

**A CRITICAL ANALYSIS OF THE LEGAL, ETHICAL
AND INTERNATIONAL PERSPECTIVES TO
ALTRUISTIC GESTATIONAL SURROGATE
MOTHERHOOD IN KENYA: WHOSE BABY IS IT?**

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DECLARATION

I, KIRUBI MUMBI MARIAH, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been 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.

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

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ABSTRACT

In 2014, the Reproductive Health Care Bill was introduced in Parliament. The Bill affords a chapter for the regulation of altruistic gestational surrogacy arrangements, a non-commercial agreement between two parties, in which one party agrees to bear a child of which the party is not genetically related to and upon the birth of the child relinquish all parental rights over the child to the other party. The determination of legal parentage of the child born from such an arrangement has been a legal tussle for courts in Kenya to contend with since neither the current laws nor the proposed Reproductive Health Care Bill provide direction as to whom parental rights are entitled upon the birth of the baby.

The objective of this research paper is to determine which party is entitled to these parental rights. On the one hand, these rights may be entitled to the surrogate since she carried and gave birth to the child while the rights may also be entitled to the intending parents who contracted the surrogate and initiated the whole process. Either way, the lack of legal direction on the issue has led to uncertainty and controversies.

Therefore, this paper conducted a qualitative study which comprised of a literature review of the determination of legal parentage in gestational surrogacy arrangements. First, this paper explored the theoretic framework underpinning altruistic gestational surrogacy arrangements. Second it addressed the state's and the societal interest in the determination of legal parentage in these arrangements and third, it undertook a comparative review of the legal framework in the United Kingdom and South Africa which offer guidance for the determination of legal parentage in an altruistic gestational surrogacy agreement in Kenya. Consequently, this paper finds the law of contract is sufficient to ensure the validity of the terms of an altruistic gestational surrogacy arrangement. Thus, the intending parents should have primary parental rights upon the birth of the child. Furthermore, this paper also asserts that the inevitable role played by the state in implementing a legal framework that recognises the intending parents as the legal parents of the child born from an altruistic gestational surrogacy arrangement in Kenya.

LIST OF ABBREVIATIONS

AHPC	Ad Hoc Parliamentary Committee
HFEA	Human Fertilisation and Embryology Act
SA	South Africa
SALC	South African Law Reform Commission
SAA	Surrogacy Arrangements Act
UK	United Kingdom
UDHR	Universal Declaration of Human Rights

LIST OF CASES

Re A and B (Children) (Surrogacy: Parental Orders: Time Limits) [2015] EWHC 911 (Fam).

A.H.W v. G.H.B [2000] NJ.

A.M.N & 2 others v Attorney General & 5 others [2015] eKLR.

AB v CD (Surrogacy - Time Limit and Consent) [2015] EWFC 12.

Anton's Trawling Co v Smith 2003] New Zealand.

Carlill v. Carbolic Smoke Ball Co. [1892] EWCA Civ 1.

Christ for all Nations v Apollo Insurance Co. Ltd [2002] eKLR.

Currie v Misa 1875-76 LR 1 App Cas 55.

D and L (Surrogacy) [2012] EWHC 2631 (Fam).

Darlington Borough Council v Wiltshier Northern Ltd CA 28 JUN 1994.

De Reneville v De Reneville [1948] 1 All ER 56, CA.

Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co Ltd [1951] UKHL.

Errington v Errington Woods [1952] 1 KB 290 (EWCA).

Esso Petroleum v Customs & Excise [1976] 1 WLR 1 HL.

Ex-parte matter between WH & Others [2011] ZAGPPHC.

G v G [2012] EWHC.

Gore v. Gibson [1845].

Hadley v Kemp [1999] EMLR 589.

Hart v O'Connor (1985) UKPC 1.

Holden v. Hardy 169 U.S. 366 (1898).

Hyde v Wrench (1840) 49 ER 132 Chancery Division.

J L N & 2 others v Director of Children Services & 4 others [2014] eKLR.

Johnson v Calvert Cal. Sup. Ct., 5 Cal4th 84, 851 P.2d 776 (1993).

Jones v Padavatton [1969] EWCA Civ 4.

Kamore v Kamore [2000] eKLR.

Kivuitu v Kivuitu [1991] eKLR.

Louisa Hamer v Franklin Sidway, 124 N.Y. 538, 27 N.E. 256 (N.Y. 1891).

Melmerley Investments v McGarry [2001].

Nash v Inman [1908] 2 KB 1.

Newbold and others v Coal Authority [2013] EWCA.

Peter Mburu Echaria v Priscilla Njeri Echaria [2007] eKLR.

R v Oldham Metropolitan Borough Council, ex parte Garlick [1993] 2 All ER 65.

Re an Adoption Application (Surrogacy) (1987).

Re Baby M 109 N.J. 396, 537 A.2d 1227, 1988 N.J.77 A.L.R.4th 1.

Re C (A Minor) (Wardship: Surrogacy) [1985] FLR 846.

Re the Matter of Baby T D L [2014] eKLR.

Re X (A Child) (Surrogacy: Time Limit) [2014] EWHC 3135 (Fam).

Ruddick v Ormston [2005] EWHC 2547.

Scammel and Nephew Ltd. v. Ouston [1941] AC 251 HL.

Security Stove & Mfg Co. v American Railway Express Co 316 U.S. 535 (1942).

Simpkins v Pays [1955] 1 WLR 975.

Skinner v. State of Oklahoma, ex. rel. Williamson 316 U.S. 535 (1942).

Smith v Hughes (1871) LR 6 QB 597.

Surrogate Parenting Associates, Inc. v. Armstrong 704 S.W.2d 209 (Ky. 1986).

Thomas v Thomas [1842] 2 QB 851.

Tweddle v Atkinson [1861] EWHC QB J57.

William & Glyn's Bank Ltd v Boland [1979] AC 487 HL.

CHAPTER ONE: INTRODUCTION

1.0 Background

Article 45(1) of the Constitution safeguards the right to family as a fundamental human right to which each person is entitled.¹ Similarly, the Universal Declaration for Human Rights reiterates that the family is the most basic unit of society. It ought to be protected not only by the state but also the society.² In *Skinner v. Oklahoma*,³ the right to procreate was identified as “one of the basic civil rights of man.” It is in light of this basic right that many childless couples today have resorted to alternative means of having a family. However, the proliferation of new reproductive technologies, including altruistic gestational surrogacy, continues to raise intricate legal and ethical issues.⁴ A key fundamental issue being the status of the surrogate mother, does she relinquish all her parental rights by entering into a surrogate agreement?⁵

To begin with, there are two forms of surrogacy, traditional and gestational surrogacy.⁶ The former refers to an arrangement where a couple contracts with a surrogate mother to have the male sperm artificially inseminated into the surrogate. The surrogate uses her own egg and is therefore genetically related to the child while the latter, is a contractual undertaking whereby the surrogate mother, agrees to conceive a child through artificial insemination with the sperm of the natural father, or insemination of the fertilized gametes of the commissioning couple.⁷ It may be commercial where the surrogate is paid to gestate, bear and relinquish all parental rights to the child after birth or it may

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

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

³ *Skinner v. State of Oklahoma, ex. rel. Williamson* 316 U.S. 535 (1942).

⁴ Epstein A, ‘Surrogacy: the case for full contractual enforcement’ 81 *Virginia Law Review* (1995), 2305-2341, surrogacy contracts are coupled with matters of commodification, incommensurability, inequality of bargaining power, the privity rule and gender inequality.

⁵ Anita L, ‘Privacy, surrogacy, and the Baby M case’ 808 *Pennsylvania Legal Scholarship Repository* (1987), 1759.

⁶ Garrity A, ‘Comparative Analysis of Surrogacy Law in the United States and Great Britain-A Proposed Model Statute for Louisiana,’ 60 *Louisiana Law Review* (1999) 809.

⁷ Garrity A, ‘Comparative Analysis of Surrogacy Law in the United States and Great Britain-A Proposed Model Statute for Louisiana,’ 809-810.

be non-commercial, also referred to as altruistic.⁸ This paper's main focus is the latter.

Historically, one of the earliest forms of surrogacy traces back to the Old Testament of the Holy Bible where Sarai, the wife of Abraham was unable to bear a child. She suggested to him to use her maid Hagar and get a child.⁹ This served as an example of the traditional form of surrogacy where the surrogate, in this case, Hagar, was genetically linked to the child.¹⁰

On the other hand, the first ever report of a baby being born under gestational surrogacy was from the United States in 1985,¹¹ but it was the highly paternalistic response in *Baby M's Case*¹² where the New Jersey Supreme Court declared all surrogacy agreements to be void and unenforceable that made headlines.¹³ In contrast, a liberal response was given in *Johnson v Calvert*¹⁴ where a Californian Supreme Court held that surrogacy arrangements involved free, informed and rational choice by a woman to use

⁸Drabiak K, Wegner C, Fredland V and Helft, P.R., 'Ethics, law, and commercial surrogacy: A call for uniformity' 35 *The Journal of Law, Medicine & Ethics* (2007), 301 defines commercial surrogacy as a contractual relationship where compensation is paid to a surrogate and agency, excluding any reasonable medical, legal, or psychological expenses, in exchange for the surrogate's gestational services.

⁹Genesis 16:1-2, Holy Bible King James Version, Abraham did as he was told and at the age of 90yrs, Ishmael was born.

¹⁰ Hatzis A, 'Just the oven: a law & economics approach to gestational surrogacy contracts' *Perspective for the Unification or Harmonisation of Family Law in Europe, Intersentia, Antwerp* (2003), 414.

¹¹ *Re C (A Minor) (Wardship: Surrogacy)* [1985] FLR 84, a surrogacy agency in the United States made a commercial surrogacy arrangement with Mrs. Cotton (the surrogate) for a couple (intentional parents) in the U.S. The local British authority intervened and made Baby Cotton a ward of court. The judge determined that the couple would be suitable parents and used the best interest of the child.

¹² *Re Baby M* 109 N.J. 396,537 A.2d 1227, 1988 N.J.77 A.L.R.4th 1, where a couple, Mr. and Mrs. Stern, entered into a surrogacy agreement with the surrogate mother, Mary Whitehead, whereby she had to carry the child to term and surrender custody of the child in return for \$10,000 plus medical expenses. After the birth, Ms. Whitehead rescinded the contract and refused to deliver the child due to deep-seated attachment with the child.

¹³ *In Re Baby M*, the Court refused to extend the protection of 'right to privacy' and 'right to procreation' to such agreements holding that "the custody, care, companionship, and nurturing that follow birth are not parts of the right to procreation."

¹⁴ *Johnson v Calvert* Cal. Sup. Ct., 5 Cal4th 84, 851 P.2d 776 (1993), the argument that a woman cannot knowingly and intelligently agree to gestate and deliver a baby for intending parents carries overtones of the reasoning that for centuries prevented women from attaining equal economic rights and professional status under the law. To resurrect this view is both to foreclose a personal and economic choice on the part of the surrogate mother, and to deny intending parents what may be their only means of procreating a child of their own genetic stock.

her body, underpinning the ‘freedom to contract’ and economic independence of the women.¹⁵

In the Kenyan Context, African Customary Law provides for *woman to woman marriages* where a barren woman marries another woman to have children for her.¹⁶ This marriage can take place whether the husband of the barren woman is alive or dead.¹⁷

Presently, altruistic gestational surrogacy has become a legal issue for the courts when they are faced with the question of determining to whom the parental rights should be accorded. In *AMN & 2 others v Attorney General and 5 others*,¹⁸ the court in determining the registration of a child born out of surrogacy acknowledged the absence of a law on surrogacy in Kenya, and held that the surrogate was the legal mother until an adoption order changed this status.¹⁹ Similarly, in *Re the Matter of Baby TDL*,²⁰ the court held that the commissioning parents had to seek an adoption order to be indicated as the legal parents of the child. Likewise, in *JLN & 2 others v Director of Children Services & 4 others*,²¹ the court took the stand that in the absence of a

¹⁵ *Johnson v Calvert*.

¹⁶ Article 2(4), *Constitution of Kenya*, see also section 3(2), *Judicature Act* (Act No 16 of 1967).

¹⁷ Alsaker K, ‘When African women take wives: A Historical Overview’ 6 *The Nordic Africa Institute* (1997) 5-6.

¹⁸ *A.M.N & 2 others v Attorney General & 5 others* [2015] eKLR where the petitioners X and Y entered into a surrogacy agreement, but thereafter were denied passports for the children even though they had received a birth certificate indicating them as parents of the children. The UK home office rejected their application holding that surrogacy was not recognised in Kenya and that they should seek adoption under the Hague Convention or register the children as British Citizens To seek British citizenship for J and G; two options are available, adoption under Article 23 of the 1993 Hague Convention on the Protection of children and Co-operation in Respect of the Inter-Country Adoption – certificates issued under The Hague Convention Article 23 are acceptable for passport services or registration as a British citizen – it is open to you to contract the United Kingdom Visa & Immigration service (UKV&I) with a view to registering the children as British citizens.

¹⁹ *A.M.N & 2 others v Attorney General & 5 others*, in the absence of a legislative framework in Kenya, the position taken by the UK Courts and noting specifically the issues before me, ought to prevail here and so I will find that the surrogate mother is the mother of the twins until such a time as the necessary legal processes are undertaken or until this or any other Court has issued requisite orders in that regard.

²⁰ *Re the Matter of Baby T D L* [2014] eKLR.

²¹ *J L N & 2 others v Director of Children Services & 4 others* [2014] eKLR, even in the absence of a legal regime, the court or any persons dealing with the issues must, in accordance with Article 57 of the Constitution, decide the issue on the basis of the best interests of the child. A child born out of a surrogacy arrangement is no different from any other child. Under Article 53 of the Constitution and section 11 of the Children Act every child has the right to certainty of their parentage, a right to family, a right to a name acquired through issuance of a birth certificate, a right to access health services and a right not to suffer discrimination of any form arising from their surrogate birth. These rights are buttressed by international

regulatory framework on surrogacy, the child would be treated as any other child and therefore the surrogate mother was the legal mother. In the same case, Justice Majanja posited that,

‘Surrogacy is not a hypothetical issue any more. It is real and many Kenyans are resulting to surrogacy as an alternative to being parents. It is the duty of the State to protect the children born out of such arrangements by providing a legal framework to govern such arrangements.’²²

It is in light of this that the Reproductive Health Care Bill was introduced in Parliament in 2014.²³ The Bill recognises altruistic gestational surrogacy in Kenya and provides a regulatory framework on the same.²⁴ However, the bill does not address the question of legal parentage and to whom parental rights are entitled upon the birth of the baby.²⁵ Legal parentage is an issue that has dogged courts around the world for many years. Different approaches have been taken for example in England, in *Re X (A child)*,²⁶ the court held that the surrogate is the child’s legal mother while in other jurisdictions like France and Italy, the surrogate mother has no parental rights over the child.²⁷

1.1 Statement of Problem

The Constitution of Kenya recognizes the right to family.²⁸ The Reproductive Health Bill provides a way of safeguarding this right by providing for gestational surrogate arrangements. However, the law in Kenya still remains silent on whether parental rights are awarded to the surrogate or the commissioning parents upon birth of the baby. Therefore, in the event of a tussle, there is no specific direction under existing law.

instruments like the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child under Articles 7 and 9 respectively.

²² *J L N & 2 others v Director of Children Services & 4 others* [2014] eKLR.

²³ *The Reproductive Health Care Bill* (Senate Bill No. 17 of 2014).

²⁴ Part III, *Reproductive Health Care Bill*.

²⁵ *The Reproductive Health Care Bill* deals with issues of reproductive health like contraceptives, abortion *et al* and affords a chapter to altruistic gestational surrogate motherhood arrangements.

²⁶ *Re X (A Child)* (Surrogacy: Time Limit) [2014] EWHC 3135 (Fam).

²⁷ *Re X (A child)* [2014].

²⁸ Article 45(1), *Constitution of Kenya*.

1.2 Justification of the Study

The right to family is an instrumental entitlement that each person should be afforded. Likewise, the rights of the child are of paramount importance in every society so including a child's legal identity.²⁹ In the absence of laws in Kenya giving direction on the issue of legal parentage, this research will critically evaluate the legal issue at hand and propose a way forward. This research will serve as an indispensable contribution to the proposed legal regulatory framework on gestational surrogacy in Kenya.

1.3 Statement of Objective(s)

1. The specific objective of this paper is to determine to whom parental rights are entitled to in altruistic gestational surrogacy arrangements upon the birth of the baby.
2. The general objective of this paper is to evaluate the legal and ethical enforcement of altruistic gestational surrogacy arrangements in Kenya.

1.4 Research Question(s)

1. To whom should legal parental rights be granted in an altruistic gestational surrogacy arrangement be accorded; the surrogate mother or the commissioning woman?
2. Does Kenyan Law contemplate the legal enforcement of altruistic gestational surrogacy arrangements?

1.5 Literature Review

Although a myriad of authorities have discussed the unique nature of altruistic gestational surrogacy arrangements, there is still a scarcity on the issue of legal parentage especially in Kenya.³⁰

Firstly, Amy Garrity while examining the legal framework on gestational surrogacy in the United Kingdom and the United States, notes that a twofold

²⁹ Article 53(1), *Constitution of Kenya*.

³⁰ *A.M.N & 2 others v Attorney General & 5 others* [2015] eKLR, Justice Isaac Lenaola, letter by the AG, Kenyan law is silent on the issue of surrogacy. Consequently, this is an area for future development of public policy and law.

response has been adopted by legislatures across the world. Some have banned all surrogacy contracts³¹ while other legislatures have made these agreements legal but under regulation in which they have tried to address the issue legal parentage, for example, California.³²

Edgar Page, asserts that there is no point at which the genetic parents voluntarily surrender or transfer their parental rights to child. They simply transfer their gametes to the womb of the surrogate to gestate the child. The arrangement is made with the surrogate on the reliance that after birth the child is theirs.³³

On the other hand, Margaret Brinig holds that contract law should not be applied in surrogacy cases because it is the courts that should make decisions concerning a child's custody and prospective parents in a surrogate agreement.³⁴ Similarly, Erin Hisano points out that legal parentage is an adjudicative matter for the courts to determine using three key tests:³⁵ The Genetic Maternity Rule espouses that a woman's genetic contribution to the child is the determining factor for legal parentage. Secondly, the Gestational Maternity Rule proposes that the birth mother is entitled to legal parental rights. This is based on the emotional and physical connection developed

³¹ Lascarides D, 'A Plea for the Enforceability of Gestational Surrogacy Contracts' 25 *Hofstra Law Review* (1997) 1231, in states like Arizona, Louisiana, Michigan, Indiana surrogacy contracts are void and unenforceable.

³² Garrity A, 'Comparative Analysis of Surrogacy Law in the United States and Great Britain-A Proposed Model Statute for Louisiana,' 815, California is one of the states that has taken a pro surrogacy approach in the United States with about 35-40 surrogate agencies and about 1000 surrogate births in a year. The courts have created a strong line of jurisprudence with the California Supreme Court holding that the gestational surrogate has no parental rights to the child. See also *Surrogate Parenting Associates, Inc. v. Armstrong* 704 S.W.2d 209 (Ky. 1986), the court held that a corporation's involvement in a surrogate parenting procedure did not contravene statutory prohibition against purchasing a child for the purposes of adoption, where the agreement to bear the child was entered into before conception.

³³ Page E, 'Donation, Surrogacy and Adoption' 2 *Journal of Applied Philosophy* (1985), 163-164 where a donation is defined as "a gift and if you give something away, any rights and duties you have in respect of that thing are transferred to the person to whom it has been given. There is a clear agreement between the commissioning couple and the surrogate that the child will be returned to them when it is born. The case has yet to be made for saying that the claims of the gestator override the claims of the commissioning parents who in this case wish to retain rather than surrender their rights and duties in respect of the embryo and resulting child. We cannot simply assume this. And to make an ad hoc ruling would seem to do an injustice to the commissioning couple."

³⁴ Brinig M.F, 'A Maternalistic Approach to Surrogacy: Comment on Richard Epstein's Surrogacy: The Case for Full Contractual Enforcement' 81 *Virginia Law Review* (1995), 2386.

³⁵ Hisano E.Y, 'Gestational Surrogacy Maternity Disputes: Refocusing on the Child' 15 *Lewis & Clark Law Review* (2011), 539-543.

during pregnancy. Consequently, the Intended Maternity Rule considers the element of intention between the surrogate and the arranging party. If the parties contracted for the purpose of gestating a child and on birth belongs to the commission parents, this serves as the determining factor. However, there is no set criteria on which test ranks above the other. Subsequently, it would be unjust for courts to rank either one above the others.³⁶

Likewise, Imra Russel posits that the issue of parental status in surrogacy agreement should be decided as a custody dispute and one should look at where the baby would be best placed.³⁷ He uses the best interest of the child test espoused in the famous *Re Baby M Case* to illustrate the same.³⁸ The courts should primarily take into consideration the best interest of the child principles in granting legal parental rights.

However, Marsha Garrison contends that legal parentage is a matter that requires legislative guidance and laws should be enacted on the same. Laws will give a uniform direction where the matter is concerned.³⁹

1.6 Theoretical Framework

This paper is centred on the theory of contract espoused by Charles Fried, an American jurist and lawyer. He denotes that a contract is a promise which is the classical view of the will theory of contract. The latter posits that voluntary agreements between rational persons ought to be enforced as expressions of a free will's intent to bind itself.⁴⁰ He asserts that free men pursue trust as unique tool used to serve each other's' purpose.⁴¹ Altruistic gestational

³⁶ Hisano E.Y, 'Gestational Surrogacy Maternity Disputes: Refocusing on the Child,' 544.

³⁷ Russell I.S, 'Within the Best Interests of the Child: The Factor of Parental Status in Custody Disputes Arising from Surrogacy Contracts' 27 *Family Law Review* (1988), 616.

³⁸ *In Re Baby M*, the Court ruled that the surrogacy contract violated the baby-selling statute; thus, it could not be enforced against the mother's wishes and leaves open the impact of the statute on a consensual adoption. In the absence of a public policy regarding surrogacy in New Jersey, the only rule of law by which this court may be guided is the application of the doctrine of the child's best interests in the exercise of its *parens patriae* jurisdiction.

³⁹ Garrison, M, 'Surrogate Parenting: What Should Legislatures Do?' 22 *Family Law Quarterly* (1988), 165, there is no prudent rationale for failing to provide legislative guidance on parental rights in surrogacy contracts. Legislative action on these issues would itself go a long way toward resolving the uncertain status of surrogate parenting.

⁴⁰ Fried, C, *Contract as promise: A theory of contractual obligation*, Oxford University Press, USA, 2015, 6, see also Atiyah P, *Promises, Morals and Law*, Oxford University Press, 1981, 17-28.

⁴¹ Fried, C, 'Contract as promise: A theory of contractual obligation', 10, the most palpable form of trust is in form of a promise and by promise we transform a choice that was morally

surrogacy arrangements proceed from the premise that an obligation is established by the existence of voluntary and informed choice to enter into a contract. Hence, the defences to the enforcement of a contractual obligation must demonstrate a failure of voluntariness or an absence of adequate information. Ideally then, the surrogate should only be allowed to breach the contract where she was coerced or fraudulently contracted, otherwise her willingness to relinquish her rights remains voluntary. This paper does however contend that contract law may involve the state in restricting contractual freedom by appropriately enforcing legal prohibitions to prevent coercive individual behaviour.⁴²

John Locke's labor theory proposes an approach that favours the surrogate mother as the legal parent to the child. The underlying principle of the theory is that people own the labor that comes from their own bodies.⁴³ Hence, the surrogate can make an argument she gestates the child, nurtures it till birth and inevitably forms a special bond with the child. Furthermore, she expends labor in bringing forth the child to the world.⁴⁴ However, this theory is rebutted by the fact that the extent of labor is not defined. The commissioning parents could argue that they provide the gametes to genetically make up the child, they contract the surrogate and provide for her upkeep during the tenure of pregnancy. Therefore, they too expend labour.

neutral to one that is morally compelled. When my confidence in your assistance derives from my conviction that you will do what is right, then I trust you and trust becomes a powerful tool for our working our mutual wills to the world. See also Scheiber H, 'Law and History Review' in Scheiber H (Ed) *the State and Freedom of Contract*, Calif Stanford University Press, 1998, the starting point of contract law should be the freedom of contract where the parties should be given the liberty to create their own bargains according to the terms they want.

⁴² Bix B.H, 'Theories of contract law and enforcing promissory morality: comments on Charles Fried' 45 *Suffolk Law Review* (2011), 9.

⁴³ Locke J '*Second treatise of government.*' *Democracy: A Reader*, 2001, 27, "man has a property in his own person [= 'owns himself']; this is something that nobody else has any right to. The labour of his body and the work of his hands, we may say, are strictly his. So when he takes something from the state that nature has provided and left it in, he mixes his labour with it, thus joining to it something that is his own."

⁴⁴ Lewis B.C, 'Enforcing Surrogacy Promises in the Best Interest of the Child' 87 *John's Law Review* (2013), 914-917, the surrogate starts out with an embryo and puts in the labour to change it into a baby. Additionally, during actual labour, the surrogate works to makes sure that the child comes into the world safely. Thus, she acquires some property interest in the child.

1.7 Hypothesis

This paper proceeds on the notion that legal parentage in surrogate arrangements is not provided for in the current legal framework nor the proposed Reproductive Health Care Bill which affords a chapter on the regulation of altruistic gestational surrogacy arrangements. Secondly, this paper also proceeds on the notion that altruistic gestational surrogate arrangements should be legally enforced in Kenya.

1.8 Research Design and Methodology

The method to be used to gather information for this paper will be through the use of the library and internet sources. Data will primarily be sourced from secondary sources including scholarly articles, books, journals and reports on legal parentage to gestational surrogacy.

This research paper will conduct a comparative analysis of the legal regulatory framework in the United Kingdom and South Africa in order to prove or disprove the hypothesis. Kenya is a commonwealth country and as such, has derived its common laws and other applicable laws from the United Kingdom. Kenyan Courts have also referred to the framework in the United Kingdom to decide on surrogacy disputes brought before it.⁴⁵

However, there are differences between the United Kingdom and Kenya; in the legal structure, cultural practices and most importantly technological state of advancement. It is therefore important to establish a middle ground which is South Africa. The latter being a fellow African country, with relatively similar beliefs and practices as Kenya, would give insight on a reasonable approach for Kenya to adopt.⁴⁶

1.9 Limitation(s)

This paper contends that the field of gestational surrogacy in Kenya is broad and is coupled by different issues. This paper is limited to evaluating the issue

⁴⁵ *A.M.N & 2 others v Attorney General & 5 others*, see also *J L N & 2 others v Director of Children Services & 4 others*.

⁴⁶ *The Children's Act (Act No. 38 of 2005 of Republic of South Africa)* that affords a comprehensive legal framework on Surrogate motherhood in Kenya.

of legal parentage as a fundamental element to surrogacy. This will ensure a comprehensive and exhaustive approach to the issue at hand.

1.10 Chapter Breakdown

1) Chapter One

Introduction to the concept of altruistic gestational surrogacy in Kenya, the issue of legal parentage and the proposed methods of research.

2) Chapter Two

An extensive analysis of the theoretical framework underpinning altruistic gestational surrogacy arrangements.

3) Chapter Three

An analysis of the institution of the family and its evolution, the societal concern in altruistic gestational surrogacy arrangements (public policy) and the application of contractual principles to address these concerns and validate these arrangements.

4) Chapter Four

A comparative study of the regulatory framework of altruistic gestational surrogacy arrangements in United Kingdom and South Africa.

5) Chapter Five

Recommendations for the legal regulatory framework on the issue of legal parentage in altruistic gestational surrogacy arrangements in Kenya.

1.11 Timeline and Duration

This research will take 6 months to complete.

CHAPTER TWO: THE FOUNDATION OF AN ALTRUISTIC GESTATIONAL SURROGACY AGREEMENT

2.0 Introduction

This chapter focuses on a critical examination of the theoretical framework of the law of contract and it provides that the law of contract can be used in the application of altruistic gestational surrogacy arrangements.

2.1 Law of Contract

2.1.1 Introduction and Background

Primarily, the term ‘contract’ was derived from a Latin word *Contractum* which means drawn together.⁴⁷ A contract refers to an agreement upon which there is sufficient consideration to do or not to do a particular thing. Similarly, a contract may be defined as an agreement or obligation between parties where one party becomes bound to another to pay a sum of money, or to do or omit to do a certain act.⁴⁸

While agreements have existed in society since time immemorial, the concept of contract developed most emphatically during the eighteenth and nineteenth centuries with the rise of the industrial revolution and the *laissez faire* doctrine.⁴⁹ The latter was categorized by a perception that individuals at the

⁴⁷ <http://www.lawsofbusiness.com/2013/04/what-is-contract.html> on 11 November 2016.

⁴⁸ <https://thelastbastille.wordpress.com/2013/11/02/contract-legally-define> on 11 November 2016, additionally, it is an agreement between two or more persons, concerning something to be done, whereby both parties are bound to each other, or one is bound to the other. See also <http://dictionary.thelaw.com/contract/> on 11 November 2016 where a contract is defined as, “a legally binding agreement involving two or more parties that sets forth an exchange of promises of what each party will or will not do. A contract requires two competent parties to have a meeting of the minds where there is an offer by one party and an acceptance of that offer by the other party, and the consideration for the mutual promises must be something of value.

⁴⁹ Les-Benedict M, ‘Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism’ 3 *American Society for Legal History* (1985), 294 where Laissez faire is defined as the admonition that government ought not to interfere with the natural laws that govern economic relations. See also Elliot C and Quinn F, *Contract Law*, Pearson Longman, 2009, 3-4, the laissez faire doctrine led to the perception of, “a society as a collection of self-interested individuals, each of whom was the best judge of their own interests, and should, as far as possible, be left alone to pursue those interests.” See also, Viner J, ‘The Intellectual History of Laissez Faire’ 3 *The Journal of Law & Economics* (1960), 50 where the writings of Thomas Paine (an advocate for less of government interference in economic relations) are quoted where he posits, “Natural Society is produced by our wants, and government by our the former promotes our happiness positively by uniting our

time were capable of making their own rational decisions especially in commercial transactions with minimal interference from the State or the courts. This approach set an important forum for the freedom of contracts as it was through these instruments that people entered into self-governing transactions. Contracts created obligations and the courts or the state would only interfere to enforce these obligations.⁵⁰

2.1.2 Tenets of a Valid Contract

For a contract to be considered valid it must comprise of an agreement between parties where the following elements are present:⁵¹

(i) Offer and acceptance

The contract should be an agreement where an offer is made by one party and unequivocally accepted by another party. The agreement may be oral⁵² or in writing.⁵³ An offer is an unequivocal manifestation by one party of its intention to contract with another.⁵⁴ It is important that the offer is definitive so that the intention of the offeror is understood clearly as was established in the case of *Scammell and Nephew Ltd. v. Ouston*.⁵⁵

affections, negatively by restraining our vices. The one encourages intercourse, creates distinctions. This first is a patron, the last a punisher. Society in every state is a blessing, but government, even in its best a necessary evil.... Government, like dress, is the badge.”

⁵⁰ Elliot C and Quinn F, *Contract Law*, 4-5 where the freedom of contract is the notion that it is parties themselves that are the best judges of their own interests, on the assumption that nobody would choose unfavourable terms. The only interference by the courts should only be to act as an umpire, holding the parties to their promises; it is not the courts’ role to ask whether the bargain made was a fair one.

⁵¹ Elliot C and Quinn F, *Contract Law*, 42.

⁵² Section 2(1), *Law of Contract Act*, Cap 23 (Act No. 43 of 1960) recognizes that English Contract Law applies in Kenya which means where the former recognizes oral agreements as valid provided the agreements meet the requirements, the same applies to Kenya.

⁵³ Section 3 (3), *Law of Contract Act* recognizes that certain agreements for instance those relating to dispositions in land must be in writing.

⁵⁴ Elliot C and Quinn F, *Contract Law*, 12-13, an offer may take many forms - written, verbal or merely implied from conduct. The person making an offer is called the offeror, and the person to whom the offer is made is called the offeree.

⁵⁵ *Scammell and Nephew Ltd. v. Ouston* [1941] AC 251 HL, where Scammell offered to supply a van for £286 on Hire Purchase terms over 2 years and Ouston was to trade in his old van for £100. A disagreement occurred between the parties and Scammell refused to supply the van. The courts, in deciding if the agreement was valid held it to be void due to uncertainty on the terms of the agreement. The meaning of ‘hire purchase terms’ was inconclusive as it could be weekly, monthly or even the cost of each instalment hadn’t been determined.

Acceptance is the unconditional agreement to all the terms of an offer.⁵⁶ It is at acceptance that the contract comes into existence, usually referred to as the point at which there is a meeting of the minds, *Consensus ad idem*. This means that there is an unequivocal offer and acceptance between the parties giving rise to consensus and thus an agreement.⁵⁷

(ii) Intention to be legally bound by the agreement

Essentially, an agreement cannot be deemed to legally exist if the parties did not intend to create legal relations through it. There is a strong presumption that for commercial arrangements the parties do intend to be legally bound⁵⁸ whereas for social and domestic agreements, parties do not intend to be legally bound.⁵⁹ However, even social and domestic arrangements may be deemed legally binding depending on the nature of the contract and the intention of the parties as was held in *Errington v Errington Woods*⁶⁰ where the court held that there was evidence of an intention to be bound by legal relations even if

⁵⁶ Elliot C and Quinn F, *Contract Law*, 23, acceptance here is taken to be unconditional since if it is conditional it amounts to a counter offer where the terms of the original offer are accepted but with certain amendments made to them. For instance in *Hyde v Wrench* (1840) 49 ER 132 Chancery Division, the case involved an agreement where Wrench had offered to sell a farm to the claimant for £1,000. The claimant in reply offered £950 which the defendant refused. Hyde then sought to enforce the original offer of £1,000 instituting an action of specific performance when the defendant declined to enforce the agreement. The court held that no contract had been created because the claimant gave a qualified acceptance which was a counter offer that destroyed the original offer that was there.

⁵⁷ *Smith v Hughes* (1871) LR 6 QB 597 where the concept of consensus ad idem was determined. Blackburn J set out the following, “if, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.”

⁵⁸ *Eso Petroleum v Customs & Excise* [1976] 1 WLR 1 HL, where the claimant ran a promotion whereby any person purchasing four gallons of petrol would get a free coin from their World Cup Coins Collection. Eso argued that the coins were simply a free gift and the promotion was not intended to have legal effect. The court however held that the context in which the coins were offered was a commercial one. Therefore there was an intention to create legal relations.

⁵⁹ *Jones v Padavatton* [1969] 1 WLR 328 Court of Appeal where a mother and daughter agreed that the former would pay her daughter \$200 if she went to London to study for the bar. The daughter agreed but did not know that the \$200 was in terms of Trinidad dollars and not US Dollars. She expected the latter amount. Her mother then decided to buy her a large house where the daughter could rent out some rooms and get money to make due. The daughter after a while got married and did not finish her studies. Consequently, her mother sought repossession of the house. The courts in consideration of whether a legally binding contract existed between the two held that it was a domestic arrangement and there was no evidence to rebut this.

⁶⁰ *Errington v Errington Woods* [1952] 1 KB 290 (EWCA).

the contract was a domestic arrangement.⁶¹ Similarly, in *Simpkins v Pays*⁶² where the agreement involved a third party (a lodger), a grandmother and her grand-daughter who entered into a weekly competition. The parties agreed that if they won anything they would share the amount amongst themselves. The grandmother however, on receipt of prize money refused to share with the rest. The court held that the agreement between the three was enforceable despite the family connection.⁶³

(iii) Capacity to contract

This is the legal right of each party to contract.⁶⁴ The latter must be made by any person recognised by law as having legal personality which includes both natural and legal persons.⁶⁵ Persons such as minors, drunken persons or persons suffering from mental incapacities have limited capacity to contract under common law principles.

a) Minors are generally not bound by the contracts they enter into.⁶⁶ The rationale for this is that they are not considered to have developed the mental capacity to contract as was held in *R v Oldham*.⁶⁷ However, there are expectations, for instance, if it is a contract for necessities to mean goods

⁶¹ *Errington v Errington Woods*, this was a case where a father bought his son and daughter-in-law a house to live in. It was agreed that the father would transfer the house to the couple if they paid the mortgage installments. Upon the death of the father, the mother of the son inherited the house and her son came to live with her. The daughter-in-law however continued to pay the mortgage installments. When her mother in law sought to possess the house, the court held that a legally binding agreement existed in which the daughter in law was fulfilling her obligations by paying the mortgage installments and was therefore entitled to live in the house.

⁶² *Simpkins v Pays* [1955] 1 WLR 975.

⁶³ *Simpkins v Pays*.

⁶⁴ <http://www.lawteacher.net/cases/contract-law/capacity-cases.php> on 13 November 2016.

⁶⁵ Adriano E, 'The Natural Person, Legal Entity or Juridical Person and Juridical Personality,' 4 *Pennsylvania State Journal of Law & International Affairs* (2015), 366, "a natural person refers to a human being, who is an individual being capable of assuming obligations and capable of holding rights while a legal person is an entity endowed with juridical personality who are usually known as a collective person, social person or legal entity."

⁶⁶ Section 2, *The Children's Act* (No 8. of 2001), a child is defined as any person under the age of eighteen (18) years.

⁶⁷ *R v Oldham Metropolitan Borough Council, ex parte Garlick 2* All ER 65 (1993) where the House of Lords in considering whether a child under the age of ten (10) years could contract to occupy residential premises held, "the laws on the validity of contracts made by minors could only apply if they were old enough to understand the nature of the transaction and the nature of any continuing obligations incurred."

suitable to the condition in life of the minor or other person, and to his actual requirements at the time of the sale and delivery.⁶⁸

b) Persons who suffer from mental illnesses or even drunken persons are actually bound by the contracts they enter into.⁶⁹ However, if it is evident that at the time the contract was made, the drunk/mentally-ill party is incapable of understanding the nature and implications of the transaction and the other party knows of this, such contract will be deemed voidable⁷⁰ at the option of the drunk/mentally-ill person as was held in *Hart v O'Connor*.⁷¹

(iv) Formalities

Generally, a contract need not take any particular form, and it may be oral or in writing. However, parties often contract in writing due to the assurance of having the agreement in writing as opposed to a verbal agreement.⁷² Furthermore, there are certain contracts that must be in writing or can only be evidenced in writing. For instance, in Kenya, Section 3 of the Law of Contract

⁶⁸ Section 4, *Sale of goods act* Cap 31 (Act No. 1 of 2012). See also *Nash v Inman* [1908] 2 KB 1 where a tailor sold some fancy coats to a minor who refused to pay for them and held that he was a minor at the time the agreement was made thus it could not be enforced against him. The court held that although the goods were indeed suitable to the minor's condition in life, they were not suitable to his actual requirements at the time because his father gave evidence indicating that his son had a wardrobe full of coats and was not in need of more coats.

⁶⁹ Elliot C and Quinn F, *Contract Law*, 75.

⁷⁰ The distinction between void and voidable was observed in *De Reneville v De Reneville* [1946] 1 All ER 56, CA where Lord Greene in considering whether a marriage contract was void or voidable held, "a void marriage is one that is regarded by every court in any case in which the existence of the marriage is in issue as never having taken place while a voidable one is regarded by the courts as a valid substituting marriage until a decree annulling it has been pronounced." Even though this case focuses on marriage contracts, the concept of void and voidable contracts applies where the former is considered valid until a party terminates it or an order is given to terminate the contract but for the latter it is considered an invalid contract from the onset.

⁷¹ *Hart v O'Connor* (1985) UKPC 1 where an agreement was entered into between a buyer and a seller but the former did not know of the latter's mental unsoundness at the time of contracting. The Privy Council held that that the person of unsound mind was bound by his agreement. See also *Gore v. Gibson* (1845) in which "the court held that the defendant was not liable on a bill of exchange which he had indorsed at a time when he was, to the knowledge of the plaintiff, so drunk that he could not appreciate the meaning, nature or effect of the endorsement."

⁷² Elliot C and Quinn F, *Contract Law*, 83. See also *Hadley v Kemp* [1999] EMLR 589 where the defendant was sued by members of a singing group for royalties received under the group. The claimants sued on the basis of an oral agreement but because they were unable to prove its existence the action failed.

Act posits that certain contracts must be in writing.⁷³ For example, a contract for the disposition of an interest in land.⁷⁴

Similarly, certain contracts must be evidenced in writing, which means that contract itself need not be in writing but there must be some written evidence of the transaction. For instance, contracts of guarantee where a one party guarantees the obligation of another.⁷⁵

(v) Consideration

A myriad of authorities have explored what the term ‘consideration’ means. To begin with, in 1875, Lush J in *Currie v Misa*⁷⁶ defined it as, “some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility, given, suffered or undertaken by the other.” Likewise, Dunedin LJ in *Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co Ltd*⁷⁷ defined it as, “an act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable.”⁷⁸ Simply put, consideration is that which represents either a benefit one party or detriment to the other party or both.⁷⁹ The importance of consideration in a contract has been viewed as the evidence indicating the intention of the parties to be bound as was observed in *Antons Trawling Co Ltd v Smith*⁸⁰ where consideration was held to be a valuable signal that the parties intend to be bound by the agreement.

⁷³ Section 3, *Law of Contract Act*.

⁷⁴ Section 3(3), *Law of Contract Act*, see also *Ruddick v Ormston* [2005] EWHC 2547 where the court ruled against a claim for specific performance of a contract of properties because the parties had not entered into a written agreement and therefore there was no valid contract.

⁷⁵ Elliot C and Quinn F, *Contract Law*, 85.

⁷⁶ *Currie v Misa* 1875-76 LR 1 App Cas 55.

⁷⁷ *Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co Ltd* [1951] UKHL.

⁷⁸ *Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co Ltd*.

⁷⁹ Elliot C and Quinn F, *Contract Law*, 89, see also *Thomas v Thomas* [1842] 2 QB 851 where it was defined as, “something which is of some value in the eye of the law, moving from the plaintiff: It may be some benefit to the defendant, or some detriment to the plaintiff, but at all events it must be moving from the plaintiff.” See also *Carlill v. Carbolic Smoke Ball Co.* [1892] EWCA Civ 1 where an example of consideration was given to be that which is constituted by a benefit accruing to one party and a detriment suffered by the other party.

⁸⁰ *Antons Trawling Co Ltd v Smith* [2003] New Zealand, see also *Melmerley Investments v McGarry* [2001].

2.2 Theory of Contract

To begin with, the law of contract is based on different theories that are used to explain the basis of contract law. These theories give views that indicate when legal contractual obligations arise and when they do not. For the purpose of altruistic gestational surrogacy contracts, this paper analyses the theory of contract under three limbs; the analytical question, normative question and a convergence of both referred to as the consent theory of contract.⁸¹

2.2.1 Analytical Theory of Contract

The analytic question answers what constitutes a contractual obligation and this is observed under two principles, the promissory and reliance principles.

i) Promissory Principle

Essentially, the promise principle posited by Charles Fried⁸² is argued to be the basis of contract law in his book, 'Contract as a Promise.'⁸³ A promise can be understood as "the communication made of an intention to undertake a particular obligation." Therefore, the promissory principle denotes that contracts involve promises that create legally binding obligations on the parties who make these promises.⁸⁴

Fried posits that a promise also has a moral backing to it, as it places an obligation to accomplish a particular task which is morally compelling often referred to as the will theory.⁸⁵ While promises lead to moral obligations, there is more justification required to make a contract legally binding. This is why

⁸¹ Smith S, *Contract Theory*, Oxford University Press, 2004, 43-45.

⁸² Charles Fried is an American jurist and lawyer who is currently a professor at Harvard University. He is well known for his expertise in civil and contract law.

⁸³ Fried C, *Contract as promise: A theory of contractual obligation*, Oxford University Press, United States of America, 2015, 1.

⁸⁴ Valente D, 'Enforcing Promises Consideration and Intention in the Law of Contract' a dissertation submitted in partial fulfilment of the degree of Bachelor of Laws (Honours), University of Otago, October 2010, 3. See also Bix B, 'Contract Law Theory' 06-12 *Minnesota Legal Studies Research Paper Series* (2006), 9 where contracts are defined as promises, and one has a moral and legal obligation to keep one's promises.

⁸⁵ Fried C, *Contract as promise: A theory of contractual obligation*, 8, "the device that gives trust its sharpest, most palatable form is promise. By promising we put in another man's hands a new power to accomplish his will. By promising we transform a choice that was morally neutral to morally binding/compelling one."

contracts not only create moral duties but legal ones enforceable under the law.⁸⁶

On the one hand, this legal backing gives the promisee a right to enforce the promise where it is not fulfilled through claims of breach of contract leading to damages, restitution and other measures of redress.⁸⁷ On the other hand, the promise must be unequivocal, therefore, the promisor must not be bound to fulfill a promise he made mistakenly or a promise that was fraudulently induced or where fulfillment of the promise is frustrated; commonly referred to as vitiating elements of a contract.⁸⁸

The promissory principle has however been criticised as a mere moral obligatory theory which is legally non enforceable.⁸⁹ It has been argued it is difficult to establish at times the will of the promisor showing his or her intent to fulfill the contractual obligation.⁹⁰ Similarly, to be different from what the law of contract entails since consideration is a vital element validating a contract while promises merely entail moral communications to do particular tasks.⁹¹ Charles Fried addresses these arguments where he asserts two key notions;

- i) Consideration need not be adequate, the law is only concerned that there is an exchange between the parties. For instance in *Hamer v Sidway*⁹² where a nephew was promised by his uncle that if he quit smoking and drinking till his twenty first birthday, he would get five

⁸⁶ Valente D, 'Enforcing Promises Consideration and Intention in the Law of Contract' 3.

⁸⁷ For example in *Security Stove & Mfg Co. v American Railway Express Co* Missouri Court of Appeals [1932] where the defendant was to deliver to the plaintiff a stove that the latter wanted to showcase at a convention. The defendant failed to do this in time and the plaintiff instituted a claim seeking damages. Court held that the plaintiff was entitled to redress.

⁸⁸ Fried C, *Contract as promise: A theory of contractual obligation*, 20, see also Onyekachi D, 'Vitiating elements of a contract as a source of contract validity' (2012), 2-3, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2156749 10 November 2016 where vitiating factors are explained as "factors that make a contract void or voidable. These include mistake, misrepresentation, duress, undue influence and illegality. The nature of the vitiating element determines the kind of defect the contract may have, the contract may not be enforceable at all or it may be enforceable in certain ways."

⁸⁹ Smith S, *Contract Theory*, 44.

⁹⁰ Barnett R, 'A Consent Theory of Contract,' 86 *Columbia Law Review* (1986), 274, "the inability of will theories to explain adequately the enforcement of objective manifestations of intention also accounts in part for the continued interest in reliance-based theories of contractual obligation."

⁹¹ Barnett R, 'Some Problems with Contract as Promise,' 77 *Cornell Law Review* (1992), 1025-1026.

⁹² *Louisa Hamer v Franklin Sidway*, 124 N.Y. 538, 27 N.E. 256 (N.Y. 1891).

thousand dollars. The nephew complied with this but his uncle's executor refused to pay the amount claiming that it was a mere promise made with no consideration thus not legally binding. The courts held for the nephew in that his forbearance from smoking and drinking was sufficient consideration.

- ii) A mere promise turns into a contractual obligation where there is the promise of something given in exchange for something usually referred to as a bargain. Contracts entail mutual exchanges where parties agree to undertake certain obligations from which they benefit from.⁹³

iii) Reliance Principle

The reliance principle posits that where one party induces another to rely on the enforcement of a certain obligation, it may be deemed binding.⁹⁴ It is closely linked to the reasonable expectations that arise causing one to rely on enforcement of the promise. Courts adopt an objective standard to assess reasonability and judge whether a party is entitled to any redress.⁹⁵

This principle is however criticised as weak and a generality since any promise made gives rise to an expectation but this does not necessarily make it a contract. It is important to note that this is precisely why courts adopt an objective criteria to the reliance test assuming that there must first be in existence a valid contract where the parties intended to be legally bound since the question is not whether the reliance creates a contract but whether an agreement existed in which reasonable expectations could arise.

⁹³ Smith S, *Contract Theory*, 110, the concept of mutual exchanges is usually likened to the efficiency theories of contract law where two persons make a voluntary exchange and the exchange will make each better off, and is therefore efficient. However, it is important to note that there are contracts that are enforceable that do not make both parties better off thus are not mutually beneficial. But even with these contracts, voluntary exchanges take place.

⁹⁴ Smith S, *Contract Theory*, 44.

⁹⁵ Valente D, 'Enforcing Promises Consideration and Intention in the Law of Contract', 4; where justification is given for the reliance principle. Courts enforce it to protect the promisee who may have made steps on reliance of this promise. For example, "the promisor, by making the promise, gives the promisee hope that it will be performed. If the promisor fails to perform, it causes a sense of injury or deprivation in the promisee."

2.2.2 Normative Theory of Contract

Having established what constitutes a contractual obligation, the normative theory of contract looks into the justification to legally enforce such obligation. It analyses what justifies a promise as a legally binding obligation.

(i) Efficiency theory

Essentially, the efficiency theory is a utility based theory premised on the notion of making parties *better off* and promoting the overall welfare of the parties.⁹⁶ The justification for contracts and the enforcement of contractual obligations is that it makes the parties better off. The efficiency theory is closely linked to the classical view of utilitarianism posited by Jeremy Bentham as the pain-pleasure principle where he averred for the greatest happiness for the greatest number of people.⁹⁷ However, the application of economic analysis to legal rules has been criticised. Critics argue that where the efficiency theory proposes that which is best for the welfare of the society or even the parties themselves means there is an external moderator or judge of *that which is best*. Likewise, to arrive at a situation where parties are made better off would mean that negotiations take place, effective mutual bargaining and inevitably unequivocal consent from both parties. Therefore, efficiency theories are supplemented by other elements to justify the enforcement of contractual obligations.⁹⁸

⁹⁶ Smith S, *Contract Theory*, 47, see also Cooter R and Ulen T, *Law and Economics*, Berkeley Law Books, 2016, 14, in economic terms, efficiency is popularly defined in regards to the "Pareto efficiency or allocative efficiency where a situation is impossible to change it so as to make at least one person better off (in his own estimation) without making another person worse off (again, in his own estimation)."

⁹⁷ Freeman M, 'Bentham, Austin and classical English positivism,' in Lloyd D, *Introduction to Jurisprudence*, Sweet & Maxwell, 1994, 249, pain pleasure principle was based on a set of measures of happiness and pain. That which led to happiness for the greatest number of people was sought as the better option under this principle. It has been criticised for being instrumental and for not taking into account that certain things cannot be measured or weighed.

⁹⁸ Barnett R, 'A Consent Theory of Contract,' 283, consent may be evident from the following: the conduct of persons with their words, their conduct and words in one context with those in another, or (3) one person's conduct and words with another person's conduct and words. See also Brilmayer L 'Consent, Contract and Territory' *Faculty Scholarship Series Paper* (1989), 21, consent is based on an individual's voluntary choice over other choices however, in contracts a further step is taken where this choice binds that individual to a legal contractual obligation.

(ii) The Rights Principle

The rights dogma posits that contractual obligations give legal effect and protection to individual rights. This entails a respect for such rights where their infringement results in legal redress through damages or special performance.⁹⁹

2.2.3 Consent Theory of Contract

Primarily, consent can be understood as, “the voluntary acquiescence to the proposal of another that entails a concurrence of minds and will.”¹⁰⁰ Consent theory is based on the vital requirement of a rights holder to unequivocally agree to the valid transfer of their individual rights creating a binding contractual obligation to do so.¹⁰¹ Barnett Roberts in his article that focusses on the consent theory of contract asserts that,

“the consent theory specifies that a promisor incurs a contractual obligation the legal enforcement of which is morally justifiable by manifesting assent to legal enforcement and thereby invoking the institution of contract.”¹⁰²

The consent theory contemplates both a subjective and objective element to determine the existence of a contractual obligation, which is actually a blend of the analytical and normative theories discussed above.¹⁰³ Traditionally, contracts were tools that gave effect to party autonomy by actualizing the intentions of the parties to the contract. However, the intention of the parties in itself may not always be sufficient to legally enforce a contractual obligation since it may be difficult to prove this intention (subjective element). Therefore, under the consent theory, the intentions of the parties are to be

⁹⁹ Smith S, *Contract Theory*, 47.

¹⁰⁰ <http://legal-dictionary.thefreedictionary.com/consent> on 11 November 2016.

¹⁰¹ Barnett R, ‘A Consent Theory of Contract,’ 301, the consent theory may be confused for the will theory that denotes the promissory principle. However, the two are distinct in that the will theory morally binds one to a contractual obligation irrespective of whether the promisor had the intention to be bound in the first place while the consent theory requires that consent whether express or implied be made before any rights are transferred or assumed to be transferred. Therefore, under the consent theory the intention to create legal relations is not only morally binding but legally too as it satisfies the objective (legal) and the subjective (moral) elements.

¹⁰² Barnett R, ‘A Consent Theory of Contract,’ 305.

¹⁰³ Perillo J, ‘The Origins of the Objective Theory of Contract Formation and Interpretation,’ 69 *Fordham Law Review* (2000), 427.

ascertained from their words and conduct rather than their unexpressed intentions, (objective element).¹⁰⁴

2.3 Application to Altruistic Gestational Surrogacy Arrangements

This paper posits that the determination of legal parentage under altruistic gestational surrogacy arrangements should be based on the consent theory of contract. The latter provides a situation where the parties voluntarily and unequivocally intend to contract (subjective) but there is evidence of this intention that may include signing of the agreement and the presence of witnesses or the conduct of the parties (objective). In circumstances where there is both the subjective and objective element of the contract, then a contractual obligation is created that legally binds both parties.

2.4 Critique of the Contractual Theory

It is not disputed that the contractual theory has its flaws, a key one being that if applied to altruistic gestational surrogacy arrangements, the latter could easily be turned into an exploitative tool through the commercial element of a contract. This has been a major argument against the enforcement of gestational surrogacy arrangements as contracts.¹⁰⁵ However, altruistic surrogacy arrangements can still be enforced without formal consideration under the doctrine of promissory estoppel which has been explored above under the promissory theory of contract espoused by Charles Fried.

Likewise, it is not only the contractual theory that can be used to support the enforcement of altruistic gestational surrogacy arrangements. As highlighted in Chapter one, the right to family is a fundamental human right embodied in Article 45 (1) of the Constitution as well as other international instruments like the UDHR.¹⁰⁶ From a human rights perspective, altruistic gestational surrogacy arrangements provide an avenue through which the right to family is realized for all people including couples that cannot beget children through

¹⁰⁴ Perillo J, 'The Origins of the Objective Theory of Contract Formation and Interpretation,' 430 while contracts as stated above are effective tools for the respect of party autonomy, the proof of the existence of this contractual intent is rooted in objective elements like what the parties signed or whether there were any witness. Consequently, the existence of a contractual obligation relies on both subjective (intent) and objective elements.

¹⁰⁵ Brinig M, 'A Maternalistic Approach to Surrogacy: Comment on Richard Epstein's Surrogacy: The Case for Full Contractual Enforcement' 2380.

¹⁰⁶ Article 45(1), *Constitution*, Article 16, *Universal Declaration of Human Rights*.

natural means. Additionally, gestational surrogacy involves the transfer of gametes of the intending couple to the womb of the surrogate meaning the surrogate has no genetic link to the child and the couple simply transfer their rights to the child to the surrogate during the period of gestation. It can be argued as will be seen in the next chapter, that even if a surrogate bears no genetic link to the child, she could still get attached to the baby and feel entitled to parental rights over it. This is precisely why a clear cut regulatory framework is necessary with regard to the enforcement of these arrangements. For instance in countries like South Africa, one of the requirements to validate an altruistic gestational surrogacy agreement is that the surrogate must have had one viable pregnancy, with a child of her own, before entering into a gestational surrogacy arrangement.¹⁰⁷

In the same vein, a long standing practice has been established in Kenya where communities would enforce obligations arising from gestational surrogacy arrangements as binding on the parties. Often, barren women would enter into woman-woman marriages for the primary purpose of getting children who would be considered the children of the barren woman even though the “other woman in the marriage gave birth to the children.”¹⁰⁸

Summarily, as posited by Justice Majanja, surrogacy is not a hypothetical issues in Kenya, it is real and the onus is on the state to come up with an effective framework to guide these arrangements.¹⁰⁹ While it is acknowledged that the law of contract would require certain parameters to be safeguarded in the law to ensure the interests of justice are met, the right to family embodied in the Kenyan Constitution and the long standing practice shown where communities have indeed practiced gestational surrogacy and enforced the terms of such agreements for a long period of time shows the undeniable intention for parties that enter into these arrangements to be bound by such agreements.

¹⁰⁷ Section 295 (c), *Children's Act*.

¹⁰⁸ Alsaker K, 'When African women take wives: A Historical Overview' 5-6.

¹⁰⁹ *J L N & 2 others v Director of Children Services & 4 others* [2014

CHAPTER THREE: ANALYSIS OF THE STATE/SOCIETAL INTEREST IN ALTRUISTIC GESTATIONAL SURROGACY

3.0 Introduction

In light of the fact that the right to family enshrined in Article 45 (2) of the Constitution is an instrumental factor for the enforcement of altruistic gestational surrogacy arrangements, this chapter gives a comprehensive analysis of the institution and role of the family in society, the societal interest in altruistic gestational surrogacy arrangements and consequently this chapter examines whether the application of contractual principles in line with altruistic gestational surrogacy arrangements are in line with public policy in Kenya.

3.1 Institution of the Family

3.1.1 Introduction and Background

To begin with, the word ‘family’ comes from the Roman term *‘familia’* which referred to the “interests of a tightly-knit and exclusive group of persons, *familia* was a unit with an adult male Roman, (*pater familias*) lawfully married, with children born to him and his wife (or successive wives) together with the children of their children through many generations.”¹¹⁰ In some contexts family today is persons sharing blood relations while in other contexts it refers to members of a household or both.¹¹¹ The Universal Declaration of Human Rights (**UDHR**) defines family as the natural and fundamental group unit of society entitled to protection by society and the State.¹¹²

¹¹⁰ Borg K, ‘A Comparative Analysis Of The Concept Of ‘Family’ *Faculty Of Laws* (2006), 34, see also Brewer P, *Frederick Engels’ The Origin of the Family, Private Property and the State: Introduction by Pat Brewer*, Resistance Books, New South Wales, 2008, 11 where the word ‘family’ was considered to come from the Latin term *famulus* which means household slave, and *familia*, the totality of slaves belonging to one man, the patriarch, who inherited all the wealth and wielded absolute power over all members of the household. This shift towards gender inequality was presented as a natural, not a social process.” Similarly, Fredrick Engel describes the family as the social organisation of reproduction and production of daily life at all stages of human society.

¹¹¹ [http://www.thefreedictionary.com/Family+\(sociology\)](http://www.thefreedictionary.com/Family+(sociology)) on 10 November 2016.

¹¹² Article 16 (3), Universal Declaration of Human Rights, 217 A (III) see also Article 23, International Covenant on Civil and Political Rights (**ICCPR**), 19 December 1966.

Historically, society was in a primitive state characterised by egalitarian, social and sexual relations, collective production and communal ownership of property. This was a phase where people engaged in sexual relations freely and with no restrictions. However, with time came the development of a social organisation where members of the community could trace their bloodlines and kinship ties.¹¹³ The institution of the family developed under four key forms;¹¹⁴ **the consanguine family** where for so long as you were a member of a certain generation, sexual relations with members of the same generation was permitted,¹¹⁵ **the punaluan family** which restricted sexual relations between brothers and sisters as well as parents and children,¹¹⁶ **the pairing family** where one man chose his wife and belonged to her but was still allowed to practice polygamy and **the monogamous family** where the main purpose was to produce children but with no issues of paternity so that children could inherit their fathers' property. Thus, laws were created to make monogamous marriages binding and their dissolution characterised by several complex formalities.¹¹⁷

3.1.2 Evolution of the Family

The initial concept of the monogamous family has evolved over the years and with it so has the institution of marriage. The industrial revolution that characterised the 18th and 19th century played an instrumental role in this paradigm shift as women became more involved in social and economic work.¹¹⁸ Consequently, acts like the Married Women Property Act¹¹⁹ recognized that a wife could own property separate from her husband.¹²⁰

¹¹³ Brewer P, *Frederick Engels' The Origin of the Family, Private Property and the State: Introduction by Pat Brewer*, 10-11.

¹¹⁴ Brewer P, *Frederick Engels' The Origin of the Family, Private Property and the State: Introduction by Pat Brewer*, 52.

¹¹⁵ The consanguine family is considered extremely rare today, some even argue that it was become extinct with traces of its existence in Hawaiian family systems only.

¹¹⁶ The Punaluan family is linked to an Indian Tribe called Punalua that practiced this kind of family system.

¹¹⁷ The monogamous family was based on the supremacy of the man and his need to produce children of his own with no dispute claims over the child. The role of the woman was merely secondary leading to the doctrine of coverture where her legal identity was subsumed into that of the husband's. See also *William & Glyn's Bank Ltd v Boland* [1979] where Lord Denning posited the following, "the law regarded the husband and wife as one and the husband as that one."

¹¹⁸ Paola G, 'The Role of Women in Society: from Preindustrial to Modern Times' 61.1 *CESifo Economic Studies* (2015), 15-17.

¹¹⁹ *Married Women Property Act*, 18 August 1882.

¹²⁰ Section 17, *Married Women Property Act*.

Similarly in Kenya, cases like *Kamore v Kamore* where the court held that property acquired jointly during the subsistence of a marriage belongs to both parties equally.¹²¹

With these changes in mind, the family institution is no longer an organ spearheaded solely by the man. Initially, men led since they held the wealth that they could bequeath to their children, however, presently, women can acquire wealth too and do have rights to bequeath this wealth to their children.¹²² These changes are also reflected in the status of the woman who now has equal rights over several factors as the man before, during and even after the subsistence of marriage.¹²³ Some of these rights include that of owning and selling property, bequeathing or inheriting property or entering into legally binding agreements.¹²⁴

3.2 Societal Interest in Altruistic Gestational Surrogacy Arrangements

In light of the fact that these agreements involve the inception of new life into the family unit and inevitably the society, the latter plays an instrumental role where altruistic gestational surrogacy arrangements are concerned.

3.2.1 Moral and Ethical Issues

Essentially, the proliferation of most of the modern contraceptive technologies¹²⁵ have raised several moral and ethical issues in society. These issues have been the centre of debate in deciding whether altruistic gestational surrogacy agreements should be enforceable as well as the binding force of the terms of the agreement.

¹²¹ *Kamore v Kamore* [2000] eKLR, see also *Peter Mburu Echaria v Priscilla Njeri Echaria* [2007] eKLR where the courts even proposed that laws be enacted to outline how matrimonial property should be shared. See also *Kivuitu v Kivuitu* [1991] eKLR where the courts held that property held jointly in a marriage with no way of ascertaining who own what interest is to be shared between the parties equally.

¹²² Brewer P, *Frederick Engels' The Origin of the Family, Private Property and the State: Introduction by Pat Brewer*, 81.

¹²³ Section 3(2), *The Marriage Act* (Act No.4 of 2014).

¹²⁴ Paola G, 'The Role of Women in Society: from Preindustrial to Modern Times', 16, see also <http://www.familiesandsocieties.eu/wpcontent/uploads/2014/12/WP11OlahEtA12014.pdf> on 8th September 2016 where the role of women in the modern society is highlighted as having incorporated dimensions of economic independence and support responsibilities that for a while were taken up by men.

¹²⁵ Andrews L, 'The Stork Market: The Law of the New Reproduction Technologies' 70 *American Bar Association Journal* (1984), 50, some of these technologies include: in vitro fertilization techniques or sperm donation.

(i) Commodification of Women

This is an issue raised by feminists who see surrogacy arrangements as a means of exploiting women.¹²⁶ It is argued that women who act as surrogates are vulnerable and chosen from backgrounds where women are likely to be exploited because they do not understand the nature and implications of surrogacy arrangements; they are chosen due to their beauty or reproductive capacity making them tools of reproduction and degrading the natural order of reproduction.¹²⁷

On the other hand, neither the surrogate nor the commissioning couple is forced into these agreements and even if they were, then the agreement ceases to be an enforceable one but a agreement vitiated by coercion.¹²⁸ Therefore, valid surrogacy agreement are underpinned by an element of voluntariness on both parties. Furthermore, commercial surrogacy has been banned by several countries across the world¹²⁹ including Kenya in its proposed regulatory framework for gestational surrogacy, it only recognises altruistic surrogacy which does not require the surrogate to be paid any fees.¹³⁰

(ii) 'Baby Selling' Market

Gestational surrogacy arrangements are argued to create a forum for a '*baby selling market*' no different from the process of adoption. Babies are likened

¹²⁶ Brinig M, 'A Maternalistic Approach to Surrogacy: Comment on Richard Epstein's Surrogacy: The Case for Full Contractual Enforcement' 2380.

¹²⁷ Scott E, 'Surrogacy and The Politics Of Commodification,' 72 *Duke University School of Law* (2009),110, this fear can be likened especially to women who come from developing countries where are easily a subject of exploitation since they can be duped into these arrangements by either coercion or lack of knowledge thereof what they may be getting themselves into. See also *Baby M* Case where it was agreed that women do have a right to choose what they do to their own bodies but the concerns of exploitation of women where surrogacy arrangements are involved cannot be ignored. In this case, feminist advocates fought for Ms. Whitehead, the surrogate, to get parental rights, because in their view, the surrogacy arrangement between Ms. Whitehead and the Sterns was an exploitative tool.

¹²⁸ Elliott C and Quinn F, *Contract law*, 252, contracts must be entered into voluntarily by both parties which is represented by valid consent given by parties to the contract; if not the contract is voidable. See also Epstein A, 'Surrogacy: the case for full contractual enforcement' 2328, the fact that contracts have certain rules that make them valid like principles of offer and acceptance does not mean that all contracts are universal. Contracts are all different because of the different subject matter each pertains to; therefore to conclude that a surrogacy contract is a mode of commodification of children is a false assertion because children are not goods or services nor can they ever be commodified. Just because a surrogacy contract appreciates the rules of contract does not mean that the value of the subject matter is negated in any way.

¹²⁹ States like New-York have declared any type of commercial surrogacy agreement void and unenforceable.

¹³⁰ Section 14, *Reproductive Health Care Bill*.

to goods and services as the subject matter of the surrogacy agreement. This creates a perception that children can be sold thereby degrading human life.¹³¹

However, the conception and existence of a baby is only assured after the execution of a gestational surrogacy agreement.¹³² Most importantly, the subject matter of the arrangement is the surrender of parental rights and not the sale of a baby.¹³³ The surrogate has no baby when the arrangement is entered into nor does she have any parental rights.¹³⁴

(iii) Comparison to Prostitution

It has been argued that these arrangements can be likened to prostitution as the sale of female sexuality. These arrangements exploit the surrogate by enticing them with money for their reproductive capacity.¹³⁵ Just like prostitution, these are arrangements concluded in the absence of free will and rational choice since the surrogate is guided by the monetary value of the arrangement.¹³⁶

For one, this argument undermines the capacity of a woman to be autonomous and rational enough to choose to do with her body as she pleases. It instead pre-supposes that women are incapable of entering into enforceable

¹³¹ Lieber K, 'Selling the Womb: Can the Feminist Critique of Surrogacy Be Answered?' 68 *Indiana Law Journal* (1992), 217.

¹³² Lascarides D, 'A Plea for the Enforceability of Gestational Surrogacy Contracts' 25 *Hofstra Law Review* (1997), 1241-1243.

¹³³ In *Johnson v Calvert* the court reasoned that a surrogacy arrangement is very different from adoption. No fee is paid to the surrogate nor does she have any baby at the time the contract is concluded. The purpose of the contract is to effect the surrender of parental rights to an intending couple once the baby is born.

¹³⁴ Posner R, 'The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood,' 5 *Journal of Contemporary Health Law and Policy* (1989), 28, "additionally, the baby is not owned by the surrogate because even the genetic father has a right to his baby. The surrogate mother no more "owns" the baby than the father does. See also Lascarides D, 'A Plea for the Enforceability of Gestational Surrogacy Contracts,' 1241, having established that the baby is not in existence at the time the contract is executed, meaning the baby cannot be an existing good. It is also important to note that parental rights as well do not exist at the time the contract is concluded, therefore no party has a right to any existing future good since such rights must be held when contract is being executed. Hence, gestational surrogacy contracts are not for the sale of any type of goods but for the surrender of parental rights."

¹³⁵ Posner R, 'The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood,' 27.

¹³⁶ Sera J, 'Surrogacy and prostitution: A comparative analysis' 5 *Journal of Gender and the Law* (1996), 319, "surrogacy contracts are seen as coercive involuntary tools even if the woman makes the choice to contract, it is not always that women make choices that are in their best self-interest. Some feminists have viewed these arrangements as an opportunity for men to exploit women and make them a class of breeders."

arrangements on their own.¹³⁷ Secondly, it is not just the surrogate in this arrangement but another woman too with the incapability to procreate.¹³⁸ Moreover, to assume surrogates enter into these agreements because of a monetary desire is false since altruistic surrogacy arrangements¹³⁹ do not require the surrogate to be paid any fee.

3.2.2 Public Policy

Primarily, there are various definitions given to the term 'public policy.' For instance, Thomas Dye defines it as "that which the government chooses to do or not to do" while Carl J. Friedrich views it as a proposed course of action of a person, group or government within a given environment providing opportunities and obstacles which the policy was proposed to utilise and overcome in an effort to realise an objective or purpose."¹⁴⁰ Similarly, public policy was considered in *Christ for all Nations v Apollo Insurance Co. Ltd*¹⁴¹ where Ringera J stated that in Kenya an act is contrary to public policy if it is either:

"(a) Inconsistent with the constitution or other laws of Kenya, whether written or unwritten; or (b) inimical to the national interest of Kenya; or (c) contrary to justice or morality. The first category is clear enough. In the second category I would without claiming to be exhaustive include the interests of national defence and security, good diplomatic relations with friendly nations, and the economic prosperity of Kenya. In the third category, I would, again without seeking to be exhaustive, include such considerations as whether the award was induced by corruption or fraud or whether it was founded on a arrangement contrary to public morals."¹⁴²

¹³⁷ Posner R, 'The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood,' 27.

¹³⁸ Parties would not enter the surrogate agreement without the need to. It is not the surrogate who goes out looking for a baby but an intending couple that goes out of its way to contract a surrogate because they want a chance at procreation and a family. Furthermore, the surrogate enters an altruistic arrangement not for money or other gains but to simply gestate a baby for an intending couple, thereafter surrender the rights to them.

¹³⁹ These form of surrogacy is widely accepted as the proposed model for Kenya.

¹⁴⁰ http://www.hss.ruh.ac.lk/homepages/lecture_notes/Sabaragamuwa%20Lecturers/Introduction%20to%20Public%20policy.pdf on 10 November 2016, see also Mackay M, 'Understanding and Applying Basic Public Policy Concepts' *University of Guelph* (2011), 1.

¹⁴¹ *Christ for all Nations v Apollo Insurance Co. Ltd* [2002] eKLR.

¹⁴² *Christ for all Nations v Apollo Insurance Co. Ltd*.

Often, the enforcement of altruistic gestational surrogacy arrangements is opposed due to the third limb highlighted in Justice Ringera's analysis, the moral and ethical issues. These arrangements are held to be against public policy due to the moral concerns they raise. Furthermore, the issue of legal parentage in altruistic gestational surrogacy arrangements is mainly based on the level of interference that the state or society may have in private matters. On the one hand, an argument could be made that family affairs are far too important to be left to the will of individuals especially where a decision is to be made on the legal parent of a child. On the other hand, an argument could similarly be made that family affairs are private and therefore, there should be minimal or no interference at all.¹⁴³

3.3 Application of Contractual Principles to Validate Altruistic Gestational Surrogacy Arrangements

i) Concern of the state and the society

To begin with, the state and the society both have a primary interest in the care and protection of children.¹⁴⁴ With this in mind, it is important to note that a surrogacy arrangement would not be entered into if the parties did not have the child's best interest. Based on the theory of contract explored in chapter 2, neither the commissioning couple nor the surrogate enter into a valid contractual altruistic gestational surrogacy agreement accidentally or unintended but consensually. Therefore, it is undisputed that all parties concerned want the best for the child, undeniably then, an altruistic gestational surrogacy arrangement does in fact take into account the state's concern in care and protection of the child.¹⁴⁵

Societal concerns are also raised over the commercialization of the process (the baby selling market). In the case of the latter, altruistic gestational surrogacy arrangements are non-commercial and the only payments made are

¹⁴³ Carbone J, 'The Role of Contract Principles in Determining the Validity of Surrogacy Contracts' 28 *Santa Clara Law Review* (1988), 582.

¹⁴⁴ Article 53 (2), *Constitution of Kenya* highlights that the best interests of the child are of paramount importance, see also Article 53 (e), *Constitution of Kenya* which posits that every child is entitled to parental care and protection. Likewise, under Article 53(a) every child has a right to a name and nationality from birth (legal identity).

¹⁴⁵ Carbone J, 'The Role of Contract Principles in Determining the Validity of Surrogacy Contracts,' 590.

for the subsistence of the pregnancy.¹⁴⁶ Likewise, in comparison to the regulatory frameworks highlighted in Chapter 4 from other jurisdictions,¹⁴⁷ there are certain requirements that must be met before parties enter into an altruistic gestational surrogacy arrangement, for example, the arrangement must not be a source of income for any of the parties.¹⁴⁸

ii) Equality of the Parties Bargaining Power

An argument is made that surrogacy arrangements impose a burden on a woman to make a futuristic decision and be bound by it. This is without concern of the un-anticipated changes that may take place putting her at an unequal position to the other party. This argument fails to appreciate the fact that this is precisely where certain requirements must be met before the conclusion of an altruistic surrogacy arrangement like ensuring the surrogate is well informed and makes a free consensual decision to gestate and give up her parental rights.¹⁴⁹ Similarly, contractual principles are there to impose the minimum conditions that ensure that arrangements entered into are valid. Therefore, provided there is free consent, informed choice, freedom from coercion or duress and sufficient evidence to ensure the surrogate does not enter into the arrangement due to financial constraints then the arrangement is valid and the parties should be held liable to perform their obligations.¹⁵⁰

iii) Validity of Surrogate Mother's Consent

Closely linked to the issue of the bargaining power of the parties, concerns are also raised over the consent of the surrogate mother and whether she should be bound by a decision made to give up parental rights prior to hormonal and emotional changes characterized by pregnancy. Truly, it makes sense that one may have changed one's mind even in other contracts, one may decide to buy a house today and a different one tomorrow. However, as Richard Posner rightly puts it, information costs are involved in the formation

¹⁴⁶ Section 14, *Reproductive Health Care Bill*.

¹⁴⁷ Chapter 4 of this paper gives an analysis of the regulatory frameworks for altruistic gestational surrogacy in the United Kingdom and South Africa.

¹⁴⁸ Section 295 (c), *Children's Act* (No. 38 of 2005 of the Republic of South Africa), see also Section 54, *Human Fertilization and Embryology Act*.

¹⁴⁹ Carbone J, 'The Role of Contract Principles in Determining the Validity of Surrogacy Contracts,' 597-598.

¹⁵⁰ Carbone J, 'The Role of Contract Principles in Determining the Validity of Surrogacy Contracts,' 600.

of valid agreements so that parties are fully aware of the nature of the transaction and its ramifications.¹⁵¹ This is precisely why the arrangement must be entered into consensually and why it anticipates the tussles that may exist in future, therefore to contemplate legal parentage before the arrangement is concluded is in fact a wise decision.¹⁵²

In the same vein, it would then be unjust to conclude that the genetic father of the child shares no interest with the child or that the maternal bond overrides all other parental interests.¹⁵³ Just like the issue of commercialization, there is also a requirement that the surrogate should have undergone one viable pregnancy before she enters into an altruistic gestational surrogacy arrangement to ensure she is fully prepared for the choice made.¹⁵⁴

iv) Concern of the Third Party

The traditional rule is that a contract only applies to the parties to the contract who incur rights and obligations under the contract, referred to as the doctrine of privity.¹⁵⁵ However, there are exceptions to this rule following the rationale that a contract can indeed affect a third party and there are instances where the parties intentions include the interests of the third party thus it would be unjust to bar the said party as was held in *Darlington Borough Council v Wiltshire Northern Ltd*¹⁵⁶ where the following was posited:

“The law of contract should give effect to the reasonable expectations of contracting parties. Principle certainly requires that a burden should not be

¹⁵¹ Posner R, ‘The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood,’ 25.

¹⁵² Carbone J, ‘The Role of Contract Principles in Determining the Validity of Surrogacy Contracts,’ 598.

¹⁵³ Carbone J, ‘The Role of Contract Principles in Determining the Validity of Surrogacy Contracts,’ 595 where an argument is made that, “the reinforcement of the maternal bond hurts both women and children to the extent that it convinces women who are not fully prepared or able to care for their children to keep them simply because it is too painful to give them up. In more traditional times, the importance of maternal bonding did not prevent strong social support for unwed mothers who chose to place their children for adoption. Reinforcement of parental bonding does not necessarily override all other interests.”

¹⁵⁴ Section 11, *Reproductive Health Care Bill*.

¹⁵⁵ This means that any other party who is not party to the contract such as third parties cannot sue or be sued to enforce the contract. The doctrine was well established in the case of *Tweedle v Atkinson* [1861] EWHC QB J57, where a contract was entered into between a father and a future father in law to give a certain amount of money to the claimant. The latter sought to enforce the contract but the court held that he could not because he was not party to it even if he would benefit from it.

¹⁵⁶ *Darlington Borough Council v Wiltshier Northern Ltd* CA 28 JUN 1994.

imposed on a third party without his consent. But there is no doctrinal, logical, or policy reason why the law should deny effectiveness to a contract for the benefit of a third party where that is the expressed intention of the parties.”¹⁵⁷

As mentioned earlier, an altruistic gestational surrogacy arrangement is entered into for purpose of bringing to life a baby. The parties to the arrangement would not enter into such an arrangement had they not the intention to raise, care and protect the best interest of the child.

3.4 Conclusion

Having assessed the societal issues that may be raised with the enforcement of altruistic gestational surrogacy arrangements, it is evident that contractual principles are sufficient to validate these arrangements. Moreover, considering that legal parentage is a serious issue, it would be prudent that parties contemplate this when contracting to avoid unnecessary problems in future. Likewise, the state plays an instrumental role in ensuring that there is an effective framework in place to enforce the terms of these arrangements provided they are entered into legally.

¹⁵⁷ *Darlington Borough Council v Wiltshier Northern Ltd.*

CHAPTER FOUR: COMPARATIVE REVIEW OF THE LEGAL FRAMEWORK IN THE UK AND SA

4.0 Introduction

This Chapter gives a comprehensive case study of the legal regulatory framework for altruistic gestational surrogacy in Kenya and a comparison of the legal frameworks in the United Kingdom (UK) and South Africa (SA).

4.1 Legal Framework for Altruistic Gestational Surrogacy Arrangements in Kenya

To begin with, under the current state, Kenya does not have in place any law regulating altruistic gestational surrogacy arrangements, an issue the courts have been left to contend with by applying adoption laws to issues of legal parentage arising from altruistic gestational surrogacy arrangements.¹⁵⁸ However, Kenya has in place the Reproductive Health Care Bill which affords a chapter for the regulation of gestational surrogacy arrangements in Kenya.¹⁵⁹

4.1.1 Review of the Reproductive Health Care Bill (the Bill)

Primarily, the Bill provides that each and every person has a right to gestational surrogacy.¹⁶⁰ This provision indicates not only Kenya's willingness to adopt surrogate motherhood but also it is reflective of the basic right to family enshrined in Article 45 (2) of the Constitution¹⁶¹ and posited in Chapter one as a fundamental reason why childless couples opt for surrogate motherhood and other forms of alternative procreation.

Secondly, the Bill posits that all forms of commercial surrogacy are prohibited in Kenya except where payments are made in respect of expenses incurred for sustenance of the pregnancy.¹⁶² This indicates why this paper focuses on altruistic gestational surrogacy arrangements in Kenya since these are non-commercial agreements.

¹⁵⁸ *Re the Matter of Baby TDL*, see also *J L N & 2 others v Director of Children Services & 4 others*.

¹⁵⁹ Part III, *Reproductive Health Care Bill*.

¹⁶⁰ Section 7(1), *Reproductive Health Care Bill*.

¹⁶¹ Article 45(2), *Constitution of Kenya*.

¹⁶² Section 14, *Reproductive Health Care Bill*.

Thirdly, the Bill is specific in outlining key requirements that must be met before a valid altruistic gestational surrogacy arrangement is concluded.¹⁶³ These requirements are in essence the safeguards that address the concerns raised in Chapter three over the enforcement of altruistic gestational surrogacy contacts. They ensure that the parties are protected and that altruistic gestational surrogacy arrangements are enforced legally, taking into consideration the state's and the society's concern. The requirements to enter into an altruistic gestational surrogacy arrangement in Kenya include:

- i) only commissioning parent or parents that are not able to give birth to a child and under a condition that is permanent and irreversible;
- ii) the commissioning parent, or parents are competent to enter into the agreement and are suitable persons to take on the parental responsibility of the child;
- iii) the parties understand and accept the legal consequences of the agreement;
- iv) the surrogate mother understands and accepts the legal consequences of the agreement;
- v) the surrogacy agreement is not being used as a source of income;
- vi) the surrogate mother must have had one viable pregnancy and delivery and a living child of her own.

4.2.2 Legal Parentage Gap in the Reproductive Health Care Bill

While the Bill indicates a positive stride in coming up with a legal framework for altruistic gestational surrogacy arrangements, the Bill does not address the element of legal parentage in these arrangements.

First and foremost, the Bill defines gestational surrogacy as the process where a woman carries to term a child whose being is effected using the gamete or gametes of at least one of the intended parents and to which the gestational surrogate has made no genetic contribution.¹⁶⁴ This provision may immediately probe one to assume that the Bill impliedly links the baby to the intended parents and not the surrogate since the latter makes no genetic

¹⁶³ Section 11, *Reproductive Health Care Bill*.

¹⁶⁴ Section 2, *Reproductive Health Care Bill*.

contribution to the child.¹⁶⁵ However, it is such an assumption that has led to the uncertainties and controversies evident in the legal battles in courts in Kenya today. For example, cases like *A.M.N & 2 others v Attorney General & 5 others*, *JLN & 2others v Director of Children Services & 4 others* and *Re the Matter of Baby TDL* are instances where the surrogate had no genetic link to the child but there still existed a legal tussle as to who the child's legal mother was.¹⁶⁶ Additionally, the Births and Deaths Registration Act defines birth as, "the issuing forth of any child from its mother after the expiration of the twenty-eighth week of pregnancy, whether or not it is dead."¹⁶⁷ Evidently, the act recognises that a child's legal mother is the one who gave birth to the child.

In the absence of clear direction in the law or the proposed law, the birth mother who is the surrogate may claim to have parental rights premised on the fact that she carried the baby to full term and gave birth to it but on the other hand, the commissioning parents equally too have a right to claim legal parental rights over the child. Therefore, it is imperative that the law in Kenya is clearer on this issue to avoid future conflicts. Other jurisdictions have been effective in providing for this, thus, the next sections of this Chapter offer a comparison with the regulatory framework in the United Kingdom and that of South Africa.

4.2 Regulation of Altruistic Gestational Surrogate Motherhood in the UK

4.2.1 Introduction and Brief Background

Primarily, the United Kingdom of Great Britain and North Ireland commonly known as Britain has had a long standing history with the concept of surrogacy with a comprehensive framework for the regulation of altruistic gestational

¹⁶⁵ Section 10, *Reproductive Health Care Bill* which provides that a surrogacy arrangement is only valid if the conception of the child is effected using the gametes of both commissioning parents and if this is not possible using the gametes of at least one of the commissioning parents.

¹⁶⁶ *A.M.N & 2 others v Attorney General & 5 others* *JLN & 2others v Director of Children Services & 4 others*, *Re the Matter of Baby TDL*.

¹⁶⁷ Section 2, *Births and Deaths Registration Act*, Cap 149 (No 2. of 1928), see also <http://www.hfea.gov.uk/1424.html> on 10 October 2016 where it is posited that a surrogate may claim a right to the child regardless of whether she is genetically linked to the child or not.

surrogacy arrangements. This is why this paper considered it prudent to look into its legal framework.¹⁶⁸

i) Warnock Report of 1984¹⁶⁹

To begin with, even before Britain had a legal framework on surrogacy arrangements, in 1982, the British parliament established the Committee of Inquiry into Human Fertilization and Embryology to examine these recent developments.¹⁷⁰ In 1984, the committee released a report known as the ‘Warnock Report.’¹⁷¹ The report recommended that all surrogacy contracts be made illegal by statute and therefore unenforceable in the courts.¹⁷² The report also recommended that where an egg is donated by one woman to another, the woman who gives birth to the child is entitled to the legal rights pertaining to the child with no entitlements to the egg donor.¹⁷³ Evidently, the Warnock report took a moralist approach towards surrogacy. Its recommendations were based on the premise that surrogacy encourages the use of human beings as means to an end which in turn leads to exploitation.¹⁷⁴

ii) Surrogacy Arrangements Act 1985¹⁷⁵

Despite the fact that the Warnock report proposed the unenforceability of surrogacy arrangements, in 1985, the Surrogacy Arrangements Act (SAA) was enacted. This was due to as a series of controversial cases concerning surrogacy

¹⁶⁸ Garrity A, ‘A Comparative Analysis of Surrogacy Law in the United States and Great Britain - A Proposed Model Statute for Louisiana,’ 816.

¹⁶⁹ Government of the United Kingdom, Department of Health and Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology*, 1984.

¹⁷⁰ <http://www.hfea.gov.uk/2068.html> established in 1982 inquire into the new technologies and techniques that afforded ways of reproduction, for instance vitro fertilisation (IVF) and embryology. This was prompted by the birth of Louise Brown in 1978 who was the first baby born of the IVF Technique. While the committee mainly focussed on IVF Technologies it also explored the issue of surrogacy arrangements as well.

¹⁷¹ Government of the United Kingdom, Department of Health and Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology*, 1984.

¹⁷² Section 59, *Report of the Committee of Inquiry into Human Fertilisation and Embryology*.

¹⁷³ Section 55, *Report of the Committee of Inquiry into Human Fertilisation and Embryology*.

¹⁷⁴ Dr McLachlan H and Professor Swales K, ‘Surrogate Motherhood: Beyond the Warnock and the Brazier Reports,’ 11 *Human Reproduction and Genetic Ethics* (2005), 2 where the Warnock report is criticised in the sense that there are different ways in which human beings are used as ends and these ways are not necessarily exploitative but even beneficial. For example, contractual arrangements always stipulate obligations on either party. These obligations aim at the satisfaction of the other party’s needs, and in so doing using the other party as a means. It all depends on how one is used for a conclusion of exploitation to arise.

¹⁷⁵ *Surrogacy Arrangements Act* 1985.

arrangements.¹⁷⁶ The first surrogacy case in 1985, popularly known as the *Baby Cotton Case*¹⁷⁷ where the court observed since there was no available legal regulation of surrogacy arrangements at the time, it ruled in favour of the commissioning parents based on what was in the best interest for the child.¹⁷⁸ The case led to a lot of publicity with issues on the commercialization of the whole process coming into question.¹⁷⁹ Consequently, Britain was in need of a legal framework to give direction to these agreements and thus the SAA was enacted. However, the latter did not provide for the determination of legal parentage in surrogacy arrangements.

iii) The Brazier Report of 1998¹⁸⁰

In 1997, the UK requested a committee¹⁸¹ to look into surrogacy arrangements. The committee came up with a report in 1998.¹⁸² Unlike the rigid approach taken by the Warnock Committee, the Brazier report sought to take into account the interests of the surrogate and the commissioning couple.¹⁸³ Thus, it recommended regulation and control of surrogacy contracts rather than a complete ban.¹⁸⁴ Furthermore, the report also recommended that

¹⁷⁶ Gamble N, 'Children of our time,' *Family Law Journal* (2008), 12, see also *Re an Adoption Application (Surrogacy)*, Decision of the United Kingdom High Court 11 March 1987 where a surrogate was paid £ 10,000 (\$17,860) to gestate and bear a child for an intending couple. The court in its interpretation of the issue observed that the contract was executed before the enactment of the Surrogacy Arrangement Act that banned commercial surrogacy and thus could not rule on it. Therefore, the court held that the payments were merely to compensate the surrogate for any expenses incurred to support the pregnancy.

¹⁷⁷ *Re C (A Minor) (Wardship: Surrogacy)* [1985] FLR 846.

¹⁷⁸ *Re C (A Minor) (Wardship: Surrogacy)*, where the judge determined that his obligation was to decipher what was best for the child. Consequently, the judge held that the baby was better suited with the commissioning parents and not Miss Kim Cotton, the surrogate, who had been paid 6,500 pounds by the commissioning parents.

¹⁷⁹ Trimmings K and Beaumont P, 'International surrogacy arrangements: an urgent need for legal regulation at the international level' 7.3 *Journal of Private International Law* (2011), 628. See also <http://news.bbc.co.uk/2/hi/health/193076.stm> on 10 October 2016.

¹⁸⁰ United Kingdom Health Ministries, *Review for health ministers of current arrangements for payments and regulation: Report of the review team*, 1998.

¹⁸¹ The three key members of the review committee include: Margaret Brazier, Alastair Campbell, and Susan Golombok. The report they came up with is consequently and popularly referred to as the Brazier Report.

¹⁸² United Kingdom Health Ministries, *Review for health ministers of current arrangements for payments and regulation: Report of the review team*.

¹⁸³ United Kingdom Health Ministries, *Review for health ministers of current arrangements for payments and regulation: Report of the review team*, 2 where the committee posits that the aim of regulation of surrogacy arrangements should be to protect all parties under the contract. Similarly, a recommendation was also made for the enactment of a code of practice for the institution of surrogacy which would, "seek to ensure that the interests of surrogates and commissioning couples are adequately protected and that all parties to an arrangement are clear about their expectations of each other."

¹⁸⁴ United Kingdom Health Ministries, *Review for health ministers of current arrangements for payments and regulation: Report of the review team*, 10, see also Dr McLachlan H and

parental orders¹⁸⁵ should be granted by the High court to give the intending parents legal rights over the child born from the surrogate. On the issue of payments made, it recommended a strict method of making lawful payments to the surrogate to ensure that commercialization and exploitation of the entire process is curbed.¹⁸⁶

iv) Determination of Legal Parentage of the Child

As mentioned above, the SAA did not provide for the determination of legal parentage in surrogacy arrangements.¹⁸⁷ It is therefore complimented by various other acts that provided for the element of legal parentage in an altruistic gestational surrogacy contract.

a. The Human Fertilisation and Embryology Act (HFEA) 2008¹⁸⁸

Similar to the HFEA of 1990, the 2008 Act provides that the legal mother in an altruistic gestational surrogacy contract is the woman who carries or who has carried a child as a result of the placing in her of an embryo or of sperm and eggs.¹⁸⁹ Likewise, where the surrogate mother is married, her husband will be treated as the legal father provided there is no evidence indicating his lack of consent on this.¹⁹⁰

The Act also stipulates that the commissioning couple can only be granted parental rights to the child through a parental order.¹⁹¹ While the Act exhaustively goes into the requirements that must be met before a parental order is granted,¹⁹² the courts in determining whether these orders should be granted not only take into account the requirements but also the circumstances

Professor Swales K, 'Surrogate Motherhood: Beyond the Warnock and the Brazier Reports,'6.

¹⁸⁵ A Parental Order is an order made by the courts with the effect of making the intending couple the legal parents of the child born out of the surrogacy arrangement.

¹⁸⁶ Section 7.11, *Review for health ministers of current arrangements for payments and regulation: Report of the review team*, where a recommendation was made that the only legal payments that can be made are those made in light of the expenses made in furtherance of the pregnancy. This is a recommendation that the British government has adopted in its laws. Similarly, the committee also recommended that the definition of expenses be added into the relevant legal instruments to avoid any ambiguities and ensure certainty on the issue.

¹⁸⁷ The Act however prohibits all forms of commercial surrogacy contracts and it also makes it illegal to have advertisements for surrogacy.

¹⁸⁸ *Human Fertilization and Embryology Act*, 13 November 2008.

¹⁸⁹ Section 33, *Human Fertilization and Embryology Act*.

¹⁹⁰ Section 35, *Human Fertilization and Embryology Act*.

¹⁹¹ Section 54(1), *Human Fertilization and Embryology Act*.

¹⁹² Section 54, *Human Fertilization and Embryology Act*.

of each case consequently adopting a purposive approach. For instance in *Re X (A Child) (Surrogacy: Time Limit)*,¹⁹³ Sir James Munby P observed that,

“parental orders go to the most fundamental aspects of status and to the very identity of the child and have a transformative effect on the child's legal relationships with the surrogate and commissioning parents and the practical and psychological realities of the child's identity, thus having an effect extending far beyond the merely legal, which is, for all practical purposes, irreversible.”¹⁹⁴

Having considered this, the requirements for granting a parental order include:

- 1) Applicants must be married or civil partners of each other.¹⁹⁵ However, this requirement is qualified by the courts consideration of the best interest of the child. For instance in *G v G*¹⁹⁶ an application was made to set aside a parental order on the grounds that the intending mother sought to leave her husband once the order was granted. The court still observed that the in the best interest of the child, the order would still be given.
- 2) Applicants must be eighteen (18) years of age at the time of making the order.
- 3) Application for the order should be made within 6months of the birth of the child. However, there are instances where the limit has been extended by the court. For example, in *Re X (A Child) (Surrogacy: Time Limit)*¹⁹⁷, the

¹⁹³ *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam).

¹⁹⁴ *Re X (A Child) (Surrogacy: Time Limit)* where Sir James quoted the dicta of Sir Stanley Burnton in *Newbold and others v Coal Authority* [2013] EWCA where Burnton posited that, “in all cases, one must first construe the statutory requirement in question. It may require strict compliance with a requirement as a condition of its validity. Against that, on its true construction a statutory requirement may be satisfied by what is referred to as adequate compliance. Finally, it may be that even non-compliance with a requirement is not fatal. In all such cases, it is necessary to consider the words of the statute in the light of its subject matter, the background, the purpose of the requirement, if that is known or determined, and the actual or possible effect of non-compliance on the parties. We assume that Parliament in the case of legislation would have intended a sensible result.”

¹⁹⁵ This means that the United Kingdom's system of surrogacy recognizes persons of the same sex as civil partners entitled to commission for parental orders, see also *Civil Partnership Act*, Cap 33, 2004 which is a UK Legislation that recognizes civil partners as having rights similar to that of traditional married couples. Consequently, civil partners can enter into surrogate arrangements and apply for parental orders as well.

¹⁹⁶ *G v G* [2012] EWHC.

¹⁹⁷ *Re X (A Child) (Surrogacy: Time Limit)* where a surrogacy arrangement was entered into by commissioning parents and surrogate parents in India valid under Indian Law. The surrogate mother conceived using eggs donated by a third party and the commissioning father's donor sperm. The surrogate parents consented to relinquishing all their parental rights to the child born. The commissioning parents however got divorced before the parental order

court in its consideration of the best interest of the child allowed for a time limit extension of twenty (20) months. Similarly, in *AB v CD (Surrogacy: time limit and consent)*¹⁹⁸ the time limit was extended by three (3) years while in *A & B (Children) (Surrogacy: Parental orders: time limits)*,¹⁹⁹ the time limit was extended by over 7 years.

4) At the time of application, the child should be living with the intending couple of whom either or both must be domiciled in the United Kingdom, Channel Islands or the Isle of Man.

5) Surrogate mother and father have consented and fully understand the implications of the order. Additionally, if the consent of the surrogate mother is given less than six weeks after the child's birth, it is considered ineffective. However, the court may dispense with such agreement in circumstances where the surrogate (and husband, if applicable) cannot be found or are incapable of giving agreement as was observed in *D and L (Surrogacy)*.²⁰⁰

6) No payments should be made to the surrogate in respect of the arrangement other than expenses made for the sustenance of the pregnancy.

was granted. Additionally, the application for the parental order was made two years after the birth of the child, not adhering to the six month limit. In light of the fact that the child had a biological relationship with the commissioning father and other circumstances of the case, the court adopted a purposive approach to the requirements stipulated by section 54 and held that the court was "concerned not only with the impact on the applicants of its decision but the welfare of the child, and because of this, a more liberal and relaxed approach than that taken in relation to time limits would be best."

¹⁹⁸ *AB v CD (Surrogacy: time limit and consent)* [2015] EWFC 12 this case involved a surrogacy arrangement where parental orders were made in respect of twins but the surrogate mother had no notice of this and the application was made over 3 years after the birth of the children. The court, while adopting a purposive interpretation to the relevant provisions where parental orders are concerned held that, "parental orders and the consequences that flow from it are, from a welfare perspective, far more suited to surrogacy situations. They were specifically created to deal with these situations. Put simply, they are a more honest order which reflects the reality of what was intended, the lineage connection that already exists and more accurately reflects the child's identity." Subsequently, the court held that the commissioning parents were entitled to the order regardless of the failure to strictly adhere to the requirements and the time limit.

¹⁹⁹ *A & B (Children) (Surrogacy: Parental orders: time limits)* [2015] EWHC 911.

²⁰⁰ *D and L (Surrogacy)* [2012] EWHC 2631 (Fam) this case involved civil partners (male couple) who sought a parental order over twins born out of a surrogacy arrangement. The couple had complied with all the requirements of making the application for the parental order except for getting the consent of the surrogate mother who could not be found. Sir Baker J in his consideration of the issue observed that where all reasonable steps have been taken to locate or contact the surrogate mother but to no avail, the court is allowed to dispense with the need of her consent. Furthermore, the main concern of the court is the welfare of the children and as such the learned judge considered the granting of a parental order in order. It is also worth noting that the court also considered that the surrogate had on numerous occasions before the birth of the baby signified consent to relinquish parental rights. However, the weight given to earlier consent is minimal.

b. Family Procedure Rules 2010²⁰¹

Parental orders are also provided for under the family procedure rules where the applicants could either be a married couple, civil partners or two persons living as partners in an enduring family relationship and are not within the prohibited degrees of relationship.²⁰² The rules also provide that the consent of the surrogate may not be required in making of the parental order where she cannot be found or is incapable of giving agreement.²⁰³

4.3 Regulation of Gestational Surrogate Motherhood in South Africa

South Africa provides an exemplary illustration of the African approach towards surrogate motherhood. Since Kenya is also an African country, a comparison with another country whose cultural background and practices may be closer to that of Kenya is in order. Essentially, what matters in SA is that the surrogate is of mature age, has a child or children of her own and there is a valid contract between the surrogate and the commissioning parents involved.²⁰⁴

4.3.1 Brief Background

One of the earliest surrogacy arrangements recognised publicly in SA was that of Karen Ferreira-Jorge of Tzaneen in 1987.²⁰⁵ The latter's mother, Pat Anthony carried triplets for her, because she was unable to carry children of her own. This case was more so unique because Karen Jorge was one of the first women to bear her own grandchildren.²⁰⁶

²⁰¹ Part 13, *Family Procedure Rules 2010*.

²⁰² Section 13.3, *Family Procedure Rules*.

²⁰³ Section 13.10, *Family Procedure Rules*.

²⁰⁴ Mahlobogwane F, 'Surrogate Motherhood Arrangements in South Africa: Changing Societal Norms?' 2 *Speculum Juris* (2013), 2.

²⁰⁵ <http://www.nytimes.com/1987/04/09/world/woman-is-carrying-her-daughters-babies.html> on 12 October 2016.

²⁰⁶ <http://www.nytimes.com/1987/10/02/world/south-africa-woman-gives-birth-to-3-grandchildren-and-history.html> on 12 October 2016, Mrs. Pat Anthony is considered the first woman to successfully carry her daughter's transplanted embryos to term. Mrs. Anthony was implanted with the ova of her daughter that had been inseminated artificially with her son-in-law's sperm and successfully delivered triplets, two boys and a girl by Caesarean. At the time of this arrangement, South Africa had not developed law regulating surrogacy arrangements therefore Mrs. Anthony was the legal guardian of the three children. However, this arrangement posed fresh moral and legal questions in the debate surrounding surrogacy impacting on the current legislation in South Africa today on surrogacy.

The publicity that came with the Pat Anthony case and the fact that at the time South Africa did not have a legal regulatory framework on surrogacy arrangements prompted the need for an in depth review of surrogacy arrangements in South Africa.²⁰⁷

Consequently, in 1989, the South African Law Reform Commission (**SALC**) conducted a questionnaire in the issue which informed a report on surrogate motherhood in 1993, the report was tabled before the Ad Hoc Parliamentary Committee (**AHPC**). The committee conducted an extensive examination and review of these reports²⁰⁸ and came up with its own report in 1999 as well as a draft legislation developed by the SALC. Both of these acknowledged the need for a law regulating surrogacy agreements.²⁰⁹ At the same time, the Child Care Act²¹⁰ was under review by the SALC where it was found that surrogacy agreements had not been sufficiently regulated in the Children's Status Act.

In 2002, another report was released which recommended that the regulation of surrogacy arrangements be provided for under the Children's Bill (now Act).²¹¹ In June 2005, the Children's Bill was approved by the National Assembly and consequently the Children's Act came into force with a chapter on the regulation of gestational surrogacy arrangements.²¹²

4.3.2 The Children's Act²¹³

Surrogacy arrangements in South Africa are primarily governed by the Children's Act.²¹⁴ According to the Act, surrogate motherhood is defined as,

²⁰⁷ Lewis S, 'Surrogacy in South Africa,' *University of Western Cape Faculty of Law* (2011) 2, the laws in force at the time, the 1986 *Regulations on Artificial Insemination of Persons and Related Matters (the Human Tissue Act 65 of 1983)* and the *Children's Status Act* (No. 82 of 1987) did provide for surrogacy arrangements.

²⁰⁸ The AHPC not only reviewed the reports but it also hosted informative comprehensive workshops with experts on surrogacy and conducted public hearings. It also conducted study tours in different regions of South Africa to research on perceptions of surrogacy in these regions. Similarly, these regions were chosen because they were found to be the regions that fostered surrogacy. The committee also reviewed the surrogacy frameworks in other jurisdictions like the United Kingdom and the United States.

²⁰⁹ Lewis S, 'Surrogacy in South Africa,' 3.

²¹⁰ *The Child Care Act* (No. 74 of 1983).

²¹¹ Sloth-Nielsen J, 'Surrogacy, South African style' *Family Law Newsletter* (2013), 19, following the recommendation to regulate surrogacy arrangements, the Children's Bill afforded a Chapter (20) to openly regulate surrogate motherhood and establish surrogacy as a legally recognised procedure of assisted reproduction.

²¹² Chapter 19, *Children's Act* (No. 38 of 2005).

²¹³ *Children's Act*.

²¹⁴ The South African Children's Act affords an entire Chapter (19) to surrogacy arrangements.

“an agreement between a surrogate mother and a commissioning parent in which it is agreed that the surrogate mother will be artificially fertilised for the purpose of bearing a child for the commissioning parent and in which the surrogate mother undertakes to hand over such a child to the commissioning parent upon its birth, or within a reasonable time thereafter, with the intention that the child concerned becomes the legitimate child of the commissioning parent.”²¹⁵

Secondly, the Act stipulates certain requirements that must be met for a surrogacy arrangement to be valid in South Africa.²¹⁶ These requirements include:

- i) The agreement must be in writing and signed by all the parties.
- ii) The agreement is entered into in South Africa.
- iii) At least one (1) of the commissioning parents is domiciled in the Republic.
- iv) Consent of husband, wife or partner of a commissioning parent or surrogate.²¹⁷
- v) Genetic origin of the child should be confirmed in the agreement as that of either the use of the gametes of both commissioning parents or the gamete of at least one (1) of the commissioning parents.²¹⁸
- vi) Both parties must fully understand, be competent to enter the agreement and consent to the implications of the agreement.²¹⁹
- vii) The surrogate mother must also:²²⁰
 - a) understand and accept the legal consequences of the agreement,
 - b) not use the surrogacy arrangement as a source of income, therefore the surrogate must have entered the agreement for altruistic reasons and not for commercial reasons,

²¹⁵ Section 1, *Children's Act*.

²¹⁶ Section 292, *Children's Act*.

²¹⁷ Section 293, *Children's Act*, this section is however qualified under subsection 3 where if the husband or partner of a surrogate mother who is not the genetic parent of the child unreasonably withholds his or her consent, the court may confirm the agreement.

²¹⁸ Section 294, *Children's Act*.

²¹⁹ Section 295, *Children's Act*, full understanding includes the acceptance by the commissioning parents of all rights and obligations that accrue to parenthood. The court therefore takes into consideration that these are suitable persons to bear these obligations.

²²⁰ Section 295 (c), *Children's Act*.

- c) have a documented history of at least one pregnancy and viable delivery,
- d) Has a living child of her own.

4.3.3 Legal Parentage of the Child

Most importantly, the Act provides that the effect of the surrogate arrangement is that it affords the commissioning parents legal parental rights over the child born out of the arrangement immediately the child is born. Furthermore, the Act clearly stipulates that neither the surrogate nor her husband or partner has any legal rights over the child and is obliged to hand over the child as soon as reasonably possible after the birth of the child.²²¹ This is quite different from the United Kingdom's framework where the commissioning parents must first obtain a parental order to make the legal parents of the child.

Exception to the Legal Parentage Rule

There are two exceptions provided for under the Act where the commissioning parents may not be the legal parents of the child born out of the surrogacy arrangement.

First and foremost, where a surrogate motherhood agreement does not comply with the requirements stipulated under the Children's Act and is considered invalid; a child born out of an invalid surrogacy agreement will be deemed to be the child of the woman that gave birth to that child.²²²

Secondly, if the surrogacy arrangement is terminated by the surrogate mother within sixty (60) days after the birth of the child by filing a written notice with the court which takes into consideration several factors including the best interest of the child before making an appropriate order.²²³ Should the court make an order to terminate the arrangement, the effect of this would be that the surrogate mother retains all parental rights to the child.²²⁴

²²¹ Section 297, *Children's Act*.

²²² Section 297 (2), *Children's Act*.

²²³ Section 298, *Children's Act*.

²²⁴ Section 299, *Children's Act*.

4.4 Application of the comparative review to Altruistic Gestational Surrogacy Arrangements in Kenya

This chapter has undertaken an extensive twofold analysis of the regulatory frameworks on legal parentage in the United Kingdom and South Africa. The former requires that a parental order is granted to make the commissioning couple the legal parents of the child while the latter clearly states that all parental rights immediately go to the commissioning couple upon birth of the child. In both jurisdictions, the issue of legal parentage has been predetermined in the law regulating surrogacy arrangements.

Similarly, in both jurisdictions, altruistic gestational surrogacy agreements are recognised and enforced as binding agreements under the law. In the UK, an altruistic gestational surrogacy agreement is enforced through a parental order which is required to give the intending couple legal parental rights over the child, ~~but~~ in South Africa, the law recognises that the intending couple has parental rights upon ~~the~~ the immediate birth of the child, ~~noting that~~ if the agreement has been freely and consensually entered into by both parties, it is binding on the parties. It is also important at this juncture to highlight that a surrogate under an altruistic gestational surrogacy arrangement has no genetic link to the baby, the latter is formed through the consummation of the gametes of the intending couple or at least one gamete of one partner in the couple. Therefore, from a human rights perspective, the intending couple, as posited by Edgar Page simply transfer these rights to the surrogate to gestate the baby on agreement that they will be transferred back once the baby is born.²²⁵

The requirements to validate altruistic gestational surrogacy arrangements in both jurisdictions mirror those that validate a contract, but, in both jurisdictions, commercial surrogacy is prohibited, therefore, there is no formal consideration in an altruistic arrangement but under promissory estoppel there is a reliance that both parties will perform their obligations. In addition to this, the laws in both jurisdictions provide for the right of each person to gestational surrogacy and the right of persons to a family which is the primary basis on which altruistic gestational surrogacy arrangements are enforced.

²²⁵ Page E, 'Donation, Surrogacy and Adoption' 163-164.

Kenya should provide for the determination of legal parentage under the proposed regulatory framework for altruistic gestational surrogacy agreements. The United Kingdom and South Africa offer different approaches that may be adopted to address the issue of legal parentage of the child. Based on this, one can arrive at a recommended model for Kenya which will be discussed further in the next Chapter.

CHAPTER FIVE: DISCUSSION, CONCLUSION AND RECOMMENDATIONS

The objective of this chapter is to give a discussion on the findings of this research and offer recommendations for the proposed legal framework regulating altruistic gestational surrogacy contracts in Kenya.

5.1 Discussion

5.1.1 Analysis of the current framework for altruistic gestational surrogacy arrangements

To begin with, this research paper has explored the concept of legal parentage in altruistic gestational surrogacy contracts and the application of these contracts in the society. The proposed Reproductive Health Care Bill which affords a chapter for the regulation of altruistic gestational surrogacy in Kenya indicates Kenya's intention to have these arrangements legally enforceable.²²⁶ However, the bill fails to address the issue of legal parentage in the event that a tussle exists between the parties to the contract. As a result, Kenyan courts have been left to deal with this issue with no existing direction in the law.²²⁷ Justice Majanja posited in *JLN & 2 others v Director of Children Services & 4 others*,²²⁸ that surrogacy is not a hypothetical issue and the onus is on the state to protect children born from surrogacy arrangements by providing an effective legal framework. Clearly, this is an issue that should be addressed to

²²⁶ Chapter 3, *Reproductive Health Bill*.

²²⁷ *JLN & 2 others v Director of Children Services & 4 others* where Justice Majanja posited that a surrogacy arrangement is no longer a hypothetical issue but a real issue that should be addressed in the law.

²²⁸ *JLN & 2 others v Director of Children Services & 4 others* [2014] eKLR, even in the absence of a legal regime, the court or any persons dealing with the issues must, in accordance with Article 57 of the Constitution, decide the issue on the basis of the best interests of the child. A child born out of a surrogacy arrangement is no different from any other child. Under Article 53 of the Constitution and section 11 of the Children Act every child has the right to certainty of their parentage, a right to family, a right to a name acquired through issuance of a birth certificate, a right to access health services and a right not to suffer discrimination of any form arising from their surrogate birth. These rights are buttressed by international instruments like the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child under Articles 7 and 9 respectively.

avoid future conflicts and ensure protection to parties that enter into altruistic gestational surrogacy arrangements.

Chapter two gives a comprehensive analysis of the theoretical framework of the law of contract. It provides an important basis since altruistic gestational surrogacy arrangements are essentially contracts between two parties. The chapter indicates that the law of contract is self-regulatory in itself through the requirements that validate a contract and the vitiating elements that would render a contract void.²²⁹

A contract is concluded once there is offer and acceptance from the parties who must have the capacity to contract and an intention to be legally bound by the agreement. A contract entered into under duress or coercion or mistake is legally invalid and thus unenforceable. This similarly applies to an altruistic gestational surrogacy contract, if it is entered into under vitiating circumstances or substantially illegal, it is unenforceable and the parties are not bound by the obligations arising from such a contract. This ensures that an altruistic gestational surrogacy contract is entered into consensually, freely and voluntarily by both parties, therefore the latter can be reasonably presumed to intend to be bound by the terms of the agreement.

In the same vein, the consent theory of contract agrees with this line of thinking as it posits that a contract entered into freely and unequivocally by both parties creates legally binding obligations on the parties.²³⁰ For this reason, provided an altruistic gestational surrogacy contract adheres to the tenets of a valid contract and there are no vitiating elements, the surrogacy arrangement is legally enforceable.

5.1.2 Analysis of the state's/societal interest in an altruistic gestational surrogacy arrangement

Even so, while the law of contract is largely characterized by party autonomy,²³¹ it still appreciates that the state has an important role to play in

²²⁹ Onyekachi D, 'Vitiating elements of a contract as a source of contract validity', 2-3.

²³⁰ Barnett R, 'A Consent Theory of Contract,' 301.

²³¹ Edwards C, 'Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues' *Faculty Publications* (2009), 647 where the party autonomy in the law of contract is based on the Classical contract theory that emerged in the late nineteenth century. "The theory insists that the unrestricted exercise of freedom of contract between

the enforcement of contracts. Furthermore, an altruistic gestational surrogacy contract is not just any other contract but a unique arrangement which involves bringing into life a third party whose welfare is affected by the terms and enforcement of the arrangement. Chapter three provides an analysis for this as it explores the state's and the society's concern in altruistic gestational surrogacy contracts.

Truly, contracts cannot be fully left to the whims of individuals since even under the traditional view of the theory of contract which was based on equal parties and an equal bargaining power, it is not always so that the parties are equal leading to oppressive bargains.²³² Likewise, the state also plays a significant role in ensuring that the contract is legally enforced and that the parties to the contract are protected. In the same vein, in *Holden v Hardy*,²³³ the court observed that the state does have an interest in the law of contract and under the state police power,²³⁴ a state would be justified to interfere with a contract. This is exactly what Chapter three of this paper contemplates, that an altruistic gestational surrogacy contract cannot be left solely to the will of the parties in the agreement.

The question then is to what extent the state or the society should be involved in the enforcement of these contracts. Chapter three indicates the interests that the society and the state may have where altruistic gestational surrogacy contracts are concerned. Issues of morality are raised while the state's primary concern is if the contract is in line with public policy. The application of contractual principles to these concerns as depicted in the Chapter clearly shows how the law of contract is sufficient enough to safeguard these concerns. It also appreciates that the state's concern which is primarily the care and protection of the child born out of the arrangement, is in line with the parties concern since parties would not contract in the first place had they not had the best interests of the child.²³⁵ In addition to this, an altruistic gestational

parties who possess equal bargaining power, equal skill, and perfect knowledge of relevant market conditions maximizes individual welfare and promotes the most efficient allocation of resources in the marketplace"; see also Smith S, *Contract Theory*, 46-47.

²³² Edwards C, 'Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues', 648.

²³³ *Holden v. Hardy* 169 U.S. 366 [1898].

²³⁴ State police power includes matters of public health, safety, security or even morals.

²³⁵ Carbone J, 'The Role of Contract Principles in Determining the Validity of Surrogacy Contracts,' 590.

surrogacy contract can be deemed unenforceable if either of the parties contract under duress, coercion, lack of free will or even mistake. Therefore, the parties are only bound to these contracts if they are entered into consensually and unequivocally.

5.1.3 Analysis of the comparative review to the determination of legal parentage of altruistic gestational surrogacy arrangements in Kenya

Subsequently, Chapter four gives a comparison of how other jurisdictions have dealt with the question of legal parentage showing the state's inevitable role in the enforcement of an altruistic gestational surrogacy contract. In both the United Kingdom and South Africa, a step has been taken in ensuring that the question of legal parentage is determined by law.

To begin with, the United Kingdom shows a history where the moral and ethical issues raised in Chapter three were also considered in reports like the Warnock and Brazier report. However, the regulatory framework depicts how the United Kingdom was able to construct its legal regulatory framework to ensure that these concerns are safeguarded but altruistic gestational surrogacy contracts are still enforceable. Similar to the situation in South Africa where certain requirements must be met before parties are allowed to enter into a gestational surrogacy contract. For instance, the surrogate mother must have had one viable pregnancy or that the agreement must be non-commercial. It is these safeguards that ensure that the concerns that may be raised by society and the state in Chapter three are dealt with accordingly.

Furthermore, the law in the United Kingdom is that the surrogate mother is the legal mother until such a time a parental order is issued to grant the commissioning couple legal parental rights to the child while the law in South Africa is that the commissioning parents are the legal parents of the child upon the birth of the child. The United Kingdom offers an approach that gives the surrogate the right to be the legal parent of the child while South Africa recognises that the contract intended the commissioning parents as the legal parents of the child and thus parental rights are entitled to them from the start.

5.2 Recommendations

In light of the fact that this paper adequately shows that provided an altruistic gestational surrogacy is entered into freely, consensually, rationally and unequivocally and both parties have met the requirements put in place to ensure that the agreement is in line with the legal regulatory framework, then the terms of an altruistic gestational surrogacy contract should be legally enforceable and binding on the parties.

With that said, this paper recommends that the Reproductive Health Care Bill provides for the determination of legal parentage in an altruistic gestational surrogacy agreement where the legal parental rights go to the commissioning couple upon the birth of the child similar to the framework in South Africa. Further, that the law specifically posits that an altruistic gestational surrogacy contact can only be enforced where the parties have, in the contract, provided for the determination of legal parentage of the child upon birth.

Secondly, the law should be clear and consistent on the definition of a mother to avoid confusion. While the implied definition in the Births and Deaths Registration Act is that a legal mother is the one who gives birth to the child, this act as well as other laws regarding the same issue should be amended to reflect the incorporation of altruistic gestational surrogacy contracts. In so doing, the law will recognise that a commissioning couple in a surrogacy arrangement obtain parental rights upon the birth of the baby and thus the female intended parent is the legal mother of the child.

Thirdly, this paper asserts that the enforcement of the terms of an altruistic gestational surrogacy should not be in conflict with the state's or the society's interest. In fact, this paper posits in both Chapters three and four that the state plays a crucial role in not only providing for an effective framework for these contracts but also in ensuring that their enforcement protects the parties concerned and realises the goal of giving effect to the right to family enshrined in Article 45(2) of the Constitution.²³⁶

²³⁶ Article 45(2), *Constitution of Kenya*.

Summarily, it is not sufficient simply enact laws, the enforcement of altruistic gestational surrogacy contracts requires practical implementation. Trainings should be conducted in medical facilities, hospitals and learning institutions and there should be the creation of legal gestational surrogacy agencies where parties can seek assistance when entering into altruistic gestational surrogacy arrangements.

5.3 Conclusion

The incorporation into the law of legal parentage in an altruistic gestational surrogacy contract is an endeavour that will not only serve the parties to the contract but also the state and ultimately the society. This is worth pursuing to ensure certainty and clarity in the enforcement of these arrangements. Undisputedly, this is a goal in line with the realization of not only the fundamental right to family but also the best interest of the child born from an altruistic gestational surrogacy arrangement.

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