

**The Law of Surrogacy: Who should the Legal Parents of the Baby be?**

Submitted in partial fulfillment of the requirements of the Bachelor of Laws Degree,  
Strathmore University Law School

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January 2017

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## **Acknowledgements**

I owe my supervisor Jonah Mng'ola, many thanks for the guidance he has provided throughout the writing process. I also offer my sincere gratitude to my family for their support that doesn't waver.

**Declaration**

I, JOY NKATHA KITHINJI, 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.

Signed: .....

Date: .....

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

Signed:.....

JONAH MNGOLA

## **Abstract**

Surrogacy is increasingly becoming more accepted in the state as an alternative method of beginning families. However, the practice is not protected by legislation. There has been tabled a Bill, the Reproductive Health Care Bill, that has made some provision for this practice. It too however, has not made provision for the specific issue that is the legal parentage of a child born via surrogacy. Judicial decisions on the matter have been inconsistent due to the lack of a relevant and specific piece of legislation. This study sought to investigate the cogency of the right to surrogacy, that is, examine whether such a right exists and consequently determine, on that basis, which party should be represented as the legal parent of the child.

The study was conducted through a literature review of material on the right to surrogacy and the legal parentage of the resulting child. It established that the right to surrogacy that can only be defended as a contractual right, and not a reproductive right. This conclusion was arrived at after an examination of the reproductive right to surrogacy found that such a right would not be enforceable. The contractual right to surrogacy however, that finds its basis in the doctrine of freedom of contract, can be defended because of the underlying element of intention. This paper argues that the intention to parent should be the primary consideration in determining parenthood; and neither genetics nor gestation should play a primary role.

Through comparative case studies of different jurisdictions, the study finally recommends that a system that confers parenthood, at the first instance, on the commissioning parents, is the most suitable for a jurisdiction that seeks to avoid legal battles. This should be effected through a reframing of the Reproductive Health Care Bill, in order to make it comprehensive.

## List of Cases

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

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

*Printing & Numerical Registering Co. v. Sampson* [1875], Court of Appeal of England and Wales.

*George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] The United Kingdom House of Lords.

## Definition of Terms

**Commissioning Parents:** A person (s) who enters a surrogate motherhood agreement with a surrogate mother.

[Children’s Act. No 38 of 2005; South Africa]

They are also referred to as intending parents.

**Gestational Surrogacy:** The process by which a woman attempts to carry and give birth to a child created through in-vitro fertilization using the gamete or gametes of at least one of the intended parents and to which the gestational surrogate has made no genetic contribution

[Reproductive Health Care Bill, 2014; Kenya]

**Surrogacy Agreement:** An agreement between a surrogate mother and an intending parent, in which it is agreed that the surrogate mother will be artificially fertilized for the purpose of bearing a child for the commissioning parents.

[Children’s Act No 38 of 2005; South Africa]

**Surrogacy Arrangement:** The process running from when the surrogate mother is artificially fertilized for the purpose of bearing a child for the commissioning parents, until the child is born.

**Surrogate Mother:** An adult woman who enters into a surrogate motherhood agreement with the commissioning parent (s)

[Children’s Act No 38 of 2005; South Africa]

## CHAPTER ONE: INTRODUCTION

### 1.1 Background to the Problem

Becoming a parent is an important part of a person's life. Unfortunately, some couples are unable to have children of their own. Fortunately for them, all over the world, surrogacy has emerged as an alternative way of starting families. A surrogacy agreement is one made between a surrogate mother and the commissioning parent or parents, clarifying that the surrogate mother will bear a child for the commissioning parent/s and surrender the child to them when the child is born.<sup>1</sup> It is possible to have either one, or both parents contribute to the genetic makeup of the child.<sup>2</sup> The appeal of this method of conception is that there is an opportunity for genetic connection between a parent and the offspring, unlike adoption.<sup>3</sup>

There are two types of surrogacy: traditional surrogacy and gestational surrogacy. Traditional surrogacy involves a couple contracting with a surrogate mother to have the intentional father's sperm artificially inseminated into the surrogate.<sup>4</sup> The second type of surrogacy, gestational surrogacy, can take place in several ways:

‘The intentional mother can use her own egg and the intentional father will use his own sperm, and the embryo, will be fertilized outside of the womb, and will then be transplanted into the uterus of the surrogate mother. In this case, the surrogate is not genetically related to the child and will be used when the intentional mother is physically unable to carry the child on her own. Other options include using the intentional father's sperm and the egg of an anonymous donor or using both sperm and egg donors to create the embryo that will be implanted in the surrogate.’<sup>5</sup>

Until 2014, the Kenyan law had not contemplated the regulation of such a method of parenting. This changed when the Reproductive Health Care Bill that attempted to address this gap in the

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<sup>1</sup> Stoll J, ‘Surrogacy Arrangements and Legal Parenthood: Swedish Law in a Comparative Context’, Uppsala University, 2013, 24.

<sup>2</sup> Epstein R.A, ‘Surrogacy: The case for Full Contractual Enforcement’, 81 (8) *Virginia Law Review*, 1995, 2305-2341, 2307.

<sup>3</sup> Epstein R.A, ‘Surrogacy: The case for Full Contractual Enforcement’, 2307.

<sup>4</sup> Garrity A, ‘A Comparative Analysis of Surrogacy Law in the United States and Great Britain: A Proposed Model Statute for Louisiana’, 60 (3) *Louisiana Law Review*, 2000, 809-832, 809: ‘A traditional surrogacy arrangement occurs through artificial insemination. Through the advances of modern technology, it is not necessary for the surrogate mother to have intercourse with the intentional father. The surrogate mother will be artificially inseminated with the sperm of the intentional father’.

<sup>5</sup> Garrity A, ‘A Comparative Analysis of Surrogacy Law in the United States and Great Britain: A Proposed Model Statute for Louisiana’, 809-810.

law was tabled before the Senate for debate. It provides for the right to gestational surrogacy, which it defines as the process by which a woman attempts to carry and give birth to a child created through in-vitro fertilization using the gamete or gametes of at least one of the commissioning parents and to which the gestational surrogate has made no genetic contribution.<sup>6</sup>

The Bill was strongly supported when it was introduced in the Senate; it passed both its first and second readings,<sup>7</sup> and at present, has been passed with amendments. The amended Bill was read a First Time in the National Assembly on the first day of December and committed to the Departmental Committee on Health for consideration.<sup>8</sup>

The Bill has clearly outlined the requirements for valid contractual agreements as regards surrogacy.<sup>9</sup> The Bill provides guidelines for the qualification of the surrogate mother, the commissioning parents and the process itself. However, as this would be the only statute regulating this practice, it is important that it addresses all the issues. As it stands, the Bill has no express provisions on who the parent of the child shall be, yet this is an essential part of these agreements. In the case of *J L N & 2 others v Director of Children Services & 4 others*,<sup>10</sup> the Children's Court, where the matter had been first raised, directed that the commissioning parents should be registered as the legal parents of the children. The High Court agreed with this ruling and stated that the child is entitled to the identity of his or her genetic parent,<sup>11</sup> and in principle, the registration of the commissioning parents, as opposed to the surrogate mother as a parent, must be permitted. It also held that while registration of the birth mother as the children's mother on the notification of birth was within the law, it is admitted that Kenya does not have a law that governs surrogacy and related issues and it was thus open for the hospital to record the commissioning parents in the notification.

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<sup>6</sup> Clause 2, 7, *The Reproductive Health Care Bill* (2014).

<sup>7</sup> The 11<sup>th</sup> Parliament, The Senate, Bills Tracker as at 12.02.2016

<http://www.parliament.go.ke/the-senate/house-business/bills-tracker-on-March-8-2016>: At its second reading, the Bill was unanimously supported by 25 votes to nil.

<sup>8</sup> The 11<sup>th</sup> Parliament, the National Assembly, Official Report, Thursday 1st December 2016 <http://www.parliament.go.ke/the-national-assembly/house-business/hansard> accessed on 12-Dec-2016.

<sup>9</sup> Clause 6-15, *The Reproductive Health Care Bill* (2014).

<sup>10</sup> [2014] eKLR.

<sup>11</sup> In this case, the genetic parents were the commissioning parents.

Due to the lack of a law, there has been no consensus in the treatment of the issue of legal parentage. In *A.M.N & 2 others v Attorney General & 5 others*, the contributors of the gametes were put in a position where they had to apply to adopt their child.<sup>12</sup>

## **1.2 Statement of the Problem**

The Constitution outlines the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care. There is however, no law governing surrogacy in the country, an integral part of reproductive health care,<sup>13</sup> save for a parliamentary Bill. The Bill, albeit a step in the right direction, has left out the important legal issue that is the legal parentage of the child born via surrogacy. This law falls short of offering a sensible means of achieving the key objective of the protection of the needs of children and other vulnerable parties involved in the surrogacy arrangement.<sup>14</sup>

## **1.3 Justification of the Study**

The Constitution assures the enjoyment of the right to reproductive health care.<sup>15</sup> The practice of surrogacy is an integral part of reproductive health care,<sup>16</sup> and unfortunately, has no law governing it in Kenya. It is a novel practice in Kenya and a number of cases have been presented to the courts, in an attempt to enforce the rights claimed. This issues discussed in the cases indicate that there is a craving for certainty on the matter of who the baby's legal parents are.

Despite there being no provision on who the legal parents of the child are, the underlying issue is whether there is a right to surrogacy, beyond the fact that the Reproductive Health Care Bill has proposed it. Upon determination of this question, and the question of what form such a right shall take, if it is indeed a right, the direction that the law should take on the legal parentage of the child, shall not be difficult to infer.

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<sup>12</sup> *A.M.N & 2 others v Attorney General & 5 others* [2015] eKLR. Despite the willingness of the hospital to register the birth certificates in the names of the commissioning parents, according to the law, the contributors of the gametes were in a position where they had to apply to adopt their child. The reason given for this was that the surrogate mother is the mother of the children until such a time as the necessary legal processes are undertaken or until a Court has issued requisite orders in that regard.

<sup>13</sup> Twine F.W, *Outsourcing the Womb: Race, Class and Gestational Surrogacy in a Global Market*, 2ed, Routledge, New York, 2015, 81.

<sup>14</sup> Horsey K & Sheldon S, 'Still Hazy After All These Years: The Law Regulating Surrogacy', 20 *Medical Law Review* (2012), 67-89, 70.

<sup>15</sup> Article 43, *Constitution of Kenya* (2010).

<sup>16</sup> Twine F.W, *Outsourcing the Womb: Race, Class and Gestational Surrogacy in a Global Market*, 81.

A regime of law that can comprehensively govern this new reproductive technology is needed, so that people do not fight or kill each other when the biological mother claims that because she bore the child in her womb for nine months, that child is hers, yet she was a surrogate mother.<sup>17</sup>

As was said by Lord Mance;

‘The law should be certain, so that it can be easily enforced and so that people can know where they stand. We expect that of Parliament when it frames statute law, and of judges when they expound the common law. We expect it in our relations with authority, and in our relations with each other.’<sup>18</sup>

#### **1.4 General Objectives**

This research shall analyse the relationship between the right to surrogacy and the effect of such a right, or lack thereof, on the legal parentage of the resulting child.

#### **1.5 Specific Objectives**

This research aims:

- i. To analyse the right to surrogacy;
- ii. To analyse the status of parenthood and its representation in law; and
- iii. To make recommendations on the legal practice of surrogacy in Kenya.

#### **1.6 Research Questions**

The following questions shall be the subject of this research:

- i. Does there exist a right to surrogacy?
- ii. What form does such a right take?
- iii. Who should the legal parents of a child born via surrogacy in Kenya be?

#### **1.7 Literature Review**

It is important to understand, before analysing who the legal mother of the child is, the right to surrogacy itself. Is there a right to surrogacy? Christine Straehle in her article ‘Is There a Right

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<sup>17</sup> Parliament of Kenya, The Senate, The Hansard, Thursday, 18th June, 2015, 45.

<sup>18</sup> Lord Mance, ‘Should the law be certain? The Oxford Shrieval lecture given in the University Church of St Mary The Virgin, Oxford’ 11th October 2011, 1.

to Surrogacy?’<sup>19</sup> argues that the right to surrogacy indeed exists but can only be defended as a contractual right, not as a procreative right.<sup>20</sup> She states that she has accepted that surrogacy is a greatly beneficial practice to persons that are unable to have their own biological children; but opines that it cannot be protected as a procreative right because it is not possible to enforce against other right-holders, and against the state.<sup>21</sup>

The question of whether there is a right to surrogacy would need to take into account the various issues that affect not only the commissioning mother, but also the surrogate mother and the baby itself. In Martha A. Field’s book, a number of arguments have been posited.<sup>22</sup> It has been said to be exploitative of women;<sup>23</sup> a baby-selling venture;<sup>24</sup> a nail in the foot that is the conventional family;<sup>25</sup> and harmful to the children born via it.<sup>26</sup> On the other side of the argument is the position that it may be discriminatory to limit having children to only those who can have them naturally<sup>27</sup> and that there is no real and discernible evil present.<sup>28</sup>

Having shed some light on the right to surrogacy, the issue of the legal parentage of the child born via surrogacy is important and has been discussed by a number of authors. Kirsty Horsey and Sally Sheldon in their article ‘Still Hazy After All These Years: The Law Regulating Surrogacy’<sup>29</sup> state that the common law position that the birth mother would be the legal mother is one that makes no exception for cases of full surrogacy, where the egg used to conceive the pregnancy was not her own.<sup>30</sup>

It also notes that regardless of who the legal parent of the child on birth is, this is a status that can be extinguished by the granting of a Parental Order, which can transfer parenthood to the commissioning parents in certain specified circumstances.<sup>31</sup> Yet, there are a range of practical problems with the process of applying for a Parental Order, which have been justly

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<sup>19</sup> Straehle C, ‘Is There a Right to Surrogacy?’ *Journal of Applied Philosophy* (2015), 1-14.

<sup>20</sup> Straehle C, ‘Is There a Right to Surrogacy?’, 2.

<sup>21</sup> Straehle C, ‘Is There a Right to Surrogacy?’, 2.

<sup>22</sup> Field M.A, *Surrogate Motherhood: The Legal and Human Issues - Expanded Edition*, Harvard University Press, England, 1990.

<sup>23</sup> Field M.A, *Surrogate Motherhood: The Legal and Human Issues - Expanded Edition*, 25.

<sup>24</sup> Field M.A, *Surrogate Motherhood: The Legal and Human Issues - Expanded Edition*, 17-19.

<sup>25</sup> Field M.A, *Surrogate Motherhood: The Legal and Human Issues - Expanded Edition*, 33.

<sup>26</sup> Field M.A, *Surrogate Motherhood: The Legal and Human Issues - Expanded Edition*, 54.

<sup>27</sup> Field M.A, *Surrogate Motherhood: The Legal and Human Issues - Expanded Edition*, 47.

<sup>28</sup> Field M.A, *Surrogate Motherhood: The Legal and Human Issues - Expanded Edition*, 58.

<sup>29</sup> Horsey K & Sheldon S, ‘Still Hazy After All These Years: The Law Regulating Surrogacy’, *20 Medical Law Review* 2012, 67-89.

<sup>30</sup> Horsey K & Sheldon S, ‘Still Hazy After All These Years: The Law Regulating Surrogacy’, 81.

<sup>31</sup> Horsey K & Sheldon S, ‘Still Hazy After All These Years: The Law Regulating Surrogacy’, 81.

characterised as ‘overly restrictive’, ‘burdensome and complex’.<sup>32</sup> For instance, the application must be made in a Family Proceedings court, with the Guardian ad litem charged with checking the existence of a genetic link with one of the commissioning parents, confirming that no payment (beyond reasonable expenses) has been made and with ensuring that the child’s welfare is respected.<sup>33</sup>

Jane Stoll in her thesis ‘Surrogacy Arrangements and Legal Parenthood: Swedish Law in a Comparative Context’,<sup>34</sup> notes the importance of regulation that clarifies parenthood in surrogacy arrangements. She stated that a jurisdiction can substantially minimise the risk of disputes over the right to parenthood following surrogacy arrangements by establishing regulation clarifying parenthood in such situations.<sup>35</sup> Regulation that clarifies the respective legal parental statuses of the parties following surrogacy arrangements and provides a mechanism for the transfer of parental rights and obligations from the surrogate to the commissioning parent (s), would guarantee a greater degree of certainty.<sup>36</sup>

Carla Spivack in her article ‘Surrogate Motherhood in the United States’<sup>37</sup> discusses the four theories that American courts use in establishing parenthood in surrogacy agreements. The first theory is *parenthood by intent* which states that ‘when gestation and genetic ties do not coincide in one woman, the natural mother is she who intended to bring about the birth of a child that she intended to raise as her own’.<sup>38</sup> In applying the next theory, which is *parenthood by contract*, the courts uphold surrogacy agreements on the contract principles, that is, he who the contract states is the parent, stands as the parent.<sup>39</sup> *Parenthood by genes* states that the persons with a genetic tie to the child stand as the child’s parents.<sup>40</sup> The final theory is *parenthood by gestation*. The courts refuse to grant a commissioning mother parental rights over the objection of the gestational mother; his approach employs the ancient common law

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<sup>32</sup> Jackson E, *Regulating Reproduction: Law, Technology and Autonomy*, Hart Publishing, Oxford, 2001, 273-275.

<sup>33</sup> Horsey K & Sheldon S, ‘Still Hazy After All These Years: The Law Regulating Surrogacy’, 82.

<sup>34</sup> Stoll J, ‘Surrogacy Arrangements and Legal Parenthood: Swedish Law in a Comparative Context’, Uppsala University, 2013.

<sup>35</sup> Stoll J, ‘Surrogacy Arrangements and Legal Parenthood: Swedish Law in a Comparative Context’, 83.

<sup>36</sup> Stoll J, ‘Surrogacy Arrangements and Legal Parenthood: Swedish Law in a Comparative Context’, 83.

<sup>37</sup> Spivack C, ‘The Law of Surrogate Motherhood In The United States’, 97-116, 58 *The American Journal Of Comparative Law* (2010).

<sup>38</sup> Spivack C, ‘The Law of Surrogate Motherhood In The United States’, 103.

<sup>39</sup> Spivack C, ‘The Law of Surrogate Motherhood In The United States’, 105.

<sup>40</sup> Spivack C, ‘The Law of Surrogate Motherhood In The United States’, 105.

presumption that the woman who gives birth is the mother, and also recognizes the bond established during the nine months of pregnancy.<sup>41</sup>

Kirsty Horsey in her article ‘Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements’,<sup>42</sup> argues that intention to parent should operate as the pre-birth determinant in ‘awarding’ parental status when a child is born.<sup>43</sup> Intention here encompasses the motivation to have a child, initiation and involvement in the procreative process and a commitment to nurture and care.<sup>44</sup>

Adoption may be a simpler, more appropriate parenting option. However, while this may satisfy the mothering role of a woman, it does not quench her desire to beget and bear; that is, to bring forth a life into the world.<sup>45</sup> As Plato, stated, ‘there is a sense in which nature has not only somehow endowed the human race with a degree of immortality, but also implanted in us all a longing to achieve it...One expression of that longing is...the wish not to lie nameless in the grave. Mankind is immortal because it always leaves later generations behind to preserve its unity and identity for all time: it gets its share of immortality by means of procreation.’<sup>46</sup>

## 1.8 Theoretical Framework

This research is based on the philosophy of human rights. Human rights protect human dignity and integrity, and are most significant for those who are disadvantaged or vulnerable.<sup>47</sup>

There are two approaches to the matter of the philosophy of human rights: foundationalism and functionalism. Foundationalism grounds the nature of human rights in a pre-political substratum of moral thought to which positive legal-political institutions ought to conform.<sup>48</sup>

This theory assumes that human rights are moral rights possessed by all human beings simply in virtue of their humanity.<sup>49</sup> Functionalism on the other hand, posits that it belongs to the

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<sup>41</sup> Spivack C, ‘The Law of Surrogate Motherhood In The United States’, 106.

<sup>42</sup> Horsey K, ‘Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements’ 22 (4), *Child and Family Law Quarterly*, 2010, 449-474.

<sup>43</sup> Horsey K, ‘Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements’, 455.

<sup>44</sup> Horsey K, ‘Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements’, 455.

<sup>45</sup> Chadwick, F. R, ‘Having Children: Introduction’ in R.F Chadwick (ed) *Ethics, Reproduction and Genetics Control*, London Croom Helm, 1987, 3-43.

<sup>46</sup> Chadwick, F. R, ‘Having Children: Introduction’ in R.F Chadwick (ed) *Ethics, Reproduction and Genetics Control*, London Croom Helm, 1987, 3-43.

<sup>47</sup> Freeman M.D.A, *Lloyd’s Introduction to Jurisprudence*, Sweet and Maxwell, London, 2014, 1287.

<sup>48</sup> Sangiuliano A.R, ‘Towards a Natural Law Foundationalist Theory of Universal Human Rights’, Osgoode Legal Studies Research Paper Series, Paper 111, 2015, 1- <http://digitalcommons.osgoode.yorku.ca/olsrps/111> on 12 December 2016.

<sup>49</sup> Tasioulas J, ‘Towards a Philosophy of Human Rights’, 65, *Current Legal Problems*, 2012, 1-30, 18.

essence of human rights that they play a certain political role or combination of such roles, for instance, operating as benchmarks for the legitimacy of states or triggers for intervention against states that violate them.<sup>50</sup>

This theory shall assist the research by shedding light on the question of whether the right to surrogacy is at all a human right, in order to aid the discussion of rightful legal parentage of a surrogate child.<sup>51</sup>

This research is also based on the doctrine of freedom of contract. The branch of this doctrine that shall be relied on is that which states that contractual freedom only allows for the conclusion of fair contracts.<sup>52</sup> This is important to note because previously, there was an unwillingness to interfere with the contracts entered into,<sup>53</sup> resulting in the exploitation of the weaker parties.<sup>54</sup>

### **1.9 Hypothesis**

This paper proceeds on the presumption that the legal framework proposed to govern the practice of surrogacy, a novel practice in Kenya, is not sufficient in that it has not stated expressly in the proposed Bill, the legal parentage of the child.

### **1.10 Assumptions**

This research proceeds on the assumption that the information found in books and articles is up to date, especially as the area of research is relatively novel.

### **1.11 Research Methodology**

The method to be used to gather information for this paper shall be through the use of qualitative data.

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<sup>50</sup> Tasioulas J, 'Towards a Philosophy of Human Rights', 1.

<sup>51</sup> The Constitution of Kenya (2010) states that every person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care. The Reproductive Health Care Bill has been proposed in pursuance of this article of the Constitution, as an Act of Parliament to provide for the recognition of reproductive rights.

<sup>52</sup> Rödl F, 'Contractual Freedom, Contractual Justice, and Contract Law (Theory)', 76 *Law and Contemporary Problems*, 2013, 57-70, 62.

<sup>53</sup> *Printing & Numerical Registering Co. v. Sampson* [1875], Court of Appeal of England and Wales.

<sup>54</sup> Gilmore G, *The Death of Contract*, Ohio State University Press, Ohio, 1974, 104.

This study shall make use of qualitative data. It shall use a library-based research as the main method of data collection. Secondary data such as books and articles on the topic shall be read widely.

This research shall also consider case studies and comparative analyses of countries that have legislated the law on surrogacy. This is important for the research in that, as a relatively new area of law for Kenya, it is possible, but not assured, that this will point the country in the right direction.

### **1.12 Limitations**

The following may limit the study:

- i. **Novelty:** this is a largely unexplored legal field in Kenya and there is little material that has been written on it locally.
- ii. **Bias:** this is an inclination of temperament or outlook; especially a personal and sometimes unreasoned judgment.<sup>55</sup> There is the possibility that, being human, there would be an inclination towards focusing only on the research that supports my hypothesis. I have attempted to limit this to the absolute minimum by structuring my research questions to accommodate whatever outcome the research provides.

### **1.13 Chapter Breakdown**

**Chapter One:** This is the introduction and background to the research problem.

**Chapter Two:** The theoretical framework.

**Chapter Three:** This chapter shall carry out an analysis of the right to surrogacy, and what form that right should take. It shall then discuss the legal parentage of the child and the determinants of such a status in this unique arrangement.

**Chapter Four:** This chapter shall conduct a comparative case study on the laws governing the legal parentage of children born via surrogacy in the United Kingdom and in South Africa. This shall shed light on what may be included in our law in order to make it more comprehensive.

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<sup>55</sup> Merriam Webster Dictionary: Definition of 'bias'.  
<http://www.merriam-webster.com/dictionary/bias> on February 17 2016.

**Chapter Five:** This chapter shall discuss with finality, the findings from the study, the conclusion and make recommendations for the filling of this gap in the law.

## CHAPTER TWO: THE THEORETICAL FRAMEWORK

### 2.1 Introduction

The Kenyan Constitution provides for the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care.<sup>56</sup> The UDHR, as well as the ICESCR also legislate this right. Is it cogent to infer the existence of a right to surrogacy from the right to health? Does there exist such a right as this? Can there exist such a right as this?

This chapter discusses the philosophy of human rights, which is the theoretical framework of this paper. It introduces human rights and gives a working definition, and then proceeds to discuss the two major theories underpinning the philosophy of human rights.

### 2.2 The Philosophy of Human Rights

The philosophy of human rights investigates the nature of a human right, or what kind of object a human right is within our broader system of normative thinking.<sup>57</sup> This analysis is important for the simple reason that the moral merits and philosophical foundations of all areas of law are worth examining.<sup>58</sup> A supposed right does not automatically become a genuine demand of human rights morality merely by being set down in an official instrument.<sup>59</sup>

#### 2.2.1. What is a Human Right?

According to James Nickel, human rights are:

‘Basic moral guarantees that people in all countries and cultures allegedly have simply because they are people. They attach to particular individuals who can invoke them; they are of high priority and compliance with them is mandatory rather than discretionary. They are considered universal in the sense that all people have and should enjoy them, and independent in that they exist and are available as standards of justification and criticism whether or not they are recognized and implemented by the legal system or officials of a country’.<sup>60</sup>

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<sup>56</sup> Article 43 (1) (a), *Constitution of Kenya* (2010).

<sup>57</sup> Sangiuliano A.R, ‘Towards a Natural Law Foundationalist Theory of Universal Human Rights’ 219.

<sup>58</sup> Nickel J.W and Reidy D.A, ‘Philosophical Foundations of Human Rights’ *SSRN Electronic Journal* , 2009, 5 - <http://ssrn.com/abstract=1432868> on 10 November 2016.

<sup>59</sup> Tasioulas J, ‘Towards a Philosophy of Human Rights’, 2.

<sup>60</sup> Nickel J, *Making Sense of Human Rights*, 2<sup>nd</sup> edn, Georgetown University Press, Washington, 1997.

Human rights engage a wide variety of disciplines: a moral dimension as they represent urgent moral concerns that states must never ignore; a political dimension as they set standards of basic political legitimacy; a legal dimension as they are posited and enshrined in national constitutions and international treaties; and a social dimension, as they are asserted for the purposes of resisting oppression and exploitation.<sup>61</sup> Ideally, these dimensions interact with one another to culminate in a cogent and comprehensive bill of rights.

Each and every individual human being is an ultimate focus of moral concern; there are moral duties that are directly 'owed to' these individual human beings; that because they are human beings equipped with the capacity to realize certain values in their lives, they each possess certain rights, independently of whether or not they are actually enforced or even recognized socially.<sup>62</sup>

James Nickel, writing on the nature of human rights states that various elements come into play in their definition: a right holder, an object, a duty holder and the normative content.<sup>63</sup> The right holder is the party who has the right.

The right has an object, that is, what the right is a right to.<sup>64</sup> This creates a focus and a direct link from the right to the object. There is also for every right a duty-holder, the party directed to do something about making available to the right holder the object of the right.

Finally, there is for every right, the normative content of the right.<sup>65</sup> This specifies the normative position of the addressees and right holder in relation to the object. It may involve the affirmation or denial of duties, and the ability or disability to alter the rights or legal status of others. James Nickel at this point, using two rights, attempts to illustrate that rights may vary in their content: the right not to be tortured and the right to marry.<sup>66</sup> At the core of the right not to be tortured is the claim each person has not to be tortured and the duty each person has not to torture others. This is a right that cannot be waived or alienated. Now consider the right to marry. At its core is neither a claim each person has to be married nor a duty each person has to marry others. Rather, at its core is a liberty or privilege to seek the consent of

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<sup>61</sup> Sangiuliano A.R, 'Towards a Natural Law Foundationalist Theory of Universal Human Rights', 218-219.

<sup>62</sup> Tasioulas J, 'Towards a Philosophy of Human Rights', 4.

<sup>63</sup> Nickel J.W and Reidy D.A, 'Philosophical Foundations of Human Rights' *SSRN Electronic Journal* , 2009, 2-3 - <http://ssrn.com/abstract=1432868> on 10 November 2016.

<sup>64</sup> Nickel J.W and Reidy D.A, 'Philosophical Foundations of Human Rights', 3.

<sup>65</sup> Nickel J.W and Reidy D.A, 'Philosophical Foundations of Human Rights', 3.

<sup>66</sup> Nickel J.W and Reidy D.A, 'Philosophical Foundations of Human Rights', 3.

others to enter into marriage and thereby to alter the legal status of oneself and another.<sup>67</sup> That is, there is the idea that no person is under a duty not to seek the consent of others to enter into marriage and that every person has the power to marry.<sup>68</sup>

Human rights can be assessed according to what interests they aim to protect and what claims they may entitle its holders to make.<sup>69</sup> On the one hand, some rights give rise to positive claims against others, and often the state, to help realize the right in question; on the other hand, some rights simply entitle their holder to negative claims against others, which is to say that the rights-holder has the right to non-interference in the exercise of the right.<sup>70</sup>

### **2.2.2. The Two Theories**

There are two main contemporary theories of this philosophy; foundationalism and fundamentalism. The former dictates that human rights have importantly distinctive normative grounds as compared with other moral norms while the latter states that the essence of human rights is in playing a certain political role or combination of such roles.<sup>71</sup>

#### *a. Functionalism*

According to functionalism, whose initial advocate was John Rawls,<sup>72</sup> even if all human rights are ultimately a sub-set of the general class of natural rights, they possess certain distinctive functions and it is this practical significance that defines their nature as human rights.<sup>73</sup>

On this view, the nature of a human right is grounded in its functional role in regulating the conduct of political institutions within the legal-political practice of universal human rights.<sup>74</sup>

Human rights have a defining normative function: they impose duties that are 'owed to' all people simply by virtue of their humanity. Over and above this defining function, they perform other functions, including political functions. For instance, human rights are relevant to assessing the status and performance of governments.<sup>75</sup>

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<sup>67</sup> Nickel J.W and Reidy D.A, 'Philosophical Foundations of Human Rights', 3.

<sup>68</sup> Nickel J.W and Reidy D.A, 'Philosophical Foundations of Human Rights', 3.

<sup>69</sup> Straehle C, 'Is There a Right to Surrogacy?', 2.

<sup>70</sup> Straehle C, 'Is There a Right to Surrogacy?', 2.

<sup>71</sup> Tasioulas J, 'Towards a Philosophy of Human Rights', 1.

<sup>72</sup> Rawls J, *The Law of Peoples*, Harvard University Press, 1999, 78–82.

<sup>73</sup> Tasioulas J, 'Towards a Philosophy of Human Rights', 18.

<sup>74</sup> Sangiuliano A.R, 'Towards a Natural Law Foundationalist Theory of Universal Human Rights' 219.

<sup>75</sup> Tasioulas J, 'Towards a Philosophy of Human Rights', 18.

This theory does not hold water however, because it is not written into the concept of a human right that they perform these other functions:

‘One can adequately grasp what a human right is without reference to any political role, just as one can understand what a nuclear weapon is without reference to its political uses. Whether and to what extent a particular human right should play any such political role is a matter for substantive argument; it is not something constitutive of its nature as a human right.’<sup>76</sup>

*b. Foundationalism*

As stated earlier, this theory holds that human rights have importantly distinctive normative grounds as compared with other moral norms.<sup>77</sup> Its main tenet is that human rights are moral rights possessed by all human beings simply by virtue of their humanity.<sup>78</sup> However, there are two tents in the camp that is foundationalism: status-based foundationalism and interest-based foundationalism.

Status-based foundationalism claims that the primary grounding of human rights cannot be in human interests because there is a discrepancy between the logic obeyed by the two different camps.<sup>79</sup> They argue instead, that the foundation of human rights must be in the ‘status’ of their holders as inviolable members of the moral community.<sup>80</sup> This is a worthy position but one that is not without its challenges.

One of its challenges is that it seems to have understood the interest-based view as advocating for utilitarianism or consequentialism and thus, does not give any room for interests in the justification of human rights.<sup>81</sup> Utilitarianism would argue that it is reason enough to kill one innocent person in order to prevent three other innocent persons being killed by someone else. However, this is exactly what the logic of rights forbids: trade-offs in the recognition of a human right to life.<sup>82</sup>

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<sup>76</sup> Tasioulas J, ‘Towards a Philosophy of Human Rights’, 18.

<sup>77</sup> Tasioulas J, ‘Towards a Philosophy of Human Rights’, 1.

<sup>78</sup> Tasioulas J, ‘Towards a Philosophy of Human Rights’, 18.

<sup>79</sup> Tasioulas J, ‘Towards a Philosophy of Human Rights’, 8.

<sup>80</sup> Tasioulas J, ‘Towards a Philosophy of Human Rights’, 8.

<sup>81</sup> Tasioulas J, ‘Towards a Philosophy of Human Rights’, 9.

<sup>82</sup> Tasioulas J, ‘Towards a Philosophy of Human Rights’, 8.

Interest-based foundationalism does not identify human rights with the actual interests that underlie them, as this would mean that whatever stands in the way of the interest would be considered a violation of the right.<sup>83</sup> On the contrary, the content of the duties generated by the interest is considered. Moreover, these are the interests of individual people, who by virtue of their characteristic human capacities, equally enjoy a certain moral status,<sup>84</sup> and one implication of that status referred to as ‘human dignity’, is that their interests cannot be traded-off against each other in the way mandated by a simple aggregative utilitarianism. Interest-based foundationalism is therefore the union of human interests and moral status; the status of individuals is to be honoured primarily by respecting, protecting and advancing their interests.<sup>85</sup>

Interest-based foundationalism holds that considerations of the human good are at the root of human rights.<sup>86</sup> However, this hypothesis does not hold for all rights; in fact, it only applies to a small sub-set of human rights, for instance, basic needs or our interest in freedom. The leading formulation of this position is by James Griffin. Freedom, according to him, comprises two values: autonomy, the capacity to choose a conception of the good life from a range of worthwhile options and liberty, the capacity to pursue one’s choices without interference from others.<sup>87</sup> Our capacity to choose and pursue a good life, he says, is the relevant dimension along which humanity is set apart from non-human animals, thus rendering freedom the only interest capable of grounding human rights.<sup>88</sup>

Until this point, it would seem that freedom-based foundationalism would function as the best basis for human rights. However, John Tasioulas introduces a version of interest-based foundationalism that includes a plurality of human interests. He defends this by holding that the existence of human rights is underscored by a plurality of universal human interests and this fact does not compromise the nature of human rights in any way.<sup>89</sup> He introduces the idea of a threshold at which interests generate human rights that he notes should be satisfied.<sup>90</sup>

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<sup>83</sup> Tasioulas J, ‘Towards a Philosophy of Human Rights’, 9.

<sup>84</sup> Tasioulas J, ‘Towards a Philosophy of Human Rights’, 9.

<sup>85</sup> Tasioulas J, ‘Towards a Philosophy of Human Rights’, 9.

<sup>86</sup> Tasioulas J, ‘Towards a Philosophy of Human Rights’, 12.

<sup>87</sup> Tasioulas J, ‘Towards a Philosophy of Human Rights’, 12-13.

<sup>88</sup> Tasioulas J, ‘Towards a Philosophy of Human Rights’, 13.

<sup>89</sup> Tasioulas J, ‘Towards a Philosophy of Human Rights’, 13.

<sup>90</sup> Tasioulas J, ‘Towards a Philosophy of Human Rights’, 13-14.

It requires that in the case of each individual, the underlying individualistic considerations of moral status and universal interests suffice to generate duties with the same content, resulting in a situation where human rights are not distinguished by the values underlying them, but by their nature as universal moral rights.<sup>91</sup>

There are two stages in the application of this threshold.<sup>92</sup> The internal stage investigates only those considerations of status and interests, of the putative right-holders that are supposed to ground the existence of the right. It is thus asked whether, in the case of all human beings, a duty with the proposed content is cogent enough to serve the underlying values.<sup>93</sup> The external stage considers the implications of affirming the right for other values and other persons, especially would-be duty-bearers.

To illustrate this analysis, he uses the example of romantic love. Acknowledging that love is one of the most life-enhancing aspects of the human experience, he asks;

‘Does it automatically follow that anyone is under a positive duty to love anyone else? Is there in this sense a right to be loved romantically? Such a right seems to be precluded at this first stage: the very nature of romantic love is at odds with the existence of a positive duty to love others. Even supposing that the duty to love another romantically is not inherently self-defeating, it would fail at the second stage. It may reasonably be concluded that no such duty actually exists, because the burden it imposes on potential duty-bearers in terms of autonomy, spontaneity, and the strains of psychological self-policing is excessive.’<sup>94</sup>

This example touches directly on the situation presented by the practice of surrogacy. It cannot cogently be concluded that any one woman has the right to the services of another woman as a surrogate mother because the burden it imposes in terms of autonomy, spontaneity, and the strains of psychological self-policing is excessive

Noting the above, it is also prudent to note that, for any given right, its effective realization will depend more on a more precise specification of the content of its associated duties and their bearers, than pure moral reasoning itself will yield.<sup>95</sup> However, moral reasoning has a place in

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<sup>91</sup> Tasioulas J, ‘Towards a Philosophy of Human Rights’, 15.

<sup>92</sup> Tasioulas J, ‘Towards a Philosophy of Human Rights’, 15.

<sup>93</sup> Tasioulas J, ‘Towards a Philosophy of Human Rights’, 15.

<sup>94</sup> Tasioulas J, ‘Towards a Philosophy of Human Rights’, 16.

<sup>95</sup> Tasioulas J, ‘Towards a Philosophy of Human Rights’, 17.

the sphere of human rights; the convention and law must operate within the parameters identified by that reasoning.<sup>96</sup>

Thus, the best philosophy of human rights is that which grounds human rights in a plurality of human interests, as the human rights are not distinguished by the values underlying them, but by their nature as universal moral rights, possessed by all human beings simply in virtue of their humanity.<sup>97</sup>

### 2.3 The Doctrine of Freedom of Contract

Most people never consider the importance of the right to contract, which is essentially the ability to gain and dispose of possessions and services, alter legal relationships, and act with some guaranty as to future obligations and rights.<sup>98</sup> It is not until one is faced with the prospect of not having that right that its value becomes more readily apparent.<sup>99</sup>

Classical contract theory emerged in the late nineteenth century,<sup>100</sup> and the classic statement of freedom of contract is found in *Printing & Numerical Registering Co. v. Sampson*:<sup>101</sup>

‘It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when freely and voluntarily entered into shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider - that you are not to lightly interfere with this freedom of contract.’<sup>102</sup>

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<sup>96</sup> Tasioulas J, ‘Towards a Philosophy of Human Rights’, 17.

<sup>97</sup> Tasioulas J, ‘Towards a Philosophy of Human Rights’, 15, 18.

<sup>98</sup> Weber D.P, ‘Restricting the Freedom of Contract: A Fundamental Prohibition’ 16 (1), *Yale Human Rights and Development Journal*, 2013, 51-103, 56;

See Scheiber H.N, *The State and Freedom of Contract*, Stanford University Press, Stanford, 1998, 3: the institution of contract has become in modern society the principal instrument for organizing the private marketplace.

<sup>99</sup> Weber D.P, ‘Restricting the Freedom of Contract: A Fundamental Prohibition’, 56.

<sup>100</sup> Edwards C, ‘Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues’, Marquette University Law School, Faculty Publications Paper 281, 2009, 647-696, 647 – <<http://scholarship.law.marquette.edu/facpub/281>> on January 18, 2016.

<sup>101</sup> *Printing & Numerical Registering Co. v. Sampson* [1875], Court of Appeal of England and Wales.

<sup>102</sup> *Printing & Numerical Registering Co. v. Sampson* [1875], Court of Appeal of England and Wales.

Classical contract theory's emphasis on unrestricted freedom of contract had its roots in nineteenth century political philosophy, which declared 'the end of man is freedom'.<sup>103</sup> However, this principle did not appreciate the harsh realities of the market at the time: equal parties did not exist and strong parties were able to impose unfair and oppressive bargains upon those who were weak and vulnerable.<sup>104</sup>

Florian notes of the liberal method:

'The traditional liberal approach combined individual autonomy and corrective justice as the two general principles of contract law. Although it is accepted as indispensable for some features of contract law, the liberal approach, with its two principles, is considered too narrow to cover all relevant parts of contract law. It is also criticized as too narrow from a normative point of view, as it is interested only in the formal freedom of property owners and contractors, not in the substantive freedom of human beings, which depends in large part on notions of distributive justice in judicial holdings.'<sup>105</sup>

As a criticism to the classical contract theory, the social approach emerged: from its perspective, the traditional liberal approach had proved incapable of coping conceptually with the developments emerging, that is, that in order to prevent a stronger party from exploiting a weaker party, there was an ever-growing body of contract rules that placed limits on the freedom of contracting.<sup>106</sup>

Some scholars claimed that freedom of contract could only survive in an economy where trust and good will existed between parties who did business.<sup>107</sup> Comprehensive reforms in the law were necessary, they insisted, to channel the exercise of liberty toward cooperation and

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<sup>103</sup> Roscoe Pound R, 'The End of Law as Developed in Juristic Thought II' 30 (3) *Harvard Law Review*, 1917, 201-225, 204;

See Edwards C, 'Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues', 647.

<sup>104</sup> Gilmore G, *The Death of Contract*, 104: 'It seems apparent to the twentieth century mind, as perhaps it did not to the nineteenth century mind, that a system in which everybody is invited to do his own thing, at whatever cost to his neighbor, must ultimately work to the benefit of the rich and powerful'.

<sup>105</sup> Rödl F, 'Contractual Freedom, Contractual Justice, and Contract Law (Theory)', 60.

<sup>106</sup> Rödl F, 'Contractual Freedom, Contractual Justice, and Contract Law (Theory)', 60.

<sup>107</sup> Dodd E.M, 'From Maximum Wages to Minimum Wages: Six Centuries of Regulation of Employment Contracts', 43 *Columbia Law Review*, 1942, 643;

See Edwards C, 'Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues', 649.

decency, and, thus, to preserve the bargain contract as the vehicle to facilitate the most efficient distribution of resources in the economy.<sup>108</sup>

Joseph Chamberlain in 1885 also criticised the faith that had been placed in freedom of contract for the best part of the nineteenth century:

‘The great problem of our civilisation is still unresolved. We have to account for and to grapple with the mass of misery and destitution in our midst, co-existent as it is with the evidence of abundant wealth and teeming prosperity. It is a problem which some men would set aside by reference to the eternal laws of supply and demand, to the necessity of freedom of contract, and to the sanctity of every private right of property. But gentlemen, these phrases are the convenient cant of selfish wealth.’<sup>109</sup>

This attitude continued into the twentieth century: in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd*,<sup>110</sup> Lord Denning compared the freedom of contract to oppression of the weak:

‘...faced with this abuse of power, by the strong against the weak, by the use of the small print of the conditions, the judges did what they could to put a curb upon it. They still had before them the idol, ‘freedom of contract’. They still knelt down and worshipped it, but they concealed under their cloaks a secret weapon. They used it to stab the idol in the back. This weapon was called ‘the true construction of the contract’. They used it with great skill and ingenuity. They used it so as to depart from the natural meaning of the words of the exemption clause and to put upon them a strained and unnatural construction.’<sup>111</sup>

Contract law rules can only be understood as emanating from a concurring influence of both approaches.<sup>112</sup> This is what is referred to as the mixed approach. The goal of this approach, and all others, is to reconcile the idea of contractual freedom and contractual justice in a way that,

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<sup>108</sup> Dodd E.M, ‘From Maximum Wages to Minimum Wages: Six Centuries of Regulation of Employment Contracts’, 43 *Columbia Law Review*, 1942, 643;  
Edwards C, ‘Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues’, 649.

<sup>109</sup> Boldeman L, *The Cult of the Market: Economic Fundamentalism and Its Discontents*, ANU Press, 2007, 251-252.

<sup>110</sup> *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] The United Kingdom House of Lords.

<sup>111</sup> *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] The United Kingdom House of Lords.

<sup>112</sup> Rödl F, ‘Contractual Freedom, Contractual Justice, and Contract Law (Theory)’, 60.

on the one hand, represents a coherent understanding of the basic structure of contract law and, on the other hand, illuminates contract law in its modern version.<sup>113</sup>

There are three conceptual ways to reconcile contractual freedom and justice that Florian Rodl outlines in his article:<sup>114</sup>

- i. The first option can be called the procedural understanding of contractual freedom. According to this understanding, the concept of fairness can only apply to the procedure of contracting. The fair procedure is then represented as contractual freedom, that is, the freedom to choose the terms of a contract. Whatever the outcome of a fair procedure of contract formation, this theory does not judge the contract upon the substantive fairness of its terms. Contractual freedom in this case includes not only the voluntariness of each party's consent, but also, arguably, equal bargaining power.<sup>115</sup>
- ii. The second option might be called the instrumental understanding of contractual freedom. According to this view, contractual freedom has a direct impact on the resulting fairness of a contract. Also in this version, contractual freedom includes the idea of equal bargaining power. In contrast to the procedural understanding, it is not denied that the substance of a contract can be judged with regard to its fairness. However, if the favourable procedural conditions, that is, contractual freedom including equal bargaining power, are met, the law refrains from correcting the substantive unfairness of a contract.<sup>116</sup>
- iii. The alternative to both of these options is that by its nature, contractual freedom only allows for the conclusion of fair contracts. There is no tension between the two concepts of contractual freedom and contractual justice because contractual freedom can only be exercised in voluntary agreements with fair terms.<sup>117</sup>

The freedom to contract argued for is the basic right of an individual to enter into agreements that gain or dispose of possessions, services or otherwise alter legal relationships.<sup>118</sup> Contract

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<sup>113</sup> Rödl F, 'Contractual Freedom, Contractual Justice, and Contract Law (Theory)', 61.

<sup>114</sup> Collins H, 'Distributive Justice Through Contracts', 45 (2) *Current Legal Problems*, 1992, 58-63, 49.

<sup>115</sup> Rödl F, 'Contractual Freedom, Contractual Justice, and Contract Law (Theory)', 61-62: 'This has been the view of Werner Flume'.

<sup>116</sup> Rödl F, 'Contractual Freedom, Contractual Justice, and Contract Law (Theory)', 62: 'This view was held by Karl Larenz'.

<sup>117</sup> Rödl F, 'Contractual Freedom, Contractual Justice, and Contract Law (Theory)', 62: 'This alternative has been developed by James Gordley on Aristotelian grounds and by Peter Benson on Hegelian grounds'.

<sup>118</sup> Weber D.P, 'Restricting the Freedom of Contract: A Fundamental Prohibition', 56-57.

law involves a balancing of conflicting social values and the third alternative seems to be have achieved this most accurately.

## **CHAPTER THREE: WHO SHOULD THE BABY'S LEGAL PARENTS BE?**

### **3.1 Introduction**

The right to surrogacy is one that has been supported by many as an emerging method of reproduction. However, it has also faced strong opposition. It has been defended as a negative reproductive right in that, one that should be free from interference by the state.

This chapter posits, based on the arguments of legal scholars, that this right, if defended as a reproductive or procreative right, would not meet the threshold of a right. However, it would qualify as a contractual right, based on the principle of freedom of contract, but one that would still remain subject to some regulation by the state.

### **3.2 The Right to Surrogacy**

Rights can be assessed according to what interests they aim to protect, and what claims they may entitle its holders to make.<sup>119</sup> These claims may be divided into those that give rise to positive claims, often against the state and those that give rise to negative claims, that is, the right-holder can claim the right of non-interference when exercising his right.<sup>120</sup> When assessing the claims a right may generate, it must be asked what is necessary for the realization and protection of the interest at stake.<sup>121</sup>

A right to surrogacy may be understood as aiming to protect two different interests, and generating two different sets of claims: the right to assisted procreation and contractual rights.

#### **3.2.1. As a right to Assisted Procreation**

The interest protected by this, is the right to have biological children.<sup>122</sup> It has been argued by some that this right is highly valued because the ability to have children and parent them provides individuals with uniquely valuable opportunities to realize themselves and their deeply held goals in life.<sup>123</sup> If this argument is accepted, that is, the protection of the interest of

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<sup>119</sup> Fabre C, *Whose Body is it Anyway?: Justice and the Integrity of the Person*, Oxford University Press, Oxford, 2006, 16-23.

<sup>120</sup> Straehle C, 'Is There a Right to Surrogacy?', 1.

<sup>121</sup> Straehle C, 'Is There a Right to Surrogacy?', 2.

<sup>122</sup> Straehle C, 'Is There a Right to Surrogacy?', 3.

<sup>123</sup> Brighouse H & Swift A, 'Parents' Rights and the Value of the Family', 117 *Ethics*, 2006, 80–108.

individuals to have children and create a family, then we may accept that those who don't have this ability need to have access to a right to surrogacy in order to realize this interest.<sup>124</sup>

What claim would the protection of such an interest give rise to?<sup>125</sup> There are a number of reasonable claims that can be made against the state in pursuance of such an interest, for instance In-Vitro Fertilization treatment.<sup>126</sup> It can in fact be said that the state has a responsibility to help those of its members who cannot realize this basic interest without help.<sup>127</sup> The basis for this is the state's underlining responsibility to enable individuals to lead autonomous lives centred and organised on defensible self-chosen goals and projects.<sup>128</sup> In this view, to procreate is a project individuals have and cherish, and societies that value the individual projects of their citizens should help realize them.<sup>129</sup> It logically follows then that by entering into a surrogacy agreement, commissioning parents are simply exercising their procreative right to become parents.<sup>130</sup> It has been accepted thus far that there is a right to procreate and that surrogacy can help realize this right. With this in mind, the next issue is whether a right to procreate outside our own body can exist.<sup>131</sup>

The kind of society in which the right to procreation is recognized, is one that, as has been mentioned, is wedded to ideas of individual autonomy for all of its members.<sup>132</sup> In such a society, individuals have to consent to their employment and the goal of protecting the individual interests of some would not be traded for the interests of others.<sup>133</sup> What this means for surrogacy is that couples may have an interest in procreation, but lack a surrogate, thus rendering the right to surrogacy meaningless.<sup>134</sup> It has been asked whether it is intelligible to

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<sup>124</sup> Straehle C, 'Is There a Right to Surrogacy?', 3.

<sup>125</sup> Straehle C, 'Is There a Right to Surrogacy?', 4.

<sup>126</sup> Straehle C, 'Is There a Right to Surrogacy?', 4.

<sup>127</sup> Straehle C, 'Is There a Right to Surrogacy?', 4.

Warnock M, *A Question of Life: the Warnock Report on Human Fertilisation and Embryology*, 1985, Oxford. Blackwell: This position was first advocated by the Warnock report, published in 1984, which served as the basis for the British Human Fertilization and Embryology Act of 1990, regulating access to and licencing of ART in the UK.

<sup>128</sup> Straehle C, 'Is There a Right to Surrogacy?', 4.

<sup>129</sup> Brighthouse H & Swift A, 'Parents' Rights and the Value of the Family', 80–108;

Brighthouse H & Swift A, *Family Values: The Ethics of Parent-Child Relationships*, Princeton University Press, Princeton, NJ, 2014;

Straehle C, 'Is There a Right to Surrogacy?', 4.

<sup>130</sup> Straehle C, 'Is There a Right to Surrogacy?', 4.

<sup>131</sup> Straehle C, 'Is There a Right to Surrogacy?', 5.

<sup>132</sup> Straehle C, 'Is There a Right to Surrogacy?', 5.

<sup>133</sup> Straehle C, 'Is There a Right to Surrogacy?', 5.

<sup>134</sup> Straehle C, 'Is There a Right to Surrogacy?', 5.

claim a right to something that is impossible.<sup>135</sup> A right to surrogacy as a right to assisted procreation would be adjudged unintelligible to the extent that it is not possible to promise the effective protection of the interest at stake, where the protection requires the collaboration of a third party who in this case, is the surrogate mother. It is not certified that sufficient numbers of women would sign up to be surrogates, and more importantly, because there cannot be coercive legislation over the disposal of persons' individual bodies, a state's jurisdiction cannot extend thus.<sup>136</sup>

Predicated on the foregoing, a right to surrogacy can't be plausibly understood as a claim right against the state.<sup>137</sup>

### 3.2.2. As a Contractual Right

Conceiving of surrogacy as a contractual right protects a different set of interests than the ones discussed above: the interests of the contractual parties involved to enter a contract freely.<sup>138</sup> Grounding the regulation of surrogacy agreements in contract, relying on the principles of autonomous bargaining, freedom of contract and the built-in ability of contract law to police unconscionable bargains, would offer protection to all parties.<sup>139</sup> The nature of the contract has been defended, not as a sale contract, but as a contract for the provision of services.<sup>140</sup> Both parties enter the contract on the assumption that the prospective surrogate agrees to engage in reproductive labour on behalf of the commissioning parents.<sup>141</sup> She gives her time, energy and bodily resources to enable the commissioning couple to have a child.<sup>142</sup>

The freedom of contract is an important interest to be protected. However, the scope of the right to freedom of contract cannot be assessed independently of the interests such a right aims to protect, and without assessing the relationship between the interest at stake and the need for protection through freedom of contract.<sup>143</sup> This is to say that a contract for the murder of a person, or the restriction of trade shall not be protected.<sup>144</sup> At the basis of a surrogacy

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<sup>135</sup> Warnock, M, *Making Babies: Is There a Right to Have Children?*, Oxford University Press, 2002, 14.

<sup>136</sup> Straehle C, 'Is There a Right to Surrogacy?', 6.

<sup>137</sup> Straehle C, 'Is There a Right to Surrogacy?', 6.

<sup>138</sup> Straehle C, 'Is There a Right to Surrogacy?', 6.

<sup>139</sup> Horsey K, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements' 464.

<sup>140</sup> Mengual A and Wolfe N, Surrogacy, World Youth Alliance, White Paper, November 2015, 4.

<sup>141</sup> Straehle C, 'Is There a Right to Surrogacy?', 6.

<sup>142</sup> Horsey K, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements', 470.

<sup>143</sup> Straehle C, 'Is There a Right to Surrogacy?', 7.

<sup>144</sup> Epstein R. A, 'Surrogacy: The Case for Full Contractual Enforcement', 2316.

agreement, lies the agreement to bear a child for the commissioning parent(s) and an undertaking to hand over such a child to them with the intention that the child concerned becomes their legitimate child.<sup>145</sup> However, do any negative externalities from surrogacy contracts reach that level, or even come close to it?<sup>146</sup> Freedom of contract would be considered a liberty right most clearly when, without such freedom, the interest it aims to protect can't be realized. It can be said that without freedom to enter into surrogacy contracts, some couples won't be able to realise their interests in biological children.<sup>147</sup>

The effect of contracts is twofold: on the parties as between themselves and on third persons. This has, and continues to influence the stand on matters of surrogacy.

Where both parties have engaged voluntarily in a transaction, there is the prospect of mutual gain,<sup>148</sup> which is not present when invalidating conditions such as force, duress, fraud or misrepresentation are present.<sup>149</sup> The commissioning couple have an intimate interest in the condition and conduct of the surrogate mother,<sup>150</sup> who wants suitable parents for the child she will give birth to and is empathetic for the plight of the infertile couple.<sup>151</sup> There has been an assumption that surrogates are vulnerable, easily exploited and somehow deserve special protection.<sup>152</sup> Contrarily, there has been evidence that far from being vulnerable, surrogates feel empowered by their ability to exercise control over their bodies in this way and the altruism that underpins surrogacy agreements.<sup>153</sup>

One of the validating elements of contracts is consideration: simply, each party must give something in return for what is gained from the other party.<sup>154</sup> In the context of unpaid surrogacy, as is the focus here, there can be sufficient consideration for the contract to be binding.<sup>155</sup> The father's promises, or detriment, or even reliance on the commitment given to hand over the child, could also constitute consideration even if the surrogate mother received

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<sup>145</sup> Section 1, *Children's Act* No. 38 of 2005 (South Africa).

<sup>146</sup> Epstein R. A, 'Surrogacy: The Case for Full Contractual Enforcement', 2316.

<sup>147</sup> Straehle C, 'Is There a Right to Surrogacy?', 7.

<sup>148</sup> Epstein R. A, 'Surrogacy: The Case for Full Contractual Enforcement', 2313.

<sup>149</sup> Epstein R. A, 'Surrogacy: The Case for Full Contractual Enforcement', 2314.

<sup>150</sup> Epstein R. A, 'Surrogacy: The Case for Full Contractual Enforcement', 2317.

<sup>151</sup> Epstein R. A, 'Surrogacy: The Case for Full Contractual Enforcement', 2319.

<sup>152</sup> Horsey K, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements', 451.

<sup>153</sup> Blyth E, 'I wanted to be interesting. i wanted to be able to say 'I've done something interesting with my life''': Interviews with Surrogate Mothers in Britain, 12 (3) *Journal of Reproductive and Infant Psychology*, 1994, 189-198.

<sup>154</sup> Elliott C and Quinn F, *Contract Law*, 7<sup>th</sup> ed, Pearson Longman, England, 2009, 89.

<sup>155</sup> Field M, *Surrogate Motherhood: Expanded Edition*, 77.

nothing of value.<sup>156</sup> In addition to this, women found to be performing as surrogates for their own satisfaction and not for valuable reward, have received consideration as the court defines it.<sup>157</sup>

Possible limits are often justified by the kind of harms that such contracts can provoke, for instance; the vulnerability that such an arrangement invokes, on the surrogate mother's end, due to the long-standing practice of gender inequality and the conditions imposed by the contract that may be undesirable to her.<sup>158</sup> There is also taken the position that the surrogate mother's sense of self is harmed.<sup>159</sup> This would void the position of the right to surrogacy as a contractual right because entering a contract as being based on autonomous decision making cannot be defended if the decision will undermine a personal sense of self, thus making any further autonomous decision impossible.<sup>160</sup> Unlike what has been said, in fact, it may be argued that quite to the contrary, surrogate work provides women with more possibilities to develop an extended sense of self and a basis of self-respect, and for two reasons: such work allows them to realize some of their own goals, and surely it gives them satisfaction to be able to help an otherwise childless couple to realize an important goal.<sup>161</sup>

Only a concern for the wellbeing of the future child should justify restrictions to surrogacy contracts.<sup>162</sup> Moreover, these restrictions should not be tied to the fact that children are born via surrogacy; instead, they are justified by a concern about who should be a parent.<sup>163</sup>

Thus introduces the discussion on persons who are not parties to voluntary transactions but may necessarily be hurt by them, begging the question whether such transactions should be invalidated because they produce adverse effects on third parties.<sup>164</sup> The third party discussed herein is the resulting child.<sup>165</sup> An in-depth discussion of this matter by Richard Epstein indicates that the most correct position to take is that the resulting child is unlikely to be affected adversely. Surrogate arrangements are usually a last resort for desperate couples who

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<sup>156</sup> Field, *Surrogate Motherhood: Expanded Edition*, 77.

<sup>157</sup> Field, *Surrogate Motherhood: Expanded Edition*, 77.

<sup>158</sup> Straehle C, 'Is There a Right to Surrogacy?', 8-10.

<sup>159</sup> Pateman C, *The Sexual Contract*, Stanford University Press, Stanford, 1988, 119.

<sup>160</sup> Straehle C, 'Is There a Right to Surrogacy?', 11.

<sup>161</sup> Straehle C, 'Is There a Right to Surrogacy?', 11.

<sup>162</sup> Straehle C, 'Is There a Right to Surrogacy?', 7.

<sup>163</sup> Straehle C, 'Is There a Right to Surrogacy?', 7.

<sup>164</sup> Epstein R. A, 'Surrogacy: The Case for Full Contractual Enforcement', 2314.

<sup>165</sup> Epstein R. A, 'Surrogacy: The Case for Full Contractual Enforcement', 2320-2325.

have tried to conceive without success.<sup>166</sup> The risk that the children would be unloved is not nil, but there is no reason to conclude that it is any higher than that of children conceived naturally.<sup>167</sup> The mere existence of a child confers rights against its natural parents; the legal obligations to the child survive the surrogacy contract and offer protection that is every bit as solid, and probably less needed, than similar rights against natural parents.<sup>168</sup>

Having noted the foregoing, this argument will now focus on intention to be legally bound by a surrogacy agreement, as the basis for determination of legal parentage of the resulting child.<sup>169</sup>

### **3.3 The Legal Parentage of the Resulting Child**

Kirsty Horsey's paper, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements', argues that those who intended to be the parents of the child should be legally recognized as the parents of the child from birth.<sup>170</sup> This argument only applies to the specific case of surrogacy, leaving the parentage of children conceived by natural means, as is.<sup>171</sup>

At present, Kenya has no law regulating the practice of surrogacy and the resulting dilemma on who the legal parents of the resulting child should be. In the case of *J L N & 2 others v Director of Children Services & 4 others*,<sup>172</sup> the Children's Court, where the matter had been first raised, directed that the commissioning parents be registered as the parents of the children. The High Court agreed with this ruling and stated that the child is entitled to the identity of his or her genetic parent and in principle, the registration of the genetic parents, as opposed to the surrogate mother as a parent, must be permitted. It also held that while registration of the birth mother as the children's mother on the notification of birth was within the law, Kenya does not have a law that governs surrogacy and related issues and it was also open for the hospital to record the genetic parents in the notification. In an opposing decision in *A.M.N & 2 others v Attorney General & 5 others*,<sup>173</sup> despite the willingness of the hospital to register the birth certificates in the names of the commissioning parents, according to the law, the contributors

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<sup>166</sup> Epstein R. A, 'Surrogacy: The Case for Full Contractual Enforcement', 2319.

<sup>167</sup> Epstein R. A, 'Surrogacy: The Case for Full Contractual Enforcement', 2321.

<sup>168</sup> Epstein R. A, 'Surrogacy: The Case for Full Contractual Enforcement', 2322.

<sup>169</sup> Elliott C and Quinn F, *Contract Law*, 67.

<sup>170</sup> Horsey K, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements', 454.

<sup>171</sup> Horsey K, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements', 455.

<sup>172</sup> [2014] eKLR.

<sup>173</sup> [2015] eKLR.

of the gametes were in a position where they had to apply to adopt their child. The reason given for this was that the surrogate mother is the mother of the children until such a time as the necessary legal processes are undertaken or until a Court has issued requisite orders in that regard. The latter case based its decision largely on the United Kingdom's legislative structure as Kenya has no law on the matter.

This inconsistency caused by a lack of legislation is a problem because, it serves as an absolute barrier to the automatic legal recognition of the commissioning parent or parents, as the case may be, despite the fact that they intend to raise the child. This is done without a discussion on whether this prevention is either necessary or desirable, or in the best interests of any prospective child, a principle that should underpin all clinical assisted reproduction practices.<sup>174</sup>

There is no contention that surrogacy is not natural conception. All the same, it finds its basis herein and is designed to replicate it, at least to an extent. The notably missing legislation on parenthood in surrogacy arrangements is really a reflection of traditional assumptions about parenthood.<sup>175</sup> Traditionally, intention to parent, genetics and gestation in the child bearing process have always intersected, while in surrogacy arrangements, each of these functions may be found in a different party.<sup>176</sup> The former is considered normal,<sup>177</sup> while the belief surrounding the practice of surrogacy is that it is 'reproductive prostitution'.<sup>178</sup>

A number of reasons have been posited in support of the position stated in the law; that the birth mother is the legal mother of the child.<sup>179</sup> The first argument is that bonding occurs between the gestational mother and the child.<sup>180</sup> There is both scientific and anecdotal evidence

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<sup>174</sup> Horsey K, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements', 450.

<sup>175</sup> Horsey K, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements', 453.

<sup>176</sup> Horsey K, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements', 452, 455.

<sup>177</sup> Horsey K, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements', 460.

<sup>178</sup> Field M, *Surrogate Motherhood: Expanded Edition*, 28.

<sup>179</sup> Section 2, *Births and Deaths Registration Act* (Act No. 7 of 1990): 'birth' means the issuing forth of any child from its mother after the expiration of the twenty-eighth week of pregnancy, whether alive or dead.

<sup>180</sup> Horsey K, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements', 461.

to support the bonding hypothesis, but there is also evidence to the contrary.<sup>181</sup> Additionally, this argument prioritizes the mother while doing nothing for the father.<sup>182</sup>

It has also been stated that it is generally better for a child to stay with its gestational mother.<sup>183</sup> This is loosely based on a best interests' argument.<sup>184</sup> In the United States, for instance, there is a presumption that it is in the best interests of the child to remain with or be placed with its natural parents.<sup>185</sup> At the same time, it is not in the best interests of the child to have any or all of its potential parents locked in dispute over parenthood.<sup>186</sup> Moreover, it is not always the case that the child's natural parents are its best option as this ascribes *prima facie* parenthood to a couple that never intended to keep the child and may not promote the child's welfare.<sup>187</sup>

Finally, it is argued that the gestational mother contributes the most to the creation of the child.<sup>188</sup> While it is true that the gestational mother contributes an endocrine cascade that determines how the child will grow, when its cells will divide and differentiate in the womb, and how the child will appear and function for the rest of its life,<sup>189</sup> the commissioning parents invest, both emotionally and financially, more than any other party.<sup>190</sup>

The arguments defending the gestational mother would not be the best fit for situations such as the ones contemplated by this paper; an appropriate stand would be one that predicates the determination of parenthood on the intention to parent.

In many cases, the genetic parents are also the commissioning parents, but this is not always the case.<sup>191</sup> Sometimes, only one parent has a genetic link to the child and it would be undesirable to distinguish between parents in this way by dictating that parenthood is based on

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<sup>181</sup> Hill J.L., 'What Does it Mean to be a 'Parent'? The Claims of Biology as the Basis for Parental Rights' 66 *New York University Law Review*, 1991, 353, at 397.

Levitt J, 'Biology, Technology and Genealogy: A Proposed Uniform Surrogacy Legislation' 25 *Columbia Journal of Law and Social Problems*, 1992, 451, at 476: 'Numerous studies indicate that external circumstances affect the bonding process between the surrogate and the foetus. If a surrogate knows from the outset that the contract is binding and that the baby belongs to the intentional parents, her expectations and this emotional ties to the child are therefore likely to be different'.

<sup>182</sup> Horsey K, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements', 473.

<sup>183</sup> Horsey K, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements', 462.

<sup>184</sup> Horsey K, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements', 462.

<sup>185</sup> Hill J.L., 'What Does it Mean to be a 'Parent'? The Claims of Biology as the Basis for Parental Rights', 400.

<sup>186</sup> Horsey K, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements', 473.

<sup>187</sup> Jackson E, *Regulating Reproduction: Law, Technology and Autonomy*, Hart Publishing, 2001, 270.

<sup>188</sup> Horsey K, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements', 463.

<sup>189</sup> Sirola K, 'Are You My Mother? Defending The Rights Of Intended Parents in Gestational Surrogacy Arrangements in Pennsylvania', 14 (1) *Journal of Gender, Social Policy and the Law*, 2006, 136, Footnote 25.

<sup>190</sup> Horsey K, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements', 463.

<sup>191</sup> Horsey K, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements', 459.

genetics.<sup>192</sup> It is noted that the importance of genetic ties cannot be understated, as this is the basis of parenthood when children are conceived by normal means.<sup>193</sup>

‘Genetic parents share a unique biological relationship with the child...an important aspect of parenthood is the experience of creating another in one’s own likeness and part of what makes parenthood meaningful is the parent’s ability to see the child grow and develop and see oneself in the process of this growth. Infertility is thus painful and creates a desire that may impel one to use surrogacy. The genetic presumption may not be damaging when applied to those who can conceive naturally...but for those who cannot have a genetically related child, it offers no solution to an unfulfilled desire to become parents.’<sup>194</sup>

All the same, genetic ties are as socially influenced as anything else, and unnecessarily prioritizing such a requirement when there are more suitable alternatives would only serve an artificial function.<sup>195</sup> In addition to this, it has been argued,<sup>196</sup> that the claim of genetics as a binding factor is based in property theories.<sup>197</sup> This however, fails from the outset. The major premise of this argument is that persons possess property rights in the products, processes and organs of their bodies and in any commodities developed from these sources.<sup>198</sup> The minor premise provides that a child is a product of one’s genetic issue. The logical conclusion is thus that the genetic donor should have property rights or quasi-property rights in the child. There is however, a problem with this argument:

‘One may possess property rights in their genetic issue but they most certainly do not possess property rights in the results of their genetic contributions; children are not property that can be owned. Thus, while one may have something approximating property rights in his or her gametes, their status with regard to an embryo is less certain. But certainly, upon birth, the property metaphor is no longer apposite. It is surely, not fitting. The production of gametes does not establish the according of

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<sup>192</sup> Horsey K, ‘Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements’, 459.

<sup>193</sup> Horsey K, ‘Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements’, 455;

See O’Donovan K, ‘A Right to Know One’s Parentage?’ 2 *International Journal of Law and the Family* 1988, 27-45.

<sup>194</sup> Horsey K, ‘Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements’, 459-460.

<sup>195</sup> Horsey K, ‘Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements’, 459.

<sup>196</sup> Hill J.L, ‘What Does it Mean to be a ‘Parent’? The Claims of Biology as the Basis for Parental Rights’, 391.

<sup>197</sup> Horsey K, ‘Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements’, 471.

<sup>198</sup> Hill J.L, ‘What Does it Mean to be a ‘Parent’? The Claims of Biology as the Basis for Parental Rights’, 391.

parental rights. For the genetic donor to argue that he or she has a claim to parent the child, it must be by virtue of some other form of contribution to the procreational arrangement.’<sup>199</sup>

The sale of children is prohibited by international conventions.<sup>200</sup> Children, like all human persons, are deserving and possessive of human dignity that is inherent in all.

The missing link in the previously mentioned methods of parenting is filled in by intention based parenthood. Intention here encompasses the motivation to have a child, initiation and involvement in the procreative process and a commitment to nurture and care.<sup>201</sup> Kirsty Horsey raises four specific arguments,<sup>202</sup> originally raised by Hill, for the recognition of intention-based parenthood in surrogacy arrangements whose underlying message is that:

‘The use of reproductive technology is an unambiguous indicator of intent. Users of such technology intend to produce a child and intend to accept the responsibility of caring for it. Use of the surrogate method, manifesting procreative intent, should invoke the legal presumption that the child belongs to the intenders.’<sup>203</sup>

The first argument is the prima facie importance of the commissioning parents in the procreative relationship.<sup>204</sup> Without their initiative, the conception and birth of the child could not have happened.<sup>205</sup> The conception is commissioned by them.<sup>206</sup> The second argument picks up from the first: the commissioning parents commissioned the conception of the child and *intend to be ones actively involved in its care* (emphasis own).<sup>207</sup> This implies that parenthood actually involves more than the genetic and gestational elements.<sup>208</sup>

Thirdly, leaving room for the transfer of parenthood permits the surrogate to go back on her word, when, by contracting with the commissioning parents, her stated intention was always

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<sup>199</sup> Hill J.L., ‘What Does it Mean to be a ‘Parent’? The Claims of Biology as the Basis for Parental Rights’.

<sup>200</sup> Article 1, *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, 18 January 2002.

<sup>201</sup> Horsey K, ‘Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements’, 455.

<sup>202</sup> She raises these arguments in her article ‘Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements’, 457-458.

<sup>203</sup> Levitt J, ‘Biology, Technology and Genealogy: A Proposed Uniform Surrogacy Legislation’, 470.

<sup>204</sup> Hill J.L., ‘What Does it Mean to be a ‘Parent’? The Claims of Biology as the Basis for Parental Rights’, 414.

<sup>205</sup> Hill J.L., ‘What Does it Mean to be a ‘Parent’? The Claims of Biology as the Basis for Parental Rights’, 414.

<sup>206</sup> Cook R, ‘Donating Parenthood: Perspectives on Parenthood from Surrogacy and Gamete Donation’ in Bainham A, Sclater S.D and Richards M (eds), *What is a Parent? A Socio-Legal Analysis*, Hart Publishing, Oxford and Portland, 1999, 135.

<sup>207</sup> Horsey K, ‘Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements’, 457.

<sup>208</sup> Hill J.L., ‘What Does it Mean to be a ‘Parent’? The Claims of Biology as the Basis for Parental Rights’, 414

to relinquish the child.<sup>209</sup> Intention is an important contractual element that creates binding contracts.<sup>210</sup> The surrogate mother should not be allowed any room to change her mind. The following has been said about honoring the parties' intentions:

'Legal rules governing modern procreative arrangements and parental status should recognize the importance and the legitimacy of individual efforts to project intentions and decisions into the future. Where such intentions are deliberate, explicit and bargained for, where they are the catalyst for reliance and expectations...they should be honored.'<sup>211</sup>

The final reasons are pragmatic.<sup>212</sup> There is need for certainty and uniformity: commissioning parents should know from the outset that they will be presumed legal parents and are responsible for the child's well-being. This would mean that determination of parenthood in surrogacy arrangements need not be settled by court order. It should be determined from the onset, by law. Eventually, due to the certainty attached to the process, only those most committed to surrogacy would consider being surrogate mothers.<sup>213</sup>

Surrogates are not passive; they deliberately choose to act as surrogates, especially in countries, such as ours, where commercial surrogacy is an impossibility and it is done with altruistic motives.<sup>214</sup> As a matter of fact, should she so choose, the burden should lie with her, to show that the legal parenthood should be altered and awarded to her; otherwise she should be held to the agreement.<sup>215</sup>

Naturally, this line of argument begs the question of what happens to children who are born to families where intentions have changed.<sup>216</sup> In such a case, where for instance, the child is born disabled and is rejected on that basis,<sup>217</sup> the certainty argument would continue to work. The commissioning parents would be held to their agreement, on the basis of their intention.<sup>218</sup> The

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<sup>209</sup> Horsey K, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements', 458.

<sup>210</sup> Elliott C and Quinn F, *Contract Law*, 60.

<sup>211</sup> Schultz M.M, 'Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality' *Wisconsin Law Review*, 1990, 297, 302.

<sup>212</sup> Horsey K, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements', 458.

<sup>213</sup> Childlessness Overcome Through Surrogacy (COTS), 'Do Many Surrogates Keep the Baby?' at <http://www.surrogacy.org.uk/FAQ4.htm> on January 10, 2017.

<sup>214</sup> Horsey K, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements', 463.

<sup>215</sup> Horsey K, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements', 463.

<sup>216</sup> Horsey K, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements', 464.

<sup>217</sup> Calls for clearer surrogacy rules after Thai Down's case, BBC News, Aug. 3, 2014 - <http://www.bbc.com/news/world-asia-28627374> on January 18, 2017.

<sup>218</sup> Horsey K, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements', 474.

law currently gives room for such an occurrence and places the responsibility of the child on the surrogate mother, when the child was one that she never intended to have.<sup>219</sup>

### 3.4 Conclusion

The distinction between legal parents is important as legal parents will remain parents for life.<sup>220</sup> Families change as society continues to transform, evidently; and in recognition of this, the method of determining legal parenthood must also be reformulated.<sup>221</sup> Other elements than intention may be valued, but they are surely unnecessary as it is rather clear that neither the genetic, sexual or gestational elements are necessary for successful parenting.<sup>222</sup> The recognition of intention more precisely reflects the expected outcome for all the parties concerned:<sup>223</sup> the commissioning parents intend to be parents and the surrogate mother intends to have a child for others.<sup>224</sup> Quite important to note is that the surrogacy contract is not the sale of a child.<sup>225</sup>

The recognition of intention based parenthood would mean that the determination of parenthood in surrogacy arrangements is no longer subject to court orders,<sup>226</sup> simplifying the process of acquiring parenthood and avoiding the plethora of problems outlined herein.

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<sup>219</sup> Horsey K, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements', 474.

<sup>220</sup> Bainham A, 'Parentage, Parenthood and Parental Responsibility: Subtle, Elusive Yet Important Distinctions' in Bainham A, Sclater S.D and Richards M (eds), *What is a Parent? A Socio-Legal Analysis*, Hart Publishing, Oxford and Portland, 1999, 34.

<sup>221</sup> Horsey K, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements', 474.

<sup>222</sup> Cook R, 'Donating Parenthood: Perspectives on Parenthood from Surrogacy and Gamete Donation' in Bainham A, Sclater S.D and Richards M (eds), *What is a Parent? A Socio-Legal Analysis*, Hart Publishing, Oxford and Portland, 1999, 136.

<sup>223</sup> Horsey K, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements', 472.

<sup>224</sup> Horsey K, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements', 470.

<sup>225</sup> Epstein R. A, 'Surrogacy: The Case for Full Contractual Enforcement', 2322.

<sup>226</sup> Horsey K, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements', 458.

## **CHAPTER FOUR: REVIEW OF THE REGULATORY FRAMEWORK ON SURROGACY IN THE UNITED KINGDOM AND SOUTH AFRICA**

### **4.1 Introduction**

The practice of surrogacy was first legislated in the United Kingdom in the Surrogacy Arrangements Act of 1985. Not long thereafter, the HFEA 1990 was enacted, and it provided a more comprehensive legal framework while also serving to amend the first Act. In 2008, HFEA was also amended.

The laws of the United Kingdom merely serve as guidelines for the Kenyan courts based on the relationship the two countries have as commonwealth states.<sup>227</sup> Their laws are not enforceable in Kenyan courts.<sup>228</sup> This is not entirely adverse as the laws of the two countries because our legal systems only agree until a certain point where there are points of contention, for instance, the legality of same-sex couples' registration as the parents of the child.

Much closer to the Kenyan legal system and one from which Kenyan laws have heavily borrowed before, is the South African legal system, including the Constitution and the Children's Act of 2005.<sup>229</sup> The Children's Act of 2005 expressly provides for the practice of surrogacy, and accompanying issues such as who the legal parents of the child are. Research also indicates that is also the only African country that has comprehensively legislated the law of surrogacy.

The two jurisdictions chosen for this comparative study have been identified for the different things they bring to the table. The choices have also been limited to these two, as they illustrate, most closely, the model that is considered most appropriate for Kenya. The first choice, the United Kingdom, is illustrative of a model that includes transfer of parenthood, since the child's parents are, at first, the surrogate parents. The second choice, South Africa, uses a different model, where the child is recognized, from birth, as being the commissioning parents' child.

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<sup>227</sup> Lumbasyo R.A, 'Towards a Kenyan legal and Ethical Framework on Surrogacy' University of Witwatersrand, Johannesburg, 2015, 43.

<sup>228</sup> Lumbasyo R.A, 'Towards a Kenyan legal and Ethical Framework on Surrogacy' University of Witwatersrand, Johannesburg, 2015, 43.

<sup>229</sup> Lumbasyo R.A, 'Towards a Kenyan legal and Ethical Framework on Surrogacy' University of Witwatersrand, Johannesburg, 2015, 44.

## **4.2 Regulatory Framework on Surrogacy in the United Kingdom**

### **4.2.1. The Surrogacy Arrangements Act (as amended in 2008)**

This Act is relevant for its definition of a surrogate mother as a woman who carries a child in pursuance of an arrangement made before she began to carry the child, and made with a view to any child carried in pursuance of it being handed over to, and the parental rights being exercised (so far as practicable) by, another person or other persons.<sup>230</sup>

### **4.2.2. The Human Fertilisation and Embryology Act 2008**

One of the reasons for which this Act was enacted was to make provision about the persons who in certain circumstances are to be treated in law as the parents of a child.<sup>231</sup> This is an important inclusion in the law of assisted reproduction as such a lacuna creates uncertainty, resulting in an inconsistent interpretation of the law.

#### *a. Meaning of Mother*

The woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child.<sup>232</sup>

#### *b. Meaning of Father*

If at the time of the placing in her of the embryo or of the sperm and eggs or of her artificial insemination, the surrogate mother was a party to a marriage, and the creation of the embryo carried by her was not brought about with the sperm of her spouse, her spouse is to be treated as the father of the child unless it is shown that he did not consent to the placing in her of the embryo or the sperm and eggs or to her artificial insemination, as the case may be.<sup>233</sup>

If the surrogate mother is not married, but:

- (a) the embryo or the sperm and eggs were placed in her, or she was artificially inseminated, in the course of treatment services provided in the United Kingdom by a person licensed to do so;
- (b) at the time when the embryo or the sperm and eggs were placed in the surrogate mother, or at the time of artificial insemination, the agreed fatherhood conditions were satisfied

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<sup>230</sup> Section 1(2), *Surrogacy Arrangements Act 1985* (United Kingdom).

<sup>231</sup> Introductory Text, *Human Fertilization and Embryology Act 2008* (United Kingdom).

<sup>232</sup> Section 33, *Human Fertilization and Embryology Act 2008* (United Kingdom).

<sup>233</sup> Section 35, *Human Fertilization and Embryology Act 2008* (United Kingdom).

in relation to a man, in relation to treatment provided to the surrogate mother under the licence;

(c) the man remained alive at that time; and

(d) the creation of the embryo carried by the surrogate mother's sperm was not brought about with the man's sperm;

the man is to be treated as the father of the child.<sup>234</sup>

The agreed fatherhood conditions are as follows:<sup>235</sup>

a) The man has consented to being treated as the father of any child resulting from treatment provided to the surrogate mother;

b) The surrogate mother has given her consent to the treatment of the man as such;

c) Neither the man nor the surrogate mother has at any time withdrawn their consent to the treatment of the man as the father of the child;

d) The surrogate mother has not given her consent to the treatment of another man as the father of the resulting child; and

e) The man and the surrogate mother are not within prohibited degrees of relationship in relation to each other.

Where a person is to be treated as the father of the child by any of the means mentioned above, no other person is to be treated as the father of the child.<sup>236</sup>

Provision is also made for persons who are not to be treated as the father of the child:<sup>237</sup> where a man consensually serves the purpose of a sperm donor, he is not to be treated as the father of the child. In addition to this, where the sperm of a man, or an embryo the creation of which was brought about with his sperm, was used after his death, he is not to be treated as the father of the child, unless he consented to such use before his death. This applies whether the surrogate mother was in the United Kingdom or elsewhere at the time of the placing in her of the embryo or of the sperm and eggs or of her artificial insemination.<sup>238</sup>

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<sup>234</sup> Section 36, *Human Fertilization and Embryology Act 2008* (United Kingdom).

<sup>235</sup> Section 37, *Human Fertilization and Embryology Act 2008* (United Kingdom).

<sup>236</sup> Section 38 (4), *Human Fertilization and Embryology Act 2008* (United Kingdom).

<sup>237</sup> Section 41, *Human Fertilization and Embryology Act 2008* (United Kingdom).

<sup>238</sup> Section 41, *Human Fertilization and Embryology Act 2008* (United Kingdom).

*c. How is parenthood transferred?*

In the United Kingdom, parenthood in cases of assisted reproduction is transferred by way of parental orders.<sup>239</sup> This is provided for in Section 54 of the HFEA.

Two people, referred to as ‘the applicants’ may apply to the court for an order providing for a child to be treated in law as the child of the applicants if:<sup>240</sup>

- (a) the child has been carried by a woman who is not one of the applicants, as a result of the placing in her of an embryo or sperm and eggs or her artificial insemination;
- (b) the gametes of at least one of the applicants were used to bring about the creation of the embryo, and
- (c) the conditions hereunder are fulfilled.

Both of the applicants must have attained the age of 18.<sup>241</sup> The applicants must be either married; in a civil partnership; or two persons who are living as partners in an enduring family relationship and are not within prohibited degrees of relationship in relation to each other.<sup>242</sup> They must apply for the order within 6 months of the day on which the child is born.<sup>243</sup> At the time of making the application, the child must be living with the applicants and either or both of the applicants must be domiciled in the United Kingdom or in the Channel Islands or the Isle of Man.<sup>244</sup>

The court must be satisfied that both the woman who carried the child, and any other person who is a parent of the child but is not one of the applicants, including any man who is the father by the means mentioned above, have freely, and with full understanding of what is involved, agreed unconditionally to the making of the order.<sup>245</sup> This however, does not require the agreement of a person who cannot be found or is incapable of giving agreement; and the agreement of the woman who carried the child is ineffective if given by her less than six weeks after the child’s birth.<sup>246</sup>

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<sup>239</sup> Section 54, *Human Fertilization and Embryology Act 2008* (United Kingdom).

<sup>240</sup> Section 54 (1), *Human Fertilization and Embryology Act 2008* (United Kingdom).

<sup>241</sup> Section 54 (5), *Human Fertilization and Embryology Act 2008* (United Kingdom).

<sup>242</sup> Section 54 (2), *Human Fertilization and Embryology Act 2008* (United Kingdom).

<sup>243</sup> Section 54 (3), *Human Fertilization and Embryology Act 2008* (United Kingdom).

<sup>244</sup> Section 54 (4), *Human Fertilization and Embryology Act 2008* (United Kingdom).

<sup>245</sup> Section 54 (6), *Human Fertilization and Embryology Act 2008* (United Kingdom).

<sup>246</sup> Section 54 (7), *Human Fertilization and Embryology Act 2008*(United Kingdom).

The court must also be satisfied that no money or other benefit, other than for expenses reasonably incurred, has been given or received by either of the applicants for or in consideration of the making of the order; for any agreement to the making of the order; for the handing over of the child to the applicants, or for the making of arrangements with a view to the making of the order, unless authorised by the court.<sup>247</sup>

### **4.3 Regulatory Framework on Surrogacy in South Africa**

#### **4.3.1. The Children's Act, 38 of 2005**

This Act defines a surrogate mother as an adult woman who enters into a surrogate motherhood agreement with the commissioning parent.<sup>248</sup> A surrogate motherhood agreement is 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.<sup>249</sup>

##### *a. The Surrogate Motherhood Agreement*

A surrogate motherhood agreement is only considered as valid if the conception of the child contemplated in the agreement is to be effected by the use of the gametes of both commissioning parents or, if that is not possible due to biological, medical or other valid reasons, the gamete of at least one of the commissioning parents or, where the commissioning parent is a single person, the gamete of that person.<sup>250</sup> The commissioning parent or parents must be unable to give birth to a child and such condition should be permanent and irreversible.<sup>251</sup>

A surrogate motherhood agreement is also rendered invalid unless the following conditions are met:<sup>252</sup>

- (a) the agreement is in writing and is signed by all the parties thereto;

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<sup>247</sup> Section 54 (8), *Human Fertilization and Embryology Act 2008* (United Kingdom).

<sup>248</sup> Section 1, *Children's Act No. 38 of 2005* (South Africa).

<sup>249</sup> Section 1, *Children's Act No. 38 of 2005* (South Africa).

<sup>250</sup> Section 294, *Children's Act No. 38 of 2005* (South Africa).

<sup>251</sup> Section 295, *Children's Act No. 38 of 2005* (South Africa).

<sup>252</sup> Section 292, *Children's Act No. 38 of 2005* (South Africa).

- (b) the agreement is entered into in the Republic;
- (c) at least one of the commissioning parents, or where the commissioning parent is a single person, that person, is at the time of entering into the agreement domiciled in the Republic;
- (d) the surrogate mother and her husband or partner, if any, are at the time of entering into the agreement domiciled in the Republic although the court may dispose of this requirement;<sup>253</sup> and
- (e) the agreement is confirmed by the High Court within whose area of jurisdiction the commissioning parent or parents are domiciled or habitually resident.

Any surrogate motherhood agreement that does not comply with the provisions of the Act, is invalid.<sup>254</sup>

*b. Termination of the Surrogate Motherhood Agreement*

The surrogate motherhood agreement may not be terminated after the artificial fertilisation of the surrogate mother has taken place.<sup>255</sup> That is to say that once the agreement is confirmed, a surrogate mother who is not genetically related to the resultant child cannot terminate the agreement and refuse to hand over the child.<sup>256</sup>

*c. The Legal Parentage of the Child*

Any child born of a surrogate mother in accordance with the surrogate motherhood agreement is for all purposes the child of the commissioning parent or parents, from the moment of the birth of the child concerned.<sup>257</sup> The surrogate mother is obliged to hand the child over to the commissioning parent or parents as soon as is reasonably possible after the birth.<sup>258</sup> The surrogate mother or her husband, partner or relatives have no rights of parenthood or care of the child,<sup>259</sup> and the surrogate mother or her husband, partner or relatives have no right of

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<sup>253</sup> Section 292 (2), *Children's Act* No. 38 of 2005 (South Africa).

<sup>254</sup> Section 297 (2), *Children's Act* No. 38 of 2005 (South Africa).

<sup>255</sup> Section 297 (1) (e), *Children's Act* No. 38 of 2005 (South Africa).

<sup>256</sup> Louw A, 'Surrogacy in South Africa: Should we reconsider the current approach?' 76 *Journal of Contemporary Roman-Dutch Law*, 2013, 564-588, 575.

Section 296, *Children's Act* No. 38 of 2005 (South Africa): No artificial fertilisation of the surrogate mother may take place before the surrogate motherhood agreement is confirmed by the court; or after the lapse of 18 months from the date of the confirmation of the agreement in question by the court.

<sup>257</sup> Section 297 (1) (a), *Children's Act* No. 38 of 2005 (South Africa).

<sup>258</sup> Section 297 (1) (b), *Children's Act* No. 38 of 2005 (South Africa).

<sup>259</sup> Section 297 (1) (c), *Children's Act* No. 38 of 2005 (South Africa).

contact with the child unless provided for in the agreement between the parties.<sup>260</sup> The child will have no claim for maintenance or of succession against the surrogate mother, her husband or partner or any of their relatives.<sup>261</sup>

Any child born as a result of any action taken in execution of an invalid surrogate motherhood arrangement is for all purposes deemed to be the child of the woman that gave birth to that child.<sup>262</sup>

#### **4.3.2. General Ethical Guidelines for Reproductive Health**

The preamble of this document recognizes women's rights to bodily integrity and notes that this must be taken into account when facilitating women in making their own choices. The concept of reproductive health offers a comprehensive and integrated approach to health needs related to reproduction: it puts women at the centre of the process, and recognizes respects and responds to the needs of women. It also notes that women have a unique vulnerability because of their reproductive function and role.<sup>263</sup>

The definition of reproductive health adopted at the conference reads as follows:

'Reproductive health is a state of complete physical, mental and social well-being and not merely the absence of disease and infirmity, in all matters relating to the reproductive system and to its functions and processes. Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how to do so. Implicit in this last condition are the right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility which are not against the law, and the right of access to appropriate health care service that will enable women to go safely through pregnancy and childbirth'.<sup>264</sup>

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<sup>260</sup> Section 297 (1) (d), *Children's Act* No. 38 of 2005 (South Africa).

<sup>261</sup> Section 297 (1) (f), *Children's Act* No. 38 of 2005 (South Africa).

<sup>262</sup> Section 297 (2), *Children's Act* No. 38 of 2005 (South Africa).

<sup>263</sup> Health Professions Council Of South Africa, *Guidelines for Good Practice in the Health Care Professions: General Ethical Guidelines for Reproductive Health*, 2008, Preamble-  
<[http://ipasa.co.za/Downloads/Ethics%20and%20Professional%20Practice/Health%20Professions%20Council/booklet\\_13\\_reproductive\\_health.pdf](http://ipasa.co.za/Downloads/Ethics%20and%20Professional%20Practice/Health%20Professions%20Council/booklet_13_reproductive_health.pdf)> on January 10, 2017.

<sup>264</sup> UN Department for Policy Coordination and Sustainable Development, *Report on the Fourth World Conference on Women*, 4-15 September 1995, para 94.

This would serve to provide women with the best chance of having a healthy infant.<sup>265</sup>

In the section discussing surrogacy, the document notes that special attention has to be made to the ethical principle of protection of the surrogate mother who can be exploited because of her socioeconomic status.<sup>266</sup> The autonomy of the surrogate mother should also be respected and the surrogate arrangement should not be commercialized.<sup>267</sup>

#### **4.4 Conclusion**

The two states studied, United Kingdom and South Africa, have different stands on the legal parentage of the resulting child. The United Kingdom's practice dictates that the surrogate mother is the legal mother of the resulting child and her spouse or another man who so agrees is the legal father. However this state of parenthood is easily transferrable by way of a parental order. South Africa on the other hand, indicates that the resultant child is considered for all intent and purposes as the child of the commissioning parents.

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<sup>265</sup> Health Professions Council Of South Africa, Guidelines for Good Practice in the Health Care Professions: General Ethical Guidelines for Reproductive Health, 2008, Preamble-  
<[http://ipasa.co.za/Downloads/Ethics%20and%20Professional%20Practice/Health%20Professions%20Council/booklet\\_13\\_reproductive\\_health.pdf](http://ipasa.co.za/Downloads/Ethics%20and%20Professional%20Practice/Health%20Professions%20Council/booklet_13_reproductive_health.pdf) > on January 10, 2017.

<sup>266</sup> Health Professions Council Of South Africa, Guidelines for Good Practice in the Health Care Professions: General Ethical Guidelines for Reproductive Health, 2008, Para 8.2-  
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<sup>267</sup> Health Professions Council Of South Africa, Guidelines for Good Practice in the Health Care Professions: General Ethical Guidelines for Reproductive Health, 2008, Para 8.3-  
<[http://ipasa.co.za/Downloads/Ethics%20and%20Professional%20Practice/Health%20Professions%20Council/booklet\\_13\\_reproductive\\_health.pdf](http://ipasa.co.za/Downloads/Ethics%20and%20Professional%20Practice/Health%20Professions%20Council/booklet_13_reproductive_health.pdf) > on January 10, 2017.

## CHAPTER FIVE: FINDINGS, RECOMMENDATIONS AND CONCLUSIONS

### 5.1 Introduction

This chapter aims to conclude the research undertaken. It shall outline the findings, recommendations and conclusions of the study. The main aim of the study was to analyse the relationship between the right to surrogacy and the legal parentage of the resulting child.

### 5.2 Findings

#### 5.2.1 The Reproductive Health Care Bill

The study found that there is no Act governing the practice on surrogacy which is an integral part of reproductive health care.<sup>268</sup> As the right to reproductive health care is one that is provided for in the Constitution,<sup>269</sup> it is imperative that it is protected by law. There has been proposed a Bill and it is acknowledged that this is necessary progress.<sup>270</sup> However, this Bill has not sufficiently addressed the issues that present in the unique situations that are surrogacy arrangements. Specifically targeted by this study is the fact that it has made no mention of the legal parentage of the resulting child.

This has resulted in an inconsistency in the judgments issued by the judiciary, with one court declaring the genetic mother the legal mother, and another declaring the surrogate mother the legal mother. This creates uncertainty, for the various parties involved in the surrogacy agreement and plagues the beginning of the child's life with tiresome litigation that can be avoided by legislation that would function as a yardstick for such decisions.

#### 5.2.2 The Right to Surrogacy

Human rights can be assessed according to what interests they aim to protect and what claims they may entitle its holders to make.<sup>271</sup> The study found that a right to surrogacy as a right to

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<sup>268</sup> Twine F.W, *Outsourcing the Womb: Race, Class and Gestational Surrogacy in a Global Market*, 81.

<sup>269</sup> Article 43(1) (a), *The Constitution of Kenya* (2010): Every person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care.

<sup>270</sup> The 11<sup>th</sup> Parliament, The Senate, Bills Tracker as at 12.02.2016:

<http://www.parliament.go.ke/the-senate/house-business/bills-tracker> on March 8 2016: At its second reading, the Reproductive Health Care Bill was unanimously supported by 25 votes to nil. At present, it has been passed with amendments.

The 11<sup>th</sup> Parliament, the National Assembly, Official Report, Thursday 1st December 2016 <http://www.parliament.go.ke/the-national-assembly/house-business/hansard> on 12 December 2016: The amended Bill was read a First Time in the National Assembly on the first day of December and committed to the Departmental Committee on Health for consideration.

<sup>271</sup> Straehle C, 'Is There a Right to Surrogacy?', 2.

assisted procreation would be adjudged unintelligible to the extent that it is not possible to promise the effective protection of the interest at stake, where the protection requires the collaboration of a third party who in this case, is the surrogate mother.<sup>272</sup> There is no valid claim one may make against any other party along the line of the duties owed to them.

This is not the case however, when one has been bound up in a contract by their own doing. There are consequences for breach of contract that one must comply with if they go back on their word. There are also safe-guards in place to protect those who are considered the weaker parties in contractual relationships. The doctrine of freedom of contract states that there is no conflict between contractual freedom and contractual justice, as contractual freedom can only be exercised in voluntary agreements with fair terms.<sup>273</sup> Unfair contracts cannot be claimed valid by appealing to contractual freedom.<sup>274</sup> In this way, surrogacy agreements, when entered into, are an exercise of the freedom of contract for as long as the terms remain fair.

This research therefore found that the right to surrogacy is only enforceable as a contractual right.

### **5.2.3 The Legal Parentage of the Child**

It was established in Chapter three that intention to parent should operate as the pre-birth determinant in ‘awarding’ parental status when a child is born.<sup>275</sup> Intention here encompasses the motivation to have a child, initiation and involvement in the procreative process and a commitment to nurture and care.<sup>276</sup>

This qualification is the most prudent as without the commissioning parents, the conception of the child would not have come about; they fully intend to be involved in the upbringing of the child; allowing otherwise gives the surrogate mother room to renege on her word; and intention based parenthood creates certainty that is in the best interests of the child as only those entirely committed to surrogacy would consider acting as surrogate mothers.<sup>277</sup>

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<sup>272</sup> Straehle C, ‘Is There a Right to Surrogacy?’, 6.

<sup>273</sup> Rödl F, ‘Contractual Freedom, Contractual Justice, and Contract Law (Theory)’, 62.

<sup>274</sup> Rödl F, ‘Contractual Freedom, Contractual Justice, and Contract Law (Theory)’, 62

<sup>275</sup> Horsey K, ‘Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements’, 455.

<sup>276</sup> Horsey K, ‘Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements’, 455.

<sup>277</sup> Horsey K, ‘Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements’, 457-458.

The state’s guiding principle on all matters concerning the child is articulated in Article 53 (2), *The Constitution of Kenya* (2010): A child’s best interests are of paramount importance in every matter concerning the child.

## **5.3 Recommendations**

### **5.3.1 The Commissioning Mother should be the Legal Mother**

The legal mother should be she who intended to bring about the creation of the child.<sup>278</sup>

In cases where the commissioning mother, by having her egg fertilized and implanted in the surrogate mother, is also the genetic mother, there is a strong argument for adjudging her the legal mother of the child. The main argument is that although she did not physically bear the child, due to no fault of her own, she intended to bring about its conception and intends to be involved in its upbringing.<sup>279</sup>

When however, due to unavoidable circumstances, the commissioning mother is not the genetic mother of the child, as the commissioning couple have likely utilised an egg donor, the argument has to be solely based on the intention to parent. She who shows that she is incapable of having children of her own and intends to be part of the parental unit responsible for the resulting child, should be adjudged the legal mother of the child.

The commissioning parents intend to be parents and the surrogate mother intends to have a child for others.<sup>280</sup> This should be the underlying argument.

### **5.3.2 The Commissioning Father should be the Legal Father**

The determination of who the legal father is, is not as complicated as the determination of the legal mother. Ordinarily, the resulting child is related to its father and he is registered as the legal father of the child in the first instance.<sup>281</sup>

However, this is based on the genetic relationship, which would suffice in cases of the normal conception of children. Surrogacy arrangements present unique and many times, unprecedented situations. Sometimes, only one parent has a genetic link to the child and it

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<sup>278</sup> Horsey K, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements', 455.

<sup>279</sup> Horsey K, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements', 457-48.

<sup>280</sup> Horsey K, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements', 472.

<sup>281</sup> In *A.M.N & 2 others v Attorney General & 5 others* [2015] eKLR, the Court noted that: 'the father is actually genetically the father of the children and so how can he adopt his own children?' It then proceeded to state that for that reason, it was not interested in determining legal fatherhood; but only the question of who the legal mother is.

would be undesirable to distinguish between parents by dictating that parenthood is based on genetics,<sup>282</sup> as has been the case before.<sup>283</sup>

### **5.3.1 Amendment of the Reproductive Health Care Bill**

The Reproductive Health Care Bill, before being passed as an Act, needs amendment to include provisions on the legal parentage of the resulting child, as this is an area of great contention in the practice of surrogacy.

It is not enough to indicate that the surrogate mother, being the birth mother, is the legal mother of the child and then provide for the transfer of parenthood. This gives room for the surrogate mother to renege.<sup>284</sup>

The Bill should indicate as the South African law does, that ‘any child born of a surrogate mother in accordance with the surrogate motherhood agreement is for all purposes the child of the commissioning parent or parents, from the moment of the birth of the child concerned’.<sup>285</sup>

## **5.4 Conclusion**

The right to surrogacy has been analysed and it has been concluded, through an analysis of human rights and their determining standards, that such a right cannot be defended as a reproductive right. It would instead be more cogent as a contractual right.

The status of parenthood was also examined and it was found that the standard model of parenthood, that is, one based on genetics, would not be the best fit for surrogacy arrangements as they present unique situations. This study has analysed three determinants of parenthood: genetic factors, gestational reasons and intention to parent. It has been concluded that while traditionally, intention to parent, genetics and gestation in the child bearing process have always intersected, in surrogacy arrangements, each of these functions may be found in a different party.<sup>286</sup> The practice of surrogacy thus calls for the analysis of who has the intention to parent as the determining factor in order to enforce the intention of the parties to surrogacy agreements.

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<sup>282</sup> Horsey K, ‘Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements’, 459.

<sup>283</sup> Horsey K, ‘Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements’, 459.

<sup>284</sup> Horsey K, ‘Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements’, 458.

<sup>285</sup> Section 297 (1) (a), *Children’s Act* No. 38 of 2005 (South Africa).

<sup>286</sup> Horsey K, ‘Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements’, 452, 455.

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