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NEW SCIENCE OF MOTHERHOOD: SURROGACY CONTRACT IN MONOGAMOUS MARRIAGES IN NIGERIA

Abstract

Recently the number of infertile women are on the increase; for various medical and genetic reasons some couples can't conceive. Because of this, most couples have subjected themselves to Assisted Reproductive Technology (ART). The method of conception under this term includes Invitro Fertilization (IVF), Frozen Embryos treatment and surrogacy. For the purpose of this work, we would espouse surrogacy and its linkage with monogamous marriages in Nigeria. Surrogacy is a form of third-party reproduction in which a women is artificially inseminated to carry a pregnancy for intended parents. The legal problem that has emerged as result of surrogacy is the bifurcation of parenthood through the introduction of a third party, a situation which was never contemplated by Lord Penzance in his definition of marriage and even the Nigerian interpretation Act on Act Marriage, both making the presence of a man and a woman mandatory and for the purposes of child bearing and rearing. In the context of surrogacy, a man and two women are present. The rule of monogamy is simply and universal, for the most part: You stay sexually, physically and emotionally faithful, to one person. Essentially, this work adopting the doctrinal research methodology seeks to examine the praxis for surrogacy contract in monogamous manages and suggest relevant nostrums for improvement.

Keywords: New Science of Motherhood, Surrogacy Contract, Monogamous Marriage, Nigeria.

1. Introduction

One of the most dramatic developments in Nigeria family law has been the use of a surrogate mother. She is a woman who arranges to become pregnant, usually by artificial insemination, so that she can give the child to an infertile woman to raise. Current study of surrogacy indicates that the demand for surrogate mothers stems primarily from female infertility. The number of infertile women are on the increase due to the use of intrauterine birth control devices, greater incidence of sexually transmitted diseases, previous abortions and the post-ponement of childbearing to establish careers. Surrogacy has had significant implication for the definition of marriage, particularly in the context of Lord Penzance's definition. Lord Penzance, in his ruling in the 19th century case of **Hyde v. Hyde**[1] defined marriage as the voluntary union for life of one man and one woman to the exclusion of all others. However, it

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. (886) L.R.I P& D

seems that the advent and widespread acceptance of Surrogacy have brought about various challenges and re-evaluation of this definition.

The Nigerian Interpretation Act[2] appears to be the only Nigerian Legislation that attempted to define Monogamous Marriage. Section 18 of the interpretation Act provides that a monogamous marriage is one which is recognized by the Law of the place where it is contracted, as a voluntary Union of one Man and one woman, to the exclusions of all others during the continuance of the marriage" The said Act, apparently adopted the celebrated definition of marriage Propounded by Lord Penzance, in the 19th Century, in the case of Hyde v Hyde[3].

The question which agitates one's mind following the increase of Surrogate births is whether this definition of marriage offered by Lord Penzance in 1886, still represents the true meaning of marriage in today's World, or is it a mere window dressing? Lord Penzance's definition, no doubt represents the traditional Concept of marriage. For the past few years, however it has been obvious that this traditional concept of monogamous marriage, has, changed dramatically in many countries of the World.

2. Nature and Concept of Surrogacy Contract in Nigeria

The term 'Surrogacy'' is derived from the Latin word "subrogate" meaning accepted to act in the Place of or "a substitute"[4] which further promotes the ideology that the Surrogate acts as a substitute for another woman who cannot go through the natural procedure of Pregnancy and child bearing.

Surrogacy is an arrangement in which a woman[5] (the surrogate) agrees to carry and give birth to a child on behalf of another person or couple (the intended Parents). A Surrogate mother is a woman who becomes pregnant by artificial insemination or by implantation of a fertilized egg created by in vitro fertilization for the purpose of carrying the Fetus to term for another person or persons[6].

2. What Does Surrogacy Mean for Intended Parents?

When Intended Parents consider surrogacy, it's usually because, it's one of their last options for having a child that is biologically related to them. Many intended parents go

[2] Cap 123,2004 Laws & the federation.

[3] . (886) L.R.I P& D

[4] Merriam-Webster, https://www.Merriam-webster.com>accessd 25th Feb. 2024

[5] Surrogacy meaning. Better Health Channel, https: //www.better health. vic govt.all> accessed 25th Feb 2024,

[6] Surrogate Mother definition and Meaning, Merriam-Webster https://www. merriam-webster.com> accessed 25th Feb. 2024.

through extensive fertility treatment and IVF processes before deciding on surrogacy. So, it is a highly emotional decision to come to, add to the unmerited shame and stigma that often come with being childless and for struggling with infertility; Surrogacy means the world to intended parents who have tried and waited for years to have a child. It's a Priceless gift given by a selfless woman, one which they will never be able to repay. Surrogacy is a life changing opportunity to create a family where there may not have been one before[7].

4. History of Surrogacy

The practice started thousands of years ago, tracing back to the Babylonians, who permitted Surrogacy to prevent divorce. The Bible contains one of the earliest records of surrogacy when Abram's wife gave him slave girl: Abram's wife Sarai had not given a child to him. But she had an Egyptian Slave girl named Hagar, and so she said to Abram, "The Lord has kept me from having children. Why don't you sleep with my slave girl? Perhaps she can have a child for me"[8] Abram impregnated Hager, and she gave him and Sarah a son named Ismael. The Sarah and Abram's story represents the first surviving recorded description of a "natural surrogacy", traditional Surrogacy completed through artificial insemination did not arrive, of course, until much later.

Today surrogates offer their services by using the Assisted Reproductive Technologies (ART) which bypass Sexual intercourse. ART Consists of treatment or procedures in which eggs are surgically removed from a women's ovaries and combined with sperm to help a woman become Pregnant. In 1996, approximately 65,000 ART treatment cycles were carried out at 300 programs in the United States. This is an area in which the Science of motherhood (called by some the "ovarian Olympics") is moving much faster than the Law. Increasingly, Courts are faced with Legal issues for which there are no precedents[9].

The Largest category of ART methods (70 percent) is invitro fertilization (IVF), sometimes referred to as fertilization 'in a glass or conception 'in a test tube". IVF consists of the surgical removal of a Woman's eggs their Fertilization with a man's sperm in a Petri dish in a Laboratory, and the transfer of the resulting embryo into the uterus through the Cervix.

[7] What Does Surrogacy Mean? Surrogate •Com< https://surrogate.com> accessed 25th feb.2024

[8] Genesis 16:1a-15, A Christian Ethical Perspective on Surrogacy. https://digital commons. Cedar VIIIe.edu>accessdd 25th Feb. 2024

[9] WP Statsky: Family Law, the Essentials (2edn USA: Delmar Cengage Learning, 2004) 315.

5. Surrogacy Methods.

Four General Methods of Surrogate Parenting are recognized as follows:

1. Artificial Insemination by Husband (AIH). The AIH Method arrangement is that which the surrogate, a women other than the wife of the Sperm donor, is artificially inseminated with the sperm of the husband of a married couple.

2. In Vitro fertilization (IVF). In Vitro fertilization is a process by which a sperm and an egg are joined in a Laboratory and the fertilized egg is implanted in the surrogate.

3. Artificial Insemination by Donor (AID). The AID method is a technique in which the Surrogate is artificially inseminated with the sperm of a donor other than the contracting male. Such sperm is typically a specimen obtained from a sperm bank.

4. Natural Insemination (NI). The NI Method involves a situation where Sexual Intercourse occurs between the Surrogate and the husband of a married couple.

Of the four Methods, AIH is the most common and NI is the least. Sometimes the IVF and AID methods are chosen in Surrogate Parenting situation, but not as frequent of AIH. Because Artificial insemination by Husband (AIH) is the most common method chosen in Surrogate parenting agreements, the definition will be applied to the term Surrogate parenting in this discussion[10].

6.Surrogacy Categories: There are two major categories of surrogates:

a) Genetic or traditional or Partial Surrogacy, the Surrogate becomes pregnant with a child biologically related to her. In this arrangement, the surrogate provides her own egg to be fertilized, either through artificial insemination or in vitro fertilization (IVF), using the intended father's sperm or donated sperm. As a result, the child conceived in traditional Surrogacy has a genetic connection to the Surrogate[11].

b)Gestational Surrogate**:** Gestational Surrogate, often called a gestational carrier, or a Surrogate host, entail the use of assisted reproductive technology (ART) to create Pregnancy, where the Surrogate has no genetic connection to the child. IVF is employed to create an embryo using the eggs and sperms of the intended parents or donors. This embryo is then transferred to the surrogate's uterus, which carries the pregnancy to terms. In gestational surrogacy, the surrogate is not genetically related to the child.

[10] *Ibid 8*
[11] *Ibid*

7. Surrogacy Agreements: Surrogacy comes into existence by agreement. An unpregnant woman enters a contract to become pregnant, to give birth to a Child, and then to relinquish all parental rights to the couple (usually a husband and wife). Surrogacy Agreements come in these forms -

a. Commercial Surrogacy agreement, a commercial Surrogacy is an agreement whereby the Surrogate mother receives a fee for carrying the child to term.
b. Non-commercial or Altruistic surrogacy Agreement: An altruistic Surrogacy Contract is where the surrogate mother receives no financial reward for carrying the Child or relinquishing her rights upon birth. The surrogate mother however, will be paid for any expenses incurred during thy course of the pregnancy such as medical expenses, health insurance, prenatal Vitamins, maternity clothing and any other pregnancy related expenses. A Situation like this may arise when a sister, for example, agrees to act as a surrogate for a sibling who cannot carry or conceive a Child[12].

The issue of a commercial Surrogacy was herald by battle over "Baby M' in 1987, the Case of Baby M, received national attention when the surrogate mother had a change of heart and withdraw her consent for adoption. This case prompted many state Legislature to enact Law declaring Commercial Surrogate Contact unenforceable. The national conversation ran the gamut, from is it ethical to Legalize what amounted to "baby Selling" to who should have custody of Baby M.

The facts of Baby M: In February 1985, William Stern and Mary Beth Whitehead entered into a surrogacy contract. It recited that Stern's wife Elizabeth was infertile, that they wanted a child and that Mrs whitehead was willing to provide that child as the mother with Mr Stern as the Father. The Contract provided that through artificial insemination using Mr. Stern's sperm, Mrs Whitehead would become pregnant, carry the child to term, bear it, deliver it to Stern and thereafter do whatever was necessary to terminate her maternal rights so that Mrs. Stern Could thereafter adopt the child. Mrs Whitehead's husband Richard was also a party to the contract - Mrs. Stem was not. Mr. Whitehead promised to do all acts necessary to rebut the presumption of paternity under the Parentage Act. Mr. Stern on his part, agreed to attempt the artificial Insemination and to pay Mrs. Whitehead $10,000 after the child's birth, on its delivery to him. The Surrogate and biological mother, Mary Beth Whitehead, refused to give up custody of Melissa (Baby m) to the couple with whom she made the Surrogacy agreement. The Courts of New Jersey found that whitehead was the child's legal mother and declared contracts for gestational carrier hood illegal and invalid. However, the Court found it in

[12] GA Luppino and J F Miller, Family Law and Practice, the Paralegal's Guide (3rd USA: Pearson Education, Inc., 2008) 509.

the best interest of the infant to award custody of Melissa to the Child's biological father, William Stern, and his wife Elizabeth Stern. After turning eighteen years Old, Melissa Stern (the Famous baby m) legally terminated Mrs. Whitehead's parental rights and designated Elizabeth Stern's maternity through adoption proceedings[13].

The matter of Baby m[14], was a seminal case in family law because it was first Court ruling in the United States involving Surrogacy and a surrogate parenting agreement.

8. Legal framework for Surrogacy Contracts in Monogamous marriages in Nigeria

Due to the ever-decreasing number of babies available for adoption and the ever-increasing technology in the area of human reproduction, couples who desperately want Children will continue to seek out surrogate mothers. Consequently, some form of protection must be provided for the couple, the Surrogate mother, and the resulting child: In Nigeria parties to Surrogacy contract can benefit from the Following Laws:

8.1, Constitution of Federal Republic of Nigeria, 1999(As Amended)

Section 17[15] of the Constitution made the following provision: 17(1), The State Social order is founded on ideal of freedom, equality and Justice

17 (3) (6) the health, Safety and welfare of all persons

17 (3) (d) there are adequate medical and health facilities for all persons.

17 (3) (h) The evolution and promotion of family Life is encouraged

From these provisions, it is discernible that the constitution promote evolution and promotion of family Life, the health and Welfare of the People; Consequently, Since the Practice of ART falls under the Umbrella of health, Welfare and family Life of the people, It can be said that the Constitution provides the ground for Laws on ART to be promulgated.

The CFRN 1999 guarantees the right to Life, stating that "Every person has a right to life and non shall be deprived intentionally of his life[16]. Those against surrogacy may argue that the Practice involves potential risk and ethical concerns that could impact the well-being and right to Life of the Surrogate Mother and the unborn child. The CFRN 1999 recognizes the right to dignity of every individual. This section States "Every

[13] *Ibid* p,510

[14] 13. (1988) 109 N. J. 396

[15] Constitution of the Federal Republic of Nigeria, 1999(As Amended).

[16] CFRN 1999 s.33,

individual is entitled to respect for the dignity of his person"[17]. Opponents of Surrogacy may argue that it violates the dignity of the surrogate mother by commodifying her reproductive capacity and reducing her to a mere vessel for carrying a child

Another Legal Provision that favour surrogacy in Nigeria is the express provision of section 36, (12) CFRN,[18] which states that subject as otherwise provided by the constitution, a person Shall not be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written Law, and in this Subsection, a written Law refers to an Act of the National Assembly or a Law of a state, any subsidiary Legislation or Instrument under the provision of a law. This provision made the practice of surrogacy legitimate, since it hasn't been expressly declared a crime.

8.2, Contract Law of Anambra State (Revised Laws of Arambra State of Nigeria, 1991).

The Nigerian Law of Contract is Laissez-faire in Principle meaning that contracts between Private parties are ordinarily governed by the Law Chosen by the contracting parties. A Contract is an agreement between two or more parties which creates reciprocal legal obligation to do or not to do particular things: for a contract to be legally binding, and therefore enforceable, it needs to satisfy basic principles: offer, acceptance, consideration and the intention to create Legal relations, competency and capacity, and contract Legality; preferably, the document will be in writing[19] (electronic or on paper). According to Section 3,[20] of the law a fundamental breach, a breach which goes to the root of the contract and has the effect of depriving the innocent party of achieving the main purpose of the contract.

Surrogacy Contracts are legally enforceable in so for there are no vitiating factors which will cripple or invalidate the Contract such as mistake, duress, misrepresentation, undue influence and illegality.

8.3, Child Rights Act 2003, this is the federal Legislation that safeguards the fundamental rights of all children in Nigeria. It expands the human rights bestowed to citizens in Nigeria 1999 constitution to children. Although this law was passed at the Federal Level, it is only effective if state assemblies also codify the law. States have adopted the Childs Right Act as a State Law. Children as defined by Child's Right is any person under the age of 18[21]. The Child's Right Act mandates that when a child is

[17] CFRN 1999, s. 34.

[18] CFRN 1999, s. 36, and 12.

[19] Introduction & Contract - Learn Nigerian Law < https://www.learnigerianlaw.com accessed 15th March,2024

[20] Revised Laws of Anambra State of Nigeria, 1991

[21] Child's Right Act 2003, s.277.

concerned, their best interest is to take precedent. It goes on to state that the parent or Legal guardian is obligated to fulfill the duty to give the child basic protection[22].Some writers have argued that surrogacy is criminal in certain parts of Nigeria by virtue of Section 30 (1) of the Child's Right Act, which provide that "No person shall buy, sell, hire, let on hire, dispose of or obtain possession of or otherwise deal in a child".

8.4, Assisted Reproductive Technology (Regulation) Bill 2016. The closest attempt to regulate surrogacy in Nigeria, is the presentation of the Assistive Reproductive Technology (Regulation) Bill 2016; which has not been passed into Law. However, Lagos state proactively passed guidelines on Assisted Reproductive Technology in 2019. Chapter vii of the ART Bill 2016, specifically spells out the rights and duties of patients, donors, surrogates and children in assisted reproduction. Clause 32 of the ART Bill makes ART available to all persons, including single persons as well as married and unmarried couples. Informed Consent is a prerequisite where ART is sought by couples and a parent of a minor seeking ART will be entitled to have access to information regarding the donor, the surrogate mother and the welfare of the child to the extent permitted by Law[23].Clause 34 allows commissioning parents and the surrogate mother to enter into a written agreement which is legally enforceable. Clause 34 (2) stats that all pregnancy related expenses, insurance and post-natal expenses in relation to the Pregnancy resulting from ART of a surrogate mother shall be borne by the commissioning parents. Clause 34 (3) permits a surrogate mother to accept monetary compensation from the commissioning parents for being a surrogate and clause 34 (4) states that a surrogate mother must relinquish all parental rights over the child. It could be said that this Bill would be a step in the right direction.

9. What obtains in some jurisdictions

South Africa has a Legislative framework governing surrogacy. The South African Children's Act of 2005, recognized the need for comprehensive legislation to address the complex, ethical, legal, and social issues associated with surrogacy arrangements[24]. The Act which aims at protecting and promoting the rights of children, introduced significant changes and development surrounding the practice of surrogacy. It provides that a surrogacy agreement must be in writing and must be entered into by the surrogate mother and the commissioning parent or parents. It emphasized the necessity of written consent from all parties involved. This ensures that all parties have a clear understanding of their roles, rights and responsibilities within the surrogacy

[22] Child's Right Act 2003, s.1

[23] ART Bill Clause 32 ,2, and 3.

[24] Children's Act 38 of 2005(South Africa), s. 292.

arrangements and that the child's welfare remains at the center of any surrogacy arrangement[25].

In United Kingdom, the Surrogacy Arrangements Act 1985 regulates certain activities in connection with arrangements that relates to agreements for a woman to carry a child as a surrogate mother. The 1985 Act provides that it is lawful to enter into a surrogacy arrangement in the UK, but it is not enforceable in law. Further, the 1985 Act prohibits the negotiation of surrogacy arrangements on a commercial basis[26].

It is thus right to state that international standard is a well-regulated surrogacy practices which focus on transparency, informed consent and the protection of the surrogate's Physical and emotional well-being. In countries with laws on surrogacy, they balance the interests of intended Parents, Surrogates, and donors. In Australia, Ukraine, Mexico and Colombia, where surrogacy is also legalized, the surrogates do not get financial compensation outside being reimbursed for medical and reasonable expenses. Perhaps, if surrogates are not rewarded handsomely in Nigeria too, women would not consider it as a survival option[27]. The fact remains that ART has come to stay and it should be regulated in Nigeria in line with global best practices.

10.The implications of Surrogacy Contract in Monogamous marriages:

Monogamy is defined as marriage with only one person at a time or the practice of having only one mate. It is the standard mating system in statutory marriage in Nigeria. It is the most common form of marriage. Research has shown that monogamy can be beneficial for both individual and society as a whole. In monogamy relationship, partners are more likely to have higher level of trust, intimacy, and commitment. This can lead to greater emotional and physical satisfaction, as well as a better mental health outcome.

Surrogacy, a complex and controversial topic can have significant implication for monogamous marriages in Nigeria, where cultural and religious values emphasize traditional family structures: some potential impacts include:

- Emotional and psychological challenges: The introduction of a surrogate mother and a child born through surrogacy can create emotional and psychological tensions within the marriage, potentially leading to feelings of insecurity, jealousy and resentment.
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[25] Children's Act 38 of 2005(South Africa),s.28.

[26] In Some Countries, such as france, Italy, and Germany, all forms of using a surrogate mother are Illegal. So it is prohibited by law.

[27] Surrogacy Legal countries-World Center of baby <https://world center of baby.com> accessed 16th Mach, 2024.

- Changes in family Dynamics: Surrogacy can affect the traditional dynamics of a monogamous marriage, potentially leading to a definition of roles and responsibilities within the family.
- Legal and ethical concerns: Nigeria's legal framework regarding surrogacy is unclear, leading to ethical concerns and potential legal disputes, which can put a strain on the marriage.
- Social Stigma: Surrogacy is often stigmatized in Nigerian culture, potentially leading to social isolation, judgement and criticism from family, friends and community members, which can impact the marriage.
- Communication and Trust Issues: The surrogacy process requires open involved. Communication, trust and honesty among all parties involved. Breakdown in communication and trust can put a significant strain on the marriage.
- Religious and Cultural Beliefs: Surrogacy may conflict with religious and cultural beliefs, leading to internal conflicts and potentially affecting the marriage.
- Financial Burden: Surrogacy can be costly, potentially leading to financial stress and tension with the marriage.
- Impact on Intimacy and Sexual Relations: The introduction of a surrogate mother and a child born through surrogacy can affect the emotional and physical intimacy within the marriage.
- Power Dynamics: Surrogacy can create power imbalances, within the marriage, potentially leading to feeling of resentment and conflict.
- Lack of Support: The unique challenges of surrogacy may not be fully understood or supported by family, friends, and community members, potentially leaving the couple feeling isolated and without a support system[28].

It is important to note that every marriage is unique, and the impact of surrogacy will vary depending on individual circumstances and the couple's ability to navigate these challenges together. A question as to whether surrogacy and other contemporary challenges affect monogamous marriages is the key issue in this work, and the answer is yes. The concept of marriage, particularly marriage under the Act is greatly hit by these problems which actually is thought to have paralyzed the accepted definition of marriage under the Act and monogamous marriage as recognized in Nigeria. The introduction into monogamous marriage, issues of surrogate motherhood , free unions and single parentage, hermaphrodites, transsexual, same-sex marriage and other

[28] Surrogate Parenting what are the major arguments of the https://www.Cliffsnotes.com>accesseddd 18th March, 2024

methods of medically assisted methods of conceptions, all stand out as topical[29]. Sprigg[30], a family law expert, is of the view that in defending the monogamous marriage, one is probably defending something that no longer exists. He defended his view by stating the various changes in the concept of marriage, which he had observed including surrogacy.

11. Conclusion

The ever-rising prevalence of infertility world over, Nigeria inclusive, has led to the advancement of assisted reproductive techniques (ART). Herein, surrogacy comes as an alternative while the infertile woman or couple is not able to reproduce. Surrogacy is a form of third-party reproduction in which a woman consents to carry a pregnancy for intended parent(s) who cannot conceive for medical reasons. It has also been established that couples in monogamous marriages also use this tool to aid satisfaction in marriage in the aspect of child bearing. The first case of assisted reproduction was Pioneered in Nigeria by Oladapo Ashira in 1984, where the first baby was delivered in 1989. Subsequently there has been an increase of report of babes birthed through assisted reproduction technology in both public and private health facilitates in Nigeria. The issue of surrogacy contract in monogamous marriages in Nigeria provides valuable insight into contemporary crises in family law. Marriage takes its structure and mission as an institution based on the fact that every child deserves and has a birthright to be raised by a father and mother, who have committed themselves to a stable and loving upbringing under the formative influence of both a male and female that is their own parents can be threatened by surrogacy. Surrogacy as a form of third-party reproduction in a monogamous marriage paralyzed the fourth arm of Lord Penzance's definition of marriage, "to the exclusion of all other's. It is believed that the definition of marriage by Lord Penzance, represent the definition of marriage in Christendom. This definition may no longer stand the test of time as universal in view of surrogacy which is prevalent today..

12. Recommendations

The Nigerian Government should prioritize the development of Legislation specifically addressing issues of surrogacy, outlining the rights and responsibilities of all parties involved in the best interest of the child born via surrogacy. This would also help resolve issues of illegal adoption and baby factories. Re-definition of marriage is also advocated. Public awareness and educational campaigns should be conducted to inform and educate the general public about surrogacy, so as to dispel misconception on moral and ethical concerns.

[29] Carol Arinze - Umobi and Arinze Dilim Umobi's Crases. in Family Law (Onitsha, Folmech Printing & publishing co. ltd, 2009)p.IV

[30] Peter Sprigg, changing concept of Marriage, LinkedIn-God sex politics.substrace.com accessed 18th March, 2024