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ARTIFICIAL REPRODUCTION AND CHILD CUSTODY

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INTRODUCTION

Artificial reproduction centres upon four basic procedures:

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

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

iii) *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

iv) "surrogate motherhood," which involves the application of one of the three procedures described above or of natural intercourse, in order to produce a pregnancy in a woman who, pursuant to a prior arrangement, surrenders 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 by recourse to gamete (that is, sperm

or ovum) donation.(2) 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 gamete donor is involved, however, and when a third person acts as surrogate mother, legal issues are raised of who may be considered parents of the child, what rights and responsibilities the different actors have regarding the child, 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 both received historic support. They represent different public philosophies, however, and their applications can produce fundamentally different results in an individual case.

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 aiming to protect the young and the otherwise vulnerable from sexual exploitation, however, the law affords natural parents custody of their children ab initio, and intervenes only upon proof of children's needs of protection or upon parents' resort to the courts.

Over a century ago, the principle 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, for instance, Cotton L.J. observed that:

> ... 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.**(7)**

This language echoed the trial court's observation that:

> The father is the head of his house, he must have 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 ....**(8)**

The principle of 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 principle is expressed today as legally protecting private ordering by parents of their natural children's circumstances.**(10)**

In contrast, courts may invoke the principle of the best interests of the child 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 views of the children's best interests.**(11)** Judicial and public authority is thereby applied to supersede the preferences natural parents have 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)** noted 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 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 paramount consideration"**(17)** of a child's welfare, courts of appellate jurisdiction should only intervene when a 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, however, is 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, under which it was presumed that children of tender years should be placed with their mothers in contrast to 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 successfully criticized 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 the worst, and courts can hope only to prevent the worst. Accordingly, the concept of "best interests" has become translated 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 resolution 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. Published in 1979, this book reverses the thrust towards single-minded pursuit of children's best interests, and establishes a principle to be respected even before this "first and paramount consideration."**(22)**

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

> 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.**(23)**

This principle may mark a significant return to greater respect for parental rights.**(24)** 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 clearly significant in artificial reproduction, which creates children (which through gamete-donor selection may appear to be custom-designed) in accordance with private agreements of genetic and intended social parents. Courts and the public may be expected 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.

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 concept be applied to potential children of artificial conception. In November 1982, for instance, when the Attorney General for Ontario referred the review of legal management of human artificial reproduction to the Ontario Law Reform Commission, 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."**(25)** 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 established facts. These include the mother's personal characteristics, and circumstances of her marital, domestic, social, intellectual, employment and, for instance, physical and mental health state. Similarly, the father may be open to such assessment, or the mother's husband or partner may be identifiable, and such features as his disposition towards rearing the child may be estimated. Many of the same factors can be assessed when a child's conception is only in prospect, but in the context of artificial conception 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.**(26)** 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 suing because of birth into circumstances of social disadvantage, particularly illegitimacy.

In earlier years, wrongful life claims were rejected with scarcely concealed judicial derision. Even when 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:

> 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.**(27)**

Since 1980**(28)** the claim has been recognized in a small number of jurisdictions, such as 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, fearing that the risk of such litigation may cause 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)**

Dissatisfied life claims complain of an infant plaintiff's illegitimacy and the social and psychological harm due to bastardy. Early actions of this nature 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 and the English courts have been.**(35)** It may be concluded that a child born of artificial reproduction would 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 birth violated the child's best interests. A custody dispute can be resolved according to this test, of course, since different scenarios can be contemplated for the child's future, and a judicial determination may be made of the one to be preferred, or of those most to be avoided. The difference between existence and non-existence <u>per se</u> 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 though not actually dishonest. 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)** and purported discharge of such responsibilities may justify restrictive legislation on artificial reproduction. The basis of such legislation is pursuit of the best interests of society itself, however, not of children the legislation intends never to be conceived.

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 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, in order 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 agaisnt the guardian's appointment was disallowed since the prospective litigation was moot. There are many legal obstructions to confident acceptance of the Court's decision, however, and it must be considered questionable.**(41)** Courts have expressed sympathy with children's needs of prenatal protection in obiter dicta,**(42)** but authoritative cases have not determined claims brought to protect embryos and fetuses while they are in utero.**(43)**

The issue has arisen 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 of being born alive. The guardian was empowered to have the woman seized, taken to the hospital, be given a general anesthetic and submitted to cesarean delivery of the child. The basis of this intervention was the State's interest in preservation of the infant's life. In fact, the woman gave natural birth to a healthy baby, leaving some question about the future role of the court-appointed guardian.**(45)** Another case has been related in which a juvenile or family court found a fetus to be a neglected child, and a cesarean delivery refused by the mother was authorized and performed; again, a healthy child was born without complications.**(46)**

United States courts have acted at the instance of hospitals and physicians, whose motives may have been fear of 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 court 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 case in Nova Scotia, **(48)** 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. **(49)** This may suggest a judicial willingness, where jurisdictional competence exists, to permit those with proper interests, such as participants in artificial reproduction agreements may have, to compel protection of embryos and fetuses in utero.

Intended social parents in proven surrogate motherhood agreements, particularly men who acted as sperm donors with a view to rearing their resulting children, may have standing to compel surrogate mothers to act in the unborn children's interests. Action may be brought to require mothers' avoidance of harmful activities, including consumption of foods and intoxicants, and perhaps to require submission to cesarean delivery. It may be doubted that lawful abortion could be obstructed in view of the danger to maternal life or health which justifies the procedure, **(50)** although an order ne exeat regno might be

sought to restrain departure from the country to seek abortion elsewhere on non-health-related grounds. Men might also have such power as husbands have to ask courts to monitor intended abortion of women they have artificially inseminated.**(51)**

Powers of this nature 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 biological fathers, would be recognized and enforceable as such. It is commonly accepted that such agreements, whether or not they involve monetary elements, would be void as against public policy.**(53)** Even if the contractual nature of agreements was insufficient to afford them legal recognition, however, biological fathers' prospective rights of 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 upon 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 to artificial insemination for achievement of 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 be implanted into

another woman, who might retain and rear the child upon birth. If the inseminated woman subsequently refused to submit to the recovery procedure, however, 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) which involved a full-term fetus a few days short of natural birth,(56) in that the embryo is minute, visible only upon microscopic examination; indeed, prior to such examination, it might be impossible to know whether fertilization had occurred. On the other hand, the invasion required is relatively minor.

The answer to the question whether courts would compel the recovery procedure may be that they would not, due both to medical uncertainty regarding whether there is an embryo to be recovered, and to 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 probabilities that compelling recovery would serve a future child's interests.(58)

It seems clear 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 to find a uterus for its future development, but since present freezing and thawing techniques show a sizable incidence of damage and loss,**(60)** this might seem not to be in the embryo's best interests. The issue concerns the embryo not in utero, however, but extra uterum.

THE EMBRYO EXTRA UTERUM

In vitro fertilization isolates an embryo from the point of its conception until implantation in a woman's reproductive system. This is so when only a single ovum is fertilized, and even more the case when chemically induced superovulation results in fertilization of several ova.**(61)** Only three or four such ova may be implanted during a single menstrual cycle, since evidence indicates that implantation of more may, paradoxically, both reduce prospects of any implantation, and increase the chance of multiple pregnancy. Surplus embroys will often be frozen ("cryopreserved"), so that, if implantation fails to occur, 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 be cryopreserved for some time. This may be for the donor's later pregnancy,

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

The same basic questions arise regarding the inherent legal status of the embryo extra uterum whether it is destined for actual or potential placement in the body of the ovum donor or of another woman; the latter may intend to keep the child upon birth or 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 will be considered here only in the general context of concepts of custody, ownership and control of human embryos extra uterum. The governing concept may centre upon control, since custody cannot be exercised as in the case of a normal child because of dependency upon medical technology; an analogy may be attempted, however, with custody of a sick child which has to be kept in hospital.

The legal status of the embryo extra uterum is difficult to establish, since a conclusion in law that it is property and ownable is offensive to ethical principles. By neo-Kantian analysis, persons should not be treated as objects, and the same may be true of potential persons, which embryos are at their least: some people, of course, consider them to be more. The philosophical ambiguity this analysis presents is apparent

in the 1984 recommendations of the United Kingdom Committee of Inquiry into Human Fertilisation and Embryology, chaired by Dame Mary Warnock. The Committee observed that:

> 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.**(62)**

The Committee also proposed, however, in the next sentence of this paragraph 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 favoured 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 of what interests are proposed to be sold or purchased under licence, if not those of ownership. The elements of use, alienation, sale, disposal and destruction, even 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 exercise control over the embryo extra uterum, that one can abandon rights of control to the exclusive exercise of the other (as in ordinary artificial insemination by sperm donor), that they can agree upon transplantation into another woman without involvement of adoption

law, and that, upon their disagreement on disposition, principles of property law would be applicable. In the same way, gamete donors may permit clinics and their personnel to exercise control and make decisions, for instance, regarding 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 law relevant to its deliberate destruction.**(65)** This is not homicide (meaning murder, manslaughter or infanticide) since "A person commits homicide when ... he causes the death of a human being".**(66)** Embryos seem not to be "human beings" in criminal law, since section 206(1) of the Criminal Code provides that

> 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 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." The section is designed to afford protection, suggesting that it should be applied broadly, but it falls under the Criminal Code's provisions on 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, since this 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 is intended for wastage 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.(70) The former category was created historically to punish those who acted on women whose pregnancy could not be proven.(71) Women commit an offence only when they act "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, addressing post-coital contraception under the Offences Against the Person Act, 1861,(74) from which Canada's abortion law is derived, expressed the opinion that:

> 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.(75)

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 the torts of trespass to property and conversion. These principles may be a source of discomfort, however, in their reliance upon concepts of property and ownership, and in any event they protect interests of owners, not those of embryos per se. In Del Zio v. Presbyterian Hospital,(77) a U.S. 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)

Beyond public law, the private law of contract may bear upon legal control of an embryo extra uterum. Such 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 contracts may be comparable to those for the education or medical care of children. 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 such a contract is considered to be for personal services; it may not be, since performance by surrender

of the embryo can easily be supervised. 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 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" under legislation against child abuse and placing or leaving children in need of protection. 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) It has been argued that such a provision is of limited constitutionality.(83) Creation of a provision to this effect in a Canadian province or territory might similarly be attacked as, for instance, an encroachment into the federal field of criminal law, 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 Report(85) and the Ontario Law Reform Commission.(86)

Protection of an embryo extra uterum may be more feasible under child welfare legislation than its protection in utero,

since protective orders would 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 and fetus in utero is not clearly established. Further, it must be remembered that, in order to be transplantable, the embryo must be implanted or cryopreserved at a developmental stage earlier 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 implantation failure of a considerably more fully developed embryo 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 action designed to prevent implantation in the uterus also ranks as lawful contraception **(87)** if undertaken up to 72 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 grounds of law and ethics that they be removed from cryopreservation and left to waste. **(89)** The State Legislature, in the glare of publicity, rejected this recommendation, however, and required them 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.

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 became artificially creatable and terminable by adoption, which was founded on legislation and operated through judicial approval. Further separation between a parent's genetic role and social function has been restored 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 relationship is intended, and to spouses planning exclusive parental relationships with children to whom they intend to have no genetic link. Legislation has been slow to approve this private ordering of separate genetic and social functions regarding 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 regarding children artificially conceived. Rights in question include 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 provides: "[h]owever, no person may contest the filiation of a person because that person was conceived through artificial insemination." It appears that 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 law 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)**

The legislation makes no reference as such to sperm donation as part of embryo donation, but Quebec's Civil Code appears to apply to a sperm donor for in vitro fertilization followed by transplantation of the resulting embryo to a woman other than the ovum donor, since it speaks generally of a child "conceived through artificial insemination." 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, sperm donors 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, due to medical confidentiality, absence of identifying data and couples' reluctance to expose their use of donated sperm. When donors intend to be no more than donors, anonymity may be expected, since their responsibilities will be unwelcome and their rights irrelevant. When in contrast donors intend to rear the children born to women who acted as surrogate mothers, their custody rights are precious, being central to their intentions, and their responsibilities are actively sought. Legislation not specifically directed to the incidents of different forms of artificial insemination may be arbitrary in its effect, however. The Nova Scotia Family Maintenance Act, for instance, defines a "possible father" as one who has "had sexual intercourse with the mother of a child",**(99)** thereby excluding a donor for asexual reproduction, while Saskatchewan's Children of Unmarried Parents Act inclusively provides that "father" includes one "who may be the possible father."**(100)**

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, and 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 consistently recommended legislation expressly to provide that:

> ... 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 that the egg donor should have no rights or obligations in respect of the child.(103)

The Ontario Law Reform Commission arrived at the same recommendation,(104) and the Australian state of Victoria has legislated this provision in its Status of Children (Amendment) Act 1984,(105) regarding ovum and embryo donation(106) by means of in vitro fertilization and transplantation.(107)

Establishment of paternity in the absence of clear legislation is affected by the conventional presumption that a husband is the father of the child his wife bears. In pursuit of a child's purported interests in legitimacy and certainty of its legal father's identity, this presumption can be tenacious.(108) Accordingly, a sperm donor who seeks to establish his paternal status, particularly in order to enjoy custody rights to a child born of a surrogate motherhood agreement made with a married woman, may face legal obstacles. These are aggravated under legislation designed to regularize artificial insemination by

donor, such as has been implemented in Quebec and Yukon Territory, which renders the genetic donor a legal stranger to the child. 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 may confound the intentions of parties to surrogate motherhood agreements, but this may reflect the law's selective advance in accepting the former but not the latter.

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. It is biologically distinguishable into that in which a woman's own ovum is artificially inseminated *in vivo*, and that in which a woman receives implantation of another woman's ovum fertilized *in vitro* or fertilized *in vivo* and recovered for transplantation. In that the woman who bears the child is considered in law to be its mother, however, this biological distinction is of no legal consequence.**(109)**

In contrast, a man entering an agreement and donating his sperm for the insemination will in law be father of the child, although such a man agreeing to insemination through another man's sperm will 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 surrogate 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 regarding consent to adoption. A natural father does not have to adopt his child born to a surrogate mother in order to enjoy lawful custody,**(114)** although he may wish to do so in order to give the child his surname, since 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 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 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. This does not follow axiomatically simply because the father participated in a legally void agreement resulting in custody. Intervention cannot be justified simply because the court feels it can arrange a better environment for the child than the parties to the agreement have achieved, for instance in the mother's home. This may be so even when a request for custody is made by a surrogate mother after she has voluntarily surrendered the child.**(115)** Indeed, in Re Moores and Feldstein, 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 lfet in the hands of those who sought it out for their love and care.**(116)**

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

It may seem incongruous that a court must accept a fait accompli in a private surrogate motherhood transaction when it is not bound by privately reached child custody arrangements in separation agreements of parties to marriage contracts and cohabitation agreements, even when those arrangements conform

to the child protection law. In Ontario, for instance, section 55(1) of the Family Law Reform Act **(117)** 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. **(118)**

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, **(119)** did not envisage "that this legislation would render private persons entering into surrogacy arrangements liable to criminal prosecution." **(120)** They said that "[w]e nonetheless recognise that there will continue to be privately arranged surrogacy agreements," **(121)** 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. **(122)**

The Ontario Law Reform Commission addressed possible legal consequences of surrogate motherhood agreements, and proposed a means by which they might be judicially regulated. **(123)** 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 faced was whether, if surrogate mothers were to refuse voluntary surrender of children born of approved agreements, court orders should be available for seizure of the children and surrender of them 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.**(124)** Several relevant specialists serving on the project's Advisory Board**(125)** considered enforcement to be in the best interests of the child,**(126)** and the Commission assessed that goal to be more compelling than resolving risk allocation among adult parties to the agreements. The Commission further reasoned that women contemplating serving as surrogate mothers would be aware, for instance through their own legal and other advisors and through the family court considering approval of the agreement, that it would be so enforceable. A woman not wishing to risk this experience 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 surrendered at birth, however, is that the mother wants to receive a sum of money or other advantage not previously revealed to the court.**(127)** 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, 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 than that they survive in 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",**(128)** their terms and obligations should be understood before they are implemented.**(129)**

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.**(130)**

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 from emphasizing genealogy towards focusing upon 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, iatrogenic (medically-induced) infertility and, for instance, industrial and environmental factors.**(131)** Artificial reproduction may be no less a result of social change than it appears to be a cause. 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.

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NOTES

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

2. See B.M. Dickens "Surrogate Motherhood: Legal and Legislative Issues" in A. Milunsky and G.J. Annas (eds.) Genetics and The Law III (1985), table (in press).

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 (C.A.), at 373.

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, and ibid. 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 (C.A.) at 334.

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

9. Principles of parental primacy have recently (and controversially) been upheld in the English Court of Appeal in Gillick v. West Norfolk and Wisbech Area Health Authority, [1985] 2 W.L.R. 413, appeal to the House of Lords pending, and, for instance, in Re Phillip B. (1979), 156 Cal. Rptr. 48 (Cal. C.A.), discussed in B.M. Dickens, "The Modern Function and Limits of Parental Rights", 97 L.Q.Rev. (1981) 462.

10. See W. Wadlington, "Artificial Conception: The Challenge for Family Law", 69 Virginia L. Rev. (1983) 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. See ibid., at 648.

13. (1978), 379 N.E. 2d 1053.

14. See ibid. at 1061-1062.

15. See, for instance, M. Joyce Schlosser, note 17 below, at 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), at 277.

16. See Dubin J.A. in Re Moores and Feldstein, note 11 above, at 647.

17. On the origin of this classic statement, see M. Joyce Schlosser, "Third Party Child-Centred Disputes: Parental Rights v. Best Interests of the Child", 22 Alberta L. Rev. (1984) 394 at 398.

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

19. See Lord Fraser of Tullybelton, ibid. at 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) 53-64.

22. See note 17, above.

23. J. Goldstein, A. Freud and A.J. Solnit, Before the Best Interests of the Child (1979) i. Emphasis in original.

24. The book was cited, for instance, in Re Phillip B., note 9 above.

25. Report, note 1 above, at 1.

26. See generally W.H. Winborne (ed.) Handling Pregnancy and Birth Cases (Shepard's/McGraw-Hill Family Law Series) (1983) 393, 419.

27. Gleitman v. Cosgrove (1967), 227 A. 2d 689 at 692.

28. Curlender v. Bio-Science Laboratories (1980), 165 Cal. Rptr. 477

(Cal. C.A.); see also Turpin v. Sortini (1981), 174 Cal. Rptr. 128 (Cal. C.A.).

29. Procanik v. Cillo (1984), 478 A. 2d 755 (N.J.S.C.).

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

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

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

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

34. See W.H. Winborne, note 26 above, at 419.

35. See E.W. Keyserlingk, The Unborn Child's Right to Prenatal Care (McGill Legal Studies No. 5) (1984) 47-58, addressing common law and civil law principles in Canada.

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

37. See Custody of a Minor, note 13 above.

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.

39. See E.W. Keyserlingk, note 35 above, at 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. S.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. S.C.) it was found that a husband's legal power to oppose abortion approved by a hospital's therapeutic abortion committee is very limited.

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.) and

Re Superintendent of Family and Child Service and McDonald (1982), 135 D.L.R. (3d) 330 (B.C.S.C.).

43. Section 203 of the Criminal Code, note 4 above, 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 (1981), 274 S.E. 2d 457 (Ga. S.C.).

45. See the discussion in E.P. Finamore, "Jefferson ... Court-Ordered Surgery to Protect the Life of an Unborn Child", 9 Amer. J. Law & Medicine 83.

46. See the references and commentary upon this case in E.W. Keyserlingk, note 35 above, at 122-3.

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

48. See note 40 above.

49. The Criminal Code, note 4 above, 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. Ibid.

51. See Re Medhurst and Medhurst, note 41 above.

52. See Report, note 1 above, at 236-259. It is recommended that upon birth of the child "legislation should provide for immediate surrender of the child", at 252. See also the discussion on Surrogate Motherhood, below.

53. See ibid. at 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(1) 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. See note 44 above.

56. It has been seen that, in R. v. Marsh, note 43 above, 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 D.K. Edmonds et al., "Early Embryonic Mortality in Women", 38 Fertility and Sterility (1982) 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. See note 1 above, at 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 health child; see para. 1.21, at 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.

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, at 56.

63. Ibid. para 13.13, at 79.

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

65. On the negligent killing of a full-term fetus under section 203 of the Criminal Code, see R. v. Marsh, note 43 above.

66. Criminal Code, note 4 above, 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).

69. Ibid.

70. In the historic case of R. v. Scudder (1828), 1 Mood 216, under the first legislation on the subject of abortion, Lord Ellenborough's Act of 1803, U.K. Stats. 43 Geo. III Ch. 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 may 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) 24, and Lord Ellenborough's Act, note 70 above.

72. Criminal Code, note 4 above, 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, s. 283(1) deals with "anything whether animate or inanimate."

77. 74 Civ. 3588 (U.S. Dist. Ct., S.D.N.Y. April 12, 1978), detailed in W.H. Winborne, note 26 above, at 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 above at note 62 and 63; the Committee considered that a power of destruction was implicit in parents' control of embryos.

80. See Report, note 1 above, at 97.

81. See ibid. at 92-94.

82. Ill. Rev. Stat. ch. 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," ibid.

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

84. Perhaps by reference to the Criminal Code's power to control use of means of contraception, 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. See note 62 above, para. 5.10, at 32.

86. See note 1 above, at 214-217.

87. See the Parliamentary Written Answer of the English Attorney-General, note 75 above.

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 66.

89. See Report, note 60 above.

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, note 4 above, 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 W. Wadlington, note 10 above.

93. For unenacted legislative proposals on artificial reproduction in British Columbia, Alberta and Saskatchewan, see Report, note 1 above, at 295, 300 and 304, respectively.

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

95. See Report, note 1 above, at 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. Note 96 above, s. 14(6); see also Report, note 1 above, at 375.

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

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) 46.

103. See note 62 above, para 6.8, at 38.

104. Report, note 1 above, at 176.

105. No. 10069, s. 5, enacting a new s. 10F(1) of the Status of Children Act 1974, No. 8602 as am. by 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 Report, note 1 above, at 385, n. 642.

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

109. The distinction may have implications for the child's medical care when genetically transmitted conditions are involved, however, 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", 11 Amer. J. Law & Medicine (1985) in press.

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's Report, note 1 above, and in a number of U.S. jurisdictions, analyzed in B.M. Dickens, note 2 above.

112. But see the discussion on contracts to transfer custody of children regarding surrogate motherhood agreements in Report, note 1 above, at 94-102.

113. See ibid. at 99-100.

114. 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 that "... for all purposes of the law of Ontario a person is the child of his or her natural parents ..."; see s. (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 reponsibilities of a parent on behalf of them in respect of the child."

115. On her capacity and possible need to make a formal application for custody of the child in Ontario, see Report, note 1 above, at 97.

116. Note 11 above, at 647.

117. R.S.O. 1980, c. 152.

118. See Clark v. Clark, [1952] O.W.N. 671 (H.C.J.) at 671-2.

119. See note 62 above, para 8.18, at 47.

120. Ibid., para 8.19.

121. Ibid.

122. Ibid.

123. See Report, note 1 above, at 218-272.

124. Ibid., at 249-253.

125. See ibid., at 8.

126. See ibid., at 252.

127. On payment to a surrogate mother, see ibid., at 253-255.

128. See text at note 121, above.

129. See the Ontario Law Reform Commission's proposal, Report note 1 above, at 256-7.

130. M.A. Glendon, The New Family and the New Property (1981) 3-4.

131. On the incidence and causes of infertility, see Report, note 1 above, at 10-14.