

**SURROGACY: RE-EVALUATING THE EXISTING PRESUMPTIONS OF
MOTHERHOOD**

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DECLARATION

I, KOSKEI BRENDA CHEPTOO, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

This dissertation has been submitted for examination with my approval as University Supervisor.

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Date:

Jonah Mngola

ABSTRACT

Despite the nuances that have emerged as a result of surrogacy arrangements, it would seem that this has been a common practice in many different parts of the world. Indeed, infertility has been considered an issue since the beginning of time thus, it is no shock that mankind worked towards developing means to remedy this problem.

With the development of human assisted reproductive technologies, methods such as artificial insemination, IVF and surrogacy have become popular over the years. Many jurisdictions have been left to play catch-up to the developments in the medical field with some succeeding and others falling short. Surrogacy is on the increase in Kenya therefore discussions are underway to pass laws and policies that would sufficiently regulate the practice.

This paper seeks to identify different legal regulations that have since emerged in various jurisdiction to answer questions specifically:

- a) Who should rightfully be recognised as the mother of a child born out of a surrogacy arrangement where the surrogate has no genetic link to the child she carries?
- b) What rights and responsibilities accrue to both the surrogate and intended parties?
- c) What legal process may be employed to recognise the intended parents as the legal parents of a child born out of this agreement?

Chapter 1 seeks to identify the research problem and hypotheses, chapter 2 will outline the responses of various jurisdictions with the emergence of questions before the courts, chapter 3 will embark on a comparative analysis of the laws in the UK, USA and Israel, chapter 4 will outline the Kenyan situation as it is and the shortcomings in the Assisted Reproductive Technologies Bill and finally chapter 5 will give recommendations and wind up the study.

LIST OF CASES

AMN & 2 others v AG & 5 others (2015) eKLR.

JLN & 2 others v The Director of Children's Services (2014) eKLR.

Baby Cotton Case (Re C: A Minor) (1985).

Re Baby M (1988).

Nachmani v Nachmani (1996).

Re Marriage of Moschetta (1994).

Ezekiel Kiptarus Mutai v Esther Chepkurui Tapkile (2015) eKLR.

Eunita Onyango Geko v Philip Obungu Orinda (2013) eKLR.

Eliud Maina Mwangi v Margaret Wanjiru Gachangi (2013) eKLR.

CHAPTER 1

1.1. BACKGROUND

The Constitution of Kenya 2010 in Article 45 recognises the family as the natural and fundamental unit of society. It also underscores the fact that the family will enjoy state protection.¹ Article 16 of the UDHR further reiterates this position and highlights the right of men and women of full age to marry and found a family without any limitation due to race, nationality or religion.²

In pursuit of this right, many people all over the world have turned to methods of human assisted reproduction such as surrogacy, in-vitro fertilisation and artificial insemination. In Kenya, it is no different. Furthermore, Article 43 (1) (a) of the Constitution recognises the right to the highest attainable standard of healthcare (up to and including reproductive healthcare).³ As a result, it has necessitated the review of the legal framework governing reproduction, and a re-evaluation of various presumptions that have existed concerning family and parenthood.

The Reproductive Healthcare Bill 2014 makes an attempt at demystifying the concept of surrogacy. It provides for a surrogate parenthood agreement which is only valid where the conception of the child is effected by the use of the gametes of both or one of the commissioning parents (where there are sufficient biological, medical or other reasons).⁴ In general, it involves a situation where a woman makes a prior arrangement to carry a child with the intention that it will be handed over to someone else at birth.⁵

In the case *JLN & 2 others v The Director of Children's Services & 2 others*, the 2nd and 3rd petitioners were a couple who entered into a surrogacy agreement with the 1st petitioner. She gave birth to twins. The dispute revolved around which party should be registered as the mother in the twins' birth notification.⁶ Under the Births and Deaths Registration Act, birth has been defined as "issuing forth of any child from its mother after the expiration of the 28th week of pregnancy, whether alive or dead."⁷

¹ Article 45, *Constitution of Kenya* (2010).

² Article 16, *Universal Declaration of Human Rights*, 10th December 1948.

³ Article 43, *Constitution of Kenya*.

⁴ Section 10, *Reproductive Healthcare Bill* (Senate Bill No.17 of 2014).

⁵ Department of Health, *Review of Human Fertilisation and Embryology Act: A Public Consultation* (August 2005) para 7.

⁶ *JLN & 2 others v The Director of Children's Services & 2 others* [2014] eKlR.

⁷ Section 2, *Births and Deaths Registration Act* (Cap 149).

The court stated that in the event of a dispute, the Children's court of the High Court may be called upon to give necessary direction as to who is to be registered as the parent by applying the principle of the best interest of the child in the absence of a legislative framework.

In another case *AMN & 2 others v AG & 5 others*⁸ the same question arose concerning registration of twins born out of a surrogacy agreement. The Respondents relied on section 2 of the Birth's and Death's Registration Act and the case *Re G* where Baroness Hale Richmond differentiates between genetic parenthood, gestational parenthood and psychological parenthood. It was argued that section 2 favours gestational parenthood therefore the one that carries the pregnancy to term and delivers the child is rightfully the child's mother. Justice Lenaola accepted this position and ruled that the host woman is presumed in law to be the mother of the child though she may have no genetic link to the child. This remains the status until other legal processes are applied to transfer legal motherhood to the commissioning woman.

1.2. STATEMENT OF THE PROBLEM

Ideally, the commissioning mother is still the biological parent of a child born out of a surrogacy arrangement. The current law in Kenya (specifically the Births and Deaths Registration Act) however favours gestational parenthood and the surrogate mother is recognised in law as the mother of a child born out of a surrogacy agreement. The emergence of surrogacy arrangements has suddenly created a situation where the presumption that the woman who gives birth to a child is the child's mother, is rebuttable.

1.3. JUSTIFICATION OF THE STUDY

While fatherhood may be undisputable, surrogacy arrangements have over time been perceived as a challenge to both the meaning of motherhood and family.⁹ This is largely based on the traditional notions of motherhood and the significance of the gestational mother's contribution to the foetus growing inside her.¹⁰ For this reason, it is important that we evaluate the roles of both biological and gestational mothers to determine who should be recognised in law as the mother to a surrogate baby.

⁸ *AMN & 2 others v AG & 5 others* [2015] Eklr.

⁹ Horsty K, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements' *Child and Family Law Quarterly* Volume 22 (2010), at 456.

¹⁰ Sirola K, 'Defending the Rights of Intended Parents in Gestational Surrogacy Arrangements in Pennsylvania' *Journal for Gender, Social Policy and the Law* Volume 14 (2006), at 136.

At the same time, principles ought to be laid down so as to best determine legal motherhood in the event of disputed maternity. This can only begin once the law clearly establishes who rightfully assumes maternity.

1.4. STATEMENT OF OBJECTIVES

- 1) To determine who should be recognised by law as the mother of a child born out of a surrogacy agreement where the host has no genetic link with the child.
- 2) To understand the rights and responsibilities arise for both the surrogate and the commissioning mother.
- 3) To determine whether legal motherhood can be transferred by any other process besides adoption and if so, which process would be the most efficient.

1.5. RESEARCH QUESTION

- 1) Who should be recognised by law as the mother of a child born out of a surrogacy agreement where the host has no genetic link with the child?
- 2) What rights and responsibilities arise for both the surrogate and the commissioning mother?
- 3) Can motherhood be legally transferred by other means besides adoption? If so which processes will be most efficient?

1.6. LITERATURE REVIEW

Since this is an area that has largely been left to courts to adjudicate, most scholars have analysed the judgements of various courts to understand the principles applied as well as the rationale for their application.

Courts have developed tests to determine maternal rights based on three components: under the *genetic maternity rule*, courts award maternal rights to the party who provided the genetic material for the child. Those in favour of this rule believe it provides a clear and fair determination of maternal rights. I.e. blood tests can determine with certainty if a genetic link exists between a mother and a child. Next is the *gestational maternity rule* which favours the birth mother. Arguments in favour of this rule are primarily based on recognition that an emotional and physical connection is developed between a mother and her child during pregnancy. Lastly, the *intent based rule* defines legal motherhood by the pre-conceived intent

of the surrogate and arranging party. It is largely dependent on the determination as to whether or not a surrogacy contract in existence is enforceable.¹¹

In an analysis of the case *Johnson v Calvert* that was adjudicated in the California Court of Appeal, Todd Krim looks at the court's interpretation of the Uniform Parentage Act (UPA) that recognised both genetic motherhood and gestational motherhood. In this case under the UPA both the surrogate and commissioning mother had statutory claims to maternity. However, the court interpreted the UPA finding the blood test determination of maternity dispositive stating that a person must first prove through blood test evidence that she is genetically related to the child before she is considered the "natural mother".¹²

Frank Bewkes also looks into further jurisprudence by American courts in New Jersey. In one case, the woman's ovum and the man's sperm were combined to be implanted and gestated by the woman's sister. The couple sought a pre-birth order declaring themselves the legal parents of the child. The court denied them the pre-birth order stating that the voluntary surrender of the child by the surrogate is only valid if carried out within 72 hours after the birth of the child. The 72 hour requirement was affirmed later in another case of similar nature. In New Jersey, the gestational surrogate was seen as a mother and the surrogacy arrangement, while allowed, was treated like an adoption.¹³

A case has been made for the intent based rules with scholars arguing that intention encompasses the motivation to have a child, initiation and involvement in the procreative process and a commitment to nurture and care. Recognising intention is said to give families created through surrogacy or assisted conception protection against differential treatment of the infertile from the fertile. At the same time, surrogacy would not be treated as inferior to other assisted reproductive techniques in the hierarchy of family formation.¹⁴

At the foundation of all other arguments lies the importance of ensuring that the best interest of the child remains paramount. However, Kelly Oliver argues that the way "best interest of the child" is determined in courts almost always guarantees that the contracting party gets

¹¹ Hisano E, 'Gestational Surrogacy Maternity Disputes: Refocusing on the Child' *Lewis and Clark Law Review* (2011) 541-543.

¹² Krim T, 'BeyondBaby M: International Perspectives on Gestational Surrogacy and the Demise of the Unitary Biological Mother' *Annals of Health Law* (1996) 203.

¹³ Bewkes F, 'Surrogate or mother? The Problem of Traditional Surrogacy' *Tennessee Journal of Race, Gender & Social Justice* (2014) 152.

¹⁴ Horsty K, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements' *Child and Family Law Quarterly* (2010) 455.

custody of the child. Having agreed to give up her child, the court most likely already finds the surrogate an unfit mother. Perhaps the greatest influencing factor is the financial security of the disputing factors. Since the contracting party in most cases is paying for the services of the surrogate, then it is more likely that they are financially secure.¹⁵

Bearing all this in mind, it is clear that there is no established regime/standard to be followed in determining motherhood. Even then, the courts in their interpretation and application of the principle of the best interest of the child overlooks many other factors that may be of importance in determining maternal rights.

1.7. THEORETICAL FRAMEWORK

Many feminists have welcomed contract pregnancy as a way to illustrate that childbearing and child rearing are two distinct human functions. Motherhood has often been taken as women's preeminent characteristic but with surrogacy, it is emphasized that not all women who bear children need to be thought of as mothers. Thus, the gestational mother's obligation to relinquish the child she bore for the commissioning party is an expression of her freedom to undertake whatever work she chooses. It is argued that the refusal to acknowledge the legal validity of surrogacy arrangements implies that women are not competent to act as rational, moral agents regarding their reproductive activity.¹⁶

Under the labour theory, entitlement to an object flows directly from the productive labor that a person puts into an object. According to this theory, legal parenthood should be awarded to the one who has invested the most in the developing foetus. Taking this into account, the gestational mother is assumed to be most deserving of parenthood.¹⁷

Lastly, there is the parity principle. This principle argues that mothers and fathers have parity as far as parenthood is concerned. Some argue that claims of fatherhood originate in the genetic contribution that fathers make to their children. In the same spirit, then, it would be wrong to state that motherhood originates in the gestational purposes. Motherhood should also be awarded on account of the genetic link between a woman and the foetus.¹⁸

¹⁵ Oliver K, 'Marxism and Surrogacy' *Hypatia Inc & Wiley, Ethics and Reproduction* (1989) 100.

¹⁶ Shanley M, 'Surrogate Mothering and Women's Freedom: A Critique of Contracts for Human Reproduction' *Chicago Journals* (1993) 620.

¹⁷ Gillers S, 'A Labor Theory of Legal Parenthood' *Yale Law Journal* (2000) 706.

¹⁸ Bayne T & Kolers A, 'Are You my Mommy? On the Genetic Basis of Parenthood' *Journal of Applied Philosophy* (2001) 281.

1.8. HYPOTHESIS

A surrogacy agreement is not meant to confer full maternal rights to the host mother.

The biological mother/commissioning mother is the one that ought to be recognised as the legal parent of a child born out of a surrogacy arrangement rather than the host/surrogate mother.

1.9. RESEARCH DESIGN/METHODOLOGY

An enormous amount of research has been carried out on surrogacy in many different jurisdictions. Research studies carried out by various scholars in books, journals and periodicals will provide the information required to fully address the research problem.

Mass media will also provide information especially with regard to discussions on surrogacy in Kenya through newspaper publications and magazines.

I intend to carry out a comparative study of the United Kingdom, the United States and Israel. Legislation in the UK recognises the gestational maternity rule. Israel recognises and enforces surrogacy contracts while recognising the genetic maternity rule. The USA is a hybrid system applying all 3 rules on a case by case basis. It would be important to understand how the systems work in the different jurisdictions.

1.10. LIMITATIONS

Although most of the research is to be undertaken through online sources, these are of a limited nature especially with regard to primary sources. Some websites do not grant free access to their material. At the same time, certain key authors require that their articles and ebooks are paid for. This renders it difficult to obtain access to these resources.

1.11. CHAPTER BREAKDOWN

Chapter 1	Research proposal: Outlines the research to be undertaken, reasons why and how it shall be carried out.
Chapter 2	History and theoretical framework: Outlines the development of surrogacy from legal perspective throughout in the UK, USA and Israel.
Chapter 3	Comparative analysis: Undertakes to compare and contrast how surrogacy has been regulated in the UK, USA and Israel.
Chapter 4	Identifies Kenya's situation and current position on surrogacy, the shortcomings in regulation and what could be borrowed from the USA, UK and Israel.
Chapter 5	Recommendations and conclusions: Proposes solutions to improve the regulation of surrogacy in Kenya.

1.12. TIMELINE/DURATION FOR COMPLETION OF DISSERTATION

TASK	DATE OF COMPLETION
Proposal writing	24 th February 2016
Data collection and research	End of November
Final submission	13 th January 2017

CHAPTER 2

This chapter will briefly highlight the practice of surrogacy in early civilizations. It shall also review the extent to which various states have legislated on surrogacy i.e. the USA, UK and Israel, while looking at the practice of surrogacy in Kenya, both under traditional African society and since the advent of human assisted reproduction.

Lastly, this chapter shall also attempt to discuss the theoretical framework underpinning the arguments concerning who between a commissioning mother and the surrogate should be recognized legally as the mother of a child born out of a surrogacy arrangement.

2.1. INTRODUCTION

As previously defined, surrogacy is an arrangement where a woman agrees to carry a pregnancy on behalf of another woman (and her spouse) with the intention that once the child is born the commissioning parents would be recognized as the child's parents.¹⁹ The concept of surrogacy could further be split into partial surrogacy (also known as straight or traditional surrogacy) or full surrogacy (known as host or gestational).²⁰ The former involves the taking of sperm from the intended father and an egg from the surrogate while the latter involves the implantation of an embryo created either using²¹ –

- a) The egg and sperm of the intended parents,
- b) A donated egg fertilised with the intended father's sperm, or
- c) An embryo created using the egg and sperm that have both been donated.

Before the discovery and development of modern assisted reproductive techniques, surrogacy by natural conception was the only way to help barren women to have children. This shall be illustrated more in the next section.

¹⁹ - <http://www.thefreedictionary.com/surrogate+mother> on 12 December 2016.

²⁰ - < <http://www.hfea.gov.uk/fertility-treatment-options-surrogacy.html>> on 12 December 2016.

²¹ - < <http://www.hfea.gov.uk/fertility-treatment-options-surrogacy.html>> on 12 December 2016.

2.2. THE PRACTICE OF SURROGACY IN EARLY CIVILIZATION

Perhaps the most significant surrogacy arrangement throughout history was that between Abram, Sarai and Hagar with Abraham being the patriarch of the canonical religions. Abram's wife Sarai was barren. They were becoming advanced in age and Sarai still hadn't born Abram any children. Sarai had an Egyptian maidservant known as Hagar whom she offered to Abram to be his wife in order that she may have children on Sarai's behalf. Hagar conceived and later gave birth to a son, Ishmael.²²

History records that Mesopotamia also practiced surrogacy with Hammurabi's code being among the first to legally recognize it. Hammurabi's code was drawn up in 1780 and the document permitted an infertile woman who wished to have an offspring to find a "bondwoman" for her husband.²³ Where the bondwoman failed to have a male child, then an additional bondwoman would be taken for this purpose. The practice could also be traced back to Ancient China. A man would 'borrow a woman's belly' in order to produce offspring for purposes of continuing his family line.²⁴

The same was the case around different parts of Africa. Marriage as a practice was and still is highly regarded within African society,²⁵ with it being largely associated with child bearing to ensure continuity in each community.²⁶ In the case of infertility, the most common "remedy" was polygamy thus surrogacy was practiced within this context. The fear of extinction for communities encouraged high procreation²⁷ and in the event that a woman was infertile, the institution of polygamy would ensure that high fertility and child bearing rates were sustained. Subsequent wives in a marital arrangement would bear children on behalf of the wife that had been unable to do so. Continuity was therefore guaranteed.

These are just but a few general examples of the existence of surrogacy within early societies. As it shall be seen later, disputes that have risen within the Kenyan courts point towards other

²²Genesis 16, *The Bible*, 4th edition, Zondervan publishers, Michigan USA, 2005, 14.

²³ <http://surrogacy.ru/eng/history/> on 13 December 2016.

²⁴ Ding C, 'Surrogacy litigation in China and beyond' Volume 2, *Journal of Law and Biosciences*, Issue No 2, 2015, 33.

²⁵ Hertrich V and Pilon M, 'Changing patterns of marriage in Africa' CEPED News, December 1998 - http://horizon.documentation.ird.fr/exl-doc/pleins_textes/pleins_textes_7/b_fdi_57-58/010025047.pdf on 13 December 2016.

²⁶ Hertrich V and Pilon M, 'Changing patterns of marriage in Africa' 2.

²⁷ Khadiagala G M and Bigombe B, 'Major trends affecting families in sub Saharan Africa' 1990, 1 - < <http://www.un.org/esa/socdev/family/Publications/mtbigombe.pdf>> on 13 December 2016.

“unusual” surrogacy arrangements that seemingly continue to exist within various Kenyan communities.

2.3. LEGISLATIVE REGULATION OF SURROGACY IN THE UK, USA AND ISRAEL

2.3.1. THE UNITED KINGDOM

Surrogacy in the UK wasn't publicised much until 1985 in the *Baby Cotton Case (Re C: A Minor)*.²⁸ The plaintiffs were a husband and wife who had been married for several years but had been unable to have children. In 1983, the husband contracted with an agency in America that found a surrogate to bear his child for a small fee. The surrogate was inseminated and shortly after she conceived. The child was born in a hospital in England on January of 1985 and was left by the birth mother in the care of the hospital until the plaintiffs collected her. The husband commenced proceedings to have the care and control of the child committed to him and his wife. The court found that the birth mother had voluntarily relinquished custody of her child. The plaintiffs appeared to be suitable parents for the child and both wanted her. The court therefore handed custody of the child to them.

Before this case was heard, the Warnock Committee had been established in 1982 to look into the ethical implications of developments in human reproduction.²⁹ Generally, the committee was charged with the responsibility to consider developments that had taken place and those likely to be seen in medicine and science with regard to human fertilization and embryology, to consider the policies and safeguards to be applied and to make the necessary recommendations.³⁰ The committee recognized that infertility had become a problem that seemed to be in the increase among many citizens in the UK. Members went ahead to propose various solutions aimed at alleviating infertility with surrogacy featuring as one such solution.

The committee established various circumstances under which surrogacy ought to be an option for the alleviation of infertility.³¹ These included:

- a) Cases of severe pelvic disease that couldn't be treated surgically.
- b) Where the intending mother had no uterus.

²⁸ *Baby Cotton Case (Re C: A Minor)* (1985), Family Law Court of the UK.

²⁹ Horsey K and Sheldon S, 'Still hazy after all these years: The law regulating surrogacy' *Medical Law Review*, Issue No 20, 2012, 69.

³⁰ Department of Health and Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology*, July 1984, 4.

³¹ Department of Health and Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology*, 1.

- c) Where the intending parents had suffered repeated miscarriages.
- d) Where the intending mother stood to benefit more from the surrogacy arrangement although she may not have been infertile. E.g. she suffers from a condition that makes pregnancy medically undesirable.

The possibility of persons misusing the right to surrogacy for purposes of convenience was also raised. The committee took a firm approach noting that this was not only unethical but was also completely unacceptable.³²

Surrogacy as a general practice wasn't rendered unlawful. It was also presumed that in majority of the cases, the terms and conditions made between parties to a surrogacy agreement would be kept. However, it would be unwise to ignore that there was a possibility that disputes could arise and such disputes were likely to present serious complications.³³ Worse yet, with regard to parenthood, it was clear that the position in surrogacy arrangements was less straightforward. The committee took the same approach as was adopted in relation to egg donation concerning the determination of motherhood, wherein, whomever gives birth to the child (for all purposes of the law) was to be regarded as the mother of the child.³⁴

The greatest recommendation by the committee was for the introduction of legislation to ensure criminal liability is impugned against persons that may be party to surrogacy arrangements for the sole purpose of commercial benefit.³⁵ It was against this backdrop that the Surrogacy Arrangements Act of 1985 was enacted.

The Surrogacy Arrangements Act was a short Act whose provisions mainly covered the definition of a surrogate and surrogacy arrangement,³⁶ prohibited the negotiation of surrogacy arrangements on a commercial basis,³⁷ and identified the publication of any advertisements for purposes of surrogacy arrangements as criminal.³⁸ Lastly, it outlined the criminal sanctions for persons found guilty of any offences mentioned in the Act.³⁹ It was clear from the onset that

³² Department of Health and Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology*, 42.

³³ Department of Health and Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology*, 45.

³⁴ Department of Health and Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology*, 44.

³⁵ Department of Health and Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology*, 46.

³⁶ Section 1, *Surrogacy Arrangements Act* (Chapter 49 of 1985).

³⁷ Section 2, *Surrogacy Arrangements Act* (Chapter 49 of 1985).

³⁸ Section 3, *Surrogacy Arrangements Act* (Chapter 49 of 1985).

³⁹ Section 4, *Surrogacy Arrangements Act* (Chapter 49 of 1985).

this Act was insufficient and incapable of dealing with issues that could be foreseen to arise as the practice of surrogacy continued to expand throughout the UK.

The Human Fertilization and Embryology Act was enacted thereafter in 1990. The HFEA established the Human Fertilization and Embryology Authority whose function was to issue licenses to carry out treatment, storage and research concerning reproductive health⁴⁰ (among other things). The HFEA directly addressed questions on parentage under sections 27 and 28. In describing the “mother” section 27⁴¹ states:

The woman who is carrying or has carried a child as a result of the placing in her of an embryo or sperm and eggs, or artificial insemination, and no other woman, is to be treated as the mother of the child.

Section 28⁴² in describing a “father” in such an arrangement suggests:

Where a woman carries a child as a result of the placing in her of an embryo or sperm and eggs or artificial insemination –

- a) If she is party to a marriage at the time the embryo was placed in her or she was artificially inseminated and,*
- b) The creation of the embryo carried by her wasn't brought about with the sperm of the other party to the marriage,*

The other party to the marriage shall be treated as the father of the child unless it is shown that he didn't consent to the placing of the embryo in her.

The Act proceeds to say that once fatherhood has been established under these conditions no other person may be treated as the father of the child in question. Section 30 of HFEA set up parental orders⁴³ and clearly outlines who may obtain them, under what conditions a parental order may be sought and the procedure to be followed to acquire one.

The HFEA underwent its first review in 1997 this review being spearheaded by Professor Margaret Brazier. The main issues for determination by the Brazier Review⁴⁴ were:

1. Whether surrogate mothers should be allowed to receive payment.

⁴⁰ Section 5, *Human Fertilisation and Embryology Act* (Chapter 37 of 1990).

⁴¹ Section 27, *Surrogacy Arrangements Act* (Chapter 49 of 1985).

⁴² Section 28, *Surrogacy Arrangements Act* (Chapter 49 of 1985).

⁴³ Section 30, *Surrogacy Arrangements Act* (Chapter 49 of 1985).

⁴⁴ <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmsctech/7/709.htm> on 19 December 2016.

2. Whether a special agency should be established to oversee and regulate surrogacy arrangements.
3. Whether the findings concerning these issues would require that existing legislation needs to change to pave way for new legislation.

The Brazier Review concluded its report and made recommendations majority of which were not implemented. What came out clearly was that the HFEA was still inadequate when it came to substantively covering matters on surrogacy. This paved the way for yet another review process between 2004 and 2007.

One of the major discussions surrounding the 2004-2007 review process was the question regarding the enlargement of the scope of legal parenthood in an attempt to include same sex couples, persons in civil unions and other “non-traditional” partnerships.⁴⁵ Ultimately the review process paid off and the 1990 HFEA was replaced by the 2008 Act. Questions on legal parenthood are addressed in sections 33 to 47. Even though the notion of legal parenthood has been expanded, the Act’s approach to the question of motherhood remains the same as that contained within the 1990 Act.⁴⁶

2.3.2. THE USA

The first case to draw attention to the surrogacy debate in the USA was *Re Baby M*⁴⁷ decided in 1988 by the New Jersey Supreme Court. William and Elizabeth Stern were a couple living in New Jersey that had been unable to have a child owing to Elizabeth’s infertility. Mr. Stern and Mary Beth Whitehead entered into a surrogacy contract which Mr Richard Whitehead (Mary Beth’s husband) consented to.

Mrs. Whitehead was to be impregnated through artificial insemination using Mr Stern’s sperm. She would then carry the pregnancy to term, deliver the baby and thereafter terminate her maternal rights to enable Mrs Stern to adopt the child. Mr Stern was to pay Mrs Whitehead \$ 10,000 once the baby was born and delivered to him. On March 27th 1986, Baby M was born.

⁴⁵ Department of Health, *Review of the Human Fertilisation and Embryology Act: Proposals for Revised Legislation (including the establishment of the Regulatory Authority for Tissue and Embryos)*, December 2006, 20.

⁴⁶ Section 33, *Human Fertilisation and Embryology Act* (Chapter 22 of 2008).

⁴⁷ *Re Baby M* (1988), Supreme Court of New Jersey.

Having no intention to disclose to hospital officials the existence of the surrogacy arrangement, Mr and Mrs Whitehead assumed the position of the child's legal parents. Her birth certificate indicated the same and she was given the name Sara Elizabeth Whitehead.

Shortly after the baby was born, Mrs Whitehead realized that she couldn't part with the child. When the Stern's visited her and the baby at the hospital it was alleged that she seemed to convey the same. Nevertheless, on March 30th she handed over the baby. The next day, she returned to the Stern's residence where she told them that she couldn't live without her baby. She requested to have the child only for a week after which she would surrender her. This didn't happen. In fact the child was not returned until four months later after being forcibly taken from the Whiteheads. The bulk of the issue discussed by the court was hinged on determining which parenting arrangement was most compatible with the child's best interest.

The Supreme Court found that statutes in New Jersey that determined maternity or paternity were to be applied. Therefore, where the surrogate was both the genetic and birth mother, she was the child's sole legal mother. As a result, an agreement requiring a surrogate to relinquish her maternal rights to the intended mother were deemed to be unenforceable and contrary to public policy.

In the USA, surrogacy is governed at the state level thus it is an area of law largely regulated by federal governments. In response to the Baby M case, a number of state legislatures passed laws that prohibited surrogacy altogether, in an attempt to ensure that a similar scenario wouldn't occur again.⁴⁸ Surrogacy contracts were rendered void and considered a violation of public policy. Arizona, New York and Michigan led the way with New York not only prohibiting surrogacy but also adding a "no compensation" provision. Columbia and Washington DC followed, the latter went a step further by criminalizing any kind of surrogacy agreement altogether.⁴⁹

A study carried out by Columbia law school sought to analyse the status of state surrogacy laws and policies as of May 2016. Evidently, the results of the report point towards a diverse approach to this subject matter. However, the general trend has been towards legalization. States such as New York, New Jersey, Michigan and Indiana still expressly prohibit the practice.⁵⁰ Despite the prohibitions, discussions appeared to be underway in New York in

⁴⁸ Hinson D S and McBrien M, 'Surrogacy across America' Volume 34, *Family Advocate*, Issue No 2, 2011, 32.

⁴⁹ Hinson D S and McBrien M, 'Surrogacy across America' 33.

⁵⁰ Columbia Law School Sexuality and Gender Law Clinic, *Surrogacy Law and Policy in the US: A National Conversation informed by Law Making*, 2016, 9.

particular concerning lifting the ban. There has been a proposed Child-Parent Security Act that if passed would see surrogacy become legal in New York. Various other states haven't fully legalized surrogacy. Seemingly, the states with the most progressive laws are California, Florida and Virginia.⁵¹

In California, surrogacy is governed by the Uniform Parentage Act. This Act was first enacted in 1973 to address the status of children born out of wedlock⁵² but has since evolved to cover conceptions and births that have occurred as a result of assisted human reproductive methods. With regard to parent-child relationships, the UPA states that:

The parent and child relationship may be established as follows:

- a) *Between a child and the natural mother, it may be established by proof of her having given birth to the child.*⁵³

In the case of assisted reproduction, the UPA makes a clear distinction between a gestational carrier and the intended parents. It defines a 'gestational carrier' as:

*A woman who is not an intended parent and who agrees to gestate an embryo that is genetically unrelated to her pursuant to an assisted reproductive agreement.*⁵⁴

On the other hand an 'intended parent' has been defined as:

*An individual, married or unmarried, who manifests the intent to be legally bound as the parent of a child resulting from assisted reproduction.*⁵⁵

In a general sense, the UPA's distinction of the gestational carrier and intended parent shows the state's appreciation of the fact that motherhood cannot only be determined on the basis of gestation. Doing so would not only risk the best interest of the child but would also infringe on the parties' rights to reproductive treatment. As shall be discussed in subsequent sections of this paper, the UPA has prescribed procedures that make it possible for the intended parents to be recognized as the legal parents of a child born out of a surrogacy arrangement.

⁵¹ Columbia Law School Sexuality and Gender Law Clinic, *Surrogacy Law and Policy in the US: A National Conversation informed by Law Making*, 10.

⁵² National Conference of Commissioners on Uniform State Laws, *Drafting Committee to Revise the Uniform Parentage Act*, 2003, 1.

⁵³ Section 7610, *California Family Code*, <http://codes.findlaw.com/ca/family-code/fam-sect-7610.html> on 27 December 2016.

⁵⁴ Section 7960, *California Family Code*, - <http://codes.findlaw.com/ca/family-code/fam-sect-7960.html> on 27 December 2016.

⁵⁵ Section 7960, *California Family Code*.

In Florida, issues on determination of parentage fall within the statute on domestic relations. It states:

*Except in the case of gestational surrogacy, any child born within wedlock who has been conceived by the means of artificial or in vitro insemination is irrebuttably presumed to be the child of the husband and wife, provided that both husband and wife have consented in writing to the artificial or in vitro insemination.*⁵⁶

Prima facie, this could be taken to mean that the presumption of motherhood on account of gestation is a rebuttable one in cases where the conception was effected through gestational surrogacy.

Last is Virginia's Code on the Status of Children of Assisted Conception. It states that:

...The parentage of any child resulting from the performance of assisted conception can be determined as follows:

- 1) *The gestational mother of a child is the child's mother.*⁵⁷

Further determination of parenthood is based on the status of the contract that was in place between the intending parents and the surrogate. Where the contract was court approved then intended parents assume legal parenthood.⁵⁸ However, where the contract was not approved by the court the gestational mother will be recognized as the child's legal parent unless the intended mother is a genetic parent.⁵⁹

From the foregoing, one can conclude that USA legislation neither favours gestational nor genetic parenthood.

2.3.3. ISRAEL

Israeli society places great emphasis on the family. The Jewish command "be fruitful and multiply" together with the occurrence of the Holocaust has contributed to the notion that child

⁵⁶ Chapter 742, *Florida Statutes on Domestic Relations* - <https://www.flsenate.gov/Laws/Statutes/2015/Chapter742/All> on 28 December 2016.

⁵⁷ Section 20-158, *Code of Virginia* - <http://law.lis.virginia.gov/vacode/title20/chapter9/section20-158/> on 28 December.

⁵⁸ Section 20-158, *Code of Virginia*.

⁵⁹ Section 20-158, *Code of Virginia*.

bearing is a major contribution to national growth and development, if only to ensure continuity of the Jewish people.⁶⁰

The aftermath of the Baby M case was not only felt in the USA but also in Israel. The Israeli government went ahead to install public health regulations that explicitly banned surrogacy.⁶¹ Shortly after, cases emerged concerning surrogacy arrangements that made it necessary for the Israeli Parliament to put together a law that would govern surrogacy.

*Nachmani v Nachmani*⁶² was one such case that created the push for surrogacy legislation. Mr and Mrs Nahmani were married in 1984. They underwent fertility treatment three years later, a time during which Mrs Nahmani was diagnosed with uterine cancer. She had to have her womb surgically removed. When she recovered from surgery, the couple wished to undergo IVF treatment and have Mrs Nahmani's eggs fertilised by Mr Nahmani's sperm and subsequently transplanted into a surrogate mother's uterus. Surrogacy was not legal at the time in Israel thus the couple opted to appeal to the Supreme Court of Israel and in 1991 they were granted the right to undergo IVF treatment within the public healthcare system.

Mrs Nachmani planned to meet with a surrogate in the US but just before the trip her husband left her for another woman. By this time, the couple had undergone several treatment cycles and had generated 11 fertilised eggs that were cryopreserved. In May of 1992, Mr Nahmani wrote to both the clinics in Israel and Los Angeles withdrawing his consent. The case proceeded to various courts and the decision was appealed several times with Mrs Nahmani claiming that she had a right to have the procedure carried out since this was the only way she could possibly become a mother.

By this time, a public committee had been set up by the Ministry of Health and Justice in Israel charge with the responsibility of preparing a proposal for legislation on in vitro fertilisation and surrogacy arrangements. There was also an outcry from Israeli citizens and in 1995, 25 couples petitioned the High Court to have the ban on surrogacy lifted. Thus in 1996, the Law of Agreements for the Carrying of Foetuses (hereinafter referred to as the Surrogate Agreements Law) was born.⁶³

⁶⁰ Birenbaum-Carmeli D, 'Contested Surrogacy and the Gender Order: An Israeli Case Study' Volume 3, *Journal of Middle East Women's Studies*, Issue No 3, 2007, 25.

⁶¹ Tovino S A, 'Book Review: The Birth of Surrogacy in Israel' Volume 21, *Journal of Law and Religion*, 2005, 256.

⁶² *Nachmani v Nachmani* (1996) Israeli Supreme Court.

⁶³ Teman E, 'Technological Fragmentation and Women's Empowerment: Surrogate Motherhood in Israel' Volume 29, *Women's Studies Quarterly*, Issue 3, 2001, 11.

The law in Israel provides that full surrogacy is only permissible in cases where both male and female gametes come from the commissioning parents who ideally must be a married couple. However, before the birth of the child, Israeli social workers are involved in order to transfer parentage to the intended couple through adoption.⁶⁴ The stance in Israel is almost similar to that in the USA. Both genetic and gestational parentage are recognized. What differs are the processes by which parenthood is transferred.

⁶⁴ Benshushan A and Schenker J G, 'Legitimising Surrogacy in Israel' Volume 12, *European Society for Human Reproduction and Embryology*, Issue 8, 1997, 1832.

CHAPTER 3

The general position in the previous chapter points towards the acknowledgment of both genetic and gestational functions of mothers. Throughout history, the duty of a mother to endure pregnancy, deliver her child and ultimately raise him/her weren't viewed as independent. The emergence of surrogacy saw the separation of these functions, all of which are of importance to the development of a child from the time of conception. Although biology and genetic links are important in the determination of motherhood, the process of pregnancy and delivery are also worth acknowledging and safeguarding by legal means.

While America and Israel recognize the intended parents as those with a rightful claim over the parentage of a child born out of a surrogacy arrangement, their governments have still deemed it necessary to put in place processes that will confer legal parentage that are recognizable and open to protection by the state. This chapter will embark on a comparative analysis of the three jurisdictions (the UK, USA and Israel) and the manner in which they have approached the regulation of surrogacy so as to uphold their state's definition of motherhood while giving it legal basis. This will be looked at in two limbs:

- a) The validity and recognition of surrogacy contracts as well as the rights and duties/obligations that accrue to both the surrogate and the intending parents based on the contracts and statute.
- b) The use of pre-birth or parental orders to formally recognize the genetic mother as opposed to the surrogate/gestational carrier.

3.1. SURROGACY CONTRACTS/AGREEMENTS

Contract law generally concerns obligations that people owe to others as a result of the relations and transactions in which they became involved. The obligations are usually self-imposed.⁶⁵ Broadly speaking, the need for contract law could be justified by two major reasons; first, to facilitate the making and performing of deferred exchanges (ensuring the protection of economic interests in most cases). The second is a moral theory that primarily focuses on the rights and duties of individual contracting parties. Remedies offered under contract law correct any injustices that are likely occur as a result of one party's default on their obligations.⁶⁶ The contract making process undergoes various stages and involves the meeting of minds to agree on certain terms and conditions that may be express or implied but remain essential to the

⁶⁵ Smith A S, *Atiya's Introduction to the Law of Contract*, Edition 6, Oxford University Press, New York, 2005, 1.

⁶⁶ Smith A S, *Atiya's Introduction to the Law of Contract*, 2.

performance of the contract. In most cases, contractual terms are the basis of disputes between parties to a contract.⁶⁷

Based on this assertion, it is evident why Israel and the United States chose the contractual model for regulating surrogacy contracts. Enforcement of contracts is relatively easier where the parties have expressly stated their intentions. In the case of surrogacy, informal agreements have proven problematic to enforce in instances where either party has breached its obligations.

In the UK, the HFEA doesn't make direct reference to surrogacy contracts/agreements. However, it sets up the Human Fertilization and Embryology Authority which has been given the mandate to grant licenses to specific institutions and medical facilities for the use and storage of gametes intended for assisted reproductive processes.⁶⁸ It would appear that the only stamp of validity for any surrogacy agreement is in its being undertaken at a licensed facility. This approach has been taken since the HFEA makes it clear that the gestational carrier (the surrogate) is still legally recognized as the mother of the child whether she is genetically related to the child or not⁶⁹ until a parental order has been obtained.

American states are different altogether. Statutes expressly state their recognition of surrogacy contracts and go ahead to outline basic terms and conditions that must be adhered to prior to the making of the contract or those that are paramount to ensuring that the contract will be deemed valid if an issue was brought before a court of law. Florida's statute⁷⁰ states:

- 1) *Prior to engaging in gestational surrogacy, a binding and enforceable gestational surrogacy contract shall be made between the commissioning couple and the gestational surrogate. A contract for gestational surrogacy shall not be binding and enforceable unless the gestational surrogate is 18 years of age or older and the commissioning couple are legally married and are both 18 years of age or older.*
- 2) *The commissioning couple shall enter into a contract with a gestational surrogate only when, within reasonable medical certainty as determined by a licensed physician:*
 - a) *The commissioning mother cannot physically gestate a pregnancy to term;*
 - b) *The gestation will cause a risk to the physical health of the commissioning mother; or*

⁶⁷ Smith A S, *Atiya's Introduction to the Law of Contract*, 35.

⁶⁸ Section 5, *Human Fertilisation and Embryology Act* (Chapter 22 of 2008).

⁶⁹ Section 33, *Human Fertilisation and Embryology Act* (Chapter 22 of 2008).

⁷⁰ Section 742.15, *Florida Statutes on Domestic Relations*, - <https://www.flsenate.gov/Laws/Statutes/2015/Chapter742/All> on 29 December.

- c) *The gestation will cause a risk to the health of the foetus.*
- 3) *A gestational surrogacy contract must include the following provisions:*
 - a) *The commissioning couple agrees that the gestational surrogate shall be the sole source of consent with respect to clinical intervention and management of the pregnancy*
 - b) *The gestational surrogate agrees to submit to reasonable medical evaluation and treatment and to adhere to reasonable medical instructions about her prenatal health.*
 - c) *Except as provided in (e) the surrogate agrees to relinquish any parental rights upon the child's birth and to proceed with the necessary judicial proceedings.*
 - d) *Except as provided in (e) the commissioning couple agrees to accept custody of and to assume full parental rights and responsibilities for the child immediately upon the child's birth, regardless of any impairment of the child.*
 - e) *The gestational surrogate agrees to assume parental rights and responsibilities for the child born to her if it is determined that neither member of the commissioning couple is the genetic parent of the child.*
- 4) *As part of the contract, the commissioning couple may agree to pay only reasonable living, legal, medical, psychological, and psychiatric expenses of the gestational surrogate that are directly related to prenatal, intrapartal, and postpartal periods.*

California's code refers to surrogacy contracts as assisted reproduction agreements for gestational carriers. Each agreement is required to have details including but not limited to - the date on which the agreement was executed, the persons from whom the gametes originated unless they are anonymous and the identity of the intended parents.⁷¹ Furthermore, it requires that it is made in writing and that prior to the execution of the agreement, both the surrogate and the intended parents must be represented by separate legal counsel.⁷² The agreement must be executed by the parties and their signatures notarized or duly witnessed.⁷³ Until all these requirements are met, no procedure for treatment may commence.⁷⁴ Finally, the agreement is to be presented before a superior court after which it will be taken as evidence rebutting any presumption that the gestational carrier and her spouse are the legal parents of the child born.⁷⁵

⁷¹ Section 7962 (a), *California Family Code* - <http://codes.findlaw.com/ca/family-code/fam-sect-7962.html> on 2 January 2017.

⁷² Section 7962 (b), *California Family Code*.

⁷³ Section 7962 (c), *California Family Code*.

⁷⁴ Section 7962 (d), *California Family Code*.

⁷⁵ Section 7962 (f) (2), *California Family Code*.

Thus, the existence of a court approved contract is proof that the legal parents are in fact the intended parents.

Virginia's code also adopts the use of court approved contracts. It reads:

*A surrogate, her husband, if any, and prospective intended parents may enter into a written agreement whereby the surrogate may relinquish all her rights and duties as parent of a child conceived through assisted conception, and the intended parents may become the parents of the child.*⁷⁶

It goes ahead to outline the process by which the contract may be approved by the court.

First, the intended parents, surrogate and her husband are required to file a joint petition at the circuit or city court where at least one of them resides. The contract is to be signed and acknowledged by a person authorized by law to make such acknowledgment. A copy of the contract is to be attached to the petition after which the court will proceed to appoint a guardian *ad litem* to represent the child's interests as well as a counsel to represent the surrogate. The court is expected to order a home study to be carried out by a local department of social services or a licensed child placing agency. After this, the court enters an order approving the surrogacy contract, and authorizing the performance of assisted conception for a period of twelve months after the date of the order, and may discharge the guardian ad litem and attorney for the surrogate.

Some of the conditions for the discharge of the guardian ad litem and the surrogate's attorney are⁷⁷:

- a) The intended parents, the surrogate, and her husband, if any, meet the standards of fitness applicable to adoptive parents.
- b) All the parties have voluntarily entered into the surrogacy contract and understand its terms and the nature, meaning, and effect of the proceeding.
- c) The agreement contains adequate provisions to guarantee the payment of reasonable medical and ancillary costs either in the form of insurance or other arrangements that are satisfactory to the parties.
- d) The surrogate has had at least one pregnancy, and has experienced at least one live birth, and bearing another child does not pose an unreasonable risk to her physical or mental health or to that of any resulting child (a finding which must be supported by medical evidence).

⁷⁶ Section 20-159, *Virginia Code* -<http://law.lis.virginia.gov/vacode/title20/chapter9/section20-159/> on 2 January 2017.

⁷⁷ Section 20-160 B, *Virginia Code* -<http://law.lis.virginia.gov/vacode/20-160/> on 2 January 2017.

- e) Prior to signing the surrogacy contract, the intended parents, the surrogate, and her husband, if any, have submitted to physical examinations and psychological evaluations by practitioners licensed to perform such services.
- f) The intended mother is infertile, is unable to bear a child, or is unable to do so without unreasonable risk to the unborn child or to the physical or mental health of the intended mother or the child (must also be supported by medical evidence).
- g) All parties have received counselling concerning the effects of the surrogacy by a qualified health care professional or social worker, and a report containing conclusions about the capacity of the parties to enter into and fulfil the agreement has been filed with the court.
- h) The husband of the surrogate is party to the agreement.
- i) At least one of the intended parents is expected to be the genetic parent of any child resulting from the agreement.

All in all, in demanding that these conditions are met before contracts are approved, legislators and courts strive to achieve a balance between the rights of commissioning parents and those of the surrogate mother and her spouse (in cases where she is married).

3.1.1. THE PLACE OF FORMAL CONTRACTS IN SAFEGUARDING THE INTERESTS OF THE SURROGATE AND THE CHILD

Before, people seemed comfortable with the idea of having informal agreements. However, recent incidences in the international scene show why surrogacy contracts may be the best way to ensure that the rights of both surrogates and the children themselves is important.

*The Baby Gammy Case*⁷⁸ was one that recently caught the attention of members of the public and media houses around the globe. A 21 year old lady from Thailand entered into a surrogacy arrangement with an Australian couple who could not have a child. Having been faced with financial constraints, her husband encouraged her to be a surrogate since she would be paid. She became pregnant with twins via IVF and four months into the pregnancy doctors informed her and the intended parents that one of the children had Down's syndrome. It was alleged that the intended parents asked her to have an abortion to which she declined stating religious reasons. At birth, Baby Gammy not only had Down's syndrome but was also diagnosed with a congenital heart problem. The Australian couple opted to take the baby's twin leaving Baby

⁷⁸ Pearlman J, 'Australian Couple Abandon Surrogate Twin with Down's Syndrome – but keep his sister' The Telegraph, 12 January 2016 - <http://www.telegraph.co.uk/news/worldnews/australiaandthepacific/australia/11005285/Australian-couple-abandon-surrogate-twin-with-Downs-syndrome-but-keep-his-sister.html> on 7 January 2017.

Gammy under the care of his surrogate mother who undoubtedly was unable to bear the burden of his medical treatment and upbringing.⁷⁹ Before this case, there was no law regulating surrogacy arrangements in Thailand. This has since changed with the Thai Government introducing the Protection for Children Born Through Assisted Reproductive Technologies Act. The Act requires (among other things) that a written agreement is made between the surrogate and intended parents before pregnancy stating expressly that the intended parents would assume legal responsibility of the child once born. It also contains a clause to the effect that the legal parents cannot deny the parentage of the child.⁸⁰

Concerns have also been raised on the lack of regulation and rampant commodification of surrogacy in India. The situation clearly outlines the reality of the exploitation that surrogates undergo to the extent that this phenomenon is now dubbed “medical tourism”. Over 350 clinics in India offer fertility services. Unlike in most other jurisdictions, fertility treatments are reported to cost between \$12,000 and \$20,000 while in America for example it costs upwards of \$70,000.⁸¹ Aside from the relatively cheap cost, clinics recruit surrogates from very poor rural areas, most of whom are illiterate thus even if they were to have contracts, they would be unable to understand their terms.⁸² Scholars have raised the alarm on how this recruitment process is slowly becoming similar to processes used in human trafficking.

From these two scenarios, one can see the difficulties that can arise out of informal arrangements. It would be in Baby Gammy’s best interest to have been taken along with his twin sister. Certainly, the Australian couple was in a much better financial position to care for him despite his birth defects. The situation has also been very unfair on the Thai surrogate who is now left with responsibility over a child she hadn’t anticipated and who isn’t related to her genetically. Where statute requires that contracts contain certain fundamental provisions for the protection of the surrogate and the child, it is easier for rights to be enforced in case of any violation. If Thailand’s law had been in existence by then, the likelihood is that the outcome of this case might have been different.

⁷⁹ Gelineau K and Peck G, ‘Case of baby with Down;s syndrome left behind shows the dark side of international surrogacy’ *The Today*, 17 August 2016 -<http://www.today.com/parents/down-syndrome-baby-left-behind-dark-side-surrogacy-1D80024922> on 10 January 2017.

⁸⁰ -<http://www.loc.gov/law/foreign-news/article/thailand-new-surrogacy-law/> on 10 January 2017.

⁸¹ Bromfield N, ‘Global Surrogacy in India: Legal, ethical and human rights implications of a growing industry’ *Rewire*, 11 June 2010 -<https://rewire.news/article/2010/06/11/stateless-babies-legal-ethical-human-rights-issues-raised-growth-global-surrogacy-india/> on 11 January 2017.

⁸² Mirkin B and Chamie J, ‘Human Right or Reproductive Exploitation?’ *Yale Global Online*, 2014 - <http://yaleglobal.yale.edu/content/surrogacy-human-right-or-reproductive-exploitation> on 11 January 2017.

3.2. TRANSFER OF LEGAL PARENTHOOD: PRE-BIRTH ORDERS VERSUS PARENTAL ORDERS

3.2.1. THE UK'S PARENTAL ORDERS

In UK law, the position remains that until a parental order is granted, the surrogate and her spouse or civil partner retain legal and parental responsibility over the child.⁸³ The HFEA highlights various conditions that must be met before a parental order is granted. First, the gametes of at least one of the applicants must have been used to bring about the creation of the embryo.⁸⁴ The applicants must be husband and wife or civil partners⁸⁵ and the application must be made within 6 months from the child's date of birth.⁸⁶ Both applicants must be above 18 years.⁸⁷ The child's home must be with the applicants at the time the application is being filed⁸⁸ and no money or benefit ought to have been paid to the surrogate save for reasonable expenses. The application process is governed by the Human Fertilisation and Embryology (Parental Orders) Regulations. These regulations borrow heavily from UK adoption laws and procedures with minor modifications.

The administration of parental orders is largely left to parental order reporters who work in collaboration with the courts. Their duties are threefold: to investigate the surrogacy arrangement including the financial agreement between the intended parents and the surrogate, inspect the welfare of the child and prepare a report to be submitted to the court detailing whether or not granting the order would be in the child's best interest in the immediate and future term.⁸⁹

3.2.2. THE USA

Federal governments in the USA confer parenthood on the intended parents by different means. California favours the use of pre-birth orders whereas Florida and Virginia allow such transfer of parenthood only after the child has been born.

⁸³ Crawshaw M, Purewal S and Van den Akker O, 'Working at the Margins: The Views and Experiences of Court Social Workers on Parental Orders Work in Surrogacy Arrangements' Volume 43, *British Journal of Social Work*, 2012, 1227.

⁸⁴ Section 54 (1) (b), *Human Fertilisation and Embryology Act* (Chapter 22 of 2008).

⁸⁵ Section 54 (2), *Human Fertilisation and Embryology Act* (Chapter 22 of 2008).

⁸⁶ Section 54 (3), *Human Fertilisation and Embryology Act* (Chapter 22 of 2008).

⁸⁷ Section 54 (5), *Human Fertilisation and Embryology Act* (Chapter 22 of 2008).

⁸⁸ Section 54 (4) (a), *Human Fertilisation and Embryology Act* (Chapter 22 of 2008).

⁸⁹ Crawshaw M, Purewal S and Van den Akker O, 'Working at the Margins: The Views and Experiences of Court Social Workers on Parental Orders Work in Surrogacy Arrangements' 1227.

In Florida, commissioning couples can file an application before the court to obtain an expedited affirmation of parental status within 3 days from the birth of the child.⁹⁰ Thereafter the court will fix a time and place for hearing the petition⁹¹ and notice of the hearing shall be given to the gestational surrogate, the physician administering fertility treatment and any party claiming paternity.⁹²

Once the court determines that there is a binding and enforceable gestational surrogacy contract, an order shall be entered stating that the intended parents are the legal parents of the child. Within 30 days a statement shall be prepared ordering the Department of Health to issue a new birth certificate naming the commissioning couple as the child's parents.⁹³

Virginia's Code provides that within 7 days of the birth of the child, intended parents are to file a written notice before the court. Once this notice has been filed and it has been reasonably evidenced that at least one of the intended parents is a genetic parent of the child the court will enter an order directing the State Registrar of Vital Records to issue a new birth certificate naming the intended parents as the legal parents of the child.⁹⁴

Under California's Code, an action to establish the parent-child relationship between the intended parents and the child may be filed before the child's birth and may be filed either in the county where the child is anticipated to be born, the county where the assisted reproduction agreement was executed or the county where the medical procedures were to be performed pursuant to the agreements.⁹⁵ A copy of the assisted reproductive agreement is to be lodged with the court as well. The court will then issue an order establishing the parent-child relationship with the intended parents as identified in the surrogacy agreement.⁹⁶

Scholars have argued in favour of pre-birth orders particularly in cases where the gestational carrier has no genetic tie with the child she is carrying citing various benefits⁹⁷:

- a) The intended parents are determined to be the legal parents of the child before the child's birth. This gives them immediate and sole access to and control over the child

⁹⁰ Section 742.16 (1), *Florida's Statute on Domestic Relations* - <https://www.flsenate.gov/Laws/Statutes/2015/Chapter742/All> on 13 January 2017.

⁹¹ Section 742.16 (2), *Florida's Statute on Domestic Relations*.

⁹² Section 742.16 (4), *Florida's Statute on Domestic Relations*.

⁹³ Section 742.16 (7), *Florida's Statute on Domestic Relations*

⁹⁴ Section 20-160 D, *Virginia Code* - <http://law.lis.virginia.gov/vacode/title20/chapter9/section20-160/> on 11 January 2017.

⁹⁵ Section 7962 (e), *California' Family Code* - <http://codes.findlaw.com/ca/family-code/fam-sect-7962.html> on 11 January 2017.

⁹⁶ Section 7962 (f) (2), *California Family Code*.

⁹⁷ Byrne M P and Snyder S H, 'The Use of Pre-birth Parentage Orders in Surrogacy Proceedings' Volume 39, *Family Law Quarterly*, Issue 3, 2005, 635.

and its postnatal care and medical treatment when it is born. It also allows their names to go on the original birth records at the hospital and the governing department of health, avoiding the process of amending the birth certificate.

- b) The determination of parentage before birth allows the hospital to discharge the child directly to the intended parents rather than to the surrogate.
- c) From an emotional and psychological perspective, a pre-birth determination of parentage permits the intended parents to participate in the delivery and hospital experience as much like the natural delivery of their own child as possible.

In *Re Marriage of Moschetta*⁹⁸ California's appeal court in its judgment demonstrates why a pre-birth order is more effective in the case of gestational surrogacy as opposed to traditional surrogacy. Robert and Cynthia Moschetta were a couple seeking to have their own child. However, Cynthia was sterile. In 1989 the Moschetta's met with a surrogacy broker who introduced them to Elvira Jones. The parties signed an agreement to the effect that Elvira would be inseminated with Robert's semen and in return she promised to sign all the necessary documents relinquishing her parental rights over the child that would be born. Elvira became pregnant around November of the same year, a time during which the Moschetta's marriage began to experience problems. Elvira gave up custody of the child (Marissa) albeit reluctantly but by December of 1990, Robert had left the family residence with the baby Marissa and Cynthia had filed for divorce. She later filed a petition seeking to establish that she was Marissa's de facto mother. Both women claimed to be Marissa's mother.

The court found that there were no competing presumptions of motherhood between Elvira and Cynthia since the latter wasn't genetically linked to the child and neither did she give birth to her. Therefore, there was no dispute as to who the child's legal mother was. The court concluded that pre-birth parentage determinations were permitted only for two genetically related intended parents who had valid presumptions for both motherhood and fatherhood. Cynthia had no other way of seeking custody of the child besides adoption.

3.2.3. ISRAEL

Israel only permits gestational surrogacy which guarantees that both commissioning parents are genetically related to the child. However, the process for transferring parenthood requires the involvement of a social worker. The social worker is nominated by

⁹⁸ *Re Marriage of Moschetta* (1994), Court of Appeal of California.

the Minister of Welfare as the child's legal guardian while the intended parents go through an adoption procedure⁹⁹ as prescribed by Israeli law.

Towards the end of the fifth month of the surrogate's pregnancy, the surrogate and commissioning couple are to notify the social worker of the birth place and estimated date of delivery. Within 24 hours after the delivery has taken place the social worker is to be notified. The surrogate then transfers the child to the custody of the commissioning couple in the presence of the social worker and will remain in their custody while the adoption is being processed.¹⁰⁰ Following the court's approval of the adoption request the commissioning parents will officially be recognized as the child's parents.

⁹⁹ Benschushan A and Schenker J G, 'Legitimising Surrogacy in Israel' 1832.

¹⁰⁰ Benschushan A and Schenker J G, 'Legitimising Surrogacy in Israel' 1833.

CHAPTER 4

Very recently, the surrogacy debate came to life in Kenya after *AMN & 2 others v the AG* was heard before the High Court. Not only did this case bring to life the continuance of surrogacy as a practice in Kenya but it also created awareness on the insufficiency of the legal and policy framework to deal with issues that may arise from such arrangements.

Since the development of assisted reproductive technologies, this practice has evolved a great deal from the way it existed in the traditional African set up. This chapter will therefore focus on the practice of surrogacy in Kenya before and after the development of assisted reproductive technologies in the country while highlighting the Constitutional underpinnings of the right to assisted reproductive health and Parliament's response to the growth of this practice.

4.1. SURROGACY BEFORE AND AFTER THE DEVELOPMENT OF ASSISTED REPRODUCTIVE TECHNOLOGIES

Various communities had arrangements that ordinarily would be considered unusual in an attempt to alleviate the stigma associated with a woman's infertility. Some of these include the Kipsigis, Suba and the Kikuyu. Some of these cases have been decided in court, most of the arising in succession matters.

In *Ezekiel Kiptarus Mutai v Esther Chepkurui Tapkile*¹⁰¹ the dispute concerned the administration of the estate of the deceased named Tapkile Chesang. Ezekiel was her brother while Esther alleged that she was the deceased's widow. According to Esther, she and the deceased had contracted a woman-to-woman marriage and had borne children for the deceased. The case sought to determine the validity of the marriage as well as whether or not the children had a right to inherit the deceased's property.

Reference was made to the work of Eugene Cotran. He described women-to-women marriages as a common phenomenon in some communities where a woman past child-bearing age and was either barren or had no sons may enter into a form of marriage with another woman. Usually this would happen where her husband had passed on. In order to ensure continuity with his bloodline, the widow would pay marriage consideration to the family of another woman after which she would be considered the 'woman husband' and the other woman would be her 'wife'. Thereafter, the woman husband would find a man within her husband's clan to have sexual intercourse with the woman whose marriage consideration has been paid. Any children

¹⁰¹ *Ezekiel Kiptarus Mutai v Esther Chepkurui Tapkile* [2015] Eklr.

resulting from such an arrangement are considered the children of the woman who paid the marriage consideration i.e. the woman husband.

In another case *Eunita Onyango Geko v Philip Obungu Orinda*¹⁰² the court encountered a similar problem. The applicant alleged that she had been married to the deceased (a woman) in a woman-to-woman marriage. The deceased had paid 9 cows as dowry to the applicant's parents and she had since had 10 children all whom she claimed were the deceased's. The court ruled in the applicant's favour holding that under the Law of Succession Act section 29 the applicant and her children could be considered beneficiaries, thus they were entitled to inherit from the deceased's estate.

The court in *Eliud Maina Mwangi v Margaret Wanjiru Gachangi*¹⁰³ had to determine whether the respondent was in fact the wife of the deceased or if she had lived with her merely as an employee. It was concluded that the existence of such marriage could only be evidenced by customary law through the fulfilment of any procedures or ceremonies which could further be corroborated by witnesses present at the time. In the case of Kikuyu custom, the *ngurario*, *ruracio* and dowry payment sufficiently evidence the existence of a woman-to-woman marriage.

It is quite incredible that even in custom, communities thought it necessary to put in place processes to ensure that intention was formalized. Through this, the expected outcome of any transaction couldn't be disputed and even if a dispute were to arise then there was evidence of parties' intentions from the onset.

The subject of assisted reproductive technologies didn't feature much in Kenyan legal discourse until very recently. Much of the reporting has been left to newspapers and media houses. Nairobi IVF Clinic was the first medical centre in Kenya to provide IVF as an option for infertility treatment.¹⁰⁴ However, there are about 6 fertility treatment centres.¹⁰⁵

The first surrogate birth in the country is reported to have taken place in 2007.¹⁰⁶ According to interviews with Nairobi IVF, between 2009 and 2012 20 couples commissioned other

¹⁰² *Eunita Onyango Geko v Philip Obungu Orinda* [2013] Eklr.

¹⁰³ *Eliud Maina Mwangi v Margaret Wanjiru Gachangi* [2013] Eklr.

¹⁰⁴ <http://nairobiivf.com/> on 11 January 2017.

¹⁰⁵ <http://www.businessdailyafrica.com/Why-more-Kenyans-are-embracing-IVF/-/1248928/2269000/-/format/xhtml/view/printVersion/-/13dvk9qz/-/index.html> on 11 January 2017.

¹⁰⁶ Wesangula D, 'Will Key Ruling on Surrogacy shed more Light?' The Standard, 20 March 2016 - <https://www.standardmedia.co.ke/health/article/2000195477/will-key-ruling-on-surrogacy-shed-more-light> on 11 January 2017.

women to carry their pregnancy for them with close to 30 babies being born by surrogate hosts within this period.¹⁰⁷ This number has since increased and is expected to increase as the years go by especially since the cost of fertility treatment in Kenya is relatively lower than in most other countries.¹⁰⁸

4.2. LEGAL BASIS FOR SURROGACY: THE CONSTITUTION OF KENYA 2010 AND THE ASSISTED REPRODUCTIVE TECHNOLOGIES BILL

To begin with, the Constitution describes the family as the natural and fundamental unit of society and the necessary basis of social order, enjoying the recognition and protection of the State.¹⁰⁹ Article 43 further guarantees the right to the highest attainable standard of health, including the right to healthcare services, including reproductive healthcare.¹¹⁰ These two provisions form the basis of the right to IVF and surrogacy as a form of reproductive mechanism, although not expressly stated.

The cases *JLN & 2 others v Director of Children's Services*¹¹¹ and *AMN & 2 others v AG*¹¹² were the genesis of the discussion surrounding regulation of surrogacy. In both instances, the position in the Birth's and Death's Registration Act concerning legal parenthood was upheld. In the latter case, Justice Lenaola noted that the children were issued with birth certificates and passports listing the commissioning parents' as the legal parents. He went on to state that the issuance of these documents was an error and contravention of the law although this was done in good faith.

Parliament responded to the outcomes in these two cases by tabling what is currently known as the Assisted Reproductive Technologies Bill 2016. The Bill establishes the Assisted Reproductive Technologies Authority charged with the responsibility to license facilities, educate members of the public on assisted reproductive technologies and maintain a database on persons who undergo or are born pursuant to assisted reproductive technologies among other

¹⁰⁷ Okwemba A, 'A Surrogate Mother Speaks: I rented out my womb for Kshs 650,000' Daily Nation, 3 February 2012 -<http://www.nation.co.ke/news/A-surrogate-mother-speaks-i-rented-out-my-womb-for-Sh650000-/1056-1319640-5a388w/index.html> on 11 January 2017.

¹⁰⁸ -<http://www.awcfs.org/index.php/component/content/article/81-features/reproductive-health/1009-uk-usa-clients-seek-infertility-treatment-from-local-clinics> on 11 January 2017.

¹⁰⁹ Article 45 (1), *Constitution of Kenya* [2010].

¹¹⁰ Article 43 (1) (a), *Constitution of Kenya* [2010].

¹¹¹ *JLN & 2 others v The Director of Children's Services & 2 others* [2014] Eklr.

¹¹² *AMN & 2 others v AG & 5 others* [2015] Eklr.

things.¹¹³ It has provisions on the requirements for facilities before they are granted licenses to administer assisted reproductive procedures and grounds for the revocation of the same.¹¹⁴

It further outlines prohibited activities and offences linked with assisted reproductive technologies and provides for the circumstances following which people may pursue assisted reproductive technologies.¹¹⁵ In requiring the Authority to keep a register of persons who undergo ART, parliament has given an opportunity to persons who have been conceived by this means to retrieve information on their birth history.¹¹⁶ Part IV addresses the basic rights of donors, parents and children.

When it comes to surrogate motherhood the Bill states:

*A woman of twenty-five years or more may, at the request of a couple, consent to a process of assisted reproduction for purposes of surrogate motherhood.*¹¹⁷

*The surrogate mother shall carry the child on behalf of the parties to a marriage and shall relinquish all parental rights at birth over the child unless a contrary intention is proved.*¹¹⁸

Surrogacy agreements are recognised under the Bill and they are to be in the prescribed form, duly signed before any procedures are undertaken.¹¹⁹ The form is expected to have the names of the parents of the child to be born¹²⁰ and shall serve as conclusive proof of parentage.¹²¹

While Parliament's attempts at forming this Bill are commendable, there is still much to be desired from it.

4.2.1. LEGAL MOTHERHOOD

The phrasing of the Bill points towards the affirmation of the intention of parties to a surrogacy arrangement. Majority (if not all) of the time, parties expect that once a child is born they shall be handed over to the intended parents especially where the surrogate has no genetic relationship with the child. However, from previous discussions it is quite clear that by virtue of the Births and Deaths Registration Act, motherhood is still conferred upon the gestational carrier despite the parties' intentions. It is not enough that the Bill demands that the child is handed over to the intended parents. In order for the intentions of the parties to be fulfilled,

¹¹³ Section 4, *Assisted Reproductive Technologies Bill* (2016).

¹¹⁴ Section 5 and 6, *Assisted Reproductive Technologies Bill* (2016).

¹¹⁵ Section 57, *Assisted Reproductive Technologies Bill* (2016).

¹¹⁶ Part IV, *Assisted Reproductive Technologies Bill* (2016).

¹¹⁷ Section 31 (1), *Assisted Reproductive Technologies Bill* (2016).

¹¹⁸ Section 31(2), *Assisted Reproductive Technologies Bill* (2016).

¹¹⁹ Section 32(1), *Assisted Reproductive Technologies Bill* (2016).

¹²⁰ Section 32 (2), *Assisted Reproductive Technologies Bill* (2016).

¹²¹ Section 32 (3), *Assisted Reproductive Technologies Bill* (2016).

there still needs to be a way to vary or supersede the law on maternal rights as established by the usual law or regulation¹²² (in this case the Births and Deaths Registration Act).

4.2.2. RIGHTS AND DUTIES OF THE SURROGATE AND INTENDED MOTHER

In general, the Bill seems not to foresee the likelihood of exploitation or manipulation of either party (particularly the surrogate). One of the greatest risks with surrogacy is the ease with which it can be commodified especially in the absence of stringent regulations that seek to protect both sides of the transaction.

In the jurisdictions previously discussed, statute expressly sets out minimum requirements that must be met with regard to every surrogacy agreement. In my analysis, these have been geared largely towards the protection of the rights of the surrogate since the odds usually are that most women who choose to be surrogates come from humble backgrounds and they do so primarily for the financial gain their commitment offers. The contract should therefore contain provisions to the effect that:

1. Payment of adequate/ reasonable medical and ancillary costs through insurance or other arrangements between the parties shall be guaranteed.
2. The surrogate jointly with the intended couple should be the source of consent over clinical management and intervention of the pregnancy.
3. The surrogate should have access to counselling services before during and after pregnancy to ensure that she is both physically and mentally capable of handling the pregnancy.
4. The surrogate should undergo a medical examination before any ART procedure to ensure there is no risk posed to her life.
5. Parties should ensure that the surrogate is properly informed of the procedure, its risks, the contractual terms and her consent should be obtained and given voluntarily by her.
6. Once parenthood has been conferred on the intended parents it cannot be relinquished.

The Baby Gammy Case is a perfect example of what could go wrong where the above conditions aren't considered paramount or at least as a bare minimum in surrogacy contracts. The guarantee that the child will be handed over upon birth and the capping of monies payable to the surrogate are extremely important to ensure that the rights of the surrogate and those of the intended parents are balanced out.

¹²² Byrne M P and Snyder S H, 'The Use of Pre-birth Parentage Orders in Surrogacy Proceedings' 639.

4.2.3. LEGAL PROCESS OF CONFERRING MOTHERHOOD

The most notable omission in the Bill is the lack of a process legally conferring motherhood on the commissioning mother. It would be risky and unreasonable to jump from an area once administered through the adoption process to one that appears to be administered by assumption. As was stated by Justice Lenaola, it is also unprocedural to simply fill in the names of the intended parents on the child's birth certificate because legally the gestational carrier is still the child's de facto mother. In *Re Marriage of Moschetta*¹²³, the court further pointed out that the existence of a surrogacy agreement wasn't sufficient to confer the status of a mother to another individual.

Borrowing from California's model, a pre-birth order seems more efficient especially where the intended parents are both genetic parents of the child. In making an application before the court, the agreement/ contract will have to be submitted first. Upon scrutiny, the court will then choose whether or not to issue an order establishing the parent-child relationship with the intended parents. The order may be presented before the medical facility where the child is expected to be born, the ART Authority and the Registrar of Births and Deaths. That way, the intended parents will have immediate and sole access to the child once it is born, their names will go on the hospital records and the child's original birth records without requiring amendment, the child will be discharged from the hospital into the custody of its intended parents and finally it may enable the intended parents to participate in the delivery and hospital experience.

In Florida and Virginia, there is a separation of the contractual process and the transfer of parenthood. The courts have to first approve of the contracts before parties proceed with ART treatments and the child's parentage can only be transferred some time after birth. The separation of the two processes is unnecessary. This model of transfer in my opinion would be tedious and inefficient in the long run and beats the purpose of acknowledging the parties' intention to begin with.

The UK parental model is more or less like an adoption procedure which is also Israel's preferred mode of transferring parentage. Adoption is relevant in situations where parenthood is being conferred upon persons who otherwise are not biologically related to the child in question. One would therefore ask if this procedure were suitable in cases where both parents are biologically related to the child (such as in surrogacy). Hence the need to have another legal process unlike adoption itself.

¹²³ *Re Marriage of Moschetta* (1994), Court of Appeal of California.

CHAPTER 5

This chapter winds up the entire study. Here I shall review the different issues that have emerged in the paper in an attempt to summarize the ideas that have featured prominently. Lastly, I will conclude by highlighting various recommendations that seek to improve the regulation of surrogacy in Kenya while protecting the positions of both the surrogate and intended parents.

OVERVIEW AND RECOMMENDATIONS

As demonstrated within this paper, before surrogacy questions on legal motherhood rarely featured in public discussions since it was assumed that when a woman was pregnant not only would she deliver the child on expiry of the 9 months anticipated, but by all means she would be genetically related to the child. Surrogacy brought about a divide between the gestational and genetic functions of a mother.

The United Kingdom chose to stick with the traditional presumption of motherhood thereby granting legal parenthood to the woman that ultimately delivers the baby. The same case applied in Israel even though both parents must be genetically related to the child. This position has served to protect the surrogate to a large extent. At the end of the day, parenthood must still be transferred through processes that are much like adoption.

The United States chose the contractual approach aimed at formalising the parties' intention from the moment an agreement is procured between them. Whereas the law acknowledges the intended parents as the child's legal parents, statute expressly gives a minimum set of terms that must be expressly stated within any surrogacy contract. This has gone a long way in balancing the rights of the surrogate, the intended parents together with the child. It is undeniable that pre-birth orders are more efficient and most suitable where both parents are genetically related to the child. Not only does it facilitate fluid transfer of custody but it also gives intended parents a chance to participate in the pregnancy process from beginning to end.

Thus, in order to ensure the same efficiency I would propose the following practices within Kenya:

That the Bill gives a bit more detail concerning a minimum set of terms that are to be included in every surrogacy agreement to avoid the likelihood of exploitation of either party and to make it easier to assign liability in cases of breach of contract.

That pre-birth orders be introduced into Kenya's legal system as a means to transfer parenthood since it would be faster, more efficient and would help authorities such as the ART Authority, the Registrar of Births and Deaths and the courts themselves to keep a clear record of surrogates, intended parents and their children.

That surrogacy contracts should be scrutinized by the ART Authority to ensure that all parties have complied with the regulations set out with regard to payment, balancing of the rights of both parties, medical examinations, etc. This will also allow the courts to fast track the process of granting pre-birth orders once the contracts have already been approved by the ART Authority.

CONCLUSION

Surrogacy is a very delicate issue. Delicate because unlike ordinary transactions for the sale of goods and services, it demands full physical, emotional and psychological involvement by both parties. There is absolutely no way of creating legislation that will perfectly protect the emotional and psychological well-being of parties involved. However, this has never been the duty of the law, at least not in an absolute sense. One cannot completely separate gestational and genetic functions, neither can we apportion greater importance to one over the other. At the end of the day, for as long as the law has taken reasonable measures to safeguard the rights of both parties and hold either of them to account on failure to abide by the law, then that law can be lauded as sufficient.

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