Not Just a Human Incubator: Legal Problems in Gestational Surrogate Motherhood

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I. INTRODUCTION

IN THE RAPIDLY-DEVELOPING AREA of new reproductive technologies, the concept of surrogate motherhood is no longer viewed as a radical solution to infertility, at least in terms of a technical procedure. In the world of law and bioethics, however, it is difficult to imagine a more controversial topic, even today. In particular, the development of "gestational surrogacy" has provoked intense ethical and legal debate in recent years.

Gestational surrogacy is distinct from what might conveniently (if somewhat ironically) be referred to as "traditional" surrogacy in that there is no genetic connection between the fetus and the surrogate mother (i.e., the gestational mother). The surrogate mother is impregnated with an embryo formed from the fertilised egg of another woman. In the usual case of gestational surrogacy, both the sperm and the ovum are donated by the intended parents. By contrast, in traditional surrogacy, a genetic connection exists between the baby and the surrogate mother in that the fetus is the product of the intended father's sperm and the *surrogate* mother's egg. In both cases, the initial intention of all parties involved is that the surrogate mother will carry the pregnancy to term and then relinquish the baby to the commissioning or "intended" parents immediately upon giving birth. This endeavour has typically been treated as a contract—the surrogate mother receiving valuable consideration for her efforts (usually a fee of around $14 000 Cdn. in addition to the payment of medical and living expenses during the term of the pregnancy).

Although there has been, as yet, no litigation on this matter in Canada, traditional contract law would suggest that when the surrogacy arrangement as described above proceeds as planned, the legal difficulties encountered by the parties should be minimal. If the surrogacy contract is completed without debate as to the rights of the various parties, all that remains to be done upon the

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birth of the child is to formalise the intended parents' custody of the child.[1] Problems will usually only arise when the surrogate mother, possibly as a consequence of the emotional intensity of the mother-baby relationship, refuses to relinquish the child to the intended parents. In such a situation, the problem faced by the courts would be whether to resolve the matter along the lines of traditional contract theory, or whether this intensely personal matter, involving the custody and well-being of a very young child, is better dealt with in the realm of family law and the "best interests of the child" test which is now the standard in Canadian child custody disputes. The problems inherent in each approach are many, as will be discussed.

Legislative efforts have in the past seemed likely to render the traditional debate purely academic. In 1996, the Canadian Parliament saw the introduction of proposed legislation that would have rendered surrogacy contracts illegal (and therefore unenforceable by the courts). Bill C-47, entitled the *Human Reproductive and Genetic Technologies Act*,[2] received second reading and was debated on 5 December 1996, and may have been attributable in part to the recommendations of the Royal Commission on New Reproductive Technologies (established by former Prime Minister Brian Mulroney on 25 October 1990, to examine controversial new technologies). Under the proposed legislation, it would have become illegal either to give or offer consideration to a woman for serving as a surrogate mother or to act as an intermediary in the establishment of such a contractual surrogacy arrangement. Had this legislation been passed, the issue of determining rights under a contract of surrogacy would have become irrelevant, as such contracts would be *prima facie* unenforceable. Bill C-47 died on the floor upon the calling of the 1997 federal election, and at present, no other legislation has been proposed in its stead. However, it seems unlikely that the issue will remain dormant for long.

Even if the contract issue is eventually settled by legislation, difficult legal questions will continue to surround the surrogacy arrangement. For one, the unenforceability of the contract would not change the fact that a baby has been born and that its custody must be determined. If the contract were unenforceable, the court would need to have recourse to other principles in determining this matter. There also remains the question of whether the surrogate mother may be held liable in tort for negligent acts committed by her during the pregnancy which have negative and lasting effects on the child. For example, can a surrogate mother be sued in negligence for consuming alcohol while pregnant, thereby causing the child to be afflicted with fetal alcohol syndrome (FAS)? For

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1 This may be more than a mere "formality" however; see *Re Fink*, *infra* note 45 at 22.

2 Bill C-47, *Human Reproductive and Genetic Technologies Act*, 2d. Sess., 35th Parl., 1996 (2d reading 5 November 1996 [hereinafter Bill C-47].

reasons that will be discussed below, the peculiarities of gestational surrogacy may complicate this already difficult area of the law.

Rather than purporting to provide a complete picture of the legal position on any one of the issues, a likely impossibility given the developing nature of the subject matter and the sparseness of applicable jurisprudence, this paper seeks to provide a general overview of the various issues surrounding gestational surrogacy, including the potential effect of legislation similar to Bill C-47 and the implications of contract, family, and tort law on the rights of the parties to a gestational surrogacy arrangement. It should also be noted at this point that these issues are dealt with exclusively as they relate to gestational surrogacy and not to traditional surrogacy.

II. Bill C-47: *The Human Reproductive and Genetic Technologies Act*

ALTHOUGH THE PROPOSED *Human Reproductive and Genetic Technologies Act* has now been shelved, this was no comment on its merits or efficacy, but rather an inevitable side effect of the exigencies of the electoral process. It is not unreasonable to suppose that future legislative efforts will bear a substantial resemblance to their now-defunct predecessor. Therefore, we believe that it is still relevant to examine the proposed legislation for the purpose of assessing legislative direction in this area and considering its practical utility, in anticipation of future proposals.

The proposed *Act* was a wide-ranging piece of legislation designed to regulate the rapidly expanding areas of genetic engineering and surrogate motherhood. It would have prohibited, for example, the manipulation of an embryo for the purposes of cloning another living or deceased human being, and would also have made it illegal to cross-breed animals and humans through artificial means. For the purposes of this paper, however, the following provisions are most significant:

> Payment of surrogate mothers
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> 5. (1) No person shall give or offer consideration to a woman to act as a surrogate mother.
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> Payment of intermediaries
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> 5. (2) No person shall give or offer consideration to another person to obtain the services of a surrogate mother.
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> Acting as intermediary
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> 5. (3) No person, other than the surrogate mother, shall arrange or offer to arrange, for consideration, the services of a surrogate mother.

Meaning of surrogate mother

5. (4) For the purposes of this section, a surrogate mother is a woman who carries a child, conceived from an ovum, sperm or zygote provided by a donor, with the intention of surrendering the child after birth.

Offence and punishment

8. Any person who contravenes any of sections 4 to 7 is guilty of an offence and
(a) is liable, on summary conviction, to a fine not exceeding $250 000 or imprisonment for a term not exceeding four years or to both; or
(b) is liable, on conviction on indictment, to a fine not exceeding $500 000 or imprisonment for a term not exceeding ten years or to both.

These provisions would have created a legislative net that effectively would have made all surrogate contracts illegal and therefore unenforceable, making it illegal to *give* or *offer* consideration to a woman to act as a surrogate mother. It would not, however, have been illegal for a woman to *receive* consideration for acting as a surrogate mother. While this technically would have meant that a woman may still offer to act as a surrogate mother for consideration, this freedom would have been all but sterilised by the fact that it would have been illegal for the intended parents to offer or give consideration back to the surrogate mother. This would have made the resulting "contract" illegal notwithstanding the lack of statutory restriction on the surrogate mother's ability to receive consideration for her services.

The legislation also addressed the primarily American phenomenon of commercial surrogacy. Businesses which act as intermediaries between surrogate mothers and intended parents, locating surrogates and facilitating surrogacy arrangements for a fee, have proliferated across the United States. Although convenient, these situations increase the likelihood of the surrogate being subjected to undue influence and exploitation—particularly if the facilitating agency somehow acquires rights against the surrogate in addition to those held by the intended parents. To avoid such problems, s. 5(2) would have made it illegal for any person to give or offer consideration to a third party to obtain the services of a surrogate mother. As well, s. 5(3) of the legislation would have made it illegal to arrange the services of a surrogate mother with exchange for consideration. Consequently, it seems that any commercial surrogacy arrangement would have run afoul of multiple sections of the proposed legislation.

It is abundantly clear that while the government, by introducing this legislation, sought to render all surrogate contracts void and unenforceable,[3] it consciously refrained from imposing any restriction on a woman's freedom to

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[3] A contract which is rendered void and unenforceable—such as by reason of illegality—does not impose contractual obligations upon the parties. Thus, the specific terms of the contract are of no legal force and effect. Parties will have no remedy under the law if the terms of the contract are not fulfilled. See S.M. Waddams, *The Law of Contract*, 3d ed. (Toronto: Canada Law Book, 1995) at 382–383.

volunteer to serve as a surrogate mother. It seems apparent that the government disapproved not of the very act of surrogacy, but rather of the notion that a woman might sell her reproductive services as a surrogate mother for profit, thereby acquiring contractual obligations to the intended parents. There would be no statutory reason why a woman could not volunteer to carry the embryo of another couple to term, but since this promise could not legally be met by any legal consideration, the surrogate mother would seemingly be free to refuse to surrender custody of the child upon giving birth.

Did this legislative scheme indicate a desire on the part of the government to allow surrogate mothers to change their minds and decide to keep their babies, free of any binding contractual obligations to the intended parents? If this was the intention, there would certainly be more effective ways to accomplish this goal, and it is to be hoped that future legislative efforts might take other alternatives into account. Instead of outlawing surrogacy contracts altogether, a statutory provision could be enacted that would permit surrogate mothers to repudiate the contract, free of liability for damages, for a given period of time after giving birth. This would provide the surrogate mother with the chance to come to terms with her feelings for the baby and then decide whether to live up to her contractual obligations, collect the consideration owed to her, and relinquish the baby to the intended parents as agreed, or to repudiate the contract, forgo the consideration, and raise the child as her own.[4]

Although this alternative approach would lead to significant uncertainty for the intended parents and entails very minimal respect for their rights in the matter, it would at least give them some opportunity to secure a contractual surrogacy, whereas the proposed legislation would outlaw this notion altogether. Further, to the extent that the proposed scheme was apparently motivated by a desire to protect the autonomy of the surrogate mother, this interest would probably be better served by a statute which would not have the effect of abrogating the woman's freedom to contract. The option to repudiate the contract within a given time, coupled with the courts' apparent reluctance to hold gestational mothers liable for prenatal injuries caused by them to the fetus,[5] would actually be a more complete protection of the surrogate mother's autonomy and would entail a more minimal impairment of her rights than the previous effort in this regard.

It is likely, however, that the protection of autonomy was only one policy factor underpinning the proposed *Act*, and that another major rationale was the

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[4] This would be similar to the adoption provisions in the Manitoba *Child and Family Services Act*, C.C.S.M. 1985–86, c. C80 [hereinafter C.F.S.A.], which in s. 16 imposes upon a birth mother a seven-day waiting period following the birth, during which she is legally unable to relinquish maternal rights or custody.

[5] See Part V(B).

moral conviction that trafficking in reproductive capacity, the notion of the so-called "womb for rent", is intrinsically wrong and should neither be sanctioned nor permitted by the Canadian government. Realistically, this is an alternative interpretation of the autonomy argument—a more paternalistic application, based in part on the feeling that contractual surrogacy somehow objectifies women by stripping them of their autonomy with respect to their own bodies for a nine month period. Government acquiescence to a relationship within which a woman's reproductive capacity is used only as a means to the ends of others could signify approval of the notion that this capacity may properly be considered a marketable asset.

While it is not difficult to imagine the resulting social outcry should the government allow surrogacy situations where women could become "baby machines" and thereby lose the right to physical self-determination, it is again important to note that courts already seem reluctant to allow the rights of either the fetus or a third party to override the bodily autonomy of a pregnant woman, at least where tort claims are concerned. With this judicial tendency in mind, it seems likely that the contractual imposition of excessive restrictions on bodily autonomy or self-determination might be found unreasonable or unconscionable and would not be upheld, even in the absence of legislation to this effect. On the other hand, it is difficult to conceive of any compelling reason to prohibit all contractual surrogacy; it is possible that some such arrangements might well be to the mutual advantage of the parties and not unreasonably restrictive of the surrogate mother's freedom. To the extent that Bill C-47 would have made even this type of arrangement illegal, it might be argued that its policy mandate was exceeded. Fortunately, if the will exists, the government now has another opportunity to devise new legislation on gestational surrogacy. It would do well to consider all sides of the various arguments—as well as the existing common law framework, however sparse—before acting.

III. THE COMMON LAW POSITION ON SURROGACY CONTRACTS

EVEN IN THE ABSENCE of specific legislation to this effect, it appears unlikely that a surrogacy contract would be enforceable in Canada. Due to the lack of jurisprudence on surrogacy in Canada, it remains unclear whether such contracts would be considered either under traditional contract law or, because of their unique subject matter, family law. Regardless of where the matter eventually falls, there seem to be major barriers to the enforceability of these contracts. We now turn to consider the legal position as it might be construed in each of these areas.

A. Contract Law

1. Generally

If the courts were to choose to consider surrogacy contracts within the parameters of contract law, there would be ample reason to treat such contracts as unenforceable. An individual's freedom to contract is not wholly unrestricted. For example, the courts may refuse to enforce a contract on such grounds as misrepresentation, incapacity, or public policy considerations, depending on the circumstances of each individual case.

It is reasonable to expect that courts would find surrogacy contracts contrary to public policy and therefore unenforceable. Where a contract seems to violate public policy, it will be enforced only if the desirability of enforcement is found to outweigh other considerations important to society.[6] Several fundamental elements of a gestational surrogacy contract present a number of policy issues which support a finding of unenforceability by Canadian courts. First, there exists in both commercial and private surrogacy arrangements a substantial risk of exploitation of the surrogate. It is believed, for example, that financially disadvantaged women are exploited because they are "forced" to bear a child for money. Additionally, the surrogate is subjected to the physical and psychological risks of pregnancy.[7] Second, the child itself is at risk due not only to the severing of the bond with the surrogate mother, but also to unexpected developments which may thwart the deal and thrust the child, upon birth, into a hostile environment.[8] Third, the surrogacy contract may not consider, as its primary goal, the best interests of the child.[9] Fourth, and finally, it has been suggested that surrogacy contracts contribute to the destruction of the traditional family unit.[10] Assuming that this traditional unit is to be seen as an intrinsic good, jeopardising it would again weigh against public policy.

2. Elements of a surrogacy contract

A typical gestational surrogacy contract consists of three elements which must be satisfied for both parties to have fully performed their obligations. Separate analysis of each element leads inescapably to the conclusion that, even without

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6 See Waddams, *supra* note 3 at 380.

7 A. Serratelli, "Surrogate Motherhood Contracts: Should the British or Canadian Model Fill the U.S. Legislative Vacuum?" (1993) 26 Geo. Wash. J. Int'l L. & Econ. 633 at 643.

8 *Supra* note 7 at 644.

9 See Part III(B).

10 F. Daunt, "Exploitation or Empowerment? Debating Surrogate Motherhood" (1991) 55 Sask. L.R. 415 at 419. See also *supra* note 7 at 643.

the enactment of legislation or a finding of unenforceability based on public policy, such contracts are likely unenforceable under traditional contract law.

First, a custody transfer must take place from the gestational mother to the intended parents. In a traditional surrogacy contract,[11] the transfer of custody occurs upon the birth of the child, the surrogate mother generally retaining no right of revocation.[12] While s. 16(2) of the Manitoba *Child and Family Services Act*[13] provides that an unmarried or separated[14] woman may surrender guardianship of the child to an agency, this provision does not specifically contemplate such a transfer occurring pursuant to a term in a surrogacy contract. More importantly, every s. 16(2) custody transfer is restricted by s. 16(5), which requires a seven-day waiting period following the birth of the child before any such transfer may occur.

The policy behind this scheme takes into account the extremely emotional nature of the decision and the vulnerability of the mother under these circumstances. The legislation further provides that the mother may revoke her consent within one year of the agreement, or until the child has been placed in a home for the purpose of adoption.[15]

As mentioned above, surrogacy contracts do not provide the surrogate mother with a right of revocation. In addition, such contracts generally do not allow for any "waiting period" after the birth of the child before custody can be transferred from the surrogate to the intended parents. For these reasons, the surrogacy contract probably violates Manitoba law regarding transfer of custody. Even if not found to be an offence, these violations would bolster the court's motives for finding the contract contrary to public policy and therefore unenforceable.

Second, gestational surrogate contracts require that the intended parents pay compensation to the gestational surrogate. This term may violate existing legislative provisions which prohibit for-profit transactions involving children. The application of such restrictions will depend on how the surrogacy arrange-

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11 This element may be inconsequential in a gestational surrogacy contract depending upon the determination of custody. While there obviously need not be a transfer of custody if the intended parents are deemed to be the legal parents upon birth, if the courts grant this distinction to the gestational surrogate instead, then the same considerations as discussed in reference to a traditional surrogacy will apply. See Part IV.

12 *Supra* note 10 at 425.

13 Supra note 4.

14 "Separated" is defined in s.16 of the C.F.S.A. as having "ceased cohabiting with her husband 300 days or more before the child was born."

15 *Supra* note 4 at s. 16(10).

ment is characterised.[16] For example, s. 63 of the Manitoba *Child and Family Services Act*[17] states:

> Penalty for taking payment for adoption
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> 63. [Any] person ... who gives or receives or agrees to give or to receive any payment or reward, either directly or indirectly;
> (a) in consideration for the adoption of a child ... ; or
> (b) to procure or assist in procuring a child for the purpose of adoption;
> commits an offence punishable on summary conviction and is liable to a fine not less than $1 000 and not more than $10 000, or to imprisonment for a term not exceeding 6 months, or both.

The language of s. 63 is broad enough to encompass all parties in a gestational surrogacy contract. If the contract is characterised as the procurement of a child for the intended parents with the end result being the adoption of the child, then the agreement appears to be illegal under the *Child and Family Services Act*.

Third, the intended mother must adopt the child. Once again, depending upon the court's determination of custody, this element may not be at issue in a gestational surrogacy contract.[18] However, in a traditional surrogacy contract or a gestational surrogacy contract where the court determines the surrogate to have custody after birth, the adoption is intended to occur pursuant to a clause in the contract. Through this the parties to the contract would conceivably avoid the usual bureaucracy of the adoption process. A typical "transfer clause" contains a promise to transfer custody of the baby and specifies where and when the necessary paperwork is to take place.[19] As part of the surrogacy contract, the transfer clause is signed prior to birth (and typically prior to conception). Section 58(3) of the *Child and Family Services Act*[20] provides:

> No consent until 10 clear days after birth.
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> 58(3) No person shall execute or give consent to the adoption of a child ... and no person shall take, request or solicit the consent of any person to the adoption of a child until the expiration of at least 10 clear days after the date of the birth of the child.

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16 *Supra* note 10 at 422.

17 *Supra* note 4.

18 The court may conclude that, since in the case of a gestational surrogacy the intended parents donate all genetic material, there is not an actual "adoption" to take place because the intended parents are the presumed legal parents. See Part IV.

19 A. Bissett-Johnson and C. Cavett, "The Legacy of Baby M: Drafting and Contractual Problems" (1987) 2 Can. Fam. L.Q. 328.

20 *Supra* note 4.

Once again, this scheme, in allowing the birth mother a period of time to consider the ramifications of her decision, appears designed to take into account the emotional nature of the decision.[21] An adoption which proceeds under a surrogate contract is in marked violation of this provision. As a result, the contract and adoption transaction, as a term of the contract, would in all likelihood be illegal and unenforceable.

3. Family law

It has been suggested that despite the fact that surrogacy agreements usually take the form of a traditional written contract, it is inappropriate to deal with them under the contract law. Fundamentally, their subject matter does not fall under the traditional contract arrangement; neither goods nor services are involved, but rather the legal relationships of adults to children. In agreeing to alter their relationships to the child according to their own desires—as expressed prior to the conception of the child—the surrogate mother and the intended parents purport to treat the child like a chattel or a commodity. However, the Supreme Court of Canada has ruled that "a child is not a chattel in which its parents have a proprietary interest; it is a human being to whom they owe serious obligations."[22] This statement makes it clear that child custody is not a matter within the province of contract law; thus, to the extent that surrogacy contracts include clauses that would assign custody rights to the intended parents, these arrangements might more properly be dealt with under family law principles.

In family law, child custody is determined only by the best interests of the child,[23] and because these interests might not be achieved by giving effect to the wishes of adults, the legislature has empowered the courts to override the decisions of adults on this basis. As such, those provisions of surrogate contracts which would apparently transfer custody and responsibility for the child according solely to the desires and intentions of the contracting parties would be inconsistent with the family law principle that such decisions and actions must be guided by and made in the best interest of the child. Since a surrogacy contract is made prior to conception, and thus before the interests of the child could possibly be assessed, it could only be made in the interests of the adult participants.

In addition to the best interests of the child principle, any attempt to transfer maternal rights will be subject to family adoption legislation. As noted

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21 See discussion of transfer of custody, Part III(A)(2).

22 *K.K.* v. *G.L. and B.J.L.* (1985), 44 R.F.L. (2d) 113 (S.C.C.), (*sub nom. King* v. *Low*) [hereinafter *B.J.L.*].

23 See, for example, the Manitoba *Family Maintenance Act*, R.S.M. 1987, c.F20, which states that "the best interests of the child shall be the paramount consideration of the court."

above, the Manitoba *Child and Family Services Act* makes any payment for adoption illegal[24] and requires a seven-day waiting period before the birth mother may relinquish maternal rights.[25] If considered under family law, surrogate contracts appear to violate these two fundamental tenets of the statute and would probably be deemed unenforceable by the courts.

Despite this probable finding of unenforceability, the unique subject matter of surrogate contracts makes them better suited to be dealt with under family law. A surrogacy contract is not a commercial matter,[26] and traditional contract law was developed in commercial contexts by drawing on commercial values.[27] The history of the common law makes it clear that traditional doctrines work best in their original contexts, within the realm of legal relations originally contemplated. Addressing surrogacy contracts, a clearly non-commercial matter, within the field of contract law necessarily results in stretching and distorting traditional doctrines in an attempt to accommodate this unique subject.[28] By contrast, family law deals extensively with issues such as custody of children.[29] The flexibility and responsiveness already available in this field of law allow for surrogate contracts to be better dealt with here than under contract law.

IV. Determination of Custody of the Child

A. Generally: The American Example

Although it seems likely, in light of the foregoing, that a surrogacy contract would be unenforceable in Canada, this would not change the fact that a child will have been born whose custody must be determined. In a gestational surrogacy, the issue of custody will only arise when the original arrangements (contractual or otherwise) are not adhered to by one of the parties. For example, after carrying the fetus for nine months and then giving birth, the surrogate mother may feel an emotional connection that renders her unwilling or unable to hand the child over to the intended parents. This conflict might be considered analogous to the situation where a child is born out of wedlock to a couple which disagrees as to who should have the legal right to raise the child. Typi-

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24 *Supra* note 4 at s. 63.

25 *Supra* note 4 at s. 16(5).

26 *Supra* note 22.

27 R. Barnes, "Delusion by Analysis: The Surrogate Mother Problem" (1989) 34 S. Dakota L. Rev. 1 at 11.

28 *Supra* note 27 at 11.

29 C. Davies, *Family Law in Canada*, 4th ed. (Ottawa: Carswell, 1984).

cally, such conflicts are resolved by the courts by reference to the "best interests of the child" test, but other recognised family law principles may come into play as well.

In Manitoba, the *Family Maintenance Act*,[30] at s. 19(2), starts with the proposition that the court is free to make a determination, on the balance of probabilities, of whether a woman is or is not the mother of a given child. While this would certainly be applicable to the gestational surrogacy scenario, there has yet to be a case of gestational surrogacy in Manitoba which has necessitated the application of this section.[31]

In order to highlight the factors which a court may consider in making a maternity determination, it is helpful to look to the American case of *Johnson* v. *Calvert*,[32] where a California trial court dealt with the question of maternity in a gestational surrogacy context. In that decision, Parslow J. held that the genetic mother, and not the surrogate, was the legal mother of the child. The judge based his reasoning on the conclusion that "who we are and what we are ... is a combination of genetic factors,"[33] and, therefore, that the egg provider has a higher claim to rear and make decisions for a child than a mere gestational "host."

While the court's decision may appear to provide a simple, efficient method of resolving the custody issue, there are valid criticisms of this approach, which would determine custody solely based upon genetics. First, it is possible that a policy of extending greater rights and responsibilities to individuals grounded solely on their genetic linkage reinforces the stigma of adoption and could provide incentive for de-adoption litigation. Second, if taken to the bounds of absurdity, even anonymous donors of genetic material could retain parental rights unless such rights were explicitly relinquished so as to allow proper adoption of the child. Finally, the *Calvert* decision also raises tort law implications. Adopting the trial court's reasoning, a gestational surrogate could potentially be held liable for any injuries to the fetus that might occur as a result of her behaviour during the pregnancy.[34]

These arguments are countered by commentators who favour the genetic approach applied by the court in *Calvert*. This line of thinking appears to follow a "lesser of two evils" tack in that using genetics as the primary determinant of parenthood is preferable to a contract-based approach which appears to define

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30 *Supra* note 22.

31 This section has never been judicially considered.

32 No. 63-91-90 (Cal. Super. Ct. 22 Oct. 1990).

33 *Supra* note 32 at 7–8.

34 The questions both of parental rights of sperm donors and of tort law implications are discussed under "Legal status of the gestational surrogate mother," See Part V(C).

family relations as negotiable ties between otherwise unconnected, autonomous individuals. A further argument in favour of genetic determination asserts that such a process avoids any potential conflict with laws proscribing baby selling; the egg provider is already the legal mother, so she cannot buy what is already hers. Finally, in terms of the best interests of the child analysis, a genetic determination of parentage reduces the possibility of the child experiencing confusion over identity or genetic heritage.

The *Calvert* decision was further refined at the appeal level, where the court turned to legislation as a means for identifying the process to be used in determining parentage.[35] The California *Uniform Parentage Act* (*U.P.A.*)[36] creates two ways for a woman to establish the existence of a mother-child relationship: presenting proof of having given birth to the child, or presenting proof of genetic relationship to the child through blood-test evidence. However, the court interpreted the blood-test determination of maternity to be decisive. Under the court's interpretation of the *U.P.A.*, a woman must first establish a genetic link with the child before being considered the "natural mother" by virtue of having given birth to the child.

This application of a genetic approach to the determination of parentage has yet to be dealt with by Canadian courts. While current family law legislation contains provisions for determining paternity through a blood test,[37] as yet no evidence exists that courts will make use of such a test for guidance in determining a child's natural *mother*.

On further appeal, the California Supreme Court affirmed the decisions of the lower courts that the intended mother, not the gestational surrogate, was the "natural mother" of the child.[38] This determination, however, was arrived at by way of a markedly different interpretation of the *U.P.A.* While the court agreed with the Court of Appeal that maternity could be established either by evidence that the woman gave birth to the child or by evidence that she was genetically related to the child, it did not view the genetic option as determinative, as was concluded at the appeal level. Accordingly, both the gestational surrogate and the intended mother presented acceptable proof of maternity.

Since California law recognises only one mother,[39] however, the court was faced with the task of determining which of the two women was the child's "natural mother." The Supreme Court eventually validated the claim of the intended mother by looking to the parties' intentions as manifested in the surro-

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35 286 Cal. Rptr. 369 (Ct. App. 1991).

36 Cal. Civ. Code, ss.7000–7021.

37 *Supra* note 23 at s. 21(1).

38 851 P.2d 776 (Cal. Sup. Ct. 1993).

39 *Supra* note 38 at 781.

gacy agreement. Simply, the court based its decision on the conclusion that "the child would not have been born but for the efforts of the intended parents.[40] The court also wandered into the realm of a "best interests" test by holding that the interests of the child are "unlikely" to run contrary to those of the adults who chose to bring the child into being.

In his dissent, Kennard J. adequately summarised the concerns arising out of the majority's reliance upon the "intent" of the intended mother as the determining factor in resolving the issue of maternity. Such an approach was not flexible enough to deal with unforeseen circumstances, in his opinion, and would always favour the intended parent over the gestational surrogate. To this, we would only add that appearing to base the determination of custody on the *contractual* intentions of the parties triggers many of the same concerns raised by dealing with surrogacy contracts under traditional contract law.

More importantly, Kennard J. strongly asserted that the majority's approach devalued the substantial claims of motherhood by a gestational surrogate whose biological contribution of carrying a child for nine months and giving birth was as much an assumption of parental responsibility as the decision by the intended parents to enter into a surrogacy arrangement. In his view, applying the majority's view could effectively render the gestational surrogate no more than a mere container or a breeding animal capable only of following the directions of the intended parents.

B. Canadian Jurisprudence

The dissent in *Calvert* at the Supreme Court level is indicative of the result at which Canadian courts are apt to arrive if faced with a similar situation, absent specific legislation along the lines of Bill C-47. Although Canadian courts have yet to address the specific issue of custody stemming from a gestational surrogacy situation, there have been two instances where the courts have dealt with custody issues arising from traditional surrogacy contracts. In both instances the courts turned to a consideration of the child's best interest or public policy, and away from a simple analysis of genetic links.

In *Re Ontario Birth Registration Number 88-05-045846*,[41] the Family Division of the Ontario Provincial Court dealt with a situation where the surrogate mother was the daughter of the intended mother and was impregnated, by way of artificial insemination, with the sperm of the intended father (the surrogate's soon-to-be step-father). The intended parents made application to the court for

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[40] *Supra* note 38 at 782.

[41] [1990] O.J. No. 608 (Q.L.) (Ont. Prov. Ct. (Fam. Div.)).

an order allowing them to adopt the child in accordance with the surrogacy contract.[42]

In making its decision, the stated goal of the court was to arrive at a result that would be in the best interests of the child. The factors considered included the surrogate mother's having received independent legal advice, the fact that the surrogate mother no longer resided with the intended parents, and the 16 months during which the surrogate mother had been able to back out of the surrogacy contract.[43] The court concluded that the adoption application should be granted, as such a result would be in the child's best interests.

By not contesting the adoption, the surrogate mother allowed the court to turn to general family law principles as a method to resolve the custody issue. Unlike the *Calvert* case in California, the surrogate situation could be addressed as a typical adoption process, albeit involving a somewhat unusual scenario. However, it is reasonable to conclude that even if the surrogate mother had contested the adoption application, the analysis employed by the judge would have been the same. The consideration of the "best interests of the child" would simply have taken into account the additional factor of the birth mother's desire to retain custody of the child.[44]

In the case of *Re Fink*,[45] the court again dealt with an application for custody of the unborn child by the intended father. The surrogate mother had volunteered to be artificially inseminated with the sperm of the homosexual intended father. The arrangement proposed to place the child in the care and custody of the intended father immediately upon its birth. In addition, the agreement contained a provision that the child would be born two weeks early by caesarian section to be performed by a doctor who was a friend of the applicant. The preemptive custody application was motivated by fear that the child would be apprehended by the Ministry of Social Services upon birth, since the surrogate mother had recently pleaded guilty to manslaughter (in an unrelated incident) and was awaiting sentencing.

The court, in denying the application, chose to decide the application on "public interest" grounds rather than on genetics or any other mode of custody determination. The basis for denial rested with the intention behind the caesarian section provision of the agreement. The sole purpose of this medical pro-

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42 The court dealt with and dismissed any application of the *Criminal Code*, R.S.C. 1985, c.C-46 (incest) or the *Child and Family Services Act*, 1984, S.O. 1984, c.55 (unusual relations).

43 In *obiter*, the court commented that the surrogate motherhood agreement "would probably not be binding anyway."

44 The facts as set out in the report are insufficient to found a discussion of the potential outcome of the case had the application been contested by the surrogate mother.

45 [1994] B.C.J. No. 485 (Q.L.)(B.C. Prov. Ct.).

cedure was to circumvent the social system which would normally be present at birth to ensure the safety and best interests of the child. The court refused to accede to such an ouster of the unborn child's normal protections. In much the same manner as in the Ontario case, *supra*, it was unnecessary for the court to address the custody issue which would have arisen had the surrogate mother contested the custody application. Again, though, it is reasonable to conclude that the court would have applied the "best interests of the child" method in resolving the custody application under current legislation.

V. TORT LIABILITY OF THE GESTATIONAL SURROGATE MOTHER

A. Generally

Just as the unenforceability of surrogacy contracts does not affect the need to develop a method of determining custody of children born out of surrogacy arrangements, neither does it affect the tort issues arising out of such arrangements. It is likely that Canadian courts will eventually be obliged to address the rights and responsibilities of the parties involved in a gestational surrogacy arrangement. The issue of contractual obligations aside, should a tort action lie against a gestational surrogate if her actions during her pregnancy result in an injury to the child?

Historically, the law has been unclear as to whether a child may succeed in an action against a mother who is at the same time her genetic, gestational, and rearing parent. One reason for this uncertainty is that a number of factors mitigate against the bringing of such actions in the first place. First, there is little financial incentive to pursue such an action in the ordinary case; unless liability insurance is involved, the suit is unlikely to alter the overall financial picture of the family. Second, there are compelling social and emotional reasons to avoid suing one's parent (and, obviously, for a happily-married couple to sue each other on behalf of their child).[46]

However, these disincentives do not exist in the surrogate mother situation, as the alleged tortfeasor is not usually a member of the family. Moreover, it seems obvious that potentially tortious behaviour is more likely on the part of a gestational surrogate than a natural mother because of the competing interests at play in the former situation; although the priorities of a natural mother (and, it should be observed, of intended parents) might be expected to rest squarely with the well-being of the fetus, the surrogate mother might well place her own health or well-being first. Where this type of maternal-fetal conflict exists, it is quite conceivable that the surrogate might act without the knowledge or approval of the intended parents. Where these actions result in injury to the child,

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[46] K.A. Bussel, "Adventures in Babysitting: Gestational Surrogate Mother Tort Liability" (1991) 41 Duke L.J. 661.

the intended parents may be inclined to sue the surrogate, whether to help defray the costs of caring for the injured child, to compensate the child for his or her loss, or even to attempt to punish the surrogate mother for her misconduct.[47]

B. Tort Liability for Prenatal Injuries

When fetal injuries occur as a result of the behaviour of the gestational mother (whether in a traditional pregnancy or in a surrogate arrangement), the ability to recover rests on finding a duty of care that was breached by the mother's conduct. Although there has been little doubt that a child is entitled to recover for prenatal injuries suffered at the hands of a third party,[48] and that the parents of a child so harmed may also have a cause of action against the third party,[49] it is not at all clear whether such a duty exists on the part of the mother herself, at least in Canada. In fact, only recently have American courts begun to recognise such a duty, and this recognition has been somewhat controversial. In *Grodin* v. *Grodin*,[50] a child developed discolouration of the teeth as a result of his mother's use of tetracycline during an unexpected pregnancy, after being assured by her doctor that it was impossible for her to become pregnant. It was held that a child may have a cause of action against his or her mother for injuries sustained *in utero*—thus holding mothers to the same liability standard as third parties concerning prenatal injuries.

A different approach, however, was taken in *Stallman* v. *Youngquist*,[51] where a fetus was injured in a car accident caused by the negligence of its mother. In holding that no cause of action existed for a fetus for the unintentional infliction of prenatal injuries, the court stated that while liability of third parties furthered the interests of both mother and child while not abrogating the mother's ability to control her own life, it would be an unreasonable infringement of the bodily autonomy of the mother to scrutinise her behaviour during pregnancy by holding her liable for unintended injuries to the fetus. In this vein, the court strongly criticised the *Grodin* court for its apparent ignorance of the mother's rights.

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47 It should be noted, however, that to justify an award of punitive damages, the surrogate's actions would likely need to have been intentional and of a high-handed, oppressive or malicious character; see *Hill* v. *Church of Scientology*, [1995] 2 S.C.R. 1130.

48 See, for example, *Duval et al.* v. *Seguin et al.* (1972), 26 D.L.R. (3d) 418 (Ont. H.C.), and the cases cited *infra* note 57.

49 See, for example, *Cherry (Guardian ad litem of)* v. *Borsman* (1992), 5 C.C.L.T. (2d) 243 (B.C.S.C.).

50 301 N.W.2d 869 (Mich. Ct. App. 1980).

51 531 N.E.2d 355 (Ill. Sup. Ct. 1988).

The *Stallman* approach would probably be closer to the position that might be taken by Canadian courts if faced with a similar dilemma. In *Winnipeg Child and Family Services* v. *G.(D.F.)*,[52] the Manitoba Court of Appeal overturned the trial court's decision to exercise the court's *parens patriae* jurisdiction to grant an injunction requiring a pregnant woman with a history of solvent abuse to enter a treatment program and committing her to the custody of the applicant agency pending trial. In disposing of the agency's argument that the mother's allegedly tortious behaviour ought to be restrained, the court held, *inter alia*, that the conflict between the rights of the mother and those of the child should be resolved in favour of the mother. The court recognised the traditional aversion of the common law against "inquisition into alleged parental indiscretions during pregnancy, like excessive smoking, drinking, or taking drugs,"[53] and noted that this aversion is due not only to respect for the mother's rights, but also to concern that the mother may grow to resent her child if forced to deviate from her chosen course of behaviour.[54]

It might be observed that the latter consideration should be of little concern in surrogacy arrangements, where the gestational mother is not usually expected to have any significant post-natal contact with the child such that resentment could be problematic. When the mother's intention is to surrender the child immediately upon birth, the court might properly be concerned with ensuring that the fetus is not unduly harmed by the mother's irresponsible prenatal behaviour.

In a very recent judgment, the Supreme Court of Canada upheld the decision of the Manitoba Court of Appeal.[55] McLachlin J., writing for the majority, based her decision largely upon the proposition that any rights or interests a fetus may possess remain incomplete until birth. As such, an action could not be brought on behalf of the fetus to restrain the mother from potentially harmful actions. Moreover, the Supreme Court confirmed that the *parens patriae* jurisdiction of the court does not extend to unborn children. Any change to the law in this regard, it was held, is properly left to the legislature.

Significantly, McLachlin J. also acknowledged that "the law of tort as it presently stands might permit an action for injury to the fetus to be brought in

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[52] (1996), 138 D.L.R. (4th) 254 (Man. C.A.), rev'ng (1996), 138 D.L.R. (4th) 238 (Q.B.) [hereinafter *G.(D.F.)*].

[53] *Supra* note 52 at 260, quoting Fleming, *The Law of Torts*, 8th ed. (Sydney: The Law Book Co. Ltd., 1992) at 168.

[54] See also *Re F (in utero)*, [1988] 2 All E.R. 193 (C.A.), a case with similar facts and holdings to those in the *G.(D.F.)* case. As quoted in *G.(D.F.)*, May L.J. remarked in *Re F* that a conflict between the rights of the mother and the unborn child would be "most undesirable."

[55] [1997] S.C.J. No. 96 (QL).

the child's name after birth."[56] She cited the cases of *Dobson* v. *Dobson*[57] and *Lynch* v. *Lynch*[58] as instances in which a child, once born, has brought action against his or her mother for prenatal injuries. However, she was equally clear that no such action has ever been brought on behalf of the fetus against the woman carrying it.

The *G.(D.F.)* case is perhaps most instructive in displaying the court's overriding concern regarding the mother's freedom to deal with her body as she sees fit. This policy is applicable not only to the "traditional" mother but also to the gestational surrogate, whose bodily integrity is *prima facie* every bit as fundamental to her personal autonomy. If the court is unwilling to subordinate the mother's rights even to those of the fetus, then it seems highly unlikely that the economic or emotional interests of the intended parents would tip the scales in favour of holding the gestational surrogate liable in tort.[59] Most likely, any additional duties owed by the gestational surrogate would have to originate in contract—an avenue equally unlikely to ground a successful claim.

C. The Legal Status of the Gestational Surrogate Mother

The foregoing is speculative, and it remains undecided both in Canada and in the U.S. whether a duty of care is owed by the gestational surrogate to either the fetus or the intended parents. In eventually making this determination, a great deal could turn on the legal status of the surrogate: whether she is in any real sense the mother of the child or whether she is merely a human incubator in which the fetus grows and prepares for birth. Prior to the present age of significant advancements in reproductive technology, the law found it necessary to recognise only one mother and one father for any given child. The presumption in favour of the birth mother has generally been irrebuttable. However, the growth of surrogate arrangements has made the expansion of the traditional definitions inevitable. This is especially so in the case of the gestational surrogacy, where the court is confronted with a birth mother who has no genetic

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56 *Supra* note 55 at para. 17.

57 (1997), 148 D.L.R. (4th) 332 (N.B.C.A.), leave to appeal granted, [1997] S.C.C.A. No. 406 (QL).

58 (1991), 25 N.S.W.L.R. 411 (C.A.).

59 Major J., dissenting (Sopinka J. concurring), would have extended the *parens patriae* jurisdiction to permit the court to act in the best interests of the fetus. In "extreme cases, where the mother's conduct has a reasonable probability of causing serious and irreparable harm to the unborn child, and no other reasonable means of treatment exists," he would permit judicial intervention to restrain the mother's actions. In his view, the "terrible harm" likely to be caused in the absence of such intervention would outweigh what he characterised as a "slight" imposition upon the mother's liberty.

connection to the fetus while the intended mother does have such a connection.

Canadian courts have yet to deal with this scenario. Even in the U.S., where surrogacy arrangements have given rise to more litigation, cases dealing with the rights of the gestational surrogate have been few and far between. However, the *Calvert* case[60] is a good example of the "traditional" approach to such cases. Although *Calvert* dealt with the contractual rights of the parties, its definition of parenthood has implications for tort law as well; if parentage is defined through genetics alone, a gestational surrogate mother stands as a third party to the fetus she carries and would almost undoubtedly be liable for any injuries to the fetus that occur as a result of her behaviour during the pregnancy.[61] Notwithstanding the complete absence of Canadian jurisprudence on issues of surrogacy, the traditional approach is consistent with the tendency of Canadian courts to look to genetics in order to determine parentage in matters of family law.[62]

This approach is appealing in its recognition of the critical role played by the intended parents in the conception of the child and the deleterious effects that might be brought to bear by the surrogate mother's tortious behaviour. Applied formalistically, however, it could produce confounding results. If parentage is determined solely by virtue of genetics, then could it follow that even an anonymous sperm donor could conceivably assert parental rights, and that people who conceive babies using donated genetic material would not be considered the parents of these children unless the donor or donors relinquished all parental rights after the birth of the child, thus enabling the intended parents to adopt the child?

While this would be a perversion of the donor system, recent Canadian jurisprudence has made it clear that this result would be unlikely. In *Zegota* v. *Zegota-Rzegocinski*,[63] the court rejected the wife's application for a declaration that her ex-husband was not the father of her child since the child had been conceived using sperm acquired through a donor program. While recognising that there was no genetic connection between the father and the child, the court found that he satisfied the criteria of a "father" in contemporary society through his emotional connection to both the child and the mother at the time of conception. Resorting to the "best interests of the child" test, the court determined

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60 *Supra* note 32.

61 *Supra* note 46 at 667.

62 See, for example, *D.R.* v. *J.W.* (1991), Sask. R. 46 (Q.B.).This is distinct, however, from the determination of custody, which is subject to the "best interests of the child" test; *supra* at 16.

63 [1995] O.J. No. 204 (Q.L.) (Ont. Ct. (Gen. Div.)).

that the ex-husband should not be denied the status of father despite his lack of genetic connection. Thus, there is little concern that Canadian courts will apply the genetics test in a rigid or inflexible manner when to do so would lead to absurd or unfavourable results.

Still, the concern remains that the application of the traditional approach entails insufficient recognition of the pivotal role played by the surrogate mother in the development of the fetus. A more "modern" approach, as proposed by Karen A. Bussel, would found a more expansive definition of motherhood upon the physical and emotional connection between mother and child, causing the gestational surrogate to be considered a parent during pregnancy. This definition "recognises that the nurturing and supportive role that the surrogate mother fulfils during gestation is identical to the role that any other mother plays during pregnancy," and that "the surrogate mother's active connection to the fetus should give her a higher priority than that afforded by the passive genetic link to the intended parents," whose actual relationship with the fetus is indirect at best.[64] This interpretation of the surrogate's role would endow her with the same personal freedom enjoyed by any pregnant woman.

Yet if the traditional approach is too insensitive to the interests of the surrogate mother, the modern approach is almost shocking in its minimisation of the role of the intended parents. To allow the surrogate mother complete and unfettered freedom to act in a manner that might jeopardise the well-being of the child is to ignore the duty of care owed by the surrogate to the intended parents, whose economic loss and emotional distress would be foreseeable results of the surrogate's negligence (or, worse yet, her intentional tortious abuse of the fetus). This foreseeability would seem to point to the existence of a duty of care, subject only to the possibility that overriding policy concerns might serve to minimise the scope of the duty or obviate it altogether.[65] Some such policy concerns are discussed in detail below.

D. The Doctrine of Parental Tort Immunity

American courts have traditionally recognised a doctrine of parental tort immunity which does not ignore the commission of a tort but still excuses liability because of a deemed immunity flowing from the special circumstances of the parent-child relationship.[66] This doctrine was first recognised in the case of *Hewlette* v. *George*,[67] where the court held that although the parents had

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64 *Supra* note 46 at 668–669.

65 This is the two-branch test of duty of care adopted by the Supreme Court of Canada in *City of Kamloops* v. *Nielsen* (1984), 10 D.L.R. (4th) 641.

66 *Supra* note 46 at 672.

67 9 So. 885 (Miss. Sup. Ct. 1891).

wrongfully committed their child to an insane asylum, to permit a child to sue a parent for personal injuries would jeopardise "the peace of society and of the families composing society." Later justifications for the doctrine have included the financial welfare of other children in the family,[68] the need for parents to control and discipline their children without fear of legal consequences,[69] and the potential that any damages awarded to the plaintiff child could revert to the offending parent should the child die intestate without having married or sired children of his own.[70]

Recent cases have significantly abrogated the immunity doctrine, with the extent of the abrogation varying from jurisdiction to jurisdiction. For example, California has constructed the standard of the "reasonably prudent parent" as a limit to liability,[71] while Wisconsin has held that a parent will not be liable for injuries arising out of an exercise of parental authority or ordinary parental discretion with respect to the provision of the necessities of life.[72] As a result, it is unclear to what extent the doctrine survives in the U.S.; clearly, courts have exhibited a reluctance to apply it blindly to the complex parent-child relationships of modern society.

The parental tort immunity doctrine has never been recognised in Canada. Moreover, it seems clear that even if the doctrine were applicable in some cases, the surrogate paradigm would not be one of them. Unless the surrogate decides to keep the baby, the doctrine could apply only during the course of the pregnancy, and even then only if the "modern" approach to the status of the surrogate were applied. Even so, there would be little justification for the application of the doctrine. None of the traditional rationales apply to the relationship between the child and the surrogate mother; as the surrogate is not the rearing parent, there need be no concern about disharmony or depletion of family assets. If the court were to go so far as to apply such considerations to a gestational surrogacy, it would in effect be encouraging the surrogate mother to revoke her agreement to surrender the child upon birth—and even if she has the right to do so, it would hardly be sound policy for the court to actively endorse such a practise. As such, parental tort immunity would seem to provide no real protection for the rights of the gestational surrogate.

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68 *Roller* v. *Roller*, 79 P. 788 (Wash. Sup. Ct. 1905).

69 *Small* v. *Morrison*, 118 S.E. 12 (N.C. Sup. Ct. 1923).

70 *Supra* note 68.

71 *Gibson* v. *Gibson*, 479 P.2d 648 (Cal. Sup. Ct. 1971).

72 *Goller* v. *White*, 122 N.W.2d 193 (Wis. Sup. Ct. 1963).

E. Autonomy of the Surrogate Mother

The *G.(D.F.)* decision makes it clear that the court views the recognition of a cause of action by the child against its mother for prenatal injuries as an interference with the mother's rights of self-determination and autonomy. As noted above, these concerns are no less pronounced in the case of the gestational surrogate mother, whose bodily integrity would be circumscribed just as severely by the existence of such a cause of action. This is not due to the genetic connection—or lack thereof—between the gestational mother and the fetus, but rather to the fundamental importance of the compromised rights.

For this reason, it has been argued that gestational surrogates should be allowed to exercise the same freedom to make medical decisions enjoyed by the ordinary pregnant woman.[73] It has long been established in Canada that no one may be forced to submit to medical treatment without first giving informed consent. Why then, it is argued, should any mentally-competent pregnant woman (regardless of her personal circumstances) be required to delegate the right to make health care decisions to third parties, be they health care professionals, the courts, or in the case of the gestational surrogate mother, the intended parents? Yet this is precisely the effect that the imposition of a duty of care would have upon a gestational surrogate mother, who would be under constant scrutiny during the term of her pregnancy and forced to act only in the best interests of the fetus, as defined by one or more of the aforementioned third parties.

As an example, suppose that a gestational surrogate mother in her third trimester is advised by her doctor to enter the hospital for complete bed rest for the final six weeks of her pregnancy, due to severe preeclampsia (a form of high blood pressure induced by pregnancy). The surrogate is reluctant to do so, since this would obviate her ability to work and severely limit her capacity to associate with family and friends; however, the doctor makes it clear that failure to rest could have grievous effects on the health of the fetus, including the possibility of a dangerously premature delivery. Clearly, in the ordinary case it would be well within the rights of a woman to violate her doctor's orders, opting instead to incur the risks associated with her refusal to obey. However, if a duty of care is owed by the gestational surrogate either to the fetus or to the intended parents, her failure to heed the doctor's warnings could result in her being held liable in negligence for what would otherwise be legal activities.

The autonomy argument would hold that the surrogate should be free to act as she deems appropriate in all the circumstances of her particular case; there should be no fettering of her right to refuse medical treatment if she so chooses, and no third party should be entitled to exert undue influence on her decision. By contrast, fetal rights advocates would argue that by opting to carry the child to term (and not abort before the fetus becomes viable), the woman has ac-

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[73] *Supra* note 46 at 679.

cepted the primary responsibility of assuring the health of the baby and must therefore act only in its best interests, as evidenced by the impartial advice of the doctor.[74] If she fails to do so, the argument goes, she will have breached her duty to the fetus and could be liable in negligence.

In light of *G.(D.F.)*, it now seems clear that no cause of action would be sustainable against the surrogate mother for failing to act as prescribed by the doctor. To force her to adhere to a restrictive therapy regimen for the sake of the fetus—either by mandatory injunction or by the threat of later tort liability—would be to treat her right to control of her physical person as subordinate to the rights of the fetus or of the intended parents. *G.(D.F.)* makes it clear that this would be unacceptable, and such is now the law in Canada. Although a pregnant woman's medical decisions may have tragic results, there appears to be no principled way to justify the supreme reign of medical technology over individual rights.[75]

As part of its primary ratio, *G.(D.F.)* stands for the proposition that due to the importance of personal autonomy, the court will not restrain a pregnant woman from engaging in legal activities, even where the well-being of the fetus is thus endangered. Such legal activities would include, in addition to the refusal of medical treatment, the use of non-restricted substances (such as alcohol, tobacco and solvents) which are suspected or known to have deleterious effects on unborn children. The court has demonstrated an unwillingness to restrain the gestational mother from doing that which she has a legal right to do, as well as that which she is not prohibited by law from doing.

The situation might be different, however, where the endangerment to the fetus is caused by an *illegal* act of the gestational mother. For example, if the woman were proven to be persisting in the use of crack cocaine during pregnancy, which use is known to cause the fetus to become crack-dependant, tort liability might flow without impeding her personal autonomy because to use illegal drugs is not a choice which Canadian law entitles people to make. Since using cocaine is prohibited by law, no autonomy rights would be implicated by holding the woman responsible in negligence for injuries caused to the fetus by the use of crack. The same might be true for prenatal injuries suffered in a car

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74 *Supra* note 46 at 683.

75 *Supra* note 46 at 685.

accident caused by the pregnant woman's negligence in driving while under the influence of alcohol.[76]

VI. CONCLUSION

ALTHOUGH THERE IS LITTLE DOUBT that the issues raised by gestational surrogate motherhood will confront Canadian courts in due course, the current paucity of relevant Canadian or American jurisprudence makes it difficult to predict with any certainty how the law will come to regulate these arrangements. By arguing from analogy to cases involving adoption, ordinary custody applications, and negligence claims against third parties for prenatal injuries, it is possible to hazard an educated guess that surrogacy contracts are probably unenforceable in Canada and that tort claims against surrogate mothers by the children they bear or by the intended parents with whom they contract are unlikely to succeed. At bottom, this hypothesis is less the product of reasoned legal analysis than it is a reflection of emerging judicial policy: courts appear consistently reluctant to interfere with the bodily autonomy of a pregnant woman by subjecting her to undue scrutiny or by circumscribing her right to deal with her body as she chooses. Perhaps the high watermark for this policy in Canada is the recent *G.(D.F.)* case,[77] where the Supreme Court of Canada refused to restrain an expectant mother from engaging in an ongoing pattern of substance abuse almost certain to harm her fetus.

The Canadian government has previously attempted to address the potential for exploitation of surrogate mothers, and seems likely to do so again before long. However, to completely prohibit commercial surrogacy may not be the most effective way to preserve the autonomy of the woman. A more complete solution would be to permit surrogacy contracts but to treat them as voidable at the instance of the surrogate within a given time frame. This would avoid the unnecessary restriction of the woman's freedom of contract while, at the same time, permitting her to escape an improvident bargain and avoid having her bodily integrity subordinated to the rights of the intended parents or any other third party. Of course, if the government's intention is to address an even higher moral concern, that commercial surrogacy is intrinsically wrong and that

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[76] It is unclear what the result would be a situation such as R. v. *Drummond*, (23 December 1996), (Ont. Prov. Ct.) [unreported], the recent case in which a woman was acquitted of attempted murder after shooting herself in the vagina with a pellet gun, allegedly for the purpose of killing her fetus. The criminal law questions raised by the case, including the status of the fetus as a "person," are beyond the scope of this paper. However, due to the intentional nature of the mother's act, it seems logical that civil sanctions could flow as described herein, even though she was found not to have committed a criminal act; public policy would not likely allow her to escape civil liability.

[77] *Supra* note 55.

the reproductive capacity of a woman ought not to be a marketable commodity, then it would follow that only non-commercial surrogacy should be deemed legal, subject to very stringent restrictions.

No simple solutions to the many problems raised by gestational surrogacy exist, but the now-defunct Bill C-47 seems especially inadequate in this regard. For the thousands of Canadians who face reproductive challenges, the constantly improving technology of gestational surrogacy represents a new horizon of hope, a way to attain the previously impossible goal of producing genetically-related offspring. To these individuals and their supporters, it must seem frustrating to see Parliament move to restrict access to this procedure so severely. While advocates of bodily autonomy are quite justified in their concern that the woman's freedom of choice and action should not be subordinated to the rights of third parties, it appears unnecessarily paternalistic to impose an all-out ban on commercial surrogacy. In situations where bargaining power is equal or can be equalised (i.e., by independent legal advice or otherwise), where the bargain between the parties is not unreasonably improvident, and where the court is satisfied that the surrogate has not otherwise been exploited and that the agreed-upon arrangement is in the best interests of the child, it would seem unjust to override the contractual intentions of the parties, each of whose interests are served to varying degrees by the completion of the contract. To eliminate by statute any possibility of such a successful arrangement would be equally unjust and would itself constitute a violation of the woman's right to self-determination.

Thus, a better solution would be the enactment of a legislative scheme, where the surrogacy contract would be presumed enforceable unless avoided by the surrogate mother within a given time period or found unenforceable for the usual contractual reasons. Such avoidance would be without fault or penalty to any party,[78] but once the option to avoid were waived or had expired, the surrogate mother would be in breach of contract for failure to surrender custody of the child to the intended parents. The only other way for the surrogate mother to retain custody would be by persuading the court that it would not be in the best interests of the child to give effect to the contractual arrangement. This alternative would recognise the paramount concerns of family law with respect to the custody of children.

Once the contract has been completed, the surrogate mother would be recognised as a third party to the fetus and as such might properly be held liable for

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[78] By choosing to avoid the contract and retain custody, it is possible that the surrogate mother would be open to a claim for *quantum meruit* in recognition of the fact that the genetic material used in conceiving the child was not her own and *ex hypothesi* has some value. This may also be the case if custody were retained as a result of the application of the best interests test, although this would be somewhat less likely in light of the orientation of family law away from contractual arrangements of custody.

any unreasonable and deliberate acts undertaken during the course of the pregnancy which were calculated to cause harm to the fetus. Alternatively, she could be liable in breach of contract for failing to obtain the permission of the intended parents to undertake a questionable course of action (assuming that the contract included a clause requiring such consultation). In general, it would be possible for the surrogate mother to be held accountable for her actions because by affirming the contract she would be considered to be affirming her intention to stand as a third party to the fetus all along. By contrast, she would not be liable in contract if she chose to avoid the contract, and could be liable in tort only to the extent that a court would be prepared to hold her responsible *qua* mother for acts committed toward her own child; as has been seen, there is at best a very limited scope for such liability in Canada.

The foregoing is only a rough sketch of a possible scheme for the legal treatment of gestational surrogacy in Canada. Undoubtedly, it has its weaknesses and is admittedly open to attack, particularly to the extent that it would involve a retroactive weakening of the surrogate mother's autonomy once a fair and enforceable contract has been completed. It might also induce a surrogate mother who would otherwise have relinquished custody to avoid the contract for fear of civil liability for prenatal injuries. Still, it is suggested that the proposed scheme addresses the many and diverse concerns inherent in gestational surrogacy—accompanied by the recognition that it would be impossible to satisfy fully every such concern. Other solutions may prove to be even more effective compromises.

Gestational surrogacy, for all the ethical and legal concerns it has created, is a remarkable and valuable advance in reproductive technology. Naturally, the advantages and disadvantages are bound to be the subject of intense debate for years to come, but it is important for the Canadian legal system to come to grips with the issues surrounding it so that the many parties—surrogate mothers and intended parents alike—who stand to benefit from the procedure may proceed with some degree of certainty.