

# NAVIGATING INFORMED CONSENT IN SURROGACY: BOUNDARIES AND LIMITATIONS.

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## Abstract:

*Informed consent is a foundational principle in ethical medical practice, yet its application in surrogacy remains deeply problematic in jurisdictions lacking clear legislative frameworks. In Nigeria where surrogacy is increasingly practiced despite the absence of comprehensive legal regulation; the process of obtaining truly informed consent is fraught with ambiguity and ethical concerns. The intersection of legal and ethical considerations makes informed consent in surrogacy a particularly complex issue. On the other hand, the complexity of surrogacy arrangements involving balancing the rights and interests of intended parents, surrogate mothers, and, ultimately, the child creates ethical, legal, and psychological considerations that must be carefully navigated. While efforts have been made with several proposed bills before the National Assembly seeking to regulate assisted reproductive technologies and surrogacy; these legislative initiatives remain pending, leaving a regulatory vacuum that complicates the process of securing genuine informed consent. This paper explores the boundaries and limitations of informed consent in surrogacy, analyzing the extent to which surrogates can provide truly autonomous consent, the evolving nature of consent throughout the process, and the role of legal frameworks in safeguarding all parties involved. It further examines power imbalances, cultural and economic factors, and the potential for coercion in surrogacy agreements. The paper highlights the importance of establishing robust boundaries, such as comprehensive counseling, detailed information disclosure, and clear legal frameworks, to protect the rights and well-being of all parties involved. By highlighting key ethical dilemmas including concerns about exploitation and commodification, emotional uncertainty, and legal variability and proposing strategies for more robust consent mechanisms, this paper aims to contribute to the ongoing discourse on acceptable and equitable surrogacy practices. Hence argues for a recalibration of legal and ethical standards to ensure that consent in surrogacy is both meaningfully informed and genuinely voluntary, thereby promoting fairness and dignity for all parties involved.*

**KEYWORDS:** Surrogacy, Intended Parents, Surrogate, Informed Consent, Assisted Reproduction

## 1. Introduction:

Having a child in marriage is seen as security in a marriage and widely celebrated as the pride of womanhood and also a sign of fertility. Surrogacy is an increasingly common method of assisted reproduction, enabling individuals and couple who may be unable to conceive naturally to have children. It involves a woman (the surrogate) carrying and delivering a child on behalf of intended parents, who assume legal and parental responsibility for the child after birth<sup>1</sup>. According to Adelakun surrogacy is a method of assisted reproductive technology where a woman carries pregnancy for another person or couple with the understanding that ownership of the baby born out of the arrangement is transferred to the intended parents who commission the process<sup>2</sup>. However, although the definition is quite clear, it could be criticized for using the term 'ownership of the baby' rather than 'custody' or, preferably 'parental rights'. According to Cecile Fabre people do not have property rights over children, hence there cannot be lawful transfer of ownership or property rights<sup>3</sup>. It is important to recognize that the transfer of parental rights is governed by the relevant legal and ethical frameworks applicable within the specific jurisdiction.

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<sup>1</sup> P. Saxena, et al "Surrogacy: ethical and legal issues". Indian J Community Med. (2012) Oct;37(4):211-3. doi: 10.4103/0970-0218.103466. PMID: 23293432; PMCID: PMC3531011. <<https://pmc.ncbi.nlm.nih.gov/articles/PMC3531011/>> Accessed 13<sup>th</sup> April 2025

<sup>2</sup>O. S. Adelakun "The Concept of Surrogacy in Nigeria: Issues, Prospects and Challenges" (2018) 18 African Human Rights Law Journal 605-624 <[https://www.researchgate.net/publication/330214541\\_The\\_concept\\_of\\_surrogacy\\_in\\_Nigeria\\_Issues\\_prospects\\_and\\_challenges](https://www.researchgate.net/publication/330214541_The_concept_of_surrogacy_in_Nigeria_Issues_prospects_and_challenges)> Accessed 14<sup>th</sup> April 2025

<sup>3</sup>C. Fabre, *Whose Body is it Anyway? Justice and the Integrity of the Persons* Oxford 2008, pp 189-190

Umeora defines surrogacy as a situation where a woman (third party) carries a pregnancy for the commissioning parents, and hands the child over to the commissioning parents after its delivery<sup>4</sup>. The word surrogate is rooted in the latin word “Subrogare” meaning “to substitute” put in another way “appointed to act in the place of another”<sup>5</sup>. It means a substitute, especially a person deputizing for another in a specific role, so the surrogate mother stands in the place of another woman, becomes pregnant, carries the pregnancy to full term, and gives birth to a child with the intention of giving up the child to that other person or couple commonly referred to as the “intended” or “commissioning” parents.

A surrogate mother therefore is a woman who, based on an agreement before pregnancy, carries a child and relinquishes all rights to and over the child to another person after giving birth to the child. Surrogacy agreements may be classified as either commercial or altruistic. Individuals often resort to surrogacy due to reasons such as infertility or uterine abnormalities that make conception either difficult or impossible. The social stigma associated with surrogacy as an option to handle infertility prevents many Nigerians from accessing this and other legal means of having children<sup>6</sup>. Although this arrangement is beneficial to all parties involved, however, several ethical, moral, and legal issues are inevitable. Hence the need to have appropriately framed laws which would protect the rights of surrogate mothers, intended parents, and the child born through surrogacy.

Surrogacy can be further classified into either Traditional surrogacy or Gestational surrogacy. In the former, the surrogate is also the biological mother, as her own egg is fertilized using sperm from either the intended father or a donor. From the legal point of view, the genetic connections between the surrogate and the child might complicate the arrangement, especially in those cases in which the surrogate wants to keep the child. These assumptions have led to the international agreement that gestational surrogacy should be the only type of surrogacy accepted<sup>8</sup>. While in gestational surrogacy the surrogate has no genetic connection to the child, as an embryo is created using the intended parents' or donors' genetic material and implanted via in vitro fertilization (IVF)<sup>9</sup>. Both forms of surrogacy require comprehensive legal and ethical agreements to protect the rights and interests of all parties involved. A fundamental aspect of these agreements is informed consent, which ensures that surrogate mothers and intended parents fully understand the medical, psychological, and legal implications of the surrogacy process before proceeding. Informed consent in surrogacy arrangements is crucial but faces several limitations and boundaries. Informed consent requires that surrogates are fully aware of the medical procedures, options available, and potential risks involved. Navigating informed consent in surrogacy involves addressing several ethical implications and boundaries.

Economic disparities can further complicate informed consent in surrogacy arrangement, as international surrogates may be subject to increased influence or control by intended parents due to underlying power imbalances.

<sup>4</sup>O. J. Umeora et al “Surrogacy in Nigeria: Legal, ethical, Social, Cultural, Psychological and Religious Musings” (2014) 13 African Journal of Medical and Health Sciences 105-106 <

<https://go.gale.com/ps/i.do?id=GALE%7CA392358891&sid=googleScholar&v=2.1&it=r&linkaccess=abs&issn=15971260&p=AONE&sw=w&userGroupName=anon%7Edd95c249&aty=open-web-entry>> Accessed 14<sup>th</sup> April 2025

<sup>5</sup>ibid

<sup>6</sup>ibid

<sup>7</sup>H. V. MacLachlan, “Surrogate motherhood: Beyond the Warnock and the Brazier reports” (2005) 11 Human Reproduction and Genetic Ethics (2005); 11 (1):12-23 <<https://pubmed.ncbi.nlm.nih.gov/16018113/>> Accessed 15<sup>th</sup> April 2025.

<sup>8</sup>FIGO (International Federation of Gynecology and Obstetrics) 2008. Committee report: Surrogacy. International Journal of Gynecology and Obstetrics 102 (3) 312-313

<sup>9</sup>R. Trivino-Caballero, “Caring for Delivery: Healthcare Professionals' Ethical Conflicts in Surrogate Pregnancy” Hypatia (2023); 38(3):531-548 <<https://www.cambridge.org/core/journals/hypatia/article/caring-for-delivery-healthcare-professionals-ethical-conflicts-in-surrogate-pregnancy/750ACDADEC9F9E43132B9B035D82873B>> accessed 15<sup>th</sup> April, 2025.

## **2. Understanding Informed Consent in Surrogacy**

### **2.1 Definition and Importance of Informed Consent**

Informed consent is a key principle in medical ethics. It refers to the voluntary agreement of an individual to undergo a medical procedure or enter a contractual arrangement after being provided with all relevant information, including potential risks, benefits, and alternatives. For consent to be truly informed, it must meet the following criteria:

- i. Disclosure: the individual must receive comprehensive and accurate information about the procedure, risks, and obligations.
- ii. Comprehension: the individual must understand the information conveyed to them.
- iii. Voluntariness: the decision must be made freely, without coercion or undue influence.
- iv. Competence: the individual must have the capacity to make an informed decision.
- v. Adequate time to reflect: the surrogate should be given sufficient time to consider her decision, ask questions, and consult with independent legal and psychological counsel. This ensures that the decision is made without coercion and with full understanding.
- vi. Independent Legal Advice: surrogates should have access to independent legal representation to review the surrogacy agreement. This ensures that her interests are protected and the contract is fully understood.
- vii. Ongoing Consent: Consent should be an ongoing process, not a one-time formality. The surrogate must be able to reaffirm or withdraw consent at various stages, within legal boundaries. For instance, the surrogate can withdraw consent before embryo implantation<sup>10</sup>.

In surrogacy, informed consent is especially critical because it extends beyond a single medical procedure, to a prolonged and emotionally complex process that affects multiple parties. The surrogate must consent not only to medical interventions, such as hormone treatments, embryo transfer, and child birth, but also to legal agreements that define parental rights, financial compensation, and medical decision-making throughout pregnancy. On the other hand, intended parents must consent to the legal terms governing their parental responsibilities and any potential medical decisions that may arise during the surrogate's pregnancy. The principle of informed consent in surrogacy can be traced to international developments such as the 1947 Nuremberg Code, which asserts that the voluntary consent of the human subject is an indispensable ethical standard<sup>11</sup>.

The extent to which a surrogate can choose how to give birth example vaginal delivery or caesarean section, hospital or home birth, use of pain medication or not; depends on the terms of the surrogacy agreement, applicable laws, and medical advice or consideration. In most gestational surrogacy contracts, the surrogate agrees to follow medical advice and may commit to delivering in a hospital or by a specified method if recommended by the physicians. However, in many jurisdictions, a surrogate retains bodily autonomy and cannot be legally compelled to undergo a specific medical procedure like a Caesarian section, even if it is in the contract. Since from the ethical point of view forcing a surrogate to undergo a medical procedure against her will would be deemed a violation of her rights. Suffice it to state that a Surrogate has the same rights as any pregnant person regarding medical decisions. Informed consent is vital to ensure autonomy, self-determination and well-being of a medical patient.

Informed consent from the surrogate is required before any medical procedure. At a minimum, the Verona principles requires her informed consent to involve:

- a. effective access to independent medical advice and/ or a second opinion;
- b. informed consent for each procedure that is free from all forms of coercion and fraud;

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<sup>10</sup>The World Medical Association adopted by the 57<sup>th</sup> WMA General Assembly, Pilaneberg, South Africa October 2006 and revised by the 73<sup>rd</sup> WMA General Assembly, Berlin, Germany, October 2022

<sup>11</sup>Committee of Inquiry into Allegations Concerning the Treatment of Cervical Cancer at National Women's Hospital and into Other Related Matters the Report of the Cervical Cancer Inquiry (Government Printing Office, Auckland, 1988) at 132.

- c. the provision of information and education about the medical procedure, lifestyle restrictions and short- and long-term risks, as well as possible complications in a language the surrogate mother understands and in a way that she understands;
- d. the number of embryos implanted and donor information;
- e. the right to maintain control over her own body including to refuse, restrict or request a medical procedure;
- f. the right to decide on birth conditions including labour, delivery and persons to be present; and
- g. information on post-birth implications related to the surrogate mother's future health and on subsequent births<sup>12</sup>.

Ensuring informed consent and the birthing woman's involvement in decision-making is positively correlated with physical and mental benefits<sup>13</sup>. It improves the patient-doctor relationship and trust in the health system<sup>14</sup>. Participation provides better clinical outcomes and quality of life for the patient, including self-esteem<sup>15</sup>. Involvement in childbirth decisions has implied less fear and depressive feeling after birth as well as shorter recovery periods.

So, while a surrogate may express her birth preferences, medical advice and legal agreements often shape what is ultimately permissible. However, no contract can completely override a person's right to make decisions about their own body.

## 2.2 Challenges in Applying Informed Consent to Surrogacy

Debate around the acceptability of surrogacy in many communities' centers on the exploitation of those women who serve as surrogate mothers and the commercialization of babies<sup>16</sup>. While the concept of informed consent may appear straightforward in theory, its application in surrogacy is fraught with challenges, some of which are:

- i. **Power Imbalances:** Economic disparities, social pressures, and legal structures may compromise a surrogate's ability to provide truly voluntary consent, particularly in cases of commercial surrogacy where financial incentives are involved and could be the motivating factor. The question being whether true consent can be said to exist when financial desperation is involved.
- ii. **Evolving Nature of Consent:** Unlike standard medical procedures, surrogacy is a long-term commitment, raising questions about whether consent given at the start remains valid if a surrogate later has second thoughts or faces unforeseen medical or ethical dilemmas.
- iii. **Legal Enforceability:** Different jurisdictions have varying laws on surrogacy agreements, with some recognizing them as binding contracts and others allowing surrogates to change their minds during or after pregnancy. This raises concerns about the rights of all parties involved.
- iv. **Psychological Implications:** surrogacy involves profound emotional and psychological dimensions, particularly for surrogate mothers who may form bond with the child they carry. Ensuring that surrogates fully understand the emotional risks beforehand is crucial for ethical surrogacy practices. Surrogates may face criticism or misunderstanding from their communities, particularly in conservative societies. The postpartum mental health of surrogates is also an important consideration particularly as hormonal shifts and emotional conflict can lead to anxiety and depression.

<sup>12</sup>International Social Service Principles for the protection of the rights of the child born through surrogacy (Verona Principles) (Geneva, 2021) at [7.4] (Referred to as Verona Principles).

<sup>13</sup>H. Goldberg, "Informed Decision making in Maternity Care" J. Perinat Educ (2009); 18(1) 32 -40 <<https://pubmed.ncbi.nlm.nih.gov/19436598>> Accessed 20<sup>th</sup> April, 2025

<sup>14</sup>ibid

<sup>15</sup>ibid

<sup>16</sup>D. R. Bromham, "Surrogacy: Ethical, legal and Social Aspects" (1995) 12 Journal of Assisted Reproduction and Genetics" vol. 12(8); 509-516 <<https://pubmed.ncbi.nlm.nih.gov/8589569/>> Accessed 15<sup>th</sup> April, 2025.

- v. **Ethical Implication:** Ethical dilemmas arise when legal conflicts occur. Such as the surrogate wanting to keep the baby after birth or if the intended parents abandon the child due to disabilities or changes in circumstances. Identity concerns about how surrogacy may affect the child's right to know their origins and the surrogate's role in the child's life may also arise. There might be the struggle to answer the question whether it is ethical to bring a child into the world through an arrangement that might complicate a child's sense of identity.

### **2.3 Legal and Ethical Foundations of Informed Consent**

Informed consent is rooted in the ethical principles of autonomy, beneficence, non-maleficence, and justice.

- i. **Autonomy:** Individuals must have the freedom to make informed choices about their bodies and medical treatments without coercion or undue influence. In surrogacy, autonomy applies to both the surrogate and the intended parents. Autonomy in surrogacy primarily relates to the surrogate's right to self-determination and control over her body during pregnancy. It involves complex ethical and legal issues about whether a woman can freely choose to become a surrogate and maintain bodily autonomy throughout the process. However, surrogacy contracts can pose serious risks to personal autonomy, such as loss of control over daily activities, emotional attachment to the child, and the physical risks of pregnancy. These factors challenge the surrogate's ability to make fully free and informed choices. In summary, autonomy in surrogacy involves balancing the surrogate's right to self-determination and bodily integrity with the interests of intending parents, legal frameworks, and ethical concerns about exploitation and consent. Hence, to respect this autonomy means recognizing her ongoing decision-making power throughout the pregnancy, howbeit within the contractual agreement entered into with the intending parents.
- ii. **Beneficence:** The principle of beneficence in surrogacy focuses on actions that promote the well-being of all parties involved. It requires medical professionals and the whole surrogacy arrangements to actively contribute to positive outcomes and minimize harm. Hence, medical practitioners are ethically obligated to ensure that surrogacy procedures improve the health and welfare of the surrogate mother and the child and invariably fulfill the psychological and emotional needs for parenthood of the intending parents. The decision to enter into a surrogacy arrangement should prioritize the well-being of all parties, particularly the surrogate and the future child. Also, there is the need for the surrogacy arrangements to provide fair compensation and support for the surrogate to avoid exploitation, which aligns with beneficence by promoting her well-being and dignity. Beneficence as a principle involves protecting the interests of the child born through surrogacy, ensuring legal clarity on parentage and safeguarding the child's rights and welfare<sup>17</sup>.
- iii. **Non-maleficence:** While the principle of beneficence in surrogacy aims to promote the well-being of all parties (surrogate, intending parents, and the child), non-maleficence on the other hand focuses on avoiding harm. The process should minimize harm to the surrogate, intended parents, and the child, ensuring that medical, psychological, and financial risks are fully disclosed. However, potential conflicts between the two principles exist. Key among the conflict that can arise is the surrogate's physical and psychological risks versus the intending parent's benefit. Beneficence supports fulfilling intending parent's desire for a child and the surrogate's satisfaction or compensation. However, non-maleficence warns against the health risks and psychological burdens surrogates face during pregnancy, including social stigma and potential depression, especially in low-income settings. Secondly, is emotional attachment versus psychological harm. Encouraging emotional bonding between the

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<sup>17</sup>P. Saxena et al (n.1)

surrogate and fetus may support the well-being of both, aligning with the principle of beneficence. However, this bond can lead to emotional distress when the child is handed over, potentially conflicting with the principle of non-maleficence by causing psychological harm to both the surrogate and the intended parents<sup>18</sup>.

In summary, there is the need to balance the promotion of good outcomes with minimizing physical, psychological and social harms

- iv. Justice: The surrogacy process should be fair and equitable, preventing exploitation of surrogates, especially in economically disadvantaged situations and that the arrangement benefits all parties fairly.

From the legal perspectives, informed consent in surrogacy is governed by national and international laws that vary widely across jurisdictions. Some countries, such as the United Kingdom, allow only altruistic surrogacy, where surrogates receive no financial compensation beyond medical and reasonable expenses. Others such as the United States and India, permit commercial surrogacy, an arrangement where surrogates are financially compensated, raising additional ethical concerns about potential exploitation. The enforceability of surrogacy agreements also differs; in some jurisdictions, a surrogate retains the right to change her mind even after birth, whereas in others, the contract is legally binding from the outset.

Legal protections are often insufficient, with surrogates sometimes lacking the legal right to refuse medical procedures, which can undermine their autonomy and bodily integrity. Legal frameworks vary widely, with some countries offering more structured support and protections for surrogates, while others lack effective regulation, leading to potential exploitation.

### **3.0 Boundaries of Informed Consent in Surrogacy**

While informed consent is a foundational, ethical and legal principle in surrogacy, its practical application is not absolute. There are distinct boundaries that limit the extent to which informed consent can be considered truly voluntary, autonomous, and enforceable. These boundaries arise due to legal restrictions, ethical dilemmas, and evolving circumstances throughout the surrogacy journey.

#### **3.1 Legal Boundaries: Variability and Enforceability.**

Different countries and even states within countries have distinct laws governing surrogacy. Some countries fully allow surrogacy and provide a legal framework to protect all parties<sup>19</sup>. While some countries prohibit surrogacy entirely deeming it unethical or exploitative; some other jurisdictions allow only altruistic surrogacy but prohibit commercial arrangements. The legal boundaries of surrogacy vary dramatically across regions, impacting the enforceability of agreements. The key legal issues involve parental rights, compensation, and the surrogate's ability to withdraw consent.

#### **3.2 Legal Parentage and Citizenship Issues.**

Legal parentage refers to the legal recognition of individuals as the parents of a child. In traditional family law, parentage is often established by biological connection or marital presumption. In surrogacy, especially gestational surrogacy, the intended parents may not be biologically related or married to the surrogate, leading to legal ambiguities. Some countries automatically assign parentage to the surrogate, requiring intended parents to adopt the child post-birth. Meanwhile international surrogacy often raises citizenship issues, where children may be left stateless if their birth country does not recognize surrogacy. In the United Kingdom (UK) the Human Fertilization and Embryology Act 2008 allows intended parents to apply for a parental order to become the legal parents. The court, however, must be satisfied that the arrangement was altruistic and, in the child's

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<sup>18</sup>P. Brandao, & N. Garrido, "Commercial Surrogacy: An Overview" <<https://pmc.ncbi.nlm.nih.gov/articles/PMC9800153/>> Accessed 3<sup>rd</sup> April, 2025

<sup>19</sup> Some states like California, Nevada, and Connecticut allow both altruistic and commercial surrogacy with clear contractual guidelines. Ukraine and Georgia permit commercial surrogacy and provide intended parents with automatic legal parentage. Germany, France and Spain ban all forms of surrogacy, making contracts legally void. While Canada, the United Kingdom, and Australia permit surrogacy but ban financial compensation beyond medical expenses.

best interest before the order can be granted. In India under the Surrogacy (Regulation) Act, 2021, only altruistic surrogacy is permitted, and legal parentage must be established through judicial procedures post birth.

In *Menneson v. France*<sup>20</sup> This case concerned the refusal of French authorities to grant legal recognition to the parent child relationships established in the United States between the applicants and their children born through surrogacy. Invariably rendering the children stateless. The ECtHR held this violated the children's rights under Article 8 ECHR (private and family life).

In *Laborie v. Canada*<sup>21</sup> the Canadian court ruled that children born abroad via surrogacy to Canadian citizens are entitled to citizenship by descent, even if there is no genetic ties, provided parentage is legally established.

Also, in *Re X (A Child)*<sup>22</sup> the court addressed citizenship complications arising from surrogacy in Ukraine. The UK court emphasized the need for parental orders to secure citizenship and legal parentage simultaneously.

These rulings have influenced subsequent ECtHR decisions, including Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, hence the court reiterated the importance of legal recognition of parentage in the best interests of the child.

In other words, the judgement in *Menneson and Labassee*<sup>23</sup> reflect the efforts of the court to uphold the principle that legal parent-child relationships must be respected to ensure the dignity, identity, and legal certainty of children. While maintaining respect for national sovereignty, the Court's decisions underscore the need for domestic legal systems to adapt to international human rights standards, particularly when restrictive policies adversely affect vulnerable individuals namely children born through international surrogacy arrangements.

### 3.3 Enforceability of Surrogacy Contracts

The enforceability of surrogacy agreements varies significantly across jurisdictions, and legal recognition depends on several factors, including local laws, public policy, and court interpretations. In some states in the United States of America<sup>24</sup> surrogacy contracts are legally binding, and courts uphold the rights of intended parents. Some states are very surrogacy-friendly and enforce both altruistic and commercial surrogacy contracts. In contrast, states like Louisiana and Michigan criminalize commercial surrogacy rendering unenforceable any contract entered in furtherance thereto.

However, in India post-2015 reforms commercial surrogacy is banned, making prior contracts legally irrelevant. The Surrogacy (Regulation) Act, 2021 bans commercial surrogacy and only permits altruistic surrogacy for Indian citizens under strict conditions. Hence, surrogacy contracts are only valid if they align with the 2021 Act. Several traditional destination countries for surrogacy like India and Thailand, have introduced bans on foreign intended parent (s) after cases of abandoned offspring (s) led to worldwide outcry. This also happened with Ukraine, which was a well-known destination for cross-border commercial surrogacy before the war in 2021<sup>25</sup>.

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<sup>20</sup>*Menneson v. France* App no. 65192/11 (ECtHR, 26 June 2014)

<sup>21</sup>Application No. 44024/13 (2022)

<sup>22</sup>[2020] EWCA Civ 1187

<sup>23</sup>*Labassee v France* App no 65941/11 (ECtHR, 26 June 2014)

<sup>24</sup>California, Illinois, and Nevada

<sup>25</sup>Writing Group on behalf of the ESHRE Ethics Committee, Francoise Shenfield, Basil Tarlatzis, Guiliana Baccino, Theofano Bounartzi, Lucy Frith, Guido Pennings, Veerle Provoost, Nathalie Vermeulen, Heidi Mertes, Ethical considerations on surrogacy, *Human Reproduction*, Volume 40, Issue 3, March 2025, Pages 420–425, <https://doi.org/10.1093/humrep/deaf006> Accessed 3rd April 2025.

In the United Kingdom surrogacy is governed by the Surrogacy Arrangements Act 1985 and the Human Fertilisation and Embryology Act 2008. Altruistic surrogacy is permitted, but surrogacy contracts are not legally enforceable. Although contracts are considered morally persuasive but legally non-binding, as the courts focus on the child's best interest in arriving at any decision. Hence the surrogate is the legal mother at birth (even if not genetically related), and her consent is required post-birth to transfer parental rights.

### **3.4 The Right to Withdraw Consent**

In certain jurisdictions, surrogates are permitted to change their minds either before or after the birth of the child. In the United Kingdom the surrogate has the right to withdraw her consent up until six weeks after birth<sup>26</sup>. If the surrogate withdraws her consent during pregnancy, then the surrogate would be the legal mother at birth and the intended parents would have to apply for a parental order through the courts, who would have to determine the issue. If the surrogate withdraws her consent within the six-week period following the birth, the intended parents will still be recognized as the legal parents, and the surrogate would need to apply for a parental order, with the final decision resting with the court<sup>27</sup>.

In the United Kingdom, surrogacy agreements are not legally enforceable, and the surrogate retains the legal right to keep the child unless a parental order is granted by the court. This approach contrasts with countries like Greece<sup>28</sup>, Israel, and South Africa, where surrogacy agreements are enforceable prior to conception, providing greater legal certainty for intended parents.

### **3.5 Disputes over Compensation**

In places where commercial surrogacy is legal, disputes often arise over payment terms, particularly in cases of pregnancy complications or termination decisions. Disputes over compensation are complex and can involve legal, ethical, and contractual considerations. And how they are handled depends largely on the legal framework of the country where the surrogacy takes place. Most surrogacy arrangements begin with a detailed surrogacy agreement between the intended parents and the surrogate. This contract usually covers: compensation, medical expenses, responsibilities of each party and dispute resolution mechanisms. If disagreements arise, such as delayed payments or disputes over reimbursements, the parties often refer to the signed contract. Courts or arbitrators typically enforce these agreements, assuming surrogacy is legal in that jurisdiction.

### **3.6 Best interests of the Child Principle**

The best interest of the child is a foundational concept in family and child law. It prioritizes the physical, psychological, and emotional well-being of a child over the interests of the commissioning parents or surrogate. It is entrenched in international legal instrument<sup>29</sup> which mandates that the best interests of the child shall be a primary consideration in all actions concerning children. In surrogacy, this principle becomes significant when determining legal parentage, custody in instances of dispute, cross-border surrogacy complications, consent and legitimacy of surrogacy contracts. Overall, this principle guides courts in custody, adoption, and surrogacy cases.

Algharani et al are of the view that legal systems should prioritize the child's attachment and psychological security over genetic ties<sup>30</sup>. Jackson opines that the child's welfare should outweigh contractual obligations in surrogacy agreements, especially in cases of conflict and ambiguity.

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<sup>26</sup>Farrer & Co (2023) "A New Pathway for Surrogacy" <https://www.farrer.co.uk/news-and-insights/a-new-pathway-for-surrogacy/> accessed 17<sup>th</sup> June 2025

<sup>27</sup> *ibid*

<sup>28</sup> Article 1458 of Government Gazette 3089/2002

<sup>29</sup> Article 3(1) of the United Nations Convention on the Rights of the Child (CRC)

<sup>30</sup> A. Algharani, and D. Griffiths "The Regulation of Surrogacy in the United Kingdom: The Case for Reform" <<https://brilliantbeginnings.co.uk/wp-content/uploads/2020/10/Algharani-and-Griffiths-final-1.pdf>> Accessed 19<sup>th</sup> June 2025.



Courts may refuse to enforce contracts if they determine the agreements is not in the child's best interests. For instance, in the U.S. and the U.K. courts have awarded custody to the surrogate if the court believed the intended parents were unfit.

In Baby M case<sup>31</sup>, William and Elizabeth Stern entered into a traditional surrogacy contract with Mary Beth Whitehead. The surrogate mother had artificial insemination with the sperm of the commissioning father, and the contract dictated that the surrogate hand over the birth at birth to the commissioning couple. This was one in 1986, when baby M arrived. Less than 24 hours after handing over the baby, the surrogate mother demanded and collected back the baby from the commissioning parents. The couple consequently approached the court seeking legal custody since Mary Whitehead refused to relinquish custody. The new Jersey Supreme Court declared the surrogacy contract unenforceable, ruling that payment for adoption was against public policy. However, the court granted custody to the Sterns (intended parents) based on the child's best interests due to the emotional and psychological environment they could provide, while giving Whitehead visitation rights.

In Johnson v. Calvert<sup>32</sup>, Mark and Crispina Calvert hired Anna Johnson as a gestational surrogate. After a dispute, Johnson claimed she was the legal mother. The California Supreme Court ruled in favour of the intended parents, establishing that intent to parent determines legal parentage in surrogacy agreements.

In another case of Buzzanca v. Buzzanca<sup>33</sup> where a married couple arranged for an embryo to be implanted in a gestational surrogate. After the couple divorced, the husband denied parental responsibility. The California Court of Appeal ruled that because the couple initiated the surrogacy process, they were the legal parents, regardless of genetics. Reinforcing that intent to parent prevails over biological ties in gestational surrogacy cases.

In Re X<sup>34</sup> where the intended parents applied for a parental order after the statutory deadline had passed. The Court allowed the parental order, emphasizing that rigid legal deadlines should not override the child's best interests. It should be noted that in the United Kingdom there is the need to get a parental order from a family court before the transfer of parental responsibility from the surrogate to the intended parents. A parental order is a legal order from a court of law that transfers parental responsibility and legal parenthood from the surrogate mother (and her spouse or civil partner if she has one) to the intended parents. A parental order also extinguishes any rights or obligations that the surrogate or her partner may have or claim to have in relation to the child.

In Jan Balaz v Anand Municipality<sup>35</sup> where a German couple used an Indian surrogate, but Germany refused to grant the child citizenship. The Gujarat High Court ruled that the child was an Indian citizen due to birth in India. In Paradis v. Gazi<sup>36</sup> A dispute arose when a surrogate changed her mind about handing over the baby, claiming she had parental rights. The Canadian court ruled in favour of the intended parents, reinforcing contractual surrogacy rights in Canada.

In Re X and Y (Foreign Surrogacy)<sup>37</sup> the Court highlighted the need for post-birth decisions to prioritize the child's needs, including citizenship, legal recognition of parents, access to healthcare and education. In other words, courts tend to override surrogacy agreements if they jeopardize the

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<sup>31</sup>Baby M Case (In the Matter of Baby M), 537 A.2d 1227 (New Jersey, 1988)

<sup>32</sup>5 Cal. 4<sup>th</sup> 84 (1993)

<sup>33</sup>61 Cal. App. 4<sup>th</sup> 1410 (1998)

<sup>34</sup>UK, 2014

<sup>35</sup>AIR 2010 Gujarat 21 (2009)

<sup>36</sup>Canada 2021

<sup>37</sup>[2008] EWHC 3030 (FAM)

child's well-being. Hence, the child's best interest remains the most compelling guiding principle in surrogacy arrangements.

These cases highlight the legal uncertainties and ethical challenges in surrogacy. While some jurisdictions uphold surrogacy contracts, others prioritize biological ties, child welfare, or the surrogate's rights. The lack of global standardization continues to cause legal disputes, especially in cross-border surrogacy cases. It therefore follows that without international legal harmonization, surrogacy will continue to present legal challenges, especially in cross-border cases.

## **4.0 Ethical Considerations and challenges**

### **4.1 Power Imbalances and Coercion Concerns**

Power imbalances occur when there is a significant difference in power between the surrogate and the intended parents or surrogacy agency. This can manifest in various ways: either financial power or legal and social power. In the former instance the intended parents or agency may have more financial resources, while the surrogate might be financially vulnerable, which can lead to her feeling pressured to accept the terms of the arrangement. Under legal and social power, the intended parents may have more legal and social resources, while the surrogates may lack the same support or knowledge about their rights, leading to a situation where their choices are limited.

Coercion in surrogacy refers to situations where the surrogate feels forced or pressured into participating in the process against her will, or under conditions that limit her freedom to make autonomous decisions. This can manifest in either economic coercion or psychological coercion. Under the former a surrogate who is struggling financially might feel compelled to become a surrogate to secure a significant sum of money, despite personal reservations or risks. On the other hand, psychological coercion manifests where surrogates may be made to feel guilty or manipulated into agreeing to surrogacy, especially if they are emotionally or socially pressured by the intended parents, family or the surrogacy agency.

These issues raise ethical concerns because they can lead to situations where the surrogate does not have full autonomy over her decision making, which can lead to exploitation or harm both physically and emotionally. Addressing power imbalances and coercion in surrogacy is crucial to ensure that all parties are treated ethically and that the surrogate's rights, health, and well-being are respected throughout the process.

### **4.2 The Role of Financial Compensation and Potential for Exploitation**

Financial compensation in surrogacy is a complex and often contentious issue, as it intersects with ethical concerns regarding exploitation, coercion, and fairness<sup>38</sup>. Although financial compensation is a key component of surrogacy yet it can lead to situations where surrogates are financially vulnerable, potentially leading to exploitation.

#### **4.2.1 Financial Compensation**

In most surrogacy arrangements, surrogates are compensated for their time, effort, and the physical and emotional demands of carrying a child for another person or couple, such compensation ordinarily will cover medical expenses, living expenses<sup>39</sup>. Emotional and psychological support as well as payment for time and effort. While many surrogates enter into these arrangements willingly, and view compensation as fair for the physical, emotional, and the time commitments required, the issue of exploitation arises when financial incentives become a form of coercion or when surrogates are vulnerable to being taken advantage of.

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<sup>38</sup> J. Brazier and R. Janssens "Regulating the international Surrogacy Market: Ethics of Commercial Surrogacy in the Netherlands and India"

<<https://pmc.ncbi.nlm.nih.gov/articles/PMC7538442/#:~:text=As%20one%20Indian%20surrogate%20explained,nature%20of%20an%20unequal%20society.>> Accessed 19<sup>th</sup> June 2025.

<sup>39</sup> *ibid*

#### 4.2.2 Potential Exploitation

Surrogacy raises concerns about the exploitation and commodification of women, emphasizing the need for genuine informed consent to protect surrogates' autonomy. Exploitation often arises due to wealth and power disparities between intended parents and surrogates, particularly when economically disadvantaged women are involved. This can lead to coercion and undermine the autonomy of surrogates.

Commodification refers to treating the surrogate's body and reproductive functions and capabilities as marketable goods, which objectifies women and violates their dignity. Critics argue that commercial surrogacy commodifies both women's bodies and children, framing them as products to be bought and sold<sup>40</sup>. In other words, commercialization of surrogacy raises concerns that it turns a deeply personal and intimate process (pregnancy) into a financial transaction. Some other are of the opinion that offering significant financial incentives may contribute to an environment where surrogacy is primarily seen as a business transaction, rather than a compassionate arrangement between parties. Leading to ethical concerns about treating women's reproductive capacity as a service for hire. These issues underscore the need for careful regulation and ethical considerations to protect all parties involved in surrogacy arrangements.

The key to avoiding exploitation in surrogacy is to strike a balance between fairly compensating surrogates for their time, effort, and emotional toll; while ensuring they are not coerced into surrogacy because of financial desperation. The following will help:

- i. Clear and transparent contracts: that ensure the surrogate's rights and autonomy are respected throughout the process.
- ii. Adequate medical and psychological support: to help surrogates deal with the emotional and physical aspects of surrogacy.
- iii. Legal protections: to prevent exploitation, including safeguards against coercion, ensuring surrogates have full knowledge of their rights, and that they have the freedom to change their mind.
- iv. Screening and support systems: this will help to ensure that surrogates are making an informed and voluntary decision, and to prevent any undue influence from intended parents or agencies.

Financial compensation no doubt is an essential part of surrogacy arrangements, it carries significant ethical risks<sup>41</sup>. When surrogate's economic vulnerability or the power dynamics of the relationship are not carefully managed, surrogacy can lead to exploitation. Proper safeguards, regulation, fair compensation are necessary to protect the rights of all parties involved.

#### 4.3 Informed Consent and Emotional Risks in Surrogacy

Emotional uncertainty is another challenge, as surrogates may not fully anticipate their emotional responses to pregnancy and relinquishing the child, complicating the informed consent process. Despite these challenges, informed consent still remains a cornerstone of medical ethics and legal practice. According to Beauchamp and Childress<sup>42</sup> valid informed consent requires that the individual understands the material information relevant to their decision, including potential risks, benefits, and alternatives essential for ensuring the ethical conduct of surrogacy arrangement. In the context of surrogacy, emotional and psychological outcomes are material information. Some authors *to wit* Jadvā<sup>43</sup> and Van Den Akker<sup>44</sup> highlight that although many surrogates report positive

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<sup>40</sup>E. S. Scott "Surrogacy and the Politics of Commodification." *Law and Contemporary Problems*, vol. 72, no. 3, 2009, pp. 109–46. JSTOR, <http://www.jstor.org/stable/40647246> Accessed 11th June 2025.

<sup>41</sup>*ibid*

<sup>42</sup>T. L. Beauchamp, & J. F. Childress, (2019) *Principles of Biomedical Ethics* (8<sup>th</sup> ed.) Oxford University Press.

<sup>43</sup>V. Jadvā, & S. Imrie "Children of Surrogate Mothers: psychological well-being, Family Relationships and Experiences of Surrogacy". *Human Reproduction* 18 (10), 2196-2204. < <https://pubmed.ncbi.nlm.nih.gov/24256993/>> Accessed 14<sup>th</sup> April, 2025

<sup>44</sup>O. B. A. Van Den Akker, (2007) "Psychological Trait and State Characteristics, Social Support and Attitudes to the Surrogate Pregnancy and Baby" *Human Reproduction*, 22 (3), 885-890 < <https://pubmed.ncbi.nlm.nih.gov/17635845/>> Accessed 14<sup>th</sup> April, 2025

experiences, a significant minority experience emotional distress, grief, or regret after relinquishing the child. These emotional outcomes, even if not universal, are foreseeable and therefore must be disclosed.

The American Society for Reproductive Medicine (ASRM) guidelines (2021)<sup>45</sup> similarly stress that surrogates must undergo not only medical screening but also psychological counselling and evaluation to ensure they understand the potential emotional ramifications of their decision. Thus, for there to be proper informed consent in surrogacy, surrogates must be made aware of the following:

- i. The possibility of emotional attachment to the child
- ii. Potential feelings of loss, grief, or regret after relinquishment
- iii. Long-term psychological impacts, both positive and negatives;
- iv. Support systems available before, during, and after the process<sup>46</sup>.

Once this information is provided to surrogates then consent can arguably be said to be valid, as the arrangement would be said to be based on a complete understanding of the risks involved in the surrogacy arrangement. In the case of *Re Evelyn*<sup>47</sup> an altruistic surrogate gave birth and handed the baby to the commissioning parents, but later changed her mind and went to court seeking custody. The court ruled in favor of the surrogate, deciding that the child's best interests were best served by remaining with the surrogate mother. The case stressed the psychological harm suffered by the surrogate and the child's bond with her.

In other words, for consent to be “properly informed” in surrogacy, the surrogate should be given clear, realistic information about the potential emotional impacts of pregnancy and the relinquishment process. Without this, the consent might not meet ethical or legal standards of validity.

Although Nigeria lacks a legal framework for surrogacy, causing uncertainty and hurdles in surrogacy arrangements; there are rules and standards that regulate the practice. Order 23 of Code of Medical Ethics in Nigeria makes provisions for assisted conception and related practices. It provides to the effect that high-technology based human reproductive processes are now being employed by registered practitioners in Nigeria. These techniques embrace wide professional practices that include in-vitro fertilization, sperm donor and egg donor techniques, embryo donation, gestational surrogacy, traditional surrogacy and other emerging procedures. While the necessary statutes to govern these desirable practices are not yet in place, ethical considerations show the essence for care and attention to the several needs of donor, recipients and offspring at every step in the surrogacy arrangement.

Again, the lack of surrogacy-specific laws in Nigeria raises concerns about the validity and the enforcement of such contracts in court. Some are of the opinion that since surrogacy is not explicitly prohibited, surrogacy contracts can be enforceable based on general principles of offer, acceptance, and consideration<sup>48</sup>. However, others contend that unregulated surrogacy violates certain other laws

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<sup>45</sup> American Society for Reproductive Medicine (ASRM). (2021) Guidance on Gamete and Embryo Donation. *Fertility and Sterility*, 116(5), 1287-1301 < <https://www.asrm.org/practice-guidance/practice-committee-documents/guidance-regarding-gamete-and-embryo-donation/>> Accessed 15<sup>th</sup> April, 2025

<sup>46</sup> A. Stuhmcke (2011) “For Love or Money: The Legal Regulation of Surrogate Motherhood” < [https://www.parliament.wa.gov.au/intranet/libpages.nsf/WebFiles/ITS+-+surrogacy+article+Stuhmcke/\\$FILE/surrogacy+article+Stuhmcke.pdf](https://www.parliament.wa.gov.au/intranet/libpages.nsf/WebFiles/ITS+-+surrogacy+article+Stuhmcke/$FILE/surrogacy+article+Stuhmcke.pdf)> Accessed 15<sup>th</sup> April, 2025

<sup>47</sup> Australia, 1998

<sup>48</sup> A. Oyinlade . 'Surrogacy in Nigeria-can Surrogacy Contracts and Agreements be Enforced' <https://www.adeolaoyinlade.com/en/surrogacy-in-nigeria-can-surrogacy-contracts-and-agreements-be-enforced/> Accessed 7<sup>th</sup> April 2025

already in force<sup>49</sup>. Order 23 of the Code of Medical Ethics prohibits medical practitioners from engaging in Assisted Reproductive Techniques (ARTs) like surrogacy unless permitted by law or an approved research protocol. It states:

A practitioner shall not engage in artificial insemination, in vitro fertilization, embryo transfer, surrogacy or any form of assisted reproductive technology unless such procedure is carried out in accordance with existing laws and ethical standards.

The Legal implication is that surrogacy is not expressly illegal, but it is prohibited for medical practitioners unless backed by law or formal ethical approval. This creates a regulatory gap that discourages professional involvement and leaves intended parents vulnerable.

Section 30 of the Child's Rights Act (CRA) prohibits the buying, selling, and trafficking of children, stipulating a penalty for anyone who: "buys, hires, sells or otherwise deals in a child for the purpose of exploitation or any other purpose". While surrogacy is not directly addressed, a commercial surrogacy arrangement could be interpreted as involving the 'sale' of a child. Particularly if money exchanges hands beyond medical reimbursement. Also, Section 50 of the National Health Act, 2014 prohibits the sale or trading of human tissue, including gametes, embryos or organs except with the approval of the Minister of Health. This targets commercialization in ART procedures and may impact surrogacy arrangements involving egg or sperm donation. Hence, the section discourages surrogacy where third-party reproductive materials are used, especially in the absence of proper regulation. Lastly, the National Agency for the Prohibition of Trafficking in Persons (NAPTIP) enforces laws against child trafficking. The agency among other activities in execution of her mandates prosecutes fertility operators over surrogacy-related births, citing the absence of regulatory safe guards as evidence of intent to traffic<sup>50</sup>. It could be seen that even where the surrogate and intending parents' consent, public policy concerns around exploitation override contractual freedom.

It is worthy to note the holding of the European Court of Human Rights<sup>51</sup> where it stated that children born via surrogacy abroad have a right to legal recognition of parentage, even where domestic law prohibits surrogacy. This implies that the child's rights must not be compromised by the absence of surrogacy laws. Similarly in another case<sup>52</sup> India's Supreme Court upheld surrogacy in principle but emphasized the need for legislative intervention to protect surrogate mothers and children from abuse. In other words, courts may allow surrogacy where it serves a legitimate interest but the call for statutory safeguards cannot be overemphasized.

## **Conclusion**

Informed consent remains a cornerstone of ethical surrogacy arrangement, particularly given the sensitive nature of reproductive rights, the socio-cultural and legal complexities surrounding surrogacy. While Nigerian law does not expressly prohibit surrogacy, it creates a legally ambiguous and ethically fraught environment. The lack of comprehensive legislation, standardized medical protocols and clear ethical guidelines significantly impedes the ability of surrogate mothers and intending parents to make fully informed decisions. This vacuum creates room for exploitation, misinformation, and potential violation of human rights. Informed consent, though fundamental, is

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<sup>49</sup>Section 30 of the Child Rights Act which prohibits buying, Selling or dealing in children. Section 12 of the Trafficking in Persons [Prohibitions] Enforcement and Administration Act which criminalizes all types of human trafficking and section 50 of the National Health Act which prohibits manipulation of any genetic material <sup>50</sup>NAPTIP Press Statement (2022) <<https://naptip.gov.ng/naptip-dg-orders-commanders-to-go-after-child-traffickers/>> accessed 19<sup>th</sup> June 2025

<sup>51</sup>*Menneson v France* Application 65192/11, Council of Europe: European Court of Human Rights, 26 June 2014.

<sup>52</sup>*Baby Manji Yamada v Union of India* (2008)

not sufficient to shield parties from potential criminal liability or civil unenforceability especially where: commercial compensation is involved; legal parentage is unclear, or the arrangement is interpreted as exploitative.

Furthermore, the power imbalance between surrogate mothers often from lower socio-economic backgrounds and commissioning parents underscores the need for robust legal and ethical safeguards. Without proper regulation, the concept of informed consent may be reduced to a mere formality, lacking in genuine voluntariness and understanding.

### **Recommendations**

To address these limitations in Nigeria there is the need:

- i. to enact comprehensive legislation that outlines the rights, duties, and protections for all parties to regulate surrogacy practices in Nigeria. The legal framework should emphasize the requirement for documented, informed, and voluntary consent of the parties involved.
- ii. There is the need for medical institutions and fertility clinics to adopt standardized informed consent protocols that include counselling, medical explanations, and legal advice to ensure all parties understand the implications of surrogacy.
- iii. Surrogate mothers and commissioning parents should undergo counselling to ensure each party understands the legal, medical, psychological, and emotional aspects of surrogacy, thereby ensuring consent is truly informed.
- iv. There is the need to establish a government regulatory body to oversee surrogacy agreements and ensure ethical compliance.
- v. Finally, there is the need to promote awareness to reduce cultural stigma surrounding surrogacy and also encourage ethically sound participation.