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THE LEGAL FRAMEWORK FOR SURROGACY IN NIGERIA: COMPARATIVE ANALYSIS WITH SOUTH AFRICA

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ABSTRACT

Surrogacy is a process that enables couple or individual who cannot conceive naturally as a result of infertility caused by either medical condition or other natural process to have children through surrogate mother. The process is often regulated by a legal agreement that define the respective rights and obligations of parties. While surrogacy is allowed in many countries, in some countries, the process is either restricted or outlawed. In Nigeria, the Child's Right Act (CRA) as well as the National Health Act (NHA) are silent about the practice of surrogacy, whereas in South Africa, the Children's Act provide a legal framework for the practice of surrogacy. Notwithstanding the absence of define legal and regulatory framework for the practice of surrogacy in Nigeria, the practice of surrogacy in the country has gained traction over the years. It is on this basis that this paper is anchored with the view to appraise the legal framework for the practice of surrogacy in Nigeria and South Africa in other to propose a legal and regulatory framework for the practice of surrogacy in Nigeria. It is recommended that the legal requirement for surrogacy as codified in Chapter 19 of the CA be replicated in Nigeria as well as the amendment of the CRA to incorporate the practice of surrogacy in the country. The author adopted the comparative and analytical methodology in achieving the objective of the work.

INTRODUCTION

Surrogacy is a process of assisted reproduction technique (ART) that allowed couple or intended parents that could not give birth naturally as a result of medical complication or infertility to birth a child through third-party intervention through either gestational carrier or a traditional mother (surrogate mother) who volunteers either altruistically or under commercial arrangement to house a child for the commissioning parents. It is a viable pathway to parenthood aside from natural pregnancy, adoption and fostering.

The need for this revolutionary approach to parenthood was provoked by high rate of infertility amongst both men and women which affect their ability to conceive and delivers a child naturally. Report from World Health Organization (WHO) showed that around 17.5% of adult population, roughly 1 in 6 worldwide experience infertility.[1] The Report further showed a limited variation in the prevalence of infertility between regions. The rates are comparable for high-, middle- and low-income countries, indicating that this is a major health challenge globally. The report also indicated that lifetime prevalence of infertility amongst adult was at 17.8% in high-income countries whereas in low and middle income countries it stood at 16.5%.[2]In Nigeria for instance, it is evidence that infertility affects 20 to 30 married couples and the data also showed that about 40 to 50% of all consultations in gynaecological clinic

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[1] World Health Organization,' 1 in 6 people globally affected by infertility: WHO'<1 in 6 people globally affected by infertility: WHO>Accessed on the 10th day of October, 2024.
[2] Ibid.

visits are infertility-related.[3] In South Africa on the other hand, data retrieved from WHO showed that fertility rate in the country for 2024 is 2.291 births per woman, a 0.78% decline from 2023, whereas that of 2023 was at 2.309 births per woman, a 0.9% decline from 2022 and the fertility rate at 2022 was 2.330 births per woman, a 0.89% decline from 2021. And that of 2021 stood at 2.351 births per woman, a 0.89% decline from 2020.[4] This indeed erode the capacity to conceive and deliver naturally.

Surrogacy therefore offers to couple and individual exciting opportunity to father children that are biologically and genetically connected to them. In this regard, the child born through this process bears the same genetic composition with that of his or her commissioning parents which is unlike what is obtainable in adoption and fostering; as though the child is legally believe to be the child of the adopted parents, the child is not genetically connected with the parent.

The legality of surrogacy depends on the law operational in a particular country or jurisdiction. While many countries recognize this practice, others prohibit the practice. Some countries on the other hand neither prohibit nor allow the practice of surrogacy. In Nigeria, the Child's Right Act (CRA)[5] as well as the National Health Act (NHA)[6] did not expressly recognize surrogacy whereas the Rules of Professional Conduct for Medical Practitioners (RPCMP) sanctioned the practice. In South Africa, the Children's Act[7] secured the enjoyment of this right to intended commissioning parents. The framework set requirements for the exercise of this right as well as protect the right of parties to the arrangement. As part of the requirement, the surrogacy agreement must be in writing, sign by parties who must be domicile in the country and the agreement confirm by the Court; thus, any surrogacy agreement that fail to meet these requirements will be consider invalid.

As good as the process of surrogacy is, it has complication as it could evoke ethical, religious, and medical complications. For instance, while some religious belief accommodates this practice, other religions are against it. In the same vein, some cultural norms frowned at this practice while it is entertained in some cultures. The practice has practical implication on the right of women and children, as many feminists argued that the practice violate the autonomy of a woman over her body while as regard to the right of the child, it renders the child a subject of commercial transaction. These and many other arguments have made many countries to consider the practice illegal, while placing strict prohibition on its practice. This is the case with Nigeria where the practice is neither allowed nor prohibited. This is unlike practices like adoption and fostering which are legally recognized by the Child's Right Act and accorded the needed legal protection both at the federal and states levels.

It is in view of this development that this paper is based with the view to critically appraise the legal basis and requirements of surrogacy in Nigeria while comparing same with the practice in South Africa to determine the lesson that Nigerian can learn from the South African experience in protecting the rights of parties to the Agreement.

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[3] Bridge Clinic,'Infertility in Nigeria: A Fertility Expert's Perspective'<Infertility in Nigeria: A fertility expert's perspective - Nigerian Health Blog>Accessed on the 10th day of November, 2024.

[4]Macrotrends,'South African Fertility Rate 1950-2024'<South Africa Fertility Rate 1950-2024 | MacroTrends>Accessed on the 10th day of November, 2024.

[5] CRA(n1)

[6]NHA(n2)

[7]CA(n3).

SURROGACY

Surrogacy has been variously defined by many scholars over the years. In ordinary legal parlance, surrogacy connotes an arrangement, often supported by a legal agreement, whereby a woman agrees to childbirth on behalf of another person(s) who will become the child's parent(s) after birth.[8] It is also defined as a form of third-party reproduction in which a woman consents to carry a pregnancy for intended parents who cannot conceive for medical reasons or an arrangement (often backed by law) in which a woman (the surrogate) agrees to assume responsibility for the pregnancy-related labour and delivery of a child on behalf of another person or couple (the intended or commissioning parents. Eme view surrogacy as the process of carrying and delivering a child for another.[9]

The practice of surrogacy borders on an arrangement between individual or couple with a third party, otherwise called the gestational carrier or surrogate mother to birth a child to the couple or individual who could not do so through natural process. The process often involves two or third party. For instance, in a traditional surrogacy setting where a mother is not involved but only an intending father, the arrangement will involve the commissioning individual and the surrogate mother, but in a scenario where couple are involved as the commissioning parents, the arrangement will involve three parties, i.e., the commissioning father and mother as well as the surrogate mother and sometimes their spouses are persons they are in relationship with. In commercial surrogacy however, the parties could be many as this may involve the intending parents, surrogate mother, agents, lawyers, the surrogate agency, and the hospital.

Surrogacy could be altruistic or commercial. Under altruistic arrangement, the gestational mother offers to help the commissioning parents achieve their dream of parenthood without any monetary gain. The surrogate mother will however be compensated for reasonable medical expenses incurred in the course of the process. This is the practice in Nigeria and South Africa as well as many countries that banned commercial surrogacy i.e. United Kingdom, Canada, and some states in the United States of America (US) and many more. Commercial surrogacy on the other hand is a practice that allows the surrogate mother to offer her womb for commercial gain. Under this arrangement, the surrogate mother sanctioned 'womb renting.' In this case, the surrogate mother has no interest in the child or the commissioning parents, as the entire process is construed as business and contractual, thus, once the mother delivers the child, the contractual relationship cease to exist. Countries that practice commercial surrogacy include, Georgia, Ukraine, and Russia.

Unlike altruistic surrogacy, Commercial surrogacy is a thriving industry globally that is estimated to have generated14 billion dollar in 2022 and it was further estimated that by 2032, the industry is projected to grow by 129 billion dollars.[10] Many factors are attributed to the growth of the industry some of which includes rising cases of infertility and growing number of same-sex couples and single people looking for ways to have babies. This demand is also driven by so-called intended parents in wealthy, western nations who are seeking to cross-border surrogacy services to avoid long waiting list or higher fees at home, or as a result of domestic laws that forbids the practice or exclude particular groups such as gay couples from the practice or unbearable restriction on the requirement for the practice. Basically, there are two types of surrogacies, Traditional and Gestational Surrogacy.

Traditional surrogacy is a process whereby a woman provides her own egg which is fertilized by artificial insemination and carries the foetus and gives birth to a child for another

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[8] Encyclopedia of Reproduction (Second Edition), Vol5., 2018.

[9] Miracle Eme,;Legal Framework for Surrogacy in Nigeria'(2022)<Legal Framework For Surrogacy In Nigeria - Family Law - Family and Matrimonial - Nigeria (mondaq.com)>Accessed on the 20th day of September, 2024.

[10] Karen Gilchrist,'The Commercial Surrogacy Industry is Booming as Demand for Babies Rises'(CNBC, M arch 20, 2022.

person.[11] Here, the surrogate mother contributes genetically to the conception and is both the biological and gestational mother of the child. Gestational surrogacy on the other hand which is often referred to as host surrogacy is a process whereby one woman (the genetic mother) provides the egg, which is fertilized, and another woman (the surrogate mother) carries the foetus and gives birth to the child. In this instance, unlike as obtainable under traditional surrogacy, the surrogate mother does not contribute genetically to the conception of the child and is strictly the carrier of the pregnancy i.e., gestational mother.

Legal Framework for Surrogacy in Nigeria

We have established at the onset that there is a general consensus amongst legal scholars to the effect that there is no specifically dedicated legal and regulatory framework that regulates the practice of surrogacy in Nigeria. The implication is that the practice of surrogacy in Nigeria is neither allowed nor prohibited. Notwithstanding these legal lapses, some authors have over the years argued in the negative that the practice of surrogacy is outlawed in the country. The proponent of this argument relied on sections 30 of the Child's Right Act[12], as well as section 50 of National Health Act[13] to base their contention. On the flipped side, other authors argued against this proposition and contended that the absence of a legal framework that expressly prohibit the practice in the country invariably permit the practice of surrogacy in Nigeria since it is not prohibited. While the argument for and against the legal framework for surrogacy in Nigeria remain debatable, we will approach this issue having regard to the provisions of the Child's Right Act as well as the National Health Act to unearth whether as argued, the practice of surrogacy is permitted or not allow in the country.

The Child's Right Act, National Health Act, and the Practice of Surrogacy in Nigeria

The Child's Right Act as the name implies is a legal framework dedicated for the protection of children. The law provides the legal framework that defines the right of the child, obligation of parents, state and agencies to children as well as provides the legal basis for adoption, fostering and family court. The law guard against child's trafficking and seeks to provide adequate protection to abandoned, destitute and molested children. It on this basis that section 30 of the law prohibited trade in human beings, where it is provided thus "No person shall buy, sell, hire, lei on hire, dispose of or obtain, possession of or otherwise deal in a child."[14] They went further to restrict the use of children for other illegal activities i.e.[15][16][17][18][19][20][21]

Section 30 of the CRA to our mind prohibits trafficking in children and other illegal dealing with children which indeed offered full protection package to Children and their wellbeing. The law went further to penalize trading in children with ten (10) years imprisonment upon conviction with no option of fine.[22] The question therefore is whether the prohibition in section 30 of the law relates to surrogacy? Ekwousi, contended that section 30 of the CRA prohibits surrogacy and equated the practice of surrogacy to "womb hiring" while the child, the outcome of the process an "object"; thus, argued that the practice of surrogacy is

[11] *Black's Law Dictionary*, 9th ed. p, 1582.
[12] CRA(n1) s. 30.
[13] NHA(n2) s. 50.
[14] CRA(n1) s.(1) 30.
[15] Ibid. s. 30(2)(a).
[16] Ibid. s. 30(2)(b).
[17] Ibid. s. 30(2)(c).
[18] Ibid. s. 30(2)(d).
[19] Ibid. s30(2).(e).

[21] Ibid. s. 30(2)(f).
[22] Ibid. s. 30(3).

against natural law and a gross violation of the right of the woman or the prospective mother.[23] Umah[2425]

Notably, Sonnies' assertion which was aired on a widely broadcast TV programmed, Channels and Umah's position which was also captured in a widely circulated national daily may no doubt have far-reaching implication in creating legal confusion in the minds of many prospective individuals or couple that intent to venture into this landscape. Therefore, to ascertain the correctness of the statement, the Cable news went on a voyage of legal discovery to determine the validity of Sonnie's assertion. Questions were asked and responses elicited from selected legal minds. Some of the renowned lawyers interviewed includes Henry Akanwa, Olu Daramola (A Senior Advocate of Nigeria, SAN), Olutumbi Babayomi(a family lawyer), Awa Kalu (also a SAN). The responses were unanimously in disputing Sonnie's assertion as regard the import of sections 30 and 50 of the CRA and NHA with respect to the practice of surrogacy in Nigeria.

These legal minds contended that the fact that there is no legal framework for surrogacy in Nigeria, it cannot therefore be correct to say that the practice of surrogacy is outlaw in the country. This contention is predicated on the trite principle in our criminal jurisprudence which holds the view that it is only when a law criminalizes an act that same can be construe as crime, otherwise, criminal culpability cannot be infer.[26] To[27] He contended that section 50 of the NHA targets activities such as genetic engineering rather than legitimate practice of surrogacy.

On the whole, the Cable News delivered it verdict on the legality of surrogacy in Nigeria. The News outlet found that indeed surrogacy is neither legislated nor prohibited in Nigeria. This verdict was reached having regard to the responses elicited from renowned legal icons in the professions who looked at the issue dispassionately and made a finding based on the position of the law as it is. We aligned ourselves with the finding of the Cable News as well as the position elicited by the lawyers. Our position is anchored on the premise that, CRA did not mention the word 'Surrogacy" anywhere in its entire provisions and this cannot be construed or imported to have been incorporated therein. Furthermore, the definition section of both CRA and NHA makes no reference or mention the word "surrogacy." This is a testament to the fact that the respective legislations were not contemplated to regulate surrogacy in the country. For instance, the CRA mentioned adoption and fostering, but omitted the word 'surrogacy.' It is important to also emphasis that the gamut of the CRA is not to regulate family affairs or matters, but concern with children's issues. Family matters are regulated by Matrimonial Causes Act (MCA).

The law as rightly observed above is set out to ensure adequate protection of the right of the child. Therefore, criminalizing selling or hiring of child for whatever reason cannot be construe as prohibiting surrogacy as the gamut of surrogacy pertains to altruistic act of birthing a child through a third party that willingly consented to the process. This has nothing to do with the activities of criminal elements that translate the practice into baby factories where children are manufacture for commercial purposes. Such activities to our mind which raise ethical issue fall within the gamut of child's trafficking and not surrogacy as surrogacy deals with contractual arrangement that is strictly regulated by legal agreement wherein the respective rights and obligations of parties to same are defined and monitored. The mother agreed to the transaction legally without coercion and is only used as a conduit pipe to actualize the

[23]JanefrancesChibundu'Fact Check: Lawyer Claims Surrogacy is Illegal in Nigeria. How True'(CableNews, May, 4, 2024.

[25] Blessing Oladunjoye,'Surrogacy:Absence of Laws Spurs Unethical Practices in Nigeria(3)(Premium Times, 13th August, 2023).

[26]*STATE v. AZUMA & ORS* (2020) LPELR-50378(CA).

[27] Ibid.

parenthood dream of parents that are by reason of infertility or medical condition incapable of conceiving naturally.

Currently, there is no existing legal framework for the practice of surrogacy in Nigeria. This assertion has been severally corroborated by both legal and nonlegal scholars. Aguwa[28] for instance while agreeing that there is no legal framework for the practice of surrogacy in the country, observed that the absence of this legal structure poses challenges and risks for all parties involved in the process. He further contended that these lapses would expose the parties' vulnerability to exploitation, abuse, and legal dispute particularly as it [29]The Founder of Headfort Foundation, a pro-poor legal firm Oluyemi Orija[3031]

General Perception on the Practice of Surrogacy in Nigeria

It is important to underscore the fact that despite the absence of legal structure for the regulation of surrogacy in Nigeria, the practice of surrogacy in the country is thriving with 85 to 90 percent success rate.[32] Study in this research by IVF select showed that the success rate varies depending on the type of IVF adopted. For instance, in surrogacy using the commissioning parent's eggs and own sperms (gestational surrogacy) the success rate is 75 to 95%,[33] while surrogacy by donor eggs and own sperms (traditional surrogacy) 85 to 95%.[34] The study also revealed that in surrogacy using donor sperms and own eggs, the success rate is 80 to 90% whereas IVF and Embryo Transfer has the success rate of 85 to 90%.[35]

There are several medical clinics both private and government that are actively involves in this practice. some of the renowned hospitals actively engage in this revolutionary practice includes; Select IVF, Nordica Fertility Centre, Care Women's Clinic, Androcare Fertility Centre, We Care IVF Surrogacy, Bless World Eggs Donor and Surrogacy Agency, Prime Care Fertility Clinic, World Fertility Service, Continental Fertility Clinic, Medison Specialist Women's Hospital Fertility and many more. These fertility centres have over the years perform thousands of IVF in the country and restore hope and joy to many countries.

One of the discouraging factors in surrogacy process is the fact that the process is extremely expensive and only few wealthy individuals can afford the service. The cost of a single IVF is Nigeria is estimated within the range of $1000 to $2200.[36] A further breakdown showed that factors such as medication, location, infertility cause, additional procedure and pre-existing health conditions play significant role in determining the price of the procedure.[37] It was further revealed that surrogacy using own eggs and own sperms cost $1800 to $22000, while surrogacy by donor eggs and own sperms cost $19000 to $23000.[38]In the same vein, IVF and Embryo Transfer cost up to $5000 whereas surrogate mother selection and blood test and surrogate mother preparation cost up to $2500 while Normal Vaginal Delivery Cost is range within $1000.[39]Cesarean section or C-section Delivery cost up to $1200 to $2500 and lastly,

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[28]ChibuzoAguwa,'The Practice of Surrogacy in Nigeria: A Complex and Evolving Landscape (Nigerian fadi, Health, 11 April, 2023)

[29] Ibid.

[31]Oladunjoye(n19).

[32]Khusim'The Price of Parenthood: Comprehensive Guide Cost of Surrogacy in Nigeria 2024(Select IVF, August 16, 2024.

[33] Ibid.

[34] Ibid.

[35] Ibid.

[36]Ibid..

[37] Ibid.

[38] Ibid.

[39] Ibid.

Housing for Surrogate mother inclusive of food could cost up to $4000.[40]

No doubt having regard to the above figures, only the wealthy in the society can afford to explore the option of surrogacy to start a family. This will indeed affect the chances of many infertile couple from experiencing this opportunity to start a family most especially in where the rate of infertility is estimated at 32 percent of the entire population.[41]

Enforceability of Surrogacy Agreement in Nigeria

We have noted that there is no legal framework that regulates the practice of surrogacy in Nigeria. With this in mind, what then will be the legal basis for the enforceability of surrogacy contract in the country? In South Africa for instance, the legal framework in the country set requirements regarding the validity and enforceability of surrogacy agreement in the country; thus, for the agreement to be legally binding, a surrogate motherhood agreement must meet specific criteria, i.e., the agreement must be in writing and signed by all parties involved, It must be concluded in South Africa and confirmed by the High Court, at least one of the commissioning parents, or the sole commissioning parent, must be domiciled in South Africa at the time of entering the agreement and failure to comply with these formal requirements renders the agreement invalid and unenforceable in the country.

In jurisdiction like UK, Surrogacy agreements are unenforceable, hence, everyone relies on each other to honour the arrangement, both in respect of handing over the child and expenses and other issues. It is also against the law for a third party (including a solicitor) to negotiate a surrogacy contract for payment[42] whereas in India, for surrogacy Agreement to be enforceable, the contract must be drafted in compliance with the guidelines laid down by the National Surrogacy Board. The contract must address issues that relates to Informed Consent which entails the surrogate mother must give her informed consent to carry the child of the intended parents and he should be aware of the medical risks and emotional challenges involved in the surrogacy process, Eligibility Criteria, wherein the surrogate mother must fulfil the eligibility criteria laid down by the National Surrogacy Board; thus, she must be a willing candidate for surrogacy and should have given birth to at least one child. The agreement must also address Medical Tests wherein both the surrogate mother and the intended parents must go through a series of medical tests to make sure they are healthy enough to go through the surrogacy process. It must also contain Financial Terms. In this regard, the surrogacy contract should clearly outline the financial terms of the surrogacy arrangement. The intended parents must compensate all the medical expenses of the surrogate mother and lastly, Parental Rights wherein the surrogacy contract should also specify the parental rights of the intended parents. It is also expected that the agreement must contain provision for Dispute Resolution. Thus,[4344]

The above discourse shows that different countries have different requirements for the enforceability of surrogacy agreement. The question therefore is whether having regard to the absence of a legal framework that define legal parameters for surrogacy agreement, surrogacy contract enter between parties can be binding or enforceable between contracting parties. It is our humble opinion that the absence of legal framework in the country regarding surrogacy contract will not invalidate surrogacy contract since the practice is not expressly outlaw. Is a different ball game if the practice had been outlaw that would have renders the agreement

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[40] Ibid.

[41]Oluwatobi Joseph Alabi,' Perception of Surrogacy within the Yoruba Socia-Cultural Context of Ado-Ekiti, Nigeria[2020](3)(9)Pubmed Central'103.

[42]Ngalaw,'Surrogacy in the UK(UK Law)'<Surrogacy in the UK (UK law) - NGA Law>Accessed 10th November, 2024.

[44]RiSAAIVF,'SurrogacyAfeement and Document in India'<Surrogacy contracts & documentation in India - RISAA IVF>Accessed on the 20th November, 2024.

unenforceable. Under general principle of common law which has general application in Nigeria, contract legally entered between parties is enforceable. This principle is validated in the case of *Baliol (NIG) LTD v Navcon (NIG) LTD*[45] where the Apex Court held to the effect that "A valid contract thus existed, and once that is in place i.e.[46]" The natural question therefore is what is a valid contract?

The Court in the case of *Amana Suits Hotels* LTD v. PDP[47] held with regard to valid contract thus:

> The traditional view is that a valid contract requires the identification of a valid offer and a valid acceptance of that offer. An acceptance is a final and unqualified assent to all the terms of the offer and it must be communicated by the offeree to the offeror. In this case the offeror is the appellant. He offered the offeree, the respondent rooms in his hotel from 2nd to 6th January, 2003 at the cost of ₦1, 831,500. This is a valid offer. There is nothing in the Record of appeal to show a valid acceptance. In the absence of a valid acceptance there is no contract. The requirement of a valid offer and valid acceptance can be dispensed with if, and only if the parties were agreed on all material points.[48]

In the same vein, in the case of *Best (Nig) Ltd v Blackwood Hodge Nig Ltd &Anor*[49] the Supreme Court outlined the basic elements of a valid contract thus: "It is basic that to constitute a binding contract, there must be an agreement in which the parties are ad idem on essential terms and conditions thereof. The promise of each party must be supported by consideration." It then suffices that for a contract to be valid in the country, it must contain the elements outlined by the court in the authorities referenced above. With this understanding in mind, it is important to underscore the fact that surrogacy agreement is often contracted between three or more parties to the arrangement, i.e. the commissioning parents, surrogate mother and sometimes surrogate agency or the hospital. Often times, there is usually offer and acceptance but without consideration as the agreement is expected to be without consideration given that it is illegal to transact in human being in line with section 30 of the CRA and the fact that there is no legal framework that prohibit commercial surrogacy in the country, it is doubtful whether surrogacy agreements that is back by consideration will be consider unenforceable in the country.

It is therefore our candid opinion that, irrespective of the legal framework for surrogacy in Nigeria, surrogacy agreement that contain all the elements of a valid contract in the country is admissible. Though it would have been less complicated if there is in place a legal framework that defines the requirements for a valid and enforceable surrogacy agreement as obtainable in South Africa, as there are instances where an agreement can be valid, but unenforceable. Therefore, the presence of a legally define legal framework outlining the requirements for an enforceable agreement would have been more preferable.

The Practice and Legal Framework for Surrogacy in South Africa

South Africa is one of the countries in the globe that has in place a robust and comprehensive legal structure for the practice of altruistic surrogacy in the world. The legal framework in the

[45](2010) LPELR-717(SC).
[46]Per Aloma Mariam Mukhtar, JSC (Pp 17 - 17 Paras B - C).
[47](2006) LPELR-11675(CA).
[48]Per Olabode Rhodes-Vivour, JCA (Pp 38 - 38 Paras B - E).
[49](2011) LPELR-776(SC).

country prohibits commercial surrogacy. Thus, Chapter 19 of the Children's Act[50] set requirements for valid surrogacy agreement in the country. Surrogacy agreement which is described as a special kind of contract is defined by the Act thus:

> [a]n agreement between a surrogate mother and a commissioning parent in which it is agreed that the surrogate mother will be artificially fertilized for the purpose of bearing a child for the commissioning parent and in which the surrogate mother undertakes to hand over such a child to the commissioning parent upon its birth, or within a reasonable time thereafter, with the intention that the child concerned becomes the legitimate child of the commissioning parent.[51]

This definition is instructive because it identified the parties to the agreement, i.e. commissioning parents and the surrogate mother as well as set out the timeframe for the release of the childbirth through this process to the commissioning parents. There is also an implied undertaking by the surrogate mother to release the child to the commissioning parents after birth or within a reasonable time as may be agreed by parties. The definitions also narrow-down the type of surrogacy that is statutorily sanctioned in the country, i.e. gestational surrogacy as opposed to traditional surrogacy.

Having established the nature of surrogacy recognize in the country, it is important to emphasize that, it is not all form of surrogacy agreement or arrangement in the country that is valid. There are substantive preconditions for the validity of surrogacy in the country. These requirements are contained in section 292 of the CA and these includes the fact that the Surrogacy agreement must be in writing, signed by all parties; the parties must be domicile in the country or one of them living in the country and the agreement must be confirm by the court.[52]

By implication, the court play crucial role in the legal scrutiny and determination of the surrogacy agreement. While serving as the gatekeeper of the process, the court is expected to be guided by the following consideration in making the determination;

a. That the commissioning parents are incapable of giving birth to a child and the condition is permanent and irreversible;[53]
b. That the commissioning parents are competent and suitable to consummate the process in terms of accepting parenthood of the child conceived;[54]
c. That both the commissioning parents and the surrogate mother have accepted the legal consequences of the process;[55]
d. That the surrogate mother is not using the process as a source of income;[56]
e. The agreement is entered for altruistic purpose and not commercial;[57] and
f. The court must act on the basis that the surrogate mother has a documentary history of at least one pregnancy and viable delivery and has a living child of her own.[58]

Certainly, the legal confirmation of the surrogacy agreement by the court is at the core of a valid surrogacy agreement that climax the process. The Court in the case of *Ex parte Three Surrogacy Applications and Others*[59] affirmed this position. In its finding, the court held that the validity

[50]CA(n3).
[51]Ibid. s. 1.
[52]Ibid 292.
[53]Ibid. s. 295(i).
[54]Ibid. s 295(ii).
[55]Ibid. s 295(iii).
[56]Ibid. s 295(iv).
[57]Ibid. s 295(v).
[58] Ibid. s. 295(viii).
[59] [8749/22;9353/22;34190/22[2022] ZAGPPHC 848(25 October 2022.

of a surrogacy agreement in line with section 292 and 295 of the CA is depending upon the confirmation of the agreement by the Court. The Court further held that in such determination, the existing children of the commissioning parents and that of the surrogate mother must not be subjected to any clinical or psychological assessment. It was also held the burden is on the Applicants in filling for confirmation, to depose in affidavit attached to the application all relevant facts and documents cogent enough to sway the mind of the court into granting the application, otherwise, the court will decline in making the confirmation.

Another important requirement for surrogacy as provided in section 296 of the CA is that the process of fertilization will only commence after the agreement giving birth to the process is validly endorsed by the parties and confirm by the Court.[60] Thus, unlike adoption and fostering processes where the child could be release to the adoptive or fostering parents for bonding before the legal consummation of the process, in surrogacy, no fertilization or artificial insemination is allowed to take place prior to signing of the agreement defining the respective rights and obligations of parties to same. This was validated by the court in the case of Ex Parte[61] The facts of the case revealed that an infertile couple who intended to use surrogacy, but who had not yet found a surrogate mother, approached the court for a declaratory order that they could proceed with having embryos created in anticipation of the surrogacy pregnancy. While the court acknowledges that good reason exists for the commissioning parents to cryopreserve embryos rather than individual male and female gametes, the court held that the current legislative framework does not provide for that option.

The question therefore is what is the fate of a surrogacy process where the surrogate mother becomes pregnant before the confirmation by the court? Logically, the court will decline the confirmation and if this situation plays out, what will become the fate of the child conceived as a result of the process. This scenario played out in the case of *Ex Parte M.S Others.*[62] The facts of the case revealed that the Johannesburg High Court was confronted with a case wherein the surrogate mother was confirmed 33 weeks pregnant before the application for confirmation was filed which indeed was against the import of sections 292 and 303 of the CA, yet the court granted the confirmation order.

The case presented a different scenario from what was contemplated in the Act. For instance, the commission parents had previously attempted the process twice but failed. In those two attempts, the Applicants went through the procedure encapsulated in the Act and were accordingly confirmed by the Court. The first attempt was truncated by the surrogate mother who terminated the process, whereas the second attempt was affected by the surrogate mother's inability to conceive after she was artificially inseminated. This failure affected the Applicants trust in the process and when the surrogate mother in the third attempt offered to help the Applicants, they were discouraged, and it took them time to accept the offer. To ensure that the process will not flop as did the previous attempts, the Applicants venture into the arrangement as trail and had the surrogate mother inseminated on the basis of verbal agreement and when it turns out to be fruitful, the Applicants approached the court for legal confirmation of the process.

The Court in the determination of the process found that this scenario presents a situation that was not envisages by the law as the provisions of the law on surrogacy does not provide for this scenario. The court found that the Applicants had previously complied with the provisions of the CA and indeed, their action for not approaching the court for legal confirmation of the third procedure was justified given their previous experiences on the issues

[60]Ibid. s 296(1).
[61]DonrichThaldar,'Performing IVF for Surrogacy before Confirmation of the Surrogacy Agreement by the Court: A Critical Analysis of Recent Case Law in South Africa'[2023](10)(15)*Humanities and Social Sciences Communications.*
[62] (48856/2010([2014]ZAGPPHC457(2 December, 2013).

and the failures encountered. In this respect, the court ignored the provisions of the act and confirmed the process, even though the 1st Applicant was confirmed 33 weeks pregnant before the legal confirmation of the process.

Effect of Surrogacy Agreement

The legal framework in South Africa clearly outlined the legal effect of a valid surrogacy agreement that is confirmed by the Court, and these include the following legal consequences;

a. The child becomes the child of the commissioning parents from the moment of birth;
b. The surrogate mother most hand over the child to the commissioning parents as soon as possible after birth;
c. The surrogate mother, parents, relatives, or associate have no parental right over the child, but the commissioning parents;
d. The surrogate mother or her family has no right to contact the child conceived through this process.
e. The surrogate mother cannot terminate the process after artificial insemination.
f. The child will have no right of succession over the surrogate mother.

This area of the agreement could evoke ethical and social problem. It is often easier for gestational surrogacy than traditional surrogacy where the mother is genetically link to the child. Indeed, where the surrogate mother is genetically link to the child, the above-mentioned conditions may not apply, as the surrogate mother cannot possible be expected to disconnect from the child from the moment of birth or the child cease to have anything to do with her. The law could have categorized the legal effect of surrogacy under two head, gestational and traditional surrogacy which would have to our mind address these concerns. The rationale for our argument is anchored on the fact that, while under gestational surrogacy, the surrogate mother is not in any way connected to the child for reason of not contributing anything genetically to the child's formation, under traditional surrogacy however, the surrogate mother is part of the process, as her egg or gamete is instrumental to the formation of the child, thus, should have a say in the upbringing of the child and this position was validated by the Act which allowed a traditional surrogate the right to terminate the agreement after giving birth to the child by filing a notice with the court which may or may not be confirm having regard to the circumstances of the case[63] and the legal effect of such termination is that the mother will not be liable to pay damages except compensation in terms of section 301 of the Act which pertains to loss of earning and monies incurred in the process.

Termination of Surrogacy Process

The legal framework in South Africa empowers the surrogate mother with the vires to terminate the surrogacy agreement on certain basis. For instance, where the surrogate mother elect to terminate the agreement in terms of section 298 of CA, the legal consequences of the decision is to the effect that the process will be considered terminated and any parental right that arises in terms of section 297 of the Act will equally stands terminated and the right to hold the child will become vested in the surrogate mother and not the commissioning parents. This is only operational to traditional surrogacy as against gestational surrogacy.[64] Similarly, where the agreement is terminated under this arrangement before the child is born, the child will become the child of the surrogate mother, her husband or her [65]The[6667]

The surrogate mother is also invested with the right to terminate the pregnancy.

[63]Ibid. s. 298.
[64]Ibid. s. 299(a).
[65]Ibid. s. 299(b).

[67]Ibid. s. 299(c and d).

However, before this right can be exercise, the surrogate mother must notify the commissioning parents of this development and sought for their consent to actualize this intention. The law further provides that the right of the surrogate mother to terminate the pregnancy is conditioned upon a life threatening medical condition that could lead to death or disability of the surrogate mother and in so doing, no liability will arise against the surrogate mother.[68] Furthermore, section 301 of the Act barred the mother from receiving any monetary compensation whether in cash or kind as a result the process except for loss of earning, medical expenses incurred in the process or insurance that may lead to death or disability.[69] The law also guaranteed the secrecy of the process by prohibiting the identities of the parties to the process from being publicize without their consent, though there is no penalty attached to persons that violate this provision.[70]

CONCLUSION

As rightly seen from the paper, surrogacy has gained traction worldwide and today many developed and developing countries have put in place legal and regulatory framework necessary to regulate this practice and Nigeria should be an exception. The legal framework in South Africa, Britain and India is worth emulating. This will indeed give the practice which is widely done in most hospitals in the country inclusive of government and private legitimacy and restore sanity and confidence in the practice. This revolutionary method that afford infertile couple alternative route to parenthood is a welcome development that Nigeria as a country must take very seriously as this will go a long way in bringing peace and succour to families that desire to experience joy of parenthood but due to one medical complication or the other had robbed them of this opportunity.

RECOMMENDATIONS

a. It is recommended that the Child's Right Act be amended to incorporate provision for surrogacy in the country which is indeed long overdue.
b. It is recommended that chapter 19 of the Children Act in South Africa be replicated in Nigeria's Child Right Act to allow for the practice of surrogacy in the country with the same requirements.
c. It is also recommended that the legal position as obtainable in India with regard to registration of surrogacy centre to codify in Nigeria to monitor the process.
d. It is further recommended that the legal framework in Nigeria should recognize both gestational and traditional surrogacy to accommodate all situations.

[68]Ibid. s.300.
[69] Ibid. s.301(a-c).
[70]Ibid. s. 302.