



SURROGACY IN NIGERIA: A CASE FOR REGULATION

By

Dr. (Mrs.) Soibi George-Ibikiri*

ABSTRACT

Reproduction, the ability to procreate a life remains a vital essence of life especially in marriage as it makes or mars the marital journey in most African societies. Women cherish the capacity to procreate and look forward to motherhood experiences. However, due to one factor or another taking its toll on the human body, some persons do not have the ability to reproduce and are led to seeking alternative options such as surrogacy, adoption and many more. Surrogacy has been found to overcome the choice of adoption that was once the choice of persons desiring to have a child as surrogacy has provided opportunity for those who want their own child using their sperm or egg or both in some cases, thereby creating some biological link with the child. However, it is the finding of this paper that not all countries practice surrogacy and in Nigeria where the act is carried out does not have a proper legal framework guiding the practice of surrogacy in Nigeria. This paper recommends that it will be beneficial to have in the practice encouraged in order to give reproduction rights and motherhood to any woman through regularization; legal framework that will deal with all issues of surrogacy.

Keywords: Surrogacy, Alternative Reproductive Technology, Motherhood

INTRODUCTION

Motherhood and procreation are cherished in human life that most people desire to accomplish them especially within the four walls of the institution of marriage where it complements the family and its bond. There is so much anxiety, backbiting, stigmatization and fuss about being unable to bear children particularly upon months of marriage as children mean continuity of a lineage. If this challenge is prolonged, the woman is deemed barren and this may lead to marriage breakdown, seeking for children outside or marrying another spouse. This challenge no doubt has led persons to seek different or alternate healthcare options from spiritual, traditional to orthodox. Surrogacy is an arrangement where a woman agrees to become pregnant for the purpose of gestating, putting to birth and handing over the child to another at a cost as compensation. This act is one of the means employed by women who cannot give birth to have their own children utilizing modern Alternative Reproductive Technology (ART). It therefore

* Ph.D, LL.M, LL.B, BL and Lecturer in Faculty of Law, Rivers State University, Port Harcourt. soibiteinyim.george-ibikiri@ust.edu.ng



can be said to be rewarding for both the carrier of the pregnancy as well as the intending parents. Surrogacy is a Latin word, *surrogatus*, which means a substitute, a person appointed to act in place of another.¹ According to Black's Law Dictionary, surrogacy means a process of carrying and delivering a child for another person. Surrogacy was defined in the Warnock Committee as "the practice whereby one woman carries a child for another with the intention that the child should be handed over after birth."

The woman who carries the pregnancy is known as the Surrogate and the persons for whom the pregnancy is carried and the child handed over to are the Commissioning or intending Parents.² The first official and legal surrogacy agreement was in mid-1970 with the child who was referred to as Baby M.³ Most times, the sperm of the man who together with his partner desire a child is used to fertilize the surrogate mother's egg and the child adopted by the biological father and his partner.⁴ The advancement of ART has made it possible for this to be without any sexual intercourse between the sperm donor and the surrogate mother as it is now possible adopting a means such as IVF to create an embryo using sperm and egg of the partners that desire the child or an egg from another donor and the embryo implanted into the surrogate's womb.

The surrogate mother is known as the 'gestational carrier.' The carrying of pregnancy for intending parents is the essence of a surrogacy contract. There are no uniform standards on the practice of surrogacy in the world, each country adopting what is most suitable. There are different types of surrogacy contracts; it can be altruistic or commercial, as it depends on whether the surrogate mother receives financial reward.⁵ In commercial surrogacy, the surrogate mother receives reward in monetary sum from the commissioning parents for her services of carrying the baby in her womb to birthing. This practice is given legal recognition in India, Ukraine and California and is said to be illegal in England.

¹ J. P. Raj, 'Issues Relating to Surrogacy: Indian Perspective' <<http://www.dehradunlawreview.com>> accessed 19th September, 2020.

² S.O. Sanni: 'Nigeria: Legal Approach to Surrogacy in Nigeria' <<https://www.mondaq.com>> accessed 19th September, 2022.

³ Sahabuddin Mondal: 'MProblems and Issues of Surrogate Mother and Her Child'. <<http://www.legalservicesindia.com>> accessed 19th September, 2022.

⁴ Raj n1.

⁵ Mondal (n3).



Many States in the United States of America, Belgium and Australia recognize only altruistic surrogacy.⁶ Altruistic surrogacy is non- commercial surrogacy as in this form of contract, no money is rewarded the surrogate mother beyond reimbursement of medical expenditures, it is based usually on mere understanding. The practice of surrogacy is not recognized in France, Spain, Sweden, Norway and Germany.⁷ United Kingdom, South Africa and Argentina allow surrogacy practices.⁸

There are two types of surrogacy and they are distinguished based on the existence or not of the genetic link between the surrogate mother and the embryo: the traditional surrogacy and the gestational or host surrogacy.⁹ The first paid traditional surrogacy was in 1980 where the surrogate mother, a 37year old woman was paid \$10,000 for the successful delivery of a baby boy.¹⁰ In the traditional surrogacy, the surrogate mother contributes genetically to the conception of the child as she is fertilized artificially through IVF or insemination with the sperms of the commissioning father,¹¹ thus, she becomes a gestational and generic mother. It is also known as genetic (partial) surrogacy.

The first gestational surrogacy was in 1985.¹² In this type of surrogacy, using medical technology, an embryo is created from a donor sperm and egg in a petri dish and implanted into the surrogate mother who carries it to due timer.¹³ Here, the egg of the surrogate mother is not used and she does not contribute genetically to the child but only a carrier of the pregnancy. The focus of this paper is to advocate the need for surrogacy regulation in Nigeria.

SURROGACY AS PRACTICED IN SOME SELECTED JURISDICTIONS

Not every country is surrogacy friendly and approves the practice of surrogacy. In some countries, it is practiced and regulated by law, with different perspectives as there are no uniform guidelines or legal frameworks on surrogacy and some do not have laws on surrogacy though practiced. Countries perception of surrogacy has affected the acceptance of the practice

⁶ (n5).

⁷ (n6).

⁸ Ibid.

⁹ Sanni (n2).

¹⁰ Mondal (n3).

¹¹ Raj (n1); Sanni (n2).

¹² Raj (n1); Mondal (n3).

¹³ Ibid.



and enactments of laws to regulate the act of surrogacy. It will be apposite to discuss the practice of surrogacy in some jurisdictions.

Surrogacy in United Kingdom

The United Kingdom only recognizes altruistic surrogacy as commercial surrogacy is considered illegal.¹⁴ The Warnock Committee propelled the enactment of Surrogacy Arrangements Act, 1985 (SAA, 1985). The SSA1985 makes surrogacy arrangements legal but prohibits advertising as well as other aspects of commercial surrogacy and paying more than expenses for a surrogacy is considered illegal.¹⁵ Intending parents are allowed under the Human Fertilization Embryo Act, 1990 to acquire legal parenthood of their child. The surrogate mother is excluded by an adoption order.

Surrogacy in India

Surrogacy in India was said to be much simpler and cost effective, hence India emerged as a leader in International surrogacy, she was the favourite destination of fertility tourism.¹⁶ However, due to the rising number of surrogacy cases and the future challenges, the Government of India to put restrictions on the practice set up a committee of experts to come up with a legal framework on surrogacy and ART. The Surrogacy Act¹⁷ and the Assisted Reproductive Technology Act were passed in 2021 with effect from January 2022. These two new laws regulating assisted reproduction and surrogacy took effect after years of advocacy by the Centre for Reproductive Rights in India.¹⁸ Surrogacy as well as *In-vitro Fertilization* and gamete donation are defined as ART in the ART Act.

Surrogacy is defined as practice whereby one woman bears and gives birth to a child for an intending couple.¹⁹ The surrogacy Act has provisions for legal surrogacy. This Act made Commercial surrogacy illegal in India and is punishable with at least 10 years of imprisonment and a fine extending to Rs 10 lakh. Therefore, surrogates are not to receive any monetary compensation for any role except reimbursements for medical and insurance coverage. SRA

¹⁴ Mondal (n3).

¹⁵ Ibid.

¹⁶ Raj (n1); Mondal (n3).

¹⁷ Surrogacy (Regulation) Act 2021 (No. 47 of 2021) (SRA).

¹⁸ Center for Reproductive Rights: New Laws in India Regulate Assisted Reproduction and Surrogacy <<https://reproductiverightsorg>> accessed 15th December, 2022.

¹⁹ Surrogacy (Regulation) Act 2021 (SRA).



provides that the surrogate must be a close relative of the couple, aged between 25-35 years, married and have a child of her own²⁰ and has been a surrogate only once in her life²¹. It also restricted altruistic surrogacy to legally wedded infertile Indian Couples who have been married for five years. There is age limitation set by Act in section 4 (c) (I) as the husband must be between 26 and 55 years and the wife between 23 and 50 years. Furthermore, Indian couples with biological or adopted children are prohibited to undertake the surrogacy practice save for where their children are mentally and physically challenged or are suffering from life threatening disorder or fatal illness.²²

All clinics involved in surrogacy practice must be registered by sections 3 and 11 of the SRA. Regulation of surrogacy is by The National Surrogacy Board and the State Surrogacy Board, they lay down the code of conduct for the surrogacy clinics, enforcement of the standards by the surrogacy clinics, investigate breaches and mete out disciplinary actions in cases of default practices by any clinic. Certificates of proven infertility/expert medical reports of either spouse or intending couple from a District Medical Board are also compulsory. Certificate of eligibility of the to-be- parents and surrogate mother must have been met.

Once the child is born, the child is deemed to be the biological child of the couple for all intents and purposes.²³ An order of parentage and custody of the surrogate child must be passed by a Magistrate's Court.²⁴ There is provision to abort the fetus only with the consent of the surrogate mother and the authorities upon adherence to the provisions of the Medical Termination of Pregnancy Act. The Act is not devoid of some measure of criticism especially its restriction of surrogacy practice to only married Indian spouses as well as the ban on commercial surrogacy that was seen as a curtailment on the rights of women surrogates and was out of touch with ground realities.

²⁰ S 4 (b)(i) SRA.

²¹ s 4(b) (iv) SRA.

²² S 4 (c)(II) SRA; The Hindu: Explained: The new laws relating to surrogacy and assisted reproduction and related challenges <from thehindu.com> accessed 15th December, 2022

²³ Ibid.; s 8 SRA

²⁴ The Hindu n22; s 4(iii)(II) SRA



Surrogacy in South Africa

The practice of surrogacy in South Africa is regulated by Chapter 19 of the Children's Act 38 of 2005. Section 301 of the Children's Act expressly prohibits commercial surrogacy. A surrogate mother can volunteer to undergo surrogacy only for altruistic reasons in South Africa.²⁵ She will not receive any financial benefit for being a surrogate mother and will only be compensated for her medical expenses incurred in the actualization of the act of surrogacy or loss of income due to her not working. The parties to the surrogacy agreement must enter into a written agreement before commencing on the surrogacy process.²⁶ A High Court must confirm the surrogacy agreement and make it an Order of Court before the surrogate mother is being inseminated.²⁷

It is required by the law that one of the commissioning parents must be the biological parent of the child to be born by the surrogate mother.²⁸ That is, the egg or sperm of one of the commissioning parents must be provided for use for the purposes of artificial fertilization. The surrogate mother and the commissioning parents are required to be domiciled in South Africa at the time of concluding the agreement.²⁹ The consent of the husband or partner of the surrogate mother must be obtained if the surrogate mother is married or is in a serious relationship at the time of the agreement.³⁰ The child or children born from a surrogate will be regarded as the lawful child/children of the commissioning parents and the surrogate mother and her partner will have no parental rights and obligations towards the child or children provided the surrogacy agreement is confirmed by the High Court.³¹

Surrogacy in Nigeria

The practice of surrogacy though not widely spread, is very much in existence in Nigeria *albeit* without any legal framework regulating it. Its legality in Nigeria is also uncertain as there are no laws or judicial responses in this direction.³² Authors, legal and medical also argue as to the

²⁵ Adams & Adams, 'How does Surrogacy Work in South Africa?' <<http://www.adams.africa>> accessed 6th December, 2022

²⁶ (n25).

²⁷ Ibid.

²⁸ Ibid.

²⁹ Adams (n25).

³⁰ Ibid.

³¹ Ibid.

³² Sanni (n2).



criminality of surrogacy in Nigeria.³³ Umah opines that surrogacy and every form of buying, selling, hiring and dealings on born and unborn babies are unlawful in certain parts of Nigeria.³⁴

In his view, Generally, section 30 of the Child Rights Act is against surrogacy in Nigeria. the section reads;”No person shall buy, sell, hire, let on hire, dispose of or obtain possession of or otherwise deal in a child. ” This provision clearly frowns at the processes and procedures of surrogacy even without mentioning the term, “Surrogacy” At this point, it is important to list the elements present in every surrogacy and then compare them with the verbs listed in section 30 of the Child Rights Act, to truly decipher the impact of Child Rights Act on surrogacy in Nigeria. It is also important to read and understand section 30 of the Child Rights Act, without focusing on its side notes/marginal notes (since side notes do not form part of statutes). Also, it must be emphasized that the Child Rights Act, protects born and an unborn child.³⁵

He went on to state that even in cases where the surrogacy is on non-commercial basis, for instance where a biological mother to a woman who is having difficulties with pregnancy, can become a surrogate and bear children for her daughter, it remains unlawful as a focus on the words, dispose of or obtain possession of or otherwise deal in a child invalidates the legality of all forms and manner of surrogacy.³⁶ If in surrogacy, parties do buy, sell, hire, let on hire, dispose of or obtain possession of or otherwise deal in a child, then by virtue of section 30 of the Child Rights Act, surrogacy is a criminal offence punishable with ten years imprisonment he argued further.³⁷ However, he limited the applicability of the Child Rights Act to only those States that have domesticated the Act into Child Rights Law and therefore surrogacy can only be criminalized in those States with Child Rights Law.³⁸

Opining further Umah stated that also, the Trafficking In Persons (Prohibition) Enforcement and Administration Act (TIPPEA Act) affects surrogacy. Section 13 of the TIPPEA Act he stated condemns all forms of human trafficking and human trafficking defined in section 82 TIPPEA Act as the giving or receiving of payments or benefits to achieve the consent of a

³³ Onyekachi Umah, ‘Why is Surrogacy Unlawful in Parts of Nigeria’ <<https://thenigerialawyer.com>> accessed 22nd September, 2022.

³⁴ Ibid.

³⁵ Umah (n33).

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid.



person having control over another person or debt bondage for the purpose of placing or holding the person whether for or not in involuntary servitude (domestic, sexual or reproductive) in forced or bonded labour or in slavery-like conditions, the removal of organs or generally for exploitative purposes captures surrogacy, parties to surrogacy and all other agents (doctors, lawyers and others). This falls under surrogacy in the giving and receipt of payments.³⁹ All forms of surrogacy are exploitative under the TIPPEA Act, surrogacy is therefore criminalized and punishable with not less than five (5) years of imprisonment or a fine of two million naira or both.⁴⁰

A case of successful gestational surrogacy was said to have been reported of a case in South-Eastern Nigeria.⁴¹ Most perpetrators of the act of surrogacy base their operations on the Human Fertilization and Embryology Authority Guidelines of the United Kingdom. The Law Reform Commission in Nigeria⁴² has however recommended that any child born to a woman as a result of artificial insemination or implantation of an embryo in the body of a woman while she is in an existing marriage must be regarded as the child of the husband. The Commission also recommended the adoption of a child born under surrogacy agreement even if the child is the biological child of the commission parents. The basis of this recommendation is to dissuade the surrogate mother from coming to claim the child.

In 2012, a Bill for the establishment of Nigerian Assisted Reproduction authority was presented before the National Assembly. However, the Bill was not passed into law as it did not enjoy the support of the majority of the Legislature. Though Nigeria is lacking a legal framework on surrogacy, there exist several successful instances of the practice in Nigeria. There are agencies including private hospitals where surrogacy practices are striving, however, the basis is upon consensual agreements signed as a contract between the parties. The terms of such contracts do not cover all the exigencies of surrogacy. There is also doubt as to the enforceability of the terms of the contract upon any breach by a court order or judgment. There is unfortunately no known case law in this respect.⁴³

³⁹ Umah (n33).

⁴⁰ Ibid.

⁴¹ J. I. Ikechebelu and ors, 'A Successful Gestational Surrogacy in South-Eastern Nigeria' African Journal for Infertility and Assisted Conception <<http://www.afrijiac.org/text.asp?>> accessed 19th September, 2022

⁴² Law Reform Commission 'Reform of Nigeria Family Law iii'

⁴³ Umah (n22)



Nigerian jurisprudence has not stated who is the mother of the child, the surrogate mother or the commissioning mother? However, going by the essence of surrogacy and the agreement reached between the parties, it is the commissioning mother that is the child's mother. It is advocated in this paper that for the sake of humanity, prevention of exploitation of either party and other abuses, surrogacy practice should be encouraged and Nigeria enacts a legal framework to this effect.

CONCLUSION

Surrogacy is a welcome development as it brings to many succor that they can now have children of theirs. However, the practice in Nigeria is not devoid inappropriate use, breaches of contract and of conflicting interests which might go sour in the long run if not properly resolved. The non-existence of a legal framework on surrogacy in Nigeria is a big set-back as it creates room for illegal and exploitative commercial surrogacy contracts where one part is over exploited and brings to the bear unnecessary power tussle that defeats the essence of the purport of the surrogacy arrangements.

RECOMMENDATIONS

The following are the recommendations made by this paper:

1. A legal framework for the act of surrogacy should be enacted in Nigeria to legalize the practice, standard procedures that would protect the rights of all parties in the surrogacy act.
2. The status of the child born from the practice of surrogacy be well defined in the surrogacy express contracts and the child not subjected to any form of discrimination.