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SCAN ARTICLE

# **Parental Order as an Affirmation of Legal Percentage in Gestational Surrogacy Cases-A Review of Re: Olatunde**

Amarachi Chizaram Okonkoh\*

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## **Abstract**

*On 29 November 2021, a Nigerian Court in the matter of Re: Olatunde, delivered judgment conferring parental rights in respect of a child born pursuant to a gestational surrogacy arrangement, on the intending parents. The decision in Re: Olatunde is perhaps the only known case where a Nigerian Court was called upon to determine the legality of a surrogacy contract and to make a declaration of legal parentage in favour of the intending parents. This decision is significant because of the absence of surrogacy or Assisted Reproductive Technology (ART) specific laws in Nigeria. This case review therefore discusses the concept of surrogacy and ART generally and examines the basis upon which the court reached the decision conferring parental rights on the intending parents. It appraises the significance of the decision and specifically enquires into whether the decision has aided in clarifying the Nigerian law on gestational surrogacy, and advanced Nigeria's jurisprudence on this subject. It concludes by emphasizing the need for the enactment of ART specific laws for the purpose of further clarifying the Nigerian ART law.*

**Keywords: Surrogacy, Parental Order, Legal Parentage, Assisted Reproductive Technology**

## Introduction

Assisted Reproductive Technology (ART) refers to ‘all interventions that include the in vitro handling of both human oocytes and sperm or of embryos for the purpose of reproduction’.<sup>1</sup> The International Committee for Monitoring Assisted Reproductive Technologies (ICMART) recognises semen, oocyte and embryo donation, as well as gestational surrogacy as constituting ART. Oocyte is the female gamete (egg) required for human reproduction, while sperm refers to the male reproductive gamete required to create an embryo or achieve pregnancy. Embryo donation refers to ‘an ART cycle, which consists of the transfer of an embryo to the uterus or fallopian tube of a female recipient, resulting from gametes that did not originate from the female recipient or from her male partner’.<sup>2</sup> Gestational surrogacy refers to an arrangement where a gestational carrier (surrogate) carries a pregnancy with the agreement to hand over the resulting child to the intending parent(s)/the parent(s) who commissioned the pregnancy and birth of the child. In a gestational surrogacy arrangement, the gestational carrier does not contribute any genetic material to the formation of the child. She only carries in her womb the foetus formed from the genetic materials provided/procured by the intending parents, and provides only one component of motherhood, which is the gestational service.<sup>3</sup>

In a gestational surrogacy arrangement, pregnancy is achieved by implanting the embryo in the uterus of the gestational carrier. The embryo which is implanted can be created through sperm or eggs procured or provided by the intending parents, or the embryo itself could be a donated embryo. Where the egg or sperm used in achieving pregnancy is donated, that means that the genetic parents may be different from the intending parents, thus, resulting in a situation where one or neither of the intending parent is the genetic parent of the resulting child. The splitting of different components of parentage in different people results in uncertainty in determining legal

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<sup>1</sup> Fernando Zegers-Hochschild and others, ‘The International Glossary on Infertility and Fertility Care, 2017’ (2017) 32 *Human Reproduction*, 1786, 1790.

<sup>2</sup> Fernando Zegers-Hochschild and others, ‘The International Glossary on Infertility and Fertility Care, 2017’ (2017) 32 *Human Reproduction*, 1786, 1793.

<sup>3</sup> Yehezkel Margalit, ‘In Defense of Surrogacy Agreements: A Modern Contract Law Perceptive’ (2014) 20 *William and Mary Journal of Women and the Law* 423, 426.

parentage. Thus, one of the thorny legal issues that surrogacy and ART raise is the question of legal parentage; in whom, is the legal right over a surrogate-born child vested? Who should be recognised as the legal father and mother? This concern exists, particularly in gestational surrogacy arrangements, where parentage is split into different components and shared among the various parties to the procreative process.<sup>4</sup> In a gestational surrogacy arrangement, there may exist three different components of parentage: genetic parentage, social/legal parentage, and gestational parentage. The genetic parent is the parent who contributed the genetic material used in creating the child, the social and in many cases, the legal parent is the parent who sets the entire procreation process in motion and who intends to raise the child, while the gestational parent is the gestational carrier.

In Nigeria, there are no ART or surrogacy specific laws which regulate the practice of surrogacy or the use of ART. Also, there are no laws which lay down special rules for determining legal parentage in gestational surrogacy arrangements, however there are laws and regulations that acknowledge the existence of reproductive technology and their use in Nigeria. On 6 May 2019, the Lagos State Government through the Health Facilities Monitoring and Accreditation Agency (HEFAMAA), (an agency under the State Ministry of Health), in collaboration with Association for Fertility and Reproductive Health (AFRH), which is an association of fertility and reproductive health professionals in Nigeria issued the ART Practice in Lagos State Regulations and Guidelines (ART Regulation).<sup>5</sup> The ART Regulation is only applicable in Lagos State and primarily offers clinical guidance to ART professionals. The ART Regulation sets out the minimum requirements facilities offering ART services must satisfy and provides guidance to clinicians on some ethical issues that could arise within the ART clinical setting. The ART Regulation does not lay down rules for resolving legal questions that arise from the use of ART. The Nigerian Rules of Professional Conduct for Medical and Dental Practitioners (Code of Medical Ethics),<sup>6</sup> is another relevant legal instrument. The Code of Medical Ethics acknowledges that ART is being used in

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<sup>4</sup> Amarachi Chizaram Okonkoh and Dorcas Odunaike, 'Contract for Gestational Services: Examining the Legal Status and Enforceability of Surrogacy Arrangements in Nigeria' in Olanike S Adedokun and Erebi Ndoni (eds), *Reproductive Health and Assisted Reproductive Technology in Sub-Saharan Africa: Issue and Challenges* (Palgrave Macmillan 2023).

<sup>5</sup> Issued by the Health Facilities Monitoring and Accreditation Agency (HEFAMAA) pursuant to the Lagos State Health Reform Law, 2006.

<sup>6</sup> Made pursuant to the Medical and Dental Practitioners' Act, Cap M8, Laws of the Federation of Nigeria (LFN) 2004, section 1(2)(c).

Nigeria, but it also admits the legal gap that its use creates, in the absence of relevant laws. Thus, the Code of Medical Ethics, beyond acknowledging the use of ART in Nigeria, does not provide answers to the legal questions that ART raises. Rule 23 of the Code states as follows:

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, full surrogacy and other emerging procedures. Whilst the necessary statutes to govern these desirable practices in the society are yet to be enshrined, ethical considerations show the essence for care and attention to the several needs of donor, recipient, and offspring at every step in these practices.<sup>7</sup>

The absence of ART specific laws has therefore created some uncertainty as to the response of the law to, and its treatment of surrogacy in Nigeria. One of the most fundamental questions which a gestational surrogacy arrangement raises is the question of legal parentage. Prior to the advent of ART, there was no confusion as to who the ‘mother’ is, and this is evidenced by the maxim, *Mater semper certa est*, which means ‘the mother is certain’. The Nigerian law does not define who a mother is, because as has been succinctly and accurately explained, ‘We really have no definition of ‘mother’ in our lawbooks, “Mother was believed to have been so basic that no definition was deemed necessary.”’ mother was therefore determined with reference to the act of gestation and birth, whereas a more flexible approach is adopted in the determination of a father. Thus, unlike in the case of the mother, ‘the law has always acknowledged the right of a woman to say who the father of her child is’.<sup>8</sup> In the light of ART, mother and father are now uncertain.

Despite the absence of ART and surrogacy laws in Nigeria, surrogacy contracts continue to be approached from the legal standpoint that the legal mother remains the gestational carrier, and her husband, remains the legal father, where she is married. To ensure that parental rights are vested in the intending parents, lawyers have resorted to several approaches, including seeking adoption orders and custody orders, to confer parental rights on the intending parents. However, an adoption

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<sup>7</sup> Rules of Professional Conduct for Medical and Dental Practitioners, rule 23.

<sup>8</sup> *Tony Anozie V Mrs Chizoba Uwakwe & Anor* (2016) LPELR-40554(CA).

order, is not reflective of the nature of a surrogacy arrangement, and in many cases, intending parents are usually unwilling to go through an adoption process to acquire parental rights over their surrogate-born children. The reluctance of intending parents to go through an adoption process is not unconnected with the stigma that is still associated with adoption in a traditional society like Nigeria,<sup>9</sup> even though there is now a growing acceptance of adoption. To seek an adoption order for a child whose birth they set in motion is to diminish their contribution and participation in the procreative process. Also, the challenge with seeking a custody or guardianship order is that such orders do not expressly confer legal parentage on the intending parents, even though they permit the intending parents to exercise some level of parental rights over the child. The shortcomings of adoption orders and custody/guardianship orders have now made parental orders or legal declaration of parentage a more attractive option for confirming legal parentage in surrogacy arrangements. In surrogacy arrangements, a parental order, or a declaration of legal parentage is therefore a fundamental issue that must be resolved because it is this confirmation of the intending parents' legal status vis-à-vis the surrogate-born child that confers rights on the parents to make decisions over the child,<sup>10</sup> and on the child to make certain claims over the parents.

Parental Order in surrogacy arrangements has been given more prominence in recent years through the United Kingdom's (UK) surrogacy law. The UK law on surrogacy requires intending parents to obtain a parental order from the Family Court in the UK, even if the surrogacy arrangement was entered into outside the UK and the child born overseas.<sup>11</sup> The law and practice in the UK in this regard, is believed to also be gradually influencing the practice in Nigeria, especially where the intending parents do not reside in Nigeria and intend to take the child outside of Nigeria, immediately after birth. In the absence of clear statutory directives on the process for affirming or acquiring parental rights in surrogacy cases in Nigeria, a parental order appears to be the most appropriate step.

Under the extant legal regime in Nigeria, issues arising from a surrogacy arrangement, including an application for parental orders can be instituted both in a High Court,<sup>12</sup> and a Magistrate Court.

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<sup>9</sup> Princewill Chigoziri Chikwe and others, 'A Review of Perceptions, Challenges and Prospects of Child Adoption in Nigeria' (2022) 21 *Global Journal of Social Sciences* 113,116.

<sup>10</sup> Rita D'alton-Harrison, 'Mater Semper Incertus Est: Who's Your Mummy?' (2014) 22 *Medical Law Review* 357, 361.

<sup>11</sup> Human Fertilisation and Embryology Act 2008, section 54.

<sup>12</sup> Constitution of the Federal Republic of Nigeria 1999 (CFRN), section 272.

The Child's Right Act 2003 established the Family Court (the court conferred with jurisdiction to deal with issues involving children), both at the High Court of a State and the Magistrate Court.<sup>13</sup> The decisions of High Courts and the Magistrate Courts are usually not reported; thus, it may be difficult to determine how many surrogacy cases have come before the Nigerian Courts. However, there is only one surrogacy case, where the applicants sought a parental order, known to these authors instituted in the High Court of Rivers State, Nigeria, in which the court conferred parental rights on the intending parents.<sup>14</sup> Thus, the surrogacy case of: *In The Matter of A Declaration of Legal Parentage In Gestational Surrogacy Arrangement: Baby Emmanuel Olatunde* (Re: Baby Olatunde)<sup>15</sup> will be reviewed.

This case review is divided into three broad parts, part one is the introduction, while part two will examine the decision of the court in *Re: Olatunde*. Each of the issues identified for determination and the basis on which the court reached a determination in respect of the issues will be treated under sub-headings for the purpose of clarity and coherence, while part three is the conclusion, which concludes the case review.

### **An Appraisal of the Decision in Re: Olatunde**

The applicants, who were the intending parents of a surrogate-born child, filed an *ex-parte* Originating Summons in the High Court of Rivers State. The Application was brought pursuant to section 50 of the National Health Act 2014 (NHA), rule 23 of the Rules of Professional Conduct for Medical and Dental Practitioners (Code of Medical Ethics), and the Rivers State High Court Civil Procedure Rules 2010.

Section 50 (1) of the National Health Act 2014 provides that:

A person shall not-

- (a) manipulate any genetic material, including genetic material of human gametes, zygotes, or embryos; or
- (b) engage in any activity including nuclear transfer or embryo splitting for the purpose of the cloning of human being;

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<sup>13</sup> Child's Right Act 2003 (CRA), sections 150, 151 and 152.

<sup>14</sup> The applicants in this case were represented by the first author.

<sup>15</sup> *Re: Olatunde*, Unreported, Suit No: DHC/50/CS/2021. Judgment delivered on 29 November 2021.

(c) import or export human zygotes or embryos.

Rule 23 of the Code of Medical Ethics, on the other hand, acknowledges that reproductive technologies are in use in Nigeria and affirms the need for care and attention to the ‘several needs of donor, recipient, and offspring’. The applicants in their application, framed two questions for the determination of the court:

1. Whether the applicants are entitled to be declared the legal parents of the surrogate-born child, who was born through a gestational surrogacy agreement, which is not prohibited by law, in view of the provisions of section 50 of the NHA; and
2. Whether the applicants, are entitled to have a Parental Order made by the Court in their favour, in respect of the child born to them through a Gestational Surrogacy made pursuant to a Gestational Surrogacy Contract?

In view of the questions raised for the determination of the court, the applicants sought two key declarations:

- a. A declaration that the applicants are the legal parents of the child, born from gametes (sperm and egg) provided and procured by the Applicants, under a Gestational Surrogacy Arrangement; and
- b. A Parental Order conferring parental rights on the Applicants, authorising them to exercise parental rights in relation to the child born from gametes (sperm and egg) provided and procured by the Applicants, under a Gestational Surrogacy Arrangement.

The facts of the case are that the child, in respect of whom a Declaration of Legal Parentage and a Parental Order were sought, was born to the applicants, a married couple in August 2021, through a gestational surrogacy arrangement. The couple prior to getting into the surrogacy arrangement was unable to achieve pregnancy and childbirth successfully. After failed In vitro Fertilisation (IVF) cycles and several fertility treatments, the couple opted for gestational surrogacy. The gametes used in creating the child were provided by the couple, so the surrogate did not contribute any genetic material to the conception and creation of the child. The surrogate was a person unknown to the couple and was recruited through the services of a surrogacy agency. Upon

delivery of the child, the surrogate handed him over to a nominee of the intending parents and walked away. Upon gaining physical custody of the child, the applicants immediately took steps to confirm and establish their legal relationship with their son, in order to enable them to exercise all legal rights over him as their child, and to enable them to take him to the United Kingdom where they have their habitual residence. It is for this reason that the applicants approached the court for a Declaration of Legal Parentage and the grant of a Parental Order.

### **The Question of Legality: Is Surrogacy a Proper Means of Having Children?**

In support of the declarations and orders sought, in its Final Written Address, the applicants argued through their counsel that despite the absence of laws expressly regulating surrogacy and ART, surrogacy remains legal in Nigeria, in the absence of any law expressly prohibiting it. Reliance was placed on the Code of Medical Ethics and the ART Regulation as two legal instruments that recognise the use of ART in Nigeria. Conceding that the Lagos State ART Regulation is inapplicable in Rivers State, because a state's subsidiary regulations and its laws cannot have extra-territorial application in another State, the ART Regulation was cited to illustrate the fact that there are legal instruments in Nigeria which recognise the use of ART in Nigeria. Surrogacy was therein described as the Cinderella of modern reproductive medicine and reproductive technology, which affords persons who would ordinarily be unable to carry and have children, a rare opportunity to become mothers and fathers. Surrogacy, applicants argued, is a modern miracle that permits individuals to actualise the right to found and enjoy a family- constitutional rights guaranteed under the Nigerian Constitution. Foreign case law and authoritative sources were cited to provide clarity on the nature of a gestational surrogacy arrangement.

In support of the applicant's contention that surrogacy is not prohibited by section 50 of the NHA, the applicants argued that the non-mention of surrogacy and the *in vitro* handling of gametes and embryos during pregnancy not an act prohibited under the NHA. This position was supported by judicial authorities which affirm that 'the express mention of one thing in a statutory provision automatically excludes any other which otherwise would have applied by implication with regard to the same issue'.<sup>16</sup> The applicants also cited the decision of the Supreme Court in *Meribe v Egwu*,<sup>17</sup> where the customary practice of a woman procuring another woman to procreate through her was sanctioned by the apex court. This was to illustrate the fact that the court will respect lawful

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<sup>16</sup> *Omatseye v FRN* (2017) LPELR-42719(CA).

<sup>17</sup> (1976) LPELR-1861 (SC).

methods adopted by persons in order to have children, provided such methods are not repugnant, immoral or contrary to public policy. Also, the applicants argued that an act is illegal, only where the law expressly prohibits it and declares it to be illegal,<sup>18</sup> thus far, no law expressly prohibits surrogacy.

The court reframed the first question as follows: ‘Whether surrogacy is a proper means of having children in Nigeria?’<sup>19</sup> On this question, the court, per Gbasam J. stated; ‘I have not seen any law that states that surrogacy is illegal, and I do not hold so’.<sup>20</sup> The court went further to explain the rationale for its decision, stating that the Rules of Professional Conduct for Medical and Dental Practitioners in Nigeria, made pursuant to the Medical and Dental Practitioners Act accommodates surrogacy. It described the Rules of Professional Conduct as a subsidiary legislation that ‘has the force of law as long as it does not conflict with the principal or substantive legislation or the Constitution’.<sup>21</sup> The court further stated that:

As pointed out above, there is no substantive legislation, on surrogacy and there is none against it. The subsidiary legislation referred to above, that is Rules of Professional Conduct for Medical and Dental Practitioners in Nigeria (Code of Medical Ethics), is not in conflict with either the principal legislation, which is Medical and Dental Practitioners Act, Cap M8, LFN 2004 or National Health Act or any other statute or the 1999 Constitution of the Federal Republic of Nigeria.

Relying on the provisions of the above subsidiary legislation which refers to surrogacy and other related acts therein provided as desirable practices in the society, it is my considered view that surrogacy does not involve the doing of anything illegal or prohibited. Therefore, being an arrangement well within the law, it can be the basis for having a child and asserting parental rights in Nigeria.

The reasoning and decision of the court on the legality of surrogacy is an accurate interpretation of the Nigerian law on the subject. In the absence of any statute expressly prohibiting an act or

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<sup>18</sup> *Bello v Attorney General Oyo State*, (1986) LPELR-764(SC).

<sup>19</sup> Re: *Olatunde*, Unreported, Suit No: DHC/50/CS/2021, 5.

<sup>20</sup> *Ibid.*

<sup>21</sup> Re: *Olatunde*, Unreported, Suit No: DHC/50/CS/2021, 6.

declaring it unlawful, illegality cannot be imputed on such act. In *Onyiuke III v Okeke*, the Nigerian Supreme Court stated what constitutes an illegal contract, when it held that:

It is the law that a contract is illegal if the consideration or the promise involves doing something illegal or contrary to public policy or if the intention of the parties in making the contract is thereby to promote something which is illegal or contrary to public policy; and an illegal contract is void and cannot be the foundation of any legal right.<sup>22</sup>

The court was therefore right to hold that surrogacy, the act upon which the surrogacy agreement which gave rise to the application was premised, is not illegal, nor is it prohibited under the Nigerian law.

The court acknowledged that there is hardly any Nigerian legislation which gives insight into the meaning of surrogacy and surrogacy agreements, and also admitted that there is a dearth of judicial pronouncements on the subject. Thus, the court took a brief foray into other jurisdictions to explain the concept of ART and the practice of surrogacy generally. In doing this, the court clarified that foreign judicial decisions are not binding on the Nigerian Court, but merely provide a persuasive aid. The court made the following affirmative pronouncement:

I have gone through the affidavit in support of the application, there is a gestational surrogacy agreement entered into voluntarily by adults with full capacity to contract. I have also gone through the Nigerian *Corpus Juris* to confirm if there is any prohibiting factor that impairs or makes surrogacy illegal, there is none, as I have held above.

Flowing from the above, and being persuaded by the decision of the Supreme Court of Iowa, United States of America in P.M. and C.M., Appellees, v. T.R. and D.R., Appellants (supra), hold that the gestational surrogacy arrangement entered by the Applicants for the purpose of having a child is a legal act that has produced the natural existence and or coming into life of [the child] . . .<sup>23</sup>

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<sup>22</sup> (1976) LPELR-8039(SC).

<sup>23</sup> *Re: Olatunde*, Unreported, Suit No: DHC/50/CS/2021, 10.

One of the requirements for the legality of a surrogacy arrangement, which the court touched on briefly, but which it refrained from expounding, is the requirement that every surrogacy contract must satisfy the elements of a valid contract. The court noted that the surrogacy contract was entered into voluntarily by adults with full capacity to contract. The court reached this decision after examining the surrogacy contract. The surrogacy contract which was presented before the court was validly executed and notarised, thus obviating any concerns that the surrogate did not act voluntarily, or that she was a minor at the time of contracting with the intending parents. Beyond noting that the surrogate accepted the offer to contract (by voluntarily giving her consent) and that she and the intending parents were adults with full capacity to contract, the court did not make any further enquiries into whether other elements of a valid contract were present. From the court's brief comment on the validity of a contract, the court noted that the elements of a valid contract were present: offer, acceptance, consideration, capacity to contract and intention to create legal relations.<sup>24</sup> However, the court did not focus on the nature of consideration given (consideration may be financial or non-financial). It is therefore unclear if the court would have found it offensive if financial consideration had been given to the surrogate, or if it would have considered the arrangement to be exploitative if none had been given to the surrogate. Regardless, of what the attitude of the court would have been to the type of consideration furnished to the surrogate, it is a key requirement that all the elements of a valid contract be present in a surrogacy contract, for the court to be able to give effect to the contract and the intentions of the parties. What is clear from the decision of the court on this question is that surrogacy contracts are enforceable in Nigeria, where the elements of a valid contract are present and where elements of illegality are absent. The court therefore answered the question of whether surrogacy is a proper means of having children in the affirmative.

#### **THE RIGHT TO A DECLARATION OF LEGAL PARENTAGE AND THE GRANT OF PARENTAL ORDER**

The second issue which the court dealt with was whether the applicants were entitled to be declared the legal parents of the child born through the gestational surrogacy arrangement, and where this is answered in the affirmative, if the applicants are entitled to have a Parental Order made by the court in their favour. In support of this issue, the applicants in their Final Written Address argued

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<sup>24</sup> *Orient Bank of Nigeria Plc v Bilante International Limited* (1997) 8 NWLR (Pt 515) 37.

that legal parentage may be established in three ways: by presumption of law; by acknowledgement and by judicial order. They argued that a party seeking to establish legal parentage through judicial order needs to approach a court for a declaration of legal parentage. In support of this issue, the applicants cited Nigerian and foreign authorities, as well as authoritative literature. The applicants contended that parentage could be asserted on a number of grounds: on the basis of genetics; on the basis of conduct and estoppel; and on the basis of the best interest of the child.

The court in its determination of this issue agreed with the contention of the applicants and noted that:

In Nigeria there are various ways of having children and or various ways of parenting a child. They include natural conception and delivery, fostering children, adoption and most recently through surrogacy arrangement. There are indeed, three known ways through which parentage may be established: by presumption of law; by acknowledgement and by judicial order. Of these three methods of establishing legal parentage, the first two are the most popular, though the third method exists, it is not popular and frequently explored in Nigeria. A party may, therefore, approach the Courts to seek a declaration or order confirming and establishing legal parentage.<sup>25</sup>

The court noted that in the case before it, the child was born from a gestational surrogacy arrangement and took note of the fact that the intending parents, who are the applicants, provided the sperm and egg that was used in the creation of the embryo, which resulted in the child. Despite noting this, the court ordered that a DNA test be carried out on the child to ascertain paternity, and justified this order on the ground that the interest of the child is in issue. However, the court made a notable clarification in respect of the DNA test, which we believe has greatly contributed to Nigeria's budding jurisprudence on this subject. The court stated that:

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<sup>25</sup> Re: *Olatunde*, Unreported, Suit No: DHC/50/CS/2021, 11.

This order itself does not impugn or disparage the efficacy and lawfulness of the act of surrogacy that gave rise to the existence of the child as held above. It rather concretised the position of the court and the right claimed by the Applicants.

Indeed, Nigerian statutes provide, and the Courts rely on and make use of blood and Deoxyribonucleic Acid (DNA) tests as a way to establish parentage. See Section 63(1) of the Child's Right Law of Rivers State...<sup>26</sup>

The court also placed reliance on the Court of Appeal decision in *Anozie v Nnani*, where the appellate court affirmed the propriety of using DNA tests to ascertain paternity.<sup>27</sup> In compliance with the Order of the court, a DNA test was conducted in the facility specified in the Order of the court and the result was transmitted to the court in a sealed envelope. Upon consideration of the scientific evidence provided to the court, the court held that the DNA result proved that the 1<sup>st</sup> applicant is 99.9% the biological father of the child. The court also agreed that parental rights could be conferred on a party based on its conduct, in which case, a party would be estopped from denying that parental rights ought to be conferred on it. Thus, the court aptly noted that:

I do not have any contrary assertion. The Applicants are entitled to the legal parentage right sought for. . . In this application and as disclosed in the affidavit in support, the 2<sup>nd</sup> Applicant by her conduct has made herself an interwoven part of the surrogacy agreement that gave rise to the birth of the son . . . the subject of this application.

It is my concise view, that a party who by her conduct led another to take steps to bring about the birth of a child, who would not have been born but for her actions must take parental status responsibilities. So it is with a person who adopts a child or treats/holds out himself as a father or mother to a child from childhood.

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<sup>26</sup> *Ibid*, 12.

<sup>27</sup>(2015) LPELR-24277 (CA).

I hold therefore, that by her conduct, the 2<sup>nd</sup> Applicant is a legal mother of [the baby] and is estopped from ever denying or reneging from any maternal responsibility or Legal Parentage hereafter.<sup>28</sup>

The court sought judicial support for its position in a number of judicial decisions, including foreign cases, which have persuasive value, such as *People v Sorensen*,<sup>29</sup> *Re Marriage of Buzzanca*,<sup>30</sup> and the decision of the Californian Supreme Court (in the United States of America) in *Johnson v Calvert*.<sup>31</sup> The diligence shown by the court in having recourse to other jurisdictions with better developed jurisprudence on this subject is commendable, as it afforded the court an opportunity to adopt a more holistic approach in the determination of the issue before it. It is our view that the dictum of the court in *Re Marriage of Buzzanca*, which was also cited by the court in *Re: Olatunde*, sums up the position of the Nigerian law on legal parentage in gestational surrogacy arrangements. The court stated:

The trial judge erred because he assumed that legal motherhood, under the relevant California statutes, could only be established in one of two ways, either by giving birth or by contributing an egg. He failed to consider the substantial and well-settled body of law holding that there are times when fatherhood can be established by conduct apart from giving birth or being genetically related to a child. The typical example is when an infertile husband consents to allowing his wife to be artificially inseminated. As our Supreme Court noted in such a situation over 30 years ago, the husband is the "lawful father" because he consented to the procreation of the child...The same rule which makes a husband the lawful father of a child born because of his consent to artificial insemination should be applied here by [61 Cal. App. 4th 1413] the same parity of reasoning that guided our Supreme Court in the first surrogacy case, *Johnson v. Calvert* (1993) 5 Cal 4th 84 [19 Cal Rptr. 2d 4194, 851 P2d 776] to both husband and wife just as a husband is deemed to be the lawful father of a child unrelated to him when his wife gives birth after artificial insemination, so

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<sup>28</sup> Re: *Olatunde*, Unreported, Suit No: DHC/50/CS/2021, 13.

<sup>29</sup> (1968 Cal 2d 280).

<sup>30</sup> (1998) (Nos. G022147, G022157) Fourth Dist. Div. Three. Mar 10, 1998.J.

<sup>31</sup> 851 P. 2d 776 (Cal. 1993),

should a husband and wife be deemed the lawful parents of a child after a surrogate bears a biologically unrelated child on their behalf. In each instance, a child is procreated because a medical procedure was initiated and consented to by intended parents.

Thus, from the decision of the court, under the Nigerian law, where an intending couple sets in motion events for the birth of a child that would otherwise not have been born, but for their efforts, the child will be deemed to be theirs, regardless of whether the child is genetically related to the intending parents or not. The court will therefore confer parental rights on the intending parents, in the absence of any compelling and cogent reason, justifying a contrary declaration. This remains the law, at least, until this position is upturned on appeal, or until laws are enacted which provide otherwise.

### **The Best Interest of the Child: An Overriding Consideration**

The best interest of the child rule is an overriding principle established by the Child's Right Act 2003 and the Rivers State Child's Right Law 2009.<sup>32</sup> The court stated that the Code of Medical Ethics, 'the only available piece of subsidiary legislation on surrogacy, pays particular attention to the treatment and welfare of the offspring of the surrogacy arrangement.'<sup>33</sup> The court also relied on section 2(1) of the Child's Right Law of Rivers State which recognises and provides for a child's right to family life and a home; this the court stated is a constitutional right. The court also relied on foreign cases on this subject, acknowledging their persuasive authority. The court relying on *Re: E&F (Assisted Reproduction: Parent)* opted that the legal status of 'parent' carries far reaching consequences for the child, especially with respect to child maintenance, inheritance, and recognition of the child as a member of the household/family.<sup>34</sup> The court therefore stated:

I am persuaded by the apt and concise judicial reasoning in the foreign cases referred to above. I therefore, emphasize that having come into existence, a child should be taken care of in a family under the warmth and

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<sup>32</sup> Section 1.

<sup>33</sup> Re: *Olatunde*, Unreported, Suit No: DHC/50/CS/2021, 17.

<sup>34</sup> [2013] EWHC 1418 (Fam).

care of the persons who facilitated his existence and should enjoy the rights that pertain to such families emanating from his intentional parents. . .

It follows that the Applicants are entitled to Parental Order to give credence to the status of the child as legitimate and the need for him to enjoy the privileges and rights associated with the child-parent relationship. The importance of the clarification of this status of the child can, therefore, not be overemphasized.<sup>35</sup>

Ultimately, the court held that the application succeeds and proceeded to hold that by virtue of the gestational surrogacy agreement between the applicants and a surrogate, the applicants are the legal parents of the surrogate-born child. The court also made an order of Legal Parentage, conferring parental rights on the applicants and authorising them to exercise parental rights in relation to the surrogate-born child.

## **Conclusion**

The decision of the High Court of Rivers State in *Re: Olatunde* is a win for the law and has contributed to the advancement of the Nigerian jurisprudence on surrogacy and ART in Nigeria, even in the absence of ART and surrogacy specific laws. The decision has provided the much-needed clarity on the judicial treatment of surrogacy, despite the absence of statutes on this subject. However, it must be emphasised that case law cannot take the place of statute. Consequently, in view of the continued and growing use of ART in Nigeria, the enactment of Nigeria's homegrown ART law, suited entirely for Nigeria's peculiar socio-legal needs cannot be put off any longer.

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<sup>35</sup> *Re: Olatunde*, Unreported, Suit No: DHC/50/CS/2021, 19.

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