ARTIFICIAL REPRODUCTION AND CHILD CUSTODY

Bernard M. Dickens*
Toronto

This article considers general principles of child custody law in regard to children born following artificial reproduction that employed donated sperm, ova or embryos, and the law applicable when women give birth to children conceived in order to be surrendered to others (notably their biological fathers). Claims to parental rights raise the issue of who the legal parents are, and may conflict with the apparent best interests of such children and the state's view of its responsibility. The article considers interests of the unconceived child, the embryo and fetus in utero, the embryo extra uterum and a child born of donation, and the status of sperm, ovum and embryo donors and of "surrogate" mothers. Particular attention is given to the Ontario Law Reform Commission's Report on Human Artificial Reproduction and Related Matters (1985), which is the first Canadian report to make wide-ranging recommendations on these issues.

Dans cet article, l'auteur, se basant sur les principes généraux du droit sur la garde d'enfants, examine les enfants nés par reproduction artificielle du don de sperme, d'ovules ou d'embryons et le droit applicable quand une femme donne naissance à des enfants qu'elle a conçus dans l'intention de les céder à d'autres (en particulier à leur père par les liens de sang). Les revendications des droits qui reviennent aux parents posent la question de savoir qui sont, en droit, les parents et peuvent s'opposer à l'intérêt de ces enfants et à la vue qu'a l'état de sa responsabilité. L'auteur passe en revue les intérêts de l'enfant qui n'est pas encore conçu, de l'embryon et du fétus dans l'utérus, de l'embryon hors de l'utérus, de l'enfant né d'un don et le statut en droit des donneurs de sperme, d'ovules et d'embryons ainsi que des mères porteuses. L'auteur s'intéresse particulièrement au rapport de la commission de réforme du droit de l'Ontario sur la reproduction artificielle humaine et autres questions s'y rapportant (1985), rapport qui est le premier au Canada à faire des recommandations sur toutes sortes de problèmes se rapportant à ces questions.

Introduction

Artificial reproduction centres upon four basic procedures:

(1) artificial insemination, which involves appropriate placement of semen by syringe or similar means into a woman's reproductive system, the semen coming from her husband or another donor;

* Bernard M. Dickens, of the Faculty of Law and the Faculty of Medicine, University of Toronto, Toronto, Ontario.

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(2) *in vitro* fertilization, also called "test tube fertilization", which involves laboratory fertilization of an ovum and its subsequent placement into the uterus of the woman whose ovum it was, or into the uterus of another woman;

(3) *in vivo* fertilization and embryo transfer, which involves insemination of a woman (probably by artificial means), removal of the fertilized ovum from her reproductive system by non-surgical means and its subsequent transfer to the uterus of another woman; and

(4) "surrogate motherhood," which involves pregnancy produced by one of the three procedures described above or by natural intercourse, in a woman who has undertaken in advance to surrender the child following birth to another person, such as the donor of sperm used for insemination, who intends to raise the child as if it were that person's natural child.[1]

Numerous permutations of artificial conception may be achieved in practice through combinations of these four fundamental procedures, particularly where there is recourse to gamete (that is, sperm or ovum) donation.[2] A recent variant of *in vivo* fertilization involves recovering an ovum from one woman and transferring it to the fallopian tube of another for possible *in vivo* fertilization by natural means. Another is GIFT (Gamete-intra-fallopian-transfer), in which sperm and ova are mixed *in vitro* but placed in fallopian tubes for fertilization to occur *in ulvo*. When a husband and wife alone are involved in artificial insemination or *in vitro* fertilization, the fact that pregnancy was medically-assisted is of no consequence, and they stand in law as natural parents and guardians of their child. When a third-party is involved, however, either as a gamete donor or as surrogate mother, legal issues are raised of who may be considered parents of the child, what rights and responsibilities toward the child the different actors have, and what custody principles should apply when courts have to exercise jurisdiction affecting the child.[3]

Two key legal principles, which may be in conflict with each other, exist in the field of child custody and placement. The principles of respecting parental rights and of pursuing the best interests of the child have each received historic support. They represent different public philoso-

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[1] See generally the Ontario Law Reform Commission, Report on Human Artificial Reproduction and Related Matters (1985), p. 2.

[2] See B.M. Dickens, Reproduction Law and Medical Consent (1985), 35 U. Toronto L.J. 255, table at p. 280, and Surrogate Motherhood: Legal and Legislative Issues, in A. Milunsky and G.J. Annas (eds.), Genetics and The Law III (1985), 183, table at p. 186.

[3] The word "custody" is used here in a broad sense, "as if it were almost the equivalent of 'guardianship' in the fullest sense"; see Sachs L.J. in *Hewer* v. *Bryant*, [1970] 1 Q.B. 357, at p. 373 (C.A.).

phies, however, and their application can produce fundamentally different results in individual cases.

The principle of respect for parental rights applies to natural human reproduction. The law in principle does not prescribe who may become parents, by whom women may conceive children, which parents may rear their natural children and which children may experience the guardianship of their natural parents. Young women are protected against premature intercourse,[4] and persons of any age are forbidden to have sexual intercourse with others they know to be within defined blood relationships, including half-siblings,[5] and with those in dependent relationships.[6] While the law aims to protect the young and the otherwise vulnerable from sexual exploitation, however, those who become natural parents receive custody of their children *ab initio*; the law intervenes only upon proof of children's needs of protection or upon parents' resort to the courts.

Over a century ago, the supremacy of parental rights was often expressed in strong language which tolerated compromise only in the case of gross parental violation. In the 1883 case, *In re Agar-Ellis*,[7] for instance, Cotton L.J. observed:

> . . . the Court should not, except in very extreme cases, interfere with the discretion of the father, but leave to him the responsibility of exercising that power which nature has given him by the birth of the child.

This language echoed the trial court's observation:[8]

> The father is the head of his house, he must have the control of his family. . . and this Court never does interfere between a father and his children unless there be an abandonment of the parental duty. . . .

The principle of respecting parental rights evolved to favour fathers of legitimate children, but its general effect today would be to permit natural parents to regulate their children's custody and upbringing free of legal interference, except upon demonstration by due process of law that the parents have violated, or are at imminent probability of violating, clearly stated pre-notified minimum standards of child protection.[9] The

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[4] See the Criminal Code, R.S.C. 1970, c. C-34, s. 146 regarding females aged under fourteen years, and aged fourteen years but under sixteen years; s. 151 regarding females aged sixteen but under eighteen years.

[5] *Ibid.*, s. 150. The incest prohibition is limited to sexual intercourse; it does not apply to wilful acts of asexual reproduction.

[6] *Ibid.*, s. 153, regarding a step-daughter, a foster daughter and, for instance, a female employee.

[7] (1883), 24 Ch.D. 317, at p. 334 (C.A.).

[8] *In re Agar-Ellis* (1878), 10 Ch.D. 49, at p. 56, per Sir Richard Malins V.-C.

[9] The House of Lords' majority in *Gillick* v. *West Norfolk Area Health Authority*, [1986] A.C. 112, [1985] 3 All E.R. 402, rejected *In re Agar-Ellis*, *supra*, footnote 7, and recognized the evolving autonomy of adolescents as they approach the age of major-

principle is expressed today as legally protecting private ordering by parents of their natural children's circumstances.[10]

In contrast, courts may invoke the pursuit of the best interests of the child in order to limit parental decision-making regarding children. They apply their equitable or inherent *parens patriae* jurisdiction, or, increasingly in modern times, a statutory jurisdiction, to determine the placement and control of children for whose futures they become responsible, and act in accordance with their own views of the children's best interests.[11] Judicial and public authority is thereby applied to supersede the preferences of the natural parents concerning how their children's welfare is to be pursued. Courts adhering to the "best interests" principle tend to explain earlier decisions in which parental preferences prevailed as showing a mere coincidence of parental wishes and children's interests, and make clear that such wishes have no inherent legal right to prevail.[12]

The Massachusetts Supreme Judicial Court in *Custody of a Minor*[13] found three sets of interests in competition in child custody cases, namely, the "natural rights" of the parents, the personal needs or best interests of the child, and the responsibilities of the State.[14] This last category may afford the courts an opportunity to advance or protect interests of public order and propriety, and to serve communal interests, even at risk to the welfare of an individual child. In most cases, however, the State's role is now seen to be to pursue the individual child's best interests, established by legal process. In the conflict between the first two principles, it seems to be accepted, in Canada and elsewhere in the common law world, that the "best interests of the child" principle has prevailed.[15]

Determination of best interests is to be undertaken upon the facts of each case.[16] Accordingly, while pursuit of best interests is the "first and

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ity, adopting the discussion by Lord Denning M.R. in *Hewer* v. *Bryant*, *supra*, footnote 3. See generally B.M. Dickens, The Modern Function and Limits of Parental Rights (1981), 97 Law Q. Rev. 462.

[10] See W. Wadlington, Artificial Conception: The Challenge for Family Law (1983), 69 Virginia L. Rev. 465.

[11] On the history of this principle, see, *e.g.*, Dubin J.A. in *Re Moores and Feldstein* (1973), 38 D.L.R. (3d) 641 (Ont. C.A.).

[12] *Ibid.*, at p. 648, approved by the Supreme Court of Canada in *King* v. *Low* (1985), 16 D.L.R. (4th) 576.

[13] 379 N.E. 2d 1053 (1978).

[14] *Ibid.*, at pp. 1061-1062.

[15] See, for instance, M. Joyce Schlosser, Third Party Child-Centred Disputes: Parental Rights v. Best Interest of the Child (1984), 22 Alta. L. Rev. 394, at p. 401. For the history of the interaction of common law and equity which produced this result, see P.M. Bromley, Family Law (6th ed., 1981), p. 277.

[16] See Dubin J.A. in *Re Moores and Feldstein*, *supra*, footnote 11, at p. 647.

paramount consideration''[17] of a child's welfare, courts of appellate jurisdiction should only intervene to review a finding when the judge at first instance was plainly wrong, and not merely because the higher court prefers a solution to the problem of a child's placement which the trial judge had not chosen.[18] The difficulty with this restraining rule of appellate intervention is, however, that the decision of a trial judge may be faulted not because of the interpretation of evidence and weighing of credibility of the witnesses in a particular case, but because of the judge's adherence to a principle of decision-making. The trial judge's discretion to find facts will not lightly be superseded, but an exercise of discretion on an expressed or implied principle which is considered wrong will be open to correction on appeal.[19]

This raises the issue of what principles are appropriate to determine the location of a child's best interests. The decline of the ''tender years'' doctrine, which maintained that children of tender years should be placed with their mothers instead of their fathers,[20] shows how the self-evident truths of one age can be shown unsound and even offensive in another. Indeed, the very expression ''best interests'' has been called into question in recent years for pointing unrealistically along the graduation of good, better and best, mandating pursuit of the ''best''. What many children face is a decline in their circumstances from bad to worse, and courts can hope only to prevent the worst. Accordingly, the concept of ''best interests'' has become interpreted to mean the ''least detrimental alternative''.

This interpretation of best interests was promoted in the celebrated discussion by Goldstein, Freud and Solnit in their 1973 book, Beyond the Best Interests of the Child.[21] This widely respected and highly influential publication has affected the goals and rhetoric of family courts since it appeared, and has sensitized legal doctrine and practice to children's psychological needs. Serious account is now paid not only to children's physical safety but also to their psychological relationships in resolving of custody disputes and, for instance, protection proceedings. The impact of this analysis adds significance to the authors' subsequent book, entitled, Before the Best Interests of the Child.[22] Published in 1979, this book reverses the thrust towards single-minded pursuit of children's best inter-

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[17] On the origin of this classic statement, see Schlosser, *loc. cit.*, footnote 15, at p. 398.

[18] *G.* v. *G.*, [1985] 2 All E.R. 225 (H.L.).

[19] See Lord Fraser of Tullybelton, *ibid.*, at p. 228.

[20] See *Ferjan* v. *Ferjan* (1980), 19 R.F.L. (2d) 113 (Man. C.A.).

[21] J. Goldstein, A. Freud and A.J. Solnit, Beyond the Best Interests of the Child (1973), pp. 53-64.

[22] J. Goldstein, A. Freud and A.J. Solnit, Before the Best Interests of the Child (1979).

ests, and establishes a principle to be respected even in preference to this "first and paramount consideration".[23]

Apprehensive of judicially sanctioned bureaucratic intervention in satisfactory but not ideal home lives of children, the authors urge the key principle that:[24]

> So long as the child is part of a viable family, his own interests are merged with those of other members. Only *after* the family fails in its function should the child's interests become a matter for state intrusion.

This principle may mark a significant return to greater respect for parental rights.[25] In the political confrontation between state-pursued best interests of children and privately ordered preferences of parents, the authors give ammunition to parents by setting conditions for judicial intervention. The principle is no less significant in cases of artificial reproduction, where children have been created (or perhaps, through gamete-donor selection, even custom-designed) in accordance with private agreements of genetic and intended social parents. Courts and the public may be required to be as tolerant and respectful of these arrangements as they are of those by which children are conceived and born in the course of nature.

I. *Interests of the Unconceived Child*

It has become so widely accepted that the courts and the public must protect the best interests of children that requests have been made that the principle be applied to potential children of artificial conception. In November 1982, for instance, when the Attorney General for Ontario asked the Ontario Law Reform Commission to review the legal management of human artificial reproduction, the Letter of Reference stated as the first consideration of the review "the safeguards for protecting the best interests of the child", and concluded by seeking a speedy report "in the interests of these children".[26] The reference was inspired by a perception that individuals could employ artificial means of reproduction, particularly in surrogate motherhood transactions, which no legal framework had been developed to accommodate. The "best interests" concept was invoked to seek proposals for law reform to contain and possibly restrict resort to private reproductive arrangements under which children can be born and placed into social families of the parties' choice.

When a child has been born, and perhaps when an embryo or fetus is proven to be *in utero*, its best interests can be assessed in light of the

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[23] Schlosser, *loc. cit.*, footnote 15, at p. 398.

[24] Goldstein, Freud and Solnit, *op. cit.*, footnote 22, p. i. (Emphasis in original).

[25] The book's reasoning was cited, for instance, in *Re Phillip B.*, 156 Cal. Rptr. 48 (Cal. C.A., 1979), as discussed in Dickens, *loc. cit.*, footnote 9.

[26] Ontario Law Reform Commission, *op. cit.*, footnote 1, p. 1.

established facts. These include the mother's personal characteristics, her marital, domestic, social, intellectual and employment circumstances and, for instance, her physical and mental health. Similarly, the father (or the mother's husband or partner) may be open to such assessment, especially as regards his disposition towards rearing the child. Many of the same factors can be assessed when a child's conception is only in prospect, but in that context restrictive laws or policies justified by the child's best interests are beset by a paradox. It has to be shown that, in the face of undesirable prospects, it is in the best interests of the prospective child not to be conceived.

The claim that an individual is better having no life at all than having a life with disadvantages or handicaps has produced no Canadian jurisprudence. In the United States, however, claims for damage awards have been brought by or on behalf of children in actions for so-called "wrongful life" and "dissatisfied life".[27] The former involve claims by genetically and otherwise handicapped children that, had their parents been afforded appropriate genetic or other preconception or prenatal counselling and medical services, the children would not have been born. They would not have been conceived, or they would have been aborted. Dissatisfied life claims involve physically and mentally normal children who sue because of birth into circumstances of social disadvantage, particularly illegitimacy.

In earlier years, wrongful life claims were rejected with scarcely concealed judicial derision. Even after parents' claims for wrongful birth came to be accepted and damages were awarded, claims by children themselves for the wrong of being alive were rejected. As the New Jersey Supreme Court observed in 1967:[28]

> The infant plaintiff would have us measure the difference between his life with defects against the utter void of nonexistence, but it is impossible to make such a determination.

Since 1980 the claim has been recognized in a growing number of jurisdictions, including California, Washington State and New Jersey itself,[29] on the principle that the "wrong" of "wrongful life" is not the life itself, but the infliction of foreseeable pain and suffering.[30] A number of states, however, fearing that the risk of such litigation might prompt

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[27] See generally W.H. Winborne (ed.), Handling Pregnancy and Birth Cases (1983), pp. 393, 419.

[28] *Gleitman* v. *Cosgrove*, 227 A. 2d 689, at p. 692 (N.J.S.C., 1967).

[29] *Curlender* v. *Bio-Science Laboratories*, 165 Cal. Rptr. 477 (Cal. C.A., 1980); *Turpin* v. *Sortini*, 174 Cal. Rptr. 128 (Cal. C.A., 1981); *Procanik by Procanik* v. *Cillo*, 478 A. 2d 755 (N.J.S.C., 1984). See also the Carolina case of *Azzolino* v. *Dingfelder*, 322 S.E. 2d. 567 (N.C.C.A., 1984), and the Colorado case of *Continental Gas Co.* v. *Empire Gas Co.*, 713 P. 2d 384 (Ca. C.A., 1985).

[30] See *Harbeson* v. *Parke-Davis, Inc.*, 656 P. 2d 483 (Wash. S.C., 1983).

health professionals to advise and perform abortions, have legislated against judicial recognition of wrongful life claims or against awards of certain damages on related grounds.[31] The English Court of Appeal has rejected the claim in principle.[32]

Early actions for dissatisfied life were described as for wrongful life,[33] but even when they were successful in principle no damages were awarded. It remains the case regarding what is now classified as a dissatisfied life claim that "judicial recognition of this cause of action has yet to be granted in any state. The courts that have considered a cause of action in dissatisfied life cases have uniformly rejected it".[34]

There is little to indicate willingness in the Canadian judiciary to be more accommodating of such claims than the United States courts in general or the English courts have been.[35] A child born of artificial reproduction would almost certainly fail in a claim that a legal injury was suffered through birth into circumstances of social, psychological or other disadvantage. Thus, it is difficult to argue in law that such births themselves violate the children's best interests. Questions of custody can be resolved according to this test, of course, because different scenarios can be contemplated for the child's future, and a court can determine which of them is to be preferred, or which is most to be avoided. Existence and non-existence *per se* may not be contrasted, however, by reference to a "best interests" test.

The contention that it is in the best interests of the children themselves that they should not be born by certain artificial reproductive techniques, or not be born into certain settings of social uncertainty, disorder or deviance, is paradoxical, and confused or misguided. The true contention is that it is not in society's best interests that children be born by such means or into such settings. This is a proper contention to be made by those who fear the social effects of unorthodox reproduction, although construction of legal prohibitions may be problematic.[36] It has been judicially recognized that decisions about child custody may weigh in the balance the separate responsibilities of the state;[37] pur-

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[31] See P. Donovan, Wrongful Birth and Wrongful Conception: The Legal and Moral Issues (1984), 16 Family Planning Perspectives 64.

[32] *McKay* v. *Essex Health Authority*, [1982] Q.B. 1166, [1982] 2 All E.R. 771 (C.A.).

[33] See *Zepeda* v. *Zepeda*, 190 N.E. 2d 849 (Ill. C.A., 1963).

[34] See Winborne, *op. cit.*, footnote 27, p. 419.

[35] See E.W. Keyserlingk, The Unborn Child's Right to Prenatal Care (1984), pp. 47-58, addressing common law and civil law principles in Canada.

[36] See M.A. Somerville, Birth Technology, Parenting and 'Deviance' (1982), 5 Int'l. J. Law and Psychiatry 123; J. Robertson, Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth (1983), 69 Virginia L. Rev. 405.

[37] See *Custody of a Minor*, *supra*, footnote 13.

ported discharge of such responsibilities may justify restrictive legislation on artificial reproduction. The basis of such legislation, however, is pursuit of the best interests of society itself, not those of the children the legislation intends never to be conceived.

II. *The Embryo and Fetus In Utero*[38]

There is no clear Canadian jurisprudence on whether courts will make custody or guardianship orders regarding embryos or fetuses to apply while they remain *in utero*. It may be contended that mothers themselves may be subject to court orders for protection of children, both before birth and thereafter.[39] Although judges have discussed whether, before their births, children are protected by child welfare legislation, courts of authority have not clearly held that the general law or even particular provincial legislation governs children while they are *in utero*. In *Re Simms and H.*[40] a Family Court in Nova Scotia granted an activist stranger's application to be appointed guardian *ad litem* of an unborn child, thereby permitting the applicant to appear in proceedings proposed to be brought in another court by the pregnant woman's husband to prevent performance of a hospital-approved abortion. The court found that the provincial Children's Services Act's definition of a "child" included the fetus, which was of about eighteen weeks' gestational age. The woman gave birth, and an appeal against the guardian's appointment was disallowed because the prospective litigation was moot. There are many legal obstacles to confident acceptance of the court's decision, however,[41] and in any event, the decision was only by way of an interim order, because final determination of the applicant's status was to be made by the court before which the husband's claim might have been heard. Courts have expressed sympathy with children's needs of prenatal protection in *obiter dicta*,[42] but authoritative cases have not deter-

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[38] An embryo is regarded as an organism in the early stages of development before recognizable human features have been formed; a fetus is an embryo which has achieved such human features, which appear at about the end of the eighth week of gestation. A growing practice is to call an embryo at the stage before implantation in the uterus would be completed in nature a "pre-embryo".

[39] See Keyserlingk, *op. cit.*, footnote 35, pp. 77-100.

[40] (1979), 106 D.L.R. (3d) 435 (N.S. Fam.Ct.).

[41] In *Dehler* v. *Ottawa Civic Hospital* (1979), 101 D.L.R. (3d) 686 (Ont. H.C.), aff'd. (1980), 117 D.L.R. (3d) 512 (Ont. C.A.) (leave to appeal to S.C.C. denied), for instance, it was held that a person could not act on behalf of an unborn child to resist abortion, and in *Re Medhurst and Medhurst* (1984), 7 D.L.R. (4th) 335 (Ont. H.C.) it was found that a husband's legal power to oppose abortion approved by a hospital's therapeutic abortion committee is very limited; see text, *infra*, at footnote 51.

[42] See *Re Children's Aid Society for the District of Kenora and J.L.* (1981), 134 D.L.R. (3d) 249 (Ont. Fam. Ct.); *Re Superintendent of Family and Child Service and McDonald* (1982), 135 D.L.R. (3d) 330 (B.C.S.C.).

mined claims brought to protect embryos and fetuses while they are *in utero*.[43]

The issue has arisen, however, in the United States, where courts have appointed officers to act as guardians of fetuses with power to act in their protection while they are *in utero*. In the first of these cases, the *Jefferson* case,[44] the Supreme Court of Georgia upheld a lower court's appointment of a guardian to act for the benefit of an advanced fetus *in utero*. It was feared that the mother's conscientious refusal of advised invasive medical care jeopardized the child's prospect of being born alive. The guardian was empowered to have the woman seized, taken to the hospital, given a general anesthetic and submitted to caesarean delivery of the child. The basis of this intervention was the State's interest in preservation of the infant's life. When the woman gave natural birth to a healthy baby, there was some question about the future role of the court-appointed guardian.[45] In another case a juvenile or family court found a fetus to be a neglected child and authorized a caesarean delivery which was performed over the mother's objections.[46]

Both these actions arose at the instance of hospitals and physicians concerned, perhaps, about possible malpractice litigation if the fetuses died after achieving viability or soon after birth, or if the children survived birth with severe injuries. When an activist stranger sought to become involved in a child's survival, however, the New York Court of Appeals condemned his attempt to enter "the very heart of a family circle, there to challenge the most private and most precious responsibility vested in the parents. . .".[47] In the *Simms*[48] case in Nova Scotia, however, such a stranger was appointed guardian *ad litem* of a fetus to join in a father's litigation to resist his wife's medically authorized abortion. This pattern of intervention may indicate judicial willingness, where jurisdictional competence exists, to permit those with proper interests, such as partici-

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[43] Section 203 of the Criminal Code, *supra*, footnote 4, governs a defendant charged with causing death to "another person". It has been held that a full term fetus at the point of delivery is a "person" within the meaning of the section; see *R.* v. *Marsh* (1979), 2 C.C.C. (3d) 1 (B.C. Co. Ct.).

[44] *Jefferson* v. *Griffin Spalding County Hospital Authority*, 274 S.E. 2d 457 (Ga. S.C., 1981).

[45] See the discussion in E.P. Finamore, *Jefferson v. Griffin Spalding County Hospital Authority*: Court-Ordered Surgery to Protect the Life of an Unborn Child (1983), 9 Amer. J. Law & Medicine 83.

[46] See the references and commentary upon this case in Keyserlingk, *op. cit.*, footnote 35, pp. 122-123.

[47] *Weber* v. *Stony Brook Hospital*, 456 N.E. 2d 1186, at p. 1188 (N.Y.C.A., 1983). This case, popularly known as the Baby Jane Doe case, was unsuccessfully appealed in *United States* v. *University Hospital, State University of New York at Stony Brook*, 729 F. 2d 144 (2d Cir., 1984).

[48] *Supra*, footnote 40.

pants in artificial reproduction agreements may have, to compel protection of embryos and fetuses *in utero*.

Intended social parents in proven surrogate motherhood agreements, especially men who have donated sperm with a view to rearing the children that result, may have standing to compel surrogate mothers to act in the unborn children's interests. Actions might be brought to require surrogate (and indeed other) mothers' avoidance of harmful activities, including consumption of foods and intoxicants, and perhaps to require submission to caesarean delivery. It may be doubted that lawful abortions could be so obstructed in Canada in view of the danger to maternal life or health which alone justifies the procedure here.[49] Apart from for lawful abortion, an interested party might seek an injunction to restrain continuing or anticipated breach of contract through the mother's misconduct (if the agreement were not held void as against public policy), or seek a *quia timet* injunction. Further, although it is even more unlikely to be granted, an order *ne exeat regno* might be sought to restrain departure from the country, for instance to seek abortion elsewhere on non-health-related grounds.[50] Men generally might also acquire such limited power as husbands have to ask courts to review the records of Canadian therapeutic abortion committees, in order to confirm that there are proper grounds for certification of abortion of women who have conceived through the men's sperm.[51]

Prospective social parents' powers to protect an embryo or fetus *in utero* might well arise if the proposal for judicially approved "surrogate adoption" advanced by the Ontario Law Reform Commission were to be enacted.[52] Outside such a scheme, it may be doubted that agreements between surrogate mothers and intended social parents, including bio-

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[49] The Criminal Code, *supra*, footnote 4, in s. 251(4)(c), permits abortion only when a committee of doctors certifies "that in its opinion the continuation of the pregnancy of such female person would or would be likely to endanger her life or health".

[50] These historic preventive forms of equitable relief are primarily commercial in nature; see R.J. Sharpe, Injunctions and Specific Performance (1983), pp. 30, 345. *Ne exeat regno* may be granted to restrain an absconding debtor; see *Felton* v. *Callis*, [1969] 1 Q.B. 200, where relief was denied; *Lipkin Gorman* v. *Cass*, The Times (London), 29 May 1985, where the Chancery Division granted the writ and impounded a passport; and generally C.R.B. Dunlop, Creditor-Debtor Law in Canada (1981), pp. 95, 99. English law concerning preliminary relief has shifted dramatically in favour of plaintiffs during the last decade, through development of the *Mareva* injunction, and, for instance, the decision in *American Cyanamid Co.* v. *Ethicon Ltd.*, [1975] A.C. 396, [1975] 1 All E.R. 504 (H.L.); see S. Goldstein, Preventing a Civil Defendant from Leaving the Country as a Form of Preliminary Relief (1985), 20 Israel L.Rev. 18.

[51] See *supra*, footnote 49, and *Re Medhurst and Medhurst*, *supra*, footnote 41.

[52] See Ontario Law Reform Commission, *op. cit.*, footnote 1, pp. 236-259. It is recommended that upon birth of the child "legislation should provide for immediate surrender of the child"; p. 252. See also the discussion on Surrogate Motherhood, *infra*.

logical fathers, would be recognized and enforceable as such; such agreements, whether or not they involve monetary elements, have been commonly understood to be void as against public policy.[53] Even if the contractual nature of agreements was insufficient to afford them legal recognition, biological fathers' prospective rights to custody of their children[54] might be sufficient to invoke court action for the protection of embryonic or fetal life. It may be doubted, however, that power would exist to impose constraints on surrogate mothers for other purposes, such as to require birth in one hospital rather than another for the intended social parents' convenience in receiving surrender of children.

A woman may have agreed in advance both to artificial insemination to achieve fertilization of her ovum *in vivo*, and to recovery of the fertilized ovum before it implants in her uterus by the non-surgical technique variously called flushing, washing, lavage or irrigation. The fertilized ovum would then be implanted into another woman, who might retain and rear the child upon birth. If the artificially inseminated woman subsequently refused to submit to the recovery procedure, which is invasive but benign in experienced hands, it may be asked whether she could be compelled to submit. The circumstances are almost diametrically opposed to those of, for instance, the *Jefferson* case.[55] That case involved a full-term fetus a few days short of natural birth,[56] and power to force surgical recovery. Here, the embryo is minute, visible only upon microscopic examination (indeed, prior to such examination, it might be impossible to know whether fertilization had occurred) and the invasion required is relatively minor.

The answer to the question whether courts would compel the recovery procedure is that probably they would not, due both to the medical uncertainty about whether there is an embryo to be recovered, and the relatively remote possibility of showing such recovery and transplantation to be in the best interests of a prospective child. This reasoning may be reinforced by the consideration that, even though unique human life may be claimed to commence at conception, there is a very high rate of implantation failure and spontaneous abortion in natural and artificial reproduction,[57] so that it might not be provable even on a balance of

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[53] See *ibid.*, pp. 92-102.

[54] In Ontario, for instance, the Children's Law Reform Act, R.S.O. 1980, c. 68, as amended by S.O. 1982, c. 20, provides in s. 1(l) that "a person is the child of his or her natural parents", and in s. 20(3) that "[w]here more than one person is entitled to custody of a child, any one of them may exercise the rights and accept the responsibilities of a parent. . .".

[55] *Supra*, footnote 44.

[56] It has been seen that, in *R.* v. *Marsh*, *supra*, footnote 43, a full-term fetus was considered to be a "person".

[57] It appears that at least 62% of women spontaneously lose their embryos before the twelfth week of gestation, and that 92% who suffer such loss are unaware of it: see

probabilities that compelling recovery would serve a future child's interests.[58]

It seems clear as well that a woman who has agreed to act as a surrogate mother but who declines to accept insemination cannot be compelled to do so, even under the scheme proposed in Ontario.[59] A more vexing issue would arise, however, if she were to have agreed to receive transplantation of another woman's embryo, fertilized *in vitro* or *in vivo*, and after achievement of fertilization and isolation of the living embryo, she were to refuse to receive it. Freezing the embryo might seem to remove some urgency about finding a uterus for its future development, but since present freezing and thawing techniques show a sizeable incidence of damage and loss,[60] their use might not appear to be in the embryo's best interests. The issue concerns the embryo not *in utero*, however, but *extra uterum*.

III. *The Embryo Extra Uterum*

In vitro fertilization isolates an embryo from its conception until its implantation in a woman's reproductive system. This is so when only a single ovum is fertilized, but also the case when chemically induced superovulation results in fertilization of several ova.[61] Only three or four ova may be implanted during a single menstrual cycle; evidence indicates that implantation of more may reduce prospects of any implantation, and also, perhaps paradoxically, increase the chance of multiple pregnancy. Surplus embryos will often be frozen (''cryopreserved''), so that, if implantation fails to occur in the first attempt, they can be used at a later cycle without repetition of hazardous recovery procedures. If implantation and pregnancy occur at an early cycle, the surplus embryos may remain frozen for some time. This may be for the donor's later pregnancy, for

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D.K. Edmonds *et al.*, Early Embryonic Mortality in Women (1982), 38 Fertility and Sterility 447.

[58] It may also be observed that a number of embryos develop abnormally, for instance into hydatidiform moles whose presence *in utero* endangers women's lives.

[59] Ontario Law Reform Commission, *op. cit.*, footnote 1, p. 264. A party to an agreement who refuses to implement it may become liable, of course, to pay appropriate damages.

[60] See the Victoria (Australia) Committee to Consider the Social, Ethical and Legal Issues Arising from In Vitro Fertilization, Report on the Disposition of Embryos Produced by In Vitro Fertilization (1984), which found, from a limited experience, that ''75% of embryos show some evidence of cellular damage after thawing'', although not necessarily such as to impair birth of a healthy child; see para. 1.21, pp. 15-16.

[61] Superovulation may be induced because ovum recovery by laparoscopy requires administration of general anesthetic, which presents risks to the woman and is therefore sought to be minimized. Development of non-surgical means of recovering ova may change clinical practice.

availability for transplantation to another woman, or in default of an alternative purpose.

The inherent legal status of the embryo created *extra uterum* is no different whether it is destined for actual or potential placement in the body of the ovum donor or that of another woman. The latter may intend to keep the child upon birth or to surrender it to the ovum donor in a surrogate mother transaction. The same issues also arise from *in vivo* fertilization followed by recovery and maintenance of the embryo, pending its transplantation into another woman. Questions arising when laboratories or clinics hold human embryos for their own research and planned wastage are rather more difficult, and are considered here only in the general context of concepts of custody, ownership and control of human embryos *extra uterum*. Control, not custody, may prove to be the governing concept. When so much depends on medical technology, there is little scope for the kind of custody one assumes over normal children. One does, however, retain custody of a sick child who requires extended hospitalization. That comparison may prove to be relevant.

The legal status of embryos *extra uterum* is difficult to establish. On neo-Kantian analysis, persons should not be treated as objects, and the same may well be true of potential persons, which embryos are at their least: some people, of course, consider them to be more. The suggestion that embryos are property and ownable offends important ethical principles. In its 1984 recommendations, the United Kingdom Committee of Inquiry into Human Fertilisation and Embryology, chaired by Dame Mary Warnock, made this explicit. The Committee observed that:[62]

> The concept of ownership of human embryos seems to us to be undesirable. We recommend that legislation be enacted to ensure there is no right of ownership in a human embryo.

The Committee also proposed, however, in the very next sentence of its Report, that the couple who stored an embryo for their use should be recognized as having "rights to the use and disposal of the embryo". Further, the Committee also urged establishment of a new statutory licensing authority to regulate aspects of artificial reproduction, and recommended that ". . . the sale or purchase of human gametes or embryos should be permitted only under licence from, and subject to, conditions prescribed by the licensing body. . .".[63]

This leaves open the legal questions of what "rights to the use and disposal of the embryo" are to exist, and what interests are proposed for sale or purchase under licence, if not those of ownership. The elements of use, alienation, sale, disposal and destruction, even when exercised

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[62] Report of the [Warnock] Committee of Inquiry into Human Fertilisation and Embryology, Dept. of Health and Social Security, H.M.S.O. Cmnd. 9314 (July 1984), para. 10.11, p. 56.

[63] *Ibid.*, para 13.13, p. 79.

subject to statutory regulation, appear to comprise the power legally contained in the concept of property ownership.[64] According to property principles, it seems that the gamete donors could exercise control over the embryo *extra uterum*, abandon their respective rights of control to the exclusive exercise of the other (as in ordinary artificial insemination by sperm donor), agree upon its transplantation into another woman without invoking adoption law, and rely on property principles in settling disagreements on disposition. In the same way, gamete donors may delegate to clinics and clinic personnel their own authority to decide, for instance, which women may receive transplantations of spare embryos.

An initial approach to the legal status of the embryo *extra uterum* may be through consideration of the law relevant to its deliberate destruction.[65] It is not homicide (meaning murder, manslaughter or infanticide) because "[a] person commits homicide when. . . he causes the death of a human being".[66] Embryos seem not to be "human beings" for purposes of criminal law, because section 206(1) of the Criminal Code provides:

> A child becomes a human being. . . when it has completely proceeded, in a living state, from the body of its mother whether or not
> (a) it has breathed,
> (b) it has an independent circulation, or
> (c) the navel string is severed.

An embryo produced from an ovum fertilized while *in vitro* will not have "proceeded. . . from the body of its mother". An embryo produced from an ovum fertilized *in vivo* recovered by flushing of the woman's reproductive system will come within the section only if it can be accepted that it is included in the description "child". Section 206 is designed to afford protection, suggesting that it should be applied broadly, but the section falls under the Criminal Code's provision for homicide, conviction for which results in liability to heavy punishment. The section may have to be given a restricted scope, lest defendants be liable to severe punishment upon extended or fanciful interpretations of language.[67]

Deliberate destruction of an embryo *extra uterum* is not criminal abortion, which is the act of "[e]very one who, with intent to procure the miscarriage of a female person. . . uses any means for the purpose of carrying out his intention. . .".[68] Clearly, when the embryo intended

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[64] See generally B.M. Dickens, The Control of Living Body Materials (1977), 27 U. Toronto L.J. 142.

[65] On the negligent killing of a full-term fetus under section 203 of the Criminal Code, see *R.* v. *Marsh*, *supra*, footnote 43.

[66] Criminal Code, *supra*, footnote 4, s. 205(1).

[67] Similarly, section 221(1), *ibid.*, appears inapplicable in addressing "[e]very one who causes the death, in the act of birth, of any child that has not become a human being. . .".

[68] Criminal Code, *ibid.*, s. 251(1).

for wastage has always been *extra uterum*, "a female person" is not intended to miscarry. The Criminal Code refers to "a female person, whether or not she is pregnant",[69] but the section has to be read restrictively. A distinction exists between a woman who may or may not be pregnant, and one who is clearly not pregnant; action regarding a woman believed not to be pregnant cannot create liability for abortion.[70] The former category was created historically to punish those who acted on (other) women whose pregnancy could not be proven by the prosecution.[71] Women commit the offence of procuring their own miscarriages, however, only when the prosecution can prove that they acted when "being pregnant".[72] There can be no doubt that a woman is not pregnant of an embryo she has been prepared to receive when it has always been outside her body.[73]

Destruction of the embryo *extra uterum* may constitute contraception, as opposed to abortion. In 1983 the Attorney-General of England, speaking of post-coital contraception under the Offences Against the Person Act, 1861,[74] from which Canada's abortion law is derived, expressed the opinion that:[75]

> The word 'miscarriage' is not apt to describe a failure to implant—whether spontaneous or not. Likewise, the phrase 'procure a miscarriage' cannot be construed to include the prevention of implantation. . . the ordinary use of the word 'miscarriage' related to interference at a state of pre-natal development later than implantation.

Accordingly, recovering an ovum fertilized *in vivo* before implantation, with a view to its transplantation in another woman or otherwise, does not violate the abortion prohibition.

Destruction or other misappropriation of an object without the owner's consent may constitute the crime of theft,[76] and/or the torts of tres-

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[69] *Ibid.*

[70] In the historic case of *R.* v. *James Scudder* (1828), 1 Mood 216, 168 E.R. 1246 (Assizes), under the first legislation on the subject of abortion, Lord Ellenborough's Act of 1803, U.K. Stats. 43 Geo. III, c. 58, it was held a complete answer to an indictment for abortion to show that the woman was not pregnant. Today, proving an honest belief that she was not pregnant will suffice; see *Pappajohn* v. *The Queen* (1980), 111 D.L.R. (3d) 1 (S.C.C.).

[71] See B.M. Dickens, Abortion and the Law (1966), p. 24, and Lord Ellenborough's Act, *supra*, footnote 70.

[72] Criminal Code, *supra*, footnote 4, s. 251(2).

[73] Where no recipient of the destroyed embryo had yet been identified, an indictment alleging the abortion of an unidentified or prospective woman might be void for uncertainty.

[74] 24 & 25 Vict., c. 100.

[75] Hansard, H.C. Deb. Vol. 42, No. 112, cols. 238-9 (10 May, 1983) (Written Answer).

[76] The Criminal Code, *supra*, footnote 4, s. 283(1) deals with "anything whether animate or inanimate".

pass to property and conversion. These principles may be a source of discomfort in their reliance upon concepts of property and ownership, and in any event they protect the interests of the owners, not those of the embryos *per se*. In *Del Zio* v. *Presbyterian Hospital*,[77] a United States Federal Court judge allowed a jury to consider a claim of wrongful conversion when the contents of a "test tube" used for *in vitro* fertilization were flushed away without the gamete donors' consent, but the jury awarded no damages on the claim.[78]

Private law principles of contract may bear more suitably on legal control of an embryo *extra uterum*. A contract could be directed to the rendering of scientific or medical services, including maintenance of an embryo *in vitro* or in cryopreservation, and need not involve concepts of property law. Such a contract may be comparable to one for the education or medical care of a child. A contract would open the way to the judicial award of damages upon breach, such as by unjustified disposal of the embryo, and threatened breach might be restrained by injunction. Whether specific performance would be ordered may depend on whether the contract is considered an agreement for personal services (it may not be, because performance by surrender of the embryo can easily be supervised), and on whether the embryo itself is considered sufficiently unique to warrant specific relief. Control through the private ordering instrument of contract law may be compatible with proposals of the Warnock Committee;[79] it is inconsistent, however, with common law approaches, which have been hostile to contracts for the transfer of custody of children.[80] It was upon addressing such agreements that the courts established the principle of the supremacy of the best interests of the child.[81]

This raises the central and unresolved issue of whether an embryo *extra uterum* would be considered a "child" for purposes of provincial child protection legislation. In the State of Illinois, legislation intended to limit planned embryo wastage as part of *in vitro* fertilization requires the person who performs the procedure to assume the "care and custody" of any embryo, subject to the penalties of the child abuse law should it come to harm.[82] Some have doubted the constitutionality of

[77] 74 Civ. 3588 (U.S. Dist. Ct., S.D.N.Y. April 12, 1978), detailed in W.H. Winborne, *op. cit.*, footnote 27, pp. 230-236.

[78] A verdict of $50,000 in damages was given, apparently upon the claim of intentional infliction of mental and physical anguish.

[79] See text, *supra*, at footnotes 62 and 63; the Committee considered that a power of destruction was implicit in parents' control of embryos.

[80] See Ontario Law Reform Commission, *op. cit.*, footnote 1, p. 97.

[81] *Ibid.*, pp. 92-94.

[82] Ill. Rev. Stat., c. 38, s. 81-26(7) (1983). The statute is legally contentious in detailing "the fertilization of a human ovum by a human sperm" and providing for "the human being thereby produced. . .".

that provision.[83] Creation of a provision to this punitive effect in a Canadian province or territory might appear to be an encroachment on the federal field of criminal law,[84] but child abuse penalties have not been struck down on this ground. Embryonic loss as an element of *in vitro* fertilization was accepted by both the Warnock Committee[85] and the Ontario Law Reform Commission.[86]

In a sense, child welfare legislation may be better equipped to protect embryos *extra uterum* than those *in utero*, because protective orders need not involve physical impositions upon a pregnant woman. It may be incongruous to protect an early embryo, however, when legal capacity to protect a more developed embryo is not clearly established. It must be remembered that, in order to be transplantable, the embryo must be implanted or cryopreserved at a more primitive developmental stage than that at which natural implantation would occur, which is taken to be at about fourteen days' gestational age. It provides a useful sense of context to note that deliberate induction of failure of implantation of such a more developed embryo, for instance by fitting a woman with an intrauterine device before conception, is legally permissible as routine contraception. Further, causing loss of such an embryo by post-coital techniques designed to prevent implantation in the uterus also ranks as lawful contraception[87] if undertaken up to seventy-two hours after unprotected intercourse, and perhaps even if undertaken up to ten days later.[88]

Judicial protection for pre-implanted embryos may be difficult to achieve except through specific legislation. When "orphan embryos" were found in Victoria, Australia, following the deaths of the gamete donors in an air crash, a committee chaired by the distinguished lawyer Professor Louis Waller recommended, on legal and ethical grounds, that they be removed from cryopreservation and left to waste.[89] In the glare

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[83] See G.J. Annas and S. Elias, *In Vitro* Fertilization and Embryo Transfer: Medicolegal Aspects of a New Technique to Create a Family (1983), 17 Family L.Q. 199, at pp. 208-210.

[84] Perhaps by reference to the Criminal Code's power to control use of means of contraception (see below), which was exercised until 1969, see S.C. 1968-69, c. 41, s. 13. Challenge may also be made for alleged discrimination against the (reproductively) disabled, contrary to s. 15(1) of the Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act, 1982, enacted by the Canada Act 1982, c. 11 (U.K.), Schedule B.

[85] *Op. cit.*, footnote 62, para. 5.10, p. 32.

[86] *Op. cit.*, footnote 1, pp. 214-217.

[87] See the Parliamentary Written Answer of the English Attorney-General, *supra*, footnote 75.

[88] See I. Kennedy, The Legal and Ethical Implications of Postcoital Birth Control, in H. Grahame (ed.), Postcoital Contraception: Methods, Services and Prospects (1983), 62, at p. 66.

of publicity, however, the State legislature rejected this recommendation, and required the embryos to be kept available for possible transplantation. A similar outcome under existing child welfare principles, however, might require a court to strain language beyond reason.

IV. *Gamete Donation*

Historically, parenthood was created only through biological linkage, and parents acquired their legal status through marriage or sin.[90] "Natural" parents were presumed to have a special relationship of social rights and responsibilities to their minor children. In time such relationships also came to be created and terminated by operation of law in adoption procedures, which are founded on legislation and operate through judicial approval. Further separation between a parent's genetic role and social function has been resisted by the law,[91] even though those who assume social functions regarding unrelated children may be included among those who bear legal responsibilities for them. Artificial reproduction has paved the way both to "natural" parenthood of children with whom no social relationship is intended, and to spouses planning exclusive parental relationships with children to whom they intend to have no genetic link. Legislation, however, has been slow to approve such private ordering of the separate genetic and social functions involved in the procreation and rearing of children.[92]

Legislation in Quebec and Yukon Territory[93] now excludes sperm donors in most cases from rights and responsibilities involving children artificially conceived, including the right to custody. In Quebec, article 586 of the Civil Code[94] provides that:

> When a child has been conceived through artificial insemination, either by the father or, with the consent of the spouses, by a third person, no action for disavowal or contestation of paternity is admissible.

Article 588 governs contest of filiation of a person "whose possession of status is not consistent with his [or her] act of birth", but goes on to add that "no person may contest the filiation of a person because that person was conceived through artificial insemination". It appears that

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[89] *Supra*, footnote 60.

[90] Sin resulted in birth of an "illegitimate child", which status stigmatized the victim; the child was really the offspring of an illegitimate parent.

[91] The Criminal Code, *supra*, footnote 4, imposes legal duties upon parents to provide necessaries of life for their children under sixteen years of age, including illegitimate children; see s. 197.

[92] See generally Wadlington, *loc. cit.*, footnote 10.

[93] For unenacted legislative proposals on artificial reproduction in British Columbia, Alberta and Saskatchewan, see Ontario Law Reform Commission, *op. cit.*, footnote 1, pp. 295, 300 and 304 respectively.

[94] S.Q. 1980, c. 39, s. 1.

the child is, in effect, irrebuttably presumed to be the natural, legitimate child of the consenting spouse.[95]

In 1984, Yukon Territory adopted[96] the part of the Uniform Child Status Act (proposed by the Uniform Law Conference of Canada[97]) that deals with artificial insemination, including fertilization of a woman's ovum *in vivo* and *in vitro* fertilization of her ovum followed by implantation in her. The Act provides in general that a husband or cohabiting man who agrees in advance to insemination with donated sperm shall be deemed in law to be the father, and that:

> A man whose semen is used to artificially inseminate a woman to whom he is not married or with whom he is not cohabiting at the time of the insemination is not in law the father of the resulting child.[98]

Neither enactment makes specific reference to the role of sperm donation as part of embryo donation. Nevertheless, Quebec's Civil Code, which speaks generally of a child "conceived through artificial insemination", appears to apply to a sperm donor for *in vitro* fertilization, even where the resulting embryo is transplanted into a woman other than the ovum donor. The Yukon Territory provision covers *in vitro* fertilization and implantation of the embryo in the ovum donor, but not transplantation into another woman.

Where no such relieving legislation exists, men who donate sperm for artificial reproduction of children born to women unrelated (and perhaps unknown) to the donors will in principle continue to bear responsibilities for the children, and perhaps to have rights with regard to them, including the right to custody. There will often be evidentiary problems in showing such paternity, of course, because of medical confidentiality, the absence of identifying data and couples' reluctance to expose their use of donated sperm. For those who intend to be nothing more than donors, anonymity may be expected, since their responsibilities will be unwelcome and their rights irrelevant. Some donors, however, intend specifically to rear the children born to women who have acted as surrogate mothers; for them their custody rights are precious, being central to their intentions, and their responsibilities are actively sought. All these expectations, however, are subject to displacement, sometimes quite arbitrarily, by legislative provisions drafted with no regard for the different forms of artificial insemination and reproduction. The Nova Scotia Family Maintenance Act,[99] for instance, defines a "possible father" as one

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[95] See Ontario Law Reform Commission, *op. cit.*, footnote 1, p. 374.

[96] Children's Act, S.Y.T. 1984, c. 2, s. 14.

[97] See Uniform Law Conference of Canada, Proceedings of the Sixty-Fourth Annual Meeting (1982), Appendix F; see s. 11.

[98] Children's Act, *supra*, footnote 96, s. 14(6); see also Ontario Law Reform Commission, *op. cit.*, footnote 1, p. 375.

[99] S.N.S. 1980, c. 6, s. 2(j).

who has "had sexual intercourse with. . . the mother of a child", thereby excluding a donor for asexual reproduction, while Saskatchewan's Children of Unmarried Parents Act[100] defines "father" broadly to include one "who may be the possible father".

Men who donate sperm may accordingly in law be fathers, but women who donate ova or embryos are unlikely in law to be considered mothers of the children gestated and delivered by others. Adhering to the experience of nature, the law presumes that a woman who bears and delivers a child is its natural mother; the recent possibility that she may not be genetically linked to the child has not affected that perception.[101] The proposition has been advanced *mater est quam gestatio demonstrat.*[102] The Warnock Committee recommended legislation which would codify that presumption:[103]

> . . . when a child is born to a woman following donation of another's egg the woman giving birth should, for all purposes, be regarded in law as the mother of that child, and . . . the egg donor should have no rights or obligations in respect of the child.

The Ontario Law Reform Commission made the same recommendation,[104] and the Australian state of Victoria, in its Status of Children (Amendment) Act 1984,[105] has already enacted provisions to that effect regarding ovum and embryo donation[106] by means of *in vitro* fertilization and transplantation.[107]

Where there is no clear legislation, paternity determinations are shaped by the conventional presumption that a husband is the father of any child his wife bears. In pursuit of the child's purported interests in legitimacy and in knowing with certainty its legal father's identity, this presumption can be tenacious.[108] Accordingly, a sperm donor who seeks

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[100] R.S.S. 1978, c. C-8, s. 2(d).

[101] It may be claimed that gestation and delivery of children are acts of authentic motherhood, and that to render such services to embryos conceived from others' ova does not diminish the role of physical and psychological mothering.

[102] J.K. Mason and R.A. McCall Smith, Law and Medical Ethics (1983), p. 46. Very special circumstances caused a Michigan court to order that an ovum donor be registered and regarded for all purposes as the legal mother in *Smith* v. *Jones*, Wayne Co. Cir. Ct., Michigan, Docket No. 85-532014-62 (1986).

[103] *Op. cit.*, footnote 62, para. 6.8, p. 38.

[104] *Op. cit.*, footnote 1, p. 176.

[105] No. 10069, s. 5, enacting a new s. 10F(1) of the Status of Children Act 1974, No. 8602, as am. by the Statute Law Revision (Repeals) Act 1982, No. 9863.

[106] In ovum donation the receiving woman uses sperm of her husband or partner, whereas in embryo donation both gametes are supplied by donors.

[107] The state's related Infertility (Medical Procedures) Act 1984, No. 10163, seems not to accommodate *in vivo* fertilization of an ovum and its transplantation to another woman; see Ontario Law Reform Commission, *op. cit.*, footnote 1, p. 385, n. 642.

[108] In the Quebec case of *Bolduc* v. *Lalancette-St.-Pierre and another*, [1976] C.S. 41 (Que. S.C.), for instance, a birth certificate named as a child's father the mar-

to establish his paternity may face legal obstacles, particularly if his object is to assert custody rights to a child born of a surrogate motherhood agreement made with a married woman. These obstacles are aggravated under legislation (such as that enacted in Quebec and Yukon Territory) designed to regularize artificial insemination by rendering the genetic donor a legal stranger to the child. In those regimes, his custody rights can be created only through formal adoption. It may appear anomalous that legislation designed to respect the private intentions of parties to sperm donation should confound the intentions of parties to surrogate motherhood agreements, but this may reflect the law's selective accommodation to the implications of artificial reproduction.

V. *Surrogate Motherhood*

The essence of surrogate motherhood is the gestation and delivery of a child intended to be surrendered at birth to the exclusive custody of another person or couple. One can distinguish the woman whose own ovum is artificially inseminated *in vivo* from the woman who receives implantation of another woman's ovum, fertilized *in vitro* or fertilized *in vivo* and recovered for transplantation, but this biological distinction is of no legal consequence.[109] In either case the woman who bears the child is considered in law to be its mother.

In contrast to an ovum donor, a man entering an agreement and donating his sperm for the insemination will in law be entitled to recognition as father of the child, although such a man agreeing to insemination through another man's sperm may not. A party to an agreement who donates sperm may have to seek a judicial declaration of his paternity, notably when the surrogate mother is a married woman, but once paternity is established to legal satisfaction, the right to an order of custody of the child normally follows. It has been seen above, however, regarding Quebec and Yukon Territory, that legislation regularizing donor insemination may irrebuttably deem the approving husband of a surro-

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ried mother's lover, with whom she had lived for the three years before birth, and who had cared for the child for a further six years. It was held, however, that the long estranged husband was the legal father, since the marriage had not been dissolved, and he had not disavowed the child. In *M.* v. *W. and R.* (1985), 45 R.F.L. (2d) 337, the British Columbia Supreme court observed that a presumption of paternity arose from a man's marriage toa woman he knew to be pregnant, notwithstanding her pre-marital sexual relations with other men at the probable time of conception.

[109] The distinction may have implications for the child's medical care when genetically transmitted conditions are involved, and a duty to know about and to inform of these conditions may in time be legally recognized: see B.M. Dickens, Confidentiality of Parentage Records: Adoption and Artificial Conception, in A.M. Capron and J.A. Kantorowitz (eds.), Changing Conceptions: Parents and Children in the New Reproductive Age (1986), in press.

gate mother to be legal father of the child, compelling the sperm donor to seek adoption of the child in order to gain lawful custody.[110]

It is commonly accepted that, in the absence of approving legislation,[111] surrogate motherhood agreements will be held void by the courts as against public policy.[112] Experience shows, however, that legal effect can be given to many of their provisions.[113] Known participants complying with their terms in Canada have not been subjected to legal proceedings, for instance for violation of prohibitions against offering and receiving money for consent to adoption. A natural father whose child is born to a surrogate mother may enjoy lawful custody even without recourse to adoption.[114] He may wish to adopt, however, in order to give the child his surname; birth registration will probably have been in the surname of the mother, or of her husband if she is married. The father's wife may want to regularize her relationship to the child by step-parent adoption. It might be dysfunctional if this were deterred by fear of legal proceedings following payment to the surrogate mother, since such adoption would appear to be in the best interests of the child. The threat of legal proceedings against a wife seeking adoption may also create the anomaly of favouring a single father over one who is married.

When a father receives surrender of his child in compliance with a surrogate motherhood agreement, his lawful custody, like that of any other parent, can be limited or ended by a judgment in child protection proceedings. For such proceedings to succeed, however, it must be shown that a provision of the child protection legislation has been violated. No such conclusion follows axiomatically from the father's participation in a legally void agreement resulting in custody. Intervention is not justifi-

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[110] The remainder of this paper will suppose that such legislation does not exist, which is the case in ten of Canada's twelve provincial and territorial jurisdictions, and also in Yukon Territory regarding embryo transplantation.

[111] No jurisdiction has enacted such legislation, but see the proposal in the Ontario Law Reform Commission, *op. cit.*, footnote 1, and in a number of U.S. jurisdictions, analyzed in Dickens in Milunsky and Annas, *op. cit.*, footnote 2.

[112] But see the discussion on contracts to transfer custody of children regarding surrogate motherhood agreements in Ontario Law Reform Commission, *op. cit.*, footnote 1, pp. 94-102. Courts may be more sympathetic when a woman affected by severe diabetes or phenylketonuria employs a surrogate to receive transfer of her embryo and nurture it in a more hospitable uterine environment.

[113] See *ibid.*, pp. 99-100, and the English Family Division decision in *Re a Baby (wardship)* (1985), The Times (London), 15 January 1985, reported in (1985), 135 New L.J. 106, known as the Baby Cotton case.

[114] In Ontario, for instance, the Children's Law Reform Act, *supra*, footnote 54, provides that ". . . for all purposes of the law of Ontario a person is the child of his or her natural parents. . .''; see s. 1 (1). Further, s. 20(3) may justify the father's exclusive custody, since it provides that "[w]here more than one person is entitled to custody of a child, any one of them may exercise the rights and accept the responsibilities of a parent on behalf of them in respect of the child''.

able simply because the court feels it can arrange a better environment for the child than the parties to the agreement have achieved.[115] This may be so even when a request for custody is made by a surrogate mother after she has voluntarily surrendered the child.[116] Indeed, in *Re Moores and Feldstein*,[117] Dubin J.A. observed, with wider significance than was appreciated at the time:

> I do not think it safe to proceed on the assumption that a child will receive greater love and a more understanding upbringing if it is returned to a mother who did not want it at the time of its birth, than it would if left in the hands of those who sought it out for their love and care.

Similarly, it would be perverse, and possibly harmful to the child's best interests, to place the child with strangers, when the father had not been shown to have violated legally mandated minimum standards of child protection.

It may seem incongruous that a court should accept a *fait accompli* in a private surrogate motherhood transaction when it is not bound to honour child custody arrangements negotiated privately by married or cohabiting couples and formalized in separation agreements, even when those arrangements conform to the child protection law. In Ontario, for instance, section 55(1) of the Family Law Reform Act[118] provides that:

> In the determination of any matter respecting. . . custody of or access to a child, the court may disregard any provision of a domestic contract pertaining thereto where, in the opinion of the court, to do so is in the best interests of the child.

This provision embodies the position at common law,[119] and is applicable in principle to disputed custody of a child born in a surrogacy agreement.

It is clear that the law does not deter surrogate motherhood agreements, but also that it accommodates them only indirectly. That in itself may show a need for systematic legal reform. This may be in the direction of deterrence and repression, but even the Warnock Committee majority, which reacted strongly against surrogate motherhood agreements and recommended criminalization of recruitment agencies and professional involvement,[120] did not envisage "that this legislation would render private persons entering into surrogacy arrangements liable to criminal prosecution".[121] They said that "[w]e nonetheless recognise that there

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[115] See Goldstein, Freud and Solnit, *op. cit.*, footnote 22.

[116] On her capacity and possible need to make a formal application for custody of the child in Ontario, see Ontario Law Reform Commission, *op. cit.*, footnote 1, p. 97.

[117] *Supra*, footnote 11, at p. 647.

[118] R.S.O. 1980, c. 152.

[119] See *Clark* v. *Clark*, [1952] O.W.N. 671, at pp. 671-672 (Ont. H.C.).

[120] *Op. cit.*, footnote 62, para 8.18, p. 47; this recommendation was implemented in the Surrogacy Arrangements Act 1985, U.K. Stats. c. 49.

[121] *Ibid.*, para 8.19.

will continue to be privately arranged surrogacy agreements'',[122] but made no recommendations for their consequences or for protection of children born as a result of them other than that statute should declare such agreements to be illegal contracts and therefore unenforceable in the courts.[123]

The Ontario Law Reform Commission addressed possible legal consequences of surrogate motherhood agreements, and proposed a means by which such agreements might be judicially regulated.[124] The Commission's purpose was not to promote such agreements; its interest was in damage control, since their use seems unavoidable. One of the most vexing issues the Commission faced was whether, if surrogate mothers changed their minds and refused voluntary surrender of children born of approved agreements, court orders should be available for seizure of the children and their surrender to the intended social parents. It may seem brutal to propose that a woman who has emotionally bonded to the child she has borne for nine months, which is likely to be genetically hers, should be liable to have it taken from her at the moment of birth. It may appear that the risk of her deciding to keep the child should be borne by the intended social parents, and that their agreement could make adequate financial and other provisions for her change of mind. Court officers should not be engaged in a heart-rending tug-of-love execution.

The Commission reviewed such a worst-case scenario and concluded that approved agreements should nonetheless be enforceable, if necessary by court officers.[125] Several relevant specialists serving on the project's Advisory Board[126] considered enforcement would be in the best interests of the child,[127] and the Commission assessed that goal to be more compelling than matters of risk allocation among adult parties to the agreements. The Commission reasoned that women contemplating serving as surrogate mothers would be made aware in advance, for instance by their own legal and other advisors and by the family court considering proposed agreements for approval, that agreements would be so enforceable. A woman not wishing to risk the pain of separation might be expected not to undertake the agreement. This reasoning may not do justice, of course, to the unexpected sentimental or emotional bonding which pregnancy may induce. Another reason why a child may not be

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[122] *Ibid.*

[123] *Ibid.*

[124] *Op. cit.*, footnote 1, pp. 218-272.

[125] *Ibid.*, pp. 249-253. See similarly, the New York State Senate Judiciary Committee, Report on Surrogate Parenting in New York: A Proposal for Legislative Reform (1987).

[126] See *ibid.*, p. 8.

[127] See *ibid.*, p. 252.

surrendered at birth, however, is that the mother wants to receive a sum of money or other advantage for surrender of the child not previously approved by the court.[128] Unenforceability of agreements might open the way to offensive commerce, ransom and baby-selling.

Provision of a legal right of custody in the social parents immediately upon birth of a child may be inadequate to protect the child in fact. The child might be severely impaired at birth, not least when birth is premature; its survival may depend upon prompt medical decisions. The intended social parents may be unavailable, however, and the mother's commitment to the child's survival may be uncertain. The same may be true of the intended social parents, of course; many parents of newborn children prefer that their children succumb quickly to major disability when survival would mean chronic distress. The special problem in surrogacy agreements is that none of the parties may be obviously credible as guardians of the severely impaired child's best interests. This is a further reason why, since, as the Warnock Committee recognized, "there will continue to be privately arranged surrogacy agreements",[129] their terms and obligations should be clarified before they are implemented.[130]

Conclusion

It has been observed that:

> The 'new family' is a convenient way of referring to that group of changes that characterizes 20th century Western marriage and family behavior, such as increasing fluidity, detachability and interchangeability of family relationships; the increasing appearance, or at least visibility, of family behavior outside formal legal categories; and to changing attitudes and behavior patterns in authority structure and economic relations within the family.[131]

This survey has addressed some contributions of modern reproductive medicine to changes in parenthood and the family. The direction of the evolution in legal perception is away from genealogy and towards a focus on human and psychological relationships: a change from genetic form to social substance and function.

The challenge of change is not necessarily welcome, and its experience is not always comfortable. Recourse to artificial reproduction arises, however, from the increasing incidence of infertility and the knowledge of harmful genetic transmission in society. Infertility is influenced by such social factors as first marriages at later ages (when natural fertility is reduced), pursuit of conception in second or later marriages following divorce, the increased incidence of sexually transmitted diseases, iatro-

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[128] On payment to a surrogate mother, see *ibid.*, pp. 253-255.

[129] *Op. cit.*, footnote 62, para. 8.19, p. 47.

[130] *Op. cit.*, footnote 1, pp. 256-257.

[131] M.A. Glendon, The New Family and the New Property (1981), pp. 3-4.

genic (medically-induced) infertility and, for instance, industrial and environmental factors.[132] Artificial reproduction may be no less a consequence than a cause of social change. It confronts legal doctrine with novel issues, but it presents legislatures, the judiciary and legal practitioners with no more than their accustomed tasks of mediating legal changes in response to developments in society.

[132] On the incidence and causes of infertility, see Ontario Law Reform Commission, *op. cit.*, footnote 1, pp. 10-14.