

Published 2023



GHANA SCHOOL OF LAW
STUDENT JOURNAL

**THE CURRENT LEGAL
FRAMEWORK FOR
SURROGACY IN GHANA AND
THE INHERENT NEED FOR
COMPREHENSIVE
LEGISLATION ON SAME**

Benedicta Fosuhene Agyen*

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Publisher

The Students' Representative Council
Ghana School of Law
Accra

ISSN: 2961-032X

This journal should
be cited as (2023)
8 GSLSJ



<http://www.gsljournal.org/>

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THE CURRENT LEGAL FRAMEWORK FOR SURROGACY IN GHANA AND THE INHERENT NEED FOR COMPREHENSIVE LEGISLATION ON SAME

Benedicta Fosuhene Agyen*

ABSTRACT

Procreation is crucial for the survival of any species. It refers to the production of offspring and is considered the primary reason for marriage in African societies. In Africa, once a woman is married, having children is expected of her. Her inability to do so after a few months of marriage can become a serious concern, potentially jeopardising her position in her matrimonial home. In addition, her husband may fall victim to the constant pressure from his family to bear children, which may cause him to take another wife or even divorce his wife. The shame and stigma of being tagged as barren could drive a woman to depression even though sometimes the woman may not be the cause of the couple's infertility. Couples in such situations could resort to adoption, however, most mothers-in-law and even the spouses themselves are not necessarily thrilled with this option in Africa. The aforesaid begs the question of what an African woman who is unable to get pregnant or carry a baby full-term can do to secure her position in her matrimonial home. One answer to this question is surrogacy. The purpose of this article, therefore, is to examine the current legal framework for surrogacy in Ghana, the loopholes that cause hesitation among Ghanaian women to adopt this method, and the inherent need for extensive laws on surrogacy in Ghana.

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1.0 INTRODUCTION

Assisted Reproductive Technology (“ART”) is a term used to describe medical procedures that are designed to help individuals or couples achieve pregnancy. These procedures can include In Vitro Fertilisation (IVF), Intracytoplasmic Sperm Injection (ICSI), Intrafallopian Transfer and other techniques that are used to overcome fertility issues. ART has helped many people who otherwise may not have been able to start families, do so.¹ For women who have had hysterectomy, abnormal wombs, recurrent pregnancy loss and excessive health risks associated with pregnancy, surrogacy may seem like the next best option. The Collins English Dictionary² defines surrogacy as an arrangement by which a woman gives birth to a baby on behalf of someone who is physically unable to have babies herself and then gives the baby to that person. Emphasis must be placed on the last phrase in the aforementioned definition. Essentially, upon the birth of the child, the surrogate is required to give the baby to the intended parents and relinquish all rights or claims that she may have over the baby. Failure to comply with the aforesaid could lead to the institution of civil actions against the surrogate for breach of the surrogacy agreement.

There are two forms of surrogacy- gestational surrogacy and traditional surrogacy. Gestational surrogacy occurs when eggs from the intended mother are fertilised with sperm from the intended father through IVF, and the embryo is inserted into the womb of the surrogate mother. In essence, gestational surrogacy entails the use of the egg and sperm of the intended parents, which are eventually implanted into the surrogate.³ This is illustrated in the case of *Johnson v Calvert*⁴, where a surrogate mother called Anna Johnson sought custody of a child she carried on behalf of the Calverts. The courts ruled in favour of the Calverts on the basis that since it was a gestational surrogacy, the Calverts were the biological relations of the baby.

Traditional surrogacy, on the other hand, occurs where the egg of the surrogate mother is fertilised by the sperm of the intended father, either through sexual intercourse or IVF, thus, making the surrogate the biological mother of the child.⁵ This is also illustrated in the *Baby M case*⁶ where a custody dispute arose between a traditional surrogate mother and the intended parents. This case highlights the need for clarity and consensus in drafting surrogacy agreements.

Surrogacy has been in existence since time immemorial, with evidence of its use dating back to ancient times in the Bible. Surrogacy has been mentioned in various ancient texts, including the Bible. In fact, the story of Abraham and Sarah in Genesis chapter 16 is often

¹ Nova IVF Fertility, 'Best Fertility Clinic - Top Infertility Hospital/Centre in India: Nova IVF' <<https://www.novaivffertility.com>> Accessed 21 November 2023.

² Mark Forsyth, *The Collins English Dictionary* (12th edn, Harper Collins 2014).

³ Carol A wheeler, 'Eight things you should know about gestational surrogacy' (Women & Infants, 21 March 2022) <<https://fertility.womenandinfants.org/blog/gestational-surrogacy>> accessed 21 November 2023.

⁴ *Johnson v Calvert* 5 Cal.4th 84 [1993].

⁵ Creative Family Connections, 'History of Surrogacy' <https://www.creativefamilyconnections.com/blog/history-of-surrogacy> accessed 21 November 2023.

⁶ *In re Baby M* 537 A.2d 1227, 109 N.J. 02/03/1988.

cited as an example of traditional surrogacy. Particular reference is made to Genesis chapter 16:1-4, which details the story of Abraham and his wife Sarah, and the fact that traditional surrogacy occurred, when Sarah presented Hagar, her Egyptian maid servant, to her husband to be impregnated by him and eventually birth a child for him. Considering the Biblical traces of surrogacy, the stigma against the concept of surrogacy by “Ghana’s Christian community” leaves much to be desired. This paper, thus, calls for comprehensive laws on surrogacy in Ghana.

2.0 GHANA’S CURRENT LEGAL FRAMEWORK ON SURROGACY

Surrogacy has a rich history and many interesting cases. This procedure has garnered much attention and praise since its discovery several years ago. As a developing nation that has been independent since the 6th of March 1957, Ghana ought to embrace the concept of surrogacy. In Ghana, citizens have the freedom to contract and contracts are enforceable. However, with the absence of comprehensive legislation regulating surrogacy in Ghana, a surrogacy agreement may leave a lot to be desired.

It can be argued that the passage of the Registration of Births and Deaths Act, 2020 (Act 1027) indicates that Ghana is gearing towards accepting surrogacy as a method of ART. The Act defines assisted reproductive birth as ‘the use of modern technological advancement including fertility medication, artificial insemination, and in vitro fertilisation to cause reproduction and childbirth other than by the orthodox means.’⁷ Surrogacy is also defined as

an arrangement where an embryo formed from an egg and sperm of persons other than a surrogate mother and the partner or husband of that surrogate mother is implanted into the surrogate mother, or an arrangement where a gamete from a person other than the partner or husband of the surrogate mother is introduced into the surrogate mother to fertilise the egg of that surrogate mother, to enable the surrogate mother carry the foetus for the period of the pregnancy and give birth at the end of the period on behalf of another woman or the intended parent.⁸

The Interpretation section of Act 1027 also defines a surrogate mother as ‘a woman who has accepted under a surrogacy agreement to carry a foetus for the period of the pregnancy and give birth to a baby at the end of the period on behalf of another woman or the intended parent.’⁹ The definitions and provisions on surrogacy under this Act show that Ghana is now willing to give legal backing to the use of ART, and Ghanaians can enter into surrogacy agreements as provided for under Act 1027. Notwithstanding all the positive aspects of Act 1027, the law on surrogacy seems vague and insufficient. Section 22 of Act 1027¹⁰ enables an

⁷ Registration of Births and Deaths Act, 2020 (Act 1027), s 48.

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid, s 22.

application for a pre-birth parental order.¹¹ Specifically, section 22(2) provides that within twelve (12) weeks after an embryo is introduced into a surrogate mother, the intended parent must apply to the high court for the grant of a pre-birth parental order to allow the intended parent or surrogate mother or both to be named as the parent of the child born through surrogacy, provided that the birth of the child occurs within twenty-eight (28) weeks of the order of the High Court. The consequence of this provision is that in the absence of such an order, the surrogate mother will be deemed as the mother of the child. However, this does not automatically imply that an intended parent would lose parental rights over the child, to the surrogate mother. The law allows an intended parent or surrogate mother to make an application for the grant of a post-birth parental order or a substitute parentage order after the birth of the child through surrogacy.

From the provisions of Act 1027, there's a clear indication that the law seeks to protect the rights of both the surrogate mother and the intended parents, but this is not sufficient. The Act is silent on issues concerning compensation of surrogates, qualifications of surrogates, and many more. The silence of the Act on these very important issues has made it quite difficult for Ghanaian women who are unable to carry a child full-term, or who for other health reasons cannot bear children to go in for this mode of conception.

3.0 REASONS WHY THERE IS AN INHERENT NEED FOR COMPREHENSIVE LEGISLATION ON SURROGACY IN GHANA

Ghana is a developing nation and must adopt a more progressive approach in terms of legislation. Should Ghanaian courts be confronted with a case concerning surrogacy, determining the case may be difficult due to the absence of comprehensive legislation on the subject matter. Such legislation will go a long way to help women who are unable to conceive or carry a pregnancy full-term due to health issues, find solace in allowing other women to carry their children for them with little to no risks. There must be express provisions in the law on who qualifies to be a surrogate mother. Act 1027, merely defines the process of surrogacy and who a surrogate mother is, but does not present the qualifications that one must have to serve as a surrogate mother.

In my considered view, a surrogate mother must have capacity - age. Surrogacy agreements are also contracts, and one of the essentials of a valid contract is that the parties must have the capacity to contract. In Ghana, despite the existence of statutes such as the Children's Act¹² which defines a child as a person below the age of 18 years, the age for entering into contracts is set at 21 years. Thus, comprehensive legislation on surrogacy in Ghana must set the age for persons who wish to enter into surrogacy agreements at 21 years or above.

The Children's Act, 1998, Act 560 enunciates what has become generally known as the Welfare Principle. The principle is simply that 'the best interest of the child, shall be

¹¹ Ibid, s 22.

¹² Children's Act, 1998 (Act 560).

paramount in any matter concerning a child.¹³ Prohibiting persons who suffer from terminal illnesses or illnesses that may be transferable to the foetus, aligns with the welfare principle. Furthermore, a mandatory requirement that surrogate mothers should provide full disclosure of their health history is of utmost importance to ensure the health and well-being of the foetus as it develops in the womb of the surrogate mother.

In light of the aforementioned, prohibiting persons who are of unsound mind from serving as surrogate mothers is also essential, subject to some exceptions. Section 1(2) of the Wills Act¹⁴ provides that persons suffering from insanity cannot make a will. However, the case of *Cartwright v Cartwright*¹⁵ is an exception. The court held in that case that a mentally unsound person can make a will during a lucid moment as long as he/she understands the nature and effect of the will. This is similar to the rule in Contract law, which provides that a contract entered into by a mentally incompetent person during a lucid interval is valid, thus, binding on the party. This is supported by the case of *Selby v Jackson*.¹⁶ Another common concern in the law of contract, pertaining to mentally unsound persons, is whether they are capable of understanding the nature and effect of the contract they have entered into. A comprehensive legislation on surrogacy must address similar concerns as surrogacy agreements are essentially contracts. Furthermore, Act 560 provides that no child shall be discriminated against 'on grounds of gender, race, age, religion, disability, health status, custom, ethnic origin, rural or urban background, birth or other status.'¹⁷ The phrase 'other status' should be interpreted to include the method by which the child was conceived (ART), to ensure that the enactment of more concise legislation to regulate surrogacy connotes not only acceptance of this mode of reproduction but also axes any form of discrimination or disdain against children born via this method.

The next point of consideration is that extensive legislation on surrogacy must contain an express provision that the surrogate mother must not be someone who is married. Ghana is a multi-cultural country with customs and beliefs dating back to ancient times. For example, in some Northern parts of the country, customs and traditions dictate that if a married woman is impregnated by another man, the child is deemed to be that of the woman's husband. Surrogacy can be gestational or traditional, and either way, both forms of surrogacy entail impregnating the surrogate mother. Looking at how important customs and traditions are to the Ghanaian society, if married persons are allowed to be surrogates, there may be issues concerning the heritage of the child. In some extreme situations, accusations of adultery may be levelled against these married surrogates. Therefore, prohibiting married persons from serving as surrogates would prevent custodial battles over children born through surrogacy.

¹³ Ibid, s 2(1).

¹⁴ Wills Act, 1971, (Act 360) s 1(2).

¹⁵ *Cartwright v Cartwright* [1775-1802] ALL ER 476

¹⁶ *Selby v Jackson* (1844) 6 Beav 192.

¹⁷ Children's Act (n 12), s 3.

Assessing the situation from another tangent, if a married woman is allowed to serve as a surrogate mother to a married couple who cannot have children themselves, it would be an awkward situation.

The element of consent is crucial to a surrogacy agreement. The Merriam-Webster Dictionary¹⁸ defines consent as 'to give assent or approval.' Consent exists through various aspects of the Law –there is the element of consent in rape cases, in cases of battery under the law of torts, in marriage contracts, among others. Consent may be express or implied, and the absence of it renders an agreement void. The Criminal Offences Act provides some instances under which consent is void.¹⁹

First, consent is void if given by a person under 12 years of age or if given by a person suffering from insanity or immaturity or if given under intoxication, so that the person is unable to understand the nature and consequence of the act to which the consent is given.²⁰ Essentially, persons below 18 years should not serve as surrogate mothers and the consent of a surrogate mother should be obtained while she is in a clear and stable state of mind. Hence, any form of consent obtained via intoxication or when the person is in such a state that she is incapable of understanding the nature of the act she consents to, is void.

Additionally, consent is void if it is obtained by or under the exercise of official, parental or any other authority and this authority is not exercised in good faith.²¹ For example, a mother compelling her daughter to agree to act as a surrogate mother against her daughter's wishes, to obtain the financial benefits associated with the procedure, would invalidate such consent.

Again, consent is void if it is obtained by deceit, duress or undue influence.²² This buttresses the fact that consent must be freely given, and the absence of the exercise of such freedom invalidates the said agreement.

The issue of consent can be tricky, as a person can initially consent to do something, but later claim that he or she did not consent. It is my humble submission that additional laws on surrogacy must be passed, particularly, for the requirement of a 'consent clause' in all surrogacy agreements. The said consent clause should be signed by the surrogate mother and the intending parents to avoid future disputes.

Also, remuneration should be considered in the promulgation of comprehensive laws on surrogacy in Ghana. Surrogacy can either be commercial or altruistic. As regards commercial surrogacy, the surrogate mother is compensated for her services and her medical expenses are catered for. This means that the intended parents would not only pay a lump sum to the surrogate mother for carrying their baby, but they would also be responsible for her medical

¹⁸ Merriam-Webster, Merriam Webster's Collegiate Dictionary (11th edn, Merriam-Webster Inc 2022).

¹⁹ Criminal Offences Act, 1960 (Act 29), S 14.

²⁰ Ibid, s 14(a).

²¹ Ibid, s 14(c).

²² Ibid, s 14(f).

bills. In contrast, altruistic surrogacy occurs when a surrogate mother volunteers to carry a baby for the intended parents without any monetary compensation.²³

Carrying a pregnancy is no mean feat and women in such situations stand at the crossroads of life and death. Additionally, the emotional and mental turmoil associated with pregnancy, the distress, back pains and even post-partum depression must all be considered in surrogacy agreements. Some critics of commercial surrogacy argue that it reduces human life to a mere business transaction, and subjects vulnerable women to exploitation. However, giving the surrogate mother no monetary compensation for her services seems unfair. The addition of a range of reasonable amounts of money to be paid to the surrogate mother in further laws on the subject matter, could aid in curbing the exploitation of the surrogate mother by the intended parents and vice versa. This notwithstanding, altruistic surrogacy must also be encouraged and regulated, especially among close friends and family.

Ultimately, comprehensive legislation on surrogacy could also include crimes related to surrogacy and their corresponding penalties. The Constitution provides that 'no person shall be convicted of a criminal offence unless the offence is defined and punishment for it is prescribed in a written law.'²⁴ Crimes related to surrogacy on the part of the surrogate mother could entail providing false health history, absconding with the baby, and concealing a miscarriage to extort money from the intended parents, inter alia. Comprehensive legislation on surrogacy could include such offences and impose penalties. This would go a long way in protecting the interests of the intended parents and those of their unborn children. Provisions on the punishment to be imposed on the intended parents should they abandon the surrogate mother during the pregnancy or after the birth of the child, as well as failure on the part of the intended parents to pay the surrogate mother for her services must also be included. In addition, the surrogate mother is a human being so her autonomy over her own body must be protected.

There must also be provisions protecting the surrogate mother in instances where the intended parents seek to terminate the pregnancy after the surrogacy procedure is set in motion. Being a parent is an arduous task, and this could prompt people to change their minds about having or even wanting children. It is proposed that a comprehensive legislation on surrogacy in Ghana could indicate that termination of the pregnancy can only be possible with the consent of the surrogate mother and that the pregnancy will not be terminated despite the desires of the intended parents if doing so would pose serious health risks to the surrogate mother, such as haemorrhage or uterine rupture. Additionally, the intended parents must pay an additional amount of money to further compensate the surrogate mother for time wastage, energy and effort, once the pregnancy is terminated.

²³ Brilliant Beginnings, 'What Is The Difference Between Altruistic Surrogacy And Commercial Surrogacy' <<https://brilliantbeginnings.co.uk/what-is-the-difference-between-altruistic-surrogacy-and-commercial-surrogacy/>> accessed 21 November 2023.

²⁴ 1992 Constitution of Ghana, art 19(11).



There could also be provisions for dispute resolution between the parties to a surrogacy agreement. Alternative Dispute Resolution, which includes arbitration, mediation and customary arbitration, as provided for under Ghana's ADR Act²⁵ is recommended.

4.0 CONCLUSION

In conclusion, ART is here to stay, and it is only appropriate that a democratic nation such as Ghana, which prioritises the rights of women and children, embraces the technology fully. Although the current situation requires extensive laws to regulate such a delicate subject matter, a lot of other factors require consideration. The ordinary Ghanaian woman who is unable to conceive or carry a child full-term could explore such potent methods which when properly regulated, could enable her experience and relish the joys of motherhood. The time has thus come for comprehensive legislation on surrogacy to be enacted in the Republic of Ghana.

²⁵ Alternative Dispute Resolution Act, 2010 (Act 798).

