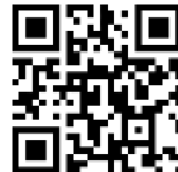
INTERNATIONAL JOURNAL OF MULTIDISCIPLINARY RESEARCH AND ANALYSIS
ISSN(print): 2643-9840, ISSN(online): 2643-9875
Volume 06 Issue 02 February 2023
DOI: 10.47191/ijmra/v6-i2-18, Impact Factor: 6.261
Page No. 604-623

Determining Legal Parentage and Nationality of a Child Born Through Assisted Reproductive Technology: A Comparative Perspective



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ABSTRACT: While procreation through copulation has remained the conventional means for pregnancy and beginning the human family, advances in medical technology has now demonstrated that coitus is no more the absolute process for childbearing. Individuals like infertile couples, single persons, lesbians and gay partners have now resorted to assisted reproductive technology (ART) and surrogacy arrangements in order to start a family. Transcending the hope and joy it offers to these groups of individuals who may have been incapable of having children of their own, this new procreative technology has stirred up a number of ethical and legal questions. The focal aim of the article was to investigate the state of the law for ascertaining the legal parentage and nationality of a child born through ART. Determination of these sensitive issues is vital because of the possibility of a child conceived through ART having more than two parents, especially where surrogacy, donor sperm and donor eggs are involved. The article adopted desk-based and comparative research methods by relying on both primary and secondary sources of information. The various sources of information were appraised and deductions derived from them were presented descriptively. The article revealed inter alia, that in some of the countries examined, ART practice is regulated and the courts, in a number of instances, have been engaged to resolve controversies pertaining to the legal parentage and nationality of children born through ART procedure. But in Nigeria, the practice is unregulated by law and there is dearth of decided cases on the subject. The authors therefore, recommended that in view of the increasing number of individuals turning to ART in Nigeria, including cross-border surrogacy, to build families, there is need for definite ART legislation in Nigeria so as to assist in resolving these problems and other related ones. Nigerian lawmakers could examine similar laws from other foreign jurisdictions and use them as potential guide to fashion out a domestic legislation in Nigeria. The Nigerian courts could also learn from decisions from other jurisdictions so as to know how to determine related cases as they occur in Nigeria.

KEYWORDS: Assisted Reproductive Technology, In Vitro Fertilisation, Gamete Intrafallopian Transfer, Intracytoplasmic Sperm Injection, Intrauterine Insemination, Legal Parentage, Nationality, Surrogacy

I. INTRODUCTION

Evolvement in medical science and technology over the past few decades have made it easier for those who were once regarded as incapable of conceiving naturally and fulfilling their dreams of having their own children realise such dreams. This is made possible via the adoption of assisted reproductive technology (ART). ART is a term that is commonly used to refer to a variety of methods applied to attain pregnancy through agency aside from the conventional sexual union between a man and woman and it includes *in vitro* fertilisation, gamete donation, donor insemination, intracytoplasmic sperm injection and intrauterine insemination.[1] Another form of medical and technological innovation employed in assisting couples to procreate is by means of surrogacy procedure.[2] This involves the hiring of a third party to either altruistically or commercially carry pregnancy and give birth to a child on behalf of another and thereafter give up the child together with all the parental rights associated with the child to the intending parent(s) or commissioning couple.

[1] Alessandro Stasi, "Protection for Children Born through Assisted Reproductive Technologies Act, B. E. 2558: The Changing Profile of Surrogacy in Thailand" (2017) 11 *Clinical Medicine Insights Reproductive Health*, 1-7 at p. 1; DOI: 10.1177/1179558117749603; retrieved from <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5753847/> (accessed on 18 December 2022). See also, Lorraine Kelly, "In Vitro Fertilisation: The Science and Ethics in the 21st Century" (2001) 7(1) *Human Reproduction & Genetic Ethics*, 15-20; DOI: 10.1179/hrge.7.1.u384347k75617561.
[2] Kimberly D. Krawiec, "Altruism and Intermediation in the Market for Babies", (2009) 66 *Washington and Lee Law Review*, 203-257 at p. 224.

Utilising ART procedure to achieve conception has indeed helped infertile married couples, homosexual couples and single individuals, who would otherwise have remained unable to conceive their own babies and become parents.[3]As a matter of fact, it has been estimated that since the inception of ART procedure in 1978, over 10 million babies have been born using the practice worldwide.[4] Given that many countries, like Nigeria, do not regulate ART practice and/or maintain registries for treatments and record births obtained through the technique, the number of babies born through the procedure is therefore, likely to be higher. In terms of financial gains, market analysts have reported that providers of IVF recorded a profit of USD 16.89 billion in 2018 with a projected profit of USD 36.39 billion in 2026.[5] In USA alone, IVF market size for 2020 was valued at USD 4.90 million with an expectation of increasing to USD 5.56 million in 2027.[6]

However, these new conceptive methods are frequently far more complicated as they raise a number of intricate questions. This is because it is possible for babies conceived through assisted reproduction to have more than two parents, particularly if donor gametes are utilised.[7] For instance, in a gestational surrogacy arrangement where a heterosexual married couple sperm and eggs are utilised, two women can probably make a biological contribution either by means of genetic structure or hormonal and other biological components[8] thereby qualifying them as biological mothers.[9] Also in a situation where donor egg and donor semen are applied by the intending parents, the child becomes biologically unconnected to both the intending parents and the surrogate. Thus, in such a case, the gestational mother, the commissioning mother and the genetic mother are three distinct individuals.[10]

Hence, it is not in doubt that utilising procreative technology to build a family can become considerably more complicated, evoking various moral and legal debates. Consequently, the primary focus of this article is to examine how the legal parentage and nationality of a child born through reproductive technique can be determined, comparatively illustrating with some countries like Thailand, United States of America (USA), United Kingdom (UK), and Nigeria.

II. RESEARCH METHODS

The article adopted desk-based and comparative research methods whereby we relied on both primary and secondary sources of information. The comparative research method helped in investigating the likely complexities relating to legal parentage and nationality of a child born through reproductive technology from the perspective of such countries like Thailand, USA, UK, and Nigeria. The various sources of information were evaluated and inferences drawn from them were presented descriptively.

III. RESULTS AND DISCUSSION

1. Meaning and Contributory Factors for Infertility

According to Anne Dana, infertility can be of two types, namely, functional infertility (FI) and structural infertility (SI).[11] Functional infertility is the inability to conceive after a year or more of regular unprotected sexual intercourse between a man and a woman

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[3] Anne R. Dana, "The State of Surrogacy Laws: Determining Legal Parentage for Gay Fathers" (2010) 18 *Duke Journal of Gender Law & Policy* 353-390.

[4] European Society of Human Reproduction and Embryology (ESHRE) 2020, "ART Fact Sheet"; retrieved from <https://www.eshre.eu/-/media/sitecore-files/Press-room/ESHREARTFactSheettv73.pdf?la=en&hash=361623B1FDF3E05140A0ABF13044104CE42CF595> (accessed on 30 January 2023).

[5] Fortune Business Insights 2021, "In Vitro Fertilisation Market Size, Share & Industry Analysis, 2019-2026"; retrieved from <https://www.fortunebusinessinsights.com/in-vitro-fertilization-ivf-market-102189> (accessed on 30 January 2023).

[6] Allied Market Research, "U. S. In Vitro Fertilisation (IVF) Services Market"; retrieved from <https://www.alliedmarketresearch.com/US-IVF-services-market>(accessed on 30 January 2023).

[7] Anne-Kristin Kuhnt & Jasmin Passet-Wittig, "Families Formed through Assisted Reproductive Technology: Causes, Experiences, and Consequences in an International Context" (2022) 14 *Reproductive BioMedicine and Society Online*, 289-296 at p. 289; DOI: <https://doi.org/10.1016/j.rbms.2022.01.001> (accessed 30 January 2023).

[8] Ruth Macklin, "Artificial Means of Reproduction and our Understanding of the Family" (1991) 21(1) The Hastings Center Report, 5-11; DOI: <https://doi.org/10.2307/3563339>.

[9] Ebrahim J. Kermani & Bonnie A. Weiss, "Biological Parents Regaining Their Rights: A Psycholegal Analysis of a New Era in Custody Disputes" (1995) 23(2) *The Bulletin of the American Academy of Psychiatry and the Law*, 261-267 at p. 264.

[10] Helen Szoke, "Surrogacy: All the Features of a Relationship that Could Go Wrong" (2001) 28 *Melbourne Journal of Politics*, 55. In fact, the case of *In re-Marriage of Buzzan*ca 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998) clearly illustrates that the number of parents can even grow up to six adults.

[11] Anne R. Dana, "The State of Surrogacy Laws: Determining Legal Parentage for Gay Fathers", (2010) 18 *Duke Journal of Gender Law & Policy* 353-390 at p. 359.

without contraception or the failure of a woman to carry a pregnancy to term.[12] Greil and McQuillan considered (functional) infertility as a "disease" that is defined by inability to achieve a successful pregnancy after 12 months or more of normal unprotected coitus.[13] In other words, FI is identified as the failure to become pregnant after a year of exposure to pregnancy risk or after a year of standard unprotected sexual intercourse in the absence of recognised reproductive pathology.[14]

FI can affect either male or female and can occur from a number of medical reasons such as "a low sperm count; having no viable eggs, or being unable to carry a baby to term."[15] Other factors that could have possible harmful consequences on reproductive health in both men and female couples and therefore, probably result in infertility include, erectile dysfunction (ED) in men, alcohol consumption, use of harmful drugs, history of sexually transmitted diseases (STDs), exposure to toxic elements, ovulatory disorder and other forms of cervical abnormalities, endometriosis, repeated abortions as well as advancement in age by women.[16]SI on the other hand is not a product of medical stipulation. Instead, it relates to a case where a person is either single or in a relationship with a same-sex partner and by reason of such association needs a third party's biological support to procreate.[17] Single individuals and same-sex partners are considered as "dysfertile" or unsuitable for parenthood regardless their fertility status.[18]

Available data indicates that the worldwide prevalence rate of FI is estimated at approximately 17%[19] with 1 in every 8 women and 1 in every 10 men reportedly facing infertility problem in the United Kingdom[20] and about 9% of men and 11 % of women of childbearing age in the US have infertility problems;[21] whilst the infertility prevalence among couples in Nigeria ranges

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[12] The Editors of Encyclopaedia Britannica, "Infertility: Medical Disorder", *Britannica*; retrieved from <https://www.britannica.com/science/infertility> (accessed on 26 December 2022). See also Enobong Mbang Akpambang & Monica Amujo-Akomolafe, "Legal Position on Surrogacy Arrangements in Nigeria and Some Selected Jurisdictions," (2020) 7(3) *International Journal of Research in Humanities and Social Studies*, 18-39 at p. 18.

[13] Arthur L. Greil & Julia McQuillan, "Trying" Times: Medicalization, Intent, and Ambiguity in the Definition of Infertility" (2010) 24(2) *Medical Anthropology Quarterly*, 137-156 at p. 138; retrieved from DOI <https://doi.org/10.1111/j.1548-1387.2010.01094.x> (accessed on 30 December 2022).

[14] T. Gerrits & M. Shaw, "Biomedical Infertility Care in sub-Saharan Africa: A Social Science Review of Current Practices, Experiences and View Points", (2010) 2(3) *Facts, Views & Vision in ObyGyn*, 194-207.

[15] Judith F. Daar, "Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms", (2008) 23(1) *Berkeley Journal of Gender, Law & Justice*, 18-82 at pp. 24-25.

[16] The Editors of Encyclopaedia Britannica, "Infertility: Medical Disorder", *Britannica*; retrieved from
<https://www.britannica.com/science/infertility> (accessed on 26 December 2022). See also, Eunice Kennedy, "What are some possible causes of female infertility?" Retrieved from
<https://www.nichd.nih.gov/health/topics/infertility/conditioninfo/causes/causes-female#:~:text=Structural%20problems%20usually%20involve%20the,reach%20the%20egg%20for%20fertilization>(accessed on 31 December 2022); Alaina B. Jose-Miller, Jennifer W. Boyden & Keith A. Frey, "Infertility", (2007) 75(6) *American Family Physician*, 849-856, PMID: 17390595.

[17] Jessica Arons, *Future Choices: Assisted Reproductive Technologies and the Law*, (Washington DC: Center for American Progress, December 2007); retrieved from<https://www.americanprogress.org/article/future-choices-assisted-reproductive-technologies-and-the-law> (accessed on 30 December 2022).

[18]Margarete Sandelowski and Sheryl de Lacey, "The Uses of a "Disease": Infertility as Rhetorical Vehicle", in Marcia C. Inhorn & Frank van Balen (eds.) *Infertility Around the Globe: New Thinking on Childlessness, Gender, and Reproductive Technologies*, (University of California Press, 2002), 33-51 at 35 (Chapter 2); retrieved from <https://doi.org/10.1525/9780520927810-002>; <http://www.jstor.org/stable/10.1525/j.ctt1ppfk5.4> (accessed on 30 December 2022). See also Anne R. Dana, "The State of Surrogacy Laws: Determining Legal Parentage for Gay Fathers", (2010) 18 *Duke Journal of Gender Law & Policy* 353-390 at p. 359. See also Lisa C. Ikemoto, "The In/Fertile, the Too Fertile, and the Dysfertile" (1996) 47(4) *Hastings Law Journal*, 1007-1061 at pp. 1008-1009.

[19] R. A. Ajayi & O. J. Dibosa-Osadolor, "Stakeholders' Views on Ethical Issues in Practice of *In-Vitro* Fertilisation and Embryo Transfer in Nigeria" (2011)15(3) *African Journal of Journal of Reproductive Health*, 73-80 at p. 73.

[20]Kathryn Doyle, "One in eight women experience infertility," (8 July 2016) *Health New*; retrieved from <https://www.reuters.com/artocle/us-health-infertility-rates-idUKKCN0Z029J> (accessed on 31 December 2022). However, Achilli, *et. al*., argues that infertility affects about 10%-15% of couples in the UK warranting them to turn to ART- see Chiara Achilli, *et. al*., "The Role of Immunotherapy in *In Vitro* Fertilisation and Recurrent Pregnancy Loss: A Systematic Review and Meta-Analysis" (2018) 110(6) *Fertility and Sterility*, 1089-1100 at p. 1089; <https://doi.org/10.1016/j.fertnstert.2018.07.004> (accessed on 2 January 2023).

[21] CCRM Fertility, "Is Infertility Rising" (16 June 2022); retrieved from, <https://www.ccrmivf.com/blog/is-infertility-on-the-rise/> (accessed on 2 January 2023).

from 10-30%.[22] Globally, the World Health Organisation (WHO) admits that about 60-80 million couples suffer from infertility and that resort to assisted reproductive technique has increased by 5%-10% yearly.[23]

While there are obtainable data regarding FI, there is basically unavailable statistics regarding individuals that are confronted with SI. As a matter of fact, data relating to prevalence of infertility concentrates primarily on functional infertility, specifying the incidences of unintentional childlessness among heterosexual, mainly married couples.[24] With regard to structural infertility, Judith Darr admitted that even as a greater number of single women seek assisted insemination donor (AID) in order to procreate, it is however difficult to correctly assess the number of single women who utilise it because of absence of government surveys report figures on such women who seek the assistance of medical practitioners for insemination.[25] Robertson equally posits that as more gays and lesbians are entering into partnership arrangements, an increasing number will aspire to have children. To achieve such aspiration, they may have to resort to assisted reproductive technologies in order to procreate.[26] So, irrespective of what is the precise prevalence of a combined functional and structural infertility data, it is apparent that the utilisation of ART by these categories of persons is growing in the world today.[27]

2. Kinds of ART

As explained earlier, ART is the utilisation of non-coital techniques to conceive a baby and start pregnancy. This may take any of the following forms:

a) In Vitro Fertilisation (IVF)

The birth of Louise Brown as the world's first test tube baby through the use of IVF in July 1978 in northwest England signalled the beginning of a success narrative of technologically assisted human procreation.[28] Ever since then, IVF has offered hope to millions of couples who could not conceive a child through a natural means.[29] IVF is the most common form of ART and it entails the fertilisation of the ova outside the womb and thereafter transferring the resultant embryos into the uterus. The woman whose ova are used is often treated with hormones and fertility drugs in order to boost egg production and through a minor surgery, known as follicular aspiration, the eggs are harvested from the woman's body.[30] The insemination and fertilisation may involve the incubation of the ovum in sperm or injecting a single sperm directly into the egg, a procedure known as intracytoplasmic sperm injection (ICSI). Most often 3-5 days after egg retrieval and fertilisation, the embryo/embryos would be transferred into the uterus; the precise number of embryos transferred is an intricate issue as it depends on several factors, including the age of the woman.[31] Like other forms of ARTs, IVF is contentious because it challenges deeply rooted moral, ethical, and religious values, especially those values that pertain to family and relationships among its members as it entails the intentional "separation of reproduction from the act of human sexuality and from the human body."[32] Actually, one of the ethical contentions against IVF is that the parents' desire to have a child did not allow them to have it through a likely unsafe means that might lead to a deformed baby.[33]

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[22] Amina Mohammed-Durosinlorun, *et. al.*, "Use and Pattern of Previous Care Received by Infertile Nigerian Women," (2019) 5(14) *Fertility Research and Practice*, 1-8 at p. 1; DOI: <https://doi.org/10.1186/s40738-019-0068-6> (accessed on 2 January 2023). See also, Nathan B. W. Chimbatata & Chikondi Malimba, "Infertility in sub-Saharan Africa: A Woman's Issue for How Long? A Qualitative Review of Literature", (2016) 4 *Open Journal of Social Sciences*, 96-102 at p.97; DOI: <https://dx.doi.org/10.4236/jss.2016.48012> (accessed on 2 January 2023).

[23] CCRM Fertility, "Is Infertility Rising" (16 June 2022); retrieved from, <https://www.ccrmivf.com/blog/is-infertility-on-the-rise/> (accessed on 2 January 2023).

[24] Judith F. Daar, "Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms", (2008) 23(1) *Berkeley Journal of Gender, Law & Justice*, 18-82 at p. 24.

[25] *Ibidem*, at p. 25.

[26] John A. Robertson, "Gay and Lesbian Access to Assisted Reproductive Technology" (2004) 55(2) *Case Western Reserve Law Review*, 323-372 at p. 324.

[27] Judith F. Daar, "Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms" (2008) 23(1) *Berkeley Journal of Gender, Law & Justice*, 18-82 at p. 25.

[28] Katherine Dow, "Looking into the Test Tube: The Birth of IVF on British Television" (2019) 63(2) *Medical History*, 189-208 at p.189; DOI: <https://doi.org/10.1017/mdh.2019.6> (accessed on 2 January 2023).

[29] Rachael Gurevich, "The Past and Future of In Vitro Fertilisation"; retrieved from <https://www.verywellfamily.com/what-does-in-vitro-mean-1960211> (accessed on 2 January 2023).

[30] Simisola Akintola & Olohikhuae Egbokhare, "Parenthood: Is the Law in Nigeria Fit for Assisted Reproductive Technology" (2018) *Indian Journal of Medical Ethics Online*, 1-6; DOI: <https://doi.org/10.20529/IJME.2018.012> (accessed on 2 January 2023). See also MedlinePlus, "In Vitro Fertilisation (IVF)"; retrieved from <https://medlineplus.gov/ency/article/007279.htm> (2 January 2023).

[31] *Ibidem*. See also, Elizabeth Brake & Joseph Millum, "Procreation and Parenthood" In: N. Edward (ed.) *Stanford Encyclopedia of Philosophy*; retrieved from <https://plato.stanford.edu/entries/parenthood/> (2 January 2023).

[32] Suzanne Wymelenberg, "New Technologies: The Ethical and Social Issues," In: Suzanne Wymelenberg, *et al*. (eds.) *Science and Babies: Private Decisions, Public Dilemmas* (Washington DC: National Academies Press, 1990), Chapter 7; retrieved from <https://www.ncbi.nlm.nih.gov/books/NBK235272/#_ NBK235272_pubdet_> (accessed on 2 January 2023).

[33] *Ibidem*.

b) Intra Cytoplasmic Sperm Injection (ICSI)

ICSI is a specialised kind of IVF that is used mainly for the treatment of serious cases of male-factor infertility[34] or for couples who have not been able to conceive in earlier IVF attempts.[35] It requires the injection of a single sperm straight into a fertilised egg. This is unlike the conventional IVF where thousands of sperms are positioned next to an egg on a laboratory dish and whether one of the sperm penetrates the egg to fertilise is left to chance.[36] The first successful live birth of using ICSI as a method of ART was reported in 1992 and ever since then, the procedure has become the mainstay for treatment of male-factor infertility and in overcoming fertilisation failure associated with the traditional IVF. A study has revealed that almost 66 percent of all assisted reproductive treatments globally were done through ICSI resulting in the births of millions of babies.[37] However, Tannus *et. al* have argued that ICSI procedure does not have an advantage over traditional IVF when it is used for non-male factor infertility in women of 40 years and above.[38]

c) Intrauterine Insemination (IUI)

Sperm preparation techniques produced for IVF and embryo transfers and the use of density gradients resulted in the stimulation of interest in IUI.[39] IUI is a fertility treatment that entails the insertion of sperm into a woman's womb. The objective of an IUI fertility treatment is to enhance the likelihood of fertilisation by increasing the number of healthy sperm that gets to the fallopian tubes when the woman is most fertile.[40] Frozen sperm from a donor can also be used for IUI after a proper screening by a licensed fertility clinic for infections and inherited diseases. Whether IUI will increase the chances of pregnancy in situations regarding unexplained infertility, low sperm count or poor quality sperm and moderate endometriosis has been a debatable matter.[41] However, Williem Ombelet *et al* have argued that generally, IUI should be preferred to more intrusive and costly forms of ARTs and should therefore, be provided as a first-line treatment in situations of sub-fertility including male sub-fertility and ovulatory dysfunction.[42] IUI can also be useful for lesbian couples using donor sperm and single women who may desire to begin a family with donor sperm.[43]

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[34] City Fertility, "Intracytoplasmic Sperm Injection (ICSI) Fertility Treatment"; retrieved from <https://www.cityfertility.com.au/fertility-services/ivf-treatment/intracytoplasmic-sperm-injection-icsi/> (accessed on 2 January 2023).

[35] UCSF Health, "FAQ: Intracytoplasmic Sperm Injection"; retrieved from <https://www.ucsfhealth.org/education/faq-intracytoplasmic-sperm-injection> (accessed on 2 January 2022).

[36] Cleveland Clinic, "Intracytoplasmic Sperm Injection (ICSI)"; retrieved from <https://my.clevelandclinic.aorg/health/treatments/22463-intracytoplasmic-sperm-injection> (accessed on 2 January 2023).

[37] Zev Rosenwaks & Nigel Pereira, "The Pioneering of Intracytoplasmic Sperm Injection: Historical Perspectives" (2017)154(6) *Reproduction*, F71-F77; DOI: <https://doi.org/10.1530/REP-17-0308> (accessed on 2 January 2023).

[38] Samer Tannus *et. al*., "The Role of Intracytoplasmic Sperm Injection in Non-Male Factor Infertility in Advanced Maternal Age" (2017) 32(1) *Human Reproduction*, 119-124; DOI: <https://doi.org/10.1093/humrep/dew298> (accessed on 2 January 2023).

[39] Peter R. Brinsden & Richard P. Dickey, "An overview of Intrauterine Insemination and Ovulation Induction", In: Richard P. Dickey, Peter R. Brinsden & Roman Pyrzak (eds.) *Manual of Intrauterine Insemination and Ovulation Induction* (Cambridge: Cambridge University Press, 2010), 1-6; DOI: <https://doi.org/10.1017/CBO9780511642159.002> (accessed on 2 January 2023).

[40] Johns Hopkins, "Intrauterine Insemination (IUI) Treatment;" retrieved from <https://www.hopkinsmedicine.org/gynecology_obstetrics/specialty_areas/fertility-services/intrauterine-insemination.html> (accessed on 2 January 2023).

[41] Aboubakar M. Elnashar, "Opinion: Intrauterine Insemination", (2004) 9(2) *Middle East Fertility Society Journal*, 101-106; NHS, "Intrauterine Insemination (IUI)"; retrieved from <https://www.nhs.uk/conditions/artificial-insemination> (accessed on 2 January 2023). Compare with: Johns Hopkins, "Intrauterine Insemination (IUI) Treatment"; retrieved from <https://www.hopkinsmedicine.org/gynecology_obstetrics/specialty_areas/fertility-services/intrauterine-insemination.html> (accessed on 2 January 2023).

[42] Willem Ombelet, *et. al*., "Intrauterine Insemination (IUI) as a First-line Treatment in Developing Countries and Methodological Aspects that Might Influence IUI Success" (2008) *Human Reproduction*, 64-72; DOI: <https://doi.org/10.1093/humrep/den165> (accessed on 2 January 2023).

[43] Johns Hopkins, "Intrauterine Insemination (IUI) Treatment"; retrieved from <https://www.hopkinsmedicine.org/gynecology_obstetrics/specialty_areas/fertility-services/intrauterine-insemination.html> (accessed on 2 January 2023).

d) Gamete Intrafallopian Transfer (GIFT)

The foremost pregnancy using GIFT was accomplished in a woman with unexplained infertility in 1984.[44] The growth of GIFT was based on the postulation that transfer of oocytes and spermatozoa to the fallopian tubes would produce optimised or improved conditions for fertilisation and early embryo growth, leading to "higher quality embryos with a higher implantation rate."[45] GIFT is used for infertile women that are ovulating and have a healthy uterus[46] but encounter difficulties with their fallopian tubes or for infertile couples who, due to religious grounds may desire to avoid fertilisation outside human body.[47] Although this form of assisted reproductive technique was developed as a treatment for unexplained infertility, it was later to be explored for other kinds of infertility, inclusive of male-factor and sub-occlusive tubal disease, categories for which it has now been discovered that GIFT is inappropriate.[48]

e) *Zygote Intrafallopian Transfer (ZIFT)*

ZIFT is a reproductive innovation that is similar to IVF and embryo transfer. Apparently, ZIFT is a hybrid ART that is derived from an arrangement of IVF and GIFT procedures and was first used in 1986[49] to assist infertile individuals towards conception.[50] However, it defers from IVF in that the fertilised embryo is transferred into the fallopian tube rather than the uterus with the aid of laparascopic surgery.[51] As a result of the direct transfer of the fertilised egg into the tubes, the ZIFT method is sometimes referred to as a tubal embryo transfer (TET).[52] Unlike the GIFT procedure where there is no clear cut means of a physician knowing that fertilisation has occurred, in ZIFT, it would be obvious that the eggs has fertilised. Research findings have indicated that there is no therapeutic benefit of ZIFT over IVF-ET in male-factor infertility on the basis of reproductive outcome or economic advantage;[53] though ZIFT can be considered as a method of treatment for patients with recurring failure of implantation in IVF-ET and with tubal factor with established patency of one tube.[54]

f) Surrogacy

This is conceivably the oldest form of ART as it dates back to biblical times where couples had used surrogates to give birth to children when the intended mother was incapable of conceiving or giving birth.[55] Also, in some Nigerian communities, it is not a

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[44] R. H. Asch, *et. al*., "Pregnancy after Translaparoscopic Gamete Intrafallopian Transfer" (1984) 2 *Lancet*, 1034-1036.

[45] J. M. De Bruijin, *et. al*., "Factors Affecting Pregnancy Outcome in a Gamete Intrafallopian Transfer (GIFT) Programme" (2003) 93(7) SAMJ, 532-536 at p. 532

[46] Tolu Oyelowo, *Mosby's Guide to Women's Health: A Handbook for Health Professional*s (Missouri: Mosby, 2007), 138-146.

[47] Richard E. Jones & Kristin H. Lopez, *Human Reproductive Biology* (Fourth Edition, Academic Press, 2014), 283-299; DOI: <https://doi.org/10.1016/B978-0-12-382184-3.00015-5> (accessed on 2 January 2023).

[48] J. Yovich, "Transabdominal Gamete Intrafallopian Transfer," In: J. G. Grudzinskas, *et. al*. (eds.) *The Fallopian Tube: Clinical and Surgical Aspects* (London: Springer-Verlag London Limited, 1994), 213-227 at p.213; DOI: <https://doi.org/10.1007/978-1-4471-1987-6_16> (accessed on 2 January 2023).

[49] P. Devroey, *et. al*., "Pregnancy after Translaparoscopic Zygote Intrafallopian Transfer in a Patient with Sperm Antibodies (Letter)" (1986) 1 *Lancet*, 1329.

[50] Tian Zhu, "Zygote Intrafallopian Transfer" (2011) *Embryo Project Encyclopedia*; retrieved from <https://embryo.asu.edu/pages/zygote-intrafallopian-transfer> (accessed on 15 January 2023).

[51] Healthwise, "Gamete and Zygote Intrafallopian Transfer (GIFT and ZIFT)"; retrieved from <https://myhealth.alberta.ca/Health/pages/conditions.aspx?hwid=hw202763> (accessed on 15 January 2023).

[52] American Pregnancy Association, "Zygote Intrafallopian Transfer: ZIFT"; retrieved from <https://americanpregnancy.org/getting-pregnant/infertility/zygote-intrafallopian-transfer/> (accessed on 15 January 2023).

[53] Herman Tournaye, *et. al*., "Zygote Intrafallopian Transfer or In Vitro Fertilisation and Embryo Transfer for the Treatment of Male-factor Infertility: A Prospective Randomised Trial" (1992) 58(2) *Fertility and Sterility*, 344-350 at p. 349; DOI: <https://doi.org/10.1016/s0015-0282(16)55195-4> (accessed on 2 January 2023).

[54] Jacob Farhi, *et. al*., "Zygote Intrafallopian Transfer in Patients with Tubal Factor Infertility after Repeated Failure of Implantation with In Vitro Fertilisation-Embryo Transfer" (2000) 74(2) *Fertility and Sterility*, 390-393; DOI: <https://doi.org/10.1016/s0015-0282(00)00610-5> (accessed on 2 January 2023). See also Ariel Weissman *et. al*, "Zygote Intrafallopian Transfer among Patients with Repeated Implantation Failure", (2013) 120(1) *International Journal of Gynaecology and Obstetrics*, 70-73; DOI: <https://doi.org/10.1016/j.ijgo.2012.07.018> (accessed on 2 January 2023). For a fuller discussion on repeated or recurrent implantation failure (RIF), see Asher Bashiri, Katherine Ida Halper & Raoul Orvieto, "Recurrent Implantation Failure- Update Overview on Etiology, Diagnosis, Treatment and Future Directions" (2018) 16 *Reproductive Biology and Endocrinology*, 121-138; C. Coughlan, *et. al*., "Recurrent Implantation Failure: Definition and Management" (2014) 28(1) *Reproductive BioMedicine Online*, 14-38; DOI: <https://doi.org/10.1016/j.rbmo.2013.08.011> (accessed on 2 January 2023).

[55] *The Holy Bible* in the Book of Genesis, Chapters 16: 1-4, 15 and 30: 1-8, respectively documented how Hagar's surrogacy on behalf of her mistress, Sarah, resulted in the birth of Ishmael to Abraham; and how Bilhah also acted as a surrogate mother on behalf of her mistress, Rachael

strange idea to find that an infertile wife marries a younger woman for her husband with the primary objective of making the younger wife bear children for the husband. Usually, the child/children given birth to by such a junior wife would regard the elder wife as their "mother" while the biological mother may, out of respect for the elder wife, is referred to as "aunty."[56] In contemporary times, after the birth of the child, the surrogate surrenders custody and guardianship of the baby to the prospective parent or parents.[57] Surrogacy has also been perceived as an arrangement whereby a woman agrees to a pregnancy reached at through ART and in which neither of the gametes belong to her or her husband and with the primary aim of carrying the pregnancy to term and upon the birth of the child give him/her to the individual or individuals for whom she was acting as a surrogate. Medically therefore, surrogacy involves the use of a surrogate or substitute mother to carry a pregnancy for another woman and after which she will hand over the child, along with any parental entitlement to the resultant child to the commissioning parents or commissioning mother.[58]

Fundamentally, there are two kinds of surrogacy, namely, traditional surrogacy (TS) and gestational surrogacy (GS).[59] In the case of TS, the surrogate carrier is inseminated with the sperm of the intending father or husband of the commissioning couple, though at times, the semen of a donor could be used. Consequently, the surrogate mother is hereditarily linked to the resulting child since the egg of the surrogate mother is used for conception.[60] In contrast, under the GS procedure, the surrogate mother is not genetically connected to the child because eggs are extracted from the intended mother or an egg donor and mixed with the semen from the intended father or sperm donor through an IVF process. The embryos are thereafter removed and placed in the surrogate's uterus. Thus, the introduction of IVF has positively assisted GS.[61] Regardless the form it takes, surrogacy arrangement can be altruistically or commercially performed. Altruistic surrogacy involves a situation where the surrogate willingly accepts to carry the baby but not for payment unless reimbursement of medical and other reasonable expenses. On the other hand, in commercial surrogacy, the surrogate offers her services in exchange for payment. Commercial surrogacy has raised concerns regarding the "exploitation and commodification of woman's bodies for client's family building"[62] as the surrogate mother is required to relinquish parental rights and entitlements for payment.[63]

3. Determination of Legal Parentage and Nationality of ART Children

Indisputably, growth in medical sciences has offered to many people the joy of procreation through technologically regulated conception without necessarily relying on sexual intercourse to achieve pregnancy.[64] It is not surprising therefore, that reproductive care has received global interest[65] leading to cross-border movements by patients searching for family-building

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to give birth to children for her husband, Jacob. See also Kimberly D. Krawiec, "Altruism and Intermediation in the Market for Babies" (2009) 66(1) *Washington and Lee Law Review*, 203-257 at p. 223; Debora L. Spar, *The Baby Business: How Money, Science, and Politics Drive the Commerce of Conception* (Boston, Massachusetts, USA: Harvard Business School Press, 2006), 72-73.

[56]Chitu Womehoma Princewill & Ayodele Samuel Jegede, "Women's Reproductive Autonomy and the Ethics of Baby Making: The Nigerian Case Study," (2019) 7 *Journal of Health Science*, 327-336 at pp. 328, 332; DOI: <https://doi.org/10.17265/2328-7136/2019.06.001> (accessed on 2 January 2023).

[57] Janice C. Ciccarelli & Linda J. Beckman, "Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy" (2005) 61 (1) *J. Soc. Issues*, 21-43; DOI: <https://doi.org/10.1111/j.0022-4537.2005.00392.x.> (accessed on 2 January 2023).

[58] Enobong Mbang Akpambang & Monica Amujo-Akomolafe, "Legal Position on Surrogacy Arrangements in Nigeria and Some Selected Jurisdictions" (2020) 7(3) *International Journal of Research in Humanities and Social Studies*, 18-39 at pp. 19-20.

[59]Mark E. Lones, "A Christian Ethical Perspective on Surrogacy" (2016) 2(1) *Bioethics in Faith and Practice*, 21-33 at p. 23.

[60] *Ibidem*.

[61] Tetsuya Ishii, "Global Changes in the Regulation of Reproductive Medicine," In: Michael K. Skinner (ed.) *Encyclopedia of Reproduction*, Second Edition (Academic Press, 2018), 380-386; DOI: <https://doi.org/10.1016/B978-0-12-801238-3.64907-3> (accessed on 2 January 2023).

[62] *Ibidem*.

[63] Morgan Holcomb & Mary Patricia Byrn, "When Your Body is Your Business" (2010) 85(4) *Washington Law Review*, 647-686.

[64] Alessandro Stasi, "Protection for Children Born Through Assisted Reproductive Technologies Act, B. E. 2558: The Changing Profile of Surrogacy in Thailand" (2017) 11 *Clinical Medicine Insights: Reproductive Health*, 1-7 at p. 1; Anne R. Dana, "The State of Surrogacy: Determining Legal Parentage for Gay Fathers" (2011) 18 *Duke Journal of Gender Law & Policy*, 353-390 at p. 353.

[65] Susan L. Crockin, "Growing Families in a Shrinking World: Legal and Ethical Challenges in Cross-border Surrogacy" (2013) 27 *Reproductive BioMedicine Online*, 733-741 at pp. 733-734.

options.[66] Beyond giving assurance to infertile couples, older women, homosexual couples and single parents to have their babies, the same reproductive techniques have introduced confusion pertaining to the determination of the legal parentage[67] and nationality of a child procured through ART. Although it may once have been easier to establish the legal parentage of a child and who possessed the duties and claims regarding children, the separation of genetic, gestational and fostering functions now complicates who the real parent is.[68] The same difficulty besets the child's nationality where there arises a disagreement between gestational surrogates and commissioning couples, same sex partners and gamete donors. This section of the article seeks to address the possible challenges concerning the legal parentage and nationality of a child born via ART procedure. This would be done by using the examples in countries like Thailand, USA, UK, and Nigeria

a) The Position in Thailand

Prior to the enactment of the Protection of a Child Born by Medically Assisted Reproductive Technology Act, B.E. 2558 of 2015 (ART Act 2015) and as a result of the principle of *mater semper certa est*,[69] the surrogate was considered as the legal mother of the child irrespective of the lack of genetic connection between the woman and the child. This position was also statutorily reinforced by section 1546 of the Civil and Commercial Code (CCC) which provided that "a child born of a woman who is not married to a man shall be deemed to be the legitimate child of such a woman" except as may be otherwise stipulated by law. As a matter of fact, the father of a child that is born outside wedlock has no legal parentage right over the child even if it is apparent that his name appears on the child's birth certificate and DNA test confirms him as the biological father. In consequence, the commissioning couple was not categorically conferred with parental rights and obligations in relation to the surrogate child[70] though they may request and obtain a birth certificate from the Birth Registrar's Office irrespective of their nationality[71] for purposes of adoption.

Under the new ART Act 2015, the legal status of the parents and the rights of related parties are expressly stated during and after the application of the ART procedure. The new law requires that at least one of the commissioning or intended parents must be genetically connected to the child. The law also contains clauses that settle the uncertainty over legal parentage of the child born through ART and removes the need for adoption of the child by the infertile couple. This is because the legislation mandates that the intended parents, who must be a married couple, will be the legal parents of a child born through ART procedure and consequently prohibits the intended parents from declining acceptance of their parentage.[72] The new statutory provision overturns the earlier deeply entrenched private law principle of *mater semper certa est* and significantly alters the long established "cultural and legal traditions that define kinship through gestation."[73] The new law also protects the child's rights because by determining the parental legal position, it will also safeguard the child's entitlement to social and legal benefits.[74]

With respect to the nationality issue of a child born through ART, it is worthy of note that Thai nationality is principally regulated by Thailand's Nationality Act 2508 (1965). Thai nationality by birth is open to a person born of a father[75] or mother of Thai nationality, whether within or outside the Thai Kingdom. A person born within the Thai Kingdom, unless the person under section 7 *bis* paragraph one, would also qualify as a Thai citizen by birth.[76] It must be stated that a person born within Thai Kingdom

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[66] Andrea Whittaker, "Cross-border Assisted Reproduction Care in Asia: Implications for Access, Equity and Regulations" (2011) 19(37) *Reproductive Health Matters*, 107-116 at pp. 107-110; DOI: <https://doi.org/10.1016/S0968-8080(11)37575-1> (accessed on 2 January 2023).

[67] G. Fuscaldo, "What Makes a Parent? It's Not Black or White" (2003) 29 *Journal of Medical Ethics*, 66-67 at p. 66.

[68] *Ibidem*. See also Ruth Macklin, "Artificial Means of Reproduction and our Understanding of the Family" (1991) 21(1) *Hasting Center Report*, 5-11.

[69] This Roman private law principle implies that "the mother of the child is always known or certain" or "the mother is the person who gives birth to a child." See Henry Kha & Kelly Rankin, "Mater Semper Certa Est? Reconceiving Surrogacy Law in New Zealand" (2019) 9(12) *New Zealand Family Law Journal*, 172-178.

[70] Alessandro Stasi, "Maternal Surrogacy and Reproductive Tourism in Thailand: A Call for Legal Enforcement" (2015) 8 *Ubon Ratchathani Law Journal*, 17-36.

[71] Alessandro Stasi, "Read the First Print of Thai Surrogacy Laws?" (17 October, 2015) *The Bangkok Post*, 4; see also Alessandro Stasi, "Protection for Children Born through Assisted Reproductive Technologies Act, B. E. 2558: The Changing Profile of Surrogacy in Thailand" (2017) 11 *Clinical Medicine Insights: Reproductive Health*, 1-7 at p. 3.

[72] Protection of a Child Born by Medically Assisted Reproductive Technology Act, B.E. 2558 (2015), sections 29 and 33.

[73] Andrea Whittaker, "From "Mung Ming" to "Baby Gammy": A Local History of Assisted Reproduction in Thailand" (2016) 2 *Reproductive Biomedicine & Society Online*, 71-78; DOI: <https://doi.org/10.1016/j.rbms.2016.05.005> (accessed on 2 January 2023).

[74] W. Techagaisiyavanit, "Reproductive Justice Dilemma under the New Thai Law: Children Born out of Assisted Reproductive Technology Protection Act BE 2558" (2016) 45 *Law J Fac Law*, 201-214.

[75] "Father," in the sense used in the legislation, also means an individual who has been shown, in line with Ministerial Regulation, to be a biological father of the child although he did not register marriage with the mother of the child or failed to carry out a registration of legitimate child.

[76] Nationality Act as amended by the Nationality Act (No. 2) B. E. 2535 (1992), section 7.

but of alien parents does not acquire the Thai nationality if at the time of his/her birth, the lawful father or his father who did not marry his/her mother or the mother was: (i) the person having been specially granted clemency for temporary residence in the Kingdom; (ii) the person having been allowed to reside provisionally in the Kingdom; and (iii) the individual having entered and stayed in the Thai Kingdom without authorisation under immigration law.[77]

However, in a situation where the Minister deems it proper, he may consider and grant an order for each particular case conferring Thai nationality to any person under paragraph one in compliance with the rules stipulated by the Cabinet.[78] A person, whose father or mother at the material time of his/her birth was a head or member of a diplomatic mission; head or member of a consular mission; an officer or expert of a global organisation and/or came as a member of family or servant of a person in diplomatic or consular mission in company of an official of a global organisation is exempted from acquiring Thai citizenship by birth.[79] A person who cannot acquire citizenship by birth can apply for citizenship by naturalisation, subject to satisfying the preconditions for such grant. The granting or refusal of permission for naturalisation is subject to the discretionary power of the appropriate Minister.[80]

b) The Position in the United States of America

In the US, although there is absence of a central body regulating the practice of ART, there still exist essential laws, regulations and guidelines on reproductive technology.[81] But despite a significant growth in procreation via the use of ART methods globally, the US statutes[82] and courts[83] have persisted in grappling with the best manner in which to settle disputes that occur from the use of these new techniques. However, some major decided cases with considerable divergent decisions have aided in defining how the US courts settle legal parentage disagreements. In *Re Baby M*,[84] the plaintiff and his wife, who was infertile, entered into a traditional surrogacy contract with the defendant whereby it was agreed that the defendant would be artificially inseminated with the sperm of the plaintiff, carry the pregnancy to term and upon delivery of the baby, surrender custody of the child and her parental rights to the plaintiff's wife. Defendant failed to part with the baby after birth and sought to retain custody. The trial court ruled that the surrogacy contract was valid and awarded custody of the child to the plaintiff based on the best interests of the child.

On a subsequent appeal, the New Jersey Supreme Court agreed absolutely with the lower court on the issue of the baby's custody based on the child's best interests but differed in the analysis of the surrogacy agreement which the appellate court held to be invalid and unenforceable because it was in direct conflict with both extant statutes and public policy as expressed in laws and decisional law.[85] The defendant's parental right as non-custodial parent was restored. Though the ruling in *Baby M case* failed to differentiate between "gestational" carriers and "surrogate" mothers despite the fact that the court was fully aware of the preservation of sperm and eggs as well as embryo implantation;[86] yet the case helped shape and influence how both legislators and members of the public perceived surrogacy and the resulting legal questions.[87]

Barely five years after the decision in *Baby M*, the California Supreme Court had an opportunity to rule on *Johnson v. Calvert*.[88] Mark and Crispina Calvert were childless married couple. They entered into a gestational surrogacy contract agreement which provided *inter alia*, that the embryo created by the gametes of the couple would be placed in the uterus of Anna Johnson as the surrogate mother;[89] after the child was born, the surrogate will surrender all parental rights regarding the child to the

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[77] *Ibidem*, section 7 *bis*.

[78] See section 7(2) bis as amended by the Nationality Act (No. 4) B. E. 2551 (2008).

[79] Nationality Act B. E. 2508, section 8.

[80] Nationality Act B. E. 2508, sections 10-12. Under section 9 of the law, an alien woman who is married to a Thai nationality can apply to obtain Thai nationality.

[81] Wendy Y. Chang & Alan H. DeCherney, "History of Regulation of Assisted Reproductive Technology (ART) in the USA: A Work in Progress" (2003) 6(2) *Human Fertility*, 64-70.

[82] Richard F. Storrow, "Parenthood by Pure Intention: Assisted Reproduction and Functional Approach to Parentage" (2002) 53(2) *Hastings Law Journal*, 597-679 at p. 599.

[83] Anne R. Dana, "The State of Surrogacy Laws: Determining Legal Parentage for Gay Fathers" (2011) 18 *Duke Journal of Gender Law & Policy*, 353-390 at pp. 353-354.

[84] 109 N. J. 396; 537 A. 2d 1227 (1988).

[85] *Ibidem*, 109 N. J. 396 at pp. 421-422, 423, 428 & 433-434.

[86] *Ibidem*, 109 N. J. 396 at pp. 469.

[87] Elizabeth S. Scott, "Surrogacy and the Politics of Commodification" (2009) 72 *Law and Contemporary Problems*, 109-146 at p. 116.

[88] 19 Cal. Rptr. 2d 494 (1993); 851 P. 2d 776 (1993).

[89] *Ibidem*, 851 P. 2d 776 at 777-778 (1993).

couple in return for payment of fees and life insurance policy. When the surrogate declined to give up the child, the couple sued for a declaration that they were the legal parents.[90] Johnson counterclaimed to be declared as the mother of the child.

While the defendant contended that Crispina Calvert was the legal mother as she was both the genetic and intended mother of the child, it was submitted on behalf of the plaintiff that she was the legal mother since she gave birth to the child.[91] Adopting the "intent test" or "but for" approach,[92] the trial court ruled that the couple was the child's genetic, biological and natural parents but gestated by the surrogate and that the latter had no parental rights to the child; that the contract was legal and enforceable against the surrogate. The ruling of the trial court was affirmed on a further appeal to the California Supreme Court.

After the decision in *Johnson's case*, some writers suggested that the controversy relating to the determination of legal parentage in gestational surrogacy cases was over and archaic,[93] but such supposition has been shown to have been wrong and hasty. In *A. G. R. v. D R. H. & S. H.*,[94] the issues presented to the court for determination related to *inter alia*, the legal validity of a surrogacy contract agreement; plaintiff's claim to the entitlement of the position of a parent; and plaintiff's claim to have a right to a relationship with the children. The facts of the case disclosed that a legally married male gay couple entered into a contract of gestational surrogacy with the plaintiff (Angelia G. Robinson), who was a sister to the first defendant (Donald Robinson Hollingsworth). While the second defendant (Sean Hollingsworth) was to provide the sperm that would be used in fertilising eggs donated by an unknown donor; the plaintiff would be implanted with the fertilised embryo and would carry the pregnancy to term.

The subsequent implantation of the plaintiff with the fertilised embryo resulted in the birth of twin girls. Following the birth of the children, the surrogate mother refused to hand over the babies and claimed a legal right to be the children's mother.[95] The court relied heavily on the far reaching public policy considerations itemised in the *Baby M case*, noting that the "lack of plaintiff's genetic link to the twins is, under the circumstances, a distinction without a difference significant enough to take the instant matter out of *Baby M*."[96] It appears that in the California Supreme Court case of *Johnson*, the "intentions as manifested in the surrogacy agreement" were of great weight on the mind of the court[97] whereas in *Baby M*, the voluntary nature of the contracting parties was of no significance.[98] The court therefore, ruled that the gestational carrier agreement was void;[99] the plaintiff (A. G. R.) had parental rights in respect of the twins, while the second defendant was the legal father of the children. The court went on to question if there would have been any distinction had the term, "gestational" been used as a replacement for the word, "surrogacy":

"The surrogacy contract is based on, principles that are directly contrary to the objectives of our laws. It guarantees the separation of a child from its mother; it looks to adoption regardless of suitability; it totally ignores the child; it takes the child from the mother regardless of her wishes and her maternal fitness;" Baby M, supra, 109 N. J. at 441, 442. Would it really make any difference if the word "gestational" was substituted for the word "surrogacy" in the above question? I think not.[100]

However, judicial attitude in the *A. G. R. case* have made some scholars to argue that courts in the US consider assisted reproduction cases relating to homosexual couples or partners in a different way from that pertaining to heterosexual couples.[101]

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[90] *Ibidem*, 851 P. 2d 776 at 778 (1993).

[91] *Ibidem*, 851 P. 2d 776 at 779 (1993).

[92] *Ibidem*, 851 P. 2d 776 at 782 (1993) - the court reasoned that the intention of who should be the resulting legal parents could be determined by examining which of the parties was responsible for the initial fertilisation of the embryo and who was intended to raise the child. The court pointed out that "but for" the Calvert's "acted on intention," the child would not exist. Thus reaching the conclusion that since Crispina Calvert was the intended mother, she was also the legal mother.

[93] Elizabeth S. Scott, "Surrogacy and the Politics of Commodification" (2009) 72 *Law and Contemporary Problems*, 109-146 at pp. 122-123; John A. Robertson, "Gay and Lesbians Access to Assisted Reproductive Technology" (2004) 55(2) *Case Western Reserve Law Review*, 323-372 at p. 360; Carol Sanger, "Developing Markets in Baby-Making: In the Matter of Baby M" (2007) 30 *Harvard Journal of Law & Gender*, 67-97 at p. 72.

[94] Docket No. FD-09-001838-07, decided on 23 December 2009; available at <https://graphics8.nytimes.com/packages/pdf/national/20091231_SURROGACY.pdf> (accessed on 26 December 2022).

[95] Stephanie Saul, "New Jersey Judge Calls Surrogate Legal Mother of Twins" (30 December 2009) *The New York Times*; retrieved from <https://www.nytimes.com/2009/12/31/us/31surrogate.html> (accessed on 27 December 2023).

[96] *A. G. R. v. D R. H. & S. H*, Docket No. FD-09-001838-07 (supra) at p. 5.

[97] 851 P. 2d 776 at p. 782 (1993).

[98] 109 N. J. 396 at pp. 440-441.

[99] *A. G. R. v. D R. H. & S. H*, Docket No. FD-09-001838-07 (supra) at p. 3.

[100] *A. G. R. v. D R. H. & S. H*, Docket No. FD-09-001838-07 (supra) at p. 5.

[101] Anne R. Dana, "The State of Surrogacy Laws: Determining Legal Parentage for Gay Fathers" (2011) 18 *Duke Journal of Gender Law & Policy*, 353-390 at p. 356; Deborah H. Wald, "The Parentage Puzzle: The Interplay Between Genetic, Procreative Intent, and Parental Conduct in Determining Legal Parentage" (2007) 15(3) *American University Journal of Gender, Social Policy & the Law*, 379-411 at p. 392.

Admittedly, lesbian partners are equally confronted with challenges of proving legal parentage, but the requirements for establishing legal parenthood tilt unfavourable against male gay partners.[102] As a result of dissimilarities in biological reproduction, gay male couples are incapable of exploiting escape clauses accessible to lesbians using a variety of reproductive techniques. Besides, since there is absence of a substitute mother to assert a rival right thereby creating a tiebreaker as is obtainable in heterosexual couples using gestational surrogacy, male gay couples tend to find it difficult to both be recognised as legal parents in the event of disputes with gestational carriers.[103]

Again, in *K. M. v. E. G.*,[104] the court was called upon to determine the parental rights and responsibilities of a woman in relation to a child born to her partner in a lesbian romantic relationship. The plaintiff and defendant were lesbian couple who conceived twins using the plaintiff's eggs which was fertilised with an anonymous donor's sperm and same was artificially inseminated into the defendant through IVF procedure. At the time of donating her egg, the plaintiff executed a document indicating that she waived all parental rights to the resultant child[105] and the defendant's name was documented in the birth certificates of the children as the mother. The couple later ended the relationship and the plaintiff sued for custody and visitation rights. The trial court and the Court of Appeal ruled in favour of the defendant. On a further appeal to the California Supreme Court, it was held that where a lesbian couple elects to procreate and one partner supplies her ova while the other partner bears the child, both women are the legal parents.[106]

Whether divorce between a couple can result in the termination of legal parentage over a child born through ART procedure became a subject of another litigation before the California Court of Appeal in the case of *In re-Marriage of Buzzanca*.[107] In that lawsuit, a gestational surrogate gestated a child created with gametes from unknown donors for an infertile married couple who were the intended parents. After separation, the husband attempted to decline parental responsibility for the child since he had no genetic link with the child (Jaycee). The argument was rejected outright by the court as it was firmly of the view that the married couple would be considered legal parents regardless of genetics since they had started and agreed to the ART that brought about the conception and birth of the child.[108]

On the issue of nationality, the Immigration and Nationality Act (INA) provides that U.S. citizens may transmit citizenship to their children born abroad, including a child born through ART, if certain criteria are fulfilled.[109] Under the 2014 policy manual, the United States Citizenship and Immigration Services (USCIS) and the U. S. Department of Homeland Security explained that a non-genetic gestational mother who gave birth to a child and is equally the child's legal mother is regarded as a "natural mother" of the child and may pass on citizenship at birth or after birth of the child if other statutory conditions are fulfilled.[110] Regardless of the policy manual guidance, there were instances where the USCIS and the State Department required, for instance, that a child must either be biologically linked to a U. S. citizen parent or to have been born by the legal gestational U. S. citizen parent before h/she could acquire citizenship at birth. This was in addition to a requirement that the child's genetic parents (or the legal gestational parents and at least one genetic parent) must be married to each other before the child could be regarded as being

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[102] Susan Frelich Appleton, "Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era" (2006) 86 *Boston University Law Review*, 227-294 at p. 267.

[103] Anne R. Dana, "The State of Surrogacy Laws: Determining Legal Parentage for Gay Fathers" (2011) 18 *Duke Journal of Gender Law & Policy*, 353-390 at p. 357. In fact, one of the reasons advanced by the court in *A.G.R. case* for its departure from following the ruling in *Johnson's case* was because the court did not require to "break a tie" between the intended mother and the birth mother since the intended parents were both male and consequently there was only a mother at issue- see *A. G. R. v. D R. H. & S. H*, Docket No. FD-09-001838-07 (supra) at p. 5. Fred Bernstein has argued that where a surrogate breaks her contract and turns around to assert her claim for parental rights over the resulting child, gay male couples will face an uphill task in establishing legal parenthood unlike heterosexual couples- see Fred A. Bernstein, "This Child Does Have Two Mothers...And a Sperm Donor Visitation" (1996) 22(1) *N. Y. U. Review of Law & Social Change*, 1-58 at pp. 16-17.

[104] 117 P. 3d 673 (Cal. 2005); 33 Cal. Rptr. 3d 61 (2005).

[105] *Ibidem* at pp. 675-676.

[106] *Ibidem* at p. 675.

[107] 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).

[108] *Ibidem* at pp. 282-283 & 293. Compare with Tennessee Supreme Court ruling involving an unmarried heterosexual partner: *In re C.K. G., C. A. G. & C. L. G.*, 173 S. W. 3d 714 (Tenn. 2005). Also the Supreme Court of Pennsylvania decision in *T. B. v. L. R. M*. 786 A.2d 913 (Pa. 2001) concerning separation of former lesbian partner.

[109] See INA 301; 309 and 320, cited in See Policy Alert, "Assisted Reproductive Technology and In-Wedlock Determination for Immigration and Citizenship Purposes," PA-2021-17 dated 5 August 2021; retrieved from <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210805-AssistedRproductiveTechnology.pdf> (accessed on 30 January 2023).

[109] *Ibidem*.

[110] See Policy Alert, "Effect of Assisted Reproductive Technology (ART) on Immigration and Acquisition of Citizenship under the Immigration and Nationality Act (INA)," PA-2014-009 dated 28 October 2014; retrieved from <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20141028-ART.pdf> (accessed on 30 January 2023).

born "in wedlock."[111] The action by the said relevant government agencies worked hardship and negatively impacted on a number of families, including same-sex couples, who had resorted to cross-border reproductive techniques in order to build a family; this led to federal litigations[112] and strong public condemnation.[113]

In an attempt to address the problem, the USCIS and the State Department issued a 2021 policy manual concerning whether a child born overseas, including one born through the utilisation of ART could be considered as being born in wedlock under the INA.[114] The recently updated policy guidance now clarifies that a child is deemed to be born in wedlock when his/her legal parents are married to one another at the time of birth and a minimum of one of the legal parents has a genetic or gestational connection with the child. The policy further defined the term, "child" to include the child of a U. S. citizen parent who is married to the child's genetic or legal gestational parent at the time of the birth of the child if both parents are recognised by the appropriate jurisdiction as the child's parents.[115] Thus, a child who has satisfied these conditions and whose application for a certificate of citizenship had earlier on been declined may file a fresh application for reopening or reconsideration of the rejection decision.[116]

c) Position in the United Kingdom

Under the Human Fertilisation and Embryology Act (HFEA) 2008,[117] the legal status of a mother of a child is assigned to the person that carries the child by reason of the implantation of an embryo or of sperm and eggs in her.[118] It is immaterial that the woman was within or outside the shores of the United Kingdom when the embryo, semen or eggs were inseminated in her;[119] although if placed in her while outside the territory of UK, rules regarding conflicts of laws could lead to various individuals being considered as the mother.[120] Where the woman was married during the period of assisted reproductive technology treatment, the husband would be regarded as the legal father of the child unless they are judicially separated or he had protested against or withheld his consent to the placing in his wife of the embryo or sperm and eggs or the woman's artificial insemination with a donor's sperm.[121] Similarly, where the woman is in a civil relationship at the time of using the ART procedure, the civil partner would qualify as the legal father except it is proved that she did not give consent to the artificial insemination.[122]

It may also happen that the woman that is being artificially inseminated is either unmarried or is not in a civil partnership. In such a situation, determination of the parentage can be ascertained in two ways. First, if no individual is considered as a father under section 35 of the legislation, then the commissioning father will be deemed as the legal father on the condition that he is genetically linked to the child. Second, where the ART treatment took place in a recognised fertility clinic, then the surrogate mother can choose the commissioning mother or a non-biological father as the child's second parent;[123] though the law prohibits a sperm donor from being treated as a legal father of the child.[124] Where sperm was used or the transfer of embryo or artificial insemination was performed after the death of the man who provided the semen and he had prior to his demise agreed in writing

[111] Elizabeth Carlson, "USCIS Policy Manual Updates on Assisted Reproductive Technology and In-Wedlock Determinations for Immigration and Citizenship Purposes"; retrieved from <https://cliniclegal.org/resources/citizenship-and-naturalization/uscis-policy-manual-updates-assisted-reproductive> (accessed on 30 January 2023).

[112] See for example, Michael Kunzelman, "Judge: Gay Couple's Child was U. S. Citizen at Birth in Canada" (17 June 2020) *AP News*; retrieved from <https://apnews.com/article/united-states-lifestyle-canada-us-news-immigration-a2b7137b9fe6fd91a307829cbdada825> (accessed on 30 January 2023).

[113] Elizabeth Carlson, "USCIS Policy Manual Updates on Assisted Reproductive Technology and In-Wedlock Determinations for Immigration and Citizenship Purposes"; retrieved from <https://cliniclegal.org/resources/citizenship-and-naturalization/uscis-policy-manual-updates-assisted-reproductive> (accessed on 30 January 2023).

[114] See Policy Alert, "Assisted Reproductive Technology and In-Wedlock Determination for Immigration and Citizenship Purposes," PA-2021-17 dated 5 August 2021; retrieved from <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210805-AssistedRproductiveTechnology.pdf> (accessed on 30 January 2023).

[115] *Ibidem*.

[116] *Ibidem*. See also 8 CFR 103.5.

[117] Chapter 22 of 2008. The precursors to the extant HFEA 2008 were the Surrogacy Arrangement Act (SAA) 1985 and the HFEA 1990. For detailed discussion on HFEA 2008, see J. McCandles & S. Sheldon, "The Human Fertilisation and Embryology Act 2008 and the Tenacity of Sexual Family Form" (2010) 73 *Modern Law Review* 175; Enobong Mbang Akpambang & Monica Amujo-Akomolafe, "Legal Position on Surrogacy Arrangements in Nigeria and Some Selected Jurisdictions," (2020) 7(3) *International Journal of Research in Humanities and Social Studies*, 18-39 at pp. 20-22.

[118] HFEA 2008, section 33(1).

[119] *Ibidem*, HFEA 2008, section 33(2).

[120] Robert L. Stenger, "The Law and Assisted Reproduction in the United Kingdom and United States," (1994-1995) 9(1) *Journal of Law and Health*, 135-161 at p. 154.

[121] HFEA 2008, section 35(1).

[122] *Ibidem*, HFEA 2008, section 42(1).

[123] *Ibidem*, HFEA 2008, sections 36 & 43.

[124] *Ibidem*, HFEA 2008, section 41.

for the use of the sperm after his death which resulted in the birth of the child, the deceased man would be regarded as the legal father of the ensuing child.[125]

It is pertinent to add that in appropriate cases, parental obligations and legal parentage could be transferred by way of obtaining a parental order. Such order makes it possible for the commissioning couple to become the legal parents of the child and correspondingly ends the legal parentage by the surrogate mother and her husband over the child.[126] The criteria for eligibility to apply for parental order are stipulated in section 54 of the HFEA and has been expanded to cover persons on same sex relationship or "two persons who are living as partners in an enduring family relationship and are not within the prohibited degrees of relationship to each other."[127] It appears that the condition that application for parental order must be made within six months of the birth of the child[128] may be relaxed by the court where it is successfully established that the applicants did not know that they ought to have applied for a parental order.[129] As a matter of fact, a parental order goes to the "most fundamental aspects of status and to the very identity of the child and have a transformative effect on the child's legal relationships with the surrogate and commissioning parents and the practical and psychological realities of the child's identity,...having an effect extending far beyond the merely legal, which is, for all practical purposes, irreversible."[130] Nonetheless, it must be added that in applying the Human Fertilisation and Embryology (Parental Orders) Regulation 2010, the welfare of the child born through reproductive technique is of primary importance when determining an application for parental order.[131]

As the law stands under section 54 of the HFEA 2008, where a child is born through a reproductive technology, a couple can apply for a parental order within a stipulated period, provided *inter alia*, that the gametes of at least one of them were used in bringing about the creation of the embryo.[132] There is no such opportunity for a single parent whose gametes were used to create an embryo that was placed in a surrogate mother resulting in the birth of a child. This position of the law, as it relates to single parents, has been strongly condemned and declared by the court to be discriminatory as it denies single parents the right to private and family life and non-discrimination guaranteed under the European Convention on Human Rights 1950.[133] The findings of the court resulted in the House of Laws and House of Commons Joint Committee on Human Rights proposing a draft of the Human Fertilisation and Embryology Acts 2008 (Remedial) Order 2018.[134]

The aim of the draft Remedial Order was to remedy the incompatibility by introducing a new section 54A into the HFEA permitting a person to apply for a parental order on the condition that s/he is not in an enduring family relationship. By the proposed drafting, if that individual is deemed by the court to be in an enduring family relationship with a partner, then they can

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[125] *Ibidem*, HFEA 2008, section 39. Compared with section 40 of the same statute which provides for embryo transferred after death of husband, etc who did not provide the sperm used for the insemination but had actually agreed in writing that the embryo should be placed inside his wife after his demise.

[126] Amel Alghrani & Danielle Griffiths, "The Regulation of Surrogacy in the United Kingdom for Reform," (2017) 29(2) *Child and Family Law Quarterly*, 165-186 at p. 172. See also Peter Braude & Sadia Muhammed, "Assisted Conception and the Law in the United Kingdom," (2005) 327 *BMJ Clinical Review*, 978-981 at p. 981.

[127] HFEA 2008, section 54(2)(c).

[128] HFEA 2008, section 54(3).

[129] In *Re X (A Child) (Surrogacy: Time Limit)* (2014) EWHC 3135, the application was brought after the statutory limited period by the commissioning parents in relation to a child that was born in an Indian clinic on 15 December 2011 and was subsequently brought into UK via a British passport on 6 July 2013. The court maintained that the commissioning parents should be allowed to pursue the application for parental orders regardless the delay in the presenting the application. The extant case overrules such earlier cases like: In *Re X (Children) (Parental Orders: Foreign Surrogacy)* (2009) Fam 71; *Re S (Parental Order)* (2010) 1 FLR 1156; *JP v. LP & Others* (2014) EWHC 595; and *Re WT (A Child)* (2014) EWHC 1303.

[130] Per Sir James Munby, P., in *Re X (A Child) (Surrogacy: Time Limit)* (2014) EWHC 3135; available at <https://www.familylawweek.co.uk/site.aspx?i=ed133396> (accessed on 23 January 2023). See also, *Re J (Adoption: Non-Patrial)* (1998) INLR 424, (1998) 1 FLR 225; *Re A & B (No. 2 Parental Order)* (2015) EWHC 2080, where the court granted parental order application brought 17 months after the statutory period had elapsed.

[131] *Re W* (2013) EWHC 3570 - the application related to triplets who were biological children of the applicants and were carried through a pregnancy by a surrogate mother vide a surrogacy agreement. The application was granted as the "welfare of each child overwhelmingly" demanded it.

[132] HFEA 2008, section 54(1)(b).

[133] European Convention on Human Rights 1950, Articles 8 and 14. See, In *Re Z (A Child No. 2)* (2016) EWHC 1191 (Fam) - here, a single father applied to the Family Court for a parental order under section 54(1) of the HFEA 2008 but the section of the law required that the court should only grant an order for a request made by two persons who are living as partners in a continuing family relationship. Held: that the order could not be granted.

[134] Available at <www.parliament.uk/jchr> (accessed on 24 January 2023).

only apply for a parental order as part of a couple and the partner will then be identified as an equal parent of the child irrespective of whether the partner has any genetic link with the child.[135]

d) The Position in Nigeria

In Nigeria, like most other African countries, where great importance is attached to childbearing, it is no wonder that many infertile couples in their desperation to have children fall back on ART formula, even though the exact number of babies conceived or born through IVF and other related ART procedures are difficult to authenticate. There is no explicit federal or state[136] legislation and/or regulatory institution controlling assisted reproductive technologies, despite the fact that there have been a number of recognised fertility clinics[137] and associations[138] in Nigeria. ART procedures in the country are mostly regulated by individual fertility clinic operator's discretion,[139] UK's Human Fertilisation and Embryology Authority Guidelines (HFEA Guidelines)[140] and private contractual agreements fashioned out by fertility clinics and executed by relevant parties.[141] Thus, for instance, where disputes arise between the intended parents and the surrogate mother or gametes donor, it is not unlikely that parties may resort to the court to determine which of the parties should be assigned the legal parentage of the child.

But in 2016, a bill for national framework for regulation and supervision of reproductive technology and allied matters was presented at the National Assembly though it has not yet been passed into law. The framework, Assisted Reproductive Technology (Regulation) Bill 2016, considers assisted reproductive technology, along with it grammatical variations and cognate expressions, as all techniques that endeavour to achieve pregnancy by manipulating semen or the egg outside a human body and implanting the gamete or embryo into the uterus.[142] The procedure is open to all individuals, including single persons, married couples and unmarried couples.[143] Where the ART procedure is utilised by a married or an unmarried couples, the informed authorisation of both couple must be obtained.[144]

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[135] House of Laws/House of Commons Joint Committee on Human Rights Proposal for a Draft Human Fertilisation and Embryology Acts 2008 (Remedial) Order 2018, Second Report of Session 2017-19, HL Paper 68 HC 645 of 2 March 2018, Summary para. 4, p. 3

[136] Meanwhile, Lagos State is the only State in Nigeria that formulated guidelines sometime in 2019 to regulate the practice of ART in the State. This it did in collaboration with the Association for Fertility and Reproductive Health (AFRH) and other collaborating agencies. See Preye Owen Fiebai & Kinikanwo Green, "Regulation of Assisted Reproductive Technology (ART) in Nigeria" (2019) 4(1) *African Journal for Infertility and Assisted Conception*, 1-2. See also, "LASG Unveils Guidelines to Regulate Assisted Reproductive Technology"; retrieved from <https://lagosstate.gov.ng/blog/2019/05/09/lasg-unveils-guidelines-to-regulate-assisted-reproductive-technology/> (accessed on 31 January 2023).

[137] Afolasade A. Adewumi, "The Need for Assisted Reproduction Technology in Nigeria" (2012) 2(1) *University of Ibadan Law Journal*, 19-41 at p. 28. In fact, Kehinde T. Bamgbopa *et. al*., argues that as at 2018, there were an estimated 74 registered ART service providing centres in Nigeria, with about 24 of them located in Lagos, southwest of Nigeria. This is in addition to other unknown or unregistered ART practitioners in the country- see Kehinde T. Bamgbopa *et. al*., "Public Perception on Ethics in the Practice of Assisted Reproductive Technologies in Nigeria" (2018) 3(3) *Global Reproductive Health*, e13 at p. 2; DOI: <http://dx.doi.org/10.1097/GRH.0000000000000013> (accessed on 2 January 2023)

[138] For instance, the formation of the Association for Fertility and Reproductive Health in Nigeria (AFRH), which is the umbrella association of IVF practitioners in Nigeria, was registered in 2010. It replaced the initial organisation, Nigerian Fertility Society which was formed as far back as in 1992- see Kehinde T. Bamgbopa *et. al*., *ibidem* at p.2.

[139] Kehinde T. Bamgbopa *et. al*., *ibidem*.

[140] Olanike S. Adelakun, "The Concept of Surrogacy in Nigeria: Issues, Prospects and Challenges" (2018) 18 *African Human Rights Law Journal*, 605-624 at p. 614; DOI: <http://dx.doi.org/10.17159/1996-2096/2018/v18n2a8> (accessed on 2 January 2023). See also, J. O. Fadare & A. A. Adeniyi, "Ethical Issues in Newer Assisted Reproductive Technologies: A View from Nigeria" (2015) 18(7) *Nigeria Journal of Clinical Practice*, 57-61. See for example, the Human Fertilisation and Embryology Authority Code of Practice Update dated April 2017; retrieved from<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/708228/DH_HFEA_HFEA_Code_of_Practice_Update_April_2019.pdf> (accessed on 31 January 2023); with the latest being the Human Fertilisation and Embryology Authority Code of Practice, 9th edition and revised in October 2021; retrieved from <https://www.hfea.gov.uk/about-us/news-and-press-releases/2021-news-and-press-releases/update-to-the-9th-edition-code-of-practice-is-now-available/> (accessed on 31 January 2023).

[141] Omolumo Adeife, "Nigeria: A Legal Perspective to the Law and Practice of Surrogacy"; retrieved from <https://www.mondaq.com/nigeria/family-law/1280312/a-legal-perspective-to-the-law-and-practice-of-surrogacy-in-nigeria> (accessed on 31 January 2023).

[142] Assisted Reproductive Technology (Regulation) Bill 2016, section 2(b).

[143] *Ibidem*, section 32(1). The bill defines an "unmarried couple" to imply a man and a woman, both of marriageable age, cohabiting together with mutual consent but without getting married- *ibidem*, section 2(w). But a definition proffered for a "couple" under the bill is rather confusing. It defines "couple" under its section 2(e) as "the persons living together and having a sexual relationship that is legal" in Nigeria or in "countries of which they are citizens or they are living in". Thus, while the term excludes same sex couples residing in Nigeria by reason of a ban on same sex relationship under the Same Sex Marriage (Prohibition) Act 2013, the ART bill indirectly admits gay/lesbian couples provided that in their countries of origin or residence, same sex marriage is legalised or recognised.

[144] Assisted Reproductive Technology (Regulation) Bill 2016, section 32(2).

In the case of surrogacy arrangement, the bill mandates the parties to enter into a surrogacy contract and same shall be legally enforceable. The surrogate mother under such situation is bound to surrender all parental rights over the resulting child.[145]Once the child is born, the intended parents cannot reject the child irrespective of birth abnormalities[146] and the birth certificate of the child shall bear the names of the "genetic parents/parent of the baby."[147] But a surrogate mother is banned from donating an occyte for the couple or person seeking surrogacy.[148] Likewise, a couple or individual is prohibited from either retaining multiple surrogates or transferring embryo in the "woman and in a surrogate" simultaneously.[149]

Section 35(1) of the bill provides for the determination of the status of the baby. It states that a child born to a married couple through ART shall be presumed to be the legitimate child of the couple having been born in wedlock and with the approval of both spouses and shall possess identical legal rights as a legitimate child born through sexual intercourse.[150] In the case of a single parent, the child will be the legitimate child of the single man or woman[151] and where a married couple or unmarried partners are either divorced or separated after both parties had agreed to the ART procedure but the separation happened prior to the birth of the child, the resulting child shall remain the legitimate child of the couple.[152] Moreover, where a woman is artificially inseminated with the frozen sperm of a deceased husband, the child born through that process is deemed to be the child of the couple.[153]

On the issue of determining the nationality of a child, the Constitution of the Federal Republic of Nigeria (CFRN), 1999 (as amended) provides that a person acquires a Nigerian citizenship by birth where his/her parents or grandparents is/was a citizen of Nigeria, including children born outside Nigeria "either of whose parents is a citizen of Nigeria."[154] Given the stance of Nigerian laws on same sex marriage,[155] would a child born to a Nigerian gay/lesbian partner through ART treatment be regarded as a Nigerian citizen by birth? It is submitted that where there is a genetic link between such a partner and the resultant child, notwithstanding the ethical issues involved, the child would be recognised as a Nigerian citizen. This is because section 42(2) of the 1999 CFRN explicitly asserts that no Nigerian citizen "shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth."[156] Conversely and by extension of argument, adoption of children by individuals in a homosexual marriage or relationship is deemed prohibited in Nigeria. As a matter of fact, discussions on ART treatments in Nigeria by fertility clinic practitioners scarcely focus on the needs of same-sex partners as they consider such deliberations irrelevant since a statute outlaws same sex practice in the country.[157]

IV. CONCLUSION

It is no longer news that conception through lovemaking is not the only medium for founding families. Advances in medical techniques have demonstrated that with the help of ART, heterosexual couples struggling with infertility, single persons, and homoerotic partners could now become parents and grow their own families. Considering the novel chances offered by the use

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[145] *Ibidem*, section 34(1) & (4). A survey conducted by Bello *et al* indicated that in Ibadan, a community in southwest of Nigeria, about 37.8% of infertile women would accept surrogacy as a form of ART treatment, with most preferring strangers as surrogates- see Folasade A. Bello, Opeyemi R. Akinajo, & Oladapo Olayemi, "In Vitro Fertilisation, Gamete Donation and Surrogacy: Perceptions of Women Attending an Infertility Clinic in Ibadan, Nigeria" (2014) 18(2) *African Journal of Reproductive Health*, 127-133.

[146] *Ibidem*, section 34(11).

[147] *Ibidem*, section 34(10).

[148] *Ibidem*, section 34(13).

[149] *Ibidem*, section 34(20) & (21).

[150] The status remains the same in relation to unmarried partners- *ibidem*, section 35(2).

[151] *Ibidem*, section 35(3).

[152] *Ibidem*, section 35(4).

[153] *Ibidem*, section 35(5).

[154] Constitution of the Federal Republic of Nigeria (CFRN), 1999 (as amended), section 25. In *Abdulrahaman Shugaba Darman v. Minister of Internal Affairs* (1981) 2 NCLR 459, the facts of the case disclosed that the plaintiff's mother was a Nigerian citizen by birth though his father was a Chadian. The court held that the plaintiff was qualified to be a Nigerian citizen by birth and accordingly his purported deportation by the Nigerian government was unlawful and unconstitutional in the circumstances.

[155] See for example, Same Sex Marriage (Prohibition) Act 2013, section 1. Also the idea of marriage under the Marriage Act 2004,, and the Matrimonial Causes Act, Cap. M7, Laws of the Federation of Nigeria, 2004, is a voluntary union between a man and a woman; as such, same-sex marriage is barred. See also the definition of "monogamous marriage" under the Interpretation Act, No 1 of 1964 (now Laws of the Federation of Nigeria, 2004), section 18.

[156] See also, Simisola O. Akintola & Olohikhuae O. Egbokhare, "Parenthood: Is the Law in Nigeria Fit for Assisted Reproductive Technology" (2018) *Indian Journal of Medical Ethics Online*, 1-6 at p. 5; DOI: <https://doi.org/10.20529/IJME.2018.012> (accessed on 2 January 2023).

[157] Kehinde T. Bamgbopa *et. al*., "Public Perception on Ethics in the Practice of Assisted Reproductive Technologies in Nigeria" (2018) 3(3) *Global Reproductive Health*, e13 at p. 4.

of reproductive technologies, it is not surprising therefore, that reproductive care has received global interest[158] leading to cross-border movements by patients searching for family-building options.[159] This may warrant the travelling by "candidate service recipients from one institution, jurisdiction or country where treatment is not available to another institution, jurisdiction or country where they can obtain the kind of medically assisted reproduction they desire."[160]

Above the prospect provided by such "procreative tourism,"[161] or "reproductive exile,"[162] as some scholars tend to describe it, the innovative reproductive technology is certainly not without its own inherent problems and controversies. Because more than two adults, and possibly from different countries, may be involved in the conception and birth of a child via ART, the question of parenthood and nationality of the child become an issue. The study has revealed that in countries like Thailand, UK, and USA, the practice of ART is statutorily regulated and in appropriate cases, where parties have disagreements, they may approach the court for settlement. But even then, homosexual couples and single parents have been shown to be discriminatorily treated when it comes to issues of legal parentage and nationality of the child. However, in Nigeria, as the study shows, the practice of ART is legislatively unregulated despite the fact that there are various recognised fertility clinics in Nigeria and a 2016 bill on the subject is still pending before the National Assembly.

The authors therefore, recommend that considering the rising growth in the number of individuals utilising ART in Nigeria, including those crossing national borders to have babies, it is imperative for definite ART legislation to be enacted in Nigeria so as to assist in resolving these problems and other related ones. Since the 2016 ART bill is still before the National Assembly, the federal lawmakers could examine similar laws from other foreign jurisdictions and use them as potential guides to expeditiously fashion out appropriate domestic legislation in Nigeria. Following global gravitation towards ART practice, the Nigerian government must "take the bull by the horn" by legislating on the subject otherwise abuses by relevant stakeholders and practitioners in the sector would be inevitable.

The present state of absence of regulatory and institutional frameworks seems to provide a hotbed for exploitation of ignorant or unenlightened desperate infertile couples in Nigeria without offering them the standard services provided in other countries where the practice is regulated. Admitted that there is no perfect law anywhere; but then let's get started. For illustration, UK began with the SAA 1985 and later followed by the HFEA 1990, which eighteen years after, was amended as HFEA 2008. The latter law itself was criticised by the court because of some of its discriminatory clauses, leading parliament to propose a draft Human Fertilisation and Embryology Acts 2008 (Remedial) Order 2018[163] to cure the defect complained about.

Similarly, for cross-pollination of ideas, the Nigerian courts could also learn some lessons from the decisions in other jurisdictions so as to know how to determine related cases as they occur in Nigeria. At the moment there seems to be dearth of judicial decisions in the area of ART, inclusive of the determination of legal parentage and nationality of children born through ART procedures in Nigeria. Pending the enactment of the ART legislation in Nigeria, we suggest further that Nigerian courts should recognise the validity of voluntarily executed contracts entered into by relevant parties engaged in ART arrangements as such contracts could reveal the intention of the parties. This will greatly assist intending parent(s) in situations where gestational surrogates may wish to unilaterally rescind their surrogacy contracts by withholding the child after birth.

CONFLICT OF INTEREST STATEMENT

The authors have no financial conflict of interest to declare in relation to this article.

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