

**LEGAL PARENTAGE IN SURROGACY ARRANGEMENTS: AN IMMEDIATE
CONCERN IN KENYA**

By

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[G62/65671/2010]

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DECLARATION

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God bless you all.

DEDICATION

I dedicate this thesis to all women whose desire is to become mothers through the surrogacy process. I have provided a foundation for a legal framework to protect your interests.

I also dedicate this work to my children and encourage them never to give up in their pursuit for their dreams and aspirations.

To my dear father and mother who were my constant encouragers and supporters in pursuit of my Master of Laws (LLM) degree.

ABBREVIATIONS AND ACRONYMS

ACHPR	: African Charter on the Human and Peoples Rights 1981;
Agreement	: the Surrogacy Parenthood Agreement;
AID	: Artificial Insemination with Donors sperm
AIH	: Artificial Insemination with Husband's sperm;
AMN Case	: AMN & 2 others v Attorney General & others (2005) eKLR;
Arrangements	: Surrogacy Arrangements;
Convention	: The United Nation's Convention on the Rights of the Child 1990;
Covenant	: International Covenant on Civil and Political Rights 1966;
HC	: High Court
HFEA	: Human Fertilization and Embryology Act 2008, Laws of the UK;
Hague Convention	: Hague Convention on Protection of the children and Co-operation in Respect of the intercountry Adoption
ICESCR	: International Covenant on Economic, Social and Cultural Rights;
IUI	: Intra-Uterine Insemination;
IVF	: In vitro fertilization;
JLN Case	: JLN & 2 others v Director of Children Services Act (2014) eKLR;
KLR	: Kenya Law Reports
NCCS	: National Council for Children's Services
s	: section;
The SAA	: The Surrogacy Arrangements Act 1985 Laws of the UK;
The US	: The United States of America;
UDHR	: The Universal Declaration of the Human Rights 1948;
UK	: The United Kingdom;
UPA	: Uniform Parentage Act

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1. *A v C* [1985] FLR 445
2. *Aldridge v Keaton*, (2009) FamCAFC 229
3. *AMN & 2 others v Attorney General & others* [2005] eKLR
4. *Anna J v Mark C* [1991] California App 3d 1557
5. *Ashish Ranjan v Anupama Tandon* Contempt Petition Civil No394 of 2009 Supreme Court of India
6. *Blew v Verta* [1992] 617(PA) 31.
7. *Braiman v Braiman* 378 N.E. 2D 1019 (1978)
8. *Brooks v Blunt* [1923] 1 KB 257
9. *Demer v Gaiety* [1971] 92N.M749
10. *Doe v Kelley* [1981]106 Michigan Application number 169
11. *Ex Parte Matter between WH and 3 others* Case No.236 of 2011, in the North Gauteng High Court, Pretoria (Republic of South Africa)
12. *Gaurav Nagpal v Sumedha Nagpal* Civil Appeal No 5099/2007 Supreme Court of India
13. *JLN & 2 others v Director of Children Services Act* [2014] eKLR
14. *L.N.W V Attorney General & 3 others* [2016] eKLR
15. *Parker v Parker* [1954] All ER 22
16. *Poole v Stokes* [1914] 110LT 1020
17. *Mausami Ganguli V Jayant Gaunguli* (2008) 75 CC673
18. *Rice v Miller* (1993) 76 Fem LR 970
19. *Re Baby M* [1988] 109 N.J. 396
20. *Re D & L* [2012] EWHC 263
21. *Re Shirks* 350P 2d 1 at 11-14

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22. *Republic v Senior Resident Magistrate Mombasa ex parte HL & Another* [2016] Eklr
 23. *Roe v Wade* [1943] 410 US 113
 24. *Strnad v Strnad* [1948] Supreme Court 190 Miscellaneous 2d 390, 391-2 N.Y.
 25. *Vikram Vir Vohra v. Shalinio Bhalla, Civil Appeal No. 2704/2010*

STATUTES

Kenya

Children Act, Act No. 8 of 2001 Laws of Kenya

Marriage Act No. 4 of 2014 Laws of Kenya

The Constitution of Kenya 2010

United Kingdom

Adoption Act 2002, Laws of the UK

The Human Fertilization and Embryology Act 2008, Cap 22 Laws of the UK

The Surrogates Arrangement Act 1985, Cap 49 Laws of the UK

South Africa

Children Act South Africa

Children Status Act South Africa

India

India Surrogacy Arrangements and Assisted Reproduction Technology Clinic Guidelines
2006

Indian Contract Act 1872

The Indian Assisted Reproductive Technology Regulation Bill 2010.

Sweden

Children and Parents Order

In-Vitro Fertilization Act (repealed);

The Genetic Integrity Act (2006)

US

Uniform Parentage Act: US

International Instruments

African Charter on the Human and Peoples' Right 1981

International Covenant on Civil and Political Rights 1966

International Covenant on Economic, Social and Cultural Rights 1976

United Nation's Convention on the Rights of the Child 1990

Universal Declaration on Human Rights 1948

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ABSTRACT

This study is divided into four chapters. Chapter one is a broad overview and layout of the research. It outlines the research project. This provides an overview of the essence of the research. It covers the background of the research, the statement of the problem, justification of the study, objectives of the study, hypothesis of the study, theoretical framework, literature review, methodology to be used and the limitations of the study.

Chapter two highlights the critical factors considered when entering in legal parentage agreements in surrogacy arrangements. This chapter interrogates the arguments for and against surrogacy arrangements. The legal challenges that compound and undermine the surrogacy arrangements are also ventilated. It also outlines the contemporary challenges which are associated with the surrogacy arrangements owing to the fact that its evolving nature coupled with the use of technology which presents new challenges for the regulation of this practice.

Chapter three discusses the current legal provisions that support legal parentage in surrogacy arrangements under the Constitution of Kenya, 2010 together with international instruments, and local pieces of legislation including the Children Act. This chapter also draws comparative parallels from best practices that Kenya can adopt from the UK; India; SA and US. It appraises, criticizes and highlights the shortcomings of the current provisions and seeks to propose the best practices applicable in the Kenyan jurisdiction. This Chapter also reviews local cases which have addressed issues surrounding legal parentage in surrogacy arrangements in Kenya.

Chapter four is the final chapter of the study. It succinctly summarizes all the chapters of this study while highlighting the fundamental policy and principles discussed in all the previous chapters. This chapter also discusses the recommendations which should be adopted to ensure the enactment of a comprehensive Act of Parliament to govern surrogacy practice in the Republic of Kenya.

CHAPTER ONE

The origin of families is as old as the stories of creation. Since the family was founded, consanguineous parturition has been profoundly crucial in fulfilling mental, emotional and psychological satisfaction of couples. Today, we cannot ignore the fact that worldwide, a family unit comprises of many different forms. The forms notwithstanding, all societies remain regardful of the position and importance of the children in the constitution of the family unit as well as perpetuation of successive growth of community. In fact, since origination of the institution of the family, victims of childlessness have suffered and continue to suffer heartrending feelings of physiological incompleteness attended with pain and gloominess from implicit stigma of barrenness or sterility. To extenuate the pain of childlessness from infertility or incessant abortion of pregnancies, the childless couples have, over the centuries grown succession to their families through traditional surrogacy and assimilative adoption of children born of others.¹

1.0 Introduction

The origin of families is as old as creation stories². Article 45 of the Constitution of Kenya 2010 clearly spells out the aspects of a family. *“The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition economic and social rights.³”* Under the Constitution therefore a man and a woman on mutual agreement are sufficient to constitute a family. Today, we cannot ignore the fact that worldwide, a family unit comprises of many different forms⁴. The forms notwithstanding, almost all societies cannot ignore the fact that children are very important constitute of the family unit. It is also accepted that children are not necessarily born in close neat families, in some cases there are raised by single mothers and single fathers.

¹ Tim Appleton, ‘Emotional Aspects of Surrogacy: A Case for Effective Counselling and Support’ in R Cook, SD Sclater, with F Kaganas (eds), *Surrogate Motherhood : International Perspectives* (Hart Publishing : Oxford,2003) 200 as cited in , E., 2010. “Medical Law: Text, Cases and Materials”, 2nd Edition, New York : Oxford , p.829.

² Genesis Chapter 2. The Bible New International Version.

³ Article 45 of the Constitution of Kenya , 2010

⁴ Aldridge v Keaton, (2009) FamCAFC 229, a decision of the Full Court of the Family Court of Australia, their Honours said at paragraph [77]. However in Kenya sec 3 of the Marriage Act does not recognize same sex marriages.

Men and women who are unable to have children⁵ due to infertility⁶, sterility, genetic incompatibilities, physical handicaps; where the mother (commissioning parent) has a medical condition that makes her pregnancy dangerous both to herself and the baby⁷; may seek assisted reproduction or assisted reproductive technologies to be parents and feel complete.⁸ In some cases women who are either incompatible or uncomfortable with the body changes that attend pregnancy and lactation period⁹ also may seek assisted reproduction or assisted reproductive technologies to be parent.¹⁰

Traditional Surrogacy¹¹ and Adoption¹² have been available as means of non-biological parents acquiring parentage and parental responsibility. However over the years these practices have failed to lend couples the satisfaction achieved in passing a heritage with their bloodline.¹³ Adoption processes have also become uncertain and lengthy hence people have

⁵*Ibid.* In elucidating the contemporary change in societal practice the author explains that in traditional society, the birth parents “gives to” the adoptive parents whereas in western adoption the birth parents “gives up” or “gives away” her child.

⁶Winborne Wesley, *Handling Pregnancy and Birth Cases* West legal Publisher (1983) p.252. The author explains that research findings found that between one in six and one in fifteen couples of reproductive age experience infertility, which is defined as the inability to conceive after one year of intercourse without contraception. Causes of female infertility include: removal of uterus, premature menopause, effects of chemical or mechanical contraception such as pelvic inflammatory disease associated with the use of intra-uterine device, the effects of sexually transmitted diseases, spontaneous and induced abortion, alcohol and tobacco consumption, non-prescription and illicit drugs and some environmental and industrial pollutants and irreversible voluntary sterilisation.

⁷ Caster Austin, ‘Don’t Split the Baby: How the US Could Avoid Uncertainty and Unnecessary Litigation and Promote Equality by Emulating the British Surrogacy Law Regime’ (2011) *Connecticut Public Interest Law Journal Volume 4* p. 3. The author explains that fertile couple may seek a surrogate mother when the female cannot physically bear a pregnancy, such as when she is affected by a heart condition or when she may transmit a harmful genetic or other congenital condition to a child she might conceive. Other reasons may include conveniences to avoid impact on lifestyle, career or physical appearance. More controversially surrogacy can be an option for homosexual couples wishing to have a child.

⁸ Elizabeth Kane, ‘Surrogate Parenting: A Division of Families, not a Creation’ (1989) *Journal of International Feminist Analysis Volume 2* p.2.

⁹ Jackson, E., 2010. “Medical Law: Text, Cases and Materials,” 2nd Edition, New York : Oxford , pp.828-829.

¹⁰ Section 2 of the Children’s Act Act No. 8 of Chapter 141 of the laws of Kenya; the mother or father of a child and includes any person who is liable by law to maintain a child or is entitled to his custody.

¹¹ In the traditional African society some cultures like the Agikuyu allowed woman to woman marriage where a the new bride children would be known as the woman’s children.

¹² Voluntarily taking offering to take up legal parentage and parental responsibility of a child.

¹³ George P. Smith, ‘The Razor’s Edge of Human Bonding: Artificial Fathers and Surrogate mothers,’ (1983) *West New England Law Review Volume 55 Issue 4 Article 2* p.1. Available at <<http://digitalcommons.law.wne.edu/lawreview/vol5/iss4/2>> (Accessed on 11 December 2015).

resorted to partial or gestational Surrogacy arrangements as the most viable option.^{14, 15}. Surrogacy is a less mentally, emotionally and psychologically stressing alternative for person(s) who cannot have children naturally.¹⁶

Different procedures may be carried out during surrogacy, Artificial Insemination¹⁷; Artificial insemination with husband's sperm where physical and physiological difficulties preclude fertilization through sexual intercourse.¹⁸; Artificial insemination with Donors sperm; *Intra Uterine Insemination*; *Invitro fertilization*.

There are two common surrogacy arrangements genetic or partial surrogacy and gestational or full surrogacy. In the genetic surrogacy, the surrogate mother contributes her own egg and the intending father (often) contributes his own sperm. Genetic surrogacy arrangements do not necessarily have to take place in a medical clinic or require any medical treatment.¹⁹ Genetic surrogacy arrangements are sometimes referred to as traditional surrogacy arrangements. The surrogate mother remains biologically related to the child but opts to give up the child to the recipient couple and to relinquish all her rights. This transfer of legal parentage may be done through adoption which is one of the subsidiary legislation under the Children Act²⁰ is the Children (Adoption) Regulations, 2005. One may argue therefore, that some aspects of the Adoption regulations are sufficient to deal with legal parentage in surrogacy arrangements but this paper seeks to demonstrate otherwise.

¹⁴ By Paul Boers, Accredited Specialist, Family Law, Nicholes Family Lawyers

¹⁵ Benard Dickens, 'Do not Criminalize New Reproductive Technologies' *Manchester Guardian Weekly*, 13th Oct. 1996.

¹⁶ *Ibid* 10.

¹⁷ The author explains that there are two principal ways undertaken for human artificial insemination. These are: homologous and heterologous. When semen is secured from a wife's husband and artificially injected by instrument into her reproductive tract, the process is termed homologous or AIH. When semen is obtained from a third party, donor, the process is referred to as heterologous or AID. Artificial insemination is a technique for improved animal husbandry occurred as early as 1322, while the first reported case of human artificial insemination (AIH) was in 1799. Not until the early part of the twentieth century were recorded instances of donor insemination observed. p.1.

¹⁸ *Ibid* 23.

¹⁹ Jadv, V, Murray, C, Lycett, E, MacCallum, F & Golombok, S 2003, Surrogacy: The experiences of surrogate mothers, *Human Reproduction*, vol. 18, no. 10, pp. 2196-204

²⁰ *Supra* note no. 10.

Gestational surrogacy on the other hand occurs where the surrogate mother does not contribute her own egg and involves *in vitro fertilization* (IVF). An embryo is created with the intending parent/s gametes and/or donated gametes/embryos which are then transferred to the surrogate mother's womb. There is therefore a possibility of genetic relationships between the child and the intending parents in a surrogacy arrangement. Gestational surrogacy arrangements are now more common than genetic surrogacy arrangements and are commonly viewed as preferable. An early concern with genetic surrogacy arrangements is that the surrogate mother might have a greater potential for adverse outcomes specifically that it would be more difficult for the surrogate mother to relinquish the child²¹. Arguably, its advantages outweigh those of genetic or traditional surrogacy.

Surrogacy has therefore been expanded precipitously over the years prompted by both scientific advances and transformations in social organizations and gender relations.²² The formulation of surrogacy arrangements like legal parentage arrangements are usually and independently facilitated by the commissioning couples in Kenya. These arrangements exist through the individual efforts and undertakings of the parties to the surrogacy contract. They are largely shrouded in secrecy and mystery.²³ Surrogacy has been in existence in Kenya through informal arrangements.

It is now considered as more of a reproductive arrangement than it is a reproductive technology. This is because it requires more complicated personal arrangements than are usual for bringing a baby into the world.²⁴ In this scenario there is urgent need to have laws that regulate these arrangements and protect the interest of the legal parents (genetic mother;

²¹ Van Den Akker, O (2007), Psychosocial aspects of surrogate motherhood, *Human Reproduction*, vol. 13, no. 1, pp. 53-62

²² Carol Susan, 'Developing Markets in Baby-Making: In the matter of Baby M' (2007) *30 Harvard Journal Law Review* p.23.

²³ Morgan Holcomb et al, When Your Body is Business, *Washington Law Review* (2010) p.12.

²⁴ *Ibid* 3 p.1.

genetic father; non genetic mother; non genetic father or egg donor or sperm donor) of the child and the rights of the resultant child in these arrangements.

This has led to most countries enacting legislations governing procedures for processing and actualizing child adoption and surrogacy practice.²⁵ In Kenya, the current legislative framework is insufficient and there is need to adopt the best international practices to enable good legal parentage surrogacy arrangement practices.

1.1 Statement of the Problem

Kenya has no legislation expressly permitting or prohibiting surrogacy arrangements.²⁶ This greatly compounds the rights of the various parties who are involved in this process. As there is no direction as to the different scenarios of who may be the legal parent and who acquires parental responsibility under surrogacy arrangements parties to these arrangement including the children of the resultant parents are greatly exposed to the social upheavals that occur in the event of a dispute.

The Constitution of Kenya²⁷ Children Act, Registration of Births and Deaths Act²⁸, Law of Succession Act²⁹ and international conventions impliedly protect the rights of the parties involved in Surrogacy Arrangements.³⁰ Ultimately the state is responsible for the fundamental rights of all parents and children, however under the Children's Act the overriding objective is to the best interest of the child.

Kenya has progressed towards making laws for assisted reproduction and health in an effort to protect Surrogacy Arrangements. However, these laws include The in Vitro Fertilization

25 Jana B. Singer, The Privatization of Family Law HeinOnline Citation: Wis L. Rev. 1443 1992.

²⁶ Kenya has made an effort to introduce a Bill in Parliament, the Reproductive Health Care Bill 2014 which seeks to address the issue of surrogacy practice in Kenya.

²⁷ Supra note 3

²⁸ (cap 149) section 12 No person shall be entered in the register as the father of any child except either at the joint request of the father and mother or upon the production to the registrar of such evidence as he may require that the father and mother were married according to law or, in accordance with some recognized custom.

²⁹ Chapter 160 of the laws of Kenya

³⁰ Constitution of Kenya 2010, Article 43(1) (a).

Bill (2014); Reproductive Health Care Bill 2014; The ART Bill 2016. These Bills do not adequately address scenarios of legal parentage with discussions of parental rights and obligations arising from surrogacy agreement.³¹

Inter-country surrogacy arrangements are taking place in Kenya despite the secrecy and lacuna in law addressing legal parentage in surrogacy arrangements. In *A.M.N & 2 others v Attorney General & 5 others*³² (the “AMN case”), the Court was faced with a matter concerning surrogacy agreement and legal parentage. The main issue before the court was determination of the lawful mother of the children. The only remedy available to the non-genetic mother (commissioning mother) was to acquire parentage rights under adoption laws. The effect is the commissioning mother was distressed as the lacuna in the law caused her a job in the UK; the twins born of the surrogacy arrangements were also rendered parentless and stateless³³. In the case of *JLN & 2 others v Director of Children Services Act* (the “JLN case”)³⁴, the court held that the Director of children services was wrong in assuming that he was protecting and caring for the children born of surrogacy arrangements by sending them to a Children’s home. The court held that this act indignified the commissioning parents and surrogate mother and fined the Director of Children Services Kshs. 500,000.00 for damages.

In surrogacy it is possible to have potentially three different players with different maternal rights (donor mother rule; gestational maternity rule and maternity rule) and paternal rights (sperm donor; donor father; commissioning father or non genetic father).

³¹The uncertainty which may arise in relation to the family law status of the commissioning parents the surrogate and her partner and most importantly the child. Jane Stoll, *Surrogacy Arrangements and Legal Parenthood: Swedish Law in a Comparative Context*, 2013. Available at <http://www.diva-portal.org/smash/get/diva2:649875/FULLTEXT01.pdf> (Accessed on 23 September 2016).

³² [2015] eKLR. Petition No.443 of 2014.

³³ In the case of *R: X & Y* where there was a conflict between the Ukrainian and the UK law the courts were empathised with the plight of the child who was rendered stateless and parentless

³⁴ [2014] eKLR

1.2 Justification of the Study

In light of the fact that surrogacy arrangements are increasingly being practiced there is urgent need for the Government to enact comprehensive legal framework addressing all aspects of the surrogacy arrangements. Whereas the Children Act³⁵ only addresses matters in the best interest of the children and parental responsibility, it does not address disputes arising out of legal parentage and parental responsibility surrogacy arrangements. The Act does not even recognize the existence of surrogacy practice in Kenya. Neither does it address the intricate question of whom the legal parent of a child born out of surrogacy arrangement is. The underwhelming legislation and inadequacy of the existent law underpins the motivation and basis for this thesis.

The lack of legislation in Kenya is also another reason for doing this thesis. There is no Kenyan law, at the moment, regulating surrogacy arrangements. Neither is there any Kenyan law prohibiting the same. Accordingly, it is safe to assume that Kenyans may enter into surrogacy arrangements. It is not wrong to conclude that the two cases regarding surrogacy by Lenaola J and Majanja J³⁶ enforced the surrogacy agreements therein under the law of contract where the agreement was taken to be like any other enforceable contractual agreement.

There is apparent need for policy, legal and institutional framework to govern issues arising out of surrogacy arrangements. The Constitution of Kenya stipulates that a child's best interests are of paramount importance in every matter concerning the child. The lack of proper legislation to protect this right undermines express constitutional guarantee. There is need for a legislation in order to adequately protect the best interest of the child as guaranteed

³⁵ *Supra* note 10.

³⁶ *A.M.N & 2 others v Attorney General & 5 others [2015] eKLR* and *JLN & 2 others v Director of Children Services & 4 others [2014] eKLR* respectively.

in the Constitution³⁷ and affirmed in the Children Act.³⁸ This is for the best interest of the child that is born out of surrogacy.

1.3 Objectives of the Study

This study is informed by the following objectives:

- a) To interrogate legal aspects of parenthood following surrogacy arrangements. What are the options for its regulation in the Kenyan context?
- b) To establish whether the current various pieces of legislation regulating legal parentage and parental responsibility rights of the resultant child in Kenya sufficiently protect the legal rights and interests of the donor parent; gestating mother; non-genetic and commissioning parents engaged in surrogacy arrangements.
- c) To assess to what extent Kenya can draw best legal parentage rights and parental responsibility rights of the resultant child in surrogacy arrangements from selected jurisdictions.
- d) To propose a legislative framework for regulating legal parentage and parental responsibility of the resultant child in protecting the rights and interest of the donor parent; gestating mother; non-genetic parent and commissioning parents involved in surrogacy arrangements .

1.4 Research Questions

The study is guided by the following questions:

- a) Do the current various pieces of legislation regulating legal parentage arising out of surrogacy arrangements in Kenya sufficiently protect the legal rights and interest of the genetic parent; gestating mother, non-genetic parent; commissioning parents involved in surrogacy arrangements; if so to what extent?

³⁷ Article 53(2) of the Constitution.

³⁸ Section 6 of the Children Act.

-
- b) Do the current various pieces of legislation regulating parental responsibility practices in Kenya sufficiently attach to the genetic parent; gestating mother; non genetic parent and commissioning parents in the best interest of the resultant child involved in surrogacy arrangements; if so to what extent?
 - c) To what extent can Kenya draw best legal parentage practices in surrogacy arrangements to protect the legal rights and interest of the genetic parent; gestating mother; non genetic parent; commissioning parents from selected jurisdictions?
 - d) To what extent can Kenya draw and attach the best parental responsibility practices to the genetic parent; gestating mother; non genetic parent and commissioning parents in the best interest of the resultant child involved in surrogacy arrangements?

1.5 Research Hypothesis

The starting point for this paper is that it is in the best interests of the child to have parents at birth and that this interest must be prioritized over an intended parent's interest in becoming a parent. This view is based on and consistent with international law. As Jane Stoll notes, in light of the controversial nature of legal parentage in surrogacy arrangements, the ethical implications of surrogacy arrangements are explored. The objective is to gain insight into the way in which values that are subconscious or concealed-values- which we all carry, might make it difficult for a state like Kenya to regulate legal parentage in surrogacy arrangements.³⁹

The current legislative framework in Kenya does not comprehensively address the issues relating to legal parentage and parental responsibility for the resultant child in surrogacy arrangements; Neither does it address the rights of the legal parent(s) norm of this arrangements. The proposed bills *Invitro* Fertilization Bill-2014; The Reproductive Health Care Bill 2014 and The Assisted Reproductive Technology Bill 2016 are an evidence of the

³⁹ See *supra* note 19

progress Kenya has made to address and propose the control, supervision and protection of legal and social rights of the parties affected by surrogacy arrangements as an assisted reproduction. Surrogacy arrangements will certainly be the primary beneficiaries of these proposed pieces of legislation. It is paramount to note, however, that as the lacuna in our legislative framework is being addressed by Parliament, the best practices in other jurisdictions should be adopted in addressing legal parentage and parental responsibility for the benefit and best interest of the child born out of surrogacy arrangements.

1.6 Theoretical Framework

Since the emergence of the feminist movement around 1910,⁴⁰ women have attempted to gain control over their bodies. For centuries, their bodies and reproductive capacities were used to control and oppress them. The feminist movement has attempted to break this mold. Women sought to control their bodies so as not to be prisoners of their biological capacity. An important step towards liberation was the legalization of abortion on demand,⁴¹ which gave women a choice of whether or not to bear children without having to ask anyone's permission.⁴² With the emergence of new reproductive technologies, however, women are faced with new challenges and choices. Some regard these choices as new reproductive freedoms while others view them as other ways for society to continue to control women through their reproductive capacities. Among these new reproductive technologies, surrogacy in particular has alarmed many commentators, especially feminists. Although they have been fighting for years to enable women to gain control over their bodies, many feminists believe that surrogacy is a form of oppression and that the choice for a woman to become a surrogate is really no choice at all.

⁴⁰ For an in depth look at the birth of feminism, see Nancy F. Cott, *The Grounding of Modern Feminism* 13-50 (1987).

⁴¹ See *Roe v. Wade* (1973) 410 U.S. 113, 153 (held that the right to an abortion is grounded in the constitutional right to privacy).

⁴² Diana Frank & Marta Vogel, *The Baby Makers* (1988) Whistleblowers p.93.

Some feminists argue that surrogacy arrangements should not be allowed because the elite upper economic group of people will use the lower economic group of people to make their babies.⁴³ However, within the coming of age, there has been a shift from feminist radicalism to feminist liberalism. The sexual liberals are uncomfortable with focusing on women as objects and victims of male supremacy. They reason that women can choose surrogacy because women need such choices to be free. This research is in line with this latter argument of feminism support of surrogacy arrangements. This is because feminists usually have a saying that goes “my body my choice”. Thus, feminists should be fierce defenders of the right to enter into surrogacy arrangements. When a woman is denied her right to self-ownership, she is denied her dignity.

Several theories have been advanced to support legal parentage in surrogacy arrangements which include *inter alia*:

(a) Genetic Theory of Maternity and Paternity

In most jurisdictions, for a woman or a man to be recognized as a child’s legal mother or legal father, all he or she has to do is to contribute the genetic material needed to conceive the child.⁴⁴ Courts acknowledge that the only way that a woman should be able to voluntarily give her biological child to another woman is by complying with the provisions of the appropriate state adoption statute. Normally, the woman or man who has the biological connection to the child is the child’s natural and legal mother or father. A woman or man can give up that legal status by voluntarily terminating his or her parental right and consenting to the child’s adoption in the manner stipulated by the jurisdiction’s adoption statute.⁴⁵ This same theory applies to traditional surrogacy arrangements. As a result, in order for the intended mother to be recognized as the child’s legal mother, the surrogate has the right to

⁴³ Janice G. Raymond, “Sexual and Reproductive Liberation,” New York Times 2 February 2010 p.64. Available at www.Reproductive Liberalism Ray.pdf (Accessed on 22 October 2015).

⁴⁴ Browne C. Lewis, "Due Date: Enforcing Surrogacy Promises in the Best Interest of the Child", 87 St. John's Law Review 899 (2013).

⁴⁵ Ibid.

change her mind and keep the child. If a gestational surrogate is involved in the case, the surrogate is not recognized as having any maternal rights with regards to the child. In that case, the woman who supplied the genetic material used to conceive the child is deemed to be the child's legal mother.⁴⁶

(b) The Locke Labour Theory

Some courts reason that a woman can earn the right to be a child's legal mother. The underlying principle of the theory is that property ownership is a natural right that a person acquires because of his or her labour.⁴⁷ According to Locke, a person who puts productive labour into creating something is entitled to claim ownership of the object. He further stated that since people own their bodies, they own the labour that stems from their bodies.⁴⁸ During the course of the pregnancy, the gestational surrogate supplies the hormones that are needed to transform the embryo into a unique child. According to this theory, it has been concluded that the surrogate earns the right to be adjudicated as the child's legal mother.⁴⁹ The surrogate acquires some property interest in the child. Courts that take that approach apply the gestation test to recognize the surrogate as the legal mother of the child. The surrogate's role as a gestator qualifies her to be the child's legal mother. Thus the contract is irrelevant. Once her status as a gestator makes her the legal mother, these courts refuse to force the surrogate to give up that title simply because she signed a contract to do so.⁵⁰

⁴⁶ Ibid.

⁴⁷ See Jessica Berg, *Owning Persons: The Application of Property Theory to Embryos and Fetuses*, 40 WAKE FOREST L. REV. 159, 182-83 (2005).

⁴⁸ Ibid.

⁴⁹ Scott B. Rae, *Parental Rights and the Definition of Motherhood in Surrogate Motherhood*, 3 S. CAL. REV. L. & WOMEN'S STUD. 219, 236 (1994). *But see* Shoshana L. Gillers, Note, *A Labor Theory of Legal Parenthood*, 110 YALE L.J. 691, 709-11.

⁵⁰ Ibid.

(c) The Expectation Theory

Despite lack of a biological connection between the woman and the child, some courts may honour a woman and a man's expectations and recognize her as the child's legal mother. One of the primary purposes of the law is to protect people's reasonable expectations.⁵¹ Parties (either single or commissioning couples) in a surrogacy arrangement expect to receive the thing for which they bargained. The surrogate promises to gestate and to surrender the child to the intended parents. In exchange, the intended parents promise to pay the surrogate's expenses and to abide by other terms of the agreement. The court's goal is to ensure that the parties receive the benefit of their bargains. To accomplish that task, the court recognizes and honours the intended parents' expectation that they will be the child's legal parents.⁵² The parties consent and have a freedom of choice and contract with mutual benefit. This study is supported by the expectation theory because of its appreciation of the rights, responsibilities and the duties of all the parties to a surrogacy arrangement in Kenya.

1.7 Literature Review

This study has been inspired and is enriched by a number of writings and publications on the subject of parentage and surrogacy arrangements. It makes numerous references to international publications.

Katharine T. Bartlett in her article, *Surrogate Parenthood: Finding a North Carolina Solution*⁵³ opines that the issue of surrogate parenthood crystallizes a set of tensions between a number of important values relating to family, gender roles and parenthood. She is the opinion that their believe that motherhood is sacred and that mothers and their children should be together makes us sympathetic with a surrogate mother who wants to keep her

⁵¹ Supra note 31.

⁵² Ibid.

⁵³ This article is available at

http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2381&context=faculty_scholarship (Last accessed on 23rd November, 2016).

child but our respect for the reproductive drive of humans, generally makes our understanding as well of the biological father who insists he should have custody of his child. She proceeds to state that our concern for the potential exploitation of women as baby machines fights with our belief that people including women, who make deals should stick to them. The value we place on biological parenthood conflicts with our empathy for couples who are unable to have their own genetic children and our desire to promote adoption of children without parents. Because these values are all important, to us, we want to resolve them correctly the same time, because we believe in all these conflicting values, we cannot help but be ambivalent or torn, the correct moral and legal answers seem all too elusive and intractable.

This article forms a critical basis to this study. However, the paper's contextualization is North Carolina. It therefore does not address the Kenyan situation. This paper discusses the Kenyan context in the context of parentage in surrogacy arrangements.

Browne C. Lewis in his article, *Due Date: Enforcing Surrogacy Promises in the Best Interest of the Child*⁵⁴ addresses the situations where the surrogate reneges on her promise and attempts to keep the child. In particular, the article deals with the adjudication of maternity after the surrogate has breached the agreement by failing to turn the child over to the intended parent or parents. The article contends that contractual surrogacy agreement obligations should be treated like any other contractual obligations. Consequently, courts should take actions to ensure that the intended mother receives the benefit of her bargains by being recognized as the child's legal mother. The appropriate way to accomplish that is to establish a rebuttable presumption that surrogacy contracts should be specifically enforced.

This article is relevant to this study. However, it concentrates on the enforcement of the rights of the parties in a surrogacy arrangement. This paper focuses more on parentage and

⁵⁴*Supra* note 42.

the rights of parties in a surrogacy arrangement. Consequently, the paper is relevant in this perspective.

In an article by J Hunt titled *A Brief Guide to Surrogacy*,⁵⁵ it is submitted that any agreement between a surrogate mother and commissioning parents is not legally enforceable and it is important to have a written surrogacy agreement, to make intentions clear and to provide evidence of intentions to the court in case a dispute arises. The article clearly gives the legal issues, the financial issues, and the procedure for birth registration of the surrogate-child and parental orders arising out of a surrogacy arrangement. The article further talks about international surrogacy arrangements. The entire article is important for this thesis for the reason that the Government of Kenya can borrow what the UK law on surrogacy provides. While the article exclusively talks about the laws of UK, this thesis draws examples from other jurisdictions as well so as to come up with the best policy, legal and institutional frameworks for surrogacy arrangements and legal parentage in Kenya.

A handout by Bianca Jackson titled *My Bun, Your Oven: An Introduction to Surrogacy Law in the United Kingdom*⁵⁶ enumerates that the legal mother of a surrogate child is the woman who carries the child, regardless of whether she is genetically related to that child. This is an irrefutable presumption. The handout highlights a number of court cases showing that commercial surrogacy arrangements are not permitted in the UK. While the UK does not permit commercial surrogacy arrangements, as it seeks to commoditize the surrogate mothers and the resultant child this thesis seeks to convince the law makers that in some instances, commercial surrogacy arrangements should be allowed so long as they are governed by the law to avoid exploitation of the surrogate mothers and safeguard the best interests of the surrogate child. The handout is of much significance to this study as it gives copies of the Acts of Parliaments of UK that govern surrogacy arrangements. These are the Surrogacy

⁵⁵ *Supra* note 1.

⁵⁶ Bianca Jackson, *My Bun Your Oven: An Introduction to Surrogacy Law in the United Kingdom*, 2014 p.23. Available at <http://www.biancajackson.mybunyouroven.surrogacylawintheuk.pdf> (Accessed 21 October 2015).

Arrangements Act 1985,⁵⁷ Human Fertilization and Embryology Act 1990,⁵⁸ and Human Fertilization and Embryology Act 2008.⁵⁹

Jane Stoll in *Surrogacy Arrangements and Legal Parenthood; Swedish Law in a Comparative Context*⁶⁰ brings out an important issue about babies born out of surrogacy arrangements. The book highlights the problems associated with legal parenthood and surrogacy arrangements and one of them being children out of such arrangements are not protected from parental exploitation. Children are seen as commodities to benefit the surrogate mother by 'empowering her' economically and the commissioning parents by because of their financial capabilities, The baby selling argument maintains that contracts for surrogacy turn children into objects of sale. This indignifies children and the human life. According to this argument, such commodification is an attack on the human dignity of the child, the surrogate, the contracting couple and everyone else. This thesis proposes that regulation measures be taken so that such problems should not arise out of legal parenthood surrogacy agreements in the proposed Kenya legislation. That the proposed laws will try as much as possible to eliminate all possible shortcomings experienced in the jurisdictions having surrogacy laws. While Stoll's book majors on Sweden, this thesis seeks to focus on Kenya and how the Government of Kenya can establish laws of its own to efficiently and properly govern surrogacy arrangements and legal parentage in Kenya.

An article by the *International Surrogacy Forum (ISF)*⁶¹ gives an overview of how surrogacy arrangements are governed in South Africa. The article clearly gives the provisions of Chapter 19 of the Children Act of South Africa which touches on surrogacy agreements. An interesting mentioning under the article is that a child born in terms of a valid surrogacy

⁵⁷ Chapter 49, Laws of UK.

⁵⁸ Chapter 37, Laws of UK.

⁵⁹ Chapter 22, Laws of UK.

⁶⁰ Jane Stoll, *Surrogacy Arrangements and Legal Parenthood; Swedish Law in a Comparative Context*, (2013) Elanders Sverige AB p. 61.

⁶¹ South Africa International Surrogacy Forum. Available at <http://www.surrogacy/SOUTHAFRICA/internationalsurrogacyforum.htm> (accessed 21 October 2015).

agreement is deemed the child of the commissioning parent(s) and the surrogate mother has no right of parenthood or care of the child unless otherwise provided for. Thus, no claim for maintenance or of succession can arise against the surrogate or her family. In summary, the ISF article explains that surrogacy for commercial gain is illegal, thus the so called 'rent-a-womb' trade is outlawed. The only payments which are permissible are those which are directly related to the pregnancy and the surrogacy agreement. The article further provides that one of the commissioning parents is required to be a gamete donor and that surrogacy agreements must be confirmed before the High Court. While the ISF article majors on surrogacy in South Africa, this thesis is concerned about Kenya formulating policies as well as legal and institutional framework to govern legal parentage in the surrogacy arrangements in Kenya.

Maureen Kakah in a Kenyan Article titled "*As Rent-a-Womb Trend Gains Local Currency, Legal Loopholes Emerge*"⁶² explains that that surrogacy is not a hypothetical issue anymore, that it is real and many Kenyans are resorting to it for medical reasons and the State ought to protect such arrangements. The article gives the meaning of a surrogacy arrangement and the different types that exist. The author further argues that there have been growing concerns that surrogacy, designed to make couples who cannot have children become parents, is also being adopted by Nairobi's *nouveau riche*, the type that has been pejoratively described as "*too posh to push*". The article explains that medical experts warn that surrogacy is not a procedure of convenience, and that it should be adopted as a last recourse. This will assist in protecting children from being commoditized and women from being exploited, The article also quotes advocate John Swaka who says that surrogacy in Kenya is unregulated, owing to the fact that it is shrouded in secrecy. But as the practice evolves and gains currency, Mr. Swaka says that the laws of the land should adopt to capture the legal need, as Justice

⁶² Maureen Kakah, "As Rent-a-Womb Trend Gains Local Currency, Legal Loopholes Emerge" Daily Nation (Kenya, 16 July 2014).

Majanja implored in his ruling.⁶³ While Ms. Kakah insists on the lack of legal regulation of surrogacy practice in Kenya, this research seeks to answer her concern by giving a proposed legislation to govern the practice surrogacy and legal parentage in surrogacy arrangements.

Bianca Jackson in a book titled *Surrogacy: A Guide to the Current Law*⁶⁴ highlights the shortcomings faced by the laws governing surrogacy in the UK. Bianca explains that the law governing surrogacy arrangements in the UK has hardly changed since the introduction of the Surrogacy Arrangements Act 1985. As a result, surrogacy law is piecemeal, outdated and full of contradictions. For example, commercial surrogacy is prohibited but the courts have the power to authorize payments to the surrogate mother. Notably, third party profit from legal parenthood and surrogacy arrangements and receive remuneration for their services. This paper is relevant to the study because it critiques the UK laws on surrogacy thus making it easy for the determination of which provisions Kenya should borrow and which ones need to be ignored. Whereas the paper critiques the UK laws, this research proposes a regulated 'pricing' in legal parenthood and surrogacy arrangements.

Muthomi Thiankolu, *Towards a Legal Framework on Assisted Human Reproduction Technologies in Kenya*,⁶⁵ submits that notwithstanding the modern trend of globalization, any legislative framework on assisted reproduction and related matters in Kenya must be informed by peculiar needs of Kenya. He states that the Kenyan drafters should be wary of the copy-and-paste mentality that seems to invariably inform the legislation drafting of Kenya. Whereas Muthomi grapples with the effect of importing laws that are not applicable to the peculiar Kenyan society and submits for the vetting of the various clauses. This article shall be pegged on the strong belief that if Kenya is to enact better laws it need to copy from the best practices. Importantly, focus should not be placed on the need to check on copy and

⁶³ See *JLN & 2 others v Director of Children Services & 4 others* [2014] eKLR.

⁶⁴ Bianca Jackson, *Surrogacy: A Guide to the Current Law* (2014). Available at <http://www.familylawweek.co.uk/site.aspx?i=ed127038> (Accessed on 25th November, 2016).

⁶⁵ Muthomi Thiankolu, "Towards a Legal Framework on Assisted Human Reproduction Technologies in Kenya; Some Thoughts on the Law," *Technology and Social Change* (2007) p.12.

pasted legislation at the behest of ignoring better provisions enacted by jurisdiction with best practices. This study uses the guidelines to come up with a comprehensive legislative framework for legal parenthood in surrogacy agreements and matters related thereto.

Mary Ruth Mellowyn in an article “An Incomplete Picture: The Debate about Surrogate Motherhood,”⁶⁶ argues that there has been a surge in the use of IVF surrogacy arrangements. The author argues that the practice of surrogacy is increasingly getting condemned for being a threat to the traditional unit. This has been propelled by the argument that introducing a third party into the family units leads to unconventional relationships in which the identity of the children can no longer be explained by reference to a biological father or mother. This study looks at the place of the legal parentage in the surrogacy arrangements. It highlights the rights and the obligations of the parents. It also outlines the rights and obligations of the commissioning parents and further reviews the place of the surrogate child in the midst of all these parties.

1.8 Methodology of the Study

This research is enriched through the use and review of Kenya, UK, South Africa, India and Sweden local statutes, subsidiary legislation, law reports and government policy papers.

In addition, primary sources of data and secondary sources are also used. These include *inter alia*: textbooks, local and international journals, articles, research papers, case law, newspapers and magazines, internet sources and other materials relevant to this study. The paper adopts compilation and analysis of secondary data as the method of research. It looks at legal instruments, case law, articles and journals, books and the internet for data that is helpful for purposes of this paper. It also adopts a comparative study approach in which it

⁶⁶ Mary Ruth Mellowyn, “An Incomplete Picture: The Debate about Surrogate Motherhood” (1985) *Harvard Women’s Law Journal*.

seeks to compare the place of surrogacy arrangements in Kenya to its place in other jurisdictions.

The University of Nairobi Law Library, Jomo Kenyatta Memorial Library, the Kenya School of Law Library and the Kenya National Commission on Human Rights Library are the main places to undertake this research.

1.9 Limitations of the Study

This study is limited only to insist on the importance of having legislative framework on surrogacy arrangements and legal parentage in Kenya. Medical issues affecting the same are not addressed in this thesis. The time frame for carrying out the research limits the proper evaluation of certain facts that has to be done over a longer time period. Additionally, the Reproductive Health Care Bill 2014 discussed in this thesis touches on a lot of matters concerned with reproductive health care but only the surrogacy laws are looked into in this research.

1.10 Chapter Breakdown

Chapter one lays the foundation of the research study. It discusses the Introduction and background of the study where it highlights the general framework which this study encompasses. It also identifies the statement of the problem which pinpoints the key areas to be addressed by the study. This chapter also states the research objectives of the study, the research questions, the hypothesis of the study and the research limitations and methodology used to conduct the study. It further justifies the reason for conducting the study. It equally discusses an array of scholarly books which have been penned by various authors on the subject matter of surrogacy arrangements and legal parentage in Kenya, South Africa, India, Sweden and other jurisdictions. These books are invaluable to the study as they help focus the subject scope of this study.

Chapter two highlights the critical factors considered when entering the surrogacy arrangements. These factors usually form the basis of the formal or informal contractual arrangements. This Chapter brings out the arguments for and against surrogacy arrangements. This chapter posits that these factors for and against surrogacy arrangements should be given serious considerations when making the Reproductive Health Care Bill in Kenya. This chapter also highlights the legal challenges that compound and undermine the surrogacy arrangements. This includes amongst others the moral reasons. It also outlines the contemporary challenges which are associated with the practice to surrogacy owing to the fact that its evolving nature and use of technology presents new challenges for the regulation of the practice.

Chapter three discusses the current provisions that support legal parentage in surrogacy arrangements under the Constitution together with international Conventions, The Children Act; and the best practices that can be adopted from the UK; India; SA and US. It appraises, criticizes and highlights the shortcomings of the current provisions and seeks to propose the best practices applicable in our jurisdiction. This Chapter also reviews local cases which have addressed issues surrounding legal parentage in surrogacy arrangements in Kenya.

Chapter four is the final chapter of the study. It succinctly summarizes all the chapters of this study. It also highlights the fundamental policy and principles discussed in the previous chapters. It thereafter presents a conclusion of the study. Lastly this chapter tables recommendations which should be adopted to ensure the enactment of a comprehensive Act of Parliament to govern surrogacy practice in the Republic of Kenya.

CHAPTER TWO

2.0 Main Challenges of Surrogacy Arrangements and the Contemporary Legal

Issues surrounding Surrogacy Practice

Revolution in reproduction has resulted to the use of assisted reproductive technology. This is now more prominent than ever. Often, way after the society has embraced, rejected or become inured to the technological advancements or innovations the law usually does not have set principles and regulations for analyzing and accommodating the new scientific and social practices. This is because new technology creates a lacuna in social thought which the legal world is less adept to accessing its pitfall.⁶⁷

2.1 Introduction

This chapter highlights the main challenges compounding the legalization of the legal parentage in surrogacy arrangements in Kenya. It discusses provisions that must be present to make a contract valid; attempts to the arguments for and against the pre-quisites surrogacy arrangements of the practice. These considerations basically outline the ideal requirements that ought to be followed and addressed when making the Agreements.

2.2 Factors required when making a legal parentage surrogate arrangement

Legal Parentage surrogacy agreements vary from one to another depending on the concerned parties(genetic parent; gestating mother; non genetic parent; commissioning parents and the child born of the surrogacy arrangement). Some agreements contain very peculiar terms. The Agreements are usually meticulously thorough detailing the basic agreement between the

⁶⁷ Herbie J Difonzo and Ruth C Stern, *The Children of Baby M* (1968) Devotion Publishers p.1.

parties.⁶⁸ There are a number of standard⁶⁹ legal, social and ethical issues inherent in surrogate arrangements which should be considered when entering into legal parentage surrogacy arrangements in order to curtail potential disputes.⁷⁰ Every agreement must have the Consent of the parties; it can either be commercial or altruistic; parties must have the capacity of entering into agreement; parties should be domiciled in Kenya.

2.2.1 Consent of the Parties

Principally, before the culmination of the Agreement, consent must be sought from the surrogate mother. The surrogate mother; legal father; commissioning couples or resultant child of the surrogacy agreement cannot accurately predict the intervening factors which may occur over the next nine months or after nine months that could undermine their ‘original consent’.⁷¹

i) Consent of the Surrogate mother

This consent must be a free and informed consent.⁷² Informed consent means that the surrogate mother is educated as to all pertinent facts concerning the medical procedure prior to giving consent.⁷³ This is hardly the case as in most instances the surrogate mother’s motivations are to remove her miserable economic situation and is not concerned with the medical; emotional or physical repercussions that may arise after the enforceable consent. The Assisted reproductive health clinics if not regulated may use gametes that may endanger the surrogate mother and the resultant child.

⁶⁸ Kindregan Charles et al, *Assisted Reproductive Technology: A Lawyer’s Guide to Emerging Law and Science* (2006) p.296. The initial recitals that are typically included in such contracts include the general purpose of the agreement; a definition of each party’s role in the arrangement... and a provision regarding anonymity.

⁶⁹ Nancy Blunet, *Who is a Mother* (1999) Berkley Electronic Press p.34.

⁷⁰ Mathew Tiew, *Oh Baby Baby: The Problem of Surrogacy* Michigan Publications (1st ed 2007) p.34.

⁷¹ *Ibid* 71.

⁷² The contracts may be long and detailed or short and simple see *Doe v Kelley* [1981]106 Michigan Application number 169 and the case of *in re Baby M* [1988] 109 N.J. 396.

⁷³ See the case of *Demer v Gaiety* (1971) 92N.M749.

The Agreements define the rights and duties of the intended parents and the surrogate mother. These contracts typically provide that the surrogate mother will be artificially inseminated, carry the fetus to term, and then relinquish her parental rights to the adopting parents.⁷⁴ Many contracts also require the surrogate to undergo physical and psychological test before artificial insemination can be done.⁷⁵

In Kenya there is no law regulating how many times a woman may consent to be a surrogate mother or how many times procedure of artificial insemination may be carried out in her body for any single commissioning parent(s). The impact of the deterioration of a woman's health is irreversible; she could even lose her life at birth. Thus, the scenarios put the surrogate mother in an inequitable bargaining position in relation to the contracting single or couple as in most cases she clearly demonstrates her inability to appreciate the present and future impact of her decision.

The inequitable position of the surrogate is further intensified by the fact that most surrogates come into contract through the intercession of the middlemen who are deployed to ensure that a proper match is found and tied down to the Agreement. Their primary desire to ensure that the contract has been successfully completed puts the middleman against the surrogate mother by ensuring that they work towards the relinquishment of the child rather than the best interest of the surrogate.⁷⁶

The surrogate mother may give birth to the child and due to emotional attachment refuse to relinquish the child. The child may have physical disabilities resulting in rejection by both the commissioning parent and the surrogate. The State and the tax payer is left with the burden of taking care of the survival and development of the child in a children's home.

⁷⁴ Muthomi Thiankolu, 'Towards a Legal Framework on Assisted Human Production in Kenya: Some Thoughts on the Law, Technology and Social Change' (2008) *East African Journal of International and Comparative Law* p.12.

⁷⁵ Kimbrell Markens, *The case against commercialization* (1988) London Publishers p.164.

⁷⁶ *Ibid* 71.

ii) Consent of the father

Prior to a mother indicating the father's name on the birth certificate of the child she requires consent of the father to do so. This consent requires legal identification of the father to be supplied before issuance of the birth certificate.⁷⁷ This imposes an unfair burden on the mother to prove something she may not have control over because of mere refusal by the father to provide the particulars. This refusal also affects the child as in the meantime the child is rendered stateless and fatherless yet he/she is entitled to care and protection by both parents.

The Kenya law must expressly provide that sperm donors, who donate the sperms to a bank, are not the legal father of the resultant child. There is also no regulatory body controlling the number of times a sperm may be used in a certain area or in addition that the use of the sperms will not result to paternity suits by women who have clear intentions of defrauding men. In the case of *A v B & another*⁷⁸ sperm donor was not considered a legal father.

iii) Consent of the Commissioning Parent(s)

The Commissioning parent(s) are also required to give consents⁷⁹ prior to their spouses entering into surrogacy arrangements or relinquishing parental rights. In some instances the spouse may refuse and the delay will affect the welfare of the child. In any event the couples' consent may be harmful to all parties including the resultant child.

There is a proposition that a longed-for child may not transform an infertile couple or person into the "happy people" they expected. The child may in fact be a constant reminder of the couple's inability to become parents, as their infertility is not cured. The couple may instead

⁷⁷ (Children Act, 2001 cap 149) section 12 No person shall be entered in the register as the father of any child except either at the joint request of the father and mother or upon the production to the registrar of such evidence as he may require that the father and mother were married according to law or, in accordance with some recognized custom.

⁷⁸ *Wilson and Anort & Robert and Anor; Rice v Miller* (1993) 16 Fam LR 970, p. 977

⁷⁹ Reproductive health Care Bill, of 2014 section 10

be “sitting on a time bomb that is guaranteed to go off at some point during their child’s life”.⁸⁰

The commissioning parent(s)

The parties to the consent must sign the agreement and the same must be entered into prior to any assisted reproductive technology procedures being carried out this will assist the surrogate mother claim for any expenses or damages resulting from the procedure. In *Blew v Verta*⁸¹ the court held that with the advent of science and technology, the Government should be ready to accept and validate the existence of unusual complex arrangements for child birth.⁸² In practice there are various ways of child birth and family formation. Surrogacy cannot subvert a concept that already has a wide expression. Therefore singling out surrogacy for prohibition could be considered discriminatory.⁸³

iv) Inability of the Resultant Child born of Surrogacy Agreement to Consent

The Child had no say in entering the consent but stands to suffer great effects infringements against her rights and interests if his or her legal parents do not take up their parental responsibility.

The Child has a right to health⁸⁴ protection and care and the unavailability of a regulatory body to accredit and standardize ART clinic can endanger the health of a child if the gametes of the parties are not screened and tested against sexually transmitted diseases and other communicable diseases⁸⁵. The child must live with the disease unintentionally transmitted by the commissioning parent(s) or surrogate mother.

⁸⁰ Ibid.

⁸¹ [1992] 617(PA) 31.

⁸² *Supra* note 3.

⁸³ *Ibid* 55.

⁸⁴ Article 53 of the Constitution of Kenya 2010.

⁸⁵ Section 20(1) of India ART Bill

The Child has a right to be raised by both parents under the children Act with equal parental responsibilities⁸⁶; the choice of parties being single can affect the child's psychology in the long term.

The surrogate child may suffer from identity crisis and statelessness⁸⁷. The identity crisis that may happen to the child on realization that he/she is the result of a surrogate arrangement may lead to a possible self-esteem loss. The child may feel a sense of neglect by biological parent(s)⁸⁸deceit and self-denial.⁸⁹

Secondly, it is averred that most people experience a strong physiological need to know their origin. This could be problematic where the parents of the child are reluctant to disclose to the child his or her genetic parents where the gametes used during IVF were obtained from a sperm bank or a willing donor.⁹⁰ Full surrogacy poses infringement of the rights guaranteed under the CRC⁹¹ as in many circumstances the child is not made aware of the existence of the genetic parent.⁹²

2.2.2 Enforceability of the consent

Many women are unable to prove paternity because of lack of funds to lodge suits against fathers or to pay for tests to be carried out in paternity clinics. Even after lodging the paternity suits some men (legal fathers) are able to manipulate the clinics to give negative paternity results. They go scot free and are never 'caught'. The Act need to have procedure that automatically take away at least 25% father's income for failure to take a paternity test.

⁸⁶ Article 7 of the UN *Convention of the Rights of the Child* states that all children have the right to be cared for by their parents

⁸⁷ Article 8 of the UN Convention of the Rights of the Child requires nations to "respect the right of the child to preserve his or her identity, including nationality, name and family relations".

⁸⁸ Keppel Vincent, 'At whose Expense? The Psychological and Social Costs of Creating Children through Gamete and Surrogacy Arrangement'. A paper presented at the New Zealand Adoption Conference, Wellington, 1990.

⁸⁹ Saints Holm, 'Genealogical Bewilderment in Children with Substitute Parents' (1964) *British Journal of Medical Psychology* Volume 37 p 133.

⁹⁰ *Ibid.*

⁹¹ Convention on the Rights of a Child.

⁹² *Supra* note 60 p.15.

The bright side about endorsing surrogacy arrangements in the HC as in SA; there is no struggle for these test to prove parentage as it is clear from the onset.

The Agreements may also require the surrogate to refrain from alcohol and drugs or to maintain a certain diet or engage or refrain from certain activities during pregnancy.⁹³

Enforcing this consent can be difficult; legitimate concerns arise as to the extent of the surrogate's autonomy during the period of the pregnancy. It is not clear whether a court order should be obtained against the surrogate mother whether this order could be enforced through total restraint through a hospital confinement or compulsory intake of certain foods.

If the child is born with genetic impairment or defect which is determined to be as a direct consequence of the actions of the surrogate it is not clear in the current legislation at what stage the surrogate be sued for negligence? Regrettably, the physical and mental damage is done to the child regardless of disputes on parental responsibility. In such a situation, the infant would likely become a ward of the state, and therefore a responsibility of the taxpayer if and until adoption could be arranged.⁹⁴

There is no provision that allows a child born of surrogacy arrangement to sue his legal parent for any neglect or desertion or aversion of parental responsibility. In Kenya there is also no registry created to ensure that the child can access birth the birth register to confirm their birth mother and the parental order register to confirm the commissioning parent(s).

Commissioning parent(s) who enter into surrogacy arrangements, it is suggested, want perfect babies in their own images and would be more likely to reject an imperfect child. Surrogacy arrangements therefore appear to stack the deck against an imperfect child. The gestational mother is prevented from thinking of the baby as her own while the contracting parents have a certain image of how the child should appear.⁹⁵

⁹³ *Ibid.*

⁹⁴ *Supra*

⁹⁵ *Ibid.*

In the case of adoption, questions had been raised whether an adopted child is entitled to her basic rights to know her historical identities and also to find out whether hereditary diseases or other health problems were a part of her genetic inheritance.⁹⁶

A comparable argument can obviously be made by the progeny of AID. The argument for disclosure would gain even more persuasiveness in light of a finding made by New England Journal of Medicine, whose statistics from a study showed that a sperm from one donor had in fact been used to produce fifty children and thus raised the potential of accidental incest among offspring who had the same father.⁹⁷

2.2.3 Commercial vs Altruistic Agreements

i) Surrogacy Mother

The Bill expressly bars the surrogate mother from using surrogacy as a source of income.⁹⁸ Payments is only allowed as a compensation for expenses that relate directly to the artificial fertilization; pregnancy; birth of the child; confirmation of the Agreement; loss of earnings suffered by the surrogate mother; and insurance cover for the surrogate mother.⁹⁹ The law must check that it is the surrogate mother who benefits commercially from the agreement and not the interested party like doctors and lawyers.

Whereas the legal underpinnings usually prescribe that the Agreements should be made purely for altruistic reasons most women who consent to these Agreements are usually motivated by the economic payments associated with these ventures.¹⁰⁰ This raises socio-ethical concerns regarding commercialization of women's reproductive organs.¹⁰¹

⁹⁶ Geoffrey Lawrence., *A Civil Liberties Analysis of Surrogacy arrangement* (1988) p.15. Available at <<http://scholarship.law.georgetown.edu/facpub/771>> (Accessed on 10 December 2015).

⁹⁷ *Ibid.*

⁹⁸ The Reproductive Health Care bill 2014 , s 11 (c)

⁹⁹ Supra s. 14(a), (b) and (c)

¹⁰⁰ Kirsty Horsey, *Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements* (1st ed 2001) p.9.

¹⁰¹ Sheela Saravan, 'An ethnomethodological approach to examine exploitation in the context of capacity, trust and experience of commercial surrogacy in India' (2013) *Journal of Philosophy, Ethics and Humanity in Medicine 1* p.4. Available at <<http://www.peh-med.com/content/8/1/10>> (Accessed on 12 December 2015).

Opponents of surrogacy believe that surrogacy is against the best interest of the birth mother. Feminists argue that the birth mother is devalued/commoditized as a human being and as a woman, as she is treated as an incubator.¹⁰² Liberalist on the other hand state that Surrogacy solves the troubled woman or man's problem of their inability to have children, thus giving the couple the gift of life or the opportunity of be called a parent warrants a token of monetary appreciation.

In a 'traditional' surrogacy context where the surrogate mother's own egg is impregnated by the contractual father's sperm, the surrogate is commoditized in two ways. First, much like the child, she is sought after as one who can provide "the good" child. In addition, although the surrogate and the sperm donor each contribute one-half of the child's genes and the surrogate carries the fetus to term, upon birth she is dispensed with and completely shoved out of the picture after being squarely for the necessities. This raises a lot of legal questions and generates a lot of heat especially in view of the fact that gestational surrogacy is associated with lower class women¹⁰³. This practice is discriminatory.

The practice is also discriminatory because sperm donors are paid for their donations every day in Kenya. In 2014 there was an online forum open to the public seeking men to "*..Make money selling your sperm online...*"¹⁰⁴

The surrogate parent is expected to keep healthy and take care of the child. She also gets into the agreement knowing that this child will have a better life than she would afford as the gestating mother to give. These thoughts can either cause distress or joy to the mother and eventually on the resultant child.

¹⁰² Comb James 'Stopping the Baby-Trade: Affirming the Value of Human Life through the Invalidation of Surrogacy Contracts: A Blueprint for New Mexico' (1998) *Dayton Law Review Volume 24* p.69.

¹⁰³ *Ibid.*

¹⁰⁴ Makozewe Posted on June 17, 2014 by makozewe <https://kenyastockholm.com/2014/06/17/make-money-selling-your-kenyan-sperms-online/>

On the other hand Surrogacy is still a social experiment as it is a socially unknown practice with unclear consequences for the individuals and society. Surrogate contracts therefore deemed to be against public policy¹⁰⁵ this is because surrogate arrangements have the frightening potential for deepening exploitation of women and commoditizing children born of surrogacy arrangements. Undoubtedly, this issue touches on almost unimaginable breadth of what it is to be a human being, it is difficult to concisely address.¹⁰⁶

ii) Commissioning Couple

Legal parentage through surrogacy arrangements is an expensive affair most people would rather go through their natural birth process instead of spending a lot of money to have a child genetically related to you or otherwise. Over and above the money spent prior to delivery of the child to the couple, there is a presumption that these parents cannot run out of money, after all that is why they enter into such agreements. We cannot ignore the fact that their situation can end up being dire like any other parent raising a child who may or may not go through tough economic times. Lack of money therefore does not water down legal parentage or parental responsibility. The courts therefore should ensure that prior to agreements money is set aside in a trust fund for the welfare of the child in terms of education and upkeep. This cannot be said to be discriminatory because surrogacy is optional and the right to have a child is not to be a fundamental right neither is the right to contract a right absolute.¹⁰⁷

2.2.4 Capacity of the persons to enter into Surrogacy Agreement.

¹⁰⁵ In the English case of *A v C* (1985) FLR 445, the commissioning couple paid money to a surrogate and sought wardship of the child. The trial judge held that the contract was for the sale of the child which was against public policy. On appeal the judgment was upheld.

¹⁰⁶ *Ibid* p. 2.

¹⁰⁷ Jane Stoll, *Surrogacy Arrangement and Legal Parenthood; Swedish law in a Comparative Context* (2013)

Elanders Sverige AB.

Persons entering into surrogacy agreements must be of sound mind and the women and men should be between the ages of 21-35 and 21-45 years. The Assumption is that the younger the gamete of the donors the less likely medical complications to the resultant child. The surrogate mother should have having one live young one does not necessary mean that the parent is free from secondary infertility as was established in the AMN case. It is not clear whether what age the surrogate mothers children should be in order to make her fit to surrogate for a commissioning parent(s).

2.2.5 The parties must be domicile in Kenya in order to enter into surrogacy arrangements

Domestic jurisdiction as to enforcement of legal parentage in surrogacy arrangements is important because it allows for accountability and supervision of the parties to attempt to ensure duties and obligations are met. Different countries tolerate different cultures and different religious acceptable practices in legal parentage surrogate arrangements. Inevitably, Kenya must be open to the cross border surrogacy arrangements which is the growing trend of the practice because the Kenyan market is affordable and currently unregulated. The lack of regulation exploits the parties involved both locally and internationally hence the gaps must be addressed. International Surrogacy laws are yet to be formulated with regard to legal parentage on surrogacy laws and Kenya should actively participate in the formulating forums.

2.3 Importance of legal parentage Surrogacy Agreements

i) It guarantees freedom of choice

It is submitted that if a private consensual arrangement promotes happiness and contentment for the parties involved, then the State has no right to interfere with these arrangements in the absence of a perceived or demonstrable harm to the surrogate mother and the child.¹⁰⁸

The freedom of choice, otherwise referred to as the principle of autonomy, provides that people have the freedom to choose what happens to their bodies provided that no harm is occasioned to anyone.¹⁰⁹ It is submitted that in surrogacy the commissioning couple have the right to make decisions about her own body and the need to assist other people to have children. Similarly couples or single parents have the freedom to pursue their own procreative arrangements without consulting anyone.

This freedom is premised on the basis that the government cannot criminalize surrogacy because parties in surrogacy have substantial civil rights established in the law. This includes the right to privacy; freedom of conscience, religion, belief and opinion; and equality and freedom from discrimination. This also extends to the choice in making decisions affecting their health and welfare as a surrogate mother.¹¹⁰

ii) It guarantees Gift of Life

Surrogacy offers infertile couples the gift of life. Proponents of surrogacy assert that people couples have the right to “procreative autonomy” which includes the right to contract with consenting collaborators for the purpose of bearing a child. The rights to “genetic continuity”

¹⁰⁸ Barbara Salmer, ‘Transitional Surrogacy and International Human Rights’ (2011) *Illinois Law Review* p.39.

¹⁰⁹ Jones Clarkson, ‘Artificial Womb Births ‘Only a Matter of Time’,’ *Sun Herald* 5 February 1945 p.45.

¹¹⁰ Morgan Holcomb and Mary P Bryn, ‘When Your Body is Your Business’ (2010) *Washington Law Review Association* p. 22.

and to rear offspring are all part of the right of reproductive choice for the contracting parents.¹¹¹

The contracting parents can use surrogacy arrangements for the purpose of implementing their personal decision to procreate and to obtain the right to intimate association with the future offspring.¹¹² The psychological and human desire to raise and care for a child entitles them to be treated as parent and to assert privacy right consistent with that status.¹¹³

iii) It defeats The “Natural” Myth theory

This argument posits that if tampering with “natural” mothering and family formation were to be condemned, then logically other forms of family formation such as adoption, guardianship, custody, step-families and even contraception must also be abandoned.¹¹⁴

This would mean that all technological advances which affect natural order, such as organ donation, dialysis and other medical advances which keep people alive, could also be condemned for tampering with nature.¹¹⁵

2.4 Conclusion

This chapter has critically assessed discussed the fundamental factors required prior to entering a legal parentage of surrogacy arrangements. It has also highlighted the challenges to the practice of surrogacy. On this chapter it is noted that these problems are uniquely peculiar to the age in practice notwithstanding the existence of legislation or not. The next chapter discusses the extent in which our current legislation can borrow from the best practices of

¹¹¹ Yasmin Ergas, ‘The Transnationalization of Everyday Life: Cross-Border Reproductive Surrogacy, Human Rights and the Re-visioning of International Law’ (2012) *Emory International Law Review* p.55.

¹¹² *Supra* note 23 at p.42. The author highlights the case of *Anna J v Mark C* (1991) California App 3d 1557 where the court held that where a surrogate mother carries an embryo formed from another woman’s egg, then the commissioning couple are considered the “*genetic, biological and natural parents*” in recognition of their right to genetic continuity and the contract is legal and enforceable. This case provided the basis for current commercial surrogacy practice in California.

¹¹³ *Ibid.*

¹¹⁴ *Supra* note 23 p.14.

¹¹⁵ *Ibid.*

legal parentage in surrogacy arrangements in the UK; SA; USA laws. It attempts to highlight the legal underpinnings of the practice of surrogacy arrangements in these jurisdictions.

CHAPTER THREE

A Discussion of the Legal Framework of Surrogacy Arrangements in Kenya and the proposed best practices proposed from the UK; US; India and South Africa.

3.0 Introduction

This chapter analyses the extent in which the legal framework in Kenya discuss legal parentage in surrogacy arrangements. These mainly include the Constitution of Kenya 2010 and International Conventions and Children Act; It also draws parallels on best practices in other jurisdictions such as the United Kingdom; South Africa; and India and the US.

The study for UK in this chapter has been motivated by the fact that the UK is one of the first jurisdictions in the world which formally and legally endorsed the practice of surrogacy arrangements as a means of reproductive health practices. South Africa on the other hand has been preferred for the reason that it is the first African country to enact legislation regulating surrogacy arrangement. India is looked at reason being that it has legally endorsed the practice of surrogacy for commercial arrangements.

It analyses landmark cases which attempted to define the legal terrain of legal parentage in surrogacy practise in Kenya amidst the inadequacy of legislations regulating the practice in Kenya.

3.1 A Discussion of the Constitution of Kenya, 2010 and the best practices of other International Covenants in protecting legal parentage in Surrogacy Arrangements.

i) Right to family

Article 45¹¹⁶ of the Constitution stipulates that the family is the natural and fundamental unit of the society and the necessary basis for social order and shall enjoy the recognition and protection of the State.¹¹⁷ Today with the help of assisted reproduction and assisted reproductive technology children may or may not be a product of a marriage union.¹¹⁸ Notwithstanding the fact that article 53¹¹⁹ does not expressly mention the words Surrogacy the rights of the children born out of surrogacy arrangement are protected under all fundamental rights and fundamental freedoms¹²⁰ enshrined in the Constitution and specifically the right to a name and nationality from birth; to free and compulsory basic education; to basic nutrition, shelter and health care; to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment; and to parental care and protection.¹²¹

ii) Right to Life

The Constitution further stipulates that every person has the right to life.¹²² The life of a person begins at conception. The protection of the life of a person thus begins at conception. For avoidance of doubt the Constitution stipulates that a person shall not be deprived of life intentionally, except to the extent authorised by the Constitution.¹²³ Abortion is also not

¹¹⁶ Supra note 3

¹¹⁷ The Constitution only permits the right to marry a person of the opposite sex it impliedly delegitimizes marriages between same sex couples in Kenya. Section 3 of the Marriage Act Act No. 4 of 2014 expressly forbids same sex marriages.

¹¹⁸ UDHR 1948, Article 16(1).

¹¹⁹ Supra note 3

¹²⁰ *ibid* Part IV of the Constitution of Kenya 2010

¹²¹ *ibid* Article 53(1) (a)-(e).

¹²² Article 26.

¹²³ *Ibid*.

permitted unless, in the opinion of a trained health professional, there is need for emergency treatment or the life or health of the mother is in danger.¹²⁴ The surrogate mother or commissioning couples and therefore not opt to abort a child on grounds of sex of a child. The Indian Assisted Reproductive Technology Regulation Bill 2010 proposes that ART clinics shall not assist couples to get a child of pre-determined sex. The Bill proposes that it shall be an offence for anyone to determine the sex of the child to be borne through ART.¹²⁵

On the contrary, the South African Children Service Act provides the surrogate mother may terminate the pregnancy either on medical grounds or at will; the surrogate mother may or may not reveal to the medical practitioner that she is a surrogate; as the court order is entered in the HC prior to artificial insemination procedures the high court may proceed to award damages to the commissioning couples based on the expense thus far.¹²⁶ This situation gravely exposes the commissioning parent(s) or no genetic parent(s) to emotional turmoil

iii) **Best Interest of the child**

When the courts were faced with a dilemma between administrative action and the best interest¹²⁷ of the child, a child's best interests are of paramount importance in every matter concerning the child.¹²⁸ In the case of *Republic v Senior Resident Magistrate Mombasa ex parte HL & Another*¹²⁹ the courts had to decide on whether it had jurisdiction to deal with custody of a child where one of one parents was not a Kenyan Emukule, J held that although

¹²⁴ Ibid.

¹²⁵ Ibid Section 25.

¹²⁶ Children Act of South Africa, s 300.

¹²⁷ ibid Children Act, section 4 (2) and (3), 4 (2) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.; (3)All judicial and administrative institutions and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to— a. safeguard and promote the rights and welfare of the child; conserve and promote the welfare of the child;. Secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest

¹²⁸ Ibid Article 53(2) of the Constitution.

¹²⁹ [2016] EKLR; Miscellaneous Civil Application no 3 of 2016
http://kenyalaw.org/caselaw/cases/advanced_search/

Section 76(1) of the Constitution provides for administrative action in matters of the court's jurisdiction the overriding objective of the Children's Court is section 4 which is to consider the best interest of the child in making court orders.¹³⁰

In the case of *L.N.W V Attorney General & 3 Others*¹³¹ Ngugi, J in deciding whether section 12 of the Registration of Births and Deaths Act¹³² was rendered unconstitutional¹³³ in the section requiring that the consent of a father child born out of wedlock is required before the inclusion of his name into the birth register and the child's birth certificate the court held that the provision "*was to that extent discriminatory on the basis of sex.*" The court's reasoning was that maintaining the section would leave the fate of the child in the feelings and wishes of the father especially if the woman cannot proof marriage. This would be discriminatory¹³⁴ to the woman and the child as the child's mother would require national identification of the father at birth which was not practical unless it was certain that the documents would be brought forward by the father himself. It was also held that section 12¹³⁵ the provision imposed an unfair burden to the birth mother¹³⁶ and it also went against Article 53(1)(e)¹³⁷ which provided *inter alia* that a child was entitled to parental care and protection which included shared and equal parental responsibility of the mother and father to,¹³⁸ whether the parents were married to each other or not. The court was concerned that the effect of section

¹³⁰ [2016] EKLR; Miscellaneous Civil Application no 3 of 2016 [http://kenyalaw.org/caselaw/cases/advanced search/](http://kenyalaw.org/caselaw/cases/advancedsearch/)

¹³¹ [2016] EKLR : Petition 484 of 2014

¹³² *section 12 No person shall be entered in the register as the father of any child except either at the joint request of the father and mother or upon the production to the registrar of such evidence as he may require that the father and mother were married according to law or, in accordance with some recognized custom. Chapter 149 of the laws of Kenya.*

¹³³ "*unconstitutional and in violation of articles 27, 28 and 53(1) of the Constitution. In addition its effect of imposing an unfair burden on women, the mothers of children born outside marriage*

¹³⁴ UDHR 1948, Article 16(1).

¹³⁵ *ibid*

¹³⁶ Going against Article 10 and 27 of the constitution of Kenya 2010

¹³⁷ of the constitution of Kenya 2010

¹³⁸ Article 53(2) of the Constitution of Kenya 2010

12 would lead to disinherit the child of any rights the child was entitled to from the father under the law of Succession Act¹³⁹.

iv) Right to highest attainable standard of health

Further, the Constitution provides 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.¹⁴⁰ Similarly that The African Charter on the Human and Peoples Rights (the “ACHPR”) or the Banjul Charter,¹⁴¹ as it is also called and Article 12(1) ICESCR provides that every individual which includes child has the right to enjoy the best attainable standard of physical health.¹⁴² Assisted reproductive may require different types of medical procedure for purposes of ensuring legal parentage rights. The parties are thus recognised by the Constitution that they including the resultant child should attain the highest standard of health. In turn Kenya requires a regulatory body to govern, standardize and accredit clinics engaged in these reproductive activities¹⁴³.

v) Special measure of protection

The Constitution recognizes that the international Covenant on Economic, Social and Cultural Rights (the “ICESCR”) state that special measures of protection and assistance should be taken on behalf of all children without any discrimination for reasons of parentage or other conditions.¹⁴⁴ A legislation that specifically addresses the surrogate children to be free from discrimination will assist in addressing the stigma that surrounds those radicals who are against surrogacy as being a means of rejection of the resultant child by the birth mother.

¹³⁹ Supra n. 122

¹⁴⁰ Article 43(1) (a) of the Constitution.

¹⁴¹ Kenya ratified this Charter on 23 January 1992. African Commission on Human and Peoples’ Rights, Ratification Table: ACHPR. Available at <http://www.achpr.org/instruments/achpr/ratification> (accessed on 5 November 2015)

¹⁴² ACHPR 1981, Article 16(1).

¹⁴³ Reproductive Health care Bill 2014 provides that everyone has a right to health and the rights should be free from discrimination or violence.

¹⁴⁴ ICESCR, Article 10(3).

vi) Right to self-determination (Privacy-Dignity)

ACHPR also stipulates that all people shall have the unquestionable and inalienable right to self-determination. This permits everyone to status pursue their political, economic and social status as they have freely chosen.¹⁴⁵ Legal parentage Surrogacy arrangements are social determinations which people have a right to determine for themselves the arrangements and agreements that follow should be free to make contract and request the state to enforce the same through legislative framework; regulatory bodies and judicial bodies.

The right to self-determination must be protected by Article 28 and 35 of the Constitution which are the right to dignity and right to privacy respectively.¹⁴⁶ In the JLN case although the court stated that the surrogate mother and Commissioning parents right to privacy was not violated by the hospital in reporting the registration of the commissioning mother's as the mother of the twin children to the Director of Children Services; on another breadth the court fined the Director of Children Services Five Hundred Thousand Kenya Shillings payable to the Commissioning parents and the surrogate mother for taking away the twin children born of the surrogacy arrangement and placing them in a children's home.

3.2 A Discussion of the Children Act and the best practices of other jurisdictions

This Act regulates parental responsibility, adoption, custody, maintenance, guidance, care and protection of children. It also gives effects to the principles of the Convention on the Right of the Child and the African Charter on the Rights and Welfare of the Child.

¹⁴⁵ Ibid Article 20(1).

¹⁴⁶ Supra note 3

i) Children Act

The Children Act¹⁴⁷ defines a child as a person under the age of 18. The Uniform Parentage Act;¹⁴⁸ the Human fertilisation and Embryology Act the India ART Reproduction Bill regulations and the Child Status Act¹⁴⁹ boldly define a child to include one born of surrogacy arrangement.

The rights of a Child which begin at conception are governed by this act and supported by article 53 of the Constitution. The Act stipulates that every child shall have an inherent right to life and it shall be the responsibility of the Government and the family to ensure the survival and development of the child.¹⁵⁰ The Act further stipulates that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.¹⁵¹

The Children Act defines a parent to mean the mother or father of a child¹⁵² and includes any person who is liable by law to maintain a child or is entitled to his custody. The legal parents in surrogacy arrangements (surrogate parents; commissioning couples(parent); genetic parent(s); non genetic parent(s); therefore can be addressed as parents under the Act pursuant to legal parentage in surrogacy Agreement as they are indeed liable to maintain a child. The dispute would arise as to whether to legal parentage and thus custody of the child which right is attached to parental responsibility.

¹⁴⁷ Section 2 of the Children Act

¹⁴⁸ Uniform Parentage Act in the USA

¹⁴⁹ Ibid

¹⁵⁰ Ibid 4(1).

¹⁵¹ Ibid 4(2)

¹⁵² Tobin v Tobin [1999] Fam CA 446; [1999] FLC 92-848, para 42

Parental responsibility means all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child's property in a manner consistent with the evolving capacities of the child¹⁵³ and is discussed under Part III of the Children's Act section 23¹⁵⁴ and 24 of the Act; the responsibility may never be abdicated until the child is 18 years old. An application for extension of parental responsibility may be made when the child is over 18 by the child, director of Children services; person concerned about the welfare of the child, either parent¹⁵⁵. Section 27¹⁵⁶ provides for Transmission of parental responsibility may take place if the people in whom the parental responsibility was vested are deceased. However legal parentage under surrogacy arrangements can only be transferred by adoption orders like in the AMN and JLN case. Although parental responsibility does not extend until the age 18 years¹⁵⁷ legal parentage last forever unless relinquished through parental order.

Children have a right to know and be cared for by their parents(both). It is not the child's concern which relationship their parents have; children have a right to welfare; clothing shelter; adequate diet, medical care including immunization and educational and guidance.

Although section 24¹⁵⁸ and 25¹⁵⁹ are titled as parental responsibility the terms therein outline or describe how parties acquire legal parentage. Where the mother and father were married at the time the child was born or after the child was born then the parties because of their legal parentage have shared and equal parental responsibility. However, where the parties do not

¹⁵³ Section 23 of the Children Act

¹⁵⁴ **parental responsibility**" means all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child's property in a manner consistent with the evolving capacities of the child

¹⁵⁵ *ibid* Section 24

¹⁵⁶ *Supra* n. 10

¹⁵⁷ *Ibid* Section 28

¹⁵⁸ *ibid*

¹⁵⁹ *ibid*

subsequently marry then the mother has superior responsibility over the child and the father acquires responsibility under section 25¹⁶⁰ of the Act. Parties may also enter into a parental responsibility agreement¹⁶¹ and the court may proceed to endorse the said agreement and the same court may proceed to terminate the said agreement on application by either party or by a child. We can therefore assume that the Children Act¹⁶² recognizes the legal mother as the genetic mother. Similarly in the UK Section 33 of the HFEA¹⁶³ particularly stipulates that the surrogate mother is the legal mother when the child is born.¹⁶⁴ However the Children's Act be cognisant of the fact that you may be a surrogate but not a genetic mother hence the parentage should be reconsidered and updated.

The Children Act ignores the different scenarios of legal parentage Kenyan laws must provide for such legal parentage laws or non-genetic mother, non- genetic father and non-genetic singles. As was seen in the AMN case and JLN case above the definition of the term legal mother in the context of a surrogate child is a highly contentious term when dispute arises.¹⁶⁵ There is need to specifically clarify who the mother of the surrogate child is immediately after birth.

The Children Act discusses a marriage or non marriage situation, disregarding any situations where parties may enter into surrogacy arrangements and have parentage or parental responsibility attached to them. In order to expedite the parentage process.

¹⁶⁰ *ibid*

¹⁶¹ Section 26 of the Children act

¹⁶² *ibid*

¹⁶³ Human Fertilization and Embryology Act, of 2008

¹⁶⁴ See HFEA 2008, s 33.

¹⁶⁵ *A.M.N & 2 others v Attorney General & 5 others* [2015] eKLR and *JLN & 2 others v Director of Children Services & 4 others* [2014] eKLR respectively.

ii) The SAA,HFEA and UPA

The Children Act like UK under the HFEA Act should stipulates that the intended parents must be registered as donors for medical screening purposes. This definition outlines a clear watershed between the transition period when the legal mother of the child transmits its parental duties and obligations to the intended parents. It will save on time and best interest¹⁶⁶ of the child as it limits the time wasted for paternity test during a trial for child maintenance.

The legal parentage of the spouse of the surrogacy if also clearly set out under the UK laws which stipulate that if the surrogate mother is married her husband is automatically the legal father of the child. Alternatively if she is in a civil partnership with another woman, that woman is automatically the second parent of the child.¹⁶⁷ Notwithstanding this provision, where the surrogate mother does not have a partner and the embryos were created with the intended father's sperm, the intended father may register as the child's legal father¹⁶⁸ and be named on the Birth Certificate.¹⁶⁹ Alternatively, the surrogate mother may name the intended mother as the second parent of the surrogate child. However, this can only be done before the

¹⁶⁶ In rights of the child with regard to succession laws, the dependency issue is clear from the onset

¹⁶⁷ Ibid s 35 and 42.

¹⁶⁸ Genetic father; a man who has married or cohabited with the birth mother after conception in the US a man who lived with the child until the age of two and recognized him as his own. Similarly in an Australian court *Mulvany & Lane*[2009]FamCAFC 131, PARAS 38-40. was in a dilemma of parental responsibility when after 6 years of marriage a separation of two adults, the father of the child discovered that he was not the genetic father of the child and the trial court held that he did not have parental responsibility however the higher court reversed the decision, ironically in the case of *Mawell & Finney*[2013]FamCAFC 76, PARAS 78-79. after a child's biological mother died the grandmother was in a legal battle with a father who had been estranged from his son for 6 years, although the courts appreciated that the child needed a stable and supportive environment provided by his grandmother he had the right to know and build a relationship with his legal father.

A legal father may also be one who voluntarily acknowledges paternity (one may also rescind such an acknowledgement within two years from registration as a putative father; the acknowledgment is endorsed as long as no-one else is presumed or acknowledged as the adjudicated father; one recognised as a father after a paternity legal action(putative father); a commissioning father after a surrogacy arrangement; a father after adoption proceedings. The state maintains a registry for unknown and putative fathers the rationale is to notify them of termination of parental rights. The registry has no effect when a child reaches age one. The judiciary may order genetic testing based on a simple letter and no proceedings, if a person does not attend to genetic testing the effect is that the courts will adjudicate on parentage. This is a practice Kenya should borrow.

¹⁶⁹ Ibid s 36.

embryos are transferred to her or before she conceives. In this circumstance the intended father would be the legal father as a result of his genetic relationship to the child but the intended mother would be named on the birth certificate as the ‘second parent’.¹⁷⁰

There is need for a structure to protect the best interest of the child in the event disputes arise as to the parentage in surrogacy laws. The UPA Act¹⁷¹ comprehensively provides a paternity establishing scheme through voluntary acknowledgement; rules and standards of genetic testing; and through the adjudication process. For persons who fail to volunteer paternity acknowledgments, their monthly income or assistance is reduced by up to 25%. The practice in Kenya is that DNA hearings of maintenance suit which suit may be prolonged thus prejudicing the legal mother and child. In the unlikely event that the donor's gametes are not pre-screened then attaching the father of a father who refuses to volunteer to a paternity test is favourable to the parties. The father must however be conscious of the fact that parental responsibility attaches to a father whether or not he is genetically related to the child.¹⁷²

iii) Whereas in the UK the SAA Prohibits Advertisement vs Commercial Surrogacy in India

The SAA states that it illegalizes advertisements to search for a surrogate. The Act prohibits women from making advertisements as potential surrogate mothers.¹⁷³ The penalty for this offence upon conviction is imprisonment for a period of three months.¹⁷⁴ The SAA further stipulates that it is illegal for anyone to receive payment for their involvement in a surrogacy arrangement.¹⁷⁵ This provision prohibits individuals and surrogacy agencies from

¹⁷⁰ Ibid s 43.

¹⁷¹ This establishes a framework of legal parentage and parental responsibility of children for unmarried and married couples.

¹⁷² Judy Thongori DNA Tests: Child's rights override parents privacy concerns **updated Sun, July 20th 2014 at 00:00 GMT +3** <http://www.standardmedia.co.ke/article/2000128833/dna-tests-child-s-rights-override-parents-privacy-concerns>.

¹⁷³ Surrogacy Arrangements Act 1985, s 3(1) (a).

¹⁷⁴ Ibid s 4(1).

¹⁷⁵ Ibid s 2(1).

commercializing the surrogacy practice in the UK.¹⁷⁶ The SAA only permits for the payment of reasonable expenses to the surrogate mother to cater for her medical expenses; loss of income and other pregnancy related costs that may be incurred over the pregnancy period.¹⁷⁷ The UK courts have had opportunity to pronounce decisions in circumstances where allegations of the clause for non-payment have occurred. In the case of *Re W*,¹⁷⁸ a UK couple entered into a surrogacy contract with a surrogate mother in United States (the “US”). The arrangement was organized by a surrogacy agency in the US. The intended parents paid both the surrogate mother and the Agency commission for their task. Upon return to the UK the commissioning couple applied for a grant of parental order. The Court held that parental order cannot be granted under the SAA if there is proof that the Arrangement was not done purely for altruistic reasons. The Court in declining to grant the parental order noted that this stipulation applies even where the surrogacy arrangement took place in a country or state where commercial surrogacy is legal.¹⁷⁹

On the contrary India is the herb of commercial tourism; The ART Bill prescribes that registered ART Banks are authorized to advertise, procure or provide semen, oocyte donor or surrogate mother.¹⁸⁰ In Kenya should the law disallow advertisements of surrogacy practices, the practice will be commercial and shrouded in secrecy; very few parties are willing to discuss the issue and despite the fact that surrogacy is an old practice there are only two reported cases in 2014 and 2015.¹⁸¹

¹⁷⁶ Ibid s 2.

¹⁷⁷ Ibid s 2(2).

¹⁷⁸ [2013] EWHC 3570.

¹⁷⁹ See HFEA 2008, s 54(10).

¹⁸⁰ Ibid section 20(16).

¹⁸¹ AMN Case AND JLN Case

iv) Transferring Legal parentage

Kenya may seek to use the UK approach in issuance of Parental Orders in surrogacy arrangement, however the South African Approach is best as it is more predictable and faster as it is endorsed by a HC by an order prior to the artificial insemination; *in vitro* fertilization or other medical procedures. The commission parents are granted a parental order from the onset unlike in the UK the intended parents can only become the legal parents of the surrogate child upon applying for a grant of parental order and obtaining approval of consent from the court.¹⁸² The application forms for parental orders are made to the Family Proceedings Court/Magistrate's Court or County Court in the intended parents' local area. If the intended parents comply with the conditions of the HFEA, the Court then appoints a Parental Order Reporter.¹⁸³

Parental orders can be granted to married or unmarried intended parents or parties in a civil partnership.¹⁸⁴ However, the SAA stipulates that the child must have been carried by a woman other than the intended mother and must also be genetically related to at least one of the intended parents.¹⁸⁵ The SAA further requires the partner to the surrogate mother to freely and unconditionally consent to the making of the Order.

It is worth noting that consent must be given within six weeks after the child has been born.¹⁸⁶ After obtaining consent the SAA makes it a requirement that couples must apply for the Parental Order before the child reaches six months of age¹⁸⁷. Six months is a long time to allow the surrogate or commissioning couples to change their minds to the detriment of the

¹⁸² See HFEA 2008, s 54(1).

¹⁸³ Ibid.

¹⁸⁴ Ibid s 54(2).

¹⁸⁵ Ibid s 54(1) (b).

¹⁸⁶ Ibid s 54(7).

¹⁸⁷ Ibid s 54(3).

child. Although the law may seek to compensate aggrieved parties by damages,; there is no significant difference between the adoption 6 week consent procedure¹⁸⁸ and the parental orders under surrogacy arrangements.

Additionally, at the time of the application and at the time of the making of the Order, the intended parents must have been domiciled in the UK and the child must be living with the intended parents.¹⁸⁹ These scenarios if being domicile is the jurisdiction of the surrogate mother costs the commissioning mother her job due to unpredictable delay in the AMN case¹⁹⁰. The law should international practices on legal parentage in surrogacy arrangements will go a long way in provide uniformity in parentage issues for foreigners. In the meantime the India approach is most suitable in ensuring the best interest of the child born of surrogacy arrangements. The Bill stipulates that for non-resident foreign couples seeking to undertake surrogacy in India shall appoint a local guardian who shall be legally responsible for taking care of the child during and after pregnancy. Further, the foreigners must also provide a letter from embassy of the country in India or from foreign ministry of the Country, clearly and unambiguously stating that:

- a. the country permits surrogacy; and
- b. that the child born through surrogacy in India will be permitted entry in the Country as a biological child of the commissioning couple, including where the embryo was a consequence of donation an oocyte or sperm outside of India.¹⁹¹

¹⁸⁸ *Re D and L* [2012] EWHC 263. ¹⁸⁸ the Court held that consent can be dispensed with if it is in the best interest to make a parental order so long as all reasonable steps have been taken to locate the surrogate mother without success. The Court noted that the child's welfare is of paramount consideration

¹⁸⁹ *Ibid* s 54(4).

¹⁹⁰ Once the courts are able to confirm that the surrogate mother consents to the names¹⁹⁰ of the non-genetic or commissioning parents appearing in the birth certificate as the court established in this case then the best interest of the child and the commissioning couple is to have the registrar of births register the child in a parental order register after 6 weeks of birth or before the child is 6 months old.

¹⁹¹ *Ibid* section 33 (19).

If the foreigner fails to take delivery of the child, the local guardian shall be legally obliged to take delivery of the child. The local guardian will be free to hand over the child to an adoption agency within one month after delivery. During the interim period the local guardian shall be responsible for the well-being of the child and the child will be give Indian citizenship.¹⁹²

The Bill also stipulates that at any given time the commissioning parents shall use only one surrogate and the surrogate must be an Indian citizen.¹⁹³ Notably, the Bill states that during the pregnancy the surrogate shall be prohibited from engaging in any act that may harm the child until the designated hand over of the child.¹⁹⁴ The commissioning parents on the other hand are expected to insure the surrogate mother and the child till the surrogate mother is free of all health complications arising out surrogacy.¹⁹⁵

Finally in the UK the Court then appoints a Parental Order Reporter,¹⁹⁶ who visits all the parties and provides the Court with a report describing the circumstances of the surrogacy, commenting on the welfare of the child, (as set out in the Adoption Act 2002 and modified by the Parental Orders Regulations), and any arrangements for direct or indirect future contact.¹⁹⁷ After the Parental Order has been granted, the Registrar General makes an entry in a separate Parental Order Register to re-register the child. This is cross-referenced with the original entry in the Register of Births. It is not possible for the public to make a link between entries in the Register of Births and the Parental Order Register. This register can only be accessed by the child once he attains the majority age of eighteen years. The effect of the Parental Order is that the intended parents receive a new birth certificate stating they are the

¹⁹² Ibid.

¹⁹³ Ibid section 33(20).

¹⁹⁴ Ibid section 33(23).

¹⁹⁵ Ibid section 33(24).

¹⁹⁶ Family Procedure Rules 2010, Rule 13.5.

¹⁹⁷ Ibid Rule 16.35.

legal mother and father of the child.¹⁹⁸ A Parental Order takes effect from the day it is made.¹⁹⁹ Up until the granting of the Parental Order by the Court, the surrogate can apply for a residence order to stop the Parental Order from being made or seek the return of child. The intended parents can make a counter application.

The provision of registries is important in Kenya as this will assist in protecting the best interest of the child. The child can access the register whenever required and the commissioning parents having received the parental orders can have their names in the child's birth certificate to avoid embarrassing situations when making applications to institutions as there relations with the resultant child.

3.2.1 Leal parentage in surrogacy arrangements entered by Same sex couples as commissioning couples

The UK SAA²⁰⁰ and The Child Status Act²⁰¹ embarrass same sex marriages or same sex parenting. Article 45 of the Constitution expressly allows marriage between a man and a woman and section 3 of the Marriage Act²⁰² expressly disallows same sex marriages. In the pretext, legal parentage or legal responsibility arising out of surrogacy arrangements in same sex marriages cannot arise. A woman was a surrogate for gay couple she refused to relinquish the child, Need for psychological training in hope that it will make the difference. The surrogate felt like a victim and wanted to precede with breastfeeding the child in her interest, she also felt that the gay couples were sexually disloyal and promiscuous. The court held that there was no evidence of that nature and that the child needed to be given to the gay couple.

¹⁹⁸ Ibid Rule 13.15(2) (a).

¹⁹⁹ Ibid Rule 13.20(1).

²⁰⁰ ibid

²⁰¹ Ibid

²⁰² Ibid

The bottom line was there was an agreement that needed to be followed regardless of who the commissioning couples were; opposite sex or same sex.²⁰³

The place of the same sex commissioning couples in South Africa²⁰⁴ legal regime In the Ex Parte Matter between WH and 3 others²⁰⁵ the South African Court held that same sex couples can use surrogacy arrangements to obtain children of their own. In this matter the Court noted that where the commissioning couples meet all the qualifications in the CSA²⁰⁶ it matters no whether they are same sex couples or not. The Court noted that the commissioning parents as well as the surrogate mother were suitable persons to accept parenthood as well as to act as surrogate mother respectively. The Court was also satisfied that arrangements for the care and welfare of the child to be born, including the stability of the home environment and the provisions for the child's needs in the event of death of the commissioning parents or divorce or separation had been more than adequately provided for. The Court finally concluded that the parties' agreement was altruistic.²⁰⁷ The Court held that the surrogate motherhood agreement in question is valid and was confirmed and that the provisions of Section 297(1) of the CSA should apply to the Agreement for all purposes.²⁰⁸ Similarly in the USA In the case of *Albridge & Keaton*²⁰⁹ a woman who moved in with a woman who was pregnant and later left when the child was still an infant was said not to have equal parental responsibility.

²⁰³ Damien Gayle and Press Association; High Court orders surrogate mother to hand baby to gay couple; Wednesday 6th May 2015 last assessed on 19th November 2016

²⁰⁴ Surrogacy arrangements in South Africa commenced from as early as 1948. South Africa International Surrogacy Forum. Available at <http://www.surrogacy/SOUTHAFRICA/internationalsurrogacyforum.htm> (Accessed 21 October 2015). Surrogacy has been available for many years in South Africa, the first recognized case being that of Karen Ferreira-Jorge of Tzaneen in 1987 where a 48 year old mother carried her daughters' triplets to term. The daughter was unable to bear children of her own and had been discouraged of enlisting the services of an unknown surrogate in fear that the surrogate may renege on her promise to give up the baby at birth. Her own mother, after offering her assistance and after the process of ovarian stimulation, gave birth to triplets.

²⁰⁵ Case No.236 of 2011, in the North Gauteng High Court, Pretora (Republic of South Africa).

²⁰⁶ Ibid section 292.

²⁰⁷ Ibid para 79.

²⁰⁸ Ibid para 80.

²⁰⁹ [2009]FamCAFC 229

3.2.2 International law on legal parentage in surrogacy arrangements

In discussing the legal status of children born out of surrogacy arrangement the Hague conference on private International law²¹⁰ discussed the legal parentage and parental responsibility for the resultant child as being crucial rights in matters of nationality inheritance, maintenance and identity. The effect of legal parentage would arise from different scenarios birth registration; judicial proceeding; acknowledgement of legal parentage.²¹¹ There is a gap in cross border relations and there is need for uniform laws governing legal parentage of surrogacy arrangements however Kenya will have to look into practices acceptable to our culture and do away with unacceptable practices such as recognition of same sex legal parentage agreements; There is also need for amendments of the registration of Birth's & Death act; the Children Act and Family laws and finally the enactment of Legislative framework addressing surrogacy arrangements.

3.2.3 Equal or Shared parentage

Equal and or shared parental responsibility cannot only vest in the natural parents and in some cases must be determined in a case by case basis. The most important factor is the best interest of the child.

Psychologist studies reveal that children are better of being reared and cared for by both parents rather than single parent arrangements²¹². The Convention on the Rights of the Child

²¹⁰ Hague Conference on Private International Law; Report on Expert group on parentage/surrogacy; the background of the meeting was to protect children rights under United Nations Convention on Rights of the Child. Ukraine; Switzerland; Spain; South Africa; United Kingdom; United States of America; Netherlands; NewZealand Mexico; Japan; Italy; Israel; India; France; China; Canada and Australia.

²¹¹ Hague Conference on Private International Law; Report on Expert group on parentage/surrogacy; the background of the meeting was to protect children rights under United Nations Convention on Rights of the Child. Countries in participation were Ukraine; Switzerland; Spain; South Africa; United Kingdom; United States of America; Netherlands; NewZealand Mexico; Japan; Italy; Israel; India; France; China; Canada and Australia.

²¹² Glover, R & Steel, C., Comparing the Effects on the Child of Post Divorce parenting Arrangements , Journal of Divorce, Vol 12 no. 2-3 (1989)

are clear that the best interest of the child is paramount²¹³ and separation of the child from his or her parents should happen in extraneous circumstances.²¹⁴

However the best interest of the child standard has its challenges to the parent and to the child. The parents' welfare are not considered and their rights may be infringed as the authorities are busy guarding the child's 'best interest'. Secondly some situations are unpredictable parties do not anticipate death, divorce, separation when they have intentions of legal parentage. The situation is also information intensive.

Shared parentage can be an issue for the court to determine both pro-actively and in a supervisory manner hence there should be guidelines; age and sex of the child; a proper definition of shared custody, physical or otherwise; when should shared custody be withheld; court should safeguard rights of the parties from exploitation of the other because of using the children as bargaining power on maintenance.

In the US and Canada, United Kingdom, SA, Netherlands, Thailand and India joint legal custody²¹⁵ has been accepted however there are two determining factors, the welfare principle²¹⁶; the no delay principle²¹⁷ and the best interest of the child principles. It also makes

²¹³Article 3 :- *...whether undertaken by public or private social welfare, institutions, courts of law administrative authorities or legislative bodies..*"

²¹⁴ Abuse or neglect of the child by parents Art 9 of the Convention of the Rights of a Child.

²¹⁵ Both parents have equal responsibilities and rights for crucial decisions of the child's welfare such as health and education.

²¹⁶ The United Kingdom takes this approach, the welfare principle ensures that the welfare of the child is also consistent with the state rules. The United Kingdom Children Act, Part 1, 5 (1989) state that these factors include "...the ascertainable wishes and feelings of the child concerned, his physical, emotional and educational needs, the likely effect on him of any change in his circumstances, his age, sex, background and any characteristics of his which the court considers relevant, any harm which he suffered or is at risk of suffering, and the range of powers available to the court under this Act in the proceedings in question." India also adopts the welfare approach under section 17 of the Guardians and Wards, Act, 1890; and can award both single and joint custody. Section 8(5) of The Hindu Minority and Guardianship Act, 1956 the paramount consideration adopted by the courts is the welfare of the child.

²¹⁷ The court ultimately seek to determine matters concerning the upbringing of the child with no delay, as delays will prejudice the welfare of the child. (the United Kingdom, Children Act, Part 1,3 (1989)

the court's decision easier when parties consent, are mature²¹⁸, consent or come up with a parental plan²¹⁹, the parents must be free from family violence and abuse. In Kenya part 11²²⁰ of the Children Act provides that the best interest of the child²²¹ primary consideration is the overriding factor however several factors are considered in determining this best interest provided in part VII 83(1) (a)-(j) of the Children Act²²².

The Kenyan and Indian approach²²³ are admirable they embrace both the welfare and best interest²²⁴ of the child. Whereas in India the Guardian and Wards Act²²⁵ is more detailed in guardianship of the child, part VIII of the Children's Act outlines the legal responsibility of the guardians. The Indian courts are more inclined to give custody of the child to the mother.²²⁶ However there are exceptions to this rule when the court granted custody to a father after observations that the mother is turning the child against the father and disallowing him visitation rights as was seen in the case of *Ashish Ranjan v Anupama Tandon*²²⁷. The courts have also awarded joint custody for half the year each to both parents with weekend visitation rights, telephone and video conferencing rights when the child is with the other parent for the sustainable growth of the child. It is debatable whether or not the weekly as opposed to the half year approach may be better.

²¹⁸ The Braiman rule in the US demands that for joint custody to take place both parents must behave in a civilized mature fashion and must be amicable parents. *Braiman v Braiman*, 378 N.E. 2D 1019 (1978)

²¹⁹ Australia and Thailand allow for a parental plan; Government of India Law Commission of India [Department of Legal Affairs] 14th Floor, Hindustan Times House, KG Marg, New Delhi 10th November 2014; Consultation Paper on Adopting Shared Parentage in India

²²⁰ *Ibid* The Children Act, Part II

²²¹ In all actions concerning the child whether private, public social welfare, institution, administrative authorities, courts of law legislative bodies, The Children Act, Part II

²²² The conduct and wishes of the parent or guardian of the child, the ascertainable wishes of the relatives of the child,.... The ascertainable wishes of the child, whether the child has suffered any harm or is likely to suffer any harm is not order is not made, the child's religious persuasions; the customs of the community to which the child belongs, circumstances of any children at home or the child siblings

²²³ The Guardian and Wards, Act 1890

²²⁴ *Mausami Ganguli v Jayant Ganguli*, (2008) 7 SCC 673

²²⁵ 1890

²²⁶ *Gaurav Nagpal v Sumedha Nagpal* Civil Appeal No p. 5099/2007, Supreme Court of India, Judgment dated 19 November 2010 similarly in *Vikram Vir Vohra v Shalini Bhalla*, Civil Appeal No 2704/2010, Judgment dated 25/03/2010 a mother was granted custody of a child when she had a new found job in Australia.

²²⁷ Contempt Petition (Civil) No. 394 of 2009, Supreme Court of India, Judgment dated 30/11/2010.

3.3 Regulatory legal parentage in surrogacy arrangements

The Children Act establishes the National Council for Children's Services (NCCS) which amongst other functions oversees the adoption of children in Kenya. However, there is need urgent need to amendment The roles and functions of NCCS to include them as representatives to in a Surrogacy Regulatory Board wherein they will ensure that the child's best interest are addressed as the overriding objective of issues arising in legal parentage surrogacy arrangements. Orders granting Legal Parentage in surrogacy arrangements may be expedited best through the proposed High Court endorsement procedure in the South African court; This will significantly reduce the amount of conflict arising from such arrangements including the definition of who is the parent; which is pre-determined as the commissioning parent in surrogacy. The Indian ART bill is similarly elaborate in laying out the guiding principles for Regulation of the operations of ART clinics;²²⁸ The commissioning couple may however be furnished with particular information regarding height, weight, ethnicity, skin colour, educational qualification, medical history of the donor provided that the identity, name and address of the donor is not disclosed;²²⁹ semen, oocyte donor or surrogate mother;²³⁰ requirement for written consent; Obligations of the ART clinics when using gametes or embryos; sourcing of gametes and the pre-requisite to the arrangements is that the details of the donors shall be kept highly confidential.²³¹ Donor gametes shall not however be stored for more than five years;²³² The Regulatory body must clearly spell out the rights and duties of the parties to the legal parentage in Surrogacy Arrangements and the Determination of the status of the child and the rights of the child.

²²⁸ Ibid Section 20(1).

²²⁹ Ibid 20(1) and (2).

²³⁰ Ibid section 20(16).

²³¹ Ibid 26(13).

²³² Ibid 27(2).

3.4. Analysis of landmark case laws

3.4.1.A.M.N & 2 others v Attorney General & 5 others²³³

A commissioning couple entered into a surrogacy agreement after the commissioning woman was diagnosed with secondary infertility and was also not genetically related to the twins born of the surrogacy arrangements as she could not donate her egg because she lacked an endocervical canal. This case was mainly concerned with how surrogacy agreements should be lawfully operationalized. It also raised questions as to the registration of a child born out of a surrogacy arrangement. The court held that the legal mother was the genetic and gestational mother regardless of the surrogacy contract in place. The contract was unenforceable because surrogacy arrangements are not governed by any Kenyan laws. The effect of the surrogacy contract was adoption.

The courts were thus able to confirm recognized the options of inter-country adoption under article 23²³⁴ of the 1993 Hague Convention on Protection of the children and Co-operation in Respect of the inter-country Adoption. The commissioning couples in this case were able to obtain a certificate as prescribed in article 23²³⁵, which enable them obtain a passport services. This was a tedious process and was limiting and costly to commissioning couples who wish to have the children recognized as their own from the onset²³⁶ in order to avoid to wriggles of court proceeding and time expanded in back and forth adoption procedure and reporting.

²³³ [2015] eKLR; Petition No. 443 of 2014.

²³⁴ of the 1993 Hague Convention on Protection of the children and Co-operation in Respect of the intercountry Adoption

²³⁵ of the 1993 Hague Convention on Protection of the children and Co-operation in Respect of the intercountry Adoption

²³⁶Chapter 19 of the Child Status Act , South Aftica

3.4.2 JLN & 2 others v Director of Children Services & 4 others²³⁷

This case highlights the duty of the State to protect children born out of surrogate arrangements by providing a legal framework to govern surrogacy.²³⁸ In particular whether the constitutional right to privacy of the surrogates was breached and whether the legal mother was properly registered under the Kenya legal frameworks regulating legal parentage in surrogacy arrangements. Following the delivery of the children, conflict arose as to whether the commissioning mother should be registered as the mother of the children and not the birth mother. MP Shah Hospital informed the 1st respondent (the Director for Children Services) of the circumstances concerning the birth of the twins. The 1st respondent was of the view that the children were in need of care and protection. He directed his officers to place the children under the care of a Children's Home.²³⁹ The children were later released to JLN and the hospital issued the Acknowledgement of Birth Notifications in the name of JLN.

Both cases called out for the formation of a legislative framework towards surrogacy arrangements which includes legal parentage. The cases also restricted the definition of surrogacy to the birth mother ignoring the commissioning couples for want of a legislative framework.

3.5 Conclusion

Chapter Three has analyzed and proposed how Kenya can start the journey toward a comprehensive legal framework with regard to legal parentage and surrogacy laws. Chapter 4 concludes and proposes rights of parties which the drafters must protect to ensure the harmonization of laws in legal parentage.

²³⁷ [2014] eKLR; Petition No.78 of 2014.

²³⁸ Ibid para 40.

²³⁹ Ibid para 2 and 3.

CHAPTER FOUR

Conclusion and Recommendations

4.0 Introduction

This chapter is a summary and conclusion in respect of the foregoing chapters. It also summarises the gaps that exist in the legal, institutional and policy framework on the relevant areas in this topic. This chapter also makes appropriate recommendations which if adopted will go a long way towards the realization of better pieces of legislation on surrogacy laws in Kenya.

4.1 Summary and Conclusion

Chapter one lays the foundation of the research study. It discusses the Introduction and background of the study where it highlights the general framework which this study encompasses. It also identifies the statement of the problem which pinpoints the key areas to be addressed by the study. This chapter also states the research objectives of the study, the research questions, the hypothesis of the study and the research limitations and methodology used to conduct the study. It further justifies the reason for conducting the study. It equally discusses an array of scholarly books which have been penned by various authors on the subject matter of surrogacy arrangements and legal parentage in Kenya, South Africa, India, Sweden and other jurisdictions. These books are invaluable to the study as they help focus the subject scope of this study.

Chapter two highlights the critical factors considered when entering legal agreements in surrogacy arrangements. These factors usually form the basis of the formal or informal contractual arrangements. This Chapter brings out the arguments for and against surrogacy arrangements. This chapter posits that these factors for and against surrogacy arrangements should be given serious considerations when making the Reproductive Health Care Bill in Kenya. This chapter also highlights the legal challenges that compound and undermine the

surrogacy arrangements. This includes amongst others the moral reasons. It also outlines the contemporary challenges which are associated with the practice to surrogacy owing to the fact that its evolving nature and use of technology presents new challenges for the regulation of the practice.

Chapter three discusses the current provisions that support legal parentage in surrogacy arrangements under the Constitution together with international Conventions, The Children Act; and the best practices that can be adopted from the UK; India; SA and US. It appraises, criticizes and highlights the shortcomings of the current provisions and seeks to propose the best practices applicable in our jurisdiction. This Chapter also reviews local cases which have addressed issues surrounding legal parentage in surrogacy arrangements in Kenya.

Chapter four is the final chapter of the study. It succinctly summarizes all the chapters of this study. It also highlights the fundamental policy and principles discussed in the previous chapters. It thereafter presents a conclusion of the study. Lastly this chapter tables recommendations which should be adopted to ensure the enactment of a comprehensive Act of Parliament to govern surrogacy practice in the Republic of Kenya.

4.2 Recommendations

This research paper proposes the following recommendations:

4.2.1 General Recommendations

- a. To conduct a civic education on legal rights attached to Assisted Reproduction and Assisted Reproductive Technology with specific emphasis on legal parentage of surrogacy arrangements. This is because many members of the society do not know the meaning of surrogacy arrangements let alone the rights they should demand under the arrangements.

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- b. To Request for public participation in proposing amendment to Legal parentage laws affecting Surrogacy; this will help demystify the practice which is shrouded in secrecy.
 - c. To propose that Kenya participates in the ongoing discussions of International surrogacy and matters arising thereto which include legal parentage and parental responsibility issues; reproductive health matters.
 - d. Proposing formation of an independent regulatory body with India's ART Bill as a mode, to the extent that we do not promote commercial surrogacy, this will increase awareness and the level of informed decisions parties will make when entering into a legal parentage surrogacy agreement.
 - e. To propose that have a the judicial authorities issue court orders prior to any medical procedure conducted towards assisting reproduction which in turn affects legal parentage.
 - f. To ensure all stakeholders having representation in the Regulatory body including with the highest ratio from NCCS that the best interest of the child is paramount to all decisions made on legal parentage and surrogacy as it is the overriding objective of the Children Act.
 - i) To further propose that the Regulatory body do come up with guidelines, this will govern and vet the conduct and capacity of the professionals who supervise the practice of surrogacy.
 - ii) That the regulatory body do address the fundamental requirements and conditions of all surrogacy agreements the date of the commencement of the agreement should be tied to the date of fertilization of the surrogate mother;

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- a. the amount of compensation to the surrogate mother should be specified;
 - b. where termination has occurred the reasons of termination of the Contractual Agreement must be specified in the agreement;
 - c. registration of the child must be in the name of the commissioning parents;
 - d. the surrogacy agreements should be deposited with the Registrar of Persons;
 - e. all parental responsibilities should be vested with the commissioning parents;
and
 - f. The parties should keep the provisions of the surrogacy agreement private and confidential to protect themselves from outside interference.
- iii) That the regulatory body do appoint officials to deal with disputes and updates international surrogacy.
 - iv) To propose a commercial amount that should be payable to all stake holders to surrogacy arrangements including the surrogate mother. This will prevent exploitation of the mother however may increase the commoditisation of Children if not regulated.
- g. There needs to be express recognition and definitions of legal parentage terms under all family law legislation which include but are not limited to The Children Act; The Law of Succession Act; the Registration of Births and Death Act. The UK definitions of legal parentage will be helpful save for legal parentage from same sex partners.
 - h. The Surrogacy Arrangements should have the following minimum requirements:

There are certain considerations which must be taken into account when designing the Agreement. These are:

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- i. an acknowledgement that the intended parents shall compensate the surrogate for her gesture;
 - ii. a statement that a licensed physician will perform artificial insemination on the surrogate;
 - iii. that the intended parents shall acknowledge the child in question once born;
 - iv. that the surrogate acknowledges the fact that the donor-husband is the real, genetic father of the infant in question; and finally
 - v. a statement by the surrogate that she will consent to the adoption of the infant by the real father and his wife.²⁴⁰

4.2.2 Recommendations to protect the surrogate child

- a. To ensure screening all gametes 6 months prior to procedure to protect the child against sexually transmitted diseases or other communicable diseases. To ensure gametes are not stored for more than 5 years.
- b. Surrogate arrangements must stipulate for the provision of financial support for the surrogate child to cushion the child and the surrogate mother in the unfortunate of demise of the Commissioning Parents before the delivery of the child, or divorce of the Commissioning Parents and subsequent willingness of none to take the child or the occurrence of any other intervening factor which may render the intended parents unavailable or unwilling to take the surrogate child. This however does not shield parties (including the surrogate child) from an agreement gone bad due to unpredictability. Even the courts have no control of enforceability of surrogacy arrangements in some instances as discussed in this thesis.

²⁴⁰*Supra* note 36.

If the child is rejected by both the commissioning couple and the surrogate mother, the surrogate child should be surrendered to the Children Services Department for adoption either by the surrogate mother or any other willing person.

Should a dispute arise as to legal parentage when the child is less than 6 months temporary order should be given to the surrogate mother but should the surrogate mother consent, the child be in the custody of the commissioning couple.

In the event of proposed foreign surrogacy arrangements; the courts must obtain an irrevocable acceptance from the commissioning parent(s) country of origin that they accept surrogacy arrangements commercial or otherwise; and that the child will acquire citizenship similar to the commissioning parents.

The Children born under surrogacy arrangements should have a guardian whether or not the matters involve foreigners. The procedure that should be followed is as is proposed in the Indian ART Bill. Which practice will ensure the child is protected and cared for by a mother figure for a minimum of one month pending the appointment the proposal of a home by NCCS.

- c. Section 12 of the Births and Registration Act should be repealed; consent and evidence should not be required prior to a legal mother putting the child's father's name on the on the Birth certificate.
- d. The registrar should open a parental order register which should be handled with privacy safe for approved conditions set out on the guidelines set out by the regulatory body. The child should be allowed access to the medical history of the surrogate; height weight skin colour and not identity unless by the consent of the surrogate parent or donor and except of dangers to health.

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- e. To secure money for three months counselling for surrogate child at the age of 7 years old if there is a single parent or commissioning parent involved.

4.2.3 Recommendation geared to protect the surrogate mother

- a. To ensure screening all gametes 6 months prior to procedure to protect surrogate mother against sexually transmitted diseases or other communicable diseases. To ensure gametes used on the surrogate mother are not stored for more than 5 years.
- b. To ensure that the surrogate mother does not undergo more than three medical procedures for the same couple or person in order to protect her health
- c. The pre-requisite conditions to be met by the surrogate mother should be set out by the regulatory body and reviewed annually to confirm their health is protected. The surrogate mother must be between the age of twenty one years and forty five years and must have given birth to at least two children of her own through normal birth and must further be mentally sound to enter into the surrogacy arrangement.
- d. Surrogate arrangements must of necessity provide for the intended parents to take life insurance cover for the surrogate mother to shield them from any medical or physical complication that may necessitate the need for an urgent medical care.
- e. The surrogate mother and the commissioning parents should enter into the Agreement freely devoid of any coercion, duress or undue influence. The Consent given should also be a voluntary and an informed consent.
- f. A surrogate mother should not enter into a surrogacy arrangement for commercial gains. However, a reasonable compensation should be available to the fifty percent prior to the procedure being carried out and fifty percent prior to delivery of the child

and fifty percent after delivery of the child whether healthy or otherwise. The commissioning parents should also shoulder the burden of all pregnancy related costs;

- g. The surrogate mothers and the commissioning parents must be given joint and separate counselling services one month prior to the parties signing an agreement(the could include information on medical, physical emotional and legal risks which should assist her in making an informed decision as far as is practical) The counselling should take place before the court order approving the surrogacy arrangement being signed and two months after relinquishing her child to the commissioning parent or parents and also in instances where to where the child born has succumbed to a still birth;
- h. To be allowed to terminate the pregnancy on the advice of a medical practitioner in the event that the pregnancy will be harmful to her or the resultant child.

4.2.4 Recommendations to protect the commissioning parent

- a. To ensured screening all gametes 6 months prior to procedure to protect surrogate mother and child against sexually transmitted diseases or other communicable diseases. To ensure gametes used on the surrogate mother are not stored for more than 5 years. This will reduce any damages that may arise from a legal suit.
- b. To ensure that the surrogate mother has at least two healthy children with no history of losing a child either through miscarriages or infant mortality.
- c. The surrogate mother and the commissioning parents should enter into the Agreement freely devoid of any coercion, duress or undue influence. The Consent given should also be a voluntary and an informed consent.
- d. The legal parentage agreements should be approved by the court order to avoid any change of mind from the surrogate mother due to emotional attachments to

the child after birth. A commission parent should as far as is practicable know anticipated costs to avoid black maid and exploitation by surrogate mother or stakeholders towards the completion period (9 months)

- i. The commissioning parents must be given joint and separate counselling services one month prior to the parties signing an agreement(the could include information on medical, physical emotional and legal risks which should assist commissioning parent(s) in making an informed decision as far as is practical) The counselling should take place before the court order approving the surrogacy arrangement being signed and two months after receiving the child; counselling should include in instances where to where the child born has succumbed to a still birth;
- e. The birth certificate of a child born through surrogate arrangements should contain the names of the commissioning parents in order to protect the legal interest of the child and the commission parents should there be any intervening factor;
- f. Infertile person(s) should be allowed to use donors to have children of their own; and
- g. The law should expressly prohibit the surrogate mothers from engaging in activities that may result in miscarriage of the child like taking drugs, alcohol and engaging in demanding physical activities amongst others.
- h. The conform that the medical practitioner will conduct himself professionally in not allowing the surrogate mother to terminate her pregnancy any account other that the fact that the pregnancy will be harmful to her or the resultant child. To be

entitled to compensation in the event that there is no medical approval of termination of pregnancy by the surrogate mother.

4.3 Conclusion

Chapter four has summarized the scope of the thesis and proposes recommendations of how the key players should be treated under legal parentage on surrogacy arrangements. The current legislation addressing matters arising with regard to legal parentage in surrogacy are inadequate and insufficient to respond to dispute arising from infringements of rights of parties. There is a commendable effort towards protecting these parties in the recent proposed bills, Invitro Fertilization Bill-2014; The Reproductive Health Care Bill 2014 and The Assisted Reproductive Technology Bill 2016. However, we must not overlook the fact that the practice is growing and gaining ‘illegal currency’ hence the need to expedite its regulation through the proposed comprehensive legislative framework.

BIBLIOGRAPHY

BOOKS

1. Diana Frank & Marta Vogel, *The Baby Makers* (1988) Whistlepowers.
2. Geoffrey Lawrence., *A Civil Liberties Analysis of Surrogacy arrangement* (1988) Novum Publishers.
3. Glender Emmerson, *Surrogacy: Born for Another* (1996) Heinlaw.
4. Herbie J Difonzo and Ruth C Stern, *The Children of Baby M* (1968) Devotion Publishers.
5. Humphrey Herman, *Families with a Difference: Varieties of Surrogate Parenthood* (1988) Jonathan Ball Publications.
6. Jane Stoll, *Surrogacy Arrangements and Legal Parenthood; Swedish Law in a Comparative Context* (2013) Elanders Sverige AB.
7. Keith J Hey, *Assisted Conception and Surrogacy: Unfinished Business* (1993) Heinlaw.
8. Kimbrell Markens, *The case against commercialization* (1988) London Publishers.
9. Kindregan Charleset al, *Assisted Reproductive Technology: A Lawyer's Guide to Emerging Law and Science* (2006) Publishers Global.
10. Kirsty Horsey, *Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements* (2001) Olympia Publishers 1st Ed.
11. Mathew Tieau, *Oh Baby Baby: The Problem of Surrogacy* (2007) Michigan Publications 1st Ed.
12. Michael Stuart, *Utilitarianism and Liberty* (1962) Bloomsbury Publishing.
13. Nancy Blunet, *Who is a Mother* (1999) Berkley Electronic Press.
14. Susan Markens, *Surrogate Motherhood* (2007) Liquidity 2nd Ed.
15. Valz R, *Review of Children of Choice: Freedom and the New Reproductive Technologies* (1995) Bookguild.
16. Winborne Wesley, *Handling Pregnancy and Birth Cases* (1983) Westlegal Publishers.

ARTICLES

1. Jennifer A Parks, 'Care Ethics and the Global Practice of Commercial Surrogacy' (2010) Volume 24 Issues 7 Bioethics.
2. Keppel Vincent, 'At whose Expense? The Psychological and Social Costs of Creating Children through Gamete and Surrogacy Arrangement' (2014) Welington.
3. Margaret Brazier, Alastair Campbell and Susan Golombok, 'Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation' 1998 HMSO: London p. 62 as cited in E., 'Medical Law: Text, Cases and Materials' 2010 2nd Edition, New York: Oxford.
4. Muthomi Thiankolu, 'Towards a Legal Framework on Assisted Human Reproduction Technologies in Kenya; Some Thoughts on the Law' (2007) Technology and Social Change.
5. Snyder Sarah, 'Baby M Trial Hears Closing Arguments' (1987) Boston Globe.

6. Sveriges Kvinn, 'Surrogacy Motherhood: A global Trade with Women's Bodies' 2010 Policy Paper.
7. Tim Apleton, 'Emotional Aspects of Surrogacy: A Case for Effective Counseling and Support' in R Cook, SD Sclater and F Kaganas (Eds), 'Surrogate Motherhood: International Perspectives' 2003 Hart Publishing: Oxford p. 200 as cited in E., 'Medical Law: Text, Cases and Materials' (2010) 2nd Edition New York: Oxford.

JOURNALS

1. Barbara Salmer, "Transitional Surrogacy and International Human Rights" (2011) *Illinois Law Review*.
2. Betsy P Aigen, "Motivations of Surrogate Mother: Parenthood, Altruism and Self-Actualization" (2010) *International Research Journal of Social Sciences Volume 2 (10)*.
3. Browne C. Lewis, "Due Date: Enforcing Surrogacy Promises in the Best Interest of the Child", 87 *St. John's Law Review* 899 (2013).
4. Carol Susan, "Developing Markets in Baby-Making: In the matter of Baby M" (2007) *30 Harvard Journal Law Review*.
5. Comb James, "Stopping the Baby-Trade: Affirming the Value of Human Life through the Invalidation of Surrogacy Contracts: A Blueprint for New Mexico" (1998) *Dayton Law Review Volume 24*.
6. Elizabeth Kane, "Surrogate Parenting: A Division of Families, not a Creation" (1989) *Journal of International Feminist Analysis Volume 2*.
7. Emily Teman, "Embodying Surrogate Motherhood: Pregnancy as a Dyadic Body Project" (2009) *Body & Society Volume 15 No. 3*.
8. George P. Smith, "The Razor's Edge of Human Bonding: Artificial Fathers and Surrogate mothers" (1983) *West New England Law Review Volume 55 Issue 4 Article 2*.
9. Herbert T Krimmel, "Can Surrogate Parenting be Stopped? An Inspection of the Constitutional and Pragmatic Aspects of Outlawing Surrogate Mother Arrangements" (1992) *Valparaiso University Law Review Volume 27 Number 1*.
10. Jadv, V, Murray, C, Lycett, E, MacCallum, F & Golombok, S 2003, Surrogacy: The experiences of surrogate mothers, *Human Reproduction*, vol. 18, no. 10, pp. 2196-204
11. Morgan Holcomb and Mary P Bryn, "When Your Body is Your Business" (2010) *Washington Law Review Association*.
12. Morgan Holcomb et al, "When Your Body is Business" (2010) *Washington Law Review*.
13. Mula Sneha Goud and Sunkara Abhiram, "Is Legalising Surrogacy-An outsourcing Motherhood?" (2012) *International Journals of Advancement in Research and Technology, Volume 1 Issue 4*.
14. Richard A Epstein, "Surrogacy: The Case for Full Contractual Enforcement" (1995) *University of Chicago Law School Journal Article*.

15. Richard F. Storrow, "New Thinking on Commercial Surrogacy," (2014) *Indiana Law Journal*: Volume 88 Issue 12.
16. Saints Holm, "Genealogical Bewilderment in Children with Substitute Parents" (1964) *British Journal of Medical Psychology* Volume 37.
17. Shalev Shirley and Dafna Lemish, "Women as Consumers of Reproductive Technology: Media Representation Versus Reality" (2011) *Journal of Interdisciplinary Feminist Thought, Article 2 Volume*.
18. Sheela Saravan, "An ethno methodological approach to examine exploitation in the context of capacity, trust and experience of commercial surrogacy in India' (2013) *Journal of Philosophy, Ethics and Humanity in Medicine 1*.
19. Shoshana L. Gillers, Note, *A Labor Theory of Legal Parenthood*, 110 YALE L.J. 691, 709-11.
20. Stephen G York, "A Contractual Analysis of Surrogate Motherhood and a Proposed Solution" (1991) *24 Loyola of Los Angeles Law Review* 395.
21. Yasmin Ergas, 'The Trans-nationalization of Everyday Life: Cross-Border Reproductive Surrogacy, Human Rights and the Re-visioning of International Law' (2012) *Emory International Law Review*.

NEWSPAPER

- 1) Angela Oketch, "Reproductive Bill is Good for Kenya Women" *Daily Nation*, 7 February 2015 p.54.
- 2) Janice G. Raymond, "Sexual and Reproductive Liberation" *New York Times* 4 December 2015 p.19.
- 3) Jones Clarkson, "Artificial Womb Births: Only a Matter of Time" *Sun Herald* 5 February 1945 p.45.
- 4) Maureen Kakah, "As Rent-a-Womb Trend Gains Local Currency, Legal Loopholes Emerge" *Daily Nation* 16 July 2014).
- 5) Stephen Lee, "Sourcing out a Life" *Chronicles* 7 October 2015 p.25.
- 6) J Hunt, "A Brief Guide to Surrogacy" *Hammersmith* 3 March 2016 p. 54.

INTERNET SOURCES

1. Barbara Melinda, "Women choose to become surrogates sociology essay" 2010. Available at www.ukessays.com (accessed on 22 October 2015).
2. Bianca Jackson, "My Bun Your Oven: An Introduction to Surrogacy Law in the United Kingdom" (2014). Available at <http://www.biancajackson.mybunyouroven.surrogacylawintheuk.pdf> (Accessed on 21 October 2015).
3. *Fifth Report of Session 2004-2005 of the House of Commons Science and Technology Committee*, Volume 1 (Chapter 3 of the Report). Available at <http://www.parliament.uk/s&tcom> (Accessed on 22 June 2016).

-
4. Geoffrey Lawrence., “A Civil Liberties Analysis of Surrogacy arrangement” (1988). Available at <http://www.scholarship.law.georgetown.edu/facpub/7> (Accessed on 10 December 2015).
 5. George P. Smith, ‘The Razor’s Edge of Human Bonding: Artificial Fathers and Surrogate mothers’ (1983) *West New England Law Review Volume 55 Issue 4 Article 2*. Available at <http://digitalcommons.law.wne.edu/lawreview/vol5/iss4/2> (Accessed on 11 December 2015).
 6. **Judy Thongori** DNA tests: Child’s rights override parents privacy concerns **updated Sun, July 20th 2014 at 00:00 GMT +3** <http://www.standardmedia.co.ke/article/2000128833/dna-tests-child-s-rights-override-parents-privacy-concerns>
 7. Katharine T. Bartlett in her article, *Surrogate Parenthood: Finding a North Carolina Solution*. Available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2381&context=faculty_scholarship (Last accessed on 23rd November, 2016).
 8. Sheela Saravan, “An ethno methodological approach to examine exploitation in the context of capacity, trust and experience of commercial surrogacy in India” (2013) *Journal of Philosophy, Ethics and Humanity in Medicine 1* p.4. Available at <http://www.peh-med.com/content/8/1/10> (Accessed on 12 December 2013).
 9. South Africa International Surrogacy Forum. Available at <http://www.surrogacy/SOUTHAFRICA/internationalsurrogacyforum.htm> (Accessed on 21 October 2015).
 10. Stephen G York, ‘A Contractual Analysis of Surrogate Motherhood and a Proposed Solution’ (1991) *24 Loyola of Los Angeles Law Review* 395. Also available at <http://digitalcommons.lmu.edu/llr/vol24/iss2/4> (Accessed on 14 December 2013).
 11. The Indian Assisted Reproductive Technology Regulation Bill 2010. Available at <http://icmr.nic.in/guide/ART%20REGULATION%20Draft%20Bill1.pdf> (Accessed on 5 October 2016).