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)

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Abstract

The recent case of QG v CS *(32200/2020) 2021 ZAGPPHC 366 (17 June 2021) concerns a sperm donor who applied to the court for parental responsibilities and rights in respect of a child conceived with his sperm. This is despite the fact that he had concluded a written agreement with the child's legal parents before the child's conception which stipulated,* inter alia, *that he would have no such responsibilities and rights in respect of the child. The ruling of the High Court in this case is a significant development in South African reproductive law, as the first case that deals with the legal position of a sperm donor with regard to a donor-conceived child.*

The following important legal principles that were laid down in the case are identified and analysed. First, there is no prohibition on a sperm donor or his family members from approaching the court in terms of section 23 or 24 of the Children's Act 38 of 2005 to acquire parental responsibilities and rights in respect of the donor-conceived child. However, if a sperm donor or his family members bring an application in terms of section 23 or 24, they cannot rely on their genetic link with the donor-conceived child. Secondly, sperm donor agreements are in principle legal and enforceable, but the court is not bound to enforce provisions dealing with parental responsibilities and rights if it is of the opinion that such provisions are not in the best interests of the child. A sperm donor agreement may, however, be informative regarding the parties' intentions.

Criticism is expressed about the way in which the court dealt with the issues of the locus standi *of donors and the psychological evaluation of donors and recepients where known donors are used.*

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1 Introduction

What does it mean to be a parent? From a biological perspective, a parent is usually defined as an individual whose gametes contributed to the creation of offspring.[1] In social animals, including humans, biological parents also often have a social function to fulfil in rearing their biological offspring – perhaps in the hopes of furthering their own bloodline. In human society, however, it has long been the case that individuals can, and do, raise children that are not biologically their own.[2] As such, parenthood has come to be understood as something which is not necessarily about furthering one's own bloodline but rather about fulfilling a particular social role in a child's life.[3] Many people, such as the medically infertile and same-sex couples, cannot become biological parents. However, they can become social parents by using assisted reproductive technology and the gametes of others – so-called "gamete donors".

This is a reality that the law has also awoken to in recent years.[4] For this reason, South Africa, like many countries, has enacted legislation that provides for and protects the freedom of individuals to form families – even where the individuals who fulfil the role of parents in a child's life do not share biological ties with the child.[5] Through judgments such as the recent case of *Wilsnach NO v M*[6] ("*Wilsnach*"), our courts have made it clear that parenthood is about more than just a biological link between a parent and a child in South African law:

> "[W]hile biological parenthood may well be the starting point of parenthood in all instances, the role and place of a parent beyond birth becomes much more than simply a matter of biology. It often happens that the biological parent ceases to play any further role in the life of the child as would be in the case of adoption or a child born through an agreement of surrogacy or a child who was abandoned and deserted."[7]

However, in a seemingly conflicting fashion, our law still sometimes places great significance on biological links. For instance, section 294 of the Children's Act 38 of 2005 prohibits persons from having a child by means of surrogacy unless they can contribute at least one of the gametes to the *in vitro*

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1 Collin's Dictionary "Biological parent" (2019) *Collin's Dictionary* <https://www.collinsdictionary.com/dictionary/english/biological-parent> (accessed 17-08-2022). M Pieterse "In Loco Parentis: Third Party Parenting Rights in South Africa" (2000) 11 *Stell LR* 324 331.

2 South African Law Commission *Review of Child Status Act Project 110 Discussion Paper* (2002) 175, 178 and 179. For examples of South African case law dealing with genetically unrelated persons suing for parental responsibilities and rights, see *CM v NG* 2012 4 SA 452 (WCC) and *Du Plessis v Venter* (4120/2020) 2021 ZAFSHC 25 (21 January 2021) *SAFLII* <http://www.saflii.org/za/cases/ZAFSHC/2021/25.html> (accessed 17-08-2022).

3 Pieterse (2000) *Stell LR* 332. The author describes "social" or "psychological" parenthood as placing emphasis on the "relationship between child and adult (whether biological ties are present or not) in the context of the family as a social unit."

4 See D NeJaime "The Nature of Parenthood" (2017) 8 *Yale LJ* 2260.

5 See the National Health Act 61 of 2003 and the Regulations Relating to the Artificial Fertilisation of Persons GN R 175 in *GG* 35099 of 02-03-2012 that were issued in terms of s 68 of the Act.

6 2021 3 SA 568 (GP).

7 Para 40.

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fertilisation ("IVF") process.[8] This was expounded upon by the majority of the Constitutional Court in *AB v Minister of Social Development*[9] ("*AB*"), per Nkabinde J, as follows:

> "The importance of this genetic link is affirmed in the adage 'ngwana ga se wa ga ka otla ke wa ga katsala' (loosely translated the adage means 'a child belongs not to the one who provides but to the one who gives birth to the child')."[10]

Concerns have been raised, rightly so, about this judgment and its reasons for finding section 294 constitutional,[11] and so it is unsurprising that there is an ongoing legal challenge revisiting the constitutionality of this provision.[12] Nevertheless, *AB* stands as the highest judgment on the matter and represents a strongly worded endorsement by our highest court of the primacy of genetic links in defining parenthood – in stark contrast to judgments like *Wilsnach* quoted above that highlight the importance of the social aspects of parenthood.

Ostensibly, there is a tension in South African jurisprudence between valuing the biological connections between a child and a biological parent, and the need to provide for and protect families where one or more legal parent has no biological link to the child. This tension was brought to the forefront in the recent judgment of *QG v CS*[13] ("*QG*"). Here a sperm donor sued for parental responsibilities and rights in respect of the child that was conceived using his sperm. This is despite the fact that the sperm donor entered into a written agreement with the child's legal parents before the child's conception – a "sperm donor agreement" – entailing *inter alia*, that he would not have any parental responsibilities and rights relating to the child. This was the first time our courts have directly addressed the legality of these kinds of agreements.

Importantly, *QG* must be distinguished from *BR v LS*[14] ("*BR*") – an earlier case in which the concept of a "sperm donor agreement" featured prominently. The difference is that while *QG* dealt with an actual sperm donor and an actual sperm donor agreement, *BR* dealt with an opportunistic claim by the respondent (the child's mother) that the applicant who sued for parental responsibilities and rights (the respondent's ex-boyfriend and the child's natural father) was merely a "sperm donor" who entered into a "sperm donor agreement" with her. Apart from being legally untenable – as it was common cause that the child was conceived through sexual intercourse[15] – the factual claim that an agreement approximating a sperm donor agreement was concluded between

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8 S 294 of the Children's Act 38 of 2005.

9 2017 3 SA 570 (CC).

10 Para 294.

11 See part 3 3.

12 *KB v Minister of Social Development* MPMBHC case no 966/2022 (judgment pending).

13 (32200/2020) 2021 ZAGPPHC 366 (17 June 2021) *SAFLII* <http://www.saflii.org/za/cases/ZAGPPHC/2021/366.html> (accessed 17-08-2022).

14 2018 5 SA 308 (KZD).

15 S 1 of the Children's Act defines "parent" as including an unmarried biological father (except in cases of incest and rape), and as excluding a "gamete donor for purposes of artificial fertilisation". Accordingly, to qualify as a gamete donor for the purposes of the Children's Act, there must be artificial fertilisation. By contrast, the parties in *BR v LS* 2018 5 SA 308 (KZD) did not use artificial fertilisation, but sexual intercourse. Hence, this excluded the possibility of any one of them qualifying as a gamete donor for the purposes of the Children's Act. The Family Advocate's Report filed in this case sets out the legal position in a clear and systematic fashion.

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the parties was nothing more than a litigation strategy by the respondent (representing herself in court),[16] which was duly rejected by the court.[17] Given this factual finding against the respondent, the court in *BR* did not have to deal with the question of the enforceability of a hypothetical "sperm donor agreement", or how the agreement could affect families with donor-conceived children. By contrast, in *QG* the existence of the sperm donor agreement was common cause and the court was seized with the question of its enforceability and its broader legal implications for families with children that do not have a genetic link with at least one of the legal parents.[18]

The judgment by the Pretoria High Court per Kollapen J in *QG* is a significant development in South African reproductive law, and thus merits thorough analysis.[19] In this article, we will analyse three pertinent aspects of the judgment and consider their impact on donor-conception families and families more generally.[20] Our analysis of the judgment is preceded by a summary of the facts. After our analysis we highlight the importance of compliance with

[16] *BR v LS* 2018 5 SA 308 (KZD) para 30:

> "At best for the Respondent, the probabilities of their respective versions are neutral, although as indicated above, I consider the Applicant's version to be the more probable. Credibility is also at best for the Respondent evenly balanced, although once again as I have pointed out above, the description of the alleged agreement as a 'sperm donor agreement' only occurred after she had conducted further research, post the birth of E and during a time when the Respondent had experienced problems with and had to abort an overseas trip. This suggests that her reliance on a 'sperm donor agreement' might be somewhat of an afterthought."

Also see the Family Counsellor's Report filed in *BR v LS* 2018 5 SA 308 (KZD) para 4.4. Read with the judgment, it is evident that the respondent only came up with the narrative of a "sperm donor agreement" when a dispute arose between her and the child's father about her wanting to obtain a passport for the child to take the child abroad, and when the child's father refused to cooperate. In response to the father's refusal to agree to the child getting a passport to leave the country, the mother refused the father contact with the child for two weeks during July 2015. This seems to have precipitated the litigation, as the next event mentioned in the Family Counsellor's Report was when the father obtained an interim court order granting him contact with the child in November 2015. The applicant denied ever having agreed to be a "sperm donor", and is quoted by the Family Counsellor (para 6.1.10) as remarking: "I am made to feel like a science experiment …".

[17] *BR v LS* 2018 5 SA 308 (KZD) paras 30 and 31. Van Niekerk analyses this particular judgment in C Van Niekerk "When is a Donor a Daddy? Informal Agreements with Known Sperm Donors: Lessons from Abroad" (2021) *Obiter* 70. Unfortunately, the author omits the crux of the judgment, namely the court's rejection of the respondent's factual claim that an agreement approximating to a sperm donor agreement was ever concluded between the parties. It is also important to note the ambivalence in the author's statement that reads as follows:

> "The court found that given the level of involvement by [the applicant], he qualified for parental responsibilities and rights as he was not merely a gamete donor."

Does it mean that (a) because of the applicant's level of involvement, he is not merely a sperm donor and qualifies for parental responsibilities and rights; or that (b) because of the applicant's level of involvement *and* the fact that he is not a sperm donor, he qualifies for parental responsibilities and rights? The latter meaning (b) would be an accurate interpretation of the judgment, while (a) would clearly not be. We assume that the author intended (b).

[18] *QG v CS* (32200/2020) 2021 ZAGPPHC 366 (17 June 2021) *SAFLII* paras 13, 14 and 45 <http://www.saflii.org/za/cases/ZAGPPHC/2021/366.html> (accessed 17-08-2022).

[19] "Reproductive law" or sometimes "fertility law" refers to an emerging discipline that concerns itself with the law related to medically assisted reproduction. As such, it intersects with various other traditional disciplines in law, most prominently family law, medical law and property law – the latter because *in vitro* gametes and embryos are susceptible of ownership in terms of Reg 18 of the Regulations Relating to the Artificial Fertilisation of Persons. See D Thaldar "The In Vitro Embryo and the Law: The Ownership Issue and a Response to Robinson" (2020) 23(1) *PELJ* 1 <https://www.ajol.info/index.php/pelj/article/view/216753> (accessed 17-08-2022).

[20] See part 3 2-3 4.

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the statutory scheme to avoid a repeat of events similar to those that led to the litigation in *QG*.

2 The facts

C and A, a lesbian couple, wished to start a family. The couple decided to place posts on social media inviting potential sperm donors to assist them in having a child. Upon seeing the post on Facebook Q, a gay man, responded and expressed his willingness to become their donor. A week after meeting with him, the couple decided that Q would be their sperm donor and approached an attorney to draft an agreement between C, A and Q – a so-called "sperm donor agreement".[21]

According to the sperm donor agreement,[22] Q would provide his sperm for the artificial insemination of C.[23] The couple, C and A, would be the legal parents of the donor-conceived child and be responsible for the child's overall welfare and care.[24] The agreement also stipulated that Q was only a donor, and that he surrendered all claims to legal parenthood.[25] Although provision was made for remote or personal contact with the child by Q, this would be at the discretion of C and A.[26]

Subsequent to entering into the agreement, the parties visited the fertility division of *Die Wilgers* hospital, where Q provided his sperm and C was successfully inseminated. Some nine months later, on 20 April 2016, C gave birth to L, a baby boy. While Q stated that he understood the consequences of being a sperm donor, he further stated that when holding L as a newborn, he realised that he was not psychologically prepared for the profound impact that the birth of L would have on him and had instantly begun to feel a bond with the child.[27] However, Q's contact with L for the next three years would be fairly limited, with only six visits taking place.[28]

This changed when C and A, who were seeking to secure new accommodation, concluded a contract with Q to lease a cottage from him — on the same smallholding as Q's mother's home and adjacent to Q's own abode. With this close proximity, there was more interaction between L and Q, as well as L and Q's mother. This interaction was with the approval of C and A – now Q's tenants. However, these more frequent interactions brought on conflict as Q and his mother often disagreed with how C and A parented L.[29] After less than a year of the rental arrangement, tensions came to a boiling point and C and A moved away and denied Q and his mother access to the child. Seven

[21] *QG v CS* (32200/2020) 2021 ZAGPPHC 366 (17 June 2021) *SAFLII* para 12 <http://www.saflii.org/za/cases/ZAGPPHC/2021/366.html> (accessed 17-08-2022).
[22] Q's founding affidavit annexure CES3 "Gamete Donor and Recipient Agreement for the Purposes of Artificial Fertilisation" (on file with the author).
[23] *QG v CS* (32200/2020) 2021 ZAGPPHC 366 (17 June 2021) *SAFLII* para 13.11 <http://www.saflii.org/za/cases/ZAGPPHC/2021/366.html> (accessed 17-08-2022).
[24] Paras 13.6, 13.7 and 13.8.
[25] Para 13.14.
[26] Para 13.10.
[27] Para 18.
[28] Paras 20 and 21. There were four visits in 2016, two in 2017 and none in 2018.
[29] Paras 24 and 25.

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months later, Q and his mother (the applicants) instituted proceedings against C and A (the respondents) in terms of sections 23 and 24 of the Children's Act to obtain parental responsibilities and rights in respect of four-year-old L.[30]

The application was brought in two parts. In Part A, the applicants sought to obtain interim contact with L and requested an investigation by the Family Advocate into L's best interests.[31] In Part B, the applicants prayed that they be granted permanent rights of contact and care in respect of L, and that the first applicant be granted co-guardianship.[32] In the following section, we briefly discuss the court findings in the *QG* judgment.

3 The judgment

3 1 Introduction

In delivering its judgment, the court considered the statutory scheme in the Children's Act that governs gamete donation and its consequences in terms of parental responsibilities and rights. With reference to sections 26(2)(b) and 40, the court acknowledged that a gamete donor (except where the donor is a spouse) is not legally regarded as the parent of any child born from using such a donor's gametes, and therefore does not acquire any parental responsibilities and rights in respect of the child that was conceived using the donor's gametes (the "donor-conceived child").[33] In other words, the donor as the *biological* parent of the donor-conceived child eschews any claim to legal parenthood (and the attendant responsibilities and rights) by becoming a donor. However, the court also held that nothing in the statutory scheme prohibits a gamete donor and his or her family members from relying on sections 23 and 24 of the Children's Act to approach a court to be granted parental responsibilities and rights in respect of a donor-conceived child.[34]

In other words, the court concluded that the fact that a gamete donor is barred from being regarded as the legal parent of a donor-conceived child does not prevent him or her from acquiring parental responsibilities and rights as a person having an interest in the care, well-being or development of a child as per sections 23 and 24.[35] It is important to note, however, that the court made it clear that while a person's status as a gamete donor does not exclude him or her from being granted parental responsibilities and rights in terms of sections 23 and 24 of the Children's Act, such a donor's genetic link with the donor-conceived child cannot be a factor in determining whether the requirements for bringing an application in terms of these provisions have been met.[36] Put differently: gamete donors and their family members cannot receive any special treatment by the courts when relying on sections 23 and 24 of the Children's Act by virtue of their genetic link to the donor-conceived child.

[30] Paras 28 and 29.
[31] Para 29.
[32] Para 29.
[33] Para 41.
[34] Para 40.
[35] Para 40.
[36] Paras 40, 91 and 94.

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Regarding sperm donor agreements, the court held that while freedom to contract is an important constitutional value, no agreement between parties can ever bind the court when making decisions concerning parental responsibilities and rights in respect of children.[37] As such, sperm donor agreements are in principle lawful, but not necessarily enforceable. In particular, the terms of a sperm donor agreement are not an absolute bar against a donor relying on sections 23 and 24 of the Children's Act to approach a court to be granted parental responsibilities and rights in respect of a donor-conceived child.[38]

On the facts, however, the court found that the applicants did not establish that the best interests of L justified the relief sought in Part A of the application – contact and an investigation by the Family Advocate – and dismissed it with costs.[39] Because Part A was an essential prelude to Part B, the applicants were also not able to proceed with Part B. The applicants applied for leave to appeal but this was denied.[40] At the time of writing, it is not yet known if the applicants will petition the Supreme Court of Appeal.

Below we analyse three pertinent aspects of the *QG* judgment and their broader implications for South African law:

(i) the enforceability of the sperm donor agreement;
(ii) the sperm donor's standing to sue for parental responsibilities and rights in terms of section 23 of the Children's Act; and
(iii) whether the sperm donor's genetic link with the donor-conceived child is relevant to applications in terms of section 23.

3 2 The enforceability of the sperm donor agreement

As mentioned above, a sperm donor agreement is a contract that governs sperm donation for purposes of medically assisted reproduction between parties that are known to each other. Previously, the court in *BR* had remarked *obiter* that sperm donor agreements may be unlawful for being *contra bonos mores*, but ultimately held that it did not have to decide the issue.[41] The uncertainty created by this statement was resolved in *QG*, where the court held as follows with regard to the sperm donor agreement:

> "The existence of the sperm donor agreement and its extensive provisions cannot oust the Court's jurisdiction nor its duty to consider the best interest of the child principle. While the terms of the agreement as well as the intention of the parties when the agreement was concluded may be relevant in dealing with the merits of the dispute the Court is called upon to adjudicate, the agreement cannot stand as an obstacle to the Court discharging its constitutional obligations nor can it, *ipso facto*[,] operate as an immutable bar to the first applicant invoking section 23. While contractual freedom is important in ensuring certainty and predictability in the constitutional order … we live in, that freedom must be exercised consistently with the values and imperatives of the Constitution."[42]

37 Para 45.
38 Para 45.
39 Paras 76-79, 81-86 and 95.
40 *QG v CS* (leave to appeal) para 15.
41 *BR v LS* 2018 5 SA 308 (KZD) para 15.
42 *QG v CS* (32200/2020) 2021 ZAGPPHC 366 (17 June 2021) *SAFLII* para 45 <http://www.saflii.org/za/cases/ZAGPPHC/2021/366.html> (accessed 17-08-2022).

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The court in *QG* clearly did not doubt the lawfulness of sperm donor agreements. On the contrary, it held that the terms of a sperm donor agreement may be relevant in dealing with the merits of a dispute. However, although lawful, the enforceability of sperm donor agreements is clearly subject to the best interests of the child concerned. The provisions of the sperm donor agreement *in casu* relating to parental responsibilities and right did not operate as an "immutable bar" against the applicants approaching the court in terms of section 23 of the Children's Act precisely because the court retains the discretion to grant the applicants parental responsibilities and rights regardless of what it stated in the sperm donor agreement. This is aligned with the general rule in our law that provisions in an agreement (such as an antenuptial contract) that purport to arrange parental responsibilities and rights are only enforceable if the court deems such provisions to be in the best interests of the child.[43]

But what about provisions in a sperm donor agreement that purport to arrange parental responsibilities and rights in a way that is not aligned with the statutory position – for example, where the parties agree that the sperm donor will have contact rights? Generally, nothing in our law prohibits the legal parents of a child from allowing any person contact with the child, or to promise such person future contact with the child. Making the promise of allowing contact with the child is not unlawful, but it cannot in itself change the *ex lege* position and is therefore not enforceable. However, sections 23 and 24 of the Children's Act provide an avenue to potentially enforce such a promise, but – as with the sperm donor agreement in general – successful enforcement is subject to the best interests of the child concerned.

This then raises a further question: given that the parental responsibilities and rights in respect of donor-conceived children are determined by statute, what contribution can a sperm donor agreement make to regulate the relationship between the parties? First, there are aspects of this relationship that are not governed by statute, such as disclosure of the arrangement to the donor-conceived child. Given that the parties are known to each other and might have contact during the course of the child's life, it would be advisable to agree on whether there will ever be disclosure and, if so, how it will be handled. Secondly, the aspects that are governed by statute, most pertinently the parental responsibilities and rights in respect of donor-conceived children, may not align with the parties' vision of how they intend to arrange their relationships with each other and the donor-conceived child. In such a case, the parties can agree to practical arrangements that differ from the statutory position. For example, the parties can agree that the sperm donor can have contact with the donor-conceived child twice a year. However, as alluded to above, whether such contractual terms are enforceable should a dispute arise

[43] See *Girdwood v Girdwood* 1995 4 SA 698 (C) paras 708I–709A, where the court held:

> "As upper guardian of all dependent and minor children this [c]ourt has an inalienable right and authority to establish what is in the best interests of children and to make corresponding orders to ensure that such interests are effectively served and safeguarded. No agreement between the parties can encroach on this authority."

This dictum was applied, *inter alia*, in *Du Toit v Minister of Welfare and Population Development* 2003 2 SA 198 (CC) and *AD v DW* 2008 3 SA 183 (CC).

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is uncertain, as this ultimately turns on what the court deems is in the child's best interests.

3 3 *Locus standi* in section 23 applications

The court in *QG* held that although a sperm donor does not have any *ex lege* parental responsibilities and rights in respect of his donor-conceived child, there is nothing in our law that excludes him *in principle* from relying on section 23 of the Children's Act, in an attempt to be granted parental responsibilities and rights in respect of such a child.[44] However, similar to any other applicant in terms of section 23, a sperm donor must show that he is a person with an interest in the care, well-being or development of a child to have *locus standi* in terms of this section.[45] Did the applicants *in casu* have an interest in the care, well-being or development of L?

In answering this question, the court noted that the case law contained examples of unmarried fathers and grandparents that qualified as persons who have an interest in the care, well-being and development of a child.[46] In addition to these categories of persons, cases were also brought to the court's attention where persons without a genetic link to the child qualified as having an interest in the care, well-being and development of such a child.[47] Importantly, the *amicus curiae* highlighted that in all of these cases the qualifying person was the *de facto* parent of the child. Based on these cases, the *amicus curiae* argued that being a *de facto* parent ought to be the benchmark when gamete donors approach the court in terms of section 23 or 24 of the Children's Act.[48] It was further submitted that lowering the benchmark would cause unnecessary instability to families, which would be contrary to the best interests of the child.[49] By contrast, it was argued on behalf of the applicants that a "person having an interest in the care, well-being or development of a child" was intentionally formulated in a broad fashion, and that the court should give effect to this purpose. Siding with the applicants' submissions, the court decided that limiting the meaning of a "person having an interest in the care, well-being or development of a child" only to *de facto* parents would be "too restrictive and may ultimately not accord with the best interests of the child principle".[50] Rather, the court took a broader approach and held that an applicant should be required to show "some tangible and clearly demonstrable interest and connection to the child, with regard being had to the facts and the

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44 *QG v CS* (32200/2020) 2021 ZAGPPHC 366 (17 June 2021) *SAFLII* para 40 <http://www.saflii.org/za/cases/ZAGPPHC/2021/366.html> (accessed 17-08-2022).

45 Para 40.

46 See para 38, where the court cited*S v J* 2011 2 All SA 299 (SCA) and *LH v LBA* 2013 JOL 29947 (ECG).

47 Para 52.3 of the *amicus curiae* heads of argument (on file with the author). The *amicus curiae* cited the following examples: *CM v NG* 2012 4 SA 452 (WCC), where the person suing for parental responsibilities and rights of a genetically unrelated child was the co-caregiver for two years, and *Du Plessis v Venter* (4120/2020) 2021 ZAFSHC 25 (21 January 2021) *SAFLII* <http://www.saflii.org/za/cases/ZAFSHC/2021/25.html> (accessed 17-08-2022). In this case, the person suing for parental responsibilities and rights of a genetically unrelated child was the co-caregiver for three years.

48 Para 52.3 of the *amicus curiae* heads of argument.

49 Paras 52.5 and 52.6.

50 *QG v CS* (32200/2020) 2021 ZAGPPHC 366 (17 June 2021) *SAFLII* para 38 <http://www.saflii.org/za/cases/ZAGPPHC/2021/366.html> (accessed 17-08-2022).

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relationship (if any) that may have come into being between the child and the person/s seeking contact rights".[51] The court added the *caveat* that "a fleeting, incidental interest may not be sufficient".[52]

This interpretation of the *locus standi* requirement for sections 23 and 24 constitutes a remarkably abstract expansion of the categories of qualifying persons that have crystalised in case law (unmarried fathers, grandparents, and *de facto* parents). As such, it has ramifications beyond reproductive law for family law in general. Does this mean that anybody who can show that they have a "connection" with a child and that their interest in the child's care, well-being or development is not just fleeting has *locus standi* to sue for parental responsibilities and rights? Would this include a neighbour who has occasionally helped a child with her homework and developed a sincere interest in her academic development? Would this include a teacher who has a "connection" with a child from a poor family and has taken an interest in the child's care by regularly bringing food for the child to school? These persons may all be well-intentioned, but should the law allow them *locus standi* to sue for parental responsibilities and rights and potentially to insert themselves into existing family units?

Of course, having *locus standi* is only the first step and does not mean that the applicants will succeed in being granted parental responsibilities and rights. However, having *locus standi* means that applicants have greater bargaining power with respondents. The broader the interpretation of "person having an interest in the care, well-being or development of a child", the greater the risk of persons outside of families attempting to insert themselves as parental role-players in those families, thereby compromising the stability and integrity of those families. Section 7(1)(k) of the Children's Act provides that one of the factors in determining the best interests of a child is the need for a child to be brought up in a stable family environment. Perceived through this lens, we suggest that the broad interpretation of "person having an interest in the care, well-being or development of a child" in *QG*, beyond the instances that have crystallised in case law , may be opening the door too wide.

How did the court in *QG* apply its broad interpretation of "person having an interest in the care, well-being or development of a child" to the applicants? This is an important question to answer for all donor-conception families who have used known sperm donors, as they would need to arrange their relationships with their sperm donors in such a way as to avoid their sperm donors qualifying for *locus standi* in terms of section 23 and 24 of the Children's Act. However, disappointingly, there is no clear answer to be found in the judgment. The court held that *locus standi* and the merits were "inextricably intertwined" and would be adjudicated together.[53] The court proceeded to analyse the facts to ascertain whether the relief sought by the applicants in Part A would serve the best interests of L. The two most pertinent conclusions of this analysis are:

[51] Para 39.
[52] Para 39.
[53] Para 46.

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(i) Factual finding (1): The contact that the applicants enjoyed with L was "hardly significant" in the five years of L's life and it was questionable whether a mutual bond existed.[54]
(ii) Factual finding (2): When the respondents initially allowed the applicants to have contact with L, they did so as a gesture of gratitude, secure in the knowledge that, as per the sperm donor agreement, there would be no interference in their rights as the legal parents of L.[55]

Accordingly, the court held that there was no evidence that L's best interests would be advanced by allowing the relief sought by the applicants. [56] The court also remarked that the family that the respondents had created for themselves and their relationship with L was intimate and special – worthy and deserving of constitutional protection from outside interference, even if the applicants were well-meaning.[57] The problem is that while the court applied its analysis of the facts to the merits and dismissed the application on the merits, the court never considered how the facts apply to *locus standi*. It is therefore uncertain how the broad interpretation of "person having an interest in the care, well-being or development of a child" applied to the applicants and whether the applicants actually had *locus standi*. The judgment on merits has effectively subsumed the issue of *locus standi*.

We suggest that the court erred in failing to adjudicate explicitly the issue of *locus standi*. If factual finding (1) is accepted, it seems unlikely that the applicants could have qualified, even in terms of the broad interpretation of "person having an interest in the care, well-being or development of a child". As such, the court could have dismissed the application based on lack of *locus standi* without having to investigate the merits. Although it is true that the same factual matrix must be considered to answer both the questions of *locus standi* and of the merits, applying the factual conclusions to the question of *locus standi* entails distinctly different considerations compared to applying the factual conclusions to the question of merits. In the former, these considerations centre on whether the applicant is a "person having an interest in the care, well-being or development of a child", while in the case of the latter, the considerations move to the factors listed in section 23(2), including the best interests of the child. By dealing with *locus standi* and merits together in the way that the court did in *QG*, with the judgment on merits subsuming the issue of *locus standi*, the court effectively abolished the *locus standi* requirement of section 23. Clearly, this was a mistake.

[54] Para 68. L had no continuous contact with the applicants for about three of those five years while the contact experienced in the first year of his life was as an infant.
[55] Paras 50 and 51. From the beginning, the sperm donor agreement clearly conveyed the respondents' intentions to the first applicant in that he would play no role in L's life, and they only required him as an altruistic donor.
[56] Para 76.
[57] Para 95.

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3 4 The (ir)relevance of the genetic link

Perhaps the most challenging issue raised by this case is the legal relevance of Q's status as L's genetic (or biological) parent. As the court put it:

> "The applicants disavow reliance on the sperm donor agreement as well as on the biological link between the first applicant and L. The biological link, however, at least factually *appears to be a significant feature in this matter*".[58]

In particular, the court considered the genetic link to have had a significant bearing on Q developing strong feelings for the child, and on his decision to try to form a relationship with the child.[59] This was a relationship which he averred was of such a close and intimate nature that its preservation was in L's best interests. This raises the question as to what weight, if any, should South African courts place on genetic ties when considering what is in the best interests of a child? This is something that *QG* partially addresses. In regard to the application in terms of section 23, the court embraced the arguments made by the *amicus curiae* in holding that a sperm donor cannot rely on his genetic link with a child as a basis for *locus standi* in terms of sections 23 and 24 of the Children's Act.[60] This is because sections 40 and 26(2)(b) of the same Act make it clear that a gamete donor (except a spouse) does not acquire any parental responsibilities and rights in respect of a donor-conceived child – and for good reason. As the court held, these provisions exist

> "to make it so that in the eyes of the law a donor-conceived child is the child of the person(s) who intended to act as the child's parent(s); and the gamete donor relinquishes any claim to parenthood and the attendant rights and responsibilities that come with it, by virtue of becoming gamete donors".[61]

This suggests that *no* weight should be given to a genetic link in such cases. What matters, and what is generally considered to be in the child's best interests, is the preservation of the "intimate space and special bonds" of the family unit that is defined by the intended parent(s).[62] Although the applicants' legal representatives did not place any explicit reliance on the applicants' genetic link with L, the applicants' submissions suggested that they felt that it was in L's best interests to know about the unique circumstances of his birth.[63] There is an argument to be made that the court ought to have considered that L was Q's biological father, on the grounds that this was relevant to determining what was in Q's best interests. This argument is based on the assertion that it is in a child's best interests to know of, and to have a relationship with, his or her biological father. This is something that the court did not consider in its

58 Para 33 (emphasis added).
59 Paras 69 and 70.
60 Para 44.
61 Para 42.
62 Paras 58 and 59. The court's comments here suggest that no person can acquire parental responsibilities and rights without the intended parents explicitly "open[ing] the doors of their lives … in such a way that now binds them to afford far reaching rights".
63 Para 5.1.7.2.2 of the Respondents' supplementary heads of argument (on file with the author); Applicants' heads of argument 32200/2020 para 2.13.2 (on file with the author); Q's founding affidavit paras 4.26, 4.39 and 4.44.1.6.

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exploration of what would be in L's best interests.[64] However, this assertion was central to another case in which the relationship between the donor-conceived child's best interests and genetic links was considered: the Constitutional Court's controversial judgment in *AB*. Given that this is a judgment by the highest court on a matter that is potentially related to this one, it is necessary to consider whether it is relevant.

In *AB*, the applicant challenged the validity of section 294 of the Children's Act (the "genetic link requirement"), which provides that no surrogate motherhood agreement is valid unless the conception of the child contemplated in the agreement is to be effected by the use of the gametes of both commissioning parents or, if that is impossible because of biological, medical or other valid reasons, the gamete of at least one of the commissioning parents or, where the commissioning parent is a single person, the gamete of that person.

The majority judgment in *AB*, penned by Nkabinde J, held that the genetic link requirement was constitutional as none of the applicant's rights had been violated.[65] In coming to this decision, the court considered the contention by the applicant that the genetic link requirement was irrational. The majority remarked that the requirement serves a particular purpose: it "protects the child by ensuring that a genetic link exists when that child is conceived".[66] The majority held that the genetic link requirement was rational as it served the legitimate government purpose of creating a genetic connection between commissioning parents and children born as a result of surrogacy.[67] It "protects" 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.[68]

On the face of it, there appears to be a conflict between the position taken by the Pretoria High Court in *QG* and the majority judgment of the Constitutional Court in *AB*. While *AB* and *QG* were different in many ways, they both required the respective courts to reflect on the best interests of the child, and to what extent they were advanced by the preservation of a genetic link between biological parent and child. Given that each judgment takes seemingly contrasting views on the matter, it is important to engage critically with the relationship between the best interests of donor-conceived children; and genetic relatedness to their parent(s). This will provide insight on which view ought to be given weight by subsequent courts grappling with this issue.

The judgment in *AB* seemingly established that in South African law the preservation (and promotion) of ties between biological parents and donor-conceived children are always in the best interests of such children. However, the *QG* judgment went against this – allotting no weight to the genetic link between Q and L when determining whether having the care of, and contact with, Q would be in L's best interests. Was this an error? Should the court have

[64] *QG v CS* (32200/2020) 2021 ZAGPPHC 366 (17 June 2021) *SAFLII* paras 66-84 <http://www.saflii.org/za/cases/ZAGPPHC/2021/366.html> (accessed 17-08-2022).
[65] *AB v Minister of Social Development* 2017 3 SA 570 (CC) para 240.
[66] Para 279.
[67] Para 287.
[68] Para 291.

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given weight to the genetic link and potentially held that at least some contact was necessary because, as held in *AB*, "clarity regarding the origin of a child is important to the self-identity and self-respect of the child"?[69] We suggest not. In our view, this would have been an erroneous interpretation of the legal significance of *AB*.

The court in *AB* must be understood as specifically addressing the issue whether there was a rational connection between a statutory provision (the genetic link requirement) and a legitimate government purpose: a "need for a genetic link between a child and at least one parent".[70] In doing so, the majority judgment makes a number of remarks about the importance of genetic ties between parents and children.[71] Importantly, these are *obiter dicta* intended further to explain the court's conclusions regarding the rationality of the genetic link requirement. It cannot, and should not, be inferred from these remarks that in the wake of the *AB* judgment, lower courts are bound to follow the majority's view that children's interests are generally best served by knowing their genetic origins and having ties to their biological parents.

Beyond the fact that these statements are not binding, there are several further reasons why the court in *QG* did well not to adopt the position of the majority in *AB* – most notably that the majority judgment in *AB* stands on an insufficient evidentiary basis. As the majority in *AB* itself admits, the state's assertions about the significance of genetic links to child welfare are not supported by any evidence.[72] They are simply accepted as being a "public good" which the legislature has chosen to pursue through the Children's Act.[73] According to the majority, the state was not required to put forward any proof of the fact that this policy was, in fact, a public good or in the best interests of the child, in order to establish its rationality. This watering down of the rationality requirement to the extent that any *ipse dixit* by the state will be deemed to comply with the rationality requirement of the Constitution of the Republic of South Africa, 1996, has been variously critiqued in the voluminous minority judgment in *AB* penned by Khampepe J[74] and in scholarly literature.[75]

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69 Para 294.

70 Para 294.

71 Such as the one quoted in the introduction to this article.

72 *AB v Minister of Social Development* 2017 3 SA 570 (CC) para 291.

73 Para 292.

74 See, eg, *AB v Minister of Social Development* 2017 3 SA 570 (CC) para 112, in which the following comments are made in the minority judgment:

> "The provision pays scant regard to whether the prospective parent or parents can perform their parental role effectively. Instead, it assumes that the biological fact of lacking a 'genetic link' necessarily means that a person should no longer be entitled to decide when it is appropriate for them to have a child. Notably in this respect, the Minister provides no empirical justification for this drastic conclusion. The effect of section 294 is to assume, without the support of evidence, that the state is in a better position to make reproductive decisions than the parent who will raise her. This is a flagrant violation of dignity, especially where the consequences are an increase in stigma, and an endorsement of homogeneity over difference."

75 See D Meyerson "Surrogacy, Geneticism and Equality: The Case of *AB v Minister of Social Development*" (2019) 9 *CCR* 317 321; D Thaldar "Post-Truth Jurisprudence: The Case of *AB v Minister of Social Development*" (2018) 34 *SAJHR* 231 249; C Albertyn "Abortion, Reproductive Rights and the Possibilities of Reproductive Justice in South African Courts" (2019) 1 *U OxHRH J* 87 108; D Thaldar "The Constitution as an Instrument of Prejudice: A Critique of *AB v Minister of Social Development*" (2019) 9 *CCR* 343; D Thaldar & B Shozi "Procreative Non-Maleficence: A South African Human Rights Perspective on Heritable Human Genome Editing" (2020) 3 *CRISPR J* 32 34.

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Reference to the psycho-social literature on the impact of not knowing one's genetic origins on the donor-conceived child, or of not having a relationship with one's biological parent as a donor-conceived child, makes it abundantly clear that promoting donor-conceived children's best interests generally does not require knowing of, and having contact with, their biological parent(s). This literature is briefly summarised below.

Before proceeding, it is essential to make a few qualifying statements. There is a distinction between the types of disclosures that can be made to a donor-conceived child, namely disclosure of the fact that a child was conceived using sperm from a donor (Disclosure (1)), and disclosure of the identity of the gamete donor (Disclosure (2)).[76] The significance of this distinction is that only in the latter case can a child truly be said to "know their genetic origins". Another important point is that empirical research on the impact of being a donor-conceived child on a child's well-being usually focuses on two related but distinct metrics: the child's overall psychological well-being (Metric (1)), and the child's feelings related to Disclosure (1), Disclosure (2), or both (Metric (2)). Results relating to Metric (1) carry significant weight, as a negative impact on psychological well-being is clearly a harm, the occurrence of which is not likely ever to be in a child's best interests. By contrast, positive or negative feelings relating to Metric (2) – we suggest – should carry less weight given that such feelings are not necessarily of the same intensity and permanency so as to translate into any substantive impact on the child's overall psychological well-being (Metric (1)). Thus, just because a hypothetical study reports that children experience positive or negative feelings about disclosure or the lack thereof, does not necessarily mean that such positive or negative feelings are legally relevant when considering a child's best interests.[77] From a legal perspective, the focus should be on whether a child's overall psychological well-being (Metric (1)) is adversely affected. With these preliminary points in mind, we can now review the literature.

First, it is important to note the substantial body of evidence in support of the assertion that children conceived through artificial reproduction (such as IVF using donor gametes), and raised in same-sex, single mother, or other alternative family forms are not psychologically less well off than children in "normal" family units.[78] In fact, some studies report that donor-conceived

[76] While Disclosure (2) necessarily implies the occurrence of Disclosure (1), the latter can occur without the former ever occurring.

[77] At least not in terms of how the concept of child welfare is generally understood in South African law. See Thaldar & Shozi (2020) *CRISPR J* 34.

[78] F Maccallum & S Golombok "Children Raised in Fatherless Families from Infancy: A Follow-Up of Children of Lesbian and Single Heterosexual Mothers at Early Adolescence" (2004) 45 *J Child Psychol Psychiatry* 1407; S Golombok, C Murray, V Jadva, E Lycett, F MacCallum & J Rust "Non-Genetic and Non-Gestational Parenthood: Consequences for Parent-Child Relationships and the Psychological Well-Being of Mothers, Fathers and Children at Age 3" (2006) 21 *Human Reproduction* 1918; RW Chan, B Raboy & CJ Patterson "Psychosocial Adjustment Among Children Conceived Via Donor Insemination by Lesbian and Heterosexual Mothers" (1998) 69 *Child Development* 443.

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children have better relationships with their parents.[79] And while many have expressed fears about donor-conceived children's welfare being compromised as they may face stigma, the data show that this is not common.[80] The data also does not sustain concerns about donor-conceived children having a confused or diminished sense of identity.[81]

In relation to Disclosure (1), there is no evidence that donor-conceived children are better or worse off (psychologically, emotionally, or otherwise) if they are informed that they were conceived using donor gametes (Metric (1)).[82] While generally associated with positive outcomes (Metric (2)), there are circumstances where negative outcomes can also arise from disclosure of one's status as a donor-conceived child.[83] For instance, disclosure may adversely affect the relationship between the commissioning parent and the donor-conceived child.[84] The only established negative outcome of non-disclosure is that if donor-conceived children only learn that they are not the biological child of their parent later in their lives (or after some tragedy such as the death of the commissioning parent), they tend to feel more negatively about it than those who are told about it when they are young.[85] But even then, the resultant negative feelings associated with later disclosure are limited to things such as "anger" and "betrayal", and do not amount to substantial harm to the child's psychological well-being.[86] As such, we cannot make the general inference that it is always in the child's best interests to know about the circumstances of their birth.

In relation to Disclosure (2), the evidence does not suggest that children who do not know or have a relationship with their gamete donor are worse

[79] See S Golombok, R Cook, A Bish & C Murray "Families Created by the New Reproductive Technologies: Quality of Parenting and Social and Emotional Development of the Children" (1995) 66 *Child Development* 285; S Golombok, S Zadeh, S Imrie, V Smith & T Freeman "Single Mothers by Choice: Mother–Child Relationships and Children's Psychological Adjustment" (2016) 30 *J Fam Psychol* 409.

[80] K Vanfraussen, I Ponjaert-Kristoffersen & A Brewaeys "What Does It Mean for Youngsters to Grow Up in a Lesbian Family Created by Means of Donor Insemination? (2002) 20 *J Reprod Infant Psychol* 237 247; Nuffield Council on Bioethics *Donor Conception: Ethical Aspects of Information Sharing* (2013) 1-162.

[81] Nuffield Council on Bioethics *Donor conception* 65.

[82] T Freeman "Gamete Donation, Information Sharing and the Best Interests of the Child: An Overview of the Psychosocial Evidence" (2015) 33 *Monash Bioeth Rev* 45. See also K Shelton, J Boivin, D Hay, MBM Van den Bree, FJ Rice, GT Harold & A Thapar "Examining Differences in Psychological Adjustment Problems Among Children Conceived by Assisted Reproductive Technologies" (2009) 33 *Int J Behav Dev* 385; CS Hahn "Psychosocial Well-Being of Parents and Their Children Born After Assisted Reproduction" (2001) 26 *J Pediatr Psychol* 525; N Gartrell & HMW Bos "US National Longitudinal Lesbian Family Study: Psychological Adjustment of 17-year-old Adolescents" (2010) 126 *Pediatrics* 28.

[83] N Kalampalikis, M Doumergue, S Zadeh & French Federation of CECOS "Sperm Donor Regulation and Disclosure Intentions: Results from a Nationwide Multi-Centre Study in France" (2018) 5 *Reprod Biomed Soc* 38 39. See also HMW Bos & EM Hakvoort "Child Adjustment and Parenting in Planned Lesbian Families with Known and as-yet Unknown Donors" (2007) 28 *J Psychosom Obstet Gynecol* 121.

[84] See 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.

[85] Freeman (2015) *Monash Bioeth Rev* 45; E Canzi, M Accordini & F Facchin "Is Blood Thicker Than Water? Donor Conceived Offspring's Subjective Experiences of the Donor: A Systematic Narrative Review" (2019) 38 *Reprod BioMed Online* 797 804.

[86] V Jadva, T Freeman, W Kramer & S Golombok "The Experiences of Adolescents and Adults Conceived by Sperm Donation: Comparisons by Age of Disclosure and Family Type" (2009) 24 *Human Reproduction* 1909 1910. See, for example, AJ Turner & A Coyle "What Does It Mean to be a Donor Offspring? The Identity Experiences of Adults Conceived by Donor Insemination and the Implications for Counselling and Therapy" (2000) 15 *Human Reproduction* 2041.

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off than those that do (Metric (1)).[87] At best, the data suggests that some children feel positively (Metric (2)) about knowing their gamete donors.[88] It is also important to note that it is not always in the best interests of the child to have a relationship with their gamete donor. In fact, there are reports of negative experiences with gamete donors among donor-conceived children.[89] This suggests that we cannot make a general inference that knowing his or her genetic origins and having a relationship with his or her biological parent, is in the child's best interests. Thus, such decisions ought to be left to the discretion of the individual parent.

Clearly, the majority judgment of *AB* is not aligned with scientific evidence, and should be reviewed at the earliest opportunity. In light of the above, it is patent that the *AB* judgment is not relevant to the present matter, and the court in *QG* did well in not considering itself bound by the *AB* majority judgment's *obiter* comments when determining if knowing and having contact with a gamete donor is in the child's best interests.

4 The importance of compliance with the statutory scheme

An issue that unfortunately did not receive attention in the *QG* judgment is that the statutory scheme for medically assisted reproduction in South Africa contains a specific requirement for known gamete donation that is intended to limit the risk of cases such as *QG* occurring – a specific requirement that was not complied with in *QG*. There is a legal duty on the healthcare professional under whose care the gamete donation by a known gamete donor takes place to ensure that both the gamete donor and the woman who intends to become pregnant using the donor's gametes are psychologically evaluated.[90] It was common cause between the parties that Q was not psychologically evaluated.[91] Whether C underwent psychological evaluation was less clear.[92]

To explain the relevance and importance of these psychological evaluations, the *amicus curiae* submitted to the court an expert opinion by Ms Voula Samouri, a clinical psychologist who practices in the field of medically assisted reproduction. Samouri explains the aim of the legally mandated psychological evaluations in the event of gamete donation by a known donor as follows:[93]

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87 HMW Bos & NK Gartrell Impact of Having a Known or an Unknown Donor on the Stability of Psychological Adjustment*Human Reproduction* 630 635.

88 Canzi et al (2019) *Reprod BioMed Online* 803.

89 S Zadeh "The Perspectives of Adolescents Conceived Using Surrogacy, Egg or Sperm Donation" (2018) 33 *Human Reproduction* 1099 1102 and 1104.

90 Reg 7(j)(ii) of the Regulations Relating to the Artificial Fertilisation of Persons.

91 Paras 4.5 and 4.10 of Q's founding affidavit. This is also not denied by the respondents, see para 6.24 of C's answering affidavit (on file with the author).

92 Para 6.28.2 of C's answering affidavit. The first respondent stated that "medical professionals" evaluated her and the second respondent's "psychological well-being". First, not all medical professionals would be competent to conduct a psychological evaluation. Secondly, as illustrated by Ms Samouri, a psychological evaluation in the context of known gamete donation is about much more than merely "psychological well-being". Accordingly, there are insufficient facts to make a finding on whether the first respondent actually underwent a psychological evaluation.

93 Para 30 of the *amicus curiae* heads of argument, where they cite para 8 of Samouri's expert opinion.

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> "[I]it is essential to make sure that the donor has properly thought these scenarios through, and fully understands that the prospective child will be the legal child of the recipient (and her spouse or partner) and that the donor should have no expectations of being (or acting as) the parent of the prospective child. In particular, it is important to ensure that the expectations of the known donor are aligned with the way in which the recipient and her spouse or partner (the legal parents) foresee the involvement of the known donor with their prospective family".

Samouri continued as follows, with specific relevance to the facts in *QG*:[94]

> "This would in particular be the case where a recipient is using a known donor who is a single, childless man who may (perhaps subconsciously) wish to enjoy some kind of father-child relationship with the donor-conceived child. A clinical psychologist would probe this possible hope during the interview and ensure that the known donor's expectations are aligned with those of the recipient and her spouse or partner, or, if there are signs that expectations are not aligned, the clinical psychologist will recommend that the recipient reconsiders proceeding with the particular known donor."

Accordingly, it should be clear why the legally mandated psychological evaluation in the event of gamete donation by a known gamete donor is an important element of the statutory scheme that governs medically assisted reproduction. Had there been compliance with this requirement, as the relevant healthcare professional was legally required to do *before* the sperm donation and subsequent insemination, the dispute in *QG* potentially could have been entirely avoided.[95]

5 Conclusion

The *QG* judgment develops South African reproductive law by addressing the increasingly popular avenue of known sperm donor arrangements. In the wake of this judgment, it is beyond doubt that sperm donor agreements are legal and enforceable. However, courts are not bound to uphold them should disputes arise. Ultimately, courts will make their determinations on who may acquire parental responsibilities and rights based on what is in the best interests of the child, regardless of what the parties have agreed upon.

The court in *QG* also provided some clarity on the standards that must be met for an individual to have *locus standi* to bring a claim for parental responsibilities and rights by means of section 23. However, the standard of "some tangible and clearly demonstrable interest and connection to the child" introduced in this judgment is somewhat abstract and worryingly broad. In trying to avoid setting the bar too high, the court may have set it so low as to open the floodgates to opportunistic lawsuits based on tenuous claims. This is especially worrying as the court in this case saw fit to investigate the merits of the case without first clearly adjudicating on whether the applicants had *locus standi*. Were such an approach to be followed by subsequent courts, it could have adverse consequences not only for families with donor-conceived children but for families more broadly. This is because parents may have to endure the ordeal of being brought before a court to rebut claims by persons who have no legitimate standing for seeking parental responsibilities and rights.

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[94] Para 31 of the *amicus curiae* heads of argument, where they cite para 9 of Samouri's expert opinion.

[95] The first applicant also makes averments to this effect. See paras 4.2, 4.5, and 7.7 of Q's founding affidavit.

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Cases such as *QG* should certainly be avoided, given their toll on all parties involved. For this reason, we argue that adherence to the statutory requirement for psychological evaluation is important. That the court in *QG* neglected to underscore this point is regrettable, as this judgment was an opportunity for the court to send a clear message to would-be parties of sperm donor agreements, and to fertility clinics, that this requirement must be taken seriously.

Given the circumstances, the *QG* judgment is a positive development of the law as far as it elucidates how, in South African law, legal parenthood is defined by ink rather than by blood. Statutes and contracts – like sperm donor agreements – transcend adherence to biological links in determining who may acquire parental responsibilities and rights. And in so doing, these legal instruments allow a person who has a child through non-traditional means (such as by using gamete donors) to be secure in knowing that the absence of a genetic link between that person and his or her child, in no way undermines their status as that child's "real" parent.

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