



The law of surrogacy in Nigeria: A comparative analysis with the law in United Kingdom

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Abstract

Surrogacy as an alternative method of reproduction is carried out when a woman carries and delivers a baby for another resulting from infertility and executed by an agreement between the parties. It is used to give hope to couples who desire to have children of their own. In some jurisdictions such as the United Kingdom and the United States, surrogacy is recognized and fully regulated. In Nigeria, however, surrogacy has not been fully embraced and there are still reservations in some quarters regarding the procedure due to cultural and moral reasons. Surrogacy arrangements in Nigeria is largely unregulated, hence, the Bill by the House of Representatives to establish a Commission to regulate Surrogacy arrangements in Nigeria was received with excitement. The aim of this article is to examine the Nigerian Surrogacy Regulatory Commission Bill, displaying how it seeks to regulate surrogacy agreements in Nigeria. Using the doctrinal method, this article examined journals, text books and newspaper publication on surrogacy in order to determine how surrogacy agreements are created. A comparative study of the law in Nigeria and the law in the United Kingdom was also carried out, highlighting areas of convergence and divergence between the laws in both jurisdictions. The work concluded by recommending that in resolving disputes arising from surrogacy agreements, Alternative Dispute Resolution mechanisms should be adopted in order to ensure that the confidentiality of the parties to the agreement and the welfare of the child is protected. This will also encourage more parties to enter into surrogacy arrangements.

Keywords: Surrogacy, Nigeria, regulation, comparative analysis, alternative dispute resolution (ADR)

Introduction

In recent times, surrogacy has gained increased attention all over the world and many countries such as the United Kingdom have taken divergent views in regulating and monitoring surrogacy arrangements in their jurisdictions. Unfortunately, the concept of surrogacy is yet to be fully accepted in Nigeria because of the diversity of our values, beliefs, culture and religion. Consequently, most persons who engage in surrogacy arrangements in Nigeria may not want to disclose this information for fear of societal disapproval. Whilst most women would love to have children of their own, unfortunately, many women due to infertility and physiological conditions are unable to procreate. Historically, alternative reproductive methods have been used to aid traditional women in having their own babies. For example, in most rural communities in Nigeria, women who have difficulties conceiving usually marry younger women who assist them to have children for their husbands. They also adopt other means in order to keep the lineage and maintain the family name. However, these arrangements are usually based on an understanding between the parties without any formal agreement.

However, with the advance in medicine, surrogacy in Nigeria is now recognized as an altruistic method of Assisted Reproductive Technology provided on clear request by the commissioning parent or parents. Although there is no specific law regulating surrogacy in Nigeria, there are however, various regulations that provide ethical guidelines for couples who wish to partake in the procedure. For example, the Ethical Guidelines by the Association for Fertility and Reproductive Health which is in line with the Human Fertilization and Embryology Act (HFEA) 2008, which being an English legislation is applicable as a guide in Nigeria^[1]. This Guideline is usually used by legal practitioners in formulating surrogacy agreements and

contracts in Nigeria. The Bill passed by the House of Representatives seeking to establish the Nigeria Surrogacy Regulatory Commission (NSRC) 2024, for monitoring and supervision of surrogacy arrangements in Nigeria was therefore received with so much enthusiasm. The Bill which aims at protecting the interest and rights of the parties engaged in surrogacy arrangements and related matters is a laudable development. This work therefore aims at examining the Bill passed by the National Assembly with a view to carrying out a comparative study with the law of Surrogacy in United Kingdom.

Surrogacy

The word surrogacy is derived from the latin word "Subrogare" which means "appointed to act in the place of", it means substitute^[2]. Surrogacy can therefore be defined as an arrangement whereby a woman agrees to hold pregnancy for a person or couple who is unable to bear a child. It gives hope to many couples who desire to have a child of their own. It is an arrangement whereby a woman agrees to bear a child for another person or couple, who will become the child's legal parent's after birth. In a surrogacy arrangement, a woman agrees to carry and deliver a baby for another by an agreement which is executed between the parties.

Surrogacy can be seen as an agreement where a woman (the surrogate mother) agrees to hold pregnancy and bear a child for another person or persons (the commissioning parents) of whom the custody of the child will be assigned directly after birth^[3].

It has been defined as

An arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with

the intention of carrying it to term and handing over the child to the person or persons for whom she is acting as surrogate; and a surrogate mother is a woman who agrees to have an embryo generated from the sperm of a man who is not her husband, and the oocyte for another woman implanted in her to carry the pregnancy to full term and deliver the child to its biological parents^[4].

Surrogacy has also been said to be a contractual undertaking whereby the natural or surrogate mother, for a fee, agrees to conceive a child through artificial insemination with the sperm of the natural father, to bear and deliver the child to the natural father, and to terminate all of her parental rights subsequent to the child's birth^[5].

Surrogate motherhood is the practice in which a woman (the surrogate mother) bears a child for a couple unable to produce children in the usual way^[6].

Surrogacy is preferred by most couples or women because it affords them the opportunity of having a child that is genetically connected to both or one of the parents although not conceived through the basic process of childbirth and child birth. Surrogacy is also referred to as mothering by proxy.

Regulation of Surrogacy in Nigeria

In Nigeria, surrogacy is recognized as an altruistic method of Assisted Reproductive Technology provided on clear request by the commissioning parents. There is no specific law regulating surrogacy, however, there are various regulations that provide guidelines for couples who wish to partake in the procedure in Nigeria. For example, the Nigeria Law Reform Commission and the Ethical Guidelines by the Association for Fertility and Reproductive Health which is in line with the Human Fertilization and Embryology Act (HFEA) 2008, which being an English legislation is applicable as a guide in Nigeria^[7].

In line with the Ethical Guidelines by the Association for Fertility and Reproductive Health, a surrogacy agreement in Nigeria will contain the following:

1. Clinics that offer surrogacy services, must maintain records of all treatment.
2. The clinics are to advise the commissioning parents of the position of the law on the procedure
3. The clinics will counsel and assess the mental state of the surrogate and the commissioning parents, so as to prevent exploitation.
4. The commissioning parents who are providing the gametes must be screened in line with regulations on gamete donation.
5. The surrogate is also expected to be of legal age, with two successful live births, and no obstetric risks experienced.
6. It is also expected that where the surrogate is married, her husband should be a part of the counselling and consent process and
7. For contractual justifications and likely disputes, valid consent and identity objects are expected to be collected and recorded before the commencement of treatment.

Furthermore, the Law Reform Commission, provides that where a child is born under a surrogacy agreement, the commissioning parents should formally adopt the child, even if the child is the biological child of the commissioning parents^[8]. The rationale behind this is to prevent the surrogate mother from returning to claim the child. These

regulations serve as a guide to parties making surrogacy agreements in Nigeria.

The move by the House of Representatives to pass a Bill to establish the Nigerian Surrogacy Commission in order to regulate surrogacy arrangements in Nigeria is laudable. This work will now carry out an analysis of the Surrogacy Bill in Nigeria.

An Analysis of the Surrogacy Regulatory Commission Bill 2024

The Surrogacy Regulatory Commission Bill 2024, proposes a regulatory framework for the Monitoring and Supervision of Surrogacy Arrangements in Nigeria. The Bill provides for the Registration and Monitoring of Surrogacy agencies in Nigeria, and Commission is vested with the following responsibilities.

- a. Registering surrogacy agreements.
- b. Monitoring and Supervising surrogacy arrangements to ensure compliance with this Bill
- c. Establishing guidelines for the ethical conduct of Surrogacy Arrangements.
- d. Providing guidance and counselling to parties involved in surrogacy arrangements.
- e. Investigating and resolving disputes arising from Surrogacy Arrangements^[9].

The Commission is also mandated to establish and maintain a Surrogate Registry for the registration of all surrogate arrangements in Nigeria^[10]. All surrogate agencies shall be registered with the Corporate Affairs Commission (CAC), and the Nigeria Surrogacy Regulatory Commission^[11]. Any person or entity who operates a surrogacy agency without being registered with the commission shall be liable upon conviction to a fine not exceeding ₦1,000,000 or imprisonment for a term not exceeding 5 years or both. Registered Surrogacy Agencies in Nigeria are also required to establish and maintain a private registry of all parties involved in surrogacy arrangements, and the private registry shall include information such as names, addresses and contact details of the surrogate and intended parents^[12]. Surrogacy for commercial purposes is prohibited^[13], and any person who offers or receives any payment, benefit or consideration in exchange for arranging a surrogacy, acting as a surrogate or entering into a surrogacy arrangement is guilty of an offence and liable to penalties as prescribed by this Act.

Furthermore, only married couples or a single person who have been medically certified as unable to conceive or carry a child to term are eligible to enter surrogacy arrangement^[14], and the minimum age for a woman to act as a gestational or genetic surrogate shall be 21 years^[15]. Any person who contravenes the minimum age requirement for surrogates shall be guilty of an offence and liable upon conviction to a fine not exceeding ₦500,000 or imprisonment not exceeding 3 years or both. Surrogacy arrangements in Nigeria must be made voluntarily based on the informed consent of all parties involved, including the surrogate, the intended parents and the surrogate's spouse if applicable^[16]. The agreement must be in writing and signed by all parties and outlining the rights, responsibilities and obligations of each party, including provisions for medical care, compensation and the legal status of the child^[17]. The agreement must also be registered with the Commission before the commencement of the surrogacy arrangement^[18].

It is also mandatory for the intended parents and the surrogate to undergo medical and psychological evaluations to assess their physical and mental suitability for the surrogacy process before entering into the arrangement^[19]. Every surrogacy agreement shall be notarized by a notary public or executed before the commissioner for oath^[20]. This study submits that the above provisions are robust and will ensure that surrogacy arrangements in Nigeria are in compliance with internationally recognized ethical, medical and legal standards.

An Analysis of Surrogacy Laws in the UK

The United Kingdom was one of the first countries to pass a law regulating surrogacy in 1985. The first law regulating surrogacy in the United Kingdom was made in 1985. This law was made in response to the publicity of a high-profile surrogacy in the UK by a woman named Kim Cotton. She had received payment for carrying a child for a foreign couple. This case was the first paid surrogacy in the UK, and therefore created so much controversy because there was no law surrounding the process. When the baby was born because of the attention the case received, it was kept in a hospital for a week while a juvenile court decided whether Cotton or the intended parents should care for her. It was in response to this that the United Kingdom passed the Surrogacy Arrangement Act (1985).

The Surrogacy Arrangement Act 1985

This Act created a number of criminal offences in respect of commercializing surrogacy^[21], advertising for a surrogacy or willingness to be a surrogate, and placed restrictions on third parties brokering surrogacy arrangements for a fee^[22].

The Human Fertilization and Embryology Act 1990

This law introduced Parental Orders^[23]. Parental orders enabled intended parents of children born through surrogacy to establish their legal parentage without the need to adopt. Under this law, parental orders could only be obtained by married heterosexual couples. The law also provides that surrogacy arrangements in the UK would not be unenforceable^[24].

The Human Fertilization and Embryology Act 2008

The 1990 Act was amended to expand the scope of people eligible for a parental order to include unmarried couples, same sex couples or couples in civil partnership and single parents^[25].

In the United Kingdom, the surrogate mother (even if not the genetic mother) is the child's legal mother, and the following criteria must be met before a court can grant a parental order:

1. The child must have been born through surrogacy (carried by a woman who is not one of the applicants).
2. The gametes of at least one of the applicants must have been used in the creation of embryo.
3. If applying as a couple, the applicants should be married, in a civil partnership or living as partners in an enduring family relationship.
4. The application should be made within six months of birth.
5. The child's home must be with the applicant at the time of the application and making the order.
6. At least one of the applicants must be domiciled in the UK, Channel Islands or Isle of Man.

7. The surrogate (and any other legal parent) must freely, and with full understanding of what is involved, agree unconditionally to the making of a parental order.
8. The surrogate's consent is not valid if given before the child is six weeks old.
9. The consent of a surrogate or any other legal parent is not required if they cannot be found or is incapable of giving agreement.
10. At the time of making the order both the applicants must have attained the age of 18
11. The court must be satisfied that the surrogate has not received any payment other than for "reasonable expenses incurred"^[26]. If the surrogate has received payments in excess of reasonable expenses, the courts must authorize the payments retrospectively.
12. The court must have regard to the child's lifelong best interest when making a parental order.

Proposed Reform in the UK

In March 2023, the Law Commission (England & Wales and Scotland), published its report, Building Families Through Surrogacy: A New Law. The report recommends a number of reforms to the existing law on parental order.

Aims of the proposed report include:

1. To permit surrogacy to continue to operate on an altruistic basis (rather than a commercial basis).
2. To enable intended parents in some circumstances to be recognized as the legal parents of their child from birth, as long as that remains the wish of the surrogate, while protecting the surrogate's autonomy throughout pregnancy and childbirth.
3. To ensure that critical screening and safeguarding measures are taken for the surrogate and intended parents before conception^[27].
4. To provide support to all parties in their decision to enter a surrogacy agreement.
5. To ensure that the welfare of the child is paramount in making surrogacy decisions.
6. To encourage more people to stay within the United Kingdom rather than enter into overseas arrangements.

Comparative Analysis of the Nigerian Surrogacy Bill and the UK Surrogacy Laws

Both the Nigerian Surrogacy Bill and the United Kingdom laws provide for consent of all the parties involved in the surrogate arrangement that is, the surrogate, the intended parents and any other relevant party.

The law in Nigeria as well as the UK Surrogacy laws prohibit commercial surrogacy. However, while the Bill in Nigeria seems to prohibit all persons from commercializing surrogacy, the Surrogacy Arrangement Act 1985, provides that it shall not be an offence for a surrogate mother or intended parents to engage in commercial surrogacy. The Act only makes it an offence for third parties to benefit from Surrogacy arrangements.

Whilst the Human Fertilization and Embryology Act 1990, makes surrogacy arrangements entered into in the UK unenforceable, there is no such provisions under NSRC Bill 2024. The Bill rather provides that the surrogacy agreement must be in writing and signed by the parties, it must be made with the informed consent of all parties involved and registered by the NSRC. From the foregoing, it is clear that it is the intention of the law makers that the agreement should be enforceable.

Furthermore, under the Human Fertilization and Embryology Act, 2008, a parental order must be obtained from the court by intended parents in order to transfer the parental rights in the child to the applicants, there is no such requirement under the Nigerian Bill. The implication is that the intended parents are the legal parents of the child born through surrogacy. This position is buttressed by Clause 20 which defines surrogacy as an arrangement whereby a woman agrees to bear a child for another person or couple, who will become the child's legal parents after birth. Whilst, the HFEA 2008, provides that the minimum age for a surrogate is 21, and the age for intended parents is 18, the Nigerian Bill puts the minimum age for both the surrogate and the intended parents at 21.

Conclusion and Recommendation

The Nigerian Surrogacy Regulatory Bill 2024, is a laudable development as it will provide a comprehensive legal framework for monitoring and supervising surrogacy arrangements in Nigeria. The Bill aims to protect the rights and interest of people entering surrogacy agreements in Nigeria which includes the surrogate, the intended parents and other relevant parties to the surrogate agreement. This work submits that the provision mandating parties entering surrogacy arrangements to undergo physical and psychological evaluation is a great initiative as it will ensure that parties are physically fit and of sound mind at the time they entered into the surrogacy agreements. Similarly, the indication by the Bill that the intended parents will be recognized as the legal parents upon the birth of the child is also a step in the right direction as it will not only dispense with the need for a parental order but will also ensure that children born through surrogacy are not born into uncertainty. In sum, this legislation will educate people on the surrogacy process whilst encouraging couples to make informed decisions before entering into surrogacy arrangements.

Having examined the above laws, to ensure that there is adequate protection of the interest of the parties to a surrogacy arrangement, this work makes the following recommendations:

1. Surrogate mothers should be compensated and the provision prohibiting commercial surrogacy should exempt surrogate mothers and intended parents. This will encourage more women to act as surrogates for couples who are desirous of having children.
2. In addition to physical and psychological evaluation, there should be criminal evaluation of the parties before entering the agreement. This will ensure that parties to a surrogacy arrangement are properly screened before the agreement is created.
3. It is also recommended that Alternative Disputes Resolution Mechanism be adopted in resolving disputes arising from surrogacy arrangements. This will not only protect the confidentiality of the parties concerned but will ensure that there is speedy resolution of the dispute.
4. The services of a lawyer should be enlisted in drafting surrogacy agreements in order to ensure that the parties get expert advice and their interest adequately protected.
5. In preparing surrogacy agreements, the best interest of the child should be given paramount consideration at all times.

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13. ibid Clause 9
14. Ibid Clause 10
15. ibid Clause 11(1)
16. ibid Clause 12(1)
17. NSRC Bill Clause 12(2)
18. ibid Clause 12(3)
19. Ibid Clause 13
20. ibid Clause 14(1)
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22. Ibid s3(1)
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24. Ibid s36
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