

Surrogate Custody Disputes in Nigeria: Kidnapping or Contract Violation?

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The Legal Landscape in Nigeria: A Call for Clarity

Surrogacy offers a ray of hope for many individuals who desire to become parents, but face obstacles such as infertility, as well as for those who, due to medical or personal reasons, are unable to carry a pregnancy to term. A surrogacy arrangement involves a woman (often regarded as a surrogate) who carries and delivers a child for the intended parent(s) who cannot conceive for medical or any other personal reasons.

Despite the growing interest in surrogacy as a path to parenthood, Nigeria lacks a formal legal framework governing these arrangements. Nigeria stands in stark contrast to countries like the United States, the United Kingdom, Canada, Ukraine, and Australia, where surrogacy is regulated by laws which protect the rights and outline the responsibilities of all parties, including intended parents, surrogates, and intermediaries.

This article takes a closer look at the legal issues surrounding surrogate custody disputes in Nigeria and highlights the important role of formal contracts in providing clarity and safeguarding the rights of all parties involved, especially in the absence of a legal framework.

Types of Surrogacies: Understanding the Difference

Surrogacy options fall into two categories:

- **Traditional Surrogacy:** Here, the surrogate's egg is fertilized via artificial insemination with the intended father's sperm, making the surrogate the child's biological mother.
- **Gestational Surrogacy:** In this modern approach, IVF technology is used to fertilize an egg from the intended mother (or a donor) with sperm from the intended father (or a donor). The resulting embryo is then implanted in the surrogate, who has no genetic ties to the baby.

The Nigerian Legal Landscape: A Work in Progress

In Nigeria, surrogacy remains uncharted territory in legal terms. While surrogacy is not expressly prohibited in Nigeria, it also is not legally acknowledged, as there is currently no legal framework regulating it in Nigeria. The country has seen attempts to regulate surrogacy, notably with the introduction of the Assistive Reproductive Technology (Regulation) Bill 2016. However, this bill is yet to become law, leaving a significant gap in the legal protection and regulation of surrogacy contracts. Lagos State stands out as the exception, having introduced guidelines on Assisted Reproductive Technology in 2019, a pioneering move yet to be

replicated in Nigeria's other states and the Federal Capital Territory. This gap in legislation leads to informal agreements, which may result in disputes and exploitation, underlining the critical need for regulatory guidance and legal protection for everyone involved.

A Real-Life Cautionary Tale

A notable case from April 2022 involving a dispute between a US-based couple and their Nigerian surrogate, highlights the potential for misunderstanding and conflict in the absence of legal frameworks. The surrogate in this case, accused the couple of abandonment and non-payment of her medical bills, which lead her to decide against handing over the newborns to the couple.¹ This incident illustrates the complexities and potential for heartbreak in surrogacy arrangements lacking legal support.

Custody Disputes: Kidnapping or Contract Violation?

In the absence of surrogacy legislation, determining the maternity of a child, especially in custody disputes, becomes complex. What happens in a scenario where a surrogate absconds with a child or refuses to relinquish the child due to the intending parent's outstanding debts or just out of maliciousness? Is this considered kidnapping? The legal interpretation—whether as a breach of contract or kidnapping—varies with the surrogacy type.

For gestational surrogacy, since the surrogate has no genetic ties to the child, her refusal to release the child to the intended parents could lead to kidnapping charges. Traditional surrogacy, however, presents a different scenario. Traditional legal reasoning exempts a traditional surrogate from kidnapping charges against her “biological child”. This distinction highlights the legal complexity surrounding the nature of the traditional surrogate's relationship with the child.

Navigating Legal Uncertainties

It is clear that the absence of surrogacy laws in Nigeria leaves all parties in a precarious position, navigating a landscape filled with uncertainty. To foster a transparent, ethical, and legally sound approach to surrogacy, it is imperative for Nigeria to establish comprehensive legislation. Such laws would address the complexities of surrogacy, safeguard against exploitation and disputes, and ultimately prioritize the well-being and rights of the children born through these arrangements as well as the rights of the other related parties.

¹ 'US-based couple accuses Nigerian surrogate mother of absconding with twins', Premium Times, (Lagos: 8 April 2022), available at: <https://www.premiumtimesng.com/news/top-news/522663-us-based-couple-accuses-nigerian-surrogate-mother-of-absconding-with-twins.html?tztc=1> accessed on March 18, 2024

Until such laws are in place, the focus is on crafting detailed, legally sound surrogacy contracts. These contracts are an indispensable tool for those considering surrogacy as a path to parenthood.

The Cornerstone of Surrogacy: Contractual Agreements

In the world of surrogacy, a well-drafted contract is more than just paperwork - it is the foundation of a successful surrogacy journey, as it involves vital decisions regarding the formation and birth of children. Such a contract will spell out the rights, responsibilities, and expectations of both the surrogate and the intended parents. Essential elements include financial agreements, medical procedures, decision-making authority, confidentiality terms, dispute resolution/governing law and plans for unforeseen circumstances like multiple births or complications. Surrogacy contracts must meticulously protect the interests of all parties, especially the intended mother and the surrogate. In traditional surrogacy scenarios, it is crucial to incorporate clauses that shield the intended mother and parents from disputes over parental rights. Across all surrogacy types, contracts should unequivocally state that any unauthorized retention of the child by the surrogate is considered kidnapping, emphasizing the severity of such actions and ensuring legal protection for the intended parents.

Understanding the Validity of Surrogacy Contracts

Surrogacy contracts, much like any other agreement, are built on the foundation of mutual consent and exchange of value, which are critical for their validity and enforceability. Even in the absence of specific surrogacy laws in Nigeria, these agreements are recognized under general contract law principles. This means that, once the contract includes a clear and definitive offer, acceptance (express or implied), and consideration (something of value exchanged), it becomes valid and enforceable. However, it is crucial to recognize that commercial surrogacy contracts, where the surrogate receives payment, are perceived differently across various jurisdictions, with some equating them to the sale of children, which is legally and ethically contentious.

In Nigeria, the legal system allows for the enforcement of contracts that meet these basic criteria. Therefore, despite the lack of specific legislation governing surrogacy, contracts related to surrogacy are treated with the same respect and consideration as any other legally binding contract.

The Question of Enforcement in Courts

A significant question arises about the enforceability of surrogacy contracts in Nigerian courts, particularly concerning public morality and policy. While debates on morality and public policy

might suggest a reluctance to enforce such contracts, it is important to note that surrogacy agreements, by meeting the legal requirements of a valid contract, qualify as enforceable under the law. Should there be any issues with a surrogacy contract, the parties involved have the right to seek legal redress and potentially have their case heard and resolved in court.

Securing Parental Rights After Birth

For the intending parent(s), an essential step following the birth of the child through surrogacy is to obtain a custody order in Nigeria. This legal step is crucial to ensure that their parental rights are fully and legally recognized and protected. Obtaining a custody order solidifies the intending parent(s) legal standing as the child's parents, providing peace of mind and legal clarity for the family's future.

Charting a Course Through Surrogacy's Legal Landscape in Nigeria

The core of surrogacy arrangements—whether traditional, or gestational—rests on contracts. The effectiveness of surrogacy contracts largely hinges on their clarity, comprehensiveness, and the precision with which they outline the rights, responsibilities, and expectations of all parties. Such contracts are vital for preempting and resolving disputes, protecting interests, and ensuring the welfare of the resulting child.

Guiding Families Through Surrogacy's Legal Journey

At SimmonsCooper Partners, we recognize the complexities and emotional nuances of surrogacy arrangements, especially in a legal landscape like Nigeria's, where clear guidelines are still in development. To address this, we have a specialized advisory service designed to support individuals and couples navigating the surrogacy process, ensuring that all parties are fully informed and protected throughout their journey to parenthood. In an era where the paths to family formation are as diverse as they are beautiful, our guidance is crucial for those seeking to explore surrogacy as a safe and legally sound option.

To discuss surrogacy-related legal services or any other related family law services, please reach out to – Funmilola Mesaiyete: lola.mesaiyete@scp-law.com; Monsurat Lamina: monsurat.lamina@scp-law.com.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.