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**A COMPARATIVE ANALYSIS OF LEGAL CONTROVERSIES IN CUSTODY AND  
PARTENITY IN ASSISTED REPRODUCTIVE TECHNOLOGIES.**

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**ABSTRACT**

*Globally, and in comparative jurisdictions, the phenomenon of assisted reproductive technologies is having far reaching consequences on traditional value systems of reproduction, custody and paternity. While the concept of dual parenting is not new, what is new is the concept of more than two legal parents for children arising from same sex couples claiming rights grounded in assisted reproductive technologies. While this may not be problematic for Nigeria due to its criminalization of same sex relationships via its Same Sex Prohibition Act, global tensions and internal agitations challenge. In this regard, the main objective of this study was to analyze the profound developments relating to custody and paternity under assisted reproductive technologies in comparative jurisdictions so as to derive useful lessons for Nigeria. Pursuant thereto, the doctrinal research methodology was adopted as the methodology of study. It was found that there is the development of a pervasive and highly influential practice of custody and paternity in comparative jurisdictions, which threatens legal, traditional notions and values of custody and paternity in Nigeria. It was also found that Nigeria does not have legislation on assisted reproductive technology and this puts Nigeria in a perilous situation to prevent incursions. In this regard, it was recommended that Nigeria's legislation of Same Sex Prohibition Act be strengthened to prevent negative incursions into the country's legal and moral ethos.*

*Keywords: Assisted Reproductive Technologies, Custody, Paternity, Same Sex Prohibition Act, Nigeria.*

**Introduction**

A central issue which arises in the context of assisted reproduction technologies (ART) is how to recognize and protect the best interests of children who are conceived through assisted reproduction taking into consideration contestations arising from same sex agitations in comparative jurisdictions. In this regard, a key issue for determination is, to what extent does the law regulates access to assisted reproduction, control the use of surrogacy and deal with issues relating to parentage of children conceived through assisted reproduction. The key question is whether generally, the law gives

priority to protecting the best interests of children born under the ART regime in terms of custody and parentage.<sup>184</sup>

### **Custody and Paternity under Assisted Reproductive Technologies (ART)**

Traditionally, custody and paternity tends to be a straight forward issue between heterosexual couples who are married but are separating. To determine the question of custody and paternity of children, the courts simply look at the best interest of the child as laid down in the United Nations Convention on the Rights of the Child, which principle is also included in the Nigerian Child Rights Act and the Kogi State Child Rights Law. However, controversies arise in the context of custody and parentage under ART particularly, when claims arise from same sex couples. While not yet pronounced in Nigeria due to the fact of the dominant traditional approaches to custody and paternity, however, because **ART** is now practiced in Nigeria, though not regulated by statute, there are useful lessons that must be taken into context to ward of some or all of the inherent controversies in the system before it makes landfall in the country.

To drive forward the discourse, the submission of Quinn sets the tone regarding custody and paternity controversies under **ART**. In this regard, according to Quinn, with the increasing use of assisted reproductive technologies (**ART**), including gamete (sperm, egg, and embryo) donation and the use of gestational carriers and traditional surrogates, particularly coupled with the recognition of same-sex marriages and other societal factors, our world is facing a new frontier of family formation. This new frontier includes the recognition of more than two legal parents for child.<sup>185</sup>

Ordinarily, custody and parentage can be established in a variety of ways namely by birth, adoption, genetics (with **DNA** testing), orders of parentage (including pre-birth orders), marital presumption, various types of custody arrangements, and by de facto parentage (also referred to as psychological, functional, equitable, or intent-based, among other descriptions).<sup>186</sup> However, there is the growing acceptance of cohabitation and non-marital parenting arrangements, marriage equality for same-sex couples, the increased frequency of divorce and remarriage, the increased recognition of polyamory, and the easy inexpensive access to genetic testing.<sup>187</sup>

**ART** contributes to the problem of custody and parentage in the following ways namely: The use of donor or contributor sperm, egg, or embryo, as well as the use of gestational carriers and genetic (true or traditional) surrogates, and the evolution of reciprocal in vitro fertilisation ("**IVF**") whereby one mom serves as genetic mom and the other as gestational mom.<sup>188</sup> Consequently, children are presently being parented by more than two parents. The further consequence is that multi-parenting is challenging traditional concepts of a parent's rights and responsibilities with regard to a child.<sup>189</sup>

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<sup>185</sup> CM, Quinn, 'Mom, Mommy & Daddy and Daddy, Dad & Mommy: Assisted Reproductive Technologies & the Evolving Legal Recognition of Tri-Parenting' [2018] (31) *Legal Recognition of Tri-Parenting*; 175.

<sup>186</sup> *Ibid.*

<sup>187</sup> *Ibid.*

<sup>188</sup> *Ibid.*

<sup>189</sup> *Ibid.*

These varying rights and responsibilities include the duties of care, custody and support.<sup>190</sup> Others include inheritance rights (of both child and parent), visitation rights, the right to make legal, medical, educational, and other decisions for the child, the child's eligibility for social security and other state or federal benefits, the ability to claim the child as a dependent.<sup>191</sup> Under insurance there are issues of health, automobile and life coverage qualifications.<sup>192</sup> Under Tort liability of the parent, there are concerns about the ability to bring suit on behalf of the child.<sup>193</sup> Other issues include, the right to travel or move with the child, the right to discipline or guide in moral and religious beliefs, the right to have access to all of the child's educational, medical, and other records, the right to be responsible for the child's medical bills and other debts, the right to the child's earnings, and finally, being subject to criminal implications and child protective service consequences for violating laws or standards for abuse.<sup>194</sup>

### **Legal Response to the Controversies of Custody and Parentage under Assisted Reproductive Technologies (ART)**

A body of law both statute and case law reflect the theme under discussion. For example, while not yet developed in Nigeria because of the dominance of the traditional approach to custody and paternity in Nigeria, comparatively, in California, section 3040(d) of the Family Code which was enacted in 2013, states as follows:

In cases where a child has more than two parents, the court shall allocate custody and visitation among the parents based on the best interest of the child, including, but not limited to, addressing the child's need for continuity and stability by preserving established patterns of care and emotional bonds. The court may order that not all parents share legal or physical custody of the child if the court finds that it would not be in the best interest of the child as provided in Sections 3011 and 3014.<sup>195</sup>

Section 7612(c) of the California Family Code enacted in 2014, addressing parentage, states:

In an appropriate action, a court may find that more than two persons with a claim to parentage under this division are parents if the court finds that recognizing only two parents would be detrimental to the child. In determining detriment to the child, the court shall consider all relevant factors, including, but not limited to, the harm of removing the child from a stable placement with a parent who has fulfilled the child's physical and psychological needs for care and affection, and who has assumed that role for a substantial period of time. A finding of detriment to the child does not require a finding of unfitness of any of the parents or persons with a claim to parentage.<sup>196</sup>

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<sup>190</sup>*Ibid.*

<sup>191</sup>*Ibid.*

<sup>192</sup>*Ibid.*

<sup>193</sup>*Ibid.*

<sup>194</sup>*Ibid.*

<sup>195</sup>CAL. FAM. CODE § 3040(d) (Deering 2017).

<sup>196</sup>CAL. FAM. CODE § 7612(c) (Deering 2017)

A plethora of case law authorities seeks to ameliorate the problem. For example, the court in *re M.C.*<sup>197</sup> involved a case where the child's biological mother, her wife, and the biological father were all the child's presumed parents. The facts of the case were that the child was born during the marriage of the two women but was the result of a premarital relationship between one of the women and a man. The non-biological mother was a presumed parent because she was married to the biological mother at the time of the child's birth. The biological father could be considered a presumed parent because he promptly came forward and demonstrated his commitment to his parental responsibilities to the extent that the biological mother and the circumstances allowed. Although the case was remanded (remitted) for the lower court to make further findings, the appellate court clearly gave the nod of approval to the concept of three presumed parents prior to the statutory changes.

Section 1853 of the Maine Parentage Act, entitled "Consequences of Establishment of Parentage," enacted in 2015 but came into effect in 2016, states:

In preservation of parents-children relationship consistent with the establishment of parentage under this chapter, a court may determine that a child has more than 2 parents.<sup>198</sup>

Under the Maine Parentage Act, the law established eight primary mechanisms for establishing parentage: by birth, adoption, acknowledgment, presumption, de facto parentage, genetic parentage, assisted reproduction or gestational carrier agreement.<sup>199</sup>

The Act then lays down specific requirements and findings for presumed parents and de facto parents. Under the "Presumed Parentage" part of the Act, a marital presumption is established so that the person married to the person giving birth (except for a surrogate) is a presumed parent.<sup>200</sup> Where the parties are not married, a non marital presumption of parentage can be established if the person:

(a) lived with the child from the time the child was born or adopted, and for a period of at least two years thereafter, and, (b) assumes personal, financial or custodial responsibilities for the child.<sup>201</sup> Under the Act, a court can recognize a de facto parent if that parent can show by "clear and convincing evidence" that the person has fully and completely undertaken a permanent, unequivocal, committed and responsible parental role in the child's life."<sup>202</sup> Facts sufficient to meet the legal requirements include:

(a) the parent has lived with the child for a significant amount of time; (b) the parent regularly takes care of the child; (c) a bonded and dependent relationship is established between the child and the parent; (d) another parent of the child has understood, acknowledged, supported, or encouraged the de facto parent informing and having this close, relationship with the child; (e) the parent has taken on complete and permanent responsibilities as a parent of the child and not because paid

<sup>197</sup>195 Cal. App. 4th 197, 123 Cal. Rptr. 3d 856 (2011).

<sup>198</sup>ME. STAT. tit. 19 § 1853(a)(2) (2015)

<sup>199</sup>ME. STAT. tit.19 § 1851 (2015).

<sup>200</sup>ME. STAT. tit.19 § 1881 (1) (2015).

<sup>201</sup>ME. STAT. tit.19 § 1881(3) (2015).

<sup>202</sup>Supra.

to do so; and (f) it is “in the best interests of the child” to continue having this parent-child relationship.<sup>203</sup>

The Uniform Parentage Act (UPA), approved in July 2017 by the National Conference of Commissioners on Uniform State Laws, expressly includes a provision for a child to have more than two legal parents. Pursuant thereto, Section 613(c), Alternative B, as regards competing parentage claims, states:

“The court may adjudicate a child to have more than two parents under this [Act] if the court finds that failure to recognize more than two parents would be detrimental to the child.”<sup>204</sup>

Articles 197 and 198 of the Louisiana State Civil Code acknowledges the possibility of dual paternity (two fathers in addition to the mother). The Code, in Article 197 lays out the child’s right to the dual paternity cause of action under which a child can institute an action to prove paternity even if the child is presumed to be the child of another man.<sup>205</sup> Indeed, the Code provides that the action can even be brought after the death of the alleged father but must be brought within a year of the death and shown by clear and convincing evidence as a higher burden of proof.<sup>206</sup>

Article 198 of the Code, lays out the biological father’s right to a paternity cause of action, even where the child is the presumed child of another man, under which a man can institute an action at any time unless (a) if the child is presumed to be the child of another man, the action must be instituted within one year from the day of the birth of the child; or (b) if the mother in bad faith deceived the father of the child regarding his paternity, then the action can be instituted within one year from the day the father knew or should have known of his paternity, or within ten years from the day of the birth of the child, whichever occurs first.<sup>207</sup> Such an action cannot be brought any later than one year from the day of the death of the child.<sup>208</sup>

The Civil Code provides for the presumption of the husband under Articles 185 and 195. Under Article 185, a marital presumption is established whereby the husband of the mother is presumed to be the father of a child born during the marriage or within three hundred days from the date of the termination of the marriage.<sup>209</sup>

The Code provides that parentage can be established under Article 195 where a man marries the mother and holds himself out as the father. The statute indicates that so long as no other man has been filiated with the child, then if that man marries the mother and “with the concurrence of the mother, acknowledges the child by authentic act,” then he is presumed to be the father of that child.<sup>210</sup>

The Code also makes provisions for disavowing paternity.<sup>211</sup> In this regard, a married man might be the presumed legal father but not the biological father of a child.

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<sup>203</sup>*Supra.*

<sup>204</sup>*Washington SB 6037 (2017).*

<sup>205</sup>*LA. CIV. CODE 197 (2005).*

<sup>206</sup>*Supra.*

<sup>207</sup>*LA. CIV. CODE 198 (2005).*

<sup>208</sup>*Supra.*

<sup>209</sup>*LA. CIV. CODE 185 (2005).*

<sup>210</sup>*LA. CIV. CODE 195 (2005).*

<sup>211</sup>*LA. CIV. CODE 187 (2005).*

Then, either the child or the biological father may later sue to recognize the biological father without displacing the presumed father – thus leading to dual paternity. In the case of *T.D. v. M.M.M.*,<sup>212</sup> the plaintiff had an affair while married, and during the marriage permitted the lover to visit the child regularly until she divorced, at which point she denied him access to the child. While other factors, such as the timeliness of bringing a cause of action, were considered, the court made it clear that several policy factors favor allowing a biological father to avow his child where such action will result in dual paternity. First a biological father is susceptible to suit for child support until his child reaches nineteen years of age.<sup>213</sup> Second, a child who enjoys legitimacy as to his legal father may seek to affiliate to his biological father in order to receive wrongful death benefits or inheritance rights.<sup>214</sup> The court focused on the benefits available to the child via legal recognition of dual paternity.

In *Smith v Cole*,<sup>215</sup> the mother of a thirteen-year-old brought affiliation action against the biological father. The court noted that Louisiana law may provide the presumption that the husband of the mother is the legal father of her child while it recognizes a biological father's actual paternity. When the presumptive father does not timely disavow paternity, he becomes the legal father. An affiliation action brought on behalf of the child, then, merely establishes the biological fact of paternity. The affiliation action does not bastardize the child or otherwise affect the child's legitimacy status. The result here is that the biological father and the mother share the support obligations of the child.<sup>216</sup>

In Canada, Chapter C.12 (1)(4) of the Children's Law Reform Act ("CLRA") states:

If, under this Part, a child has more than two parents, a reference in any Act or regulation to the parents of the child that is not intended to exclude a parent shall, unless a contrary intention appears, be read as a reference to all of the child's parents, even if the terminology used assumes that a child would have no more than two parents.<sup>217</sup>

Thus, in *A.A. v. B.B., et al.*,<sup>218</sup> the facts were that A and her partner C had been in a stable same sex union since 1990, and in 1999 they decided to start a family with the assistance of their male friend B. They thought it was in the child's best interest that B remain involved in the child's life. C, the biological mother, and B, the biological father, were the child's legal parents but wanted A, the non-biological parent, to be recognized as a mother. A and C did not apply for an adoption order because that would cause B to lose his parental status. Instead, A brought an application for a declaration that she was the child's mother. While the lower-level judge felt without authority to grant the application, the appellate court held that its "inherent parens patriae jurisdiction" could be applied "to rescue a child in danger or to bridge a legislative gap."<sup>219</sup> According to the

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<sup>212</sup>730 So. 2d 873 (La. 1999).

<sup>213</sup>LA. CIV. CODE. Art 209.

<sup>214</sup>Supra.

<sup>215</sup>553 So. 2d 847 (La. 1989).

<sup>216</sup>Supra.

<sup>217</sup>Ontario Children's Law Reform Act, R.S.O. 1990, c. 23, s. 1 (1) (2016).

<sup>218</sup>83 O.R. (3d) 561 (Ct. App. Ontario 2007).

<sup>219</sup>Supra.

court a legislative gap existed in this case. The purpose of the CLRA was to declare that all children have equal status. At the time, equality of status meant recognizing the equality of children born inside and outside of marriage. The legislature had in mind traditional unions between one mother and one father. It did not legislate in relation to other types of relationships because those relationships and the advent of reproductive technology were beyond the vision of the Law Reform Commission and the Legislature of the day. Present social conditions and attitudes have changed. Advances in our appreciation of the value of other types of relationships and in the science of reproductive technology have created gaps in the CLRA's legislative scheme.<sup>220</sup>

The court went on to look at the fact that it was contrary to the child's best interests that he "was deprived of the legal recognition of the parentage of one of his mothers" especially given the child's own statement "I just want both my moms recognized as my moms." The child also noted: "It would help if the government and the law recognized that I have two moms. It would help more people to understand. It would make my life easier. I want my family to be accepted and included, just like everyone else's family."<sup>221</sup> The court also recognized the lesbian moms' fear about the death of the biological mother, leaving the child with her biological father but without her other mother or any mother.<sup>222</sup>

Brazilian laws recognize dual paternity. In this regard, Article 48 of the Child and Adolescent Statute<sup>223</sup> provides that the origin of paternity is biological. However, Article 1.593 of the 2002 Civil Code in Brazil establishes that paternity might be "affective." Thus, in (RE) No. 898.060<sup>224</sup> the Brazilian Federal Supreme Court recognized dual paternity (referred to in Brazil as the concomitance of paternities). The facts involved a woman raised by her "affective based" father who, when she was 18, discovered that he was not her biological parent. To guarantee her legal rights as to her biological father and determine her ancestry she brought suit including asking for a DNA test.

Through ART, more countries are recognizing more than two parents in custody and parenting. The consequence for the traditional form of parenting namely between two parents is whittling down with manifest social outcomes for the larger society.

### Lessons for Nigeria

Steadily, the world is becoming a global village through the phenomenon of globalization driven by regional economic and political integration. Consequently, traditional values are being challenged by foreign values. Nigeria is no exception.

In a globalized world, the incidence of custody and paternity arising from ART and driven by such practices as same sex marriages is on the rise. It is noteworthy that Nigeria has criminalized same sex marriages and in this regard, to a large extent, whittled down the vagaries of custody and paternity issues arising from ART as there have been no same sex contestations of custody and paternity in Nigeria.

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<sup>220</sup>*Supra.*

<sup>221</sup>*Supra.*

<sup>222</sup>*Supra.*

<sup>223</sup>*Brazil Law 8.069 (1990).*

<sup>224</sup>*(Brazil 2016)*

Be that as it may, because of global tensions on the question of LGBTQ rights which to a large extent is driving the controversies inherent in custody and paternity in ART in comparative jurisdictions, the useful lesson Nigeria must learn is that experiences elsewhere demonstrate that these controversies are destructive to the traditional moral system of custody and paternity as is known in Nigeria.

Thus, in this context, it is pertinent that the country further strengthens its Same Sex Prohibition Act to include issues arising in the controversies in custody and paternity ART in comparative jurisdictions as discussed in this paper.

**Conclusion**

This paper analyzed the controversies inherent in custody and paternity in ART in comparative jurisdictions and drew useful lessons for Nigeria.