



TOPE ADEBAYO LP



# **EXPLORING SURROGACY IN NIGERIA: A COMPASSIONATE JOURNEY TO PARENTHOOD**

## Introduction:

In April 2023, the World Health Organization (WHO) reported that infertility has become a global health issue affecting millions of people of reproductive age. The WHO estimates that 1 in 6 people will experience infertility in their lifetime, indicating the urgent need to increase access to affordable, high-quality fertility care.<sup>1</sup> The family being the building block of society, there is no doubt that infertility could, potentially result in adverse consequences such as divorce, polygamy, social stigma, depression, domestic violence, etc.

In recent times, technological innovation in medical research and practice has resulted in the development of several treatments and remedies targeted at various causes of infertility, which includes surgical procedures; pharmacological interventions; and assisted conception, which could be intrauterine insemination or in vitro fertilisation.<sup>2</sup> Another important tool in the fight against infertility is Assisted Reproductive Technology (ART), which involves the surgical removal of an egg (or eggs) from a woman's ovary, fertilization of the egg in a laboratory, and returning the fertilized egg into the uterus of the woman or a surrogate.<sup>3</sup> While ART can be a game changer in infertility treatment, it presents health and legal chal-



lenges, especially when the treatment involves surrogacy, where there are potentially three or more 'parents' involved in the birth of a child.

In its simplest form, surrogacy involves a person agreeing to carry and give birth to baby for someone else, with the intention that when the baby is born, the surrogate will give custody of the baby to the intended parent or parents.<sup>4</sup> Surrogacy can generally be divided into two types: traditional surrogacy and gestational surrogacy. With traditional surrogacy, the surrogate provides her egg, which is inseminated with the sperm of the intended father, meaning that the surrogate is biologically related to the child. On the other hand, with gestational surrogacy, the egg is procured from the intended mother and inseminated using the sperm of the intended father, and then placed in the uterus of the surrogate, who has no biological connection to the child.<sup>5</sup> Surrogacy arrangements are also sub-divided in altruistic and commercial surrogacy, the difference arising from whether the surrogate is paid for carrying and birthing the child.<sup>6</sup>

This article aims to review and explore the legal and contractual pros, peculiarities and problems associated with surrogacy in Nigeria.

<sup>1</sup>World Health Organization, Infertility prevalence estimates – 1990 – 2021, (Online) <<https://www.who.int/publications/i/item/978920068315>> (accessed: 2<sup>nd</sup> February 2024).

<sup>2</sup>National Health Service, Treatment-Infertility, (Online) <<https://www.nhs.uk/conditions/infertility/treatment/>> (accessed: 2<sup>nd</sup> February 2024).

<sup>3</sup>Centers for Disease Control and Prevention, What is Assisted Reproductive Technology?, (Online) <<https://www.cdc.gov/art/whatis.html#:~:text=According%20to%20this%20definition%2C%20ART,donating%20them%20to%20another%20woman.>>> (accessed: 2<sup>nd</sup> February 2024).

<sup>4</sup>Australian Government, Department of Health and Aged Care, 'Surrogacy' (Online) <<https://www.pregnancybirthbaby.org.au/surrogacy#:~:text=Surrogacy%20involves%20a%20person%20agreeing,steps%20that%20must%20be%20met.>>> (accessed: 6<sup>th</sup> February 2024).

<sup>5</sup>Rebecca Buffum Taylor, 'Using a Surrogate Mother: What You Need to Know' (Online) <<https://www.webmd.com/infertility-and-reproduction/using-surrogate-mother>> (accessed: 6<sup>th</sup> February 2024).

<sup>6</sup>Yuri Hibino, 'The Advantages and Disadvantages of Altruistic and Commercial Surrogacy in India' (2023) *Philosophy, Ethics, and Humanities in Medicine*, Vol. 18, Issue 8, at page 3.

## A Historical Perspective of Surrogacy: Old Wine in a New Bottle

Although the modern iteration of surrogacy, characterised by innovation in medical technology, is rather recent, the practice of surrogacy has an ancient origin. It is documented that in ancient times, due to infertility or the desire for more children, women gave their maid servants to their husbands to bear children.<sup>7</sup> Perhaps the most famous example of this practice is the biblical story involving Abraham and Sarah, whose maid became a traditional surrogate, resulting in the birth of Ishmael.<sup>8</sup> The Bible also records the story of Jacob and his wives Leah and Rachel, whose maids were also traditional surrogates, bearing four children.<sup>9</sup> The Babylonians also practiced traditional surrogacy, as a means of avoiding the stigma that arose from the dissolution of a marriage that experienced difficulty in producing children.<sup>10</sup>

In the Middle Ages, driven by religious proscription of adultery, traditional surrogacy, which at that time required extra-marital intercourse, acquired a level of opprobrium. However, the development and perfection of artificial insemination techniques between the 1770s and the 1970s,<sup>11</sup> gave surrogacy a new lease of life. As such, the first commercial surrogacy agreement was

concluded in 1976.<sup>12</sup>

Soon thereafter, the famous Baby M case was decided by the Supreme Court of New Jersey.<sup>13</sup> This case involved the validity and bindingness of a commercial surrogacy agreement – arising from traditional surrogacy – where the surrogate had agreed to terminate her parental rights upon the birth of the child. The Supreme Court of New Jersey determined that while altruistic surrogacy was lawful, as a matter of public policy, commercial surrogacy was unlawful, and perhaps criminal. The court voided the commercial surrogacy agreement and restored the parental rights of the surrogate mother, concluding that the legislature is not constitutionally precluded from legislating to permit commercial surrogacy agreements.

In **Johnson v. Calvert**,<sup>14</sup> another famous case involving a commercial surrogacy agreement, the Supreme Court of California reached a different conclusion. The case was factually different from the Baby M case because it involved gestational surrogacy. The court upheld the commercial surrogacy agreement, holding that the commissioning mother, “who intended to bring about the birth of a child that she intended to raise as her own — is the natural mother under California law”.<sup>15</sup> The court accordingly determined that commercial gestational surrogacy is not contrary to public policy.

In Nigeria, there is not a great deal of recorded history of surrogacy. However, there is evidence of customary practices that share similarities with surrogacy arrangements. For example, in Igbo custom, it was the case that where a man dies without a male heir, his wife or sisters would marry a wife on behalf of the deceased man, and the new wife would proceed to bear his children. The new wife was a kind of surrogate, being the vehicle via which a male heir is born, so that the

<sup>7</sup>Sadeghi MR. Surrogacy, an Excellent Opportunity for Women with More Threats. *J Reprod Infertil.* 2019 Apr-Jun;20(2):63. PMID: 31058048; PMCID: PMC6486566. (Online) <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6486566/>>

<sup>8</sup>Genesis 16: 1 – 4 (MSG).

<sup>9</sup>Genesis 30: 3 – 13 (MSG).

<sup>10</sup>N Postgate, *Early Mesopotamia: Society and Economy at the Dawn of History* (Routledge, 1992) at pg. 105.

<sup>11</sup>Gary N. Clarke, A.R.T. and history, 1678–1978 (2006) *Human Reproduction*, Vol. 21, No. 7, pp. 1648 – 1649.

<sup>12</sup>Creative Family Connections, *History of Surrogacy* (Online) <<https://www.creativefamilyconnections.com/blog/history-of-surrogacy/#:~:text=How%20long%20has%20surrogacy%20been,Sarah%20and%20her%20husband%20C%20Abraham.>> (accessed: 6<sup>th</sup> February 2024).

<sup>13</sup>Matter of Baby M, 109 N.J. 396, 537 A.2d 1227 (N.J. 1988).

<sup>14</sup>5 Cal.4th 84, 19 Cal. Rptr. 2d 494, 851 P.2d 776 (Cal. 1993)

<sup>15</sup>Ibid. at pg. 93.

family lineage is not lost. It is however important to state that in **Meribe v. Egwu**<sup>16</sup> and **Okonkwo v. Okagbue**,<sup>17</sup> the Supreme Court determined that this customary practice was repugnant to natural justice and good conscience. Generally, very few communities (if any) still engage in such practices.

Nevertheless, across the African continent, traditional altruistic surrogacy was generally accepted and practiced. So, usually, when a couple is unable to have a child, they would get a substitute, usually an unmarried female relative, to have children on their behalf, and the children will be treated as the legitimate children of the otherwise childless couple.<sup>18</sup>

### An Overview of the Laws Regulating Surrogacy in Nigeria

In Nigeria, due to social, ethical, cultural, religious, and legal conservatism, surrogacy is usually not a matter that is publicly discussed. Nevertheless, with surrogacy's fast-growing popularity and patronage in Nigeria, there is a need to address the legal and contractual intricacies involved to avoid abuse or unintended violations of the law. It is commonly asserted that unlike countries like South Africa<sup>19</sup> and the United Kingdom,<sup>20</sup> Nigeria does not have any legal framework that addresses the issue of surrogacy.<sup>21</sup> This usually results in a conclusion that surrogacy is neither legal



nor prohibited, meaning that persons who engage in surrogacy arrangements cannot be criminally liable.<sup>22</sup> The reason for this prevalent view is that there are no reported cases in which Nigerian courts have grappled with the issue of surrogacy or surrogacy agreements. More importantly, the two legislative attempts at codifying the Nigerian law on surrogacy – i.e., the Nigerian Assisted Reproduction Authority (Establishment) Bill 2012 and the National Health Act (Amendment) Bill 2016 – were never enacted by the National Assembly.

However, while it would be correct to say that there is no statute that codifies the law as it pertains to surrogacy, it would be factually incorrect to say that surrogacy in Nigeria is wholly unregulated. There are different statutory and regulatory provisions that directly or inadvertently regulate the practice of surrogacy in Nigeria. To begin with, **Section 1(1)© of the Medical and Dental Practitioners Act**,<sup>23</sup> provides that the Medical and Dental Council of Nigeria (MDCN) shall have the responsibility to prepare a statement of the code of conduct desirable for the practice of the medical profession in Nigeria. In exercise of this power, MDCN enacted the **Code on Medical Ethics in Nigeria, 2004**. Being a Code made pursuant to the powers conferred by an existing law, in the same manner as the Rules of Professional Conduct for Legal Practitioners,<sup>24</sup> the Code on Medical Ethics is subsidiary

<sup>16</sup>[1976] Vol. 10 N.S.C.C. 181.

<sup>17</sup>(1994) 9 NWLR (Pt. 368) 301.

<sup>18</sup>Omolabake Ogunwande and Glory Ozuru, 'Socio-Legal Issues of Surrogacy in Nigeria: A Quagmire' (2020) African Journal of Law and Human Rights, Vol. 4, No. 1 at pp. 43 – 44.

<sup>19</sup>See: Children's Act (Act No. 38 of 2005)

<sup>20</sup>See: Human Fertilisation and Embryology Act, 2008 and Surrogacy Arrangements Act, 1985

<sup>21</sup>Tania Broughton, Surrogacy Growing in Africa (Online) Africa Legal <<https://www.africa-legal.com/news-detail/surrogacy-growing-in-africa/>> (accessed: 7<sup>th</sup> February 2004).

<sup>22</sup>Dr. Enobong Mbang Akpambang and Monica Amujo-Akomolafe, 'Legal Position on Surrogacy Arrangements in Nigeria and Some Selected Jurisdictions' (2020) International Journal of Research in Humanities and Social Studies Vol. 7, Issue 3 at pg. 29.

<sup>23</sup>Cap. M8, LFN 2004

<sup>24</sup>See: Yaki v. Bagudu (2015) 18 NWLR (Pt. 1491) 288

legislation, which has the force of law.<sup>25</sup>

In this wise, **Rule 23 of the Code on Medical Ethics in Nigeria** contains extensive provisions on assisted conception and related practices. **Rule 23** acknowledges that Nigerian medical practitioners are now engaged in ART, including surrogacy, describing it as a desirable practice. **Rule 23©** provides that in the practice of surrogacy, the medical practitioner would need to put in place systems to ensure that a surrogate is: (a) screened for uterine fitness and gestational capability; (b) screened for psychological stress; (c) counselled that birth may not occur; (d) informed as to the extent of screening done, particularly with respect to screening for the Human Immuno-Deficiency Virus; and (e) made to give consent with respect to possible psychological stress.

**Rule 23(D)** provides the principles applicable to the adoption of a child would also be applicable to the surrogacy process; while **Rule 23(E)** advises that such procedures should be voluntary and not commercialized. It is apparent that the endorsement of surrogacy by the Code on Medical Ethics serves to sanction or validate the practice of altruistic surrogacy in Nigeria, at least when the procedure is performed and administered by a registered medical practitioner.<sup>26</sup> The binding provisions of the Code of Medical Ethics is perhaps the reason why clinicians affirmatively

conclude that surrogacy is legal in Nigeria.<sup>27</sup>

Secondly, one of the legislations that inadvertently regulates the practice of surrogacy is the **National Health Act, 2014** ('NHA'). The NHA is a statute that was aimed at providing a legal framework for managing the Nigerian health system by setting minimum standards for the provision of health services.<sup>28</sup> It is our position that the NHA inadvertently regulates surrogacy because in all sixty-five sections of the NHA, there is not a single mention or reference to surrogacy. However, **Section 50(1)(a) & (c)** of the Act, read together with the definitions in **Section 64** of the Act, provides that a person shall not:

- a. Manipulate any genetic material, including genetic material of human gametes (i.e., sperm or egg), zygotes (the union of a male and female zygote), or embryos (a human offspring in the first eight weeks of conception);
- b. Import or export human zygotes or embryos.

Having prohibited these acts, **Section 50(2)** of the NHA then provides that a person who engages in the prohibited actions commits an offence, and if convicted, would be sent to prison for a minimum term of five years. The language of **Section 50(1)** of the NHA reveals the difficulty that often arises when a draftsman is forced to deploy scientific language in drafting legislation. It is unclear in what context the Act uses the word manipulate, as in its ordinary meaning, manipulate could mean “to treat or operate with the hands or by mechanical means especially in a skilful manner” or “to manage or utilize skilfully”.<sup>29</sup> The same perplexity afflicts the use of the words import or export; it is unclear if they are utilized in a commercial or grammatical sense; because in its ordinary usage, import means to “to bring from a foreign or external source”<sup>30</sup> while export means “to carry away”.<sup>31</sup>

Despite the statutory confusion, the lack of judicial clarifica-

<sup>25</sup>Section 18(1) of the Interpretation Act Cap. 123, LFN 2004, *Adene v. Dantunbu* (1994) 2 NWLR (Pt. 328) 509; and *Idoniboye-Obu v. N.N.P.C.* (2003) 2 NWLR (Pt. 805) 589.

<sup>26</sup>*Olusegun Olaitan Oluwaseyi & Olatawura Oladimeji, Surrogacy Agreements and the Rights of Children in Nigeria and South Africa* (Online) *Obiter* <[http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S1682-58532021000100002](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1682-58532021000100002)> (accessed: 7<sup>th</sup> February 2024).

<sup>27</sup>Abayomi Ajayi & Victor Ajayi, *Gestational Surrogacy in Nigeria* in E. Scott Sills (ed.) *Handbook of Gestational Surrogacy: International Clinical Practice and Policy* Issues (Cambridge University Press, 2016) at pg. 213.

<sup>28</sup>Osahon Enabulele and Joan Emien Enabulele 'Nigeria's National Health Act: An assessment of health professionals' knowledge and perception' (2016) *Nigerian Medical Journal*, Vol. 57, No. 5, 260 -265.

<sup>29</sup>Merriam Webster Collegiate Dictionary (10<sup>th</sup> Ed., Merriam-Webster Inc., 1994) at pg. 708

<sup>30</sup>*Ibid.* at pg. 583.

<sup>31</sup>*Ibid.* at pg. 410.

tion, and the potential rule of law implication, it would not be illogical to conclude that the NHA proscribes the use of skill to handle sperm cells, eggs, and the product of fertilization, i.e., zygotes. It is also possible that the NHA forbids the implantation of already fertilized eggs into a carrier. These prohibited actions are the very hallmarks of surrogacy, meaning that potentially, surrogacy has been inadvertently criminalized in Nigeria, same being punishable by a penalty of at least five years imprisonment. This has commercial implications because in Nigerian law, an agreement which is concluded for the purpose of committing an illegal act is unenforceable.<sup>32</sup> Accordingly, a medical practitioner who administers the surrogacy process for a fee – even if it is altruistic surrogacy – would be unable to enforce the contract, because it is an agreement designed to procure a service potentially prohibited by the NHA. In the same manner, if a breach occurs, the unenforceability of the contract means that the intending parents and the surrogate will have no contractual remedies against the medical practitioner.

Accordingly, there is potentially a conflict between the provisions of the Code of Medical Ethics and those of the NHA – while the Code validates surrogacy, the Act appears to proscribe it. Ordinarily, being an Act of the National Assembly, the NHA should supersede the Code of Medical Ethics.<sup>33</sup> However,



arising from the NHA's lack of clarity vis-à-vis the Code of Medical Ethics' specific provisions, we would suggest that the Code of Medical Ethics, which is drafted in clear language, remains the controlling statute with respect to altruistic surrogacy in Nigeria.

Thirdly, as discussed above, what the Code of Medical Ethics legitimizes is altruistic surrogacy, and it appears that another statute inadvertently outlawed the practice of commercial surrogacy. The statute is the **Childs Right Act 2003** ('CRA'), which is the law that codifies and guarantees the rights of all children in Nigeria.<sup>34</sup> **Section 30(1) & (3)** of the CRA provides that:

- 1) No person shall buy, sell, hire, let on hire, dispose of or obtain possession of or otherwise deal in a child.
- 3) A person who contravenes the provisions of subsection (1) of this section commits an offence and is liable on conviction to imprisonment for a term of ten years.

It must be recalled that in commercial surrogacy, the surrogate is paid a fee for the purpose of carrying and birthing the child, with the expectation that after birth, the surrogate would hand over custody of the child to the intending parent or parents. Accordingly, within the language of the CRA, intending parents buy the child, because they obtain custody (i.e., possession) of the child as a result of a fee paid to the

<sup>32</sup>Ekeremor L.G.C. v. Omie (2022) 4 NWLR (Pt. 1819) 129; A.C.B. Ltd, v. Alao (1994) 7 NWLR (Pt. 358) 614 and Ajaokuta Steel Co. Ltd, v. Corp. Ins. Ltd. (2004) 16 NWLR (Pt. 899) 369

<sup>33</sup>Izeze v. I.N.E.C. (2018) 11 NWLR (Pt. 1629) 110.

<sup>34</sup>National Human Rights Commission, 'Child Rights' (Online) <[https://www.nigeriarights.gov.ng/focus-areas/child-rights.html#:~:text=Child's%20Right%20Act%20\(2003\)%20is,36%20states%20of%20the%20federation.](https://www.nigeriarights.gov.ng/focus-areas/child-rights.html#:~:text=Child's%20Right%20Act%20(2003)%20is,36%20states%20of%20the%20federation.)> (accessed: 8<sup>th</sup> February 2024).

surrogate. More so, being the product of a commercial transaction, within the language of the CRA, the transfer of custody and parental responsibility can rightly be described as dealing in a child. Not only does the CRA prohibit dealing in a child for a fee, it criminalizes same, imposing a sentence of ten years behind bars. Ipso facto, in Nigeria, commercial surrogacy agreements are illegal, criminal, and unenforceable. The fact that at the time the contract is concluded, the child has not been conceived, does not affect the unenforceability of a surrogacy agreement. This is because the very purpose of the contract is to conceive, birth and transfer custody of the child for a fee. This is similar to the legal position in England, where commercial surrogacy arrangements are unenforceable.<sup>35</sup>

However, as the unease surrounding surrogacy continues to wane, there have been efforts to provide comprehensive regulation for the practice, to clearly define its legality, and prevent abuse of the rights of the parties involved. In 2016, the Assisted Reproductive Technology (Regulation) Bill, 2016 ('ART Bill') was introduced on the floor of the Senate, with the aim of providing regulation for ART procedures and encouraging its safe and ethical practice in Nigeria. However, the ART Bill was not enacted, despite scaling through the second reading. The ART Bill proposed

the establishment of national and state boards, which boards will possess judicial powers, and will be charged with the duty of ensuring adherence to defined regulations and practices for ART procedures.<sup>36</sup> The ART Bill provides for a written agreement between the commissioning parents and the surrogate stating, the rights, duties, and obligations of the parties, and what type of surrogacy the parties choose. The Bill stipulates that the surrogate mother must relinquish all parental rights over the child to the commissioning parents and the commissioning parents must accept custody.<sup>37</sup> The Bill also provides for commercial surrogacy.<sup>38</sup> It sets the age limit for surrogate mothers as being between 21 and 45 years, prohibiting a woman from acting as a surrogate more than three times in her lifetime.<sup>39</sup> The Bill further stipulates that the commissioning parents are bound to accept custody of the child, irrespective of any disability of the child or children and that refusal will amount to a crime.

Although the passage of the Bill has stalled, its importance in regulating the practice of surrogacy in Nigeria cannot be overemphasized, as it would serve as a significant milestone in the history of ART in Nigeria. There is an urgent need for a codifying enactment, as the present situation, where several legislations inadvertently – and perhaps, confusingly – regulate surrogacy is undesirable. Perhaps, as a stopgap, in 2019, the Lagos State government issued ART Practice in Lagos State: Regulations and Guidelines<sup>40</sup> and set up a committee for monitoring and regulating ART clinics in Lagos State.<sup>41</sup> However, we have reservations with respect to the legality of the guidelines issued by the Lagos State government, as the regulation of professional occupations is a matter within the exclusive legislative competence of the National Assembly.<sup>42</sup> In this wise, the Medical and Dental Practitioners Act has designated the medical profession as a regulated profession, and as such, the Lagos State government has no constitutional authority to issue guidelines with respect to medical practice or institutions, even in Lagos State.<sup>43</sup> Accord-

<sup>35</sup>XX v Whittington Hospital NHS Trust [2018] EWCA Civ 2832 at [10].

<sup>36</sup>Chapter II of the ART Bill.

<sup>37</sup>Section 34 of the ART Bill.

<sup>38</sup>Section 34(3) of the ART Bill.

<sup>39</sup>Clause 34 (5) of ART Bill.

<sup>40</sup>Folashade Rose Adegbite, 'Offspring from Assisted Reproductive Techniques and Customary Law in Nigeria: Matters Arising' (2022) US-China Law Review, Vol. 19, No. 9 at pg. 419.

<sup>41</sup>Lagos State Government, 'LASG Inaugurates Committee to Regulate Assisted Reproductive Technology Practice' (Online) <<https://lagosstate.gov.ng/lasg-inaugurates-committee-to-regulate-assisted-reproductive-technology-practice/>> (accessed: 8<sup>th</sup> February 2024).

<sup>42</sup>Item 49 in Part 1 of 2<sup>nd</sup> Schedule to the Constitution of Federal Republic of Nigeria, 1999 (as altered).

<sup>43</sup>A.-G., Lagos State v. A.-G., Fed. (2013) 16 NWLR (Pt. 1380) 249 and INEC v. Asuquo (2018) 9 NWLR (Pt. 1624) 305.

ingly, despite the noble goal behind the Lagos guidelines, the courts are likely to uphold same.

### The Legal Issues that Arise from Surrogacy Arrangements in Nigeria

At the root of the aversion to gestational surrogacy is the cultural belief that the birth of a child should not be reduced to a money making venture.<sup>44</sup> As such, despite its relative prevalence and sanction by the Code of Medical Ethics in Nigeria, in the absence of comprehensive legislation, it is likely that Nigerian courts would find that on public policy grounds, surrogacy arrangements are void, illegal, and unenforceable.

Another legal potential legal problem is the question of parentage. In view of the provision of Section 42(2) of the Constitution, Nigerian law has abolished questions pertaining to legitimacy, as a Nigerian cannot be subjected to any disability or deprivation as a reason of the circumstances of his/her birth. However, the prevailing question remains: in the absence of statutory clarification, as between the surrogate and the intending parents, who is the parent of the child? Under the common law, arising from the Latin *maxim mater semper certa est*, a mother is proved demonstrably by parturition, i.e., by the action of giving birth.<sup>45</sup> So, for example, if a surrogate – traditional or gestational – refuses to give up the child after delivery, what legal recourse do the commission-

ing parents have? This situation becomes complicated if the surrogate is married at the time of birthing the child, because pursuant to **Section 165** of the Evidence Act 2011 (as amended), the husband of the surrogate is presumed to be the father of the child, the whole situation being even more complicated by the fact that any surrogacy agreement is mostly likely unenforceable.

Accordingly, under extant law, if the surrogate elects to retain custody of the child, the intending parents have very little legal recourse. The only conceivable exception would be a case of an altruistic gestational surrogacy. Since the surrogate is not paid a fee, an action founded on the surrogacy arrangement is not likely to be dismissed for offending public policy. The fact that the surrogate is not genetically related to the child is likely to create a situation where, invoking the statutory powers delineated in **Sections 1 & 63** of the CRA, the court might order DNA tests, and if the court determines that it is in the best interest of the child, award custody to the commissioning parents.

There is also the problem of the citizenship and domicile. In Nigeria, citizenship is determined primarily by blood, i.e., *jus sanguinis*. So, if a person is born in Nigeria, the person is a citizen if any of his parents or grandparents is a Nigerian; and if born outside Nigeria, if any of his parents is a Nigerian.<sup>46</sup> So, in a situation where commissioning parents move overseas to a surrogacy friendly country and the child is born in said country, is the child a Nigerian citizen? Likewise, in the situation where the surrogate is a foreigner, who gives birth to the child in Nigeria, is the child a Nigerian citizen? Arising from the legal presumptions pertaining to motherhood (and potentially fatherhood), a real legal question might arise as to the citizenship of a child born as a result of a surrogacy arrangement.

In the same manner, domicile is a very important legal concept that determines the personal law of a person and is vital

<sup>44</sup>Omolabake Ogunwande and Glory Ozuru, 'Socio-Legal Issues of Surrogacy in Nigeria: A Quagmire', Op. Cit., note 18, at pp. 42 – 46.

<sup>45</sup>The Amphill Peerage Case [1977] 1 A.C. 547.

<sup>46</sup>Section 25 of the Constitution of the Federal Republic of Nigeria, 1999 (as altered).

<sup>47</sup>Ramanathan Swathy, Concept of Domicile Under Private International Law: An Understanding (Online) SSRN <<https://ssrn.com/abstract=3841048>> (accessed: 9<sup>th</sup> February 2024).

<sup>48</sup>Bhojwani v Bhojwani (1995) 7 NWLR (Pt. 407) 349 and S.A. Adesanya, Laws of Matrimonial Causes (1973, Ibadan University Press) at 15 – 16

<sup>49</sup>Halsbury's Laws of England (4th ed, 2003) Vol 8(3), para 40.

in respect of matters such as taxes, marriage, administration of estate, etc.<sup>47</sup>

The law is that at birth, a child acquires the domicile of his/her father.<sup>48</sup> The potential for a legal quagmire becomes apparent, because if the child is birthed by a surrogate who is unmarried, under the common law, he/she acquires the domicile of the surrogate.<sup>49</sup> However, if the surrogate is married, then legally, the child prima facie acquires the domicile of the surrogate's husband. The problems pertaining to citizenship and domicile is perhaps the reason why MDCN<sup>50</sup> and the Nigerian Law Reform Commission<sup>51</sup> advise that children born out of surrogacy arrangements, even if gestational surrogacy, should be adopted by the intending parents.

### Contractual Considerations in Surrogacy Arrangements

Due to the varying interests and rights of the parties involved, the journey to parenthood through surrogacy is complex, emotional, and oftentimes expensive. Although we have discussed the policy public considerations above, in view of the endorsement by the Code of Medical Ethics, and a changing societal approach, before embarking on this journey, parties need to document their respective aim and expectations in a binding agreement to guide them through the process. Highlighted below are some key considerations to guide parties in documenting their responsibilities and obligations in binding the

surrogacy agreement.<sup>52</sup>

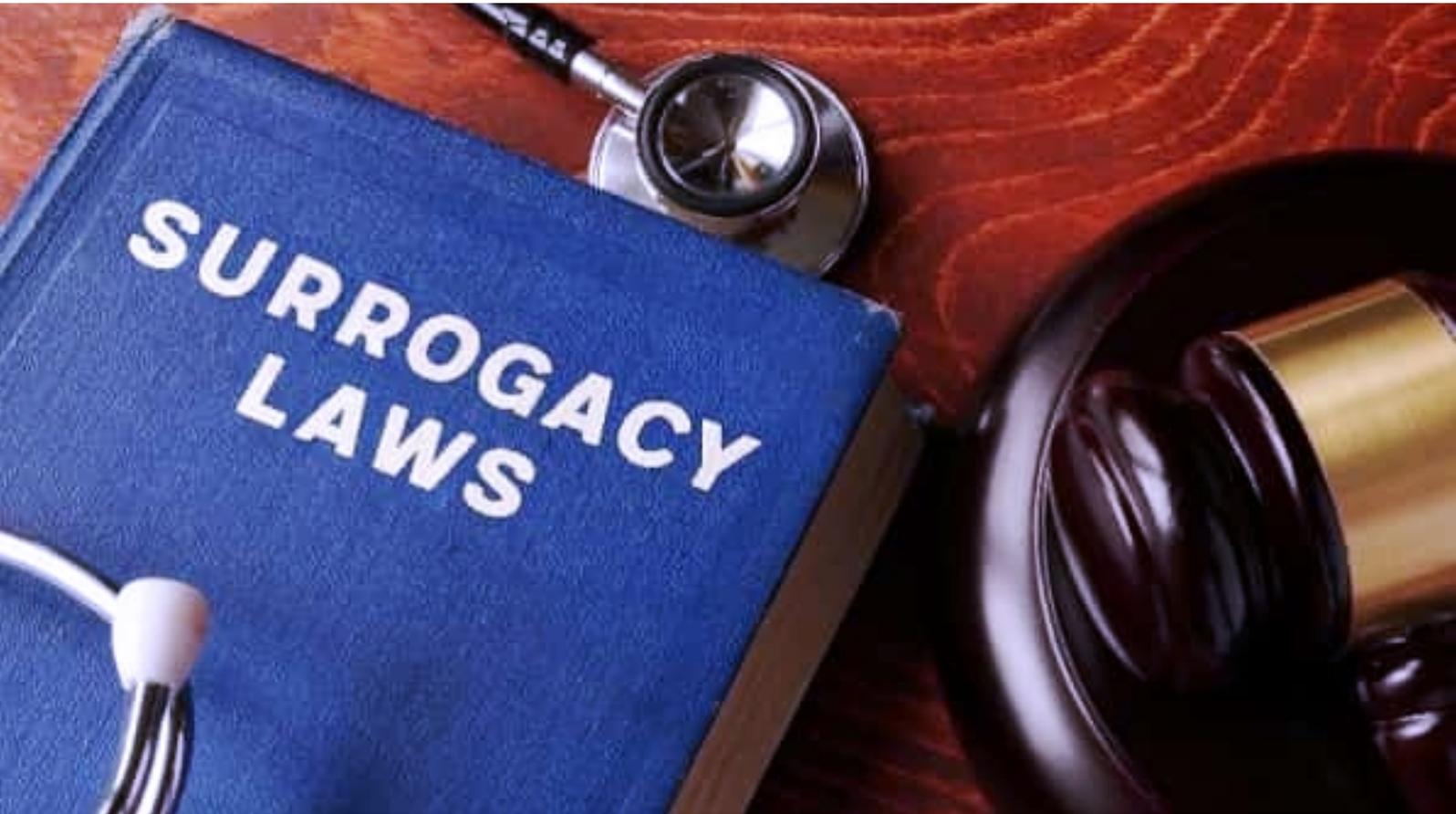
- a. **Enforceability-** Not all jurisdictions have legalized surrogacy and though legal in some jurisdictions, it may not be enforceable.<sup>53</sup> To ensure enforceability, parties domiciled in countries such as Nigeria where surrogacy has not been outrightly legalized may contemplate contracting under the law of an alternative country with extensive laws and regulations on surrogacy that recognizes and enforces surrogacy agreements.
- b. **Local Requirements-** It is important for parties to identify the statutory requirements applicable in their respective jurisdictions before entering a surrogacy arrangement. Some jurisdictions may have requirements on age, marital status, spousal consent, etc. However, as in all contractual agreements, parties to a Surrogacy Agreement must have the requisite contracting capacity as defined by the applicable law.
- c. **Disclosures-** Certain disclosures are necessary to ensure the success of a surrogacy journey. The surrogate mother may be required to disclose her health history or submit to a physical and psychological examination to ensure that she is fit and capable of carrying the child to term. The surrogate mother must also be informed of the implications or possible complications that may arise so that, if necessary, waivers can be obtained.
- d. **Consent-** Consent is the bedrock of any agreement. Parties to a surrogacy arrangement must consent to the different elements of the arrangement including: the type of surrogacy (traditional or gestational); maximum number of attempts to achieve pregnancy; the surrogate mother's dos and don'ts during the pregnancy (i.e., diet, abstinence from sex, drugs, alcohol, etc.); conditions on which the pregnancy may be terminated (i.e., threat to the life of the surrogate mother); level of medical care to be provided by the commissioning parent; who can be present during the

<sup>49</sup>See: Rule 23(D) of the Code of Medical Ethics for Nigeria.

<sup>50</sup>Olanike S. Adedokun 'The concept of surrogacy in Nigeria: Issues, prospects and challenges' (2018) African Human Rights Law Journal, Vol. 18, at pg. 614.

<sup>52</sup>See: Academy of Adoption & Assisted Reproductive Attorneys, 'Surrogacy Agreements- Contract Terms' (Online) <<https://adoptionart.org/assisted-reproduction/intended-parents/gestational-surrogacy/surrogacy-agreements-contract-terms>> (accessed: 9<sup>th</sup> February 2024).

<sup>53</sup>Although legal in the United Kingdom, a surrogacy agreement is not enforceable. See Whittington Hospital NHS Trust v XX [2020] UKSC 14.



birthing of the child; birthing process; termination of parental rights upon birth; what happens if the child is disabled; compensation (in the event the pregnancy does or does not proceed to term); and post-birth arrangements. For surrogacy agreements, no detail is too much!

In the fertility business, the surrogate mother is usually economically inferior compared to the intending party. The resultant effect is an emotionally, economically, and socially weaker surrogate manipulated by the intending parents during the

negotiation process. If parties' consent (especially that of the surrogate) is fettered and given under duress or undue influence, it may void the surrogacy agreement, and result in fundamental rights issues. Due to the unequal power of the contracting parties, jurisdictions such as New York require separate surrogate attorneys to ensure that both parties' rights and interests are protected.

Overall, when entering a surrogacy arrangement, parties need to seek legal guidance to ensure the protection of their respective rights and enforcement of the contract.

**Recommendations**

The journey to parenthood through surrogacy can be challenging and has brought to the forefront the urgent need for a clear and comprehensive legislation in Nigeria. A legal

framework is needed to provide certainty and protect the rights of all parties involved. It is vital for the law to state categorically whether surrogacy is legal in Nigeria, and if it is legal, to clearly define permissible surrogacy arrangements, enforceability of agreements, parentage, and citizenship of the child, and to mandate independent legal counsel for all parties involved.

Despite surrogacy going against traditional family norms, we believe that Nigeria can embrace diverse paths to parenthood by implementing legislation that is centered on ethics and empathy. By crafting a legal framework that is clear and certain, Nigeria has the opportunity to not only empower individuals seeking to build families through surrogacy but also to ensure robust protections grounded in human dignity. This framework should facilitate surrogacy arrangements that are mutually beneficial, protecting the rights and well-being of all parties involved, including surrogate mothers, commissioning parents, and most importantly, the child.

The process of developing comprehensive legislation for surrogacy will undoubtedly be complex. However, with a balanced approach that combines ethical considerations with an understanding of the emotional aspects of surrogacy, Nigeria can create a system that nurtures the human connections essential for bringing new life into the world through surrogacy.

## Conclusion

Surrogacy has redefined traditional notions of parenthood, providing a viable option for individuals and couples facing infertility and those with medical conditions that prevent pregnancy. As society evolves, so does our understanding and acceptance of diverse paths to parenthood. Nigeria should endeavour to join her counterpart States where surrogacy is officially legalized, and its procedure and practice regulated. This would enable intending parents, surrogates, and fertility clinics to understand and comply with the legal framework governing surrogacy.

Ethical considerations are also paramount in the surrogacy process. Issues such as consent, compensation, and the rights of all parties involved must be carefully addressed to prevent exploitation. Open communication, transparency, and legal documentation are essential to ensure a positive and ethical surrogacy experience. It is our firmly held belief that the complexity of the procedures for implementing surrogacy requires a contractual relationship between the parties, within terms implied and prohibited by the governing statute.

PLEASE NOTE THAT THIS ARTICLE IS FOR INFORMATION PURPOSES ONLY AND DOES NOT CONSTITUTE LEGAL ADVICE

## MEET THE CONTRIBUTORS



**THERESA IDELEGBAGBON**  
ASSOCIATE

**GBENGA OGUNDOYE**  
ASSOCIATE

**TOLULOPE OGUNTADE**  
SENIOR ASSOCIATE

**CHUKWUEBUKA OKEKE**  
SENIOR ASSOCIATE

**Brought to you by TALP's Dispute Resolution  
and Corporate Commercial Departments**

*For further enquiries, log onto [www.topeadebayolp.com](http://www.topeadebayolp.com)*

Do you need to get in touch with us, to know more on how we can help you and your business?  
Kindly contact us by using any of the details provided below:

### **TOPE ADEBAYO LP**

25C Ladoke Akintola Street, G.R.A. Ikeja Lagos, Nigeria

p: +234 (1) 628 4627

e: [info@topeadebayolp.com](mailto:info@topeadebayolp.com)

w: [www.topeadebayolp.com](http://www.topeadebayolp.com)

