



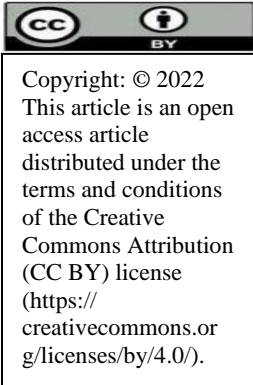
## THE ETHICAL, LEGAL, AND SOCIAL CONSIDERATION OF SURROGACY IN NIGERIA AND GHANA

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### Article

#### Abstract

Surrogacy has brought tremendous joy and satisfaction to several African families and African homes that have generally struggled with childbearing. It has in fact saved millions of infertile couples who would have been subjected to societal ridicule, shame, and rejection due to the fact that African societies consider the inability to procreate as a disability and waste no time in concluding that the woman is barren in the circumstance with enormous tension on them to produce offspring. However, despite the happiness, positivity, and benefits surrogacy arrangements seem to bring to couples, there are numerous issues that are constantly arising, specifically as regards the legal, ethical and societal challenges these arrangements pose which must not be overlooked. These issues are germane not just because of the severeness of the activity surrounding surrogacy arrangements but the implications and impacts it has on both the stakeholder and lawmakers who are duty-bound to ensure the legitimacy and general suitability of surrogacy practices in their various jurisdictions. This is particularly more important in Africa where there is an alarming level of unethical, inimical, and insalubrious practices that usually undermine the fundamental human rights of citizens without real value for human lives. It is therefore very vital, as evident in the analysis of this chapter, to reflect on the ethical, legal, and social concerns packaged with surrogacy activities in Africa, with focus on Nigeria and Ghana.



**Keywords:** Surrogacy, legal, ethical and societal challenges.

### 1.0 INTRODUCTION

Generally, in Nigeria and Ghana, surrogacy practices have raised ethical, legal, and societal issues as the practice is not unpopular in Africa. While many jurisdictions around the world have successfully legislated on it and created laws and policies to regulate surrogacy practices within their jurisdictions, the same cannot be said about Nigeria and Ghana in

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this respect. This is the present reality of the two countries despite having similar challenges faced by the countries already regulating surrogacy practice.

Ethically, the unavailability of laws has made surrogacy practices in these countries morally questionable because most of the parties to surrogacy get themselves involved out of desperation to produce offspring and struggle for survival without ethical guidelines to control their conducts<sup>1</sup>. Furthermore, an unregulated surrogacy practice has warranted a “practice-by-all” as there are many unverified entities carrying out the practice in these countries.<sup>2</sup> Surrogacy practice also raises the societal issues like the risk of exploiting the poor for commercial surrogacy which usually comes in form of “baby factories”, and this is becoming even more rampant<sup>3</sup>.

It is thus, imperative to consider these pertinent issues surrounding surrogacy practices in this chapter as it directly impacts the lives, rights and the society at large of both Nigerians and Ghanaians. The chapters will therefore attempt to expose and dissect these ethical, legal and societal issues surrounding surrogacy practices in both Nigeria and Ghana. The second chapter outlines and explains the types and forms of surrogacy, the third and fourth chapters focus on these ethical, legal and social concerns of surrogacy affecting both Nigeria and Ghana while the fifth chapter proffers solutions and recommendations to these issues.

## 2.0 CONCEPT OF SURROGACY

### i. Definition

Surrogacy is called “*Surrogatus*” in Latin which means a substitute, that is, a person appointed to act in the place of another<sup>4</sup>. According to the Black's Law Dictionary, surrogacy means the process of carrying and delivering a child for another person<sup>5</sup>. Surrogacy is described as a procedure in which a woman (a surrogate) bears a child for another person (the commissioning or intended parents) with the intention of handing the child over to the commissioning parent at delivery<sup>6</sup>.

Brazier, Golombok and Campell<sup>7</sup> further defined surrogacy as “the practice where a woman (a surrogate) carries a child for another person (s) (the commissioning or intending parent) due to a prior agreement that the child would be handed over to the commissioning parent at birth”<sup>8</sup>.

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<sup>1</sup> <https://punchng.com/poverty-compassion-made-us-carry-pregnancies-for-fellow-women-nigerian-surrrogate-mothers/> (accessed 8<sup>th</sup> August, 2021)

<sup>2</sup> <https://www.africanews.com/2018/12/27/nigeria-surge-in-surrogacy-despite-lack-of-legislation//> accessed 5 April 2022

<sup>3</sup> Nigeria shuts down “baby factory” by Ibrahim Garba, <https://thenationonlineng.net/ivf-female-undergraduates-now-exchanging-their-reproductive-eggs-for-money/> accessed on 25 August, 2021

<sup>4</sup> <https://thenationonlineng.net/ivf-female-undergraduates-now-exchanging-their-reproductive-eggs-for-money/> (accessed 25<sup>th</sup> August, 2021) accessed on 5 April 2022

<sup>5</sup> Oliphant RE. New York: Aspen Publishers; 2007. Surrogacy in Black law dictionary, family law; p. 349.

<sup>6</sup> M., Brazier, S., Golombok, A., Campbell, ‘Surrogacy: review for the UK Health Ministers of current arrangements for payments and regulation’, *Human Reproduction Update* 1997, Vol. 3, No. 6 pp. 623–628 <accessed at <https://academic.oup.com/humupd/article-pdf/3/6/623/1704754/030623.pdf>>

<sup>7</sup> Ibid.

<sup>8</sup> <https://www.mondaq.com/nigeria/family-law/840674/legal-approach-to-surrogacy-in-nigeria> accessed 20 August 2021.

## 2.1 TYPES OF SURROGACIES

Surrogacy can be mainly classified into two, namely; traditional and gestational<sup>9</sup>. The distinctive in both types lies in the genetic source of the egg.

### i. Traditional Surrogacy

In traditional surrogacy, which is otherwise referred to as natural or straight surrogacy, the eggs of the surrogate and the sperm of the intended or commissioning father or a donor is used for fertilization and since the surrogate's eggs were utilized, the resultant babies are biologically hers. Insemination of the surrogate can be done either spontaneously or artificially, hence, insemination with the intended father's sperm will result in a baby who is genetically linked to the intended father and the surrogate.<sup>10</sup> Using a spouse's sperm is desirable since there are less legal issues, however it should be emphasized that while using sperm from a deceased husband is lawful, it is riddled with issues surrounding the child's rights in respect to the father.<sup>11</sup>

Insemination is often conducted at doctors' offices or fertility clinics, and it can also be done by the parties themselves without the involvement of a third party (physician). When donor sperm is used, some States require the intended parent to go through a formal adoption procedure in order to gain parental rights to the child.

### ii. Gestational Surrogacy

Gestational surrogacy takes place when the surrogate mother does not contribute genetically to the conception of the baby. Here, the surrogate is strictly the carrier of the pregnancy.<sup>12</sup> The absence of biological or genetic relationship between the surrogate and the child distinguishes gestational surrogacy (also known as host or full surrogacy)<sup>13</sup> from traditional surrogacy.<sup>14</sup> This is because unlike in traditional surrogacy, which involves usage of the surrogate's egg, gestational surrogacy depends on egg donation from a third party.<sup>15</sup> Another difference is that the gestational type of conception demands a different medical procedure. It relies on *In Vitro Fertilization* (IVF), a

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<sup>9</sup> Ibid.

<sup>10</sup>Kalsang Bhatia *et al's Surrogate Pregnancy: An Essential Guide for Clinicians*, 11(1) OBSTET. & GYNECOL. 49-54(2008).

[https://www.researchgate.net/publication/227847989\\_Surrogate\\_pregnancy\\_an\\_essential\\_guide\\_for\\_clinicians](https://www.researchgate.net/publication/227847989_Surrogate_pregnancy_an_essential_guide_for_clinicians) accessed on 5 April 2022

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[https://www.researchgate.net/publication/227847989\\_Surrogate\\_pregnancy\\_an\\_essential\\_guide\\_for\\_clinicians](https://www.researchgate.net/publication/227847989_Surrogate_pregnancy_an_essential_guide_for_clinicians) accessed on 5 April 2022

<sup>12</sup>[https://www.researchgate.net/publication/227847989\\_Surrogate\\_pregnancy\\_an\\_essential\\_guide\\_for\\_clinicians](https://www.researchgate.net/publication/227847989_Surrogate_pregnancy_an_essential_guide_for_clinicians) accessed on 5 April 2022

<sup>13</sup> Susan Imrie & Vasanti Jadvia, *The Long-Term Experiences of Surrogates: Relationships and Contact with Surrogacy Families in Genetic and Gestational Surrogacy Arrangements* 29(4) REPROD. BIOMED. ONLINE 424 – 435 (2014).

<sup>14</sup> Lack of genetic relationship between the surrogate and the child is the reason this type of surrogacy has been described as “womb-leasing.” See STAUCH, et al., *supra*, note 8.

<sup>15</sup> Gestational surrogacy provides a treatment option for women with clearly defined medical problems such as absent uterus, recurrent miscarriage, repeated failure of IVF and other conditions. See Peter R. Brinsden, *Gestational Surrogacy*, 9(5) HUM. REPROD. UPDATE 483 – 491 (2003).

treatment that was first made available in 1978.<sup>16</sup> IVF includes creating an embryo from the intended mother's (or donor's) egg and the intended father's (or donor's) sperm, which is then transferred to the surrogate.<sup>17</sup> Traditional surrogacy is generally done through *Artificial insemination* (AI), which uses Intrauterine Insemination, however, IVF is not restricted to gestational surrogacy and may be utilized in traditional surrogacy as well *Intrauterine insemination* (IUI).<sup>18</sup>

In strict medical context, gestational surrogacy can take different forms, all of which result in a baby who is not genetically connected to the surrogate. It could take any of the following forms:<sup>19</sup>

- a) The intended father's sperm and the planned mother's eggs are used to form the embryo.
- b) The embryo is produced using sperm from the intended father and an egg from a donor.
- c) The embryo is created using the intended mother's egg and donor sperm.
- d) A surrogate is used to transfer a donor embryo, which could be an excess embryo from another IVF procedure<sup>20</sup> is transferred to the surrogate and intended father, in which case the child will be genetically unrelated to the intended parents (s).<sup>21</sup>

## 2.1 FORMS OF SURROGACY ARRANGEMENTS

Surrogacy arrangements can take two different forms, namely; Commercial Surrogacy and Altruistic Surrogacy. These two forms can come under either gestational or traditional surrogacy. This is important as sourcing or getting a volunteer to act as a surrogate can be extremely difficult. Furthermore, the laws in some countries to tally criminalize some forms of surrogacy arrangements.

### i. Commercial Surrogacy

Commercial Surrogacy entails agreeing to carry a pregnancy for another couple and then returning the conceived baby to the couple who commissioned the surrogate mother after being paid. It is based on the parties signing a contract stating that custody of the child will be given to the

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<sup>16</sup> Carla Spivack, *The Law of Surrogate Motherhood in the United States*, 58 AM. J. COMP. L 98 (2010). See also FREMGEN, *supra* note 17, at 300 (2016) (stating that IVF treatment continued to be considered experimental until the early 1990s).

<sup>17</sup> FREMGEN, *id.* (projecting IVF as an option for couples with viable reproductive cells (ovum and sperm) but unable to achieve conception through sexual intercourse).

<sup>18</sup> Surrogate.com, *Traditional vs Gestational Surrogacy – What's Best for my Family?*

<https://surrogate.com/about-surrogacy/types-of-surrogacy/traditional-vs-gestational-surrogacy-whats-best-for-my-family/> accessed on 25 October, 2021

<sup>19</sup> The key factor is that the egg of the surrogate is not used.

<sup>20</sup> Ultimate disposition of excess embryo could be problematic in some instances such as where the couple are divorcing and there's no agreement as to custody. See, for example, *Davis v. Davis* 842 S.W.2d 588 (Tenn. 1992) (Tenn. Sup. Ct.): In summary, we hold that disputes involving the Disposition of pre-embryos produced by in vitro fertilization should be resolved, first, by looking to the preferences of the progenitors. If their wishes cannot be ascertained, or if there is dispute, then their prior agreement concerning Disposition should be carried out. If no prior agreement exists, then the relative interests of the parties in using or not using the pre-embryos must be weighed. Ordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the pre-embryos in question. If no other reasonable alternatives exist, then the argument in favor of using the pre-embryos to achieve pregnancy should be considered. However, if the party seeking control of the pre-embryos intends merely to donate them to another couple, the objecting party obviously has the greater interest and should prevail. *Id.* at 604. The Court ruled that the preembryos should be destroyed. See also FREMGEN, *supra* note 17 at 300.

<sup>21</sup> Brinsden, *supra* note 21.

commissioned couple when the child is born. The contract often stipulates that the surrogate mother will be paid, that the conceived baby will be handed over to the assigned couple, that the pregnancy will not be aborted unless medically necessary, and that the surrogate mother will not engage in any other detrimental behaviours throughout the pregnancy.

However, the absence of legislation has raised a serious question as to whether surrogacy contracts are enforceable or not, and experts hold divergent views on this dilemma.<sup>22</sup> Enuma, championing the anti-enforcement argument claims that surrogacy contracts are not enforceable in Nigeria.<sup>23</sup> Disagreeing with Enuma and advocating the enforceability of surrogacy contracts, Chukwusa argued that surrogacy of contracts are enforceable as valid binding contracts.<sup>24</sup> This has raised serious concern even in countries with legislation on surrogacy as surrogacy practice comes with novel issues. Similarly in Ghana, the absence of legislation has mad surrogacy agreement unenforceable<sup>25</sup>. For instance, in the United States of America, Mary Beth Whitehead consented to be a surrogate mother for William Stern and his wife, the commissioned couple, but she refused to grant them custody when the baby was born, despite signing a contract to that effect.<sup>26</sup> The couple proceeded to court to have the surrogacy contract enforced, and the court upheld the arrangement and awarded custody to the couple, claiming that the surrogate mother had no parental rights. The surrogate mother filed an appeal, and the New Jersey Supreme Court decided that commercial surrogacy arrangements are unlawful, but that in the best interests of the child, custody would be awarded to the Sterns with surrogate mother visiting rights.<sup>27</sup> This case, among others, creates a situation where a party to a surrogate arrangement might afford not to honour his part of the contract and this raises genuine risks. It further reveals how delicate surrogacy agreements are even when there are legislations in place, and lack of legislation clearly implies more danger for parties going into surrogacy agreements within Nigeria and Ghana.<sup>28</sup>

## ii. **Altruistic Surrogacy**

Altruistic surrogacy is a circumstance in which a woman agrees to be a surrogate mother for a couple who is having reproductive issues for humanitarian reasons<sup>29</sup>. For instance, a woman can volunteer to be a surrogate mother for her sister and husband whereby her sister's ovum can be fertilised with a sperm donated by a third party and she would then assist in carrying the pregnancy for the couple until conception. This sort of arrangement is only motivated by love for the couple and a desire to help those who are unable to conceive naturally, with no monetary gain.

If there are volunteers or family members willing to serve as surrogate mothers for their infertile relatives, as in the instance above, hate and tension around the notion of giving birth to a third-

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<sup>22</sup> Samuel Enuma, 'Assessing the Enforceability of Surrogacy Agreements in Nigeria' in Sanjo Adebulewa (ed), *A Compilation of Medical Law Topic* (Ibadan University Press 2002) 22.

<sup>23</sup> Ibid.

<sup>24</sup> A. Chukwusa, 'Surrogacy Contracts: Enforceable?' (2018) Nigerian Law School Abuja Students' Law Journal 97.

<sup>25</sup> [https://shodhganga.inflibnet.ac.in/bitstream/10603/123925/7/07\\_chapter%201.pdf](https://shodhganga.inflibnet.ac.in/bitstream/10603/123925/7/07_chapter%201.pdf) accessed on 5 April 2022

<sup>26</sup> Sharyn L. Roach Anleu, 'Reinforcing Gender Norms: Commercial and Altruistic Surrogacy, *Acta Sociologica*, Vol.33, No. 1, 1990, 64.z

<sup>27</sup> Erica Davis, 'The Rise of Gestational Surrogacy and the Pressing Need for International Regulation', *Minnesota Journal of International Law*, Vol 21:1, 2012,122.

<sup>28</sup> [https://shodhganga.inflibnet.ac.in/bitstream/10603/123925/7/07\\_chapter%201.pdf](https://shodhganga.inflibnet.ac.in/bitstream/10603/123925/7/07_chapter%201.pdf) accessed on 5 April 2022

<sup>29</sup> Ibid.

party functioning as a surrogate mother will be reduced. The argument is that altruistic surrogacy is not without risks, yet medical professionals appear to endorse this form of surrogacy.<sup>30</sup> Personal characteristics, such as the capacity to preserve the doctor-patient connection in the absence of a contract, contribute to the choice for altruistic surrogacy. Also, the couple's donation of gametes aids medical intervention. It also prevents the marketing of procreation, which is a key component of commercial surrogacy.<sup>31</sup>

#### **4.0 LEGAL, ETHICAL AND SOCIAL ISSUES WITH SURROGACY IN NIGERIA.**

##### **i. Legal Issues with Surrogacy in Nigeria**

In Nigeria, there is presently no legal structure that governs surrogacy; nevertheless, the country does have what can be regarded as a traditionally organized third-party reproduction<sup>32</sup>. The traditional African belief, in which procreation is valued, has no doubt contributed to the gradual acceptance of surrogacy and the potential development of a legal framework. Surrogacy is being practiced in some regions of the nation, according to a recent inquiry, however the validity of such actions is disputed given the lack of any law or court statement on the subject.

Though, the United Kingdom and the United States had surrogacy legislation in place for decades, Nigeria has yet to pass any legislation on the issue, despite Nigeria's usual habits of copying the legal systems of the two nations. As a result, determining whether surrogacy is expressly legal or illegal in Nigeria is impossible. However, due to the absence of law regulating surrogacy in Nigeria, most artificial reproductive technology clinics in the country base their operations on the Human Fertilisation and Embryology Authority Guidelines of the United Kingdom.<sup>33</sup> A Bill for the establishment of a Nigerian Assisted Reproduction Authority was presented before the National Assembly in 2012 and was read for the second time on 2 May 2012.<sup>34</sup> This Bill was however not passed into law. Afterward, in 2014, the National Health Act<sup>35</sup> was enacted. Section 50 of the Act prohibits Assisted Reproductive Technology (ART) by providing:

(1) A person shall not:

(a) manipulate any genetic material, including genetic material of human gametes, zygotes or embryos; or

(b) engage in any activity including nuclear transfer or embryo splitting for the purpose of the cloning of human being;

(c) import or export human zygotes or embryos.

(2) A person who contravenes or fails to comply with the provision of this section commits an offence and is liable on conviction to imprisonment for a minimum of five years with no option of a fine.

Despite the fact that there are no specific laws on surrogacy practices and the National Health Act explicitly prohibits some ART practices in Nigeria, the implementation of the latter is yet to be

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<sup>30</sup> Sharyn L. Roach Anleu, 'Reinforcing Gender Norms: Commercial and Altruistic Surrogacy, Acta Sociological, Vol.33, No. 1, 1990, 71.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid

<sup>33</sup> JO Fadare & AA Adeniyi 'Ethical issues in newer assisted reproductive technologies: A view from Nigeria' (2015) 18 Nigerian Journal of Clinical Practice S57 S59

<sup>34</sup> House of Representatives 'Votes and proceedings' (2 May 2012) 97 <http://nass.gov.ng/document/download/5555> accessed 20 June 2021.

<sup>35</sup> National Health Act was enacted by the Nigerian National Assembly in 2014.

seen as it continues to be practised within our borders. The African Journal for Infertility and Assisted Conception, for instance, reported a successful gestational surrogacy in south-eastern Nigeria for a “35-year-old married graduate trader with primary infertility of 7-year duration owing to Mullerian dysgenesis.”<sup>36</sup>

Furthermore, several privately organized establishments around the country participate in consensually planned surrogacy, serving as a middle ground between the surrogate mother and the commissioning parent. They offer the service of bringing parties together through the execution of a contract agreement and are funded by fees paid by the parties in the surrogate contract.<sup>37</sup>

Surrogacy agreements in Nigeria are commonly seen to be based on basic contract terms; the question is therefore whether such contracts created for the purpose of surrogacy may be enforced in our national courts.

## **5.0 ETHICAL AND SOCIAL ISSUES WITH SURROGACY IN NIGERIA**

An unregulated surrogacy practice generally poses threat to societal values and moral standards that are acceptable in any sane society. This is even more so in a society like Nigeria where there is a high poverty level and the poor are prepared to do whatsoever to survive. In Nigeria, for example, baby factories and baby harvesting, which entail the breeding, trafficking, and maltreatment of new-borns and their biological mothers, are increasingly available<sup>38</sup>. Since 2006, when it was initially conveyed in a report by the United Nations Educational, Scientific, and Cultural Organization in Nigeria<sup>39</sup>, numerous additional baby factories have been found over the years.<sup>40</sup>

Due to the stigmatization of childless couples in Southern Nigeria and problems surrounding cultural acceptability of surrogacy and adoption, infertile women are known to be significant customers of these baby factories<sup>41</sup>. These methods have aided the industry's expansion, resulting in physical, psychological, and sexual abuse against victims.<sup>42</sup>

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<sup>36</sup> J.I., Ikechebelu, K., Ibadin, N.N., Joe-Ikechebelu, L.A., Nwajiaku, K., Nwaefulu, S.I., Okwelogu. “A successful gestational surrogacy in Southeast Nigeria”, *African Journal for Infertility and Assisted Conception* [serial online] 2017; 2:19-22. Available on: <http://www.afrijiac.org/text.asp?2017/2/1/19/241009>

<sup>37</sup> An example of such establishment is Nordica Fertility Centre, an agency based in Nigeria which connects intending parents to Nigerian surrogate mothers/egg donors and gestational carriers.

<https://www.growingfamilies.org/service-providers-nigeria/> accessed on 8 August, 2021

<sup>38</sup> <https://guardian.ng/news/upsurge-in-baby-factories-sale-of-infants-raises-concerns/> accessed on 5 April 2022

<sup>39</sup> <http://www.news24.com/Africa/News/Nigeria-frees-16-in-baby-factory-raid-20130620> Google Scholar (accessed on 25 August 2021)

Ajayi, R. A., Dibosa-Osador, O. J. (2011). Stakeholders' views on ethical issues in the practice of in-vitro fertilisation and embryo transfer in Nigeria. *African Journal of Reproductive Health*, 15, 73–80.

[http://reference.sabinet.co.za/sa\\_epublication\\_article/ajrh\\_v15\\_n3\\_a7](http://reference.sabinet.co.za/sa_epublication_article/ajrh_v15_n3_a7)

Google Scholar (accessed on 25 August 2021)

<sup>40</sup>

<http://doi.org/10.1093/humrep/deg347>

Google Scholar accessed on 25 August 2021

<sup>42</sup> Alfred, C., Francis, A. A., Ale, A. C. (2014). Dialectics of the incubation of “Baby Factories” in Nigeria.

*International Journal of Peace and Conflict Studies*, 2. <http://rcmss.com/2014/IJPCS-VO12->

[No1/Dialectics%20of%20the%20Incubation%20of%20D4%C7Baby%20Factories%D4%C7%D6%20in%20Nigeria.pdf](http://rcmss.com/2014/IJPCS-VO12-No1/Dialectics%20of%20the%20Incubation%20of%20D4%C7Baby%20Factories%D4%C7%D6%20in%20Nigeria.pdf)

Google Scholar (accessed 25 August, 2021)

The alarming rate in which women are donating their eggs for money over the years as also raised serious societal concern in the country<sup>43</sup> as such, where not properly monitored and regulated, could be disastrous for the seemingly ignorant and desperate donors. This calls for serious intervention before it degenerates to an unsalvageable and calamitous phase.

## 6.0 LEGAL, ETHICAL AND SOCIAL ISSUES WITH SURROGACY IN GHANA

### i. Legal issue with surrogacy in Ghana.

Ghana is a sub-Saharan African country, where infertility still needs recognition as a health issue. People often ignore the discussion on issues like infertility or difficulties in conceiving. Some men prefer hiding it from their family or wife rather than accepting the fact and treating the health issue. The reason behind this behaviour is the way society sees it. In many developing countries including Ghana infertility is seen as a curse and also society links it with the reputation of a couple or a man or woman.<sup>44</sup>

This problem has made couples to look for solutions and amongst the solutions is surrogacy. Surrogate motherhood is the oldest form of assisted reproduction. Historians relate that it was practiced in several ancient societies, usually for the purpose of circumventing laws that allowed a husband to divorce his wife on the grounds of her alleged infertility.<sup>45</sup> It is generally acceptable that a surrogate mother is a woman who agrees to carry someone else's baby after becoming pregnant using some form of assisted reproduction, usually in-vitro fertilization (IVF) or artificial insemination. Surrogacy has been on the rise in Ghana after it was first recorded in 2005.<sup>46</sup> While the early cases of surrogacy in 2005 did not raise societal concern in Ghana, the more recent and increasing use of this third-party involvement in conception has questions about its acceptability from religious groups and sections of the public.

The practice of surrogacy has further raised a dense of legal questions centered on the surrogate mother. Is she an employee, a prostitute, or a slave?<sup>47</sup> And what is the legal relationship between the couple and the surrogate mother? These concerns are heightened by the fact Ghana does not have a clear-cut policy or legislation or professional guidelines on surrogacy yet. The practice is thus prone to abuse.<sup>48</sup> It was observed that a surrogacy arrangement may be governed by some form of a contract, its implications go beyond the contractual obligations of the parties.<sup>49</sup> As rightly pointed there are no laws governing surrogacy in Ghana and question that comes to mind is who is the legal mother of the child born through surrogacy in Ghana? In Ghana, the surrogate mother is the legal mother of the baby. Therefore, her name and the intended father's name are mentioned

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<sup>43</sup>Female undergraduates now exchanging their reproductive eggs for money <https://thenationonlineng.net/ivf-female-undergraduates-now-exchanging-their-reproductive-eggs-for-money/> (accessed 25 August, 2021)

<sup>44</sup> <https://worldfertilityservices.com/surrogacy-cost-in-ghana> accessed on 26 August, 2021.

<sup>45</sup> Nicholas postgate. Early Mesopotamia Society and Economy at the Dawn of History { Routledge, 1992} , Page 105 <https://www.hli.org/resources/surrogacy-ethical-issues> accessed on 26 August, 2021.

<sup>46</sup> Gerrits T Surrogacy in Ghana : An exploration of practices, Experiences and Dilemmas colloque-gra-paris 2016 (colloque Gpa, Paris 2016) [https://colloqueGpa,Paris2016.site.ined.fr/fichier/s\\_rubrique/25963/colloqueGpa,Paris2016biographies.eng.en.pdf](https://colloqueGpa,Paris2016.site.ined.fr/fichier/s_rubrique/25963/colloqueGpa,Paris2016biographies.eng.en.pdf)> accessed on 3 September, 2021

<sup>47</sup><https://www.hli.org/resources/surrogacy-ethical-issues> accessed on 26 August, 2021

<sup>48</sup> <http://ww.linkedin.com/pulse/need-legislation-surrogacy-art> accessed on 4 September,2021.

<sup>49</sup> <http://ww.linkedin.com/pulse/need-legislation-surrogacy-art> accessed on 4 September,2021.



on the child's birth certificate as the baby's parents. After that, the parents may have to apply for a parentage declaration so as to take the child to their country or home.<sup>50</sup>

On 6<sup>th</sup> October 2020, President of Ghana assented to the Registration of Births and Death Act, 2020( Act 1027) effectively bringing the law into force. The law aims to, amongst others, provide for the registration of births, foetal deaths, and death in the country.<sup>51</sup> With the passage of this Act, can a person engage the services of a surrogate? It is not obvious from the long title of the Act the law's incursion into the area of surrogacy and other assisted reproductive birth issues however the law recognises the right of an intended parent that is a person who desires to be a parent through surrogacy or any other assisted reproductive arrangement to engage the services of a surrogate for that purpose.

## **7.0 ETHICAL AND SOCIAL ISSUES WITH SURROGACY IN GHANA**

Generally, like every other country that have unregulated surrogacy, the practice in Ghana poses threat to societal values and moral standards. One of these threats is on the mother. The surrogate is usually maltreated. The maltreatment ranges from vulgar abuse and more. Whatever form it takes, surrogate motherhood is seen as a form of reproductive prostitution.<sup>52</sup> The society see and equate her act as prostitution. In street prostitution, the woman sells or rents her body or body parts, the relationship to the customer is entirely impersonal, she must do what is told, her value or usefulness comes solely from her function, she is to leave when she is told and if there is a pimp, he gets a share of the money.<sup>53</sup> The pimp here simply means the medical practitioner or even the legal practitioner who may involve in the practice. Therefore, there is potential for exploitation of women who agree to become surrogate mothers.<sup>54</sup>

Another ethical issue bothers on the interest of the child. It is opined that God designed the family in a way that serves the best interest of the child.<sup>55</sup> The best interest of child are those things that makes the life of a child worthy and which could physical, mental, emotional, and spiritual. The introduction of surrogacy practice has a fracturing influence that can be very detrimental to a child whose parental figures are multiplied. This is because such may have as many as three mothers that is there could situation where the child may even be adopted leading to three mothers who are the (egg donor, surrogate and the adoptive).<sup>56</sup> And also the sperm donor and the adoptive father. This research shows that the sperm- donor kids are not really all right.<sup>57</sup>

The offspring of the sperm donation usually raises a host of different but equally complex and sometimes troubling issues. Many are disturbed that money was involved in their conception, some are disturbed that when they see someone who resembles them, they wonder if they are related and some affirm the right of donor offspring to know the truth about their origin.<sup>58</sup> There are stories by the donor off-springs that shows their confusions. One of such is the statement made by the

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<sup>50</sup> <https://worldfertilityservices.com> accessed on 13 September, 2021.

<sup>51</sup> <https://audreygrey.co> accessed on the 13<sup>th</sup> September, 2021.

<sup>52</sup> <https://www.hli.org/resources/surrogacy-ethical-issues> accessed on the 13 September, 2021.

<sup>53</sup> <https://www.hli.org/resources/surrogacy-ethical-issues> accessed on the 13 September, 2021.

<sup>54</sup> <https://www.hli.org/resources/surrogacy-ethical-issues> accessed on the 13 September, 2021.

<sup>55</sup> <https://www.hli.org/resources/surrogacy-ethical-issues> accessed on the 13 September, 2021.

<sup>56</sup> <https://www.hli.org/resources/surrogacy-ethical-issues> accessed on the 13 September, 2021.

<sup>57</sup> <https://www.ruthinstitute.org> accessed on the 15 September, 2021.

<sup>58</sup> <https://www.ruthinstitute.org> accessed on the 15 September, 2021.

British author Christine Whipp who was conceived by anonymous sperm donation more than four decades ago. She is of the view that some donor off-spring have of being a “ freak of nature” or a “ lab experiment”<sup>59</sup> she was quoted to have said

...my existence owed almost nothing to the serendipitous nature of normal human reproduction, where babies are the natural progression of mutually fulfilling adult relationships, but rather represented a verbal contract, a financial transaction and a cold, clinical harnessing of medical technology.

Another experience of the donor off-spring is that there is lack of trust when the parents did not tell them the truth about their origins and this is suspected that they are products of secret relationships.<sup>60</sup> Lynne Spencer<sup>61</sup> said: “when you grow up and your instincts are telling you one thing and your parents – the people you are supposed to be able to trust the most in your life- are telling you something else, your whole sense of what is true and not true is all confused”

## 8.0 CONCLUSION

Surrogacy may appear to be a good idea at the time but it does not serve the best interest of the intended mother and child who is born of a surrogate mother. The reason for this assertion is not far-fetched. There is a problem of lack of legislation as rightly observed under the two jurisdictions. Lack of legislation has borne several problems that made surrogacy not attractive in these jurisdictions. One of the problems associated with the lack of legislation is the non-fulfillment of the agreement between the couples and the surrogate mother.<sup>62</sup> An example is Mary Beth Whitehead’s case.<sup>63</sup> This case presents a typical example of the change of mind of the surrogate mother in the face of a legally executed contract that ends in a court of law.

The change of mind probably is due to the bond formed during the nine months of pregnancy and feels that society would ask her about the whereabouts of the child. However, in situations where the surrogate mother also provides the eggs, it would be difficult for the mother to hand over the child to the commissioned parents completely. In Ghana, such a situation may arise, and in the absence of legislation providing an answer for the position, a real danger exists after the delivery of the child. The change of mind on the part of the surrogate mother raises a conflict of interest regarding the enforcement of the agreement signed by the parties.

Another instance is the case of Ms. Denise Vanga a 23-year-old who was informed by a friend that she could rent her womb and earn some amount of money during the subsistence of the pregnancy and receive a lump sum after delivery and handing over the child. She met officials of Mount Carmel Fertility Centre, Dowena where the fertilized egg and sperm of a couple inseminated into her womb.<sup>64</sup> A medical examination conducted on her later revealed that she was carrying quadruplets for the couple whom she did not know. According to her story, she would receive GHC 10,000.00, after the delivery and would have GHC 400.00 per month and a rented room for

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<sup>59</sup> <https://www.ruthinstitute.org> accessed on the 15 September, 2021.

<sup>60</sup> <https://www.ruthinstitute.org> accessed on the 15 September, 2021.

<sup>61</sup> <https://www.ruthinstitute.org> accessed on the 15 September, 2021.

<sup>62</sup> <https://www.hli.org/resources/surrogacy-ethical-issues> accessed on the 13 September, 2021

<sup>63</sup> A. Chuckwusa, ‘Surrogacy Contracts: Enforceable?’ (2018) Nigerian Law School Abuja Students’ Law Journal 97

<sup>64</sup> <https://www.myjoyonline.com/news/2015/january> accessed on 13 September, 2021.

herself and her three-year-old son.<sup>65</sup> It was a verbal agreement, and the surrogate mother never met the client, and the client bore all the bills of the surrogate.<sup>66</sup> She performed her part of the bargain, but after the delivery, the payment never came hence her decision to go to the public.<sup>67</sup>

Meanwhile, the client had access to the children while there was no mechanism to ensure that the surrogate mother gets paid. The problems and dangers of pregnancy endured by the surrogate were not rewarded. In the face of this injustice and the unregulated nature of the business, there are fertility clinics in Ghana busily engaged in the business of urging the childless couple to avail themselves for surrogacy as well as inviting members of the public to donate sperms and eggs for the surrogacy business. One of such organisation is the Baby Dust Surrogacy Centre Agency in Accra.<sup>68</sup> The organisation, a registered entity since October 2013 provides services such as legal support, matching surrogate mothers, matching egg and sperm donors.<sup>69</sup>

The story of Ms. Vanga raises legal and ethical considerations. First, how do you agree to carry a fertilised egg of a ‘supposed couple’ you do not know and never met during the pregnancy. Indeed, fertility clinics may also engage in this to use the sperm of donors to procreate and later sell them to individuals in need of children. Second, the lack of a written agreement between the commissioned parents and the surrogate was a severe violation of her rights. Hence when the proxy did not receive the promised reward, she turned to the media but was not successful. Third, carrying four children goes with a lot of risks, and that is why a legal regime is necessary to protect all parties. Fourth, another issue outstanding is whether the medical facility acted as agents of the commissioned parents and in that case would a cause of action lie against the facility.

In the face of the unregulated nature of ART and the need to respect the rights of parties especially, surrogate mothers, the society of Private Medical and Dental Practitioners at their 39<sup>th</sup> Annual General Meeting held at Sunyani added their voice to the unregulated nature of the surrogacy market in Ghana.<sup>70</sup> They called for a law to regulate surrogate motherhood so that the rights, duties, and responsibilities of the parties would be respected. The issue of respecting the agreement reached with the surrogate mother is very crucial seeing that the fertility clinic and the commissioned parents would get what they are entitled, but no one is interested in the affairs of the surrogate mother.

## **9.0 RECOMMENDATIONS**

It is noted that ladies who accept to act as surrogates for other couples endure numerous risks, which makes a compelling case for the regulation of the concept with legislation for the operation of the technology. Such a law would protect the interest of the parties to the transaction to avoid any controversy after the performance of one’s obligation under the contract.

We therefore suggest and make the recommendation of having a sustainable and enforceable legislation under the two jurisdictions. The legal framework is necessary to ensure further that professionals don’t hide behind the technology and take undue advantage of the vulnerable parties

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<sup>65</sup> <https://www.myjoyonline.com/news/2015/january> accessed on 13 September, 2021.

<sup>66</sup> <https://www.myjoyonline.com/news/2015/january> accessed on 13 September, 2021

<sup>67</sup> <https://www.myjoyonline.com/news/2015/january> accessed on 13 September, 2021

<sup>68</sup> [www.findsurrogatemother.com/surrogacy-agencies/ghana/greateraccra](http://www.findsurrogatemother.com/surrogacy-agencies/ghana/greateraccra) accessed on 14 September, 2021

<sup>69</sup> [www.findsurrogatemother.com/surrogacy-agencies/ghana/greateraccra](http://www.findsurrogatemother.com/surrogacy-agencies/ghana/greateraccra) accessed on 14 September, 2021

<sup>70</sup> [www.ghananewsagency.org/health/private-health-practitioners-call-for-law-to-govern-surrogate-motherhood-120642](http://www.ghananewsagency.org/health/private-health-practitioners-call-for-law-to-govern-surrogate-motherhood-120642) accessed on 14 September, 2021

and exploit them. In making the legislation, the following factors could be considered to safeguard the interest of ladies who accept to act as a surrogate for a couple.

### **A. Consent**

The first issue requiring legislation to regulate the surrogacy business is the consent given by the surrogate mother to carry the baby for another. The way the permission of the prospective surrogate mother was secured may result in the concealment of several issues from the surrogate mother. For example, what prompted the person to come forward to act a surrogate mother for another and what was the 'quality and the clarity' of the communication to the surrogate, which resulted in the consent? The gap influences the problem associated with the procurement of the approval of the surrogate. Most of the ladies who act as surrogate mothers may do so based on monetary considerations and have an impoverished background. The mention of money is enough motivation to urge the person to agree. There is, therefore, the need to ensure that doctors and the couple in need do not sweet talk the person to accept without any independent advice and help. In this regard, civil society may play an advocacy role and assume responsibilities in the surrogacy processes.

The surrogate must know the identity of the couple before consenting. Agreeing to act for someone whom you do not know may affect the permission. It requires confidentiality clauses to regulate the relationship between the commissioned parents and the surrogate.

### **B. Risk**

Carrying pregnancy is associated with risk and dangers, which may even lead to the death of the surrogate mother. The risk also includes a situation where, through complication, the surrogate may not be able to give birth again in her lifetime. Such circumstances occur as a matter of time and not envisaged at the time of negotiation, but it may happen. Secondly, who explains the risk associated with the practice of the surrogate mother? Indeed, a doctor or the fertility clinic responsible for the process cannot be an impartial judge to explain the risk associated with the means to the surrogate mother. The policy intervention is to get an independent person; possibly a regulatory body to explain the process and procedure to the surrogate mother.

Since complications may result, which may lead to deaths, the legal framework must also provide for insurance for the surrogate mother to allow for compensation in the event of suffering any disability, deformity or even death. The risk of abortion is also very crucial, and the law should address that as well. If there is evidence to suggest that the surrogate may suffer harm because of carrying the pregnancy, then depending upon the circumstances, there should be a way to terminate the pregnancy legally as provided under the Criminal Offences Act of Ghana.

The medical problem of changed circumstances of the surrogate mother ought to be taken care of in the law. Complications may develop, which may affect the future childbearing capability of the surrogate mother. The lack of legislation now means the surrogate mother has no protection in law to secure her condition after the medical condition arises. If the surrogate mother has not married, this affects her childbearing capabilities in the future. Compensation may not be enough to take care of that eventuality.

### **C. Custody Rights**

In Ms. Vanga's issue discussed; she never met the commissioned parents. Having regard to the treatment given to her, would it be wrong for her to refuse to give custody to the hospital because

she has not received her price under the contract? Indeed, the crucial question here is whether the commissioned couple has paid the sum promised Ms. Vanga a fact only known by the medical staff. Under such circumstances, the law must allow the surrogate to keep the custody of the child until the terms negotiated and agreed are respected by all the parties. Having regard to the bond established between the surrogate mother and the child and the fact that people have seen her pregnant, a sudden denial of custody may raise several issues for her, and she may have to explain to the society what has happened to the pregnancy and or the baby after delivery.

#### **D. Medical Care of the Surrogate**

The surrogate mother's health is of paramount importance as some surrogate mothers may have a family who needs her after going through the exercise. In that sense, the law must ensure that after the delivery, the health needs of the surrogate is attended to until an independent doctor certifies that the health of the surrogate has normalised. During the pregnancy, because the commissioned parents need their child healthy, all will be done to take care of the medical needs of the surrogate. However, if the surrogate has a family, to what extent would this impact on the life of other members of the family, particularly when they saw a family member pregnant? The new position may affect her role as a surrogate in the family, having to assume dual roles.

#### **E. The unequal bargaining power of the parties**

Another issue that requires legal intervention is the unequal bargaining power between the contracting parties to a surrogacy agreement. The surrogate mother, in most cases, is at a disadvantage having regard to the risk associated with childbirth and what she receives in return. The party 'selling her womb' is economically weaker to the party paying for the services of the surrogate. The status of surrogate mothers is weak due to their economic and social positions in society, allowing the superior party to make and secure better terms during negotiations with the weaker party. The mention of money in itself may crowd out the surrogate mother's mind without thinking through the effects of going through the cycle. Poverty thus would not allow the surrogate mother to reason and assess the whole process before consenting. In the face of this unequal position of the parties, the law ought to intervene to ensure that parties are not unduly influenced by money to enter into contracts that have minimal benefit for them. A scheme to ensure that such vulnerable persons get representation would not be out of place. Some have therefore argued that given this inequality, surrogacy contracts should not be legalised and enforced.

#### **F. The problem of change of heart**

Those opposed to surrogacy arrangements argue that the questions regarding the legality and the enforcement of surrogacy contracts are vague due to other difficulties of unequal bargaining power, resulting in the problem of changes of heart. The problem of change of heart may drive that individual to try and evade the contract following her initial inability to foresee her eventual emotional condition and the circumstances that will follow the performance of the contract and a possible claim for change of heart. The difficulty with this is how to address the issue of change of heart? After someone has carried a pregnancy for nine months, the bond created between that person and the child may necessitate the change of heart from the surrogate mother. Meanwhile, there is an agreement between the parties. To what extent would the law provide a remedy for the parties? Would money be enough? It is for these reasons that even before a surrogate mother consents, a psychologist takes her through counselling to disabuse her mind from the fact because of the bond created; you can change your mind. The terms of the contract ought to be respected.

In the United States of America, (USA) the courts have under such circumstances ruled for the suspension of the surrogate contract and stated that there should be a cooling off period to allow the parties to reflect on the issues. In one of the very first surrogacy cases dealt with by the U.S.A. court system, the court concluded that the surrogate mother's informed consent would be extremely problematic until the cooling period is over.<sup>71</sup> It is in this regard that the law must set in place, a regulatory body to oversee the operation of the fertility clinic with power to prosecute those who disobey the provisions of the law or decide to renege on the agreed terms in the contract. In drafting the legislation to regulate the technology and the right of the parties, these countries especially Ghana may learn from the countries with laws on surrogacy.

From the foregoing so far, we opined that a clear legal and policy framework in the two jurisdictions will address the issues that flow from surrogacy. The surrogate mothers and children will be protected and thereby saving the nations from the cost to cater for abandoned children.

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<sup>71</sup> Yehezkel Margalit, 'In Defense of Surrogacy Agreements: A Modern Contract Law Perceptive', *William & Mary Journal of Women and the Law*, Vol. 20, Issue 2, Article 6, 433. The Baby M Case.