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Gestational Surrogacy with Oocyte/Embryo Donation and the Litigious Foci in Nigeria

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Abstract

It happens often that a couple unable to have biological children may resort to traditional or gestational surrogacy to get own child who will inherit their property and continue their lineage. The basic question underlying this research is: from where does the parental responsibility of the in-vitro fertilization (IVF) commissioning couple over the child born through gestational surrogate donor derive in the scheme of the contractual and legal frameworks operating in Nigeria? This paper sets out to examine the legality of gestational surrogacy with donor gametes vis-à-vis subsisting case law on the acquisition of parentage in Nigeria. It finds that there is no law vesting parentage on a couple who merely commissioned gestational surrogacy without genetic contribution or vesting inheritance rights on the IVF child over the property of such couple. It recommends that Nigeria should enact legislation in the area of IVF embryo transfer (ET) to legalize IVF-ET, give statutory authorization for the execution of surrogacy contracts, and provide details of the relationships amongst all the stakeholders in the IVF-ET arrangement.

Keywords: Adoption, gestational surrogacy, Nigeria, oocyte/embryo donation, parental responsibility, rights of the child.

1. Introduction

Surrogacy simply refers to an arrangement whereby a woman agrees to carry and deliver a child for a man, a couple or another woman who is unable to do so herself. Surrogacy is a form of third party assisted conception. It is the reproductive process whereby a person provides sperm cell and egg/oocytes or embryos, and another woman offers her uterus as a carrier of transferred embryos, so that a sub-fertile couple could have a child. The woman who carries the pregnancy and bears the child is called a 'surrogate'. The person or couple who is seeking the services of a surrogate is called the 'commissioning/intending/intended person/husband/wife or couple' as the case may be. The job of the surrogate is to conceive, carry the pregnancy to term and deliver the baby for the person(s) that contracted her. The surrogacy contract signed before the commencement of the procedure is usually, among other things, to the effect that the surrogate mother loses all parental responsibilities for the child as the mother on delivery, while the commissioning person or couple takes on the parental responsibilities for the child as the parents.

Surrogacy can be traditional or gestational. It is traditional where the surrogate has a genetic contribution in the conception of the baby, such as the use of her own vitrified embryo in the in-vitro fertilization (IVF) or by the use of her oocyte/egg in the process of artificial insemination. It is gestational where the surrogate has no gamete contribution to the formation of the baby and is

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only a carrier of the pregnancy. Gestational surrogacy is achievable through the process of IVF by the use of sperm cell and oocyte/egg or embryo donated by the commissioning couple (in which case it is gestational surrogacy without donor), or other person not being the surrogate (in which case it is called gestational surrogacy donors), or one gamete from the intending person or either of the intending wife and husband and the other gamete from a person not being the surrogate (in which case it is called gestational surrogacy with part donation).

In Nigeria, gestational surrogacy with donor is the more common type. This is so because of the increasing uptake of better quality donor gametes by sub-fertile couple with poor quality gametes and genetic defects. In vitro fertilisation with oocyte donation (IVF-OD) is considered to give better implantation, pregnancy, and live-birth rates compared to IVF with autologous oocytes. An increasing demand and a good success rate with oocyte verification programmes have led to the formation of oocyte banks, reducing the need for donor–recipient cycle synchronisation and allowing egg sharing. Surrogacy can be commercial or altruistic. Altruistic gestational surrogacy is rare or non-existent in Nigeria. Commercial surrogacy, covertly practised in Nigeria, is outlawed in most part of the world.[1]

In vitro fertilization and embryo transfer (IVF-ET) is an artificial medical manipulation of human gametes (sperm cell and egg) to produce an embryo that would be implanted in the womb of a prospective mother or surrogate mother for onward maturation into a full baby in an obviously recognised pregnancy. There is no obvious problem with this kind of manipulation under the Nigerian law if the process is covered under the fundamental right of the couple to their privacy[2] and within wedlock, especially if the sperm cell came from the commissioning husband and the egg from the commissioning wife who also conceived and carried the baby to term and delivery. This is because, children born by a couple within the subsistence of their marriage are presumed to be children of the marriage.[3]

Legal problems tend to arise where the IVF baby is not born by the commissioning wife within the context of marriage or where the gametes used in the gestational surrogacy procedure are obtained from donors other than the commissioning couple. By virtue of sections 165 and 166 of the Evidence (Amendment) Act (Nigeria) 2023, the child is only presumed 'to be born in lawful wedlock' of the couple if the spouses are married. The problem is legally tricky and more complicated where the pregnancy procured by the use of donor gametes is carried by a surrogate mother in obvious gestational surrogacy.

Britain regulates in-vitro fertilisation and voluntary surrogacy through the Human Fertilisation and Embryology Act of 1990 which details the criteria for the usage of such procedures and the legal status of the parents.[4] Similarly, in Israel, the first country to enact national legislation governing surrogacy arrangements, the Parliament legalised non-commercial surrogacy arrangements. In Nigeria, there is no formal legal framework in place for surrogacy detailing the criteria for the usage of such procedures and the legal status of the parents. Legal practitioners model surrogacy agreements after that of the recommendations of the Human Fertilisation and Embryology

[1] DE Lascarides, 'A Plea for the Enforceability of Gestational Surrogacy Contracts' (1997) 25(4) *Hofstra Law Review* 1221–59.
[2] Ss 37 and 46 of the Constitution of the Federal Republic of Nigeria Cap 23 LFN 2004 (as amended).
[3] *Tony Anozia v Mrs Patricia Okwunwa Nnani & Anor* (OW 29 of 2013) [2015] NGCA 15 (22 January 2015).
[4] Human Fertilisation and Embryology Act, 1990, ch. 37.

Authority of Britain;[5] and the Surrogacy Arrangements Act of the United Kingdom[6] primarily because Nigerian laws are generally modelled after British laws, as a former British colony. The enforceability of these Nigerian surrogacy contracts, which have no legal authorisation, in a Nigerian court of law, is highly unlikely. There is currently no law in Nigeria empowering parties to engage in surrogacy contract. Only court decisions have provided some sort of guidance on the matter so far in Nigeria.

This paper sets out to examine the legality of gestational surrogacy with donor gametes vis-à-vis subsisting court decisions on the acquisition of parentage in Nigeria, ie whether gestational surrogacy with gametes donation can be one of the ways of acquisition of parentage in Nigeria, the legal status of the stakeholders engaged in the procedure especially the parental status of the commissioning couple if any, as well as the possibility that the commissioning couples are in fact in commission of felony of abduction by engaging in IVF.

2. Conceptualising Gestational Surrogacy Donor

A careful examination of the processes and procedures in the practice of gestational surrogacy donor, ie the type of gestational surrogacy where the commissioning couple do not contribute their own gamete for the IVF procedure, will readily show that the IVF-ET commissioning couple are not the natural parents of the resultant child. The commissioning couple in gestational surrogacy donor is not even the customary or statutory guardians or foster parents of the ensuing child. For all that it may be worth the couple could be challenged by the donor, the surrogate or the child at present or in future time. In gestational surrogacy without donor, ie where the gametes are picked from the commissioning couple or where at least one parent is genetically related to the child, but the carrier is not, it makes the process less legally complicated for the commissioning couple when the issue of custody of the resulting child comes up before the court, as the court will most likely award custody to biological parent(s). Gestational surrogacy with no or part donation of gamete(s) is more legally attractive for the commissioning couple. The commissioning or intended couple in gestational surrogacy donors have no protection whatsoever under the laws of Nigeria unless they employ the limited lifeline offered by section 25 of the Matrimonial Causes Act 2004[7] for custody, being that the Child's Rights Act 2003 or equivalent state laws have not given them the opportunity to proceed and adopt this kind of IVF children after delivery. The National Health Act only provides for the use of body fluids and tissues, but it is absolutely quiet with regard to IVF-ET and gestational surrogacy. No law in Nigeria stipulates that the commissioning couple, irrespective of their genetic relationship to the child, is the natural or adoptive parents of the child. There is no amount of consent by the IVF-ET couple and their donors that can transfer parenthood of the resultant child from the donors to the IVF-ET couple without genetic assurances. The consenting procurators can transfer their personal rights to one another, but they cannot by a mere agreement amongst them, transfer the childhood, custodial and filiations rights of the child to one another without the consent of the child and an enabling statute or customary law. The intentions of the contracting parties are immaterial in the face of extant laws on custody and filiations.

The issue of intention once fell for determination before the Court in *Ali v Ali*.[8] Opinions on the issue of intentions of parties to contract of marriage have been divergent. Kasumu and Salacuse opine that the courts have to pay more attention to the intention of the parties, as well as their

[5] Human Fertilisation and Embryology Authority, hfea.gov.uk.
[6] UK Surrogacy Arrangements Act of 1985, chap. 49, whole act, legislation.gov.uk.
[7] Cap M7 *Laws of the Federation of Nigeria (LFN)* 2004.
[8] [1966] 2 WLR 620.

manner of life, to decide which law to apply to their marriage.[9] Cumming Bruce J categorically stated that personal intention is irrelevant to the legal consequence of a validly celebrated marriage.[10] The child, being a human person with fundamental rights preserved in the Constitution of the Federal Republic of Nigeria (CFRN) 1999 (as amended),[11] has its own interests (as a child as well as when it grows up) different from the interests of the commissioning couple, its donors and the surrogate, and it has every legal right to assert its interest to supersede that of the procurators. Where a child is not under the care of its natural or adoptive parents or under a lawful guardian, its legal rights and the parental responsibilities of its parents/guardians supersede whatever rights the person under which care the child is for the time being, irrespective of whether it is foster care or any other care under section 11(b) of the Matrimonial Causes Act 2004.[12] Parentage and parenthood cannot be confused with guardianship, fostering, wardship, unplanned care, as well as unsolicited and opportunistic care. Statutory parentage and parenthood must also be separated from customary parentage and parenthood. Sometimes, mere nurturing and mentorship (seen in customary fostering) are misconceived as customary adoption. A foster parent has no legal rights or duties towards the child under customary law.[13]

'Guardian' is defined as one who has the legal authority to care for another's person or property'.[14] As held in *Chibuzor v Chibuzor*,[15] there is no mandatory requirement for writing of instrument of adoption under customary law but the presence of a witness is a vital condition for customary adoption process. In *Chibuzor v Chibuzor*,[16] no credible evidence was led, by calling persons who witnessed the adoption, to substantiate the claim of adoption of the child (Okechukwu) by his late grandfather (Eugene), who took care of him (because Eugene's daughter, Cecilia, had Okechukwu, in Eugene's house and out of wedlock). Therefore, the court, on that basis, agreed with the respondent that what played out was mere infant guardianship and not adoption. The court concluded that Okechukwu remained the son of Cecilia Chibuzor and can only inherit any right that inures to his mother, Cecilia, in the estate of their father, Eugene. Thus, because there is no evidence of customary adoption by his grandfather, Eugene, Okechukwu is not entitled to participate in the distribution of the intestate estate of his grandfather who fostered him or who acted as his guardian. The court will refuse right of inheritance to the adopted child in statutory adoption if the child or his next friend could neither produce an adoption order or lead evidence to that effect.[17] Where such proof is tendered and admitted, the Court will allow inheritance rights.[18]

Customary adoption appears less rigorous and more attractive to commissioning couples engaged in gestational surrogacy donors. However, the sticky issue in this kind of adoption and indeed in statutory adoption too is the parentage of the child that is up for adoption vis-à-vis the legality of the abrogation, by way of the adoption, of the parental rights and responsibilities of the natural parents of that child, knowing that the natural parents did not consent to the adoption. A side kick to this is the possible acts of felony of abduction of the commissioning couple pursuant to section 27(1) of the Child's Rights Act 2003. Such commissioning couple may also be charged under the

[9]AB Kasamu and JW Salacuse, *Nigerian Family Law* (Butterworths, London, 1966) 28.
[10]*Ali v Ali* [1966] 2 WLR 631.
[11] Chapter VI of the Constitution.
[12] Cap M7 LFN 2004.
[13]*Chibuzor v Chibuzor* [2018] LPELR-46305(CA).
[14] BA Garner,*Black's Law Dictionary* (9th Edition, Thomson West) 774.
[15][2018] LPELR-46305(CA).
[16][2018] LPELR-46305(CA).
[17] See *Olaiya v Olaiya* [2002] 12 NWLR (Pt 782).
[18] See *Aduba v Aduba* [2018] LPELR-4576 (CA).

Violence against Persons (Prohibition) Act 2015 or equivalent state law[19] for the offence of coercion if keeping the resulting child is construed as detrimental to his/her physical or psychological wellbeing; or for the offence of forcefully isolating or separating the child from family and friends. In this connection, a child born through gestational surrogacy donors and under the assumed care or protection of the commissioning couple after delivery is not under lawful custody or protection of his/her father or mother, guardian or such other person having lawful care or charge of the child.

In order for the court to issue an adoption order for a child, one of the following conditions must be met: (a) the child's parents or, in the absence of a living parent, the child's guardian, must consent to the adoption; or (b) the child must be adopted due to abandonment, neglect, abuse, or maltreatment and there must be compelling reasons in the child's best interest.[20]

A child born through gestational surrogacy donors does not therefore fall within the context of the subtle parental felony of child abuse contained in the disjunctive conditions precedent of statutory adoptability of the child, as contained in section 128 of Child's Rights Act. Even if the child is abandoned, neglected, persistently abused or ill-treated, it is settled that in Nigeria, sections 72, 73 and 74 of the Child's Rights Act 2003 empower the court to still return a child from the person that took care of him during the time that his parent abandoned him, to the parent that abandoned him after some judicial assurances from the abandoning parent. The court may award just compensation in favour of the person that took care of the child during the period of the parental abandonment. In the end, the only thing in it for the commissioning couple who took care of the child, from delivery to date, may be the compensation money. That is if the court will be minded to hold that the gamete donor is liable in child abandonment or neglect as the case may be.

The medical practitioners who perform the IVF-ET stand a significant chance of carting away the uproar of the IVF stakeholders, not on the general issues of medical negligence, but on issues relating to the illegalities of the practice itself in Nigeria. Being that there is no law in Nigeria empowering the practitioner to bring the child into the world by the mere surrogacy contract that the child was not a party to, the children from gestational surrogacy donor, can sue for a myriad of reasons ranging from forced parenting, abduction, breach of fundamental rights, to identity issues. These identity litigations have already started in the developed countries.

The commissioning couple cannot establish their parentage to the child resulting from the gestational surrogacy donor in court. There is no evidence that the child was born by the couple. The presumption of natural parenthood of the commissioning couple to the baby is highly rebuttable for the immutable genetic reasons. There is no genetic material of the couple that can be found in that baby. The natural parents of a child are not just the presumed parents of the child, as born within wedlock, but the biological parents whose genetics are embedded in the child. In addition, or alternatively, the child may even seek out his natural parents when he grows up.[21]

In *Dyer*, a Florida woman won $5.25m in damages from a fertility doctor who fraudulently used his own sperm to impregnate her 45 years ago. Cheryl Rousseau sued John Boyd Coates III, a Vermont doctor, in 2018 after a home DNA test kit identified him as her daughter's biological father. Rousseau signed an artificial insemination contract with Coates in 1977 after discovering that her husband's vasectomy was irreversible. The doctor told her that he had located a donor who

[19] For instance ss 5 and 15 of Anambra State Violence against Persons (Prohibition) Law 2017.
[20] S 128 of the Child's Rights Act 2003.
[21] O Dyer, 'US Fertility Doctor must Pay $5m Damages for Using Own Sperm in IVF' *BMJ* 2022;377:o895.

resembled her husband and was a medical student. Later that year, she gave birth to a girl. Her daughter, Barbara, was 40 when she decided to seek information about her genetic background and took tests offered by the websites Ancestry.com and 23andme. The results showed that Coates was her biological father. A Federal Court jury awarded Rousseau $250, 000 in compensatory damages and $5m in punitive damages.

The major problem with the IVF-ET commissioning couple is not as much with the recanting donors as it is with the possible erratic actions of the child who is the product of the IVF-ET. An IVF-ET child could sue anybody and everybody, including the hospital, the IVF-ET couple, the surrogate and the biological parents for abduction,[22] or denying him/her the opportunity to be with a known and exiting parent[23] or for identity theft, or for coercion or forcefully isolating a child or separating him or her from his or her biological parents.[24]

In Nigeria, the only way provided in the law for the lawful and definite severance of parent-child relationship and ties is through statutory (and possibly customary) adoption.

3. Acquisition of Parentage in Nigeria

It is remarkable that all the relevant laws in Nigeria, including the Marriage Act 2004,[25] the Matrimonial Causes Act 2004,[26] the Child's Rights Act 2003, the Constitution of the Federal Republic of Nigeria 1999,[27] and the Interpretation Act 2004[28] did not define the words 'parents', 'child', 'father' or 'mother'. The partial definition of 'child' in the CFRN 1999 (as amended),[29] as including a step-child, a lawfully adopted child, a child born out of wedlock and any child to whom any individual stands in place of a parent, confirms that a child need not be a product of marriage. It is indisputable that to be a parent of a child, one must either be the father or mother of the child. A father or mother could be natural, presumed or adoptive. Presumed parentage does not exist in nimbus. It is rooted in the presumptions embedded in Nigeria's Evidence Act, and backed by established facts.[30]

However, according to section 17(2) of Child's Rights Act 2003, where the father of an unborn child dies intestate, the unborn child is entitled, if it was conceived during the lifetime of his father, to be considered in the distribution of the estate of the deceased father. In other words, a child is not entitled, if it was not conceived during the lifetime of his father, to be considered in the distribution of the estate of the deceased father. In other words, inheritance by parentage is only legally effective in Nigeria if it is natural, adoptive or established on legal presumptions. Children born by gestational surrogacy do not seem to be within this presumption. In Nigeria, there is no presumption that a child delivered by a gestational surrogate with oocyte (gamete) donor(s) is the legal child of the commissioning couple. Now that there is currently no law in Nigeria authorising IVF or IVF contract, or defining the relationships between the stakeholders in IVF practice, the situation and environment are therefore stupendous miasmata of litigious foci to all the

[22] Child's Rights Act 2003 s 27(1).
[23] Ibid.
[24] Violence against Persons (Prohibition) Law of Anambra State 2017; Violence against Person's (Prohibition) Act 2015.
[25] Cap M6 LFN 2004.
[26] Cap M7 LFN 2004.
[27] Cap C23 LFN 2004 as amended.
[28] Cap I23 LFN 2004.
[29] Cap C23 LFN 2004 as amended at Paragraph 19 (interpretation section) of Fifth Schedule of Part 1, Code of Conduct for Public Officers.
[30] *Okonkwo v Okagbue* [1994] 9 NWLR (Pt 368) 301-346.

stakeholders involved, including the medical practitioner who performs the IVF procedure for the gestational surrogacy, the IVF child, the gamete donors, the IVF father, mother and the surrogate. The commissioning couple are at best the 'person with whom' the IVF child 'is residing' as provided in section 11(b) of the Matrimonial Causes Act 2004.[31]

Before 2003, the Customary Court, the Magistrate's Court and the District Court were in the practice of awarding paternity of children to persons who are not biological parents of the children as dictated by customs. On appeal, the High Court usually reverses the judgment of such lower courts. Almost always, the reason for the reversal is that any custom that allows the award of a child to a non-biological parent is contrary to natural justice, equity and good conscience and therefore invalid. Such native law or custom is said to have failed the repugnancy test of validity of native law and customs.[32] The repugnancy test that the courts employed was not anchored on a scientific determination of the paternity of the child. Rather, it was on the rebuttable presumption that the paternity of the child does or does not rest on a person based on available established facts. In the past too, there were instances of inconsistencies of judicial decisions on the child's paternity, where paternity was not awarded to a biological father.[33] In 2014, the Supreme Court in *Ukeje v Ukeje*[34] held that the paternity or maternity of a child vests on the person who has been disclosed on the birth certificate, although the Court did not rule out a genetic testing of parentage.

4. Genetic Testing for Parentage

A reliable, reproducible and scientific way of determining the paternity of a child is by genetic tests. This is regardless of whether the person to be tested is under the customary law or the statute. The presumption of paternity contained in section 165 of the Evidence (Amendment) Act 2023 is not exclusive to customary marriage. The Child's Rights Act 2003 statutorily introduced the use of scientific tests in the determination of the paternity or maternity of a person in Nigeria. Section 63(1)(a) of the Act provides that in any civil proceedings in which the paternity or maternity of a person falls to be determined by the court hearing the proceedings, the court may, on application by a party to the proceedings, give a direction for the use of scientific tests, including blood tests and Deoxyribonucleic Acid (DNA) tests to show that a party to the proceedings is or is not the father or mother of that person.

Eleven years after the commencement of the Child's Rights Act 2003, the issue of genetic testing for paternity fell before the Appeal Court in *Tony Anozia v Mrs Patricia Okwunwa Nnani & Anor.*[35] The facts of the case are that the appellant (Tony Anozia) filed a suit against a married woman (the first respondent) and her adult son (the second respondent) seeking for a declaration of the paternity of the second respondent. His case was that he had coitus with the first respondent sometime in 1957, at a time when the first respondent's husband was terminally ill and incapable of performing sexual acts. The respondents denied the claims. While the matter was yet to be tried, the appellant filed an application seeking for an order of court referring parties for a DNA test. The trial court refused the application on the ground that granting same would amount to allowing the appellant to use the interlocutory application to realise the relief he sought in the main suit. The appellant's appeal was unanimously dismissed by the Court of Appeal. The court doubted whether that form of proof could be ordered or was necessary to determine the paternity of a 57 years old man, who

[31] Cap M7 LFN 2004.
[32] *Edet v Essen* [1932] 11 NLR 47-48; *Mariyama v Sadiku Ejo* [1961] NRNLR 81-83; *Okonkwo v Okagbue* (n 27).
[33] *Nwaribe v President Oru District Court* [1964] 8 ENLR 24-27; *Cole v Akinyele* [1960] LLJR-SC 84.
[34] [2014] 11 NWLR (Pt 1418) 384-414.
[35] [2015] 8 NWLR (Pt 1461) 241.

did not complain about his parenthood, just to please or indulge a self-acclaimed predator, who emerged to destabilise family bonds and posed as a biological father.

The Court of Appeal in *Tony Anozia v Mrs Patricia Okwunwa Nnani & Anor*[36] went back to the old pre-2003 methods of determining paternity and held that in any case, the appellant had admitted in his pleading that by the time he had the amorous relationship with the first respondent, the first respondent was married and the product of the relationship was born within wedlock to the first respondent's husband. Having so admitted, what then was the need for the DNA test? According to the Court, at that juncture of the second respondent's age, it was only the second respondent who could waive this right to the paternity of the one who brought him to this world but who is now dead and/or agree to subject himself to DNA test where there was no rival claim to his paternity except the embarrassing claim of the appellant.[37]

The decision in *Tony Anozia v Mrs Patricia Okwunwa Nnani & Anor*[38] clearly demonstrates the reluctance of the court to apply section 63(1)(a) of the Child's Rights Act 2003. The principle of the reliance of the court on the concept of 'delivery within wedlock' and genetic testing both work against the claim of paternity by IVF commissioning couple especially in the circumstances of gestational surrogacy with gametes donors. The only category of couples that may have valid paternity and maternity claim to their IVF babies in view of the case laws on presumption of paternity are those commissioning couples who personally donated their gametes for the procedure, and which the wife, preferably, carried the baby herself. Where the gametes are procured from gametes donors and the pregnancy was carried by a surrogate, the commissioning couple cannot successfully lay claim to the paternity of the IVF child in Nigerian courts in view of the aforementioned factual circumstances vis-à-vis Nigerian case law on paternity acquisition.

Section 69 of the Matrimonial Causes Act 2004[39] defined 'children of the marriage' (for couples under statutory marriage to the complete exclusion of couples under customary and Islamic marriages) to include (a) any child adopted since the marriage by the husband and wife or by either of them with the consent of the other; (b) any child of the husband and wife born before the marriage, whether legitimated by the marriage or not; and (c) any child of either the husband or wife (including an illegitimate child of either of them and a child adopted by either of them) if, at the relevant time, the child was ordinarily a member of the household of the husband and wife, so however that a child of the husband and wife (including a child born before the marriage, whether legitimated by the marriage or not) who has been adopted by another person or other persons shall be deemed not to be a child of the marriage. This provision of section 69 of the Matrimonial Causes Act 2004[40] thus excludes IVF children born by way of gestational surrogate with donors as children of a statutory marriage.

5. Acquisition of Parental Responsibilities in Nigeria

Parental responsibility is defined in the Child's Rights Act 2003 as all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property. The law is trite in Nigeria[41] that a person need not be the parent of the child before he could exercise parental responsibilities. Persons who have parental responsibility over a child, as

[36][2015] 8 NWLR (Pt 1461) 241.
[37] Per Ignatius Igwe Agube, JCA.
[38][2015] 8 NWLR (Pt 1461) 241.
[39] Cap M7 LFN 2004.
[40] Cap M7 LFN 2004.
[41] S 41(10)(b) of the Child's Rights Act 2003.

provided in the Act are the natural parent, adoptive parent, guardian, foster parents, persons in lawful custody of the child, applicants for emergency protection order, the State Government while a care order is in force.[42] Fostering order vests in and can be exercisable by and enforceable against the foster parents, all such rights, duties, obligations and liabilities in relation to custody, maintenance and education of the child as if the child were a child born to the foster parent in lawful marriage.[43]

Section 68(10) of the Child's Rights Act 2003 states that a person who does not have parental responsibility for a particular child but has care of the child may, subject to the provisions of this Act, do what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting the welfare of the child. This is where the commissioning couple in gestational surrogacy donor belongs.[44]

The implication of section 274 of the Child's Rights Act 2003 is that the Act is the final authority on the enactments relating to children, adoption, fostering, guardianship and wardship, and thus by extension, on parental responsibilities for family practices under the statute. The Child's Rights Act 2003 only applies to statutory marriage in Nigeria.[45] The result is the duality of regulations of the marriage systems and their incidents in Nigeria. The National Assembly of Nigeria, which enacted the Child's Rights Act 2003, is not empowered by the CFRN 1999 (as amended) to make Acts for the formation, annulment and dissolution of marriages under Islamic law and customary law including matrimonial causes relating thereto.[46]

5.1. The Legal Status of Surrogacy Agreement in Nigeria

In the celebrated case of *In re Baby*,[47] which was a traditional surrogacy suit in the United States of America, the New Jersey Supreme Court declared all surrogacy contracts void and unenforceable, for being a violation of several state laws and public policies. In particular, the contract's unenforceability was predicated upon the following laws:

i) Those which prohibit the exchange of money in connection with adoptions. The Adoption Laws in Nigeria equally prohibit payment for adoption.[48]

ii) Those which require 'proof of parental unfitness or abandonment before termination of parental rights is ordered or an adoption is granted';[49] and

iii) Those which permit a woman to revoke her surrender of custody and consent to adoption in private placement adoptions.[50]

[42]Ss 42(3)(a), 55(3), 68, 82(1)of the Child's Rights Act 2003.
[43] S 110(1)(a)and(b) of the Child's Rights Act 2003.
[44] See also s 11(b) of the Matrimonial Causes Act Cap M7 LFN 2004.
[45] See Item 61 of Second Schedule of the Legislative Powers of Part I of the Exclusive Legislative List of the Constitution of the Federal Republic of Nigeria Cap C23 LFN 2004 as amended, for the power of the National Assembly to make Laws for statutory marriage to the exclusion of customary marriage.
[46] See also the Marriage Act Cap M6 LFN 2004, the Matrimonial Causes Act Cap M7 LFN 2004 and the various Succession Laws in Nigeria.
[47] M537 A.2d 1227 (N.J. 1988).
[48] See also s 53 of the National Health Act of Nigeria 2014 and s 17 of the Adoption Law Cap 7 Laws of Enugu State 2004.
[49] This requirement is found in s 50(1)(e) and 128 of the Child's Rights Act of Nigeria 2003.
[50] This is equally provided for under Nigerian Laws. See s 226 of the Child's Rights Act of 2003.

The court compared the practice of commercial surrogacy to baby-selling, arguing that state laws prohibiting the sale of babies also applied to surrogacy contracts for public policy reasons. After finding surrogacy contracts void and unenforceable in New Jersey, the Court was left to decide the custody issue as the surrogate mother contributed genetic material, the surrogacy type in issue being traditional surrogacy.

Five years after *In Re Baby*,[51] the enforceability of a commercial surrogacy contract was again tested in *Johnson v Calver*.[52] The California Supreme Court, after wrestling with the determination of who was the natural mother of the child, held that a gestational surrogate has no parental rights to a child who is not genetically linked to her. The court arrived at this conclusion after rejecting the public policy arguments advanced by Mrs Johnson. Custody was awarded to the couple who supplied the zygote.

In the whole of United States, only four states: Florida, Nevada, New Hampshire, and Virginia have legislation providing for the legality and enforceability of altruistic surrogacy agreements. These four states prohibit couples from paying compensation to the surrogate for her services in excess of any expenses incurred as a result of the pregnancy. In at least seven states, all surrogacy agreements are void and unenforceable. Five other states and the District of Columbia impose civil and criminal penalties on those who enter into such contract. Britain, France, Germany, Greece, Israel, Norway, Spain, and Switzerland have banned commercial surrogacy in Europe.[53]

The numerous outlined violations of specific statutes inherent in surrogacy contracts, as well as the absence of any enabling legislation for bringing such a contract into existence, which seeks to expropriate and appropriate parental responsibilities and inheritance rights without Wills, render it practically impossible to enforce in Nigeria, to the best of the authors' knowledge. The restrictive abortion laws in Nigeria work to preserve the interest of the commissioning couple by prohibiting the surrogate to abort the continuation of the pregnancy. Otherwise, surrogacy contract cannot operate to thwart the constitutional rights of the surrogate to terminate the pregnancy under her right to privacy.

The practice of commissioning couple of gestational surrogacy donor seeking to adopt the baby of the procedure in other to legalise parental and child rights of the couple and the child has no foundation in Nigerian law. The conditions for adoption outlined in the Child's Rights Act 2003 will not have been met at the relevant time of seeking the adoption. Gestational surrogacy not being a customary law practice in Nigeria, the taking of the custody of the child of gestational surrogate donor appears not to be on the authority of any known statutory laws in Nigeria. Such custody will not be on the basis of statutory adoption, guardianship, fostering or wardship as the conditions for those are not met. The custody appears to be unauthorised by law, adverse and can constitute the offence of abduction. The felony charges of abduction stares the couple in the face. The surrogacy contracts executed between the donors, the couple and the surrogate, it is submitted, end at providing contractual cover for the parties as to consent to donate gametes or carry a pregnancy. Such signed documents cannot extend to mean consent of the gamete donors or the surrogate mother, for a baby not yet conceived or delivered, to be adopted by the commissioning IVF couple, as there is currently no law in Nigeria permitting such extension.

[51]M537 A.2d 1227 (N.J. 1988).
[52] 851 P.2d 776 (Cal. 1993).
[53] LUzych, 'The Mother of all Questions: How to Govern Surrogacy', (1993)(8 Mar)PA LJ 2.

Curiously, the IVF medical practitioner, who is at the centre of this legally unauthorised practice, does not participate in the bazaar of document signing. If gestational surrogacy donor is besmirched with the likelihood of abduction charge against the stakeholders, the IVF medical practitioner may thereby become a party to the offense. Furthermore, the other stakeholders may have no defence when a child from gestational surrogacy donor files fundamental rights application against the contravention of its right to privacy, its inability to be shown its biological parents in this highly hush-hush business. From the provisions of the Child's Rights Act 2003, this child can apply to Court for DNA test between it and the commissioning couple to ascertain its genetic relationship with them. Surrogacy contracts are not protected by Nigerian law so as to bind the child who did not participate in the contract. In fact, surrogacy contracts clearly contravene the provisions of the Child's Rights Act 2023 that give a child the right to be raised by his/her biological parent. The child born by way of gestational surrogacy donor can validly commence felony charge against the medical practitioner, the surrogate and the commissioning couple for abduction. In *Raphael Obijiaku v Chief Joe Obijiaku & 2 Ors*,[54] the Court held that 'a private legal practitioner or indeed a private citizen has the indisputable right under section 301(1) of the Anambra State Administration of Criminal Justice Law 2010 to lay a complaint and prosecute same, without the fiat of the Attorney General of the State'. In states in which the ACJL provides for the right to private prosecution, the child would not need the fiat of the Attorney-General to commence the prosecution. The snag is that a court will not order compulsory DNA test when the resulting child had become an adult and the refusal of the commissioning couple to undergo a DNA test will not amount to contempt of court.[55]

5.2. Parentage under Nigerian Laws

A parent is the lawful father or mother of a person.[56] In Nigeria, a parent is either natural or adoptive. While parental responsibilities are not exclusive to parenthood, succession rights to intestate estate are purely based on the existence of a parent-child relationship.

According to the Second Schedule of the Constitution,[57] the formation, annulment and dissolution of marriages other than marriages under Islamic law and customary law including matrimonial causes relating thereto are within the exclusive legislative powers of the Federal Government. The necessary legal implications of this provision include that the formation, annulment and dissolution of marriages under Islamic law and customary law including matrimonial causes relating thereto are not within the exclusive legislative list, and therefore are not regulated exclusively by the Acts of the National Assembly. Islamic and customary marriages, being a provision also not in the concurrent list of the Constitution, has dispatched the formation, annulment and dissolution of marriages under Islamic law and customary law including matrimonial causes relating thereto to the residual competences of states.

However, the marriage customs of the customary groups must pass the validity tests legislated into the different State High Court Laws, and Federal Capital Territory (Abuja) High Court Act, for such customs to become valid and enforceable. There are three such tests. The first is that the customary law is not repugnant to natural justice, equity and good conscience. The second is that it is not incompatible either directly or by implication with any law for the time being in force. The third is that it must not be contrary to public policy. IVF-ET is not a customary marriage practice.

[54] (2022) 17 NWLR (Pt 1857) 377 at 405 paras E- F Aboki JSC.
[55] S 63 of the Child's Rights Act 2003.
[56] See Appeal of Gibson, 154 Mass. 378, 28 N. E. 290.
[57] Legislative Powers, Part I, Exclusive Legislative List, contains as its Item 61.

5.3. Parentage in Gestational Surrogacy Donor

The crux of this paper is to determine where the parental responsibility of the IVF commissioning couple over the child born through gestational surrogate donor derives in the scheme of the contractual and legal frameworks operating in Nigeria. Could such couple be called the parents of the IVF child under the Nigerian legal framework by relying solely on the surrogacy contract executed between the surrogate mother and the commissioning couple? If they are parents, who made them parents? Is parenting and parentage in Nigeria now donated to couples by the IVF medical practitioners? Which law in Nigeria empowered the medical doctors in Nigeria to donate parentage to commissioning couples? Is the couple guilty under section 27 of the Child's Rights Act 2003?

It is arguable that the parents of the IVF child are the gamete donors who are scientifically and indisputably, in the absence of chimera, the genetic parents.[58] Realistically, though, the Nigerian courts do not automatically employ this genetic method of determination of parentage as can be seen in many cited cases in this paper. Thus, despite the new provision at section 63 of the Child's Rights Act 2003, Nigerian courts still go back to the traditional methods of determination of parentage.[59] However, the traditional method of determination of the true mother of a child by Nigerian courts, known to be fallible, rebuttable and mostly unscientific, is not as problematic as that of the father. Where a woman conceives, carries and delivers a baby, it would be difficult to convince the Nigerian courts that she is not the true mother of the baby, being that, by the special provision of section 63 of the Child's Rights Act 2003, the use of DNA testing for the determination of paternity or maternity of a child is not compulsory in Nigeria. By the Child's Rights Act 2023 section 63, the Court has the discretion to make an order. However, once it is made, it is binding on the parties. On that account, the surrogate mother may have her day in court as the mother of the IVF baby born through gestational surrogate donor.

On the issue of paternity, the traditional method of determination is to know who got the woman pregnant. Is it the donor of the sperm cell or the IVF medical practitioner that introduced the embryo into the gestational surrogate donor that got the surrogate mother pregnant? It is instructive that the sperm cell of the donor never came in contact with the surrogate. There was thus no artificial insemination of the surrogate with the sperm cell of the donor. Rather, the IVF medical practitioner produced an embryo in the laboratory using the sperm cell and oocyte/egg of donors. The embryo so produced is introduced into the genitalia of the surrogate by the practitioner. If the medical practitioner has his way in court as the father of the child born by way of gestational surrogacy donor on the ground that he got the surrogate mother pregnant 'scientifically' then, where the IVF couple have custody of such a child, the couple will not have been liable for the offence of abduction if the medical practitioner and the surrogate mother consented to the custody. As a corollary to the above, the IVF medical practitioner and the gestational surrogate donor mother may also consent to an adoption proceeding as parents of the IVF child when the IVF couple applies to adopt the child.

6. Conclusion

Nigeria is in dire need of legislations in the areas of IVF-ET. The need to include the legalisation of IVF-ET, the statutory authorisation for the execution of surrogacy contracts, and the statutory

[58] *Johnson v Calver* 851 P.2d 776 (Cal. 1993).
[59] See *Anozia v Nnani* [2015] 8 NWLR (Pt 1461) 241.

detailing of the relationships amongst all the stakeholders in the business of IVF-ET. Among other issues, the law will provide specifically that:

1. It shall be lawful for consenting parties to go into a contract for non-commercial surrogacy.
2. Gestational surrogacy with gametes donation shall be one of the ways of acquiring parentage in Nigeria.
3. Notwithstanding the provisions of the Child's Rights Act 2003, the Matrimonial Causes Act 2004 and the Marriage Act 2004:
   (1) The gestational surrogate without donor has no parental rights and obligations over the resulting IVF child.
   (2) The commissioning/intending/intended person/wife/couple shall have parental rights and obligations over the resulting IVF child.
   (3) The commissioning/intending/intended person/wife/couple shall for all intents and purposes be deemed the customary or statutory guardian or foster parents of the ensuing IVF child.
   (4) The consent of the procurators namely the commissioning party, the donor and the surrogate shall sufficiently transfer the custodial and filial rights of the child to the commissioning party.
   (5) The resulting IVF child shall be the child of the commissioning party for all purposes including for the purpose of inheriting the property of the commissioning party.
4. The medical practitioner who conscientiously performed the surrogacy procedure or the artificial medical manipulation or implantation for gestational surrogacy is excluded from legal liability in any suit of the surrogate, the commissioning party or the resulting IVF child, except to the extent that the doctor perpetrated fraud in the process.
5. Commercial surrogacy is a crime punishable with terms of imprisonment or with fine or both.

It is instructive that while we are waiting for the legalisations on IVF and IVF contract in Nigeria, and the promulgation of the enactment detailing the relationships amongst the stakeholders to IVF practices in Nigeria, the IVF commissioning couple ought to apply wisdom. IVF commissioning couples are not parents to the IVF child born through gestational surrogate donor under any law in Nigeria, be it statutory or customary. The commissioning couple is not even statutory guardians or foster parents. The child is equally not under them by way of wardship. They can best be described as per section 11(b) of the Matrimonial Causes Act 2004,[60] which does not carry any parental responsibility, succession or fostering right. An application to Court under section 25 of Matrimonial Causes Act 2004[61] in proceedings for ancillary relief, being proceedings with respect to the custody, guardianship, maintenance, welfare, advancement or education of a child, may be indicated, for them to be legally entitled to the custody of the IVF children especially those IVF children from gestational surrogate donor, so as not to run afoul of the law and incur felony charges.

[60] Cap M7 LFN 2004.
[61] Cap M7 LFN 2004.