P A L Kop, M van Wely et al 'Counselling on disclosure of gamete donation to donor offspring: A search for facts' (2012) 4 *Facts Views and Visions in Obstetrics and Gynecology* 159.

571 K Daniels, W Gillett & V Grace 'Parental information sharing with donor insemination conceived offspring: A follow-up study' (2009) 24 *Human Reproduction* 1099.

572 M Visser, P A L Kop, M van Wely et al 'Counselling on disclosure of gamete donation to donor offspring: A search for facts' (2012) 4 *Facts Views and Visions in Obstetrics and Gynecology* 159.

identity development. A phased implementation approach, beginning with major fertility centres and progressively extending to smaller clinics would promote effective uptake, supported by adequate digital infrastructure and training.

To effectively design a centralised national database for gamete donation, a cloud-based relational database management system (RDBMS), such as PostgreSQL or MySQL, should be used to ensure scalability, robust data integrity, and ease of access. The system must be architectured with high availability and redundancy to prevent data loss. It is crucial to create a standardised data schema that includes essential fields such as donor ID, age, gender, ethnicity, medical and psychosocial history, genetic screening results, and sperm/egg quality metrics, thereby facilitating uniform data entry across different clinics. A user-friendly graphical interface should be developed for both donors and clinicians; clinicians would benefit from dashboards for quick searches of donor profiles, while donors would have access to easily navigable informational resources and consent forms.

Privacy and security are paramount, and so it is essential to implement stringent data encryption at rest and in transit, alongside multi-factor authentication for accessing sensitive information. This must be guided by established legal frameworks such as the General Data Protection Regulation (GDPR),[573] the European Union's comprehensive data protection law that sets strict standards for how personal information is collected, processed, and stored. In addition, it is important to conduct regular audits and compliance checks to adhere both to the GDPR and to relevant local regulations. A workflow management system should track each stage of the donation process – recruitment, screening, storage, and use – while automated notifications and reminders help ensure timely processing and follow-ups. In addition, integrating analytics tools for the collection and analysis of donation trends, donor demographics, and ARTs' success rates could provide invaluable insights for healthcare providers and policymakers.

Facilitating connections with electronic health records systems will streamline information sharing, so ensuring comprehensive health records for both donors and recipients. Incorporating a feedback mechanism will allow recipients and donors to report their experiences, which can be valuable for continual improvement of the process. Finally, including a regulatory compliance module will ensure adherence to national regulations and

[573] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

guidelines on gamete donation, storage, and use, so making it easier for clinics to comply with legal requirements. Drawing inspiration from successful systems in countries like Sweden and the UK, which have effective frameworks for gamete donation tracking, compliance measures, and user interfaces, could inform the development of a practical and efficient database that is tailored to local needs.

e). Dedicated regulatory body for gamete donation

Oversight measures are critical, which calls for the creation of a dedicated reproductive donation regulatory body tasked with monitoring compliance of regulations, maintaining the central registry, and facilitating research initiatives. Regulation 5 stipulates that 'the Director-General shall establish an electronic central data bank into which all information regarding gamete and embryo donations is stored'.[574] However, the electronic central data bank has not yet been established. SARA, which is a subcommittee constituted under SASREG, together with the fertility clinics affiliated under SASREG, voluntarily keep records of gamete donation is South Africa. Legislative action would be required to standardise and enforce this directive. Regular audits and reporting mechanisms should also be implemented to uphold adherence to established guidelines.

The establishment of a centralised regulatory authority, akin to the UK's HFEA, is gaining momentum as a vital necessity for the fertility sector.[575] This authoritative body would be empowered to implement and enforce uniform guidelines and accreditation standards, thereby elevating the quality of care and adherence to ethical principles across all fertility clinics and related stakeholders. By fostering a collaborative governance framework that encompasses a broad spectrum of stakeholders, this regulatory entity would ensure that decision-making processes are informed by diverse perspectives and expertise. Furthermore, government backing and involvement would be instrumental in lending credibility and teeth to this authority, so enabling it to conduct rigorous audits, enforce compliance, and take swift corrective action when necessary. This would ultimately safeguard the interests of patients and uphold the integrity of the fertility sector.

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574 National Health Act.

575 D Thaldar & N Mthembu *Report on the Competitive Dynamics of the South African Fertility Healthcare Sector* University of KwaZulu-Natal (2024).

f). Long-term research on the impact of gamete donation

Research must be prioritised to assess the long-term outcomes for donor-conceived children in South Africa, including longitudinal studies focusing on psychological, social, and cultural factors. This requires collaboration with academic institutions and healthcare facilities, emphasising studies that evaluate various disclosure strategies and cultural influences on child well-being. Concurrently, educational resources should be developed, encompassing comprehensive training for healthcare providers, public awareness campaigns, and age-appropriate materials for donor-conceived children and their families, so ensuring that these resources are culturally sensitive and effective through partnerships with relevant experts. These recommendations signify a committed step towards creating a regulatory framework that not only safeguards the interests of children but also promotes informed and compassionate practices in gamete donation.

Incorporating the child's best interests into South Africa's regulatory frameworks for donor gametes requires a multifaceted approach that addresses legal, ethical, and social considerations. By ensuring the right to identity, prioritising psychological well-being, and establishing clear legal guidelines, South Africa can create a framework that protects the rights and welfare of donor-conceived children. Ultimately, the success of such a framework will depend on its ability to balance the interests of all parties involved, while foregrounding the child's best interests.

V. CONCLUSION

This chapter revealed the critical importance of prioritising the best interests of the child in the context of gamete donation. The idea of extending legal recognition to prospective children's interests is complex and raises several issues.[576] The South African Constitution emphasises the best interests of the child as being paramount in any matter concerning a child. However, applying this principle to prospective children – those who are not yet born – poses challenges. The rights enshrined in the Constitution are typically activated upon birth, meaning that legal recognition of prospective children's interests could conflict with established legal norms. By

[576] L Frith 'Gamete donation and anonymity: The ethical legal debate' (2001) 16(5) *Human Reproduction* 818–824; M Cowden 'No harm, no foul: A child's right to know their genetic parents' (2012) 26(1) *International Journal of Law, Policy and the Family* 102–126.

introducing the multifaceted dimensions of this issue, it highlights how various aspects of gamete donor selection can affect the well-being and development of donor-conceived children. By examining the psychological implications related to identity formation, it underscores the need for robust frameworks that address the complexities of disclosure and the emotional landscape of donor conception.

Nuanced elements such as sex selection and the importance of genetic screening further emphasise that every consideration in the donor selection process should be informed by a commitment to advancing the welfare of the child. These factors are not merely procedural but also have profound implications for a child, so warranting careful attention from both medical and regulatory perspectives.

In evaluating the ethical and legal considerations involved, it became clear that current frameworks must evolve to better support the rights and interests of donor-conceived children. Ethical practices that champion transparency, informed consent, and non-discrimination are essential for ensuring that children are not only regarded as an outcome of ART procedures but also as individuals with inherent rights and needs.

By advocating readily available pre- and post-conception counselling, the establishment of a centralised information management system, and rigorous psychological and genetic screening protocols, I propose a paradigm shift that places child welfare at the forefront of reproductive health practices. Furthermore, the recommendation to create a dedicated regulatory body underscores the need for a committed, ongoing effort to monitor compliance with established standards.

The best interests principle is inherently broad, which can risk becoming overly subjective. Judges interpreting this principle may impose their personal moral values, especially in cases where societal norms and cultural values[577] heavily influence what is perceived as 'best'. This subjectivity can lead to inconsistent application of the law, which is problematic when maintaining a fair and just legal system.

Extending the best interests principle to prospective children could also create legal contradictions. One major area of concern is reproductive autonomy. If the interests of prospective children are legally recognised, it might impose restrictions on reproductive choices and decision-making. This could conflict with the rights of parents to make

[577] D Thaldar 'The Constitution as an instrument of prejudice: A critique of *AB v Minister of Social Development*' (2019) 9 *Constitutional Court Review* 343–361.

autonomous decisions about reproduction, so potentially infringing personal freedoms that are protected under the Constitution.

There is also the potential for conflict with parental rights. Parents have the right to make decisions in the best interests of their existing children, and extending this principle to those not yet born could complicate parental decision-making. For instance, if prospective children's interests are given legal standing, it could constrain parents' choices regarding fertility treatments or the decision to have children at all. This could be seen as an overreach into personal autonomy and family privacy, which are areas that are typically guarded by constitutional rights.

The legal recognition of prospective children's interests in South Africa's constitutional framework is fraught with potential contradictions, in particular concerning reproductive autonomy and parental rights. While the best interests principle serves as a crucial guideline in child-related matters, its broad application risks subjectivity and inconsistent legal interpretations. Moreover, differentiating between ART and natural reproduction in applying this principle requires careful consideration to avoid unjust discrimination and to uphold individual rights and freedoms. As Freeman's research underscores, empirical evidence on psychosocial outcomes should inform ethical debates, but such evidence cannot resolve all ethical questions related to these complex issues.[578]

Ultimately, this chapter asserts that by fostering a regulatory landscape that is attentive to the best interests of the child, we not only promote the ethical practice of gamete donation but also contribute to the development of a healthier and more empowered generation of donor-conceived individuals. Through collective efforts – spanning legal reforms, clinical practice enhancements, and educational initiatives – we can ensure that the voices and experiences of children are central to all discussions and decisions in the field of assisted reproduction. This not only affirms our moral responsibility but also enriches the societal fabric by advocating a future where donor-conceived children are understood, valued, and supported in their unique identities. As technological advances in reproductive technologies continue to evolve, it is crucial to consider how these innovations may affect future considerations of the best interests of the child.

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578 T Freeman 'Gamete donation, information sharing and the best interests of the child: An overview of the psychosocial evidence' (2015) 33(1) *Monash Bioethics Review* 45–63.

In conclusion, the challenge lies in balancing the best interests of children with the rights and autonomy of parents and donors. A comprehensive regulatory framework, informed by ongoing research and ethical discourse, is essential to navigate these challenges effectively. By focusing on the voices and experiences of children, in particular those conceived through donations, South Africa can foster a legal environment that truly prioritises the welfare and rights of all children.

CHAPTER 5

DECISION-MAKING BY INTENDED PARENTS

I. INTRODUCTION

The concept of parenthood embodies various emotional, social, and biological dimensions. In a general sense, being a parent involves nurturing, providing, and guiding a child throughout their life. This role is characterised by responsibilities such as offering unconditional love, support, education, and making sacrifices for the child's welfare. From a biological perspective, a parent is usually defined as an individual whose gametes contributed to the creation of offspring.[579] Pertaining to ART, the woman who gives birth to a child (excluding surrogates), is the legal mother of the child – irrespective of whether she has a genetic link with the child.[580] The woman's spouse at the time of either (a) the creation of the in-vitro embryo that resulted in the child, or (b) the transfer of the in-vitro embryo that resulted in the child, is deemed to be the legal parent of the child, irrespective of whether he has a genetic link with the child.[581]

In contemporary society, it has long been recognised that individuals can and do nurture children who are not their biological offspring. Therefore, parenthood has evolved to be perceived as not merely being a means of perpetuating one's genetic lineage but also as a significant social role in a child's life.[582] For many, including those experiencing infertility and same-sex couples, the path to biological parenthood may be unattainable. However, through ART and the contributions of gamete donors, they can fulfil the role of social parents, nurturing and guiding children who are not their biological offspring.

This chapter focuses on the multidisciplinary approach including both psychological theories and the legal and normative status of intended parents' decision-making in selecting gamete donors. It aims to explore and evaluate the scope of intended parents' discretion and whether and how it might fall under constitutionally protected reproductive autonomy. The

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579 Collin's Dictionary 'Biological parent' (2019) *Collin's Dictionary* available at *https://www.collinsdictionary.com/ dictionary/English/biological-parent;* M Pieterse 'In loco parentis: Third party parenting rights in South Africa' (2000) 11 *Stellenbosch Law Review* 324 331.

580 Children's Act (Footnote14), s 40(2).

581 Ibid.

582 B Shozi, R Hazarilall & D Thaldar 'Blood is thicker than water, but is it thicker than ink? An analysis of parenthood and sperm donor agreements in the wake of *QG v CS* (32200/2020) [2021] ZAGPPHC 366 (17 June 2021)' (2022) 33 *Stellenbosch Law Review* 529.

core question addressed is whether the decision to select a donor based on subjective criteria plausibly falls within the right to reproductive autonomy.

Many individuals and couples find themselves turning to gamete donation for a variety of compelling reasons. Among these are concerns about the potential for passing on genetic disorders to their children, which may arise from personal or family medical histories. In addition, some may experience challenges related to absent or abnormal sperm cells caused by developmental issues or diseases affecting the reproductive organs. The impact of environmental factors, such as exposure to teratogens, as well as the consequences of treatments like chemotherapy and radiotherapy, can further complicate natural conception.[583] Moreover, an increasingly significant factor is the trend of age-related female infertility, which is observed in both developing and developed nations. This phenomenon is often linked to a growing number of highly educated urban women who prioritise their educational and professional ambitions, and subsequently delay marriage and childbearing.[584] These circumstances collectively lead many to seek the support of gamete donors as a viable path to parenthood.

The aspects pertaining primarily to intended parents in the context of gamete donation encompass several crucial dimensions.[585] First, emotional and psychological preparedness is essential, as these parents must navigate the complexities of their feelings about infertility and the use of a donor, and often experience a mix of hope, anxiety, and grief. Second, the selection criteria for donors become a significant consideration, as intended parents seek individuals whose characteristics align with their values and aspirations for their future child. In addition, legal considerations play a vital role; understanding parental rights, donor anonymity, and the implications for the child's access to donor information is paramount for informed decision-making. Last, the financial implications of gamete donation are noteworthy, as prospective parents must account for the costs involved, including donor fees, medical procedures, counselling, and potential legal services. Collectively, these aspects shape the journey of intended parents as they embark on the path to parenthood through gamete donation.[586]

Recipients of gamete donation embark on a quest to find a match based on their own decision-making process. Some recipients prefer no contact with the donor, while others may

583 E E Puscheck 'Infertility' *Medscape* (30 January 2020).
584 J Kim 'Female education and its impact on fertility' (2016) *IZA World of Labor* 228.
585 I V Ezeome 'Gamete donation—a review of ethical and legal issues' (2022) 26(3) *African Journal of Reproductive Health* 124.
586 Ibid.

seek varying degrees of interaction. They desire the autonomy to choose the gametes they use, which leads them to seek information about the donor's physical, psychological, and cognitive traits, as well as their family and health histories. Recipients are also interested in understanding behaviours that could influence the health of the children conceived through donation and may hope to receive updates from donors about any significant health changes.[587]

The increasing diversity of family structures has profound implications for legal and psychological frameworks. This chapter examines the interplay between intended parents' decision-making criteria, constitutional rights, and legal considerations. By defining these objectives, it highlights the complex landscape in which intended parents operate and the challenges and opportunities they face. Understanding the subjective criteria that guide donor selection and the legal protections available is crucial for supporting intended parents in their making of informed and empowered choices. This holistic approach not only respects the autonomy of intended parents but also ensures the welfare of donor-conceived children, thereby promoting ethical and equitable practices in ART.

II. INTENDED PARENTS' SUBJECTIVE CRITERIA FOR GAMETE DONOR SELECTION

How intended parents choose donors and which donor attributes come to matter has been a prime concern of many scholars.[588,589] Numerous scholars have tracked the desirability of certain donor attributes, such as race, class markers, education and national identity – or what Payne refers to as objects of 'biodesirability'.[590] Defining subjective criteria refers to personal preferences and individualised considerations that intended parents could prioritise when selecting a gamete donor. Unlike objective criteria, which are based on medical or legal standards, subjective criteria are shaped by the unique values, desires, and priorities of the individuals involved. These personal choices allow intended parents to seek donor characteristics that align with their cultural, aesthetic, or personal ideals, and they therefore play a significant role in their decision-making process. By emphasising personal agency and

587 Ibid.

588 C Jones 'Looking like a family: Negotiating bio-genetic continuity in British lesbian families using licensed donor insemination' (2005) 8(2) *Sexualities* 221.

589 K A Wong 'Donor conception and "passing", or; why Australian parents of donor-conceived children want donors who look like them' (2017) 14(1) *Bioethical Inquiry* 77.

590 J G Payne 'Reproduction in transition: Cross-border egg donation, biodesirability and new reproductive subjectivities on the European fertility market' (2014) 22(1) *Gender, Place and Culture* 107.

autonomy, subjective criteria reflect the deeply personal nature of family formation and the diverse motivations behind selecting a gamete donor.

When considering which subjective criteria for gamete donor selection could qualify for more constitutional protection, it is crucial to evaluate how these criteria relate to fundamental human rights, such as dignity, freedom, and equality. Even though respect for autonomy is centrally important in our society, it is not absolute.[591] Gamete donor selection criteria by which donors are chosen can be viewed through both objective and subjective lenses, and each are weighted differently in the broader constitutional framework. Objective criteria, such as health history and carrier status for genetic conditions, are often seen as paramount, given their direct implications for the child's well-being.[592] These criteria are typically protected and prioritised due to their clear impact on the future health of the offspring. Conversely, subjective criteria such as race, appearance, and education might not have the same level of protection but are frequently considered by intended parents for psychological reasons.[593,594] These factors can significantly influence the parents' identification with the child and their personal satisfaction in the parenting experience.[595] The emphasis on these subjective criteria highlights the inherent subjectivity in donor selection, as parents may seek traits that align with their own identity or values. This complex interplay between objective and subjective criteria underscores the nuanced decision-making process in gamete donor selection, so reflecting both personal preferences and broader societal and ethical considerations in a constitutional context.

The analysis of gamete donor selection criteria in a constitutional framework requires a nuanced understanding of individual rights, societal norms, and legal precedents. The right to family life, as protected under the right to privacy and dignity, emphasises the autonomy of individuals in making reproductive choices, including the selection of gamete donors.[596,597] This autonomy is balanced against potential societal interests, such as promoting equality and

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591 C Jacobs 'Realising the right to reproduce with assistance in South Africa: A constitutional perspective' (10 November 2021), available at *https://hdl.handle.net/1887/3239122*

592 D Meyerson 'Surrogacy, geneticism and equality: The case of *AB v Minister of Social Development*' (2019) 9(1) *Constitutional Court Review* 317.

593 L Frith, N Sawyer & W Kramer 'Forming a family with sperm donation: A survey of 244 non-biological parents' *Reproductive BioMedicine* (forthcoming).

594 C T Drewes *Anonymous Sperm Donor Preferences of Non-Genetic Mothers* (unpublished Master's dissertation, Smith College, 2009).

595 M Rodrigues Expert Opinion 1, filed in *AB v Minister of Social Development* 2016 (2) SA 27 (GP) and *AB v Minister of Social Development* 2017 (3) SA 570 (CC).

596 *Bernstein v Bester* 1996 (2) SA 751 (CC).

597 *Nandutu v Minister of Home Affairs* 2019 (5) SA 325 (CC).

preventing discrimination, which may come into play when considering criteria like race and appearance. The constitutional framework allows for examining whether such criteria infringe broader societal values or perpetuate bio-normative prejudices.[598] For instance, while the use of subjective criteria like education and race in donor selection may align with personal preferences, it is essential to ensure that these choices do not reinforce stereotypes or undermine the principles of equality and non-discrimination that are enshrined in the Constitution.[599] In addition, the constitutional mandate to consider less restrictive means in the limitation of rights urges a careful evaluation of whether existing laws or practices unduly limit individuals' reproductive autonomy without sufficient justification.[600] Through this lens, the constitutional framework serves as a critical tool for balancing individual desires with societal values, so ensuring that the process of gamete donor selection respects both personal autonomy and broader ethical standards.

Furthermore, ethnic and cultural criteria are likely to receive the strongest constitutional protection because they are closely tied to the rights of cultural identity[601] and dignity.[602] Many legal frameworks recognise cultural and ethnic identity as fundamental rights, which are often linked to broader protections against discrimination.[603] The selection of a donor based on ethnic or cultural criteria can be essential for maintaining cultural heritage and identity, which are important aspects of personal dignity and self-determination.

Medical criteria also warrant significant constitutional protection, particularly when they relate to preventing hereditary conditions or ensuring the future child's health.[604] The right to health is often enshrined in constitutions or interpreted as part of the right to life and bodily integrity.[605] Selecting a donor based on medical criteria can be seen as an extension of the right to health and well-being, thereby allowing parents to make informed decisions that promote their future children's best interests.

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598 *Hoffmann v South African Airways* 2001 (1) SA 1 (CC).
599 Ibid.
600 *Van Der Merwe v Road Accident Fund* 2006 (4) SA 230 (CC).
601 Constitution, s 31.
602 Section 10.
603 Article 2.1 *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* (1992).
604 Institute of Medicine (US) Committee on Assessing Genetic Risks *Assessing Genetic Risks: Implications for Health and Social Policy* (L B Andrews, J E Fullarton, N A Holtzman et al (eds)) (1994) Ch. 8 'Social, Legal, and Ethical Implications of Genetic Testing'.
605 Constitution, s 12(2)*(a)*.

Aesthetic criteria are generally less likely to receive robust constitutional protection, as they primarily reflect personal preferences and ideals of beauty, which are subjective and not directly linked to fundamental rights. However, generally, the complexities of individual rights and societal values can create situations where aesthetic preferences gain legal significance. While personal preferences for physical appearance are valid, they do not necessarily specifically align with constitutional values or human rights principles. However, it is crucial to consider that intended parents' aesthetic and personality-based preferences can also be viewed through the lens of freedom of expression. This fundamental right allows individuals to articulate their subjective ideals of aesthetics, which may warrant some level of constitutional protection. Although these preferences are highly subjective and relate more to individual desires than to fundamental rights, they nonetheless represent a form of self-expression that contributes to the broader framework of reproductive autonomy.

The legal implications of recognising this connection suggests that aesthetic and personality preferences could indeed receive constitutional protection, meaning that laws restricting these preferences might be challenged as being violations of the right to express one's identity. In addition, the cultural significance of beauty and personality traits further underscores the need for inclusive legal standards that reflect societal values. Understanding this relationship may influence policymakers to consider these factors when drafting laws related to reproductive rights. Therefore, acknowledging the intersection of aesthetic preferences and freedom of expression not only enriches discussions of reproductive autonomy but also emphasises the validity of intended parents' desires within legal frameworks.

Today, ART and donor selection emphasise informed choice, genetic diversity, and the health and well-being of future generations, and distance themselves from the exclusionary and harmful ideologies of the past. This evolution reflects a commitment to ethical standards that prioritise individual rights and the potential benefits of genetic science when applied responsibly. The history of eugenics serves as a cautionary tale, notably marked by the Nazi regime's damaging quest for 'racial purity', which led to significant human suffering and discrimination. This dark past has led to the widespread discrediting of eugenics. However, in modern times, the lessons learned have helped shape ethical practices in fields like ARTs and donor selection. According to Thaldar and Shozi, 'it is important not to conflate state-enforced, unethical practices in the name of 'eugenics', like forced sterilisation, with the agenda of promoting human well-being through genetic interventions, which are freely chosen by

prospective parents.'[606] As we embrace the ethical advancements in ARTs and donor selection, it is imperative that robust legal frameworks are in place to safeguard against any potential misuse, so ensuring that these practices remain beneficial and do not devolve into societal harm.

The constitutional rights of intended parents in South Africa, in particular in the context of ART, remain an intricate and evolving area of reproductive law. According to the definition, reproductive rights may not be explicitly stated; rather, they can be derived from the interpretation of existing rights.[607] These include the rights to reproductive autonomy, reproductive health, privacy, dignity and equality.[608] The legislative history of reproductive rights in South Africa can be divided into three phases: legislation before 1996, the Constitution enacted in 1996, and subsequent legislation after 1996.[609] Prior to the Constitution, the Abortion and Sterilisation Act[610] allowed for legal termination of pregnancies, but its restrictive provisions limited reproductive rights to a narrow interpretation focused on the right not to have children.[611]

The 1996 Constitution marked a significant shift, and recognised reproductive rights under section 12(2)(a), which grants individuals the right to make decisions about reproduction, including access to termination of pregnancy.[612] This was further explored in the case of *AB v Minister of Social Development*,[613] which acknowledged reproductive autonomy in the context of non-coital reproduction, although later rulings restricted this right to those physically involved in the reproductive process. Following the Constitution, various Acts like the Choice on Termination of Pregnancy Act[614] and the Children's Act have affirmed reproductive rights, primarily focusing on the right not to reproduce. However, while these statutes recognise non-coital reproduction methods, such as artificial fertilisation and surrogacy, they do not explicitly affirm the right to reproduce non-coitally, so indicating gaps in the legal framework that need

606 D Thaldar & B Shozi 'An imbalanced approach to governance? An analysis of the WHO's position on human genome editing' (2023) 37 *Bioethics* 7.

607 C Shalev 'Rights to sexual and reproductive health: The right to autonomy and equality' (2000) *Health and Human Rights* 40.

608 C Jacobs 'Realising the right to reproduce with assistance in South Africa: A constitutional perspective' (10 November 2021), available at *https://hdl.handle.net/1887/3239122*

609 C van Niekerk 'Assisted reproductive technologies and the right to reproduce under South African law' (2017) 20(1) *Potchefstroom Electronic Law Journal (PELJ)* 1.

610 Abortion and Sterilisation Act 2 of 1975.

611 Van Niekerk C "Assisted Reproductive Technologies and the Right to Reproduce under South African Law" *PER / PELJ* 2017(20)

612 O'Sullivan 'Reproductive Rights' 37-15.

613 2016 2 SA 27 (GP).

614 92 of 1996.

to be addressed to fully support these rights. Furthermore, the constitutional imperative to consider the best interests of the child often overshadows the rights of intended parents, so creating a legal landscape where the potential rights of an unborn child are sometimes prioritised over the autonomy of the parents.[615]

The rights of intended parents in South African constitutional law encompass a complex interplay of reproductive autonomy, personal dignity, and the fundamental right to family life. With an increase in the use of ARTs, there is now a focus on the rights of individuals to pursue non-coital reproduction and the breadth of their reproductive freedoms.[616] It is important to note, however, that these rights hold little significance without a legal framework that effectively supports and enforces them.[617]

As ART becomes increasingly prevalent, the legal framework governing these practices has to evolve to reflect the diverse needs and rights of individuals seeking to build families. South Africa's Constitution provides a foundation for protecting the rights of intended parents, including the right to make informed choices about reproduction and the right to privacy. However, this landscape is accompanied by ethical considerations, in particular concerning donor anonymity and disclosure, which further complicate the rights of intended parents. Understanding these rights is crucial not only for legal practitioners and policymakers but also for the intended parents themselves, as they navigate the emotional and practical challenges of conception in a context that values both individual freedoms and the welfare of children.

The right to reproductive autonomy empowers individuals to make informed decisions about their reproductive health[618] and family planning without coercion or undue interference. This is particularly relevant for intended parents, as they must have the freedom to choose how they wish to conceive, including selecting donors whose characteristics align with their personal preferences. Similarly, the right to privacy protects the personal and intimate aspects of their lives, so allowing intended parents to keep their reproductive choices confidential,

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615 *Christian Lawyers Association of South Africa v Minister of Health* 1998 (4) SA 1113 (T), *Ex Parte CJD and Others* 2018 (3) SA 197 (GP).

616 C van Niekerk 'Assisted reproductive technologies and the right to reproduce under South African law' (2017) 20(1) *Potchefstroom Electronic Law Journal* 1.

617 W T Mugadza 'Olaniyan K *Corruption and Human Rights Law in Africa* (2016 Hart Publishing Oxford)' (2018) 21(1) Potchefstroom Electronic Law Journal 1.

618 S Shalev 'Health and human rights' (2000) 4(2) *Health and Human Rights* 38: In particular, identifies personal autonomy and the right to equality as providing, directly or indirectly, for the rights to sexual and reproductive health.

particularly regarding donor anonymity and the confidentiality of medical and genetic information.

Moreover, the right to equality ensures that all individuals have equal access to ART services and donor gametes, regardless of their marital status, sexual orientation, or other personal characteristics.[619] Discriminatory practices in accessing these services can hinder individuals from building their families, emphasising the need for inclusive policies that uphold equality in reproductive choices.

Finally, the right to family life encompasses the ability to form and maintain a family unit, which is recognised as a fundamental human right.[620] For intended parents, the pursuit of donor gametes is often driven by a deep desire to create a family, and legal frameworks must support their efforts to access ART – acknowledging family formation as vital for personal fulfilment and social stability.

Collectively, these rights highlight the importance of addressing the legal and ethical considerations associated with ART to foster a supportive environment for intended parents and their future families.

a). Reproductive autonomy

In South Africa, the constitutional framework provides robust support for family rights, including the right to make decisions about reproduction and family formation. This is enshrined in section 12(2)(a) of the Constitution, which guarantees the right to bodily and psychological integrity, encompassing decisions regarding reproduction. This provision forms the cornerstone of the right to family formation, affirming the autonomy of individuals to decide whether and how to start a family. Furthermore, the right to privacy, protected under section 14, ensures that personal decisions ,such as the selection of donor gametes, remain in the private domain of individuals and families.[621]

In legal terms, the woman who gives birth to a child is considered to be the legal mother, regardless of genetic connection (except in surrogacy).[622] The legal father is identified as the woman's husband at the time the in-vitro embryo is created or implanted, irrespective of his

619 Ibid.
620 D Thaldar 'The right to family life: Why the genetic link requirement for surrogacy should be struck out' (2023) 15(3) *South African Journal of Bioethics and Law* 84–91.
621 Ibid.
622 Children's Act (Footnote 14), s 26(2)*(b)*.

genetic link to the child. Recently, the Pretoria High Court ruled that the term 'husband' discriminates against lesbian couples, and infringes on their right to equality. To address this, the court ordered replacing 'husband' with 'spouse' to ensure inclusivity.

While biological parenthood may initiate the journey, it is not the sole path to becoming a parent, as evidenced by gamete donation, which enables infertile, homosexual, and single individuals to embrace parenthood beyond genetic ties. However, South African law still places great significance on biological links. For instance, section 294 of the Children's Act prohibits persons from having a child by surrogacy unless they can contribute at least one of the gametes to the IVF process.[623] The use of donor gametes is a critical aspect of exercising the right to family formation for individuals and couples who face biological barriers to conception. By allowing the use of donor sperm or eggs, the law facilitates the creation of families that could otherwise be unattainable.

Reproductive autonomy is a significant right that underscores individuals' freedom to make decisions about reproduction. This right reflects a commitment to personal autonomy, so allowing individuals the freedom to decide whether, when, and how to have children. Historically, this right has been interpreted to emphasise bodily integrity, primarily concerning natural reproduction.[624]

When applying reproductive rights to new reproductive technologies in South Africa, Shozi advocates a broader understanding of reproductive autonomy. Shozi argues that reproductive autonomy should not be limited to decisions involving one's own body but should also encompass broader choices about family formation, including the use of new reproductive technologies (NRTs) like IVF and surrogacy.[625] He criticises the narrow view that confines reproductive autonomy to bodily integrity, and suggests instead that it should protect individuals' freedom to form families, even if this involves the use of the bodies or gametes of others.

In *Surrogacy Advisory Group v Minister of Health*[626] the decision highlights a judicial recognition of the need to protect individuals' freedom in forming families through NRTs, supporting Shozi's broader conceptualisation of reproductive autonomy being beyond mere

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623 Section 294 of the Children's Act.

624 B Shozi 'Something old, something new: Applying reproductive rights to new reproductive technologies in South Africa' (2020) *South African Journal on Human Rights* 1–24.

625 Ibid.

626 *Surrogacy Advisory Group v Minister of Health* (50683/2020) [2022] ZAGPPHC 558; [2022] 4 All SA 187 (GP); 2023 (1) SA 241 (GP) (19 July 2022).

bodily integrity. The court addressed regulations that imposed psychological evaluations on individuals using known donors for artificial fertilisation, and restricting their autonomy to make reproductive choices, which Shozi criticises as being a narrow view that is confined to bodily integrity.[627] Shozi further explains that 'bodily integrity and psychological integrity are capable of being viewed as separate, self-standing, rights that may each be infringed by limitations of reproductive autonomy'.[628] The court found this requirement to be unconstitutional as it infringed the rights to equality, privacy, and access to healthcare, so emphasising the importance of allowing individuals to make autonomous decisions about family formation without undue state interference.[629] Furthermore, the case also examined the prohibition of preimplantation sex selection, which the court found to unjustly limit reproductive choice, so aligning with Shozi's argument that reproductive autonomy should encompass broader family formation choices.[630]

Furthermore, the Constitutional Court case of *AB v Minister of Social Development*[631] also highlights a landmark decision about reproductive rights in the context of artificial reproduction. In this case, AB, who was unable to conceive or carry a pregnancy to term owing to infertility, sought to use donor gametes and a surrogate to have a child. Section 294 of the Children's Act, which requires a genetic link between the commissioning parents and the child, however excluded her from using surrogacy. AB challenged this provision, arguing that it violated her rights to privacy, reproductive autonomy, dignity, equality, and non-discrimination. The High Court initially ruled in favour of AB, recognising her use of donor gametes as being protected under section 12(2)*(a)* and declaring the genetic link requirement to be unconstitutional. However, the Constitutional Court overturned this decision. The majority, led by Justice Nkabinde, held that reproductive autonomy is tied to bodily integrity and does not extend to decisions involving another's body, thereby limiting it to one's own body. In contrast, Justice Khampepe, for the minority, supported a broader interpretation, and suggested that section 12(2) protects reproductive decisions even without bodily involvement,

627 *Surrogacy Advisory Group v Minister of Health*, paras 49–55.
628 B Shozi 'Something old, something new: Applying reproductive rights to new reproductive technologies in South Africa' (2020) *South African Journal on Human Rights* 1–24.
629 *Surrogacy Advisory Group v Minister of Health*, para 90.
630 *Surrogacy Advisory Group v Minister of Health*, para 168.
631 *AB v Minister of Social Development* 2017 (3) SA 570 (CC). For a detailed discussion of the legal proceedings in AB, see D W Thaldar 'Post-truth jurisprudence: The case of *AB v Minister of Social Development*' (2018) 34 *South African Journal on Human Rights* 231.

so aligning with Shozi's view that reproductive autonomy should include forming families through natural or artificial means.[632]

In South African constitutional law, reproductive autonomy is deeply rooted in the foundational values of dignity and freedom. These principles highlight the essential right of individuals to make decisions about forming a family in a manner that honours their personal identity and self-conception. The freedom to choose whether, when, and how to create a family is a profound expression of one's individuality and life aspirations.[633] For intended parents, the selection of a donor is a pivotal component of this autonomy, and allows them to harmonise the genetic characteristics of their potential children with their own values and cultural heritage. This ensures that the family they build truly reflects their identity and aspirations.

The decision-making process of intended parents in selecting gamete donors is shaped by deeply rooted psychological motivations and is constrained by legal frameworks. This chapter adopts an interdisciplinary approach, integrating psychological and legal perspectives to examine whether intended parents' subjective criteria for donor selection – such as race, education, or appearance – constitute an exercise of reproductive autonomy under South African constitutional law. These perspectives are interwoven to provide a comprehensive analysis of how individual preferences interact with constitutional protections.

The framework below outlines how psychological insights and legal principles are synthesised to address the chapter's core question: *Does the decision to select a donor based on subjective criteria plausibly fall within the right to reproductive autonomy under South African constitutional law?*

b). Trivers's Parental Investment Theory

This analysis is grounded in three foundational psychological perspectives that elucidate the complexities of decision-making and selection: Trivers's Parental Investment Theory, the Complementarity Theory, and the Positive Assortative Mating Theory. Trivers's Parental Investment Theory posits that individuals select traits like health and intelligence to optimise offspring viability, so reflecting an evolutionary drive to maximise reproductive success. The

632 B Shozi 'Something old, something new: Applying reproductive rights to new reproductive technologies in South Africa' (2020) *South African Journal on Human Rights* 1–24.

633 W Holness, B Clark, A Edgcumbe et al 'A "parenting licence" granted by one's existing children? Critical analysis of the judgment in *Ex Parte JCR* 2022 5 SA 202 (GP)' (2023) 26(1) Potchefstroom Electronic Law Journal 1–32.

Complementarity Theory[634] suggests that parents seek donors whose traits complement their own, thereby addressing psychological needs for balance in family dynamics. The Positive Assortative[635] Mating Theory highlights preferences for similarity in characteristics like ethnicity or education, so fostering familial and cultural continuity. These theories provide a scientific basis for understanding subjective criteria as being rational and psychologically significant choices. The legal perspectives encompassed in this discourse include the constitutional rights of dignity, bodily integrity, and freedom, each of which is intricately pertinent to Trivers's Parental Investment Theory.

Understanding how humans select partners in natural mate selection compared to choosing a donor match for gamete selection is a fascinating lens through which to examine human behaviour and decision-making.[636] In natural mate selection, individuals often evaluate potential partners based on a combination of internal traits, such as kindness and reliability, and external attributes like physical attractiveness and social status.[637] This process aligns with Trivers's Theory of Parental Investment, which posits that the sex investing more in offspring will be more selective in mate choice, and seek attributes that ensure offspring survival and success.[638] In contrast, the selection of a donor for gamete donation isolates genetic contribution from factors like parental investment, and offers a unique opportunity to study preferences in a controlled setting.[639] This divergence in contexts highlights the adaptive strategies humans have developed over time to optimise reproductive success, whether through direct mate selection or through the more deliberate process of donor selection. Trivers's Parental Investment Theory provides a comprehensive framework for understanding the reproductive strategies and mate selection behaviours observed across various species, including humans.[640] This theory, as detailed in Trivers's work, posits that differences in parental investment between males and females significantly influence sexual selection and

634 R F Winch, T Ktsanes & V Ktsanes 'The theory of complementary needs in mate-selection: An analytic and descriptive study' (1954) 19(3) *American Sociological Review* 241–249.

635 D Thiessen & B Gregg 'Human assortative mating and genetic equilibrium: An evolutionary perspective' (1980) 1(1) *Ethology and Sociobiology* 111–140.

636 J Scheib 'The Psychology of Female Choice in the Context of Donor Insemination' in K R Daniels and E Haimes (eds) *Donor Insemination: International Social Science Perspectives* (Springer New York 1998) 191.

637 S Sarir, N Muhammad, I Ala, M A Jadoo, S Iqbal *et al* 'Role of Physical Attractiveness in Mate Selection by Educated Women in Khyber Pakhtunkhwa' (2018) 9 *Arts and Social Sciences Journal* 335.

638 F Pazhoohi 'Parental Investment Theory' in L M Welling & T K Shackelford (eds) *The Cambridge Handbook of Evolutionary Perspectives on Sexual Psychology* (1 ed, Cambridge University Press 2022) 137.

639 Ibid.

640 D M Buss 'Sex differences in human mate preferences: Evolutionary hypotheses tested in 37 cultures' (1989) 12 *Behavioral and Brain Sciences* 1-49.

mate choice dynamics. Typically, the parent who invests more in offspring – often the female – becomes a limiting resource for which members of the less-investing sex compete.[641] This differential investment shapes the mating behaviours and preferences observed in numerous species.

In many animals, females invest substantial resources into their offspring through gestation and caregiving, as noted by Trivers.[642] This significant investment results in females being more selective when choosing mates, often preferring males who display superior genetic qualities or the ability to provide resources and protection. Males consequently engage in competition to access these selective females, which manifests in displays of strength, territory control, or other traits that are attractive to potential mates.[643]

Mate selection is a critical link in human societal development, and is characterised by complex decision-making. It emphasises the importance of cue preferences and the variety of methods individuals use when selecting partners. Central to mate selection are resources, which serve as significant factors influencing decision-making, with numerous studies highlighting their impact.[644,645] Financial resources often dictate the degree of preference for certain cues, with men valuing physical attractiveness in women and women emphasising men's resources.[646] This is supported by Trivers's Theory of Parental Investment which confirms that mate selection aims to optimise genetic continuation, with women focusing on economic resources and men on appearance.[647] Mate selection criteria and decision-making strategies can also be examined from the perspective of sociological theories like Complementarity Theory[648] and Positive Assortative Mating, which suggest that individuals seek partners with complementary or similar characteristics, respectively. Both theories underscore the complex interplay of characteristics that individuals consider in mate selection, so reflecting a dynamic balance between seeking complementary traits and ensuring compatibility through similarity.

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641 Ibid.

642 R L Trivers 'Parental investment and sexual selection' in B Campbell (ed) *Sexual Selection and the Descent of Man, 1871–1971* (1972) 136–179.

643 Ibid.

644 D M Buss 'Sex differences in human mate preferences: Evolutionary hypotheses tested in 37 cultures' (1989) 12 *Behav Brain Sci* 1–14.

645 J C Yong and N P Li 'Cash in hand, want better looking mate: Significant resource cues raise men's mating standards' (2012) 53 *Personal Individ Differ* 55–58.

646 S W Gangestad & J A Simpson 'The evolution of human mating: Trade-offs and strategies of pluralism' (2000) 23 *Behav Brain Sci* 573–587.

647 R L Trivers 'Parental investment and sexual selection' in *Sexual Selection and the Descent of Man* (1972) 136–179.

648 R F Winch, T Ktsanes & V Ktsanes 'The theory of complementary needs in mate-selection: An analytic and descriptive study' (1954) 19(3) *American Sociological Review* 241–249.

These sociological perspectives provide a broader understanding of how resource availability, personal needs, and social circumstances influence the mate selection process.

Furthermore, Trivers's contribution contends that women are more likely than men to seek a mate with non-physical characteristics that maximise the survival or reproductive prospects of their offspring.[649] And in mate selection research it was found that women accorded more weight than men to socioeconomic status, ambitiousness, character and intelligence than men.[650] Women, by selecting resourceful partners, aim to secure the best possible environment for their children, so maximising reproductive success.

Applying Trivers's theory to modern contexts such as gamete donor selection reveals the continued relevance of these principles. Intended parents have the opportunity to prioritise genetic traits that suggest health, intelligence, and physical attractiveness – qualities indicative of good genes based on donor profiling. The work of Scheib et al. supports this notion, illustrating that intended parents value characteristics in a donor that align with a long-term mating strategy, and emphasising genetic quality over other attributes.[651] In the realm of mammals, a pronounced disparity in parental investment is evident, as females typically devote more resources and care to their offspring than males. This inherent imbalance compels females to exercise discernment in their mating choices, so ensuring that they avoid ill-suited partners and suboptimal decisions.[652] An empirical study conducted in the US by Zeifman and Ma confirmed that women tend to have similar preferences for sperm donors and life partners, so suggesting that children from donor insemination are likely to share traits with those born traditionally.[653]

In the gamete donor selection process, Trivers's theory is particularly applicable. Intended parents engage in a form of mate selection by evaluating potential donors based on traits believed to correlate with successful offspring, such as intelligence and physical health. This process reflects the fundamental principles outlined by Trivers, where investment in

649 D M Buss 'Sex differences in human mate preferences: Evolutionary hypotheses tested in 37 cultures' (1989) 12 *Behav Brain Sci* 1–14.

650 A Feingold 'Gender differences in mate selection preferences: A test of the parental investment model' (1992) 112 *Psychol Bull* 125–139.

651 J E Scheib 'Sperm donor selection and psychology of female mate choice' (1994) 15 *Ethol Sociobiol* 113–129.

652 J E Scheib, A Kristiansen & A Wara 'A Norwegian note on sperm donor selection and the psychology of female mate choice' (1997) 18 *Evolution and Human Behavior* 143–149.

653 D Zeifman & J Ma 'Experimental examination of women's selection criteria for sperm donors versus life partners' (2013) 20(2) *Personal Relationships* 311–327.

offspring quality is maximised through the selection of superior genetic material.[654] This evolutionary approach is mirrored in the context of gamete donor selection, where intended parents often seek donors with traits such as genetic resemblance, health, intelligence, and other characteristics that align with their values and aspirations for their future children.

The parallels between natural mate selection and gamete donor selection lie in the emphasis on optimising genetic quality and the future success of offspring. In natural mate selection, individuals may choose partners based on perceived genetic advantages, and in gamete donor selection intended parents are guided by similar considerations. They may prioritise internal attributes like kindness and reliability over external markers such as income or physical attractiveness,[655] so reflecting a shift away from traditional success markers and aligning with evolving social norms and values. This illustrates how evolutionary psychology can inform legal reasoning by grounding reproductive preferences, such as selecting for health or intelligence, in constitutionally protected rights to bodily and psychological integrity.

Despite these similarities, ART involves more complex arrangements than natural reproduction, so necessitating legal protections to ensure that ethical standards are maintained. Legal frameworks in ART are essential for obtaining informed consent from all parties involved, ensuring that donors are fully aware of the implications of their donation and that intended parents make informed decisions. These protections also prevent discrimination and promote equality by regulating the selection process, thereby preventing societal inequalities from being perpetuated through reproductive choices.

Moreover, legal protections safeguard the rights of donor-conceived individuals by providing access to information about their genetic origins, which is crucial for identity and health. This is in contrast to natural reproduction, where such considerations are inherently managed within familial contexts. Legal oversight balances individual autonomy with societal interests, so ensuring that personal choices do not undermine public values such as diversity and non-discrimination. Regulations also prevent exploitation by ensuring fair compensation for donors and preventing commercialisation that prioritises profit over ethical considerations.

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654 R L Trivers 'Parental investment and sexual selection' in B Campbell (ed) *Sexual Selection and the Descent of Man, 1871–1971* (1972) 136–179.

655 B Torgler & S Whyte 'Selection criteria in the search for a sperm donor: Internal versus external attributes' (2013) CREMA Working Paper No 2013-22, Center for Research in Economics, Management and the Arts (CREMA), Zürich.

While natural mate selection operates without legal governance due to its organic and personal nature, ARTs in a structured and 'medicalised' environment require regulation to protect the rights and interests of all stakeholders involved. Legal protections in ART thus provide a necessary framework to ensure that reproductive choices are made ethically, fairly, and with consideration of broader societal values. Ultimately, both Trivers's theory and legal frameworks highlight the importance of optimising offspring success, whether through natural or assisted reproduction, while also ensuring ethical and equitable practices.

In general, 'despite millions of dollars poured into IVF research worldwide, the literature and research on recipient preferences is notably underdeveloped.'[656] In fact, much of the current research focuses on the increase in both recipient and donor support of disclosure to offspring[657] even in countries with strong legal frameworks upholding donor anonymity.[658,659,660]

In an examination of mate preferences across 37 cultures, Buss found that women in 36 of these cultures prioritise financial stability in a potential mate more than men do.[661] Buss also found that women generally exhibit a stronger preference for ambition and industriousness. Conversely, men are more inclined to value youth and physical attractiveness in their partners. These findings are supported by Buss and Barnes, who note that 'women typically desire a spouse to have a good family background and be considerate, honest, dependable, kind, understanding, fond of children, well-liked by others, ambitious, career-oriented, and tall, while men seek a female who is physically attractive, good looking, a good cook, and frugal'.[662] Moral qualities, including cooperative behaviour, generosity, and altruism, are also important, particularly as they can enhance male reproductive success.[663]

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656 Ibid.

657 A Brewaeys, J K De Bruyn, L A Louwe et al 'Anonymous or identity-registered sperm donors? A study of Dutch recipients' choices' (2005) 20 *Human Reproduction* 820–824.

658 K Daniels 'Donor gametes: Anonymous or identified?' (2007) 21 *Best Practice & Research Clinical Obstetrics & Gynecology* 113–128.

659 K Daniels, W Gillett & V Grace 'Parental information sharing with donor insemination conceived offspring: A follow-up study' (2009) 24 *Human Reproduction* 1099–1105.

660 P Thorn, T Katzorke & K Daniels 'Semen donors in Germany: A study exploring motivations and attitudes' (2008) 23 *Human Reproduction* 2415–2420.

661 D M Buss 'Sex differences in human mate preferences: Evolutionary hypotheses tested in 37 cultures' (1989) 12 *Behavioral and Brain Sciences* 1–14.

662 D M Buss & M Barnes 'Preferences in human mate selection' (1986) 50 *Journal of Personality and Social Psychology* 559–570.

663 M Gurven, W Allen-Arave, K Hill et al '"It's a wonderful life": Signaling generosity among the ache of Paraguay' (2000) 21 *Evolution and Human Behaviour* 263–282.

A survey conducted in the 1990s by Baker et al.[664] revealed that among heterosexual married women, lesbian and single women, all groups considered the donor race/ethnic origin physical features, medical history and education level to be the most important characteristics. More recently, Torgler and Whyte also investigated the intricate criteria that women utilise when selecting sperm donors in the online market, so filling a significant void in empirical research about female preferences in sperm donor selection. Their study explores a novel research setting where the online market provides women with diverse options to find donors who meet their specific criteria.[665]

The study's findings illuminate a distinct preference among women for internal attributes over external ones when selecting sperm donors.[666] Traits such as reliability, openness, and kindness are prioritised, while external factors like income, occupation, and physical attractiveness hold less sway. It is essential to clarify that while traits such as income, occupation, and physical attractiveness are not the predominant factors in decision-making for women, this does not imply that they are without significance; rather, they play a more neutral role in influencing the final choice. These insights have profound implications for how intended parents – those actively seeking gamete donors – make their selection decisions. The emphasis on internal attributes indicates that intended parents (in particular women) are prioritising donors who embody qualities like kindness and reliability, traits that are perceived as being beneficial for a child's development and well-being. This aligns with the broader trend in mate selection, where character and personality traits have become increasingly valued. Torgler and Whyte note that 'Character is more important than physical attributes, abilities, and resources'.[667]

Furthermore, the research suggests a shift away from focusing on external markers of success, such as income or occupation. This change could be attributed to the increased financial autonomy of women and evolving social norms, so reflecting 'the ability of socialisation and better access to resources to rapidly shape the female decision process'.[668]

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664 W Baker, J Copeland, S McKeachie et al. 'Choosing a sperm donor: Comparison of preferred characteristics by recipient martial status and sexual orientation' (1998) 70 suppl *Fertility and Sterility* S185–S186.

665 B Torgler & S Whyte 'Selection criteria in the search for a sperm donor: Internal versus external attributes' (2013) CREMA Working Paper No 2013-22, Center for Research in Economics, Management and the Arts (CREMA), Zürich.

666 Ibid.

667 Ibid.

668 D M Buss, T K Shackelford, L A Kirkpatrick et al 'A half century of mate preferences: The cultural evolution of values' (2001) 63 *Journal of Marriage and Family* 491–503.

This shift highlights a growing recognition that personal qualities and values are critical to effective parenting and the long-term success of children.

According to Pennings, the selection of the donor is based on three standards: the partner of the recipient, an overall attractive person and the presence of one or more specific characteristics.[669] However, the application of these standards is contingent on individual circumstances. It is essential to recognise that not all recipients are part of a couple; some are individuals embarking on the journey of parenthood alone and who are seeking a donor to fulfil their aspirations. Therefore, matching to the partner is possible only when there is a partner. Many concerns appear to revolve around selecting donors based on specific traits, owing to fears of veering towards the creation of so-called 'designer babies'. However, it is crucial that such preferences are guided by considerations of moral and ethical acceptability.

Therefore, Trivers's Parental Investment Theory suggests that individuals invest more in offspring when they perceive higher reproductive value, which provides insight into why intended parents might prioritise donor traits such as health and intelligence. Recognising this evolutionary drive highlights that such preferences are not arbitrary but rather rooted in a fundamental human tendency to optimise offspring viability. Therefore, reproductive autonomy in donor selection must account for these ingrained preferences, rather than dismissing them as being merely subjective.

The legal perspective examines how South African constitutional law supports or limits intended parents' discretion in donor selection. The key rights, including reproductive autonomy (section 12(2)(a)), dignity (section 10), privacy (section 14), and equality (section 9), provide the framework for assessing whether subjective criteria align with constitutional protections. Landmark cases such as *AB v Minister of Social Development* and *J v Director General, Department of Home Affairs* illustrate judicial interpretations of reproductive autonomy, in particular in the context of ART. For instance, *AB v Minister of Social Development* highlights the tension between autonomy and legislative requirements, such as the genetic link mandate in surrogacy. The legal perspective evaluates whether subjective preferences, rooted in psychological motivations, merit protection as expressions of personal identity and family formation under the Constitution. By integrating psychological insights,

669 G Pennings 'The right to choose your donor: A step towards commercialization or a step towards empowering the patient?' (2000) 15 *Human Reproduction* 508–514.

this analysis argues that such preferences are not arbitrary but rather reflect fundamental aspects of autonomy and dignity.

c). Dignity

In the context of reproductive autonomy, the value of dignity plays a pivotal role, in particular in cases like *AB v Minister of Social Development*. Dignity is about recognising the intrinsic worth of individuals and their right to self-determination, especially in deeply personal matters such as family planning. This case underscores the importance of respecting individuals' choices about reproductive methods, including the use of donor gametes and surrogacy. Upholding dignity means acknowledging the legitimacy of these choices as expressions of personal identity and aspirations that are free from unjust constraints, thereby affirming individuals' rights to form families that resonate with their own sense of self and values.

Thaldar's explained that 'human dignity' is the intrinsic worth inherent in every human being, a value that transcends mere accomplishments or behaviours.[670] This interpretation distinguishes it from other forms of dignity, which may be attributed to one's conduct, achievements, or self-assessed worth. Thaldar explains that rooted in historical and philosophical traditions, including Stoicism, Christianity, and Enlightenment thought, human dignity is regarded as an immeasurable and fundamental aspect of humanness.[671] Within the framework of South African law, human dignity emerges as a cornerstone, underpinning and enhancing other rights, while emphasising principles of equality and the potential for personal development.

d). Right to bodily and psychological integrity

The constitutional value of bodily and psychological integrity, in particular regarding reproductive autonomy, is also encapsulated in section 12(2) of the Constitution. This section affirms the right to bodily and psychological integrity, which includes making decisions about reproduction, maintaining control over one's body, and being free from medical or scientific experiments without informed consent.[672] The right to bodily and psychological integrity is a

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670 D Thaldar 'The right to family life: Why the genetic link requirement for surrogacy should be struck out' (2022) 15(3) *South African Journal of Bioethics and Law* 84-91.

671 Ibid

672 Section 12(2) of the Constitution.

fundamental aspect of reproductive autonomy, allowing individuals to make informed and independent choices about their reproductive health and family formation.

In gamete donor selection, bodily integrity ensures that intended parents have control over the genetic lineage of their offspring, so allowing them to choose donors whose characteristics align with their values and aspirations. Psychological integrity supports this by allowing parents to make these decisions based on their emotional and psychological needs, so ensuring that they feel connected to and satisfied with their reproductive choices. Trivers's theory complements this by suggesting that such choices are inherently strategic, aimed at maximising the reproductive success and well-being of future generations. Therefore, the right to bodily and psychological integrity empowers individuals to make informed and autonomous decisions in gamete donor selection, so reflecting personal desires and evolutionary strategies.

The Complementarity Theory,[673] on the other hand, proposes that individuals are motivated by psychological needs and personal motivations when selecting a mate, often seeking partners whose characteristics complement their own. This theory suggests that people look for traits in a partner that fulfil their unmet needs or balance their own traits. For instance, Becker predicted that individuals with fewer financial resources might prefer mates with more financial resources to complement their economic needs.[674] However, subsequent studies, such as that of Lui and Suen,[675] had contrasting results, indicating that resource complementarity could manifest differently across genders.[676] Women with fewer financial resources, for example, often prioritise a partner's economic status more than men do, so reflecting the gendered nuance in resource complementarity.

Complementarity Theory, which posits that individuals seek partners or donors whose traits complement their own, can be linked to the legal aspect of psychological integrity. This theory aligns with the right to psychological integrity by acknowledging the emotional and psychological needs of individuals in forming balanced family dynamics. The choice to select donors with complementary traits reflects a desire to create a harmonious family environment, so addressing both personal and familial psychological needs. By supporting these preferences, the legal framework upholds the autonomy and psychological well-being of intended parents,

673 R F Winch, T Ktsanes & V Ktsanes 'The theory of complementary needs in mate-selection: An analytic and descriptive study' (1954) 19(3) *American Sociological Review* 241–249.

674 G Becker 'Economics of the family: Marriage, children, and human capital' in T W Schultz (ed) *A Theory of Marriage* (1974) 299–351.

675 H-K Lui & W Suen 'A direct test of the efficient marriage market hypothesis' (1999) 37 *Econ Inq* 29–46.

676 Y Chen & M Yao 'Influence of resource availability on college students' preference for mate cues' (2018) 41 *Psychol Sci* 674–679.

so enabling them to make decisions that enhance their family's overall balance and cohesion. This psychological tendency aligns with the legal principle of psychological integrity, affirming that donor selection may be motivated by deeply held needs for emotional balance and familial cohesion – both of which are protected under the right to dignity.

In the context of selecting donor gametes, this constitutional right should empower intended parents to make informed choices about the genetic material used in their reproductive process. For example, intended parents may choose donor sperm or eggs based on specific genetic traits or health considerations that align with their desires for their future family. This decision-making process is a direct exercise of their reproductive autonomy, so allowing them to select donor gametes that meet their personal, cultural, or medical preferences. Blank identifies three principal categories within the right to reproductive freedom. The first category involves the decision to have children, encompassing natural conception and adoption.[677] The second category covers the choice to avoid reproduction, which includes the use of contraceptives, pregnancy termination, and voluntary sterilisation. The third category, which extends the first, focuses on determining both the quantity and *quality* of children.[678] While deciding on the number of children is widely accepted and upheld by human rights instruments, the aspect of choosing the *quality* of children has generated significant debate. This issue is particularly relevant in the context of reproductive freedom for intended parents selecting donor gametes. Advances in genetic screening and reproductive technologies enable these parents to select sperm or eggs based on specific genetic traits or health considerations that align with their desires for their future family.[679] This capacity to influence the genetic makeup of offspring raises intricate ethical and legal discussions, as it intersects with the broader issues of genetic selection and its potential ramifications on societal norms and values, so highlighting the delicate balance between personal reproductive autonomy and ethical considerations in assisted reproduction.[680]

Our understanding of reproductive autonomy has evolved far beyond the simple question of *whether* or *when* to have a child. Given *Surrogacy Advisory Group v Minister of Health*, it now extends to choices about *how* to have a child – and, in a modest but meaningful way, *what kind* of child to have. With our courts affirming that ARTs fall within the protective

677 R Blank *Politics and the Life Sciences* (1997) 280.
678 Ibid.
679 C van Niekerk 'Assisted reproductive technologies and the right to reproduce under South African law' (2017) 20(1) *Potchefstroom Electron L J* 1–31.
680 Ibid.

ambit of reproductive rights, intended parents are no longer just navigating the path to parenthood – they are beginning to curate aspects of their child's genetic inheritance.

By ensuring that intended parents can freely choose donor gametes, the Constitution aims to support their right to control their reproductive outcomes and respect their bodily and psychological integrity. This autonomy is crucial in allowing them to craft their family's genetic profile according to their values and needs, without external interference or coercion. However, as John Robertson observes, while the value of liberty in procreation is widely acknowledged in the case of natural reproduction, the same is not the case with artificial reproduction.[681] The law tends to view natural reproduction as a deeply private realm, which is largely insulated from outside interference. Conversely, those who turn to medical assistance for conception, given challenges in natural reproduction, are often seen as recipients of state generosity. As a result, the state feels justified in constraining their options, and in imposing its values on prospective parents. Robertson insightfully argues that this double standard lacks justification, as both groups are essentially exercising the same fundamental right: the desire to procreate.[682] The High Court judgment in *AB* is a classic example of this interference.

Reproductive autonomy must be understood in a manner that accords equal respect to all family structures, transcending the confines of mere biological connections. It is unacceptable for section 12(2)(a) to privilege biologically based families, especially when the Children's Act acknowledges the legitimacy of family bonds formed through psychological or emotional ties. If our legal framework embraces such inclusive definitions of family, it follows that the liberty of intended parents to choose family forms grounded in emotional and psychological connections should be equally safeguarded. This freedom merits the same legal protection as decisions pertaining to biologically linked families. By interpreting reproductive autonomy to uphold the right to form diverse family types, the law can effectively support the use of NRTs in realising the profound freedom to create a family.[683]

However, clear disparities in legal treatment between natural and artificial reproduction are evident, as illustrated by the *Surrogacy Advisory Group v Minister of Health* case.[684] The court highlighted inconsistencies and deemed certain regulations unconstitutional, so revealing a bias that unjustly curtails reproductive autonomy for individuals utilising ARTs. The High

681 J A Robertson *Children of Choice: Freedom and the New Reproductive Technologies* (1994).
682 Ibid.
683 B Shozi 'Something old, something new: Applying reproductive rights to new reproductive technologies in South Africa' (2020) *South African Journal on Human Rights* 1–24.
684 High Court of South Africa, Gauteng Division, Pretoria, Case No. 50683/2020, (2022).

Court case scrutinised several regulations under the National Health Act that affect individuals' rights to make autonomous reproductive decisions. The court's approach revealed the judiciary's commitment to upholding constitutional rights while respecting the purpose of the legislation. The judgment highlighted the court's recognition of the rights of intended parents, noting that reproductive autonomy encompasses decisions about if and how to have children, including the use of ARTs. The court acknowledged that personal decisions about family formation are deeply personal and should be protected under the right to privacy and bodily integrity.[685] This aligns with the constitutional rights enshrined in sections 9, 12, 14, and 27 of the Constitution, which advocate equality, privacy, and access to healthcare services.

Tensions emerge in the form of regulatory restrictions that the court deems to be unconstitutional. For instance, the requirement for psychological evaluation for known donors, including husbands or partners, was challenged for infringing equality and privacy rights without a legitimate governmental purpose.[686] The court found this requirement to be discriminatory and lacking justification, therefore declaring it to be unconstitutional. Similarly, the prohibition on preimplantation sex selection was contested as it contradicted the right to make reproductive choices, further highlighting the tension between individual autonomy and regulatory ethics.[687]

The court's decision to strike down or amend certain regulations reflects a broader judicial intention to ensure that laws governing assisted reproduction do not unjustifiably infringe personal rights. This includes reading down provisions to allow individuals involved in assisted reproduction to freely communicate their experiences, thereby safeguarding their right to freedom of expression and privacy.[688]

The *AB* case is a pivotal illustration of the inherent tension in legal interpretation, where the emphasis on bodily integrity reveals a shortcoming in the constitutional protection of reproductive autonomy, overlooking the equally vital psychological dimensions of reproductive choices. In reproductive matters, there is no legal justification for prioritising bodily integrity as the sole foundation of reproductive rights, with psychological integrity being

685 *Surrogacy Advisory Group v Minister of Health*, High Court of South Africa, Gauteng Division, Pretoria, Case No. 50683/2020, (2022). Note 99, paras 65–87.
686 *Surrogacy Advisory Group v Minister of Health*, High Court of South Africa, Gauteng Division, Pretoria, Case No. 50683/2020, (2022). Note 99, paras 49–90.
687 Paras 91–168.
688 Paras 169–199.

secondary.[689] Instead, reproductive rights, according to Shozi, should be understood more comprehensively, recognising that both psychological and bodily well-being merit legal protection.[690] While bodily integrity often receives emphasis, there are instances, such as in the *AB* case, where the psychological aspects of reproductive decisions should be given greater consideration given their deeply personal nature. These decisions are areas where the state should exercise caution and refrain from undue intrusion, thereby acknowledging the profound impact on an individual's psychological well-being.

South African courts have generally demonstrated a commitment to safeguarding the reproductive autonomy of intended parents, and have thoughtfully navigated the ethical complexities inherent in ARTs. Nonetheless, further refinements are necessary to align with the rapid advancements and evolving nuances in this dynamic field. The judiciary's role is pivotal in ensuring that regulatory frameworks align with constitutional mandates, so fostering a legal environment that respects both individual freedoms and societal values.

e). Freedom

The constitutional value of freedom, in particular in the context of reproductive autonomy, encompasses the right of individuals to make independent decisions about family formation, including the selection of donor gametes. This freedom delineated in section 12 of the Constitution, which guarantees personal autonomy and security over one's body, thereby supporting the right to make reproductive choices free from unwarranted state interference. In terms of gamete selection, this constitutional freedom allows intended parents to choose donor sperm or eggs based on their personal preferences, such as genetic traits, health considerations, or compatibility with their cultural values. This choice is a fundamental aspect of reproductive autonomy, enabling individuals to exercise their freedom in crafting their family's genetic composition.

The significance of this freedom was poignantly highlighted in *AB* v *Minister of Social Development*,[691] where the High Court scrutinised the constitutionality of restrictions on surrogacy agreements that mandated a genetic link between the child and at least one commissioning parent. The court found that such restrictions infringe the reproductive autonomy of infertile individuals, highlighting the importance of freedom in deciding how to

689 B Shozi 'Something old, something new: Applying reproductive rights to new reproductive technologies in South Africa' (2020) *South African Journal on Human Rights* 1–24.
690 Ibid.
691 [2016] ZACC 43.

form a family. The judgment underscored that reproductive choices should not be unduly limited by the state, so reinforcing the principle of autonomy in family planning.

The value of freedom, in particular in shaping personal choices, lies at the heart of the discourse on whether selecting a donor based on subjective criteria is embraced in the right to reproductive autonomy. This is a complex issue, involving various facets of constitutional rights, societal norms, and personal desires. Reproductive autonomy, in particular in the context of donor selection, encompasses a range of criteria that intended parents might consider. Health, history and carrier status are often viewed as essential elements of this autonomy, as they allow parents to make informed decisions about the genetic health of their potential offspring. This aligns with the argument that reproductive autonomy includes the right to prevent the transmission of genetic conditions or health issues.

Furthermore, the choice to use donor gametes often involves sensitive and deeply personal considerations, such as the selection of a donor based on genetic, medical, or social criteria. The right to privacy safeguards these decisions, acknowledging the complex interplay of factors that intended parents must weigh in their pursuit of parenthood. According to Shozi et al.[692] in an in-depth analysis of reproductive law in the context of MAR, recipients are entitled to utilise donor gametes, male, female, or both, without the need for a medical justification.[693] Moreover, recipients have the freedom to choose their gamete donor based on specific attributes such as eye and hair colour, race, complexion, religion, occupation, educational background, and personal interests.[694] It is the legal responsibility of the healthcare professional at the fertility clinic to ensure that the recipient's preferences regarding donor characteristics are respected and fulfilled.[695] The practice of using donor gametes is well established and accepted in the South African medical community.[696]

On the other hand, selecting donors based on race and appearance introduces more complex and potentially contentious issues. From a psychological perspective, parents may wish for a donor whose racial and physical characteristics resemble their own, so fostering a sense of identification and continuity. This desire can be linked to personal satisfaction and

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692 B Shozi, A Edgcumbe & D Thaldar 'New frontiers for reproductive health rights: Contemporary developments in the regulation of assisted reproductive technologies in South Africa' in O S Adelakun & E Ndoni (eds) *Reproductive Health and Assisted Reproductive Technologies in sub-Saharan Africa: Issues and Challenges* (2023) 193–233.

693 2012 Regulation (n 54), reg 10(2)(a).

694 Ibid reg 14(1)*(a)*(iii).

695 Ibid reg 11*(c)*(ii).

696 Dr Rodrigues, Expert opinion (filed in *AB* High Court judgment (n 13) and *AB* Constitutional Court judgment (n 11)).

identity, which are legitimate aspects of forming a family. However, such criteria also raise ethical concerns about reinforcing racial stereotypes or preferences, so highlighting a tension between personal desires and societal implications. Similarly, choosing a donor based on education or perceived intelligence can be contentious. Intended parents might view these traits as contributing to their child's future success and aligning with their values. Nonetheless, this raises questions about the commodification of human traits and the societal implications of valuing certain attributes over others.[697]

Within the constitutional framework, the right to family life is protected under the rights to privacy and dignity.[698] This suggests that reproductive autonomy should include the freedom to make choices about the characteristics of one's offspring. However, the law must consider this autonomy with respect to potential societal harms or discrimination resulting from subjective criteria. The challenge lies in balancing individual autonomy with societal impact. While the right to choose based on subjective criteria is a facet of reproductive autonomy, it must be balanced against potential societal impacts, such as reinforcing social inequalities or perpetuating discriminatory practices. Recognising diverse family structures and the varied reasons that people seek specific donor traits is crucial. Thaldar argues against a bio-normative conception of family, and advocates the acceptance of various family forms – whether through genetic linkage or other connections.[699]

Societal prejudice must not shape the court's consideration of a child's best interests, inn particular when intended parents are choosing donor gametes. The law should not deter parents from having a child due to the prospect of prejudice, as this would only serve to perpetuate bias. Rather, the Constitution mandates that the law uphold reason and act as a bulwark against prejudice,[700] thereby empowering parents to make family decisions that are unencumbered by discrimination.[701]

Consequently, while selecting a donor based on subjective criteria may align with the right to reproductive autonomy, it is crucial to analyse such decisions in the broader societal and ethical context. This analysis should strive for balance, acknowledging the individual's

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697 T Moll 'Making a match: Curating race in South African gamete donation' (2019) 38(7) *Medical Anthropology* 588–602.

698 D Thaldar 'The right to family life: Why the genetic link requirement for surrogacy should be struck out' (2022) 15(3) *South African Journal of Bioethics and Law* 84–91.

699 Ibid.

700 *Hoffmann v South African Airways* 2001 (1) SA 1 (CC).

701 D Thaldar 'The right to family life: Why the genetic link requirement for surrogacy should be struck out' (2022) 15(3) *South African Journal of Bioethics and Law* 84–91.

right to form a family according to personal values,[702] while also considering the potential societal implications of these choices.

f). Freedom of expression

i). Parental freedom of expression and the design of children: Expanding the conceptual frame

The development of ARTs enables prospective parents to make deliberate choices about the genetic characteristics of their future children. Traditionally, reproductive rights have been defended through the lenses of *bodily and psychological integrity* (which includes reproductive autonomy) and *privacy*, which are both protected under the Constitution. However, these rights are primarily *inward-looking*: they protect the individual against external intrusion but do not necessarily frame reproductive choices as a positive form of outward engagement with the world.

In contrast, *freedom of expression* offers a constitutional right that is *outward-facing*. It protects not only self-expression but also the impact of that expression on the outside world. This therefore argues that framing parental use of ART as an exercise of freedom of expression offers a richer and stronger constitutional foundation for protecting parental choice, while still recognising that such freedom may be limited where real harm to the child can be demonstrated.

ii). The nature of freedom of expression

Freedom of expression, unlike privacy and autonomy, is not confined to the internal sphere of the individual. It is about manifesting internal thoughts, values, and visions externally, with the aim – sometimes implicit, sometimes explicit – of affecting the environment.

When intended parents choose certain traits for their future children, they are engaged in a deeply expressive act: they are externalising their aspirations, ideals, and dreams through a living medium – their future child. This act is not fundamentally different from how an artist expresses visions and ideals through a painting, sculpture, or symphony.

[702] A Pande '"Mix or Match?": Transnational fertility industry and white desirability' (2021) 40(4) *Medical Anthropology* 335–347.

Recognising reproductive design choices as falling under freedom of expression therefore acknowledges their outward impact: not only do these choices shape the child, but they also express values into the broader cultural fabric.

Importantly, this framing does not claim that freedom of expression magically overrides other considerations, such as the *best interests of the child*. Nor does it suggest that bodily integrity and privacy are inadequate. Rather, it adds an additional layer of constitutional protection: one that is particularly well suited to defend parental choices that project meaning into the world. This freedom can be viewed as an extension of individual autonomy and self-determination, both of which are central to the purposes of freedom of expression. Individual autonomy is a vital part of human dignity, allowing people to make decisions that align with their personal values and life goals.[703] By choosing gamete donors based on specific criteria, intended parents exercise their autonomy, so making informed reproductive choices that reflect their desires and aspirations for their future family.

Furthermore, the importance of facilitating the search for truth includes the dissemination and access to information.[704] In the context of gamete donation, this means that intended parents should have access to comprehensive information about potential donors, including genetic, medical, and personal characteristics. Such transparency ensures that parents can make informed decisions, so aligning with their values and expectations for the prospective child. This informed decision-making process is protected under the broader umbrella of freedom of expression and scientific inquiry, as it relies on the availability and exchange of truthful information.

Lastly, supporting democracy as a key purpose of freedom of expression includes the respect for individuals' rights to make personal choices that are free from undue interference.[705] In the context of intended parents selecting gamete donors, this democratic principle underscores the importance of allowing parents the freedom to choose their donors without paternalistic influence from external sources.[706] This freedom is crucial in ensuring that parents can access a comprehensive bank of donors, so enabling them to make choices that align with their personal values and expectations for their future family. By promoting such autonomy, a

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703 D W Thaldar & M Steytler "Time for Cinderella to go to the ball: Reflections on the right to freedom of scientific research" (2021) 138(2) *South African Law Journal* 258–286.

704 Ibid.

705 Ibid.

706 G Cavaliere 'The problem with reproductive freedom. Procreation beyond procreators' interests' (2020) 23 *Medicine, Health Care and Philosophy* 131-140.

democratic society respects and protects the rights of individuals to make informed reproductive choices, reflecting their desires and aspirations.[707] This approach aligns with the broader theme of advocating an environment where personal autonomy and freedom in scientific research and expression are upheld, in particular in the realm of reproductive technologies.

iii). Parental expression vs Best Interests of the child

When assessing whether parental expression through ART can be limited, the key constitutional question is whether such expression causes *harm* sufficient to justify a limitation of the right. The *best interests of the child* principle, as articulated in the South African Children's Act,[708] prioritises the child's welfare in all decisions affecting them, including those made during gamete donor selection. While the Act does not exhaustively outline every possible reproductive scenario, this does not equate to a deficiency. Rather, it allows for judicial interpretation in complex cases, as evidenced by the evolving jurisprudence on reproductive rights.

When parents exercise their freedom of expression in selecting donor traits, this principle serves as a safeguard against potential harm that could arise from such choices. If a selected trait is likely to result in significant harm or disadvantage the child – such as a genetic predisposition to a serious illness – this could justify limitations on parental freedom of expression. The justification for such limitations is grounded in the obligation to prevent foreseeable harm and ensure that the child's future well-being is not compromised. Therefore, while parents have the autonomy to make reproductive choices, this freedom is not absolute and must be balanced against the ethical and legal imperative to protect the best interests of the child, so ensuring that they are born into conditions that do not unduly compromise their health or quality of life. However, it is critical to distinguish two levels of potential harm. These are discussed below:

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707 Ibid.
708 Children's Act 38 of 2005.

Trait-based harm

When considering 'trait-based harm' in the context of ART, a crucial aspect is balancing parental expression with the best interests of the child. The constitutional question at play is whether the expression of parental choice through ART can be limited due to the potential harm it may cause, so justifying a restriction of the right to such expression. This involves evaluating whether a specific trait selected, such as a genetic predisposition to a disability or serious illness, inherently harms the child. Often, this question can be answered objectively, as certain traits can be predictably detrimental to the child's well-being. In instances where a selected trait foreseeably undermines the child's quality of life, it may justifiably limit parental freedom of expression. For example, choosing to select for a serious degenerative disease could reasonably be perceived as being harmful, so warranting a limitation on parental choice to prioritise the best interests of the child.

The example of selecting gamete donor traits to include deafness brings to light the intricate debate on trait-based selection, where reproductive choices intersect with cultural identity and ethical considerations. The specific case involving the deaf lesbian couple that drew attention to selecting for deafness occurred in the early 2000s. The couple, Sharon Duchesneau and Candy McCullough, both of whom are deaf, chose a sperm donor with five generations of deafness in his family to increase the likelihood of having a deaf child. This case gained widespread media attention and contributed to the ongoing debate about reproductive choices, disability, and cultural identity, and eventually influencing discussions on legislative measures like the UK's Human Fertilisation and Embryology Act 2008.[709] This debate emphasises the complex relationship between freedom of expression for intended parents and the principle of the best interest of the child.

On one side, proponents argue that trait selection represents a form of freedom of expression, so allowing parents to make reproductive choices that align with their cultural values and personal identities. In the deaf community, for instance, some parents view deafness not as a disability but rather as a cultural identity, and they may wish to select a donor with a similar trait to ensure that their child shares in this cultural heritage.[710] This perspective underscores reproductive autonomy and the right of parents to make decisions reflecting their

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709 D M Sanghavi 'Wanting babies like themselves, some parents choose genetic defects' (2006) *New York Times*. Available at

710 H-D L Bauman and J M Murray 'Reframing: From hearing loss to deaf gain' (2009) 1 *Deaf Studies Digital Journal* 1–10.

personal beliefs and cultural affiliations, akin to the broader concept of expressive freedom in personal and familial life.[711]

Conversely, critics argue that selecting for traits like deafness can conflict with the best interest of the child principle, which prioritises a child's welfare and potential for an open future. This principle suggests that children should be given the best opportunities for health and well-being, free from preventable limitations. Critics contend that deliberately choosing a trait perceived as a disability might limit a child's potential, particularly in a predominantly hearing society where being deaf could introduce significant barriers.[712] From this viewpoint, the intentional selection of traits associated with impairments could be seen as compromising a child's right to an open future, wherein they have the broadest possible range of opportunities and the ability to engage fully with the world around them.[713]

The tension between these perspectives highlights the need for nuanced ethical deliberation and policy-making that considers both parental rights and the welfare of future children. Engaging with diverse viewpoints, in particular those from within affected communities, is essential to ensuring that reproductive technologies and the associated legislative frameworks do not inadvertently marginalise cultural identities or compromise the well-being of children. Porter and Smith argue for policy reform that includes a more explicit and transparent process of defining what constitutes a ‘serious illness’ or ‘disability’, taking into account both medical and social models of disability.[714] As the debate continues, finding a balance between respecting cultural identities and ensuring the welfare of future generations remains as a pivotal challenge.[715]

Artefact-based harm

Artefact-based harm raises intriguing questions about the implications of intentionally designing a child through the selection of donor gametes, and positioning the child as a cultural artefact. The complexity of this issue lies in its psychological and philosophical dimensions, which go beyond mere physical or medical considerations. At the heart of the debate is whether

711 I Karpin & K Savell *Perfecting Pregnancy: Law, Disability, and the Future of Reproduction* (2012).
712 A Buchanan, D W Brock, N Daniels & D Wikler *From Chance to Choice: Genetics and Justice* (2000).
713 S Wilkinson *Choosing Tomorrow's Children: The Ethics of Selective Reproduction* (2010).
714 G Porter & M K Smith 'Preventing the selection of "deaf embryos" under the Human Fertilisation and Embryology Act 2008: Problematizing disability?' (2013) 32(2) *New Genetics and Society* 171–189.
715 Ibid.

the knowledge of being 'designed' might inherently constitute harm to the child, so affecting their psychological and emotional well-being.

This question is complex and requires a nuanced understanding of identity and self-perception. On the one hand, knowing that one was intentionally designed could potentially undermine a child's sense of worth. The awareness that certain traits were deliberately chosen might lead to feelings of being a product rather than a person, which could affect self-esteem and sense of individuality. Concerns may arise about whether they are valued for who they are as a person or merely for the traits that were selected for them.

On the other hand, the knowledge of being designed could also enhance a child's self-image. Being chosen and crafted with care might be perceived as being a profound expression of love and desire from the parents. It could foster a sense of uniqueness and specialness, knowing that their existence was highly anticipated and valued. For some, this intentionality might translate into a positive self-concept, so reinforcing their worth and identity. Based on Erikson's theory[716] of identity development, which views adolescence as a prime time for identity formation, in order to develop 'a secure sense of identity, adolescents must feel safe and sufficiently connected to explore their nascent independence'.[717]

Ultimately, according to Erikson's framework, whether artefact-based harm exists depends on various factors, and would largely depend on how these children interpret their conception narrative, including the child's personal disposition, family dynamics and societal attitudes towards ART. It is a deeply personal and subjective experience that may differ significantly from one individual to another. Internal working models derived from early interactions and attachments provide the foundational beliefs and expectations about oneself and others.[718] For children who know they were intentionally designed, these models may influence how they perceive their self-worth and relational dynamics. If their early environment supports a positive narrative about their conception, these models can foster a secure sense of identity, so enhancing their self-esteem and interpersonal relationships. Therefore, addressing artefact-based harm requires careful consideration of these psychological complexities, so ensuring that children conceived through ART are supported in ways that promote their well-being and healthy identity formation.

716 E H Erikson *Identity: Youth and Crisis* (1968).
717 J Slutsky, V Jadva, T Freeman et al 'Integrating donor conception into identity development: Adolescents in fatherless families' (2016) 106(1) *Fertility and Sterility* 202–208.
718 Ibid.

iv). The psychological perspective on being a 'designed child'

Self-esteem can be defined as an individual's attitude about him or herself, involving self-evaluation along a positive-negative dimension.[719] This self-esteem refers to an individual's overall positive evaluation of the self.[720] Self-concept, similar yet different, is 'the individual's belief about himself or herself, including the person's attributes and who and what the self is'.[721] Self-concept develops with the interaction of the child with the people around them.[722] In the context of 'designed' children, the parental narrative plays a crucial role in shaping a child's self-esteem, as the way parents communicate about their child's conception can significantly influence the child's self-perception and overall self-evaluation.

Thus one can easily imagine factitious scenarios in which being a 'designed' child enhances self-esteem:

Positive reinforcement scenario

> 'We, your father and I, carefully chose your genetic donors to give you the best chances – thick black curly hair, dark eyes, intelligence. And look how wonderfully you have turned out! You are our dream come true.'

In such a scenario, the child may internalise the idea that they are highly valued, carefully planned, and loved not by accident but rather by deliberate intention. Rather than experiencing a loss of authenticity, the child could feel empowered by the knowledge that they embody their parents' highest aspirations.

Similarly:

> 'Many children are born from accidents or fleeting desires. But you – you were the product of careful thought and hope. You are not a by-product of lust; you are the embodiment of our dreams.'

Such messages could strengthen a child's psychological resilience and positive self-concept, rather than harming it. But, of course, context matters. If the parental message suggests conditional love – we only love you because you fit our design – that could be damaging. However, if the message is framed in terms of unconditional love combined with intention and careful planning, it is difficult to see how this alone would amount to psychological harm.

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719 R A Baron & D Byrne *Social Psychology: Understanding Human Interactions* 6 ed (1991).

720 M Rosenberg, S Carmi & S Carrie 'Global self-esteem and specific self-esteem' (1995) *American Sociological Review*141–156.

721 R F Baumeister (ed) *The Self in Social Psychology* (1999).

722 A Verma & R Wagani 'The role of parent–child relationship, self-esteem and self-concept in academic achievement' (2023) Maharaja Sayajirao University of Baroda and Universal AI University.

Indeed, where positive parental narratives are employed, being a designer child could reinforce the child's self-esteem, resilience, and sense of worth. According to Verma and Wagani, 'building self-esteem and self-concept depends upon the quality of parent–child relationship'.[723] Further psychological research is warranted to deepen our understanding of how different types of parental messaging impact the self-concept of designer children. However, at a constitutional and conceptual level, the right to reproductive expression deserves robust protection.

Further research in these areas would help clarify the nuanced impacts of parental messaging on the self-concept of children conceived through donor methods and other forms of ART. This psychological perspective underscores how reproductive choices, including donor selection based on resemblance and health, are not only emotionally meaningful but also resonate with the constitutional rights to dignity, equality, and cultural identity – so reinforcing the legitimacy of these preferences as expressions of protected autonomy.

g). Genetic resemblance and health

Genetic resemblance, viewed through the lens of Positive Assortative Mating Theory,[724] highlights the psychological inclination towards selecting partners or donors with similar traits to ensure familial and cultural continuity, while legally it is intertwined with the rights to dignity and cultural identity, so affirming the individual's autonomy in preserving personal and cultural heritage through reproductive choices. The theory reflects the unique cultural and ethnic context of South Africa, where diverse family structures and cultural identities influence donor selection. This theory explains intended parents' preference for donors with similar ethnic or physical traits, so reflecting a psychological need for familial and cultural continuity that enhances family cohesion. The theory emphasises that individuals tend to select partners who possess characteristics similar to their own. It highlights a preference for similarity in partners, encompassing attributes like socioeconomic status, educational level, and values.[725,726] This tendency for similarity can also be observed in biological aspects, as seen in

723 A Verma & R Wagani 'The role of parent–child relationship, self-esteem and self-concept in academic achievement' (2022) 10(4) *International Journal of Indian Psychology* 964–972.

724 D Thiessen & B Gregg 'Human assortative mating and genetic equilibrium: An evolutionary perspective' (1980) 1(1) *Ethology and Sociobiology* 111–140.

725 D Buss 'Human mate selection' (1985) 73 *American Scientist* 47–51.

726 M Watkins & W Meredith 'Spouse similarity in newlyweds with respect to specific cognitive abilities, socioeconomic status, and education' (1981) 11 *Behavior Genetics* 1–21.

studies on animal mating.[727] The theory suggests that choosing a partner with similar social and economic status facilitates a shared social environment and adapts to a common lifestyle, thereby reducing potential conflicts and enhancing compatibility. This reinforces how cultural and ethnic continuity, as psychologically meaningful motivations, are protected under the rights to equality and cultural identity in South African constitutional law.

Intended parents often prioritise genetic resemblance when selecting a donor, seeking individuals whose physical attributes or genetic backgrounds align with their own or their partner's. Consequently, resemblance is regarded as the visible sign of a biological connection; individuals who look alike are considered to share genetic ties and are viewed as family.[728,729] Furthermore, the practice of matching gives parents the freedom to decide whether to reveal the donor conception to their child or not.[730] However, as Pennings highlights, 'it is impossible to predict with a reasonable degree of certainty what the phenotypic result of the combination of the genes of the recipient and the donor will be.[731]

When selecting an oocyte donor, recipients typically seek information about the donor's health and physical resemblance to enhance family kinship and connection[732,733] The resemblance to the intended mother is particularly significant for her. While having options empowers women and allows them to envision the ideal donor, it can also lead to dissatisfaction if choices are limited or if they feel pressured to choose based on the limited provided information.[734] In situations with minimal choice, such as with lesbian recipients, the focus shifts to traits that support normal child development and family unity.[735]

According to Pennings, most women desire a donor who resembles their partner as closely as possible.[736] This preference helps ensure that the child blends seamlessly into the

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727 Y Jiang, D I Bolnick & M Kirkpatrick 'Assortative mating in animals' (2013) 181 *American Naturalist* e125–e138.

728 M Strathern *Reproducing the Future* (1992).

729 G Becker *The Elusive Embryo: How Women and Men Approach New Reproductive Technologies* (2000).

730 E Haimes 'Gamete donation and the social management of genetic origins' in M Stacey (ed) *Changing Human Reproduction: Social Science Perspectives* (1992) 119–147.

731 G Pennings 'The right to choose your donor: A step towards commercialization or a step towards empowering the patient?' (2000) 15(3) *Human Reproduction* 508–514.

732 D A Greenfeld 'Effects and outcomes of third-party reproduction: Parents' (2015) 104 *Fertility and Sterility* 520–524.

733 L R Rubin, I de Melo-Martin, Z Rosenwaks et al 'Once you're choosing, nobody's perfect: Is more information necessarily better in oocyte donor selection?' (2015) 30 *Reproductive Biomedicine Online* 311–318.

734 Ibid.

735 A Ravelingien, V Provoost, E Wyverkens et al 'Lesbian couples' views about and experiences of not being able to choose their sperm donor' (2015) 17 *Culture, Health & Sexuality* 592–606.

736 Ibid.

family, so minimising potential identity issues and societal stigma. Health is another critical factor, with parents typically seeking donors who are free from known genetic disorders to secure the future child's physical well-being.[737] Donors should not only be healthy, but also preferably young because paternal and maternal age are risk factors for oocytes and spermatozoa.[738]

Another motivation for seeking a donor who closely mirrors the partner in both heterosexual and homosexual couples is that the partner was originally chosen for specific desirable traits.[739] These traits are valued by the other partner, and opting for a donor who significantly diverges from the partner's characteristics might be perceived as an implicit rejection of the partner. Consequently, if the 'reproductive partner's' attributes are markedly misaligned with those of the actual partner, it could lead to considerable discomfort and unease in the relationship. A third rationale for preferring a donor with similar traits is that such resemblance can significantly enhance and facilitate the attachment and bonding process between the social parent and the child, with the term 'social parent' referring to the parent who raises and nurtures the child without necessarily sharing a genetic connection.[740]

Research shows that recipients express interest in various factors when selecting a donor, including race, lifestyle choices (such as smoking), educational background, intelligence, and personality traits.[741] These aspects are considered essential as they contribute to the overall profile of the donor and influence the potential for a harmonious family dynamic and healthy child development.

In South Africa, where cultural diversity is prominent, the emphasis on genetic resemblance is particularly significant. Parents might select donors from the same ethnic group to maintain cultural continuity and to facilitate the child's integration into extended family and community settings. This focus highlights a deep-seated psychological need for continuity and belonging in familial contexts. The practice of ethnic matching in gamete donation is often championed for its potential to foster family resemblance, thereby increasing the likelihood

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737 D Gong, Y Liu, Z Zheng et al 'An overview on ethical issues about sperm donation' (2009) 11 *Asian Journal of Andrology* 645–652.

738 J R Kovac, J Addai, R P Smith et al 'The effects of advanced paternal age on fertility' (2013) 15(6) *Asian Journal of Andrology* 723–728.

739 G Pennings 'The right to choose your donor: A step towards commercialization or a step towards empowering the patient?' (2000) 15(3) *Human Reproduction* 508–514.

740 B R Aronowitz & J Feldschuh 'Artificial insemination by donor: Yours, mine, or theirs?' in J Offerman-Zuckerberg (ed) *Gender in Transition: A New Frontier* (1989) 151–161.

741 T Bracewell-Milnes, S Saso, S Bora et al 'Investigating psychosocial attitudes, motivations and experiences of oocyte donors, recipients and egg sharers: A systematic review' (2016) 22 *Human Reproduction Update* 450–465.

that a donor-conceived child will closely resemble their recipient parents. Such resemblance helps create a seamless familial integration, allowing the child to 'fit in' and maintaining a public appearance of genetic continuity, which can alleviate potential discomfort and uphold family privacy about the use of a donor.[742,743] Beyond physical resemblance, ethnic matching plays a crucial role in nurturing a positive ethnic identity, especially for children from historically marginalised communities. Growing up in an environment that reflects their ethnic background enables these children to connect deeply with their cultural heritage, so imbuing their lives with meaning and resilience against discrimination.[744] This rationale parallels the arguments for ethnic matching in adoption, where it serves to reinforce the child's ethnic identity and facilitates their integration into a community that shares their cultural roots.[745]

The practice of ethnic matching in gamete donation is however scrutinised for perpetuating racialism, as it implicitly suggests that ethnicity is a biological construct that must be preserved. This perspective risks reinforcing stereotypes and racialist thinking, so implying that certain ethnic traits are inherently valuable and should be maintained.[746] By doing so, it upholds societal norms that prioritise physical resemblance based on racialised traits, so potentially marginalising families that do not conform to these standards.[747] Furthermore, critics argue that ethnic matching undermines the parental virtue of acceptance, which holds that parents should embrace their children regardless of their resemblance. By placing emphasis on ethnic matching, there is an underlying suggestion that a child's acceptance is contingent on their ability to resemble their parents, thereby reducing the child's worth to a singular characteristic.[748] This approach perpetuates the notion that only families with phenotypically similar members are 'normal', thereby marginalising diverse family structures and undermining the richness of familial diversity.[749] Therefore, the policy of ethnic matching in

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742 G Pennings 'The right to choose your donor: A step towards commercialization or a step towards empowering the patient?' (2000) 15 *Human Reproduction* 508–514.

743 S S Quiroga 'Blood is thicker than water: Policing donor insemination and the reproduction of whiteness' (2007) 22 *Hypatia* 143–161.

744 J Small 'Ethnicity and placement' (2000) 24 *Adoption and Fostering* 9–13.

745 J Wainwright & J Ridley 'Matching, ethnicity and identity: Reflections on the practice and realities of ethnic matching in adoption' (2012) 36 *Adoption and Fostering* 50–61.

746 H Fogg-Davis 'Navigating race in the market for human gametes' (2001) 31 *Hastings Center Report* 13–21.

747 R Homanen 'Reproducing whiteness and enacting kin in the Nordic context of transnational egg donation: Matching donors with cross-border traveller recipients in Finland' (2018) 203 *Social Science & Medicine* 28–34.

748 A Asch & D Wasserman 'Where is the sin in synecdoche? Prenatal testing and the parent–child relationship' in D Wasserman, J Bickenbach & P Wachbroit (eds) *Quality of Life and Human Difference: Genetic Testing, Health Care and Disability* (2005) 172–216.

749 T Rulli 'Preferring a genetically-related child' (2016) 13 *Journal of Moral Philosophy* 669–698.

gamete donation is a double-edged sword. While it can promote the development of positive ethnic identities, especially for children from marginalised communities, it also risks perpetuating problematic societal attitudes about race and family. Policymakers must carefully weigh these considerations, ensuring that the practices align with ethical standards that respect both the rights of individuals and the diversity of family structures.

This understanding of genetic resemblance is crucial not only from a psychological perspective but also legally. In South Africa, where cultural continuity is often a significant aspect of family identity, a legal recognition of intended parents' discretion in selecting genetically similar donors aligns with the constitutional protection of dignity and cultural rights.

The psychological perspective of Positive Assortative Mating[750] explains the desire for familial continuity, while the legal perspective assesses its alignment with dignity and privacy rights. This preference aligns with the constitutional right to dignity (section 10), as recognised in *J v Director General, Department of Home Affairs*, which upheld the importance of family identity in non-traditional structures, so suggesting that subjective criteria are a legitimate exercise of reproductive autonomy.[751] In this case, the Constitutional Court emphasised the necessity of recognising and respecting the parental rights of same-sex couples. This decision underscored the imperative to affirm their right to form families that authentically reflect their identities and personal values, free from discrimination. In this landmark case, the Constitutional Court addressed the legal recognition of parental rights for a same-sex couple who used a sperm donor to conceive a child. The couple faced challenges in having their parenthood legally recognised, as existing legislative frameworks did not adequately account for non-traditional family structures formed through assisted reproduction. This case was pivotal in affirming the rights of same-sex couples to be recognised as legal parents, regardless of genetic ties, and underscored the need for legal frameworks to evolve alongside societal changes.

South African jurisprudence on reproductive autonomy, as exemplified by this case, reflects a broader commitment to recognising and protecting the rights of intended parents in diverse family structures. Courts have approached these rights by affirming the principles of equality, dignity, and privacy, so ensuring that all individuals have the freedom to form families

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750 D Thiessen & B Gregg 'Human assortative mating and genetic equilibrium: An evolutionary perspective' (1980) 1(1) *Ethology and Sociobiology* 111–140.

751 *J v Director General, Department of Home Affairs* (2003 5 BCLR 463 (CC)).

in ways that align with their identities and values. However, tensions emerge when these rights intersect with traditional legal interpretations and societal norms, in particular concerning the recognition of non-genetic parenthood and the use of donor gametes.

Similarly, the case of *QG v CS* illustrates how donor agreements protect parental autonomy, so reflecting psychological needs for certainty in family roles. The case, while primarily focused on the legal recognition of parental rights in a same-sex relationship, also touches on the broader themes of genetic resemblance and the rights to dignity and cultural identity. In the context of genetic resemblance, the court's decision underscores the importance of recognising the psychological and cultural dimensions of family formation beyond mere biological connections. By affirming the applicants' parental rights, the ruling highlights the legal system's acknowledgement of diverse family structures that prioritise emotional and psychological bonds over genetic ties. The psychosocial literature shows that the impact of not knowing one's genetic origins does not necessarily harm these children. Therefore, fostering their well-being can occur without direct contact with biological parent(s).[752] This aligns with the rights to dignity and cultural identity, as it respects the individuals' autonomy in defining their familial relationships and cultural heritage. The court's emphasis on the best interest of the child further reinforces the notion that a child's well-being is closely tied to a stable and nurturing environment, regardless of genetic resemblance, thereby honouring the dignity and cultural identity of all involved parties.

Ultimately, by empowering intended parents to select donors in ways that reflect their personal, cultural, and familial values – while prioritising the health of their future child – the law honours the constitutional imperatives of dignity, equality, and cultural identity, so ensuring that reproductive choices remain both personally meaningful and constitutionally grounded.

h). Ethical considerations

Selecting gamete donors based on subjective criteria raises ethical questions, in particular about potential biases and discrimination. Preferences for certain genetic traits may perpetuate societal inequalities or reinforce discriminatory attitudes. For instance, favouring donors based

[752] B Shozi, R Hazarilall & D Thaldar 'Blood is thicker than water, but is it thicker than ink? An analysis of parenthood and sperm donor agreements in the wake of *QG v CS* (32200/2020) [2021] ZAGPPHC 366 (17 June 2021)' (2022) 33(3) *Stellenbosch Law Review* 529–547.

on race or ethnicity could inadvertently support racial biases, even if unintentionally.[753] Ethical concerns also arise when preferences reflect societal prejudices, such as favouring donors with specific physical attributes or educational backgrounds, so potentially marginalising those who do not fit these criteria. These biases highlight the importance of ethical oversight in the donor selection process to ensure that personal preferences do not lead to discriminatory practices.

Intended parents face *several ethical considerations* when selecting donor gametes, especially when subjective criteria are involved:

i). Bias and discrimination

Choosing donors based on specific genetic traits can lead to biased selections that reflect societal prejudices, so potentially perpetuating existing inequalities.[754] Such preferences may also inadvertently support discriminatory attitudes where certain genetic attributes are favoured over others.

While distinctions made based on physical attributes may be rationalised through individual preferences, no such justification exists for the rejection of a donor solely on the grounds of their sexual orientation or religious beliefs. Acceptable grounds for declining a donor should be confined to medical and genetic considerations, specifically the potential for transmissible diseases or inherited conditions.

Choosing a friend, partner, or donor is inherently a subjective and personal decision. It is noteworthy that individuals seldom invoke the principles enshrined in the Declaration of Human Rights to critique someone's choice of companion. This is primarily because selecting a partner transcends the realm of justice; it is a deeply personal choice that is influenced by individual preferences and characteristics that resonate with the chooser. Similarly, recipients of donations will select donors based on attributes that hold significance for them, and this selection process is not easily subjected to universal rational justification.[755] In essence, while the criteria for selecting partners and donors may vary widely among individuals, it is vital to maintain a framework that respects personal autonomy and the right to choose without unwarranted discrimination. Achieving a perfect match is seldom possible, so necessitating a delicate balancing act of priorities when selecting a donor. Intended parents with highly

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753 G Pennings 'The right to choose your donor: A step towards commercialization or a step towards empowering the patient?' (2000) 15 *Human Reproduction* 508–514.

754 I Ezeome 'Gamete donation – a review of ethical and legal issues' (2022) 26(3) *African Journal of Reproductive Health* 124.

755 H T Engelhardt Jr & K W Wildes 'The artificial donation of human gametes' (1991) 5 *Bailliere's Clinical Obstetrics and Gynaecology* 637–658.

specific criteria must often bear the cost of their selectiveness; if they find themselves dissatisfied with the available donors, they may face extended waiting periods. Ultimately, it falls upon the recipients to weigh this potential disadvantage against the prospect of accepting a less-than-perfect match.[756]

ii). Genetic screening

While rigorous genetic screening of gamete donors can help avoid the transmission of genetic diseases, it also poses ethical challenges. Ethical concerns about gamete donor genetic screening include potential for discrimination, genetic determinism, and the impact on donor autonomy and privacy, as well as the possibility of unintended consequences for the donor and their relatives.[757] Expanded screening may reduce the pool of available donors and lead to stigmatisation if undesirable genetic traits are identified.[758] This process must balance the benefits of genetic health against the psychological and social impacts on donors and their relatives. Frith, Sawyer, and Kramer[759] called for greater uniformity in genetic screening to ensure that recipients are well informed of their options and able to better choose between programmes and donors.

Additional constraints are associated with the screening of donors. Since a donor's medical and genetic background plays a crucial role in determining their eligibility, it is imperative that donors provide honest and accurate information about their personal medical, familial, and social histories. However, a notable gap in current research pertains to the preferences of recipients concerning the genetic screening of donors. Understanding these preferences is essential for ensuring that the screening process aligns with the expectations and needs of those seeking donor gametes. A study from 2008 revealed that couples had varying preferences when it came to the genetic screening of their donor.[760]

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[756] N Herpin 'Obstacles to sperm donation in France' in J Elster & N Herpin (eds) *The Ethics of Medical Choice* (1994) 48–69.

[757] I Ezeome 'Gamete donation – A review of ethical and legal issues' (2022) 26(3) *African Journal of Reproductive Health* 124.

[758] Ibid.

[759] L Frith, N Sawyer & W Kramer 'Forming a family with sperm donation: A survey of 244 non-biological parents' (2012) 24(7) *Reproductive BioMedicine Online* 709–718.

[760] V L Baker, H M Rone & G D Adamson 'Genetic evaluation of oocyte donors: Recipient couple preferences and outcome of testing' (2008) 90(6) *Fertility and Sterility* 2091–2098.

iii).Anonymity and disclosure

The debate about anonymous and non-anonymous donations presents various ethical dilemmas. The legal position in South Africa is that gamete donors must be anonymous and it is an offence to reveal the identity of a gamete donor.[761] However, after Thaldar and Shozi's critical interrogation of the law they concluded that 'gamete donation can be anonymous, completely open to the public, or anywhere in between – depending on the election of the individual gamete donor'.[762] And, furthermore 'the legal requirement is specific consent by the donors, and to err on the side of caution such consent must be in writing'.[763] Therefore, it is essential to understand that different regulations govern the selection of donors, and non-compliance with these laws can lead to legal ramifications for intended parents and the fertility clinics involved.

The issue of anonymity in gamete donation presents complex challenges for intended parents navigating ARTs. The decision to choose between anonymous and non-anonymous donation carries significant implications for parents and offspring. Proponents of anonymity argue that it protects the family's privacy and allows parents to manage issues related to infertility discreetly, which can be crucial in cultures where gamete donation is stigmatised.[764] However, findings from the 2020 We Are Donor Conceived survey[765] highlight potential drawbacks of anonymity, as many donor-conceived individuals express harm from not knowing their biological origins or medical histories. The survey gathered insights from 481 individuals conceived through gamete donation. Participants were predominantly aged 20 to 40 years, and mainly from the US. Most were female, conceived via sperm donation, and had anonymous donors. The survey highlighted diverse family structures, with respondents raised by heterosexual, single, and same-sex parents, and many having donor-conceived or adopted siblings. An example response from the survey study:

> 'Had I known how I would feel as a parent of a donor conceived child, I would have asked the clinic if our donor was willing to be known, or asked about known donors. At the time, I was thinking about me and how threatened my role felt (understandable when you are living the stress and drama of infertility). But

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761 South African Law Reform Commission, Issue Paper 32, Project 140, 'The right to know one's own biological origins' (20 May 2017).

762 D Thaldar & B Shozi 'Is open-identity gamete donation lawful in South Africa?' (1 June 2022) *Sabinet African Journal.*

763 Ibid.

764 I V Ezeome 'Gamete donation – a review of ethical and legal issues' (2022) 26(3) *African Journal of Reproductive Health* Art. 14.

765 We Are Donor Conceived '*2020 We Are Donor Conceived survey*' (2020), available at *https://www.wearedonorconceived.com/*

> once the baby comes, you become a parent and your focus is all about what's best for him. What would be best for him is that he could at least know the wonderful woman who helped us to have him.'[766]

This parent's comment highlights significant ethical considerations in South African reproductive law concerning donor anonymity and disclosure. It underscores the emotional complexities faced by intended parents, in particular regarding their initial focus on personal needs during the stress of infertility, contrasted with their evolving perspective on the child's well-being once they become parents. In South Africa, current laws allow for both anonymous and known donations, but the implications of these choices can be profound. The desire for a child to know their donor reflects a growing recognition of the importance of identity and connection in donor-conceived individuals. This raises ethical questions about the responsibilities of clinics and donors in providing transparent options and support for intended parents, so emphasising the need for policies that balance the rights of donors with the best interests of the child. Ultimately, this perspective supports the need for a nuanced approach to donor anonymity, encouraging openness that offers the possibility for the child's right to know their origins.

iv). Informed consent

In the context of informed consent for gamete donation, it is crucial to respect the autonomy of intended parents by ensuring that donors are fully informed about the processes and risks involved. Programmes should inform gamete donors and recipients of donor gametes about potential legal, medical, and psychosocial issues involved in donation. Concerns have been raised about the adequacy of information provided to oocyte donors, in particular regarding the procedures, risks, and potential uses of their donated gametes.[767] For intended parents, this transparency is vital as it affects the ethical integrity of the ART process they participate in. This underscores the need for a thorough and comprehensible consent process, so allowing donors ample time to consider their decision.[768] For intended parents, the assurance that donors have provided informed and voluntary consent is integral to the ethical framework of gamete donation, and safeguards the interests of all parties involved.

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766 Ibid.

767 I V Ezeome 'Gamete donation – a review of ethical and legal issues' (2022) 26(3) *African Journal of Reproductive Health* Art. 14.

768 Ibid.

In conclusion, the subjective criteria that intended parents use when selecting gamete donors are influenced by a complex interplay of evolutionary theories, personal desires for genetic resemblance, health considerations, and ethical reflections. Trivers's Parental Investment Theory provides a foundational understanding of the innate desires for genetic continuity and investment in offspring, which often manifest in preferences for donors who resemble the intended parents. This desire for resemblance is not merely superficial but is deeply tied to psychological motivations for identity and familial cohesion. Health considerations further underscore the importance of selecting donors who can contribute to the well-being of future children, so ensuring that potential genetic risks are minimised. However, these preferences are not without ethical implications. The risk of perpetuating biases and societal inequalities through selective criteria necessitates a careful balance, where intended parents must navigate their personal desires alongside broader ethical responsibilities. By integrating these considerations, intended parents can make informed and responsible choices that honour both their aspirations and the diverse, ethical landscape of modern assisted reproduction.

III. PROTECTIONS FOR INTENDED PARENTS' INTERESTS

Shifting focus from the broader theoretical framework, this section considers the tangible legal mechanisms that are designed to safeguard the interests of intended parents in the realm of ARTs. Protecting intended parents' discretion in donor selection is a fundamental component of reproductive autonomy, and is essential for allowing individuals to form families that align with their personal values, desires, and identities.[769] In South Africa, this autonomy encompasses not only the decision to have children but also the manner in which one chooses to form a family, including the selection of gamete donors. This freedom allows intended parents to create families that reflect their personal and cultural beliefs, supporting diverse family structures and personal choices about genetics, racial, or cultural lineage.[770] The psychological process of selecting gamete donors is significant for intended parents, who often seek donors that match their own or their partner's traits to create a sense of genetic continuity

[769] A Pande '"Mix or Match?": Transnational fertility industry and white desirability' (2021) 40(4) *Medical Anthropology* 335–347.

[770] D Thaldar 'The right to family life: Why the genetic link requirement for surrogacy should be struck out' (2022) 15(3) *South African Journal of Bioethics and Law* 84–91.

or connection.[771] This choice contributes to their emotional well-being and satisfaction with the family-building process, emphasising its centrality to reproductive autonomy.

However, in some countries, paternalistic approaches in reproductive healthcare can significantly diminish this autonomy by transferring the decision-making power regarding gamete selection to medical professionals. For instance, in Spain, the law mandates that the medical team is responsible for selecting the donor to ensure maximum phenotype and immunological similarity with the recipient, rather than allowing intended parents to make the choices themselves.[772] This practice is rooted in legal frameworks that prioritise medical expertise over personal choice. Such paternalistic practices can erode the fundamental rights and personal aspirations of intended parents, so underscoring the vital need to empower and support intended parents rather than relying on legislative enforcement that may constrain personal agency. Therefore it is crucial to foster an environment where personal choice and autonomy are respected and upheld.

In contrast, South Africa's legal and ethical framework emphasises the protection of intended parents' discretion in donor selection as a core aspect of reproductive autonomy. This approach not only aligns with the right to privacy and family life, but also respects and supports the diverse and personal decisions individuals make regarding family formation. While regulatory frameworks may impose certain restrictions to protect the rights of all parties involved, including donors and resulting children, it is crucial to balance these considerations with the reproductive autonomy of intended parents. Ensuring that intended parents have the freedom to make informed choices about their family formation is vital for respecting human rights and ethical standards in reproductive technologies.

In the complex landscape of ARTs, intended parents are afforded various legal protections to support their interests when selecting and using donor gametes. These protections ensure that their choices are respected, their autonomy is upheld, and their rights as parents are recognised in the legal framework. Here are key areas where protections are provided:

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771 D A Greenfeld 'Effects and outcomes of third-party reproduction: Parents' (2015) 104 *Fertility and Sterility* 520–524.

772 Spanish Law 14/2006 of 26 May, on Assisted Human Reproduction Techniques *Official State Gazette* No 126, 27 May 2006, 19947–19956.

a). Anonymity

Anonymity in donor conception has long been a topic of ethical and practical debate, especially concerning the interests of intended parents. The traditional model of anonymous donor conception was initially designed to protect the privacy of donors and intended parents, so allowing them to maintain control over their family narratives without the potential for donor interference.[773] However, the advent of direct-to-consumer genetic testing has increasingly challenged this model, and exposed the limitations of maintaining donor anonymity.[774]

For intended parents, anonymity was seen as a protective measure, offering them the certainty that donors would not become involved in their family life. Anonymity also facilitated a sense of security about the social and parental roles they occupy, without the need for external influence or input.[775] However, with genetic testing enabling donor-conceived individuals to trace their genetic origins, this sense of security is increasingly under threat.[776]

The shift towards non-anonymous donor conception, which includes communication agreements among parents, donors, and offspring, offers both challenges and benefits for intended parents. On the one hand, there is the potential for increased complexity in family dynamics, as donors might play a role in the child's life. On the other hand, it promotes transparency and honesty in family narratives, which can enhance trust and stability in the family unit.[777]

Open communication agreements offer a structured approach to managing these relationships, so balancing the privacy and boundaries of intended parents with the rights and needs of donor-conceived individuals to understand their genetic origins.[778] Countries like the UK and Australia, which have adopted non-anonymous policies, provide systems where donor-conceived individuals can access identifying information about their donors, therefore respecting the offspring's right to information while maintaining a framework for

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773 J Edwards, S Franklin, E Hirsch et al *Technologies of Procreation: Kinship in the Age of Assisted Conception* (1999).

774 P Borry, O Rusu, W Dondorp et al 'Anonymity 2.0: Direct-to-consumer genetic testing and donor conception' (2014) 101(3) *Fertility and Sterility* 630–632.

775 T Ishii 'Global changes in the regulation of reproductive medicine' in M K Skinner (ed) *Encyclopaedia of reproduction* 2 ed (2018) 380–386.

776 J C Harper, D Kennett & D Reisel 'The end of donor anonymity: How genetic testing is likely to drive anonymous gamete donation out of business' (2016) 31(6) *Human Reproduction* 1135–1140.

777 T Ishii & I de Miguel Beriain 'Protections for intended parents' interests: Shifting to a model of donor conception that entails a communication agreement among the parents, donor, and offspring' (2022) 23 *BMC Medical Ethics* 18.

778 S Zadeh 'Disclosure of donor conception in the era of non-anonymity: Safeguarding and promoting the interests of donor-conceived individuals?' (2016) 31(11) *Human Reproduction* 2416–2420.

communication that supports the interests of intended parents.[779] The implementation of non-anonymous donor conception requires the careful consideration of all parties involved, necessitating comprehensive counselling and support systems to facilitate these agreements and to address any concerns that arise.[780] This approach acknowledges the complex identities of donor-conceived individuals and seeks to balance their rights with the legitimate interests of intended parents and donors.

While some countries continue to mandate donor anonymity, transitional measures allowing both anonymous and non-anonymous donor conception can help ease this shift.[781] However, the full transition to a non-anonymous model must consider the social, cultural, and legal contexts of each country, as well as the varying degrees of readiness among stakeholders to accept such changes.[782] Therefore, while anonymity in donor conception once served as a protective measure for intended parents, the shift towards non-anonymous donor conception with communication agreements reflects a broader understanding of identity, transparency, and the rights of donor-conceived individuals.[783]

In South Africa, the legal framework governing donor conception is primarily outlined in the National Health Act and its accompanying Regulations Regarding Artificial Fertilisation of Persons. This legislation permits both anonymous and non-anonymous sperm and egg donations, though in practice the anonymity of donors is generally maintained, and identifying information is typically not disclosed to intended parents. However, donors can choose to reveal their identity with written consent. The Act emphasises the importance of obtaining consent from all parties involved in the donation process, so ensuring that the rights of donors, intended parents, and the resulting children are considered. While there is no explicit legal mandate for disclosing donor origins to donor-conceived individuals, there is growing advocacy of their right to access information about their genetic background.

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779 Human Fertilisation and Embryology Authority (HFEA) 'Home DNA testing and matching in donor-conceived people and their parents', available at *https://www.hfea.gov.uk/donation/donor-conceived-people-and-their-parents/*

780 J Slutsky, V Jadva, T Freeman et al 'Integrating donor conception into identity development: Adolescents in fatherless families' (2016) 106(1) *Fertility and Sterility* 202–208.

781 F Kelly, D Dempsey, J Power et al 'From stranger to family or something in between: Donor linking in an era of retrospective access to anonymous sperm donor records in Victoria, Australia' (2019) 33(3) *International Journal of Law, Policy and the Family* 277–297.

782 J Liao & K Devolder 'Intra-family gamete donation: A solution to concerns regarding gamete donation in China?' (2016) 13(3) *Journal of Bioethical Inquiry* 431–438.

783 T Ishii & I de Miguel Beriain 'Protections for intended parents' interests: Shifting to a model of donor conception that entails a communication agreement among the parents, donor, and offspring' (2022) 23 *BMC Medical Ethics* 18.

In South Africa, the handling of donor anonymity has been clouded by a widespread misinterpretation of the law, leading to significant real-world consequences. Contrary to the prevailing belief in the South African fertility industry and the South African Law Reform Commission,[784] donor anonymity is not a legal mandate. Instead, South African law is more nuanced, permitting identity-release and open-identity donations with the donor's consent. This legal flexibility mirrors international practices where identity-release systems have emerged not through legal mandates but as market-driven responses catering to diverse preferences of donors and recipients. The misconception that anonymity is legally required has led South African gamete banks and donation agencies to unnecessarily restrict their offerings, so potentially limiting options for individuals who might benefit from open-identity donations.[785] This misinterpretation has not only constrained the practices of these agencies but also has possibly deprived donor-conceived individuals of the opportunity to access more comprehensive information about their genetic origins, as lawfully allowed once they reach the age of majority.[786] SASREG guidelines clear states that all donations, unless they are 'known donations' are to be anonymous:

> Anonymity: 'All donations taking place within Chapter 8 on Artificial Fertilization of the National Health Act South Africa, unless qualifying as a "known donation" are to be anonymous. No identifying information will be passed between donor and recipient. This means that no adult photos of the donors will be shared with the recipient, and no meetings between donor and recipient will be allowed.'[787]

This misinterpretation of the law does not necessitate legislative reform but rather calls for professional policy leadership by SASREG.

b). Legal recognition of parenthood

Intended parents require assurance that they will be legally recognised as the parents of any child conceived through donor gametes. This is critical to avoid any disputes about parentage and to ensure that they have all parental rights and responsibilities from the moment of birth. Legal frameworks, such as the Children's Act, often define the woman who gives birth as the

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784 D Thaldar & B Shozi 'Is open-identity gamete donation lawful in South Africa?' (2022) *Sabinet African Journals.*

785 Ibid.

786 Children's Act.

787 South African Society of Reproductive Medicine and Gynaecology (SASREG), 2008.

legal mother and her spouse as the legal father, irrespective of genetic ties.[788] This legal recognition supports diverse family structures and provides certainty and security to intended parents. However, in non-traditional family structures this issue can become more complex and is not always protected by the law. A notable South African case that brings parenthood issues into focus is *J v Director General, Department of Home Affairs*.[789] This case involved a lesbian couple who used a sperm donor to conceive a child. They faced legal challenges in being recognised as the legal parents, so highlighting the complexities that can arise in such situations. The Constitutional Court's ruling in favour of recognising the non-biological partner as a parent was a landmark decision, affirming the rights of same-sex couples to be acknowledged as legal parents in cases involving donor gametes. This case underscores the importance of legal recognition in ART, so ensuring that diverse family structures are supported and that intended parents' rights are protected and upheld.

c). Enforceability of donor agreements

The enforceability of donor agreements is a crucial protection for intended parents, as it provides a legal framework for their relationship with the donor. In *QG v CS*,[790] the court recognised that while sperm donor agreements are legal, their enforceability is subject to the best interests of the child.[791] This ensures that intended parents can establish clear terms with donors, defining their roles and responsibilities, while safeguarding the child's welfare. This case revolved around whether the donor's rights and obligations were clearly defined and enforceable under the existing legal framework, in particular focusing on the extent to which the donor could influence or challenge the parental rights of the intended parents. It is crucial to understand that gamete donors inherently lack parental rights and responsibilities concerning a donor-conceived child.[792] However, in exceptional circumstances, a donor may petition the court to be granted such rights and responsibilities. To succeed in this endeavour, the donor must first establish locus standi, demonstrating to the court that they possess a legitimate interest in the child's welfare. Simply being a donor does not automatically confer this status;

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788 B Shozi, A Edgcumbe & D Thaldar 'New frontiers for reproductive health rights: Contemporary developments in the regulation of assisted reproductive technologies in South Africa' in O S Adelakun & E Ndoni (eds) *Reproductive Health and Assisted Reproductive Technologies in Sub-Saharan Africa: Issues and Challenges* (2023) 193–233.

788 2012 Regulation (n 54), reg 10(2)*(a)*.

789 (2003 5 BCLR 463 (CC)).

790 (32200/2020) [2021] ZAGPPHC 366.

791 *QG v CS* (32200/2020) [2021] ZAGPPHC 366. Note 199.

791 2012 Regulation (n 54), reg 10(2)*(a)*.

792 Children's Act (n 14), s 26(2)*(b)*.

rather, the individual must show that they have already been actively involved in the child's life in a positive way to warrant consideration. Furthermore, the donor must convincingly argue that granting them parental rights and responsibilities aligns with the best interest of the child. Only when these stringent criteria are met can the court consider altering the legal framework to recognise the donor's request.

The court's role in confirming and enforcing donor agreements is vital, as demonstrated by its examination of the terms of the donor agreement to determine its enforceability. This emphasises the importance of having agreements reviewed and confirmed by legal authorities to ensure their validity. Ultimately, *QG v CS* serves as a crucial reminder of the importance of enforceable donor agreements in protecting the rights of intended parents. It highlights the need for clear legal frameworks and thorough legal oversight to ensure that all parties understand and accept their rights and obligations. By having robust agreements in place, intended parents can safeguard their parental rights and secure their family's future, free from legal uncertainties about the donor's role.

d). Privacy and autonomy in donor selection

The right to privacy protects intended parents' decisions in selecting donor gametes, so allowing them to make choices based on personal values and criteria without external interference. This autonomy is crucial, as the selection process often involves sensitive considerations such as genetic compatibility, medical history and personal characteristics of the donor. The legal framework upholds these choices, ensuring that intended parents can pursue parenthood in a manner that aligns with their unique circumstances.

The judgment in *Ex Parte JCR*[793] highlights various legal challenges and issues associated with surrogacy and the rights of intended parents, in particular in the context of ARTs. In *Ex Parte JCR*, the Pretoria High Court introduced additional requirements for surrogacy agreements. The court mandated psychological assessments of existing children in the surrogate and commissioning parents' families, effectively shifting decision-making power about the surrogacy process to these children. This requirement is seen as undermining the intended parents' rights to reproductive autonomy and privacy.[794] The imposition of such

793 2022 5 SA 202 (GP).

794 W Holness, B Clark, A Edgcumbe et al 'A "parenting licence" granted by one's existing children? Critical analysis of the judgment in *Ex Parte JCR* 2022 5 SA 202 (GP)' (2023) 26(1) Potchefstroom Electronic Law Journal 1–32.

evaluations is argued to violate commissioning parents' constitutional rights to dignity, equality, reproductive autonomy, and access to reproductive healthcare, so adding an unjustifiable burden on those already navigating complex legal and medical processes to have children through surrogacy. These issues illustrate how judicial decisions can impose additional burdens and fail to adequately balance competing rights and interests.

Moreover, once again the *AB v Minister of Social Development*[795] case serves as a poignant example of how privacy and autonomy are compromised in the realm of gamete donor selection. Although the primary focus of the case was the use of surrogacy by single individuals, it brought to light broader themes related to privacy and autonomy in the context of ARTs. The *AB* case challenged the constitutionality of certain provisions in the Children's Act that required a genetic link between the commissioning parent and the child in surrogacy arrangements. AB argued that this requirement infringed her constitutional rights, including her rights to equality, dignity, and reproductive autonomy.[796] Although the case did not directly address gamete donor selection, it highlighted the broader issue of how legislative requirements can impinge on personal autonomy and privacy in reproductive decisions. The Constitutional Court ultimately upheld the genetic link requirement, emphasising the state's interest in ensuring a genetic connection between the child and at least one commissioning parent. However, the case sparked significant debate about the extent to which the law respects individual autonomy and privacy in making reproductive choices. Critics argued that such requirements could limit the options available to individuals seeking to become parents through ART, in particular affecting those who may not have viable gametes of their own. Recent and compelling counter-evidence, derived from large sample sizes and longitudinal studies, suggests that offspring conceived through donated gametes do not experience psychological harm related to the absence of a genetic connection with their parents. These findings challenge

795 (2017 3 BCLR 267 (CC)).

796 D Meyerson 'Surrogacy, geneticism and equality: The case of *AB v Minister of Social Development*' (2019) 9 *Constitutional Court Review* 317–341.

previous assumptions and indicate that the lack of a genetic link does not adversely affect the emotional well-being of these children.[797,798,799,800]

Another critique of this iconic case by Meyerson argued that the *AB* majority failed to recognise these flaws in the provision because 'it was too ready to ascribe AB's predicament to medical conditions and personal preferences rather than legal discrimination'.[801] This oversight is particularly problematic because it fails to acknowledge the systemic barriers and discriminatory practices that can influence reproductive choices. By focusing solely on AB's personal circumstances, the court neglected to address how the legal framework itself might restrict reproductive autonomy and limit the options available to intended parents. The decision in *AB* highlights the tension between legislative frameworks designed to protect children's interests and the rights of individuals to make autonomous reproductive choices. It underscores the need for a careful balance between regulation and respect for personal autonomy and privacy in the context of ARTs more broadly.

e). Access to counselling, information and support services

Intended parents are often provided with psychological and legal counselling as part of the process of using donor gametes. This support helps them understand the implications of their choices, manage expectations, and navigate the emotional complexities associated with donor conception. Legal counselling ensures that intended parents are aware of their rights and responsibilities, so contributing to informed decision-making. Psychological assessments play an indispensable role in the fertility treatment process, safeguarding the mental and emotional readiness of donors, recipients, and surrogate mothers. These evaluations ensure that all parties are well prepared to navigate the complexities of the procedures and to embrace their potential outcomes with resilience and understanding.[802]

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797 S Golombok, L Blake, P Casey et al 'Children born through reproductive donation: A longitudinal study of psychological adjustment' (2012) 54(6) *Journal of Child Psychology and Psychiatry* 653–660.

798 L van Gelderen, H Bos, N Gartrell et al 'Quality of life of adolescents raised from birth by lesbian mothers: The US national longitudinal family study' (2012) 33(1) *Journal of Developmental and Behavioral Pediatrics* 1–7.

799 V Jadva, L Blake, P Casey et al 'Surrogacy families 10 years on: Relationship with the surrogate, decisions over disclosure and children's understanding of their surrogacy origins' (2012) 27(10) *Human Reproduction* 3008–3014.

800 L Blake, P Casey, V Jadva et al '"I was quite amazed": Donor conception and parent–child relationships from the child's perspective' (2013) *Children and Society* 1–13.

801 D Meyerson 'Surrogacy, geneticism and equality: The case of *AB v Minister of Social Development*' (2019) 9 *Constitutional Court Review* 317–341.

802 D Thaldar & N Mthembu *Report on the Competitive Dynamics of the South African Fertility Healthcare Sector* University of KwaZulu-Natal (2024).

In a comprehensive study by Schrijvers et al. it was revealed that 'intended parents found it relevant to discuss the following seven topics in psychosocial counselling: the decision to opt for donor sperm treatment, choosing a sperm donor, coping with questions from family and friends, non-genetic parenthood, single motherhood, openness and disclosure, and future contact between the child and half-siblings'.[803]

In the context of protecting the interests of intended parents during the selection of donor gametes, South African regulations emphasise the importance of informed decision-making and emotional support. Regulation 4(1) requires that 'a healthcare provider must ensure that the prospective parents are fully informed of the implications of the use of donor gametes, including the emotional and psychological implications'.[804] This provision ensures that intended parents understand the complexities associated with donor conception. Regulation 5 also states that 'the healthcare provider must provide information on the availability of counseling services',[805] thereby encouraging intended parents to seek psychological support. While the law does not explicitly mandate psychological counselling for intended parents, it strongly encourages the provision of support services to ensure they are adequately prepared for the emotional journey of donor conception. This dual focus not only aids in informed consent but also fosters a supportive environment for families formed through donor gametes.

Intended parents have access to information about donor selection, medical procedures, and legal requirements, so empowering them to make informed choices. Support services, such as counselling and fertility clinics play a vital role in facilitating the donor conception process and addressing any concerns or challenges that may arise. These protections collectively ensure that intended parents can pursue their goal of forming a family through donor gametes with confidence, knowing that their rights are recognised and respected. By providing a comprehensive legal framework, the law supports the diverse paths to parenthood embraced by modern families, so fostering an inclusive and supportive environment for all.

Medical risks associated with donor-assisted conception include general risks from ART procedures, as well as the potential transmission of infectious diseases and genetic

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803 A M Schrijvers, F B van Rooij, G Overbeek, E de Reus et al 'Psychosocial counselling for intended parents who opt for donor sperm treatment: Which topics do they find relevant?' (2019) 38(5) *Journal of Reproductive and Infant Psychology* 474–484.

804 Regulations Relating to the Use of Human Gametes, Embryos, and Surrogacy Government Notice R. 200 in *Government Gazette* 31861 of 16 February 2009.

805 Ibid.

heritable conditions from the donor to the recipient.[806] Recipients should be informed about how these risks are minimised through comprehensive screening interviews that gather detailed medical and family history from the donor. While these precautions help reduce risks, it is important to understand that they do not eliminate them. Obstetric risks are also relevant; women who conceive through oocyte donation may face a higher likelihood of complications, such as pre-eclampsia, hypertensive disorders, preterm birth, low birth weight, and caesarean sections compared to those who use their own gametes.[807]

When obtaining informed consent for MAR using donor gametes, it is crucial to cover several important aspects. Consent must clearly outline the benefits and risks associated with using donated gametes, including any obstetric risks involved. It should also address the confidentiality of donors and whether anonymity will be maintained. In addition, the rights of donors regarding the withdrawal of consent must be explained, along with the potential consequences of such a decision. Information about the availability of counselling services, financial considerations, and the possibility that treatment may not lead to a successful pregnancy should also be included.[808] [809]

f). Areas for improvement

Intended parents navigating the complexities of donor gamete selection may encounter several significant challenges. The following legal and policy reforms are recommended to strengthen protections for intended parents and to address these challenges.

i). Standardised expanded carrier screening and counselling

In South Africa, genetic screening of donor gametes traditionally focuses on a limited set of tests that target specific genetic disorders, often based on ethnic background or family medical history. Typically, these tests only include screening for common conditions such as cystic fibrosis, karyotyping, sickle cell disease and thalassemia screening, but they do not encompass

806 ESHRE Working Group on Reproductive Donation, J Kirkman-Brown, C Calhaz-Jorge et al 'Good practice recommendations for information provision for those involved in reproductive donation†' (2022) 2022(1) *Human Reproduction Open*.

807 M Mascarenhas, S K Sunkara, B Antonisamy et al 'Higher risk of preterm birth and low birth weight following oocyte donation: A systematic review and meta-analysis' (2017) 218 *European Journal of Obstetrics & Gynecology and Reproductive Biology* 60–67.

808 A R Cattapan 'Good eggs? Evaluating consent forms for egg donation' (2016) 42 *Journal of Medical Ethics* 455–459.

809 M Storgaard, A Loft, C Bergh et al 'Obstetric and neonatal complications in pregnancies conceived after oocyte donation: A systematic review and meta-analysis' (2017) 124 *BJOG: An International Journal of Obstetrics & Gynaecology* 561–572.

the broader range of genetic disorders that could be relevant to the diverse South African population. They also screen for STDs. This approach contrasts with ECS panels, which evaluate carrier status for hundreds of genetic disorders regardless of ancestry, thereby offering a more comprehensive assessment of genetic risks.

The ECS panel is a genetic test designed to identify carriers of a wide array of autosomal recessive or X-linked disorders which could potentially be passed on to offspring if both parents are carriers of the same condition.[810] These panels provide individuals or couples with crucial information about their genetic risks. If both partners are detected as carriers of the same genetic disorder through ECS, they face a higher likelihood of having a child affected by that disorder. This insight can guide reproductive decisions, such as the use of donor gametes, preimplantation genetic testing, or adoption.[811]

In the current landscape, there is a notable difference in the genetic screening processes for egg and sperm donors. These processes can vary based on the specific protocols of fertility clinics and the regulations in place. Nevertheless, there is a growing recognition of the need to standardise genetic screening practices, including the implementation of ECS panels, to ensure consistent and equitable reproductive care.

Developing a national ECS panel in South Africa, informed by the country's unique genetic diversity and prevalent genetic disorders, could facilitate genetic matching between donors and recipients, thereby enhancing reproductive genetic risk management. This panel should be comprehensive and culturally appropriate, and developed in collaboration with geneticists, reproductive specialists, and policymakers.[812] By standardising the list of prevalent diseases screened, South Africa can improve its reproductive genetic services, so ensuring that intended parents and donors have the necessary information and support to make informed reproductive choices. This initiative would contribute to better health outcomes for future generations and uphold the psycho-legal rights of all parties involved in the donor selection process.

To protect the health and safety of children, legal frameworks should mandate standardised genetic testing or, more specifically, ECS for donors. Such requirements

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810 M R Payne, A B Skytte & J C Harper 'The use of expanded carrier screening of gamete donors' (2021) 36(6) *Human Reproduction* 1702–1710.

811 D Chokoshvili, D F Vears & P Borry 'Expanded carrier screening for monogenic disorders: Where are we now?' (2018) 38 *Prenatal Diagnosis* 59–66.

812 G De Wert, S van der Hout, M Goddijn et al 'The ethics of preconception expanded carrier screening in applicants of medically assisted reproduction' (2020) 35 *Human Reproduction* 1256–1261.

safeguard intended parents from potential hereditary health issues affecting their children. Regulation 4(2) requires that 'a healthcare provider must ensure that the donor is screened for infectious diseases', but lacks a definitive directive for specific genetic screening, so allowing clinics to interpret these requirements at their discretion.

While expanding the criteria for donor screening may enhance the likelihood of recipients having healthy children, it also has potential drawbacks. These negative effects include possible reduction in available donors, either by excluding candidates with minimal risks or preventing some from coming forward owing to fear of their genetic test results. For the donor and his or her close relatives, expanded genetic screening may reveal risks, knowledge of which may be beneficial (if the findings allows for prevention, treatment or other meaningful courses of action), but that may also turn out to be psychosocially harmful, especially if findings reveal a serious genetic risk that has no medical treatment.[813]

Furthermore, expanded screening may lead to higher costs that can put the service out of reach for some.[814] Financial constraints should not deter the implementation of more rigorous screening processes for donors. The potential costs associated with raising a child born with a severe hereditary illness can far exceed the expenses incurred from comprehensive screening. By investing in thorough donor evaluations upfront, we can mitigate the risk of hereditary diseases and, ultimately, save on the substantial financial burden that may arise from managing such conditions over time.

It is crucial to emphasise the necessity of conducting thorough genetic evaluations for intended parents, as genetic risk extends beyond the donor. Comprehensive assessments of both the donor and the intended parent are essential for accurate risk evaluation and for equipping recipients with the information needed to make well-informed choices in respect of their donor. For many hereditary diseases to manifest, the affected individual typically inherits two mutated copies of a gene: one from each gamete parent.[815] Consequently, both the recipient and the donor must be compatible for a risk to exist. This understanding underscores the

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813 T J Musci & K Moyer 'Prenatal carrier testing for Fragile X: Counseling issues and challenges' in A R Gregg & J L Simpson (eds) *Genetic Screening and Counseling Obstetrics and Gynecology Clinics of North America* (2010) 61–70.

814 F Cariati, V D'Argenio & R Tomaiuolo 'The evolving role of genetic tests in reproductive medicine' (2019) 17 *Journal of Translational Medicine* 267.

815 N C Rose & M Wick 'Current recommendations: Screening for Mendelian disorders' (2015) 40 *Seminars in Perinatology* 23–28.

importance of holistic genetic screening in the donor selection process, so ensuring that all relevant genetic factors are considered.

Conversely, Pennings argued that since the overall risk reduction of ECS is less than 1 per cent, it is too small to outweigh the potential burdens.[816] Donors should therefore only be tested for common autosomal recessive conditions. The list of conditions should be kept to those that have a higher chance of both the donor and recipient being carriers. Given this risk, and the possibility that donors may have children with someone other than the intended parent, the results about carrier status should be shared with each donor individually.[817]

Coupling ECS with comprehensive genetic counselling is essential for both recipients and donors to fully understand the implications of genetic testing results. Genetic counselling provides a crucial educational component, helping individuals interpret complex genetic information and make informed decisions about their reproductive options. For donors, this counselling can alleviate concerns about carrier status and its potential impact, so ensuring that they are comfortable with their decision to donate. Similarly, for recipients, understanding their genetic risks and those of their chosen donor empowers them to make choices that align with their health goals and family planning aspirations.[818]

Moreover, it is vital to ensure that both sperm and egg donors undergo the same level of genetic screening and are offered identical opportunities for genetic counselling. This parity not only promotes fairness and equity in the donor selection process but also enhances the overall effectiveness of reproductive genetic risk management. By standardising both the screening process and the availability of genetic counselling, we can create an informed donor and recipient community that is better equipped to navigate the complexities of genetic inheritance and reproductive choices.[819] This approach supports a holistic and ethically sound framework for assisted reproduction, prioritising the well-being and autonomy of all parties involved.

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816 G Pennings 'Expanded carrier screening should not be mandatory for gamete donors' (2020) 35 *Human Reproduction*1256–1261.

817 D Accoe 'Disclosing reproductive genetic carrier status: What about the donor?' (n.d.) Bioethics Institute Ghent & Metamedica, Department of Philosophy and Moral Sciences, Ghent University, Belgium.

818 D Chokoshvili, D F Vears & P Borry 'Expanded carrier screening for monogenic disorders: Where are we now?' (2018) 38 *Prenatal Diagnosis* 59–66.

819 G De Wert. S van der Hout, M Goddijn et al 'The ethics of preconception expanded carrier screening in patients seeking assisted reproduction' (2020) 35 *Human Reproduction Open* 1256–1261.

In conclusion, the standardisation and mandatory offering of ECS to all intended parents seeking donor gametes is a pivotal step in enhancing reproductive health services in South Africa. By implementing a consistent ECS protocol, more comprehensive uniform genetic screening across all facilities will be conducted, thereby capturing valuable data that can be used to refine and optimise the panel to better reflect the genetic diversity of the population. Over time, this approach will enable batch testing, which can significantly reduce costs and increase accessibility. Ultimately, the adoption of a standardised ECS panel will not only safeguard the health of future generations but also empower intended parents with the knowledge to make informed reproductive choices, so ensuring equity and quality in assisted reproduction.

ii). Cultural sensitivity training

In South Africa, cultural beliefs about kinship and genetic ties complicate the acceptance of donor gametes. Intended parents may encounter societal pressure or stigma, in particular in communities that prioritise biological relationships over chosen familial connections. Providing cultural sensitivity training for healthcare providers can help address the unique concerns of diverse communities about donor conception. This training can foster understanding and respect for various cultural beliefs while promoting acceptance of donor gametes.

IV. FACTORS INFLUENCING CHOICES AND THEIR CONSIDERATION IN LEGAL FRAMEWORKS

a). Influence of social and economic factors

Social and economic factors significantly shape the choices available to individuals and couples seeking ART in South Africa. Although the Constitution's Bill of Rights proclaim that 'South Africans can "make decisions concerning reproduction"; access to and the use of ARTs are viewed in general as excessively expensive, accessible only to the privileged few'.[820] Access to ART is often hindered by socioeconomic status, which directly influences decision-making about family planning and reproductive health options. For instance,

[820] C Huyser & L Boyd 'ART in South Africa: The price to pay' (2013) 5 *Facts Views Vis Obgyn* 91–99.

individuals from lower socioeconomic backgrounds may struggle to afford private healthcare services, where most ART treatments are provided.

The challenges associated with accessing ART are deeply intertwined with social issues rather than purely legal frameworks. Although legal reforms could address certain barriers, the primary obstacles are economic and social – especially in the context of third-world countries. It is said that ART services are not widely available[821] and often not affordable.[822] Access to ART is severely restricted by high treatment costs, lack of public funding, inadequate policy prioritisation, a shortage of clinics and trained staff, long travel distances for patients, and over-servicing in the private sector.[823] According to a study conducted across sub-Saharan Africa between 2021 and 2023, fertility experts emphasise the need for government funding and suggest strategies like using mild stimulation protocols to lower costs.[824]

b). Gamete donor diversity

In addition, the limited variety of specific gamete donor diversity influences intended parents gamete donor choice. In South Africa, there may be a scarcity of certain donors from specific ethnic backgrounds, such as Mediterranean, Jewish and Indian communities. This can be attributed to religious and cultural reasons. While these factors undeniably influence the choices of intended parents it is more a matter of practical reality than an issue necessitating legal intervention or protection.

These inequities have implications for reproductive rights and access to healthcare; however, they do not stem directly from deficiencies in legal frameworks or policy measures. Instead, they reflect deeper socioeconomic disparities that hinder equitable access to essential reproductive health services. Many individuals and couples may feel compelled to forgo ART altogether due to the high costs or the inability to find a suitable donor, so perpetuating a cycle of reproductive disadvantage.

Therefore, while economic constraints and the limited availability of specific donor types do not necessitate legal intervention per se, two significant legal-policy aspects that do

821 W Ombelet, I Cooke, S Dyer et al 'Infertility and the provision of infertility medical services in developing countries' (2008) 14 *Human Reproduction Update* 605–621.

822 J D F Habbema 'Is affordable and cost-effective assisted reproductive technology in low-income countries possible? What should we know to answer the question?' (2008) 1 *ESHRE Monographs* 21–24.

823 A Whittaker, T Gerrits, K Hammarberg et al 'Access to assisted reproductive technologies in sub-Saharan Africa: Fertility professionals' views' (2024) 32 *Sexual and Reproductive Health Matters* 2355790.

824 Ibid.

merit attention in the context of gamete donation are: handling donor anonymity and practitioner involvement.

First, the handling of donor anonymity in South Africa illustrates a misinterpretation of the law that has tangible implications for stakeholders. South African law permits both identity-release and open-identity donation, contingent upon donor consent, and yet historical hesitance in the fertility sector has led to an unwarranted adherence to strict anonymity. This misinterpretation not only restricts donor options but also affects the psychological well-being of donors and recipients. Research indicates that many donors seek a sense of connection and legacy, desiring the option to be known to their offspring should they choose to be.[825] Conversely, recipients often express a desire for transparency and access to information about donors, which can alleviate anxiety about genetic health and family history. Understanding these psychological aspects is crucial for designing systems that accommodate the diverse preferences of both parties. Addressing this issue calls for professional policy leadership rather than legislative reform, in particular from organisations like SASREG, to ensure that practices align with the existing legal framework and better serve the needs of intended parents.

Studies on the perspectives of donors and recipients and offspring involved in identity-release donation show that donors have primarily altruistic motives.[826] Furthermore, research examining the long-term effects of participating in an identity-release donor programme reveals that most donors express satisfaction with their choice.[827] The current findings suggest that intended parents with identity-release donors maintained stable relationships[828] and were open about using donor conception.[829] From the perspective of intended parents, study results revealed a general satisfaction with their decision to choose an identity-release donor, as it provides their child with the opportunity to access more information about their genetic background.[830]

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825 A Skoog Svanberg, G Sydsjö & C Lampic 'Psychosocial aspects of identity-release gamete donation - perspectives of donors, recipients, and offspring' (2020) 125 *Upsala Journal of Medical Sciences* 175–182.

826 Ibid.

827 AS Svanberg, C Lampic, A-L Gejervall et al 'Gamete donors' motivation in a Swedish national sample: Is there any ambivalence? A descriptive study' (2012) 91 *Acta Obstetricia et Gynecologica Scandinavica* 944–951.

828 G Sydsjö, A S Svanberg, M Bladh et al 'Relationships in couples treated with sperm donation – a national prospective follow-up study' (2014) 11 *Reproductive Health* 62.

829 S Leeb-Lundberg, S Kjellberg & G Sydsjö 'Helping parents to tell their children about the use of donor insemination (DI) and determining their opinions about open-identity sperm donors' (2006) 85 *Acta Obstetricia et Gynecologica Scandinavica* 78–81.

830 JE Scheib, M Riordan & S Rubin 'Choosing identity-release sperm donors: The parents' perspective 13–18 years later' (2003) 18 *Human Reproduction* 1115–1127.

To address these needs, several recommendations can be made, particularly concerning SASREG policy reforms, practitioner training, and system-level changes in donor agencies and clinics. First, SASREG should develop clear guidelines that encourage clinics to transparently offer both identity-release and open-identity options. These guidelines could include best practices for informing donors and recipients about the implications of each choice, so ensuring that all parties can make informed decisions that are aligned with their psychological needs. In addition, training programmes for healthcare providers should emphasise the importance of understanding the psychological needs of both donors and recipients. Practitioners should be equipped to facilitate open discussions about anonymity preferences and the emotional implications of these choices, so helping to build trust and ensure that the options provided are in line with the desires of both parties.

SASREG and fertility clinics should develop comprehensive donor profiles that include standard medical information, personal anecdotes, motivations for donation, and health histories, providing recipients with deeper insight while respecting the anonymity preferences of donors. This would cater to recipients who prefer deeper engagement and transparency while still respecting the choice of donors who wish to remain anonymous. In addition, regulatory bodies must enforce strict measures to guarantee that all information is managed in accordance with the highest standards of safety and privacy rights.

Training programmes for healthcare providers and counselling staff should emphasise understanding the psychological and emotional needs of both donors and recipients, equipping practitioners to facilitate empathetic, guided discussions about anonymity preferences and informed decision-making tailored to clients' individual backgrounds and values. By integrating these recommendations, South African fertility practices can evolve to meet the psychological and emotional needs of both donors and recipients, so ultimately fostering a more supportive environment that acknowledges their preferences while adhering to the legal framework. In doing so, the sector can move away from outdated practices and better serve the diverse needs of all stakeholders involved in the reproductive journey.

Language barriers can also significantly affect the decision-making processes of individuals seeking reproductive assistance, particularly for those with lower educational attainment who may be making choices in a second or third language. For these respondents, navigating the complexities of donor selection can be particularly daunting, leading them to rely more heavily on practitioners for guidance. When practitioners are seen as the primary source of information, individuals may feel less empowered to make informed decisions about

which donor to choose. This reliance can stem from a lack of confidence in their language skills, which can create anxiety and uncertainty during such a critical process.

To address these challenges, it would be beneficial for donor agencies and clinics to develop multilingual donor websites that provide information in languages predominant among the South African population. By offering content in various local languages, these platforms could enhance accessibility and understanding, so empowering individuals to engage more meaningfully with the information presented. This approach would not only help demystify the donor selection process but also encourage recipients to explore their options independently, so fostering a sense of autonomy in decision-making. Ultimately, creating multilingual resources can bridge the gap created by language barriers, ensuring that all individuals, regardless of their educational background or linguistic proficiency, can make informed choices that align with their reproductive goals.

V. CONCLUSION

Considering the in-depth exploration presented in this chapter, it is essential to deliberate on whether subjective donor selection should be included in the scope of constitutionally protected reproductive autonomy in South Africa. The chapter highlights that reproductive autonomy is deeply connected to the rights to privacy and dignity, so allowing individuals to form families in ways that align with their personal values and identities. However, because subjective donor selection could reinforce stereotypes or perpetuate inequalities, it suggests that such choices may need to be carefully regulated. Therefore, the question remains: whether such discretion should be protected and, if so, on what grounds – potentially emphasising the importance of personal identity and cultural continuity – while ensuring that it does not conflict with broader ethical and societal values. The analysis suggests the need for a nuanced legal framework that balances these considerations, reflecting both individual rights and societal ethics.

In exploring the multifaceted dynamics of reproductive autonomy in South Africa, this chapter considered the intricate decision-making processes of intended parents, in particular in the realm of donor selection. Reproductive autonomy is deeply intertwined with the ability of individuals to make choices about forming families in ways that reflect their personal values

and identities.[831] This core principle supports the idea that intended parents should have the discretion to select donors based on subjective criteria, as it aligns with their aspirations and visions for their families. Reproductive autonomy, in this context, encompasses more than just the ability to have children; it involves the freedom to make decisions about the characteristics and traits valued in potential offspring, so reflecting cultural, ethical, and personal beliefs.[832,833]

The conceptual framework provided a structured approach to examining subjective donor preferences by bridging psychological motivations with legal principles. By applying this framework, it was possible to analyse how intended parents' personal desires for specific donor traits – rooted in psychological theories like Trivers's Parental Investment Theory – are not only valid but also supported and constrained by legal rights such as the right to dignity, bodily and psychological integrity, and freedom. This integration allowed for a comprehensive understanding of how personal and cultural ideals influence donor selection in a legally protected context, effectively unifying the psychological and legal discussions into a cohesive analysis that respects individual autonomy while ensuring adherence to societal and ethical standards.

Understanding reproductive autonomy in South Africa involves a complex interplay of legal, ethical, and social dimensions. At the heart of this autonomy is the constitutional foundation, which anchors reproductive rights in the Constitution, emphasising the rights to privacy, dignity, and family life. These constitutional protections underscore the importance of reproductive choices as being a fundamental aspect of personal autonomy and self-determination.[834] However, the legal framework and judicial interpretations, such as those seen in *AB* v *Minister of Social Development*, highlight tensions between legislative provisions and individual rights, in particular concerning the requirement for a genetic link in surrogacy as mandated by the Children's Act. This legal complexity indicates a need for reform to better accommodate diverse family structures and support non-coital reproduction methods.[835]

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831 B Shozi 'Something old, something new: Applying reproductive rights to new reproductive technologies in South Africa' (2020) *South African Journal on Human Rights* 1–24.

832 G Pennings 'The right to choose your donor: A step towards commercialization or a step towards empowering the patient?' (2000) 15 *Human Reproduction* 508–514.

833 T Metz 'Questioning South Africa's "genetic link" requirement for surrogacy' (2014) 7(1) *South African Journal of Bioethics and Law* 34–39.

834 D Thaldar 'The right to family life: Why the genetic link requirement for surrogacy should be struck out' (2022) 15(3) *South African Journal of Bioethics and Law* 84–91.

835 D Meyerson 'Surrogacy, geneticism and equality: The case of *AB v Minister of Social Development*' (2019) 9 *Constitutional Court Review* 317–341.

Given recent advancements in ART, it is not only possible to have a child – it is now also possible to create a specific child. South Africa is being confronted with the need to exam the application of reproductive freedom, striving to balance and safeguard the interests of all involved parties. Balancing reproductive autonomy with societal interests is crucial, as this autonomy is not absolute.[836] In South Africa, the conundrum about the particular meaning of reproductive autonomy[837] lies in the necessity for self-determination to make the right to reproductive autonomy more effective.[838] Individuals desire a specific child for deeply personal and private reasons.[839]

Reproductive autonomy must be weighed against broader societal goals, such as promoting equality and preventing discrimination, to ensure that personal reproductive choices do not perpetuate societal inequalities or discriminatory practices.[840] Mbasa provides a culturally rich context that highlights the profound cultural significance of blood ties in African communities, where family identity and continuity are deeply rooted in biological connections. Given that 76 per cent of my study's participants were African, closely reflecting the 82 per cent African demographic[841] of the South African population, the significance of blood ties in these African communities is a pivotal influence in shaping family identity and continuity. This cultural emphasis on blood relations underscores the importance of personal identity and cultural continuity, which are key considerations in the debate about whether subjective donor

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836 C Jacobs 'Realising the right to reproduce with assistance in South Africa: A constitutional perspective', available at *https://hdl.handle.net/1887/3239122*

837 C Pickles *Pregnancy Law in South Africa – Between Reproductive Autonomy and Foetal Interests* (2017) 92 confirms that "'the Constitution does not specifically grant anyone the right to autonomy'. This was confirmed by Pickles, who asserts:
'[T]he term 'reproductive autonomy' seems problematic because this term does not appear in any South African legislation. It recently made its debut in AB 1, but the High Court did not explicitly engage the concept and it did not clarify its meaning in a constitutional setting. The court merely used the phrase as a heading to its discussion of how s 12(2)(a) of the Constitution includes the right to procreate via the use of a surrogate. The majority in AB 2 did not go on to clarify the conceptual scope of reproductive autonomy and the Constitutional Court set the High Court decision aside. This makes it difficult to determine the position of ... reproductive autonomy generally ...'

838 J Khampepe (*AB* para 53) explains the relationship between freedom and reproductive autonomy in the following terms: 'the value of freedom vivifies the rights protected by section 12 of the Constitution', which is 'narrower and more specific'. This makes sense as reproductive autonomy relates only to reproduction, while freedom or autonomy are more general and non-specific. Pickles suggests that '[i]f human autonomy is broadly understood as the process of self-regulation, then reproductive autonomy will be the process of self-regulation in the context of reproduction'.

839 C Jacobs 'Realising the right to reproduce with assistance in South Africa: A constitutional perspective', available at *https://hdl.handle.net/1887/3239122*

840 B Shozi 'Something old, something new: Applying reproductive rights to new reproductive technologies in South Africa' (2020) *South African Journal on Human Rights* 1–24.
South African Stats available:

841 South African Stats available:
https://www.statssa.gov.za/?p=18613#:~:text=1.South%20Africa's%20Population%20Hits,are%20aged%2060%20and%20older.

selection should be constitutionally protected under reproductive autonomy. The participants in Mbasa's study grappled with cultural expectations and familial pressures, which often prioritise biological lineage and the continuation of family heritage, and reflecting similar concerns that intended parents might have when selecting donor gametes. These cultural insights suggest that subjective donor selection is not merely a matter of personal preference but is also intertwined with broader cultural and identity-related values. The emphasis on biological ties can lead to reinforcing stereotypes and perpetuating inequalities, as seen in the preference for blood-related children over adopted ones. Such dynamics underscore the need for careful regulation to ensure that reproductive autonomy does not inadvertently sustain societal biases or ethical dilemmas. The challenge, therefore, is to create a legal framework that respects individual rights to privacy and dignity, while balancing these with societal ethics and the potential for reinforcing existing inequalities. Therefore, a nuanced legal approach that honours both individual choice and the collective cultural ethos ensures that reproductive autonomy in South Africa is both inclusive and ethically sound.

Reforms should aim to balance individual rights with ethical considerations, preventing discrimination while respecting personal values and cultural identities.[842,843] The argument for preserving this discretion is rooted in the broader understanding of autonomy as being a fundamental right, which is protected under the rights to privacy and dignity. As highlighted by Thaldar,[844] the right to family life is not only about forming a family but also doing so in a manner that resonates with the individuals' identity and values. However, this discretion is not without its challenges and potential for regulation. This introduces the possibility of regulation, not to undermine reproductive autonomy but to balance it against societal ethics and the rights of others.

In South Africa, the notion of constitutionally protected reproductive autonomy encompasses a range of considerations, including the right to make informed choices about reproduction. Subjective criteria, such as race, appearance, and education, are often considered by intended parents for reasons of psychological identification and personal satisfaction. These criteria reflect personal ideals and desires, making them inherently subjective and less clearly

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842 D Thaldar & B Shozi 'An imbalanced approach to governance? An analysis of the WHO's position on human genome editing' (2023) 37(7) *Bioethics.*

843 D Thaldar & B Shozi 'Is open-identity gamete donation lawful in South Africa?' (2022) 112 *South African Medical Journal*.

844 D Thaldar 'The right to family life: Why the genetic link requirement for surrogacy should be struck out' (2022) 15(3) *South African Journal of Bioethics and Law* 84–91.

linked to fundamental rights compared to objective criteria like health history and genetics, which have direct implications for the child's well-being.

Reproductive autonomy is interpreted to include the use of ART, including its advancements. This broad understanding, as Shozi describes, is that individuals have the right not only to decide whether to have children but also how to form their families, even if the technologies involved are socially contentious.[845] However, this freedom is balanced by a key principle that both Shozi and Thaldar offered, which is known as 'procreative non-maleficence'.[846] Procreative non-maleficence dictates that the scope of decisions intended parents can make about using ARTs should be limited by law to prevent harm to the potential child.[847] This principle aligns with the liberal view that personal freedom should be curtailed only to prevent harm to others, therefore ensuring that while intended parents have discretion in donor selection, their choices do not negatively affect the future child.

Therefore, while protecting intended parents' discretion in donor selection as a core aspect of reproductive autonomy, it is also subject to the necessity of balancing personal freedom with societal impact. The constitutional framework provides a means to navigate these complex waters, ensuring that the exercise of autonomy is consistent with ethical considerations and societal values.[848] This chapter contributed a meaningful perspective by advocating a legal approach that both preserves and enhances reproductive autonomy in South Africa, so ultimately fostering a more inclusive and equitable framework for family formation.

Furthermore, it has been emphasised that the constitutional rights and protections extended to intended parents in South Africa are deeply rooted in their fundamental rights to family formation and privacy.[849] Legal precedents, such as the *QG v CS* and *AB v Minister of Social Development* cases illustrate the evolving legal landscape associated with gamete donation and the recognition of diverse family structures.[850,851] These legal frameworks provide

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845 B Shozi 'Something old, something new: Applying reproductive rights to new reproductive technologies in South Africa' (2020) *South African Journal on Human Rights* 1–24.

846 D Thaldar & B Shozi 'Procreative non-maleficence: A South African human rights perspective on heritable human genome editing' (2020) 3(1) *CRISPR J* 32–36.

847 Ibid.

848 Ibid.

849 Constitution of the Republic of South Africa, 1996 ss 12(2)(a) and 14.

850 B Shozi, R Hazarilall & D Thaldar 'Blood is thicker than water, but is it thicker than ink? An analysis of parenthood and sperm donor agreements in the wake of *QG v CS* (32200/2020) 2021 ZAGPPHC 366 (17 June 2021)' (2022) 33(3) *Stellenbosch Law Review* 529–547.

851 *AB v Minister of Social Development* 2017 3 SA 570 (CC).

a foundation for intended parents to make autonomous reproductive choices, while ensuring the welfare of donor-conceived children.

This chapter advocates legal and policy reforms to clarify parental rights, enhance genetic donor screening practices, and ensure informed consent, alongside integrating psychological services into ART offerings and promoting public awareness to destigmatise infertility and ART.[852] These efforts aim to create a more inclusive and supportive environment for intended parents, underscoring the need for a legal framework that upholds reproductive autonomy while addressing ethical and societal considerations.

[852] I V Ezeome 'Gamete donation—a review of ethical and legal issues' (2022) 26(3) *African Journal of Reproductive Health* 124–135.

CHAPTER 6

CONCLUSION

I. INTRODUCTION

The privilege of becoming a parent by conceiving a child biologically is not universally accessible, so compelling many individuals to turn to donor gametes because of medical, relational, or socio-cultural factors.[853] ARTs like IVF and IUI offer a beacon of hope for those confronting infertility, those in same-sex partnerships, or those having health conditions impeding natural conception.[854] In South Africa, a nation celebrated for its democratic ethos enshrined in its Constitution, which champions freedom, dignity, and equality, the legal landscape of gamete donation is complex and evolving.[855] This study embarked on a psycho-legal analysis, and examined the intersection between the legal frameworks, ethical considerations, and the lived experiences of intended parents selecting gamete donors. By scrutinising how these factors enmesh in the South African context, this research aimed to illuminate the nuanced challenges and opportunities in the arena of donor gamete selection, thereby contributing to a more informed and equitable framework for reproductive law and policy.[856]

The study highlighted how the intersection of legal rules and psychological processes informs and complicates the experience of donor conception. It showed that the law does not operate in a vacuum, but rather in a socio-emotional landscape marked by loss, desire, uncertainty, and evolving family norms. Moreover, this research has demonstrated that donor selection is influenced not only by psychological needs but also by unconscious cognitive mechanisms. Drawing on theories such as Kahneman and Tversky's work[857] on heuristics and

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853 B Shozi, Aliki Edgcumbe & D Thaldar 'New frontiers for reproductive health rights: Contemporary developments in the regulation of assisted reproductive technologies in South Africa' in O S Adelakun & E Ndoni (eds) *Reproductive Health and Assisted Reproductive Technologies in sub-Saharan Africa: Issues and Challenges* (2023) .

854 L Frith, N Sawyer & W Kramer *Forming a Family with Sperm Donation: A Survey of 244 Non-Biological Parents* (2012).

855 South African Law Reform Commission, Issue Paper 32, Project 140, 'The right to know one's own biological origins' (20 May 2017).

856 S Golombok, R Cook, A Bish et al 'Families created by the new reproductive technologies: Quality of parenting and social and emotional development of the children' (1995) 66(2) *Child Development* 285–298.

857 D Kahneman & A Tversky 'Prospect theory: An analysis of decision under risk' (1979) 47(2) *Econometrica* 263–292.

Trivers's Parental Investment Theory,[858] it is evident that intended parents rely on both rational and emotional strategies to navigate a complex and high stakes decision-making process. These choices are often shaped by deeply ingrained social norms, gender roles, and familial expectations – factors that the legal framework currently does not account for in a substantive way.

The central premise of this research was that any regulatory system governing assisted reproduction – in particular in relation to gamete donor selection – must not only be legally sound but also psychologically responsive. To investigate this, a novel Four Node Conceptual Framework was used to examine the alignment between: (a) the legal rules governing gamete donor selection in South Africa, (b) how those laws are implemented in clinical practice, (c) the rights and lived experiences of intended parents, and (d) the future interests of the donor-conceived child.

From a legal standpoint, South Africa's reproductive framework – including the National Health Act, the Children's Act, and the Regulations Relating to Artificial Fertilisation of Persons – emphasises key principles such as donor anonymity, informed consent, and the ethical treatment of all parties involved in ART procedures. These laws are bolstered by POPIA, which upholds the confidentiality of donor and recipient information. Together, these instruments aim to safeguard privacy, autonomy, and ethical conduct in fertility treatments.

However, this thesis showed that while the legal architecture may appear robust on paper, its application in practice can sometimes be misaligned with the emotional and psychological realities of intended parents. For example, although open-identity gamete donation is not explicitly prohibited under South African law, and in fact may be legally permissible under POPIA with the donor's informed and specific consent,[859] fertility clinics overwhelmingly default to anonymous donor models. This practice reflects a conservative interpretation of the law that privileges institutional risk aversion over patient autonomy and donor-conceived children's potential interest in knowing their origins.

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858 R L Trivers 'Parental investment and sexual selection' in B Campbell (ed) *Sexual Selection and the Descent of Man, 1871–1971* (1972) 136–179.

859 D Thaldar & B Shozi 'Is open-identity gamete donation lawful in South Africa?' (2022) 112 *South African Medical Journal* 1.

II. SUMMARY OF KEY FINDINGS

By examining the original research questions of this thesis, the key findings highlight the alignment or misalignment between the legal provisions, their practical implementation, and the rights and interests of all parties involved in reproductive assistance. Through this analysis, the study not only highlights the current state of reproductive law in South Africa pertaining to gamete selection, but also offers critical reflections on the gaps and challenges that persist, thereby setting the stage for potential policy reforms and further research. To follow is a breakdown of each original research question:

a). How extensive is the existing body of literature and legal research on South African laws governing gamete donor selection by intended parents?

The existing body of literature and legal research on South African laws governing gamete donor selection is limited.[860] Despite the importance of this issue in the context of ART, there is a notable scarcity of comprehensive analyses and empirical studies that focus on the practical implementation of these laws and their alignment with the rights and interests of intended parents and prospective children. This indicates a need for further exploration and documentation to effectively inform policy and practice.[861] This significant lacuna in comprehensive analyses and empirical studies confirms the fundamental need for this study. Without robust local data, policy development risks being ungrounded in lived realities. Providing the first original empirical insights into South African intended parents' experiences creates an essential evidence-based foundation for informed legal and ethical discourse.

Moll's[862] investigation into donor matching and racial considerations in South African gamete donation, and Thaldar's significant 2020 contribution exploring the motivations, experiences, and opinions of gamete donors[863] are among the few studies available that pertain to gametes in South Africa, but not specifically to intended parents' gamete selection experience.

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860 G Pennings 'The right to choose your donor' (2000) 15(3) *Human Reproduction* 508.

861 Ibid.

862 T Moll 'Making a match: Curating race in South African gamete donation' (2019) 38(7) *Med Anthropol.* 588–602.

863 D Thaldar 'Egg donors' motivations, experiences, and opinions: A survey of egg donors in South Africa' (2020) 15(1) *PLoS ONE* e0226603.

b). What are the specific gaps in the current understanding of reproductive law in South Africa pertaining to gamete donor selection?

Significant gaps exist in the current understanding of reproductive law in South Africa, in particular concerning donor anonymity and the rights of donor-conceived children to know their genetic origins, which were extensively explored in previous chapters. The lack of clarity and consistency in these areas can lead to legal challenges and personal distress for donor-conceived individuals.[864] Furthermore, the absence of a centralised donor registry hinders the effective tracking of donor information, thereby posing risks to both intended parents and resulting children.[865]

c). What are the public policy objectives served by the extant law?

The current legal framework in South Africa governing ART, including gamete donor selection, aims to serve several important public policy objectives. These objectives reflect the nation's commitment to human rights, equality, and the well-being of its citizens. Key public policy objectives include equipping all people to make informed decisions about their SRHR and ensuring that these rights are respected, protected, and fulfilled. This entails providing access to accurate information, counselling, and support to make informed choices that er free from coercion or discrimination. Another objective is to increase the quality of and access to comprehensive and integrated services, so making services like ART widely available and equitable for all individuals, regardless of socioeconomic status, and aligning with South Africa's commitment to providing comprehensive healthcare. Protecting individual rights and autonomy is central, and recognises the right to make informed decisions about reproductive health and family planning, including the use of donor gametes, supported by requirements for informed consent. A paramount objective is the child's best interests and well-being, so establishing safeguards for children born through ART. The law also promotes ethical and informed practices in ART, establishes regulatory oversight, clarifies the legal parentage of children born through ART, and protects the privacy and confidentiality of the individuals involved. The legal framework, encompassing the National Health Act, the Children's Act, and

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[864] D Thaldar & B Shozi 'Is open-identity gamete donation lawful in South Africa?' (2022) 112 *South African Medical Journal* 1.

[865] South African Law Reform Commission, Issue Paper 32, Project 140, 'The right to know one's own biological origins' (20 May 2017).

the Regulations Relating to the Artificial Fertilisation of Persons, aims to balance the protection of donor anonymity with the rights of intended parents and donor-conceived individuals. However, these public policy objectives often conflict with practical realities,[866] and the implementation of the law faces challenges owing to ambiguities, inconsistencies, and gaps, thereby creating tension between competing rights and the aspirational goals of the framework.

Decision-making by intended parents

d). What are the intended parents' own subjective criteria when selecting a gamete donor?

Intended parents typically consider subjective criteria such as medical and genetic factors, physical resemblance, and cultural or racial alignment when selecting a gamete donor. These criteria reflect their personal values and the desire to create a familial connection with the donor-conceived child that mirrors their own identity.[867] Preferences may also be shaped by societal norms and the psychological comfort of having a child that resembles the intended parents. Intended parents use a variety of their own subjective criteria when selecting a gamete donor. These preferences are personal and are influenced by psychological factors, so reflecting a desire for a child who is not only healthy but who also feels to be genuinely integrated into the family and who aligns with established values.

A significant subjective criterion, and often the most prioritised, is related to *medical and genetic factors*. Intended parents place high importance on the donor having a clear medical history and undergoing genetic testing for inheritable disorders. These concerns are paramount, and significantly more so for women and those seeking oocytes. Knowing whether the donor has previously had children or successfully donated before is also moderately important, so reflecting a desire for confidence in the donor's reproductive capability.

Physical characteristics are another key area of subjective preference. As already stated, the desire for the donor to physically resemble the intended parents or their partner stands out as having notable importance, driven by a wish for a sense of family likeness and continuity. Seeing adult photographs of the donor is also valued to facilitate a more informed

866 B Shozi 'Something old, something new: Applying reproductive rights to new reproductive technologies in South Africa' (2020) *South African Journal on Human Rights* 1–24.

867 A Pande '"Mix or match?": Transnational fertility industry and white desirability' (2021) 40(4) *Medical Anthropology* 335–347.

decision. Attributes like physical attractiveness, race, skin tone/complexion, body type, and even eye or hair colour are considered, although with varying degrees of importance across individuals and demographic groups. Females, for example, tend to place higher importance on race and skin tone compared to males. This preference for resemblance can be psychologically linked to identity repair and a desire for the child to 'pass' as biologically related, and potentially influenced by cultural and societal norms. This resonates with the *J v Director-General, Department of Home Affairs* case, which recognised same-sex couples' rights to family formation, so highlighting the importance of family identity beyond biological connections.

The selection process is significantly influenced by subjective and often idealised criteria, reflecting personal aspirations and perceived social advantages. Participants often sought donors with traits they perceived as being desirable, such as intelligence, athleticism, and superior appearance. Interestingly, female respondents placed a greater emphasis on racial and complexion matching than male respondents, so potentially reflecting concerns about social belonging and 'passing'.[868] While understandable, this highlights the potential for aspirational motives to influence selection, so raising potential ethical concerns about eugenics and the concept of 'designer babies'. It is important to note that while some professionals expressed concerns about this 'superiority' seeking, others viewed it as being a natural expression of parental hopes and desires.

The *donor's lifestyle and habits* are also subjectively assessed, with a strong emphasis on the absence of substance abuse. It is notably important for intended parents that the donor has never abused drugs and/or alcohol, which is a concern rated significantly higher by women and those seeking oocytes. This reflects concerns about potential health risks and undesirable behavioural traits that could affect the child. While perhaps less critical than health or resemblance for many, *age and physical health indicators* like BMI/weight are considered important, and are often associated with reproductive success and overall well-being. *Education and career* aspects are generally less highly prioritised compared to health and physical factors. While having a high IQ, tertiary education, or a successful career are considered, they are not typically the main drivers of donor selection. However, preferences can vary based on factors like sexual orientation and gender, with females showing a stronger preference for a donor with a high IQ.

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868 K A Wong 'Donor conception and "passing," or why Australian parents of donor-conceived children want donors who look like them' (2017) 14(1) *Bioethical Inquiry* 77–86.

The *donor's identity* and the level of anonymity are also subjective considerations for intended parents. While some prefer that the donor not know their identity, the desire to know the donor's identity or for the child to have that right later receives moderate, although generally lower, priority compared to health factors. Attitudes to anonymity are complex and can be influenced by a desire for privacy and control over the family narrative. However, some parents later wish for their child to know the donor, so highlighting evolving perspectives after the child is born. Finally, intended parents also subjectively value the *opinion of healthcare professionals* on their donor choice, so indicating that guidance from doctors and nurses plays a significant role in their decision-making process.

These subjective criteria, although varied in their importance, collectively inform the deeply personal choice of selecting a gamete donor, balancing perceived genetic quality, desired familial resemblance, and broader personal values and concerns. These preferences, while seemingly subjective, are underpinned by deep psychological needs. Drawing on theories such as Trivers's Parental Investment Theory, intended parents intuitively favour characteristics signalling enhanced fitness for offspring, such as health and intelligence, as a means to optimise offspring viability. Furthermore, the desire for physical resemblance and racial or cultural alignment resonates with Positive Assortative Mating Theory, which explains the tendency to select partners (and by extension, donors) who are similar in key respects.

Finally, the sheer volume of choices and the emotional weight of the decision often leads to decision fatigue and reliance on heuristics. The interviews revealed instances of participants struggling with information overload, so leading some to delegate the selection process to fertility staff. This raises important questions about informed consent and autonomy, and aligns with established psychological models of bounded rationality and heuristic decision-making under pressure.[869] This underscores the need for professional support and guidance during the donor selection process. The reported instances of 'decision fatigue' and deferral of choices to fertility staff further underscore the psychological burden of this expressive act in a constraining system. When the legal framework limits access to detailed information or flexible options it directly impedes the intended parents' capacity to fully exercise their constitutional right to self-governance and self-actualisation, which are core components of human dignity in reproductive choice.

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[868] D Kahneman & A Tversky 'Prospect theory: An analysis of decision under risk' (1979) 47(2) *Econometrica* 263–292.

e). Do these interests qualify for protection under the scope of any constitutional rights?

These interests are protected under certain constitutional rights, in particularly the right to dignity and the right to make decisions about reproduction as enshrined in section 12(2) of the Constitution. These rights ensure that intended parents can make autonomous reproductive choices without undue interference, as long as these choices do not infringe the rights of others.

Based on the subjective criteria that intended parents use when selecting a gamete donor they qualify for protection under the scope of certain South African constitutional rights. This protection is primarily rooted in the concept of reproductive autonomy. This right is derived from several fundamental rights in the Constitution, in particular the *right to bodily and psychological integrity* (section 12(2)). This section explicitly grants individuals the autonomy to make decisions about reproduction. This study revealed that choosing a donor based on subjective criteria, such as physical resemblance, racial congruence, or certain personality traits, is seen as being a deeply personal aspect of family formation. This aligns with the understanding that reproductive autonomy encompasses not only the decision to have children but also the manner in which individuals choose to form their families. These subjective preferences are also viewed as reflecting psychological needs and motivations, and can be considered an exercise of personal identity and values.

Several constitutional rights intersect with donor selection, so supporting the autonomy of intended parents. The right to dignity (section 10) affirms the intrinsic worth of individuals and their right to self-determination in personal matters, including family planning and donor choice. This includes the desire for traits like resemblance, which is linked to the creation of family identity and continuity. The right to family (section 28) highlights the centrality of reproductive decisions to family formation. The right to privacy (section 14) protects the intimate aspects of reproductive choices, encompassing donor selection. Furthermore, subjective preferences, including aesthetic and personality-based ones, can be viewed as being expressions of freedom of expression (section 16). However, this reproductive autonomy is not absolute.[870] It must be balanced against broader societal values and ethical considerations, in particular the prevention of discrimination and inequality (section 9). The potential well-being of the future child is paramount, invoking the best interests of the child principle and the

[870] C Jacobs 'Realising the right to reproduce with assistance in South Africa: A constitutional perspective'. available at *https://hdl.handle.net/1887/3239122*

concept of procreative non-maleficence,[871] which limits reproductive choices that could harm the child. This delicate balance safeguards parental rights while acknowledging the state's interest in child welfare.

Therefore, while intended parents' subjective criteria in donor selection are linked to their constitutional rights to reproductive autonomy, dignity, bodily and psychological integrity, family, and potentially freedom of expression, these rights are limited. They must be exercised in a manner that is balanced against the rights of others, ethical considerations, in particular non-discrimination, and the potential well-being of the resulting child.

f). What factors influence the choices made by intended parents, and to what extent are these factors considered in current legal frameworks?

Factors influencing intended parents' choices include cultural norms, financial constraints, and the availability of donor information. While the South African legal framework acknowledges intended parents' reproductive autonomy, it does not fully account for the diverse factors that influence donor selection. There are significant gaps in mandatory genetic screening, practical application of donor identity rules, and the consideration of cultural or socioeconomic realities, often leaving a disconnect between parental priorities and legal provisions, in particular regarding the potential child's long-term well-being.

Interest of the prospective child

g). How much attention has been given to understanding the potential impact of gamete donor selection on the well-being and interests of the eventual child in South African reproductive law?

The potential impact of gamete donor selection on the well-being and interests of the eventual child has not been sufficiently addressed in South African reproductive law. The current framework primarily focuses on donor anonymity and the rights of intended parents, with limited consideration of the future needs and rights of donor-conceived children. This oversight necessitates a re-evaluation of legal priorities to truly align with the paramount principle of the

[870] D Thaldar & B Shozi 'Procreative non-maleficence: A South African human rights perspective on heritable human genome editing' (2020) 3(1) *CRISPR Journal* 32–36.

best interests of the child, and extending its application to prospective children. While the principle of the best interests of the child is paramount in all matters concerning children, its application to *prospective* children is complex and has received insufficient explicit legal attention.

The law largely focuses on ensuring ethical donor practices and maintaining anonymity under the National Health Act. The Regulations Relating to the Artificial Fertilisation of Persons reinforce the confidentiality of donors and the legal status of intended parents but do not address how the selection criteria may affect the child's future well-being. For instance, despite intended parents strongly prioritising a comprehensive medical history and genetic testing for donors for the child's health, South African law does not mandate such comprehensive genetic testing for donors, so representing a significant gap between parental concern and legal safeguards.

The legal framework struggles to balance donor anonymity that is intended to protect privacy with the potential interests of the child to know their genetic origins. Psychological research suggests that a genetic link is not essential for a child's psychological well-being,[872] and quality parenting is more significant.[873] However, late discovery of donor conception can cause distress, and the lack of a centralised donor registry makes facilitating future disclosure or access to information difficult, so leaving donor-conceived individuals vulnerable.

Judicial interpretations of the best interest of the child principle in ART cases have sometimes relied on assumptions, such as the necessity of a genetic link, rather than empirical evidence, so suggesting that judicial decisions are not always based on evidence and may unnecessarily constrain reproductive freedom. The principle of procreative non-maleficence suggests the limiting of choices only to prevent foreseeable harm to the child.[874]

The concerns raised about the potential impact of donor selection on donor-conceived children, such as fears of instrumentalisation or conditional acceptance, require careful evaluation. While some critics suggest that choosing specific traits might reduce children to 'artefacts' or limit their future choices, this study argues that instrumentalisation in human relationships is not inherently ethically problematic if it does not lead to harm or undermine dignity. Furthermore, conditional acceptance is a phenomenon found across all forms of

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872 [2015] ZAGPPHC 580, 2016 (2) SA 27 (GP) ('*AB HC*'); [2016] ZACC 43, 2017 (3) SA 570 (CC) ('*AB CC*') para 86; Golombok Expert opinion (*AB* record at 737–745); Jadva Expert opinion (*AB* record at 1794–1824).

873 K R Daniels, H L Ericsson & I P Burn 'The views of sperm semen donors regarding the Swedish Insemination Act 1984' (1998) *Medical Law International* 117, 124.

874 D Thaldar & B Shozi 'Procreative non-maleficence: A South African human rights perspective on heritable human genome editing' (2020) 3(1) *CRISPR Journal* 32–36.

parenting, irrespective of conception method, and reflects parental personality rather than the means of conception.[875] Similarly, challenges in identity formation, although real, are not legal wrongs and can even build resilience. This highlights that discomfort with certain parental preferences, or speculative concerns, cannot justify legal interference.

Therefore, while the best interest of the child principle is a guiding ethos, its explicit legal attention and application to the potential impact of selection criteria on prospective children are insufficient in current South African reproductive law. This highlights a need for a more child-focused approach and legal reform.

h). What ethical and legal considerations should be taken into account when assessing the impact on children, and how can these be incorporated into regulatory frameworks?

To best protect the interests of donor-conceived children in South Africa's regulatory framework for ART, a multi-pronged approach is vital. This includes strengthening and clarifying existing laws on donor anonymity and children's rights, mandating comprehensive screening for both donors and intended parents (including medical, psychological, and genetic screening), and implementing standardised counselling for all involved. A notable concern raised is the absence of routine psychological support for intended parents, in contrast to the more structured processes in place for donors. This points to a gap between the legal framework and the emotional and psychological needs of those pursuing donor conception. Encouraging counselling that is sensitive to diverse cultural contexts and family structures can help address important issues such as managing expectations, understanding the implications of donor conception, and developing effective disclosure strategies. Such support can play a vital role in promoting the long-term psychological well-being of all parties involved, in particular the donor-conceived child.

Furthermore, a centralised, well-protected national registry is crucial for tracking donor activity and facilitating access to information for donor-conceived individuals upon reaching adulthood. Establishing a dedicated national regulatory body with the power to enforce regulations and accredit clinics is also essential.

Ethical and legal considerations should include the child's right to know their genetic origins, the psychological impact of donor conception, and the importance of transparency in

875 E Mendi & J Eldeleklioğlu 'Parental conditional regard, subjective well-being and self-esteem: The mediating role of perfectionism' (2016) 7 *Psychology* 1276–1295.

the donor selection process. Incorporating these considerations into regulatory frameworks will require legislative reforms and the establishment of comprehensive guidelines that support the interests of all parties involved, in particular the donor-conceived child. This approach will ensure that the legal framework evolves in alignment with ethical standards and the changing dynamics of reproductive technologies.

The findings further reveal that while South African law provides a robust framework for ARTs, there is a notable misalignment between legal provisions and the practical realities faced by intended parents, in particular concerning access to comprehensive donor health information and equitable reproductive healthcare services.[876] A particularly significant challenge affecting the child's potential 'right to know' their genetic origins on reaching adulthood[877] is the failure to establish and enforce a centralised national donor registry.[878] Although legislation mandates the creation of such a database, it remains unimplemented.[879] The current reliance on voluntary record-keeping by fertility clinics and entities like SARA results in inconsistent data collection, verification, and preservation practices. This lack of a robust centralised system means that crucial medical, genetic, and even non-identifying information about donors may be lost or mishandled over time, so directly undermining the stated legal and ethical goal of allowing donor-conceived individuals access to their biological heritage for health needs and identity formation when they reach the age of majority.

Furthermore, promoting transparency on open-identity donation options, addressing social and cultural barriers through public awareness campaigns and cultural sensitivity training, and investing in long-term research on the outcomes for donor-conceived children are key. Finally, refining legal guidance on trait selection and reinforcing the principle of non-parentage for gamete donors are necessary to ensure that the child's best interests are prioritised. This holistic approach will create a more ethical and supportive environment for all involved in ART.

In conclusion, donor selection is not merely a logistical process but also a deeply personal and emotionally charged journey. Understanding the psychological dimensions of this process is crucial for providing effective support to intended parents and ensuring ethical

876 South African Law Reform Commission, Issue Paper 32, Project 140, 'The right to know one's own biological origins' (20 May 2017).

877 R Probert 'Families, assisted reproduction and the law' (2004) 16 *Child & Fam. L.Q.* 273, 287.

878 Reg 1 of GN 175 in *GG* 9699 of 2012-03-02: 'Electronic Central Data Bank' means an electronic bank in which all information on artificial fertilisation treatment outcome is stored and managed.

879 Ibid.

practices in assisted reproduction. Future research could focus on developing interventions to mitigate decision fatigue and to promote informed consent.

III. REFLECTIONS AND RECOMMENDATIONS FOR LEGAL AND POLICY REFORM

This study advocates several key considerations to protect and enhance the alignment between legal frameworks and the lived experiences of intended parents in South Africa:

a). Donor anonymity

It is imperative to uphold the legal frameworks that govern donor anonymity while integrating mechanisms that facilitate conditional identity disclosure with explicit consent. Unlike Australia, South Africa should not succumb to pressures advocating mandatory non-anonymity. Upholding our democratic values allows parents the discretion to reveal donor identities to their children, so enabling a tailored approach that respects individual cultural, religious, and personal contexts. As Thaldar aptly articulates, 'the position in SA law is that gamete donation can be anonymous, completely open to the public, or anywhere in between – depending on the election of the individual gamete donor.'[880] Moreover, it is essential to ensure 'specific consent by the donors, and to err on the side of caution such consent must be in writing'.[881] This balanced approach not only safeguards donor privacy but also empowers families to navigate sensitive discussions in a manner that aligns with their unique circumstances. In South Africa, the handling of donor anonymity has been clouded by a widespread misinterpretation of the law, so leading to significant real-world consequences. Contrary to the prevailing belief in the South African fertility industry and the South African Law Reform Commission,[882] donor anonymity is not a legal mandate. Instead, South African law is more nuanced, permitting identity-release and open-identity donations given the donor's consent.

The pervasive practice of mandatory anonymity by fertility clinics and gamete donation agencies in South Africa stems from a misconception about the law, as a critical analysis of relevant legal sources reveals that gamete donation can lawfully range from anonymous to

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880 D Thaldar & B Shozi 'Is open-identity gamete donation lawful in South Africa?' (2022) 112(6) *S Afr Med J.* 409–412.

881 Ibid.

882 Ibid.

completely open, depending on the individual donor's election. This belief is even shared by the South African Law Reform Commission,[883] despite it being misdirected. Several statutes and legal principles support the lawfulness of open-identity gamete donation, including the Children's Act which grants donor-conceived children the right to access medical and other information. And while section 41(2) restricts information *disclosed by agencies* from revealing identity, it crucially does not prohibit gamete donors themselves from disclosing their identities. Most explicitly, Regulation 24(1)(c) specifically provides for the disclosure of a gamete donor's identity, subject only to their consent, so directly refuting the widespread belief in mandatory anonymity. Furthermore, the Regulations Relating to the Artificial Fertilisation of Persons implicitly acknowledge known donation in several provisions and while Regulation 19 appears to prohibit disclosure, a literal interpretation is untenable and a purposive interpretation confirms individuals' freedom to disclose their own involvement. POPIA, while governing personal information, does not prohibit disclosure of a donor's identity as long as specific informed consent is obtained**,** so making it flexible enough for open-identity donation. Contract law also allows for donor anonymity to be freely arranged as a contractual choice rather than a statutory mandate, and case law like *QG v CS*[884] implicitly confirms the lawfulness of known gamete donation by not deeming it unlawful – despite its centrality to the facts. Thus, the current mandatory anonymity practice by South African gamete banks and agencies is an unnecessary self-imposed limitation based on a misconception, affecting patient autonomy and donor-conceived children's potential interests, and with the key legal requirement for open-identity donation being the specific written consent of the donors.

This reflects a conservative application of the law that privileges possible institutional risk aversion or lack of infrastructure over patient autonomy and the donor-conceived children's potential interest in knowing their origins. This 'medical paternalism' directly curtails the intended parents' constitutional rights to reproductive autonomy (section 12(2)(a)), dignity (section 10), and privacy (section 14), which collectively establish a robust foundation for reproductive expression.

It is imperative to harmonise conflicting provisions on donor anonymity and to provide clear legal certainty. The law should explicitly support the spectrum of anonymity options (anonymous, identity-release, open-identity), so allowing donors to choose but with informed consent. This approach aligns with the South African Constitution's commitment to freedom

883 South African Law Reform Commission, Issue Paper 32, Project 140, 'The right to know one's own biological origins' (20 May 2017).

884 ZAGPPHC 366.

and dignity, recognising that upholding parents' discretion to reveal donor identities is an aspect of reproductive expression. Unlike some jurisdictions, South Africa should not succumb to pressures advocating ither mandatory anonymity or non-anonymity, as it would unduly infringe deeply personal reproductive choices. Educating healthcare professionals about these nuances is crucial to ensure consistent application and respect for patient autonomy.

While open-identity disclosure is often praised for promoting transparency and supporting donor-conceived individuals' right to know their origins, it could also potentially introduce emotional complexities, privacy concerns, and may deter some potential donors who are unwilling to be identified, so underscoring the need for carefully balanced regulatory safeguards.

b). Genetic screening

The strong emphasis on donor health and genetic screening reflects a deep-seated parental desire to provide their children with the best possible start in life. This is not merely a matter of avoiding disease; it speaks to a profound investment in offspring well-being, so aligning with the constitutional right to bodily and psychological integrity (section 12(2)(a)).[885] However, this preference raises critical questions. Does this prioritisation inadvertently create a hierarchy of desirable traits, potentially marginalising donors with less-than-perfect health profiles? Could this lead to a commodification of 'healthy' genes, thereby potentially undermining the inherent dignity and worth of all individuals? The *AB v Minister of Social Development* case, while focusing on surrogacy, highlights the tension between reproductive autonomy and the state's interest in protecting the child's best interests. This study suggests a need for careful consideration of how to balance parental autonomy with the prevention of foreseeable harm to the child, without creating discriminatory practices.

Furthermore, more comprehensive genetic screening for donors should be offered to ensure the health and safety of future generations, 'bridging the gap between best practices and current legal requirements'.[886] Implementing specific genetic screening for gamete donors in South Africa presents a compelling case for policy reform, as it offers a more thorough and scientific approach to safeguarding the health and well-being of future children. The

885 Constitution of the Republic of South Africa, 1996.

886 B Shozi, A Edgcumbe & D Thaldar 'New frontiers for reproductive health rights: Contemporary developments in the regulation of assisted reproductive technologies in South Africa' in O S Adelakun & E Ndoni (eds) *Reproductive Health and Assisted Reproductive Technologies in sub-Saharan Africa: Issues and Challenges* (2023).

advantages of genetic screening are substantial; it can significantly reduce the risk of transmitting genetic diseases, thereby providing intended parents with greater peace of mind compared to relying solely on trust or familial history, which may not always be comprehensive or reliable.[887] By establishing standardised screening protocols, the process can become more transparent, so enabling recipients to make informed decisions based on scientific evidence rather than anecdotal accounts. The absence of such mandates currently compromises the constitutional right to bodily integrity of the child by not mitigating foreseeable genetic risks, so making this reform critical.

The practice of genetic screening is, however, fraught with challenges. Ethical concerns such as the potential for discrimination based on genetic traits, the risk of genetic determinism, and the implications for donor autonomy and privacy must be carefully addressed.[888] Furthermore, expanded screening may inadvertently narrow the pool of available donors and lead to the stigmatisation of individuals identified with less desirable genetic traits, so resulting in emotional and social repercussions for both donors and their families.[889]

To effectively navigate these complexities, it is essential that genetic screening is mandated by law in South Africa, so balancing the imperative of public health protection with ethical considerations. This calls for greater uniformity in genetic screening practices to ensure that recipients are well informed about their options, so enabling them to make educated choices between various programmes and donors. In addition, understanding the preferences of recipients regarding genetic screening is crucial for aligning the process with the expectations and needs of those seeking donor gametes. As we look toward the future of reproductive health in South Africa, a thoughtful and balanced approach to genetic screening can promote both safety and ethical integrity, ultimately benefiting families and society at large.

Current regulations remain ambivalent, which has the effect of limiting access to ECS. To meet the legitimate expectations of intended parents – many of whom view genetic health as a fundamental aspect of responsible parenthood – this ambiguity should be addressed through clear legislative guidance that supports and standardises the use of ECS for all gamete donors. Screening criteria must be evidence-based and proportionate to actual risk, so

887 A Buchanan, D W Brock, N Daniels et al *From Chance to Choice: Genetics and Justice* (2000).
888 T Duster *Backdoor to Eugenics* (2003).
889 I Ezeome 'Gamete donation – a review of ethical and legal issues' (2022) 26(3) *African Journal of Reproductive Health* 124.

preventing the exclusion of donors based on non-significant conditions, and thereby upholding the principle of procreative non-maleficence.

c). Centralised Donor Registry

The establishment and enforcement of a mandatory centralised national donor registry could be achieved through targeted legislative reform to the National Health Act or its accompanying regulations. This would require explicit statutory provisions obliging all licensed fertility clinics and gamete banks to submit donor data – both medical and biographical – into a centralised, secure database overseen by a designated regulatory authority, such as the Department of Health or a dedicated ART oversight body. Compliance could be enforced through licensing conditions, routine audits, and penalties for non-compliance. To protect privacy and data integrity, the registry should operate in accordance with POPIA, so ensuring that access to identifying information is permitted only with the donor's specific written consent or when authorised by law. This framework would ensure long-term traceability of donor information, support identity-release options, and safeguard the health and rights of donor-conceived individuals.[890] While SASREG has made commendable efforts to establish a donor registry, participation by clinics remains voluntary. This lack of mandatory regulation undermines the potential effectiveness of the registry, as it may fail to provide the reliable and accurate information that is necessary for informed decision-making. Without a robust framework ensuring participation and compliance, the integrity of the registry is at risk, and its capacity to serve as a trustworthy resource could be significantly diminished.

The identified legal gaps, such as the absence of clear legislative guidelines for ECS or a national tracking system for donor activity, signify critical oversights that directly affect the health and well-being of future children, and the peace of mind of intended parents. These omissions reveal that extant law is not well-equipped to deal with the deeply personal and health-critical matters involved in donor selection, and often relies on self-reporting rather than on robust evidence-based mandates.

The establishment of a mandatory centralised donor registry is paramount. Empirical evidence from the interviews highlighted significant concerns among healthcare professionals regarding the repeated use of the same donor given limited availability of 'quality donors', so

[890] South African Law Reform Commission, Issue Paper 32, Project 140, 'The right to know one's own biological origins' (20 May 2017).

raising ethical and medical questions. This challenge is compounded by the current absence of a national central registry in South Africa, which leaves clinics struggling with logistical and legal complexities in managing donor records, especially for long-term tracking that is required for identity-release options. Furthermore, the existing "six-live-birth limit" per donor, as outlined in the National Health Act, is perceived as being outdated, particularly when families desire biological siblings. A centralised registry would not only enhance transparency and accountability by standardising data management and oversight but also enable effective enforcement of donor limits and facilitate critical information access for donor-conceived individuals about their medical history and origins, thereby addressing a significant gap in current legal frameworks and practices. Without this reform, the integrity of donor tracking remains compromised, so posing risks to both intended parents and future children.

d). Socioeconomic barriers

Finally, addressing the socioeconomic barriers to ART access is crucial for promoting equity and inclusivity in reproductive healthcare.[891] Policymakers should consider subsidising ART services and expanding their availability in public healthcare facilities, so ensuring that all individuals, regardless of financial means, can pursue their reproductive aspirations. By implementing these recommendations, South Africa can foster a more equitable and just framework for assisted reproduction, thereby aligning with its constitutional commitment to human rights and dignity for all its citizens.[892]

IV. CONCLUDING REMARKS

This psycho-legal study demonstrates that navigating gamete donor selection in South Africa is a complex process that is deeply influenced by the interplay of psychological motivations, legal frameworks, and ethical considerations. It has demonstrated the value of combining doctrinal legal analysis with empirical data and psychological theory. While the legal framework provides normative grounding, the empirical insights bring to light how individuals

891 L Frith, N Sawyer & W Kramer (2012) 'Forming a family with sperm donation: A survey of 244 non-biological parents' (2012) 24(7) *Reproductive BioMedicine Online* 709–718.

892 S Golombok, R Cook, A Bish et al 'Families created by the new reproductive technologies: Quality of parenting and social and emotional development of the children' (1995) 66 *Child Development* 285–298.

actually experience the regulatory environment, and psychological theory helps explain these patterns.

Intended parents, driven by deeply personal desires for healthy connected families, exercise their reproductive autonomy, a right robustly supported by the South African Constitution's guarantees of dignity, privacy and, most pertinently, freedom of expression. Recognising parental choices in ART as protected freedom of expression better captures the outward, impactful nature of such decisions, framing them not merely as private matters but also as deliberate creative acts that manifest values into the world – in the form of a future person. This approach underscores that the mere fact that a child was designed is insufficient, in itself, to constitute harm, particularly where positive parental narratives are employed to reinforce the child's self-esteem and sense of worth.

Reproductive autonomy is a fundamental right in South Africa, and is firmly rooted in the Constitution, in particular in sections 12(2)(a) (right to bodily and psychological integrity, including reproductive decisions), 10 (dignity), and 14 (privacy). This right is understood to encompass decisions about whether to reproduce, how to reproduce (including using ART and donor gametes), and even the characteristics of the prospective child, so reflecting personal values and aspirations. The decision to select a donor based on subjective criteria, such as health, genetic history, physical resemblance, or other traits prioritised by intended parents, is seen as a plausible exercise of this constitutional right, so reflecting the desire for genetic or cultural continuity and identity affirmation in the family. Significantly, the empirical finding that intended parents prioritise donors with favourable medical histories and who have undergone genetic screening directly aligns with the child's best interests. This demonstrates that donor selection is not merely an expression of parental preference, but also an act of responsible parenthood. The strong parental preference for healthy donors, while understandable and aligned with the constitutional right to bodily and psychological integrity, also brings forth a crucial tension: the potential for inadvertently creating a hierarchy of desirable traits or even commodifying 'healthy' genes. This necessitates a regulatory framework that carefully balances parental autonomy with the prevention of foreseeable harm to the child.

However, as observed in practice, reproductive autonomy is not absolute. It exists in tension with other rights and interests, in particular the paramount principle of the best interests of the child and broader societal values like non-discrimination and equality. Applying the best interests of the child principle to prospective children, as seen in cases like *AB v Minister of Social Development* and *Ex Parte JCR*, is complex and can lead to legal contradictions,

potentially imposing intrusive state interventions or prioritising hypothetical child interests over actual parental rights and autonomy. The principle of procreative non-maleficence[893] is offered as an ethical lens to balance parental reproductive rights with the state's duty, limiting choices only when they would demonstrably harm the future child. The practical implementation of reproductive autonomy is hindered by inconsistencies in applying laws, including the widespread misinterpretation of donor anonymity requirements, and instances of paternalism by healthcare professionals that can infringe on patient choice.

Furthermore, freedom of expression is an important, outward-facing constitutional right that provides an additional layer of protection for parental choices in ART, in particular concerning the selection of donor traits. The conclusion is that selecting donor traits is a deeply expressive act through which parents externalise their aspirations and values for their future child. This perspective acknowledges the outward impact of these choices on both the child and the broader cultural fabric. Freedom of expression also supports the need for transparency and access to comprehensive donor information, so allowing parents to make informed choices that align with their values. However, like reproductive autonomy, this freedom is not absolute[894] and can be limited if the selected traits would cause real, objective harm to the child, such as a serious genetic illness.

Recognising parental choices in ART as protected freedom of expression better captures the outward, impactful nature of such decisions. It frames them not merely as private matters but as deliberate, creative acts that manifest values in the world – in the form of a future person. While real, objective harm to the child (in particular in the form of selected disabilities) may justify limitations on this freedom, the mere fact that a child was designed is not sufficient, in itself, to constitute harm. Indeed, where positive parental narratives are employed, being a designer child could reinforce the child's self-esteem, resilience, and sense of worth.

Further psychological research is warranted to deepen our understanding of how different types of parental messaging affect the self-concept of designer children. However, at a constitutional and conceptual level, the right to reproductive expression deserves robust protection.

In examining the complex interplay between psycho-legal considerations and the selection of gamete donors by intended parents, the ethical implications have been explored.

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893 D Thaldar & B Shozi 'Procreative non-maleficence: A South African human rights perspective on heritable human genome editing' (2020) 3(1) *CRISPR Journal* 32–36.

894 C Jacobs 'Realising the right to reproduce with assistance in South Africa: A constitutional perspective', available at *https://hdl.handle.net/1887/3239122*

The analysis underscores a certain fundamental tension in South African ART: the imperative to balance intended parents' deeply personal, psychologically-driven choices with the state's duty to regulate ART to protect the well-being of all parties, especially the future child, but within reason. This study reveals that the current legal framework, while ostensibly robust, at times falls short of effectively addressing these deeply personal matters, so leading to inconsistencies and a misalignment with lived experiences.

While some commentators argue that choosing specific characteristics may commodify children or constrain their future choices, there is a compelling argument to be made that such selections can also be seen as a moral obligation when they promise significant benefits for the child's development and well-being. By engaging with both sides of this debate, it revealed the nuanced perspectives on trait selection and assessed the broader implications for intended parents navigating the landscape of ARTs. Some commentators have argued that not only is the selection of certain traits in children morally permissible, it is also morally obligatory if the choice is within the parents' power and the traits in question will confer advantages on the children.[895]

The discourse on prenatal interventions often centres on selecting traits that may enhance a child's intelligence, athletic prowess, physical strength, resistance to diseases, and overall lifespan. If we could choose these traits for ourselves today, it would be challenging for many to deny the appeal of greater intelligence, improved endurance in sports, immunity to specific viral infections, and the potential for a longer life.[896] Given that these attributes are desirable for adults, it stands to reason that they would also be beneficial for children. This however raises a significant ethical question: *Is it inherently wrong to strive for these enhancements in our children simply because the interventions occur before birth?* Ultimately, if we seek to improve our own lives, it is only logical to wish for similar advantages for the next generation.

It is however essential to comprehend the mechanisms underlying gene expression. Genes, which are segments of DNA that code for proteins, play a pivotal role in determining various traits, with their expression influenced by both genetic factors, such as inherited alleles, and environmental factors, including nutrition, environment and upbringing.[897] In the context

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895 J Savulescu 'Procreative beneficence: Why we should select the best possible children' (2001) 15(5–6) *Bioethics* 413–426.

896 T F Murphy 'Selecting the traits of children prior to birth' (2012) 14(2) *Virtual Mentor* 158–161.

897 Institute of Medicine (US) Committee on Assessing Interactions Among Social, Behavioral, and Genetic Factors in Health *Genes, Behavior, and the Social Environment: Moving Beyond the Nature/Nurture Debate* eds LM Hernandez and DG Blazer (National Academies Press Washington DC 2006) ch 3.

of selecting gamete donors, intended parents often seek traits that have a solid genetic foundation, and indicated by a well documented family history of those traits.[898] For example, certain characteristics, such as eye colour, have a clear genetic basis; the OCA2 gene is significantly involved in melanin production, making it likely that a child will inherit blue eyes if the donor possesses that trait, assuming that no other genetic factors intervene.[899] However, more complex traits such as intelligence and athletic ability are polygenic, meaning that they are influenced by multiple genes and are shaped by environmental conditions. While parents may choose a donor with a background of high intelligence or athletic prowess, the expression of these traits in their child is not guaranteed, as research indicates that numerous genetic variants and environmental interactions contribute to such characteristics.[900]

Therefore, the debate about prenatal interventions and the selection of traits presents a complex interplay between the allure of enhancing a child's potential and the nuanced understanding of gene expression. On the one hand, the prospect of choosing traits that could lead to improved intelligence, physical abilities and overall health is undeniably appealing to many prospective parents. On the other hand, a thorough comprehension of the intricate mechanisms of gene expression reveals that while certain traits may have a genetic basis, the influence of multiple genes and environmental factors complicates the certainty of their expression. Therefore, as we navigate these opposing views, it is crucial to balance the desire for specific enhancements with an awareness of the inherent unpredictability of genetic inheritance and expression, so fostering a thoughtful approach to the ethics and implications of gamete selection. Ultimately, the choice of a specific donor does not assure the arrival of a particular child, thereby levelling the playing field much like in natural reproduction. Just as biological parents cannot predict with certainty the traits their children will inherit, intended parents selecting a donor must also embrace the inherent unpredictability of genetics. This shared uncertainty underscores the complexity of human inheritance, reminding us that the essence of individuality cannot be wholly determined by genetic selection alone.

Some critics argue that choosing traits for children reduces them to being mere products valued only for meeting parental expectations, and yet this view is questionable since parents already exert significant influence over their children's development after birth, so raising the

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898 N Green 'The baby business *How money, science, and politics drive the commerce of conception*' (2006) 116(8) *J Clin Invest.* 2061.

899 S Robertson 'Genetics of eye color' News: Medical Life Sciences (2019), available at *https://www.news-medical.net/health/Genetics-of-Eye-Color.aspx*

900 R Plomin, J C DeFries, V S Knopik et al. *Behavioral Genetics* (2012).

question of why prenatal interventions for similar benefits should be rejected.[901] Furthermore, commentators suggest that intervening to select traits for children limits their future choices, as it forces them into paths designed by their parents.[902] However, this argument is not compelling; individuals have ample opportunities and choices throughout their lives to shape their own destinies, so making the concern about parental influence less significant. Even if parents choose certain traits before birth, children will still have the ability to create meaningful lives based on their own decisions and circumstances.[903]

In conclusion, the psycho-legal analysis of gamete donor selection reveals a rich tapestry of ethical considerations that challenge our understanding of parental responsibility and child autonomy. While concerns about commodification and predetermined futures are valid, they must be weighed against the potential advantages that careful selection of traits may confer on children. Ultimately, the discourse indicates that the selection of gametes is not merely a personal choice but also a significant moral consideration that holds the potential to enhance the quality of life for future generations. As society continues to grapple with these issues, it is essential to foster an informed dialogue that respects both the aspirations of intended parents and the rights of the children they seek to bring into the world.

VI. CONTRIBUTIONS TO THE FIELD AND IMPLICATIONS FOR FUTURE RESEARCH

This psycho-legal analysis is the first original empirical investigation of the subjective criteria and experiences of South African intended parents when selecting gamete donors. This fills a critical gap in the existing literature, in particular in South Africa's culturally diverse context, so offering an evidence-based foundation for understanding local practices and needs. Methodologically, the study pioneers the integration of psychological insights with legal analysis, developing and applying a novel psycho-legal framework to analyse the complex interplay between law, clinical practice, intended parents' rights, and prospective children's interests. By integrating psychological theories such as Trivers's Parental Investment Theory with legal analysis, the study provides a holistic view of the factors influencing donor selection. This multidisciplinary approach contributes to a more nuanced understanding of reproductive decision-making.

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901 Ibid.
902 J Habermas *The Future of Human Nature* (2003).
903 T F Murphy 'Selecting the traits of children prior to birth' (2012) 14(2) *Virtual Mentor* 158–161.

Furthermore, the study offers a critical legal analysis of the South African ART framework, highlighting ambiguities and inconsistencies, in particular regarding donor anonymity and mandatory genetic screening, and provides a critique of key judicial interpretations. It argues for a more evidence-based approach to applying principles like the best interests of the child and reproductive autonomy. Finally, it translates its empirical findings and critical analysis into concrete evidence-based recommendations for legal and policy reforms specifically tailored to the South African context – proposing a framework for reconciling reproductive autonomy with the interests of children and broader societal values. This multidisciplinary approach has the capacity to expose the deep-seated misalignments that a purely legal or psychological analysis might miss. By demonstrating that the law does not operate in a vacuum but within a socio-emotional landscape, this framework provides a robust template for future research and policy development in other complex areas where human rights, technology, and personal experience intersect, proving that a truly effective regulatory system must be both legally sound and psychologically responsive.

The implications for future research are substantial. There is potential for broader cultural comparisons to understand how cultural differences influence gamete donor selection. Future research could also focus on longitudinal studies examining the long-term psychosocial outcomes for donor-conceived individuals, in particular in terms of identity formation and the impact of disclosure practices. Given the rapid advancement in reproductive technologies and artificial intelligence, future studies could investigate the implications of these technologies for donor anonymity and the associated ethical considerations. In addition, research could focus on developing comprehensive guidelines for donor screening, including genetic testing, to ensure the health and well-being of both donors and offspring. Finally, future studies could assess the effectiveness of implemented policies and reforms suggested by this research, in particular in improving equitable access to ART and safeguarding the rights of all parties involved.

To address a specific limitation in this research, I recommend the use of more accessible and widely recognised terminology in surveys – for example, terms such as ‘straight’ and ‘gay’ – in order to reduce ambiguity and improve the accuracy of self-identification. At the same time, this study provides a critical foundation for further scholarly engagement with reproductive law and ethics, particularly within the South African context. Such engagement is becoming increasingly urgent given the rapid advances in reproductive technologies, which

continue to outpace the development of legal and ethical frameworks.[904] Future research should therefore not only explore the unique challenges and opportunities arising in South Africa, but also situate these within the broader, evolving global discourse on assisted reproduction.

The participants in this sample were dominated by a specific demographic, with a high percentage of male participants and a significant representation of Black South Africans. While this reflects the demographic distribution in my sample, it may not fully capture the diversity of all intended parents in South Africa or other regions. Future research could expand recruitment methods to include a more balanced representation across different genders, ethnicities, and socioeconomic groups to enhance the generalisability of the findings.

Based on the limited studies conducted to date in other countries, Pennings argues that the selection criteria used by recipients are rather diffused and muddled.[905] Up until now it has been impossible to deduce general priorities and tendencies.[906] By bridging the gap between empirical research and the legal context, this study has contributed to the development of a more compassionate, patient-focused, and ethically sound system that supports individuals and families throughout their fertility journey. Such a framework must ensure that reproductive autonomy is protected, ethical practices are enforced, and the welfare and rights of all parties, especially donor-conceived children, are prioritised. By addressing the identified gaps and inconsistencies, South Africa can move towards a more just and refined system that truly supports individuals and families in their journey towards parenthood through assisted reproduction.

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904 G Marchant, B Allenby & J Herkert (eds) *The Growing Gap Between Emerging Technologies and Legal-Ethical Oversight: The Pacing Problem* (Springer, Dordrecht 2011) 19–32.

905 G Pennings 'The right to choose your donor' (2000) 15(3) *Human Reproduction* 508.

906 Ibid.

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