

THE SURROGATE MOTHERHOOD AGREEMENT: A PROPOSED STANDARD FORM CONTRACT FOR QUEBEC

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Résumé de l'article

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THE SURROGATE MOTHERHOOD AGREEMENT: A PROPOSED STANDARD FORM CONTRACT FOR QUEBEC*

by Nicholas KASIRER**

L'auteur propose un modèle de contrat pour les parties cherchant à établir une entente de mère porteuse. Après avoir examiné attentivement le contrat sous l'angle de la notion québécoise d'ordre public et de bonnes moeurs, l'auteur argumente que les parties sont libres de conclure un contrat de mère porteuse lorsque l'entente représente un traitement d'infertilité qui est dans le meilleur intérêt de la mère porteuse et du futur enfant. Chaque clause du contrat est pleinement expliquée et commentée, avec une attention particulière aux questions de validité et d'exécution forcée du contrat en droit québécois. L'auteur prétend qu'il existe des circonstances où une entente bien rédigée et bien pensée n'offensera pas l'intérêt public et il se dit confiant que le droit québécois des obligations peut régir ce type unique de transaction commerciale et la relation familiale créée par cette transaction.

The author proposes a standard form contract for Quebec parties who seek to enter into a surrogate motherhood arrangement. After carefully considering the contract from the point of view of the Quebec notion of public order and good morals, the author argues that the parties are free to enter into a surrogate motherhood contract when the arrangement represents a treatment of infertility which is in the best interest of the surrogate mother and the prospective child. Each clause of the contract is explained and commented on fully, with particular attention to the questions of the validity and the enforceability of the arrangement under Quebec law. The author contends that circumstances do exist in which a well drafted and well thought out agreement will not offend the public interest, and he is confident that the Quebec law of contract can regulate this unique commercial transaction and the family relationships it creates.

* The author wishes to thank Professor Edith Deleury, Hélène Guay and Peter Oliver for their helpful comments in the preparation of this article. Mindful that this paper engages no-one's responsibility but his own, the author suggests that persons contemplating a surrogate motherhood agreement obtain independent legal advice.

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SUMMARY

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HELP WANTED

*“Couple infertile cherche mère porteuse.
Frais légaux et indemnisation payés.
S’adresser [sic] à Mme. Williamson;
Gravenor Keenan, avocats, 2001 rue Uni-
versity, suite 1150, Mtl. P.Q. H3A 2N2
Tél. 288-3828 confidentialité assurée.”¹*

INTRODUCTION

1. Background

Recent advances in medical science have taken human reproduction from the confines of the nineteenth century marital bed into the wide-open twentieth century laboratory. As a result, a commercial market has been created where the idea of commerce had once been inconceivable. People now “arrange”, “transact”, and “agree” to have babies. Predictably, lawyers now find themselves at the center of this new marketplace, mediating the arrangements, structuring the transactions, and drafting the agreements.

One of the most controversial of the new reproductive technologies has been dubbed “surrogate motherhood”. Briefly stated, surrogacy is the “practice whereby one woman carries a child for another with the intention that the child be handed over after birth”.² The variations of the surrogate motherhood arrangement fall into two principal categories, as spelled out by the British Council for Science and Society:

“(a) An IVF (in vitro fertilization) embryo is not implanted in the woman who produced the egg, but is implanted in another woman who has agreed to carry the embryo to birth and then return it to its genetic mother.

(b) A couple enter into an agreement with another woman that she will undergo A.I.D. (artificial insemination by donor), using the man’s semen,

1. McGill [University] Daily, September 24, 1984, 2.

2. United Kingdom, *Report of the Committee of Inquiry into Human Fertilisation and Embryology*, Dept. of Health & Social Security, Mary Warnock (Chairman) (1984), 42 [hereinafter the “Warnock Report”].

and that if she conceives successfully and gives birth, the baby shall be returned to the couple."³

The A.I.D. method is most commonly used⁴ and will be the focus of this essay.

Though some jurisdictions have proposed legislation to regulate this new reproductive process,⁵ surrogate motherhood is arranged for the most part by private contract between the couple desiring the child and the surrogate. As the advertisement reproduced at the outset of this essay suggests, Quebec too has its share of anxious would-be parents and willing surrogate mothers. The purpose of this essay is to present a workable⁶ contract for Quebec parties who seek to enter into such an arrangement. We shall consider our proposed standard form contract clause by clause, endeavouring to address not only the problems which arise in the narrow context of each clause, but also the wider questions of validity and enforceability of the agreement as a whole.

It is appropriate at the outset to consider three fundamental issues raised by such a contract in Quebec law: first, the freedom of the parties to agree to a surrogate motherhood arrangement; second, the limits that the public interest places on this freedom; and finally, the effect of this limited freedom on the enforceability of the contract. Though these basic questions of contractual freedom, public order and enforceability must necessarily be considered within the narrow context of each clause

3. *Human Procreation* [:] *Ethical Aspects of the New Techniques* (1984), 50. There are, of course, variations on these themes.

4. G. ANNAS, "Law and the Life Sciences", *Hastings Center Report* (April, 1981), 23. The irony is that by the A.I.D. method, the surrogate mother is not a "surrogate" at all since she is in fact the biological mother. The French expression *mère porteuse* is thus more appropriate. The IVF-embryo transfer method presents a distinct series of legal, ethical and medical problems since the gestatory mother and the genetic mother are two different individuals. For a discussion of the legal problems connected with the IVF method, see, e.g., D. BRAHAMS, "In-Vitro Fertilisation and Related Research", (1983) *The Lancet* 726.

5. See, e.g., Michigan, *Bill to Regulate Surrogate Parenting*: Sub. HB no. 4114 (1983), and California, *Bill to Amend Division 4 of the Civil Code* (1982), reprinted in *The Reproductive Technologies: Social Ethics and Public Policy Responses*, Centre de Bioéthique de Montréal (1983), Document III, 91.

6. Workable and enforceable are not necessarily synonymous. See discussion, *infra*, note 33 and accompanying text.

and each obligation contained in the contract, it is useful to discuss them as general themes given their importance to the overall legality of the arrangement.

The mere presentation of this proposed standard form makes plain our bias that the surrogate motherhood contract is *prima facie* valid and not contrary to the public interest.⁷ It is our position that the contract is a legitimate expression of the free will of the parties where it renders accessible a treatment of infertility and creates an arrangement in the best interest of both the surrogate and the child.

2. Freedom of Contract

Quebec law, firmly implanted in the liberal legal tradition, allows parties to contract privately as they see fit, subject to the "law of public order and good morals".⁸

All contracts governed by Quebec law, including the surrogate motherhood agreement, are required to meet the four conditions to validity set out in article 984 C.C. The issues of "consent legally given" and "parties legally capable of contracting" must be considered given the particular circumstances of each arrangement.⁹ The requirement that the consideration or cause of the contract be lawful and not contrary to public order and good morals¹⁰ poses the problem of the nature and characterization of the fees which, accordingly, must be addressed in the contract. Finally, we observe that the object of the contractual obligation

7. Indeed a lawyer drafting a contract he knew to be illegal would be acting in violation of s. 2.01 of the *Code of Ethics of Advocates*, R.R.Q. 1981, c. B-1, r.1 which states: "The advocate must not utter words or publish writings contrary to laws, nor incite anyone to violate the law, but he may ... contest the application thereof."

8. Art. 13 C.C. Jean-Louis BAUDOIN contends that this caveat gives the principle of freedom of contract a character of "absolutisme apparent": *Les obligations*, (1983), para. 78.

9. A minor would most likely be unable to act as a surrogate mother, for example, since she would be incapable of contracting. We note, however, that s. 42 of the *Public Health Protection Act*, R.S.Q., c. P-35, allows a minor fourteen years of age or older to seek the medical care and treatment required by her "state of health" without parental consent. BAUDOIN discusses minors' consent in the context of artificial insemination in "Aspects juridiques", J.-E. RIOUX et al. (eds), *L'insémination artificielle*, (1983) 113, 118.

10. Art. 990 C.C.

cannot be forbidden by public order and good morals.¹¹ So that the object is not perceived to be illicit, we shall suggest that the contract be framed as an innominate contract of service.

We believe that, *prima facie*, there is no compelling public interest against the validity of the contract. Accordingly, the contract should stand to allow the realization of the parties' "reproductive intent"¹² or their "volonté dans l'établissement du lien juridique biologique".¹³

That the private *interest* exists to justify the contract is evidenced by the demand of would-be parents and the supply of surrogate mothers. That the private *right* exists for the surrogate mother is clear from her property right in her own body. Liberal philosopher John Locke spoke of the individual's right to control the product of his (or her) labour:

"[E]very Man has a *Property* in his own *Person*. This no Body has any right to but himself. The Labour of his Body and the *Work* of his Hands, we may say, are properly his."¹⁴

This thinking underlies the right granted to every person of full age in Quebec to dispose *inter vivos* of a part of his body, as set out in article 20 C.C. Again, Baudouin explains:

"[L]e droit accepte désormais généralement que le corps humain puisse, dans certaines limites, faire l'objet d'un contrat et que la cession de certaines de ses parties (comme le sperme par exemple) ne soit pas nécessairement exclue du champ contractuel. Certains droits, dont le droit québécois, vont même plus loin en permettant effectivement une certaine commercialisation des parties du corps humain susceptibles de régénérescence."¹⁵

This personal right is expressed as a fundamental freedom in section 1 of the Quebec *Charter of Human Rights and Freedoms*,¹⁶ which might be invoked by the surrogate to support her right to agree to the arrangement: "Every human being has a

11. Art. 1062 C.C.

12. K. FREY, "New Reproductive Technologies: The Legal Problem and a Solution", (1982) *Tenn. L. Rev.* 303, 332.

13. P. RAYMOND, "Le rôle de la volonté individuelle dans l'établissement du lien de filiation" in C. Labrusse & G. Cornu (eds), *Droit de la filiation et progrès scientifique*, (1982), 87.

14. *The Second Treatise of Government*, (1698) para. 27 in John LOCKE, *Two Treatises of Government* (Cambridge, 1960), 328-9 [emphasis in original].

15. Jean-Louis BAUDOUIN, *loc. cit.*, note 9, 117.

16. L.R.Q., c. C-12.

right to life, and to personal security, inviolability and freedom." Interestingly, in the United States the constitutional right to privacy has been invoked to protect the decision whether or not to bear children.¹⁷ This argument might be introduced in Quebec should a similar right of privacy be recognized based on the Quebec *Charter*.¹⁸

3. Public Order and Good Morals

In this context, the narrow question is to determine whether a contract to carry a child and renounce parental authority is so contrary to current public morality as to render the contract absolutely null and thereby unenforceable. It is our position that public interest considerations are insufficient to displace the intention of the parties, and that the surrogate motherhood agreement is not, on its face, contrary to public order and good morals.

The surrogate motherhood arrangement is unlike natural reproduction for which the state has no *prima facie* right to intervene. The involvement of a third party (the surrogate) and the state's concern for her well-being, as well as for the welfare of the child in the case of any dispute between the surrogate and the would-be parents, justify state intervention. Until this is done by specific legislation, however, intervention must be limited to the state's interest in public order and good morals. Indeed, this limited right of the state to interfere in the private affairs of individuals is a fundamental tenet of the modern liberalism on which the Civil Code is founded.¹⁹

17. See, e.g., *Carey v. Population Services International*, 431 U.S. 678 (1977). Note, however, that this right alone was not enough to legitimize surrogate motherhood agreements: *obiter dictum* of Kelly J. in *Doe v. Kelley*, 307 N.W. 2d 438, 441 (Mich. App., 1981).

18. L.R.Q., c. C-12, ss 4, 5, and 8 would be possible grounds.

19. In *On Liberty* (1849), John Stuart MILL asked "How much of human life should be assigned to individuality and how much to society?" He answered: "To individuality should belong the part of life in which it is chiefly the individual that is interested; to society, the part which chiefly interests society." MILL and Jeremy BENTHAM, *The Utilitarians* (New York, 1973), 522-3.

A more modern, more radical, but no less tenable expression is offered by Germaine GREER, writing on governments as family planners in the context of the population explosion in *Sex and Destiny*, (1984), 373-4:

"Governments cannot plan families. They cannot even influence family formation. They certainly cannot keep families together, for,

There is general agreement in Quebec civil law that it is impossible to give a precise definition of either "public order" or "good morals", but that together they amount to the totality of rules of public ethics and morality "à un moment donné de l'évolution sociale".²⁰

The evolutionary nature of the concept is critical to understanding the law's acceptance of surrogate motherhood contracts. Advances in medical science have changed public morality and have consequently changed judges' perception of public order and good morals. Commenting on "Legal Aspects of Artificial Insemination and Embryo Transfer in French Law", Mariel Revillard notes that "far from remaining insensitive to the repercussions of scientific discoveries, civil law has evolved under the influence of progress in biology".²¹

In 1978, the same phenomenon was observed in Quebec by Chief Justice Jules Deschênes in *Cataford v. Moreau*.²² The Chief Justice recognized that, though at one time a contract for voluntary sterilization may have been contrary to public order and good morals, the evolution of that concept was such that this was no longer the case. The weighing, therefore, of public versus private interests in the surrogate motherhood arrangement must be done with a view to Quebec's prevailing public morality, and in the context of the current state of medical science.

We contend that where the contract is initiated as a treatment of infertility, and in the best interests of both the surrogate mother and the child, there are no grounds for objection based on the public interest. If the contract is properly drafted so as to respect the state's interest in the institutions of marriage and the family, as well as the psychological and physiological health of the mother and the best interests of the child, then the contract should be declared valid.

although they might express a desire to do such a thing, their own bureaucratic structure makes it impossible. The more government interferes with family life the more it is weakened."

We hasten to add that we suspect both Mill and Greer would approve of any state intervention to prevent the exploitation of women as surrogate mothers.

20. Jean-Louis BAUDOIN, *loc. cit.*, note 8, para. 79. See generally Chailies, "What are Public Order and Good Morals?" *Travaux de l'Association Henri-Capitant* (1956), t. 7, 645.

21. (1974) 23 Int. & Comp. L.Q. 383, 383.

22. [1978] C.S. 933, 938.

Quebec law recognizes alternatives to natural reproduction where natural reproduction is impossible. Adoption is the obvious example,²³ and recently artificial insemination has come under the regulation of the Civil Code of Quebec.²⁴ Both these alternatives to natural reproduction are subject to significant control by the state,²⁵ but their acceptability rests in their therapeutic value — they both represent legitimate ways to treat infertility.²⁶ From the point of view of the would-be parents, surrogate motherhood is a treatment of infertility where other treatment is inaccessible — adoption is difficult because of the undersupply and surplus-demand for adoptable children, while A.I.D. is impossible where the prospective mother is infertile. Opponents of surrogate motherhood would argue that the cost of the accessibility of this technology is a depersonalization of sexuality and a wholly unacceptable threat to the institutions of marriage and the family. David Roy canvasses these issues in his useful article, “Surrogate Mothering via Artificial Insemination [:] Moral and Ethical Issues”, and concludes that these threats do not necessarily materialize.²⁷ Indeed we would argue that successful treatment of infertility only reinforces marital and familial relationships by giving childless couples the chance to have a family.

The validity of the surrogate motherhood agreement is often called into question on the grounds that the arrangement may compromise the well-being of the surrogate mother herself. Does this render the agreements contrary to public order and good morals? This was the principal reservation of the majority opinion of the Warnock Report, which recommended that all surrogacy agreements be prohibited in the United Kingdom given the serious risk of exploitation of socially and economically disadvantaged women.²⁸ Brahams puts the concern most eloquently: “The idea of a cottage baby-farming industry is abhorrent and

23. See arts 595 *et seq.* C.C.Q.

24. See arts 586 and 588, para. 2, C.C.Q. in the title of the Code dealing with filiation.

25. Bernard DICKENS, “Surrogate Parenthood — New Barriers [:] Legal Issues” in *The Reproductive Technologies*, *loc. cit.*, note 5, Document I, 71, 78-80.

26. Jean-Louis BAUDOIN, *loc. cit.*, note 9, 114 and Mariel REVILLARD, *loc. cit.*, note 21, 385.

27. David ROY, “Surrogate Mothering via Artificial Insemination [:] Moral and Ethical Issues” in *The Reproductive Technologies*, *loc. cit.*, note 5, Document I, 144, 154 *et seq.*

28. Warnock Report, *op. cit.*, note 2, 46-7.

unacceptable.”²⁹ The public interest in preventing this exploitation justifies state intervention. Yet concern for the well-being of the surrogate should not preclude all use of a useful technology. Our solution is to make a thorough screening process a condition precedent to the completion of the contract. This will act as a check against the exploitation that full freedom of contract might bring about and, moreover, give a court evaluating a surrogate motherhood arrangement a tangible point of departure for analyzing the facts at hand. The *possibility* of exploitation is not enough to remove all surrogate mother services from the marketplace on the grounds that they are repugnant to public morality.³⁰

Our final justification of the contract vis-à-vis this notion of public order is the concern for the best interest of the child, which is one of the underpinnings of all the Quebec codal provisions on family law.³¹ This consideration should be the focus of any inquiry as to the public interest in the private surrogate mother contract. Lawyers may find it incongruous to speak of the interest of the child in a contractual arrangement agreed to before the child exists. Jurists have spilled a great deal of ink on the subject of the rights of the unborn child and, technically, it may be true that this child has no legal interest to assert in the surrogate motherhood agreement. Yet we suggest that to ignore the child's best interest in the arrangement would be the worst sort of wilful blindness. If the issue of the validity of the agreement arose after the child was born, a court would certainly consider the effect on the child of enforcing or not enforcing the contract. Indeed, whatever the status of the child as a legal person at the time of the contract, the child's best interest would be the paramount consideration in any dispute regarding the performance of the contract after the child's birth. Where the arrangement is in the best interest of the child then, all other things

29. D. BRAHAMS, "In-Vitro...", *loc. cit.*, note 4, 728.

30. The argument that public order does not require the illegality of such arrangements to protect the mother is buttressed by the finding of physician Philip PARKER that "there is no evidence to support the notion that surrogate motherhood, with or without a fee, leads to serious adverse psychological consequences and therefore (as some people feel) should be prohibited": "The Psychology of Surrogate Motherhood: An Updated Report of the Longitudinal Pilot Study" in *The Reproductive Technologies*, *loc. cit.*, note 5, Document 1, 134, 137.

31. See, e.g., art. 30 C.C.: "In every decision concerning a child, the child's interest and the respect of his rights must be the determining factors."

being equal, the transaction should not be characterized as contrary to public order and good morals. The state's intervention should center on the one party to the transaction who is not a party to the contract: the child.³²

4. Enforcement

The threat that public order and good morals poses to the freedom of would-be parents and surrogates to arrange their affairs as they see fit may not materialize until one of the parties challenges the terms of the contract. A Quebec court will not inquire as to the legality of the contract until it is asked to, which would most likely occur when one of the parties tries to enforce the contract against the wishes of the other.³³ Accordingly, Kentucky lawyer K.M. Brophy's characterization of the contract as a "gentleman's agreement" is particularly apt.³⁴ Contrary to public order or not, the "reproductive intent" of the parties will be realized unless it is called into question. If challenged successfully on these grounds, the contract will be treated as if it never existed.³⁵

"On the other hand", points out Peter Bowal in a recent Canadian article:

"The contract might be valid on its face and the issue becomes one of whether and how a particular term is to be enforced or what is the appropriate remedy for breach of that term."³⁶

In our proposed standard form we have included a 'severability' clause to allow the parties to excise otherwise unenforceable terms without bringing down the whole transaction.

32. G. ANNAS, *loc. cit.*, note 4, 24 agrees as to the appropriateness of this inquiry. For him the answer to the question of legality "must be found in the answer to another: what is in the best interest of the child".

33. Note, however, that a contract contrary to public order and good morals is an absolute nullity. This can be raised not only by the parties but by any person whatsoever: see Jean PINEAU, *Théorie des obligations*, (1979), 108.

34. K.M. BROPHY, "A Surrogate Mother Contract to Bear a Child" (1981-2) 20 *J. Fam. L.* 263, 266. The term is perhaps somewhat awkward considering the players involved.

35. Jean PINEAU, *op. cit.*, note 33, 107.

36. Peter BOWAL, "Surrogate Procreation: A Motherhood Issue in Legal Obscurity", (1983) 9 *Queen's L.J.* 5, 19.

The question of enforceability is most important to two aspects of the contract: the fees provision, which may run into enforcement problems if it is characterized as money paid for the purchase of a child; and, secondly, the surrogate's undertaking to renounce her rights as mother of the child. Each clause presents a two-fold problem: is it valid, and if so, on what terms is it enforceable? We shall address these questions in the context of each clause.

A Quebec lawyer contemplating the legality of a surrogate motherhood agreement is in a difficult position given the lack of learned and judicial attention the issue has received to date in the province. On the other hand, a crush of legal and medical literature exists in the United States³⁷ where the issue of the legality of the contract vis-à-vis "public policy" has now found its way before the courts.³⁸

Given the absence of Quebec jurisprudence on point, it is useful to consider the United States case law. The principal forum for argument has been Michigan courts thanks mainly to the zeal of Dearborne lawyer Noel Keane.³⁹ In *Doe v. Kelley*,⁴⁰ the Michigan Court of Appeals rejected an action by parents, in connection with a surrogacy contract, to have certain adoption statutes prohibiting the exchange of money declared unconstitutional. Mr. Justice Kelly held that the parties had not been denied their constitutional right to privacy, though he did not feel it necessary to decide on the legality of the surrogate mother agreement itself. At trial, however, Gibbs J. characterized the arrangement as "baby bartering" and felt no compunction in holding it invalid on that basis:

37. See, e.g., E. ERIKSON, "Contracts to Bear a Child", (1978) 68 *Cal. L. Rev.* 611; T. MADY, "Surrogate Mothers: The Legal Issues", (1981) *Am. J. L. & Med.* 323; S.M. PATTERSON, "Parenthood by Proxy: Legal Implications of Surrogate Birth", (1982) 67 *Iowa L. Rev.* 385.

38. Quebec parties should be warned that though "public policy" is a concept similar to the idea of public order and good morals in the Code, it is by no means an exact synonym. For a discussion of public policy in the American context, see American Law Institute, *Restatement of the Law, Second* [:] *Contracts 2d* (1981) Vol. 1, para. 8 and Vol. 2, paras. 182 *et seq.*

39. P. PARKER, "Surrogate Motherhood: The Interaction of Litigation, Legislation and Psychiatry", (1982) 5 *Int'l J.L. & Psych.* 342, 343.

40. *Doe v. Kelley*, *supra*, note 17.

“A mercenary consideration used to create a parent-child relationship and its impact on the family unit strikes at the very foundation of human society and is patently and necessarily injurious to the community.”⁴¹

The Michigan Court of Appeals again was not bound to address the narrow question of validity in *Syrkowski v. Appleyard*, though Cynar P.J. did allow himself the following *obiter dictum*:

“While we do not decide whether surrogate mother contracts are against public policy ... [w]e view the surrogate mother arrangements with caution as we approach an unexplored area in the law which, without a doubt, can have a profound effect on the lives of our people.”⁴²

Again, the decision at trial was unequivocal (although it must be read with some hesitation given that the same trial judge was presiding as had in *Doe*):

“Neither the laws nor the public policy of the State of Michigan permit the direct or indirect judicial recognition and enforcement of ‘surrogate mother’ contracts.”⁴³

Obviously the lessons learned in Michigan and elsewhere are helpful to Quebec parties, although the specific evaluation of any Quebec contract must be from the point of view of Quebec law and Quebec law’s perception of the “public order and good morals” aspect of the transaction. We submit the following contract as a proposed standard form for Quebec parties. Care has been taken in its preparation to ensure that the arrangement will represent more than a “gentleman’s agreement”. It is intended to create binding contractual obligations which will allow for the enforcement of the “reproductive intent” of the parties before Quebec courts in cases where the arrangement it represents amounts to a treatment of infertility in the best interest of both the surrogate and the child.

41. 6 F.L.R. 3011, 3113 (Circuit Court, Wayne County, 1980), cited by P. PARKER, *loc. cit.*, note 39, 343.

42. 333 N.W. 2d 90, 94 (Mich. App., 1983).

43. 8 F.L.R. 2139 (Circuit Court, Wayne County, 1982), cited by P. PARKER, *loc. cit.*, note 39, 344.

PARAGRAPH I: PARTIES

THIS AGREEMENT IS MADE THIS _____ day of _____, 198____, by and among

_____ (hereinafter the "surrogate mother");
and _____ the lawful husband of the surrogate mother (hereinafter the "surrogate's husband");
and _____ (hereinafter the "natural father");
and _____ the lawful wife of the natural father (hereinafter the "social mother").

We have included four parties to the contract: the surrogate mother, her husband, the natural father and the social mother.

If the surrogate is married, it is prudent to include her husband as a party to the contract as evidence of his consent to the procedure. Indeed, Michigan attorney Noel Keane insists on the husband's full consent to avoid later complications between the husband and the surrogate or the child.⁴⁴ In Quebec this consent is no longer a prerequisite to the surrogate mother's capacity to contract,⁴⁵ nor is consent of the spouse necessary for medical treatment.⁴⁶ Nonetheless, it is useful to secure the consent of the surrogate's husband in order to preclude future disputes with the husband regarding his role in the arrangement. The extent of his participation, his future relationship with the surrogate mother,⁴⁷ and particularly his rights and duties towards the child are all best spelled out in advance to ensure his understanding of these undertakings.

Must the surrogate mother be married before she can enter into such an agreement? There seems to be no logical reason

44. Noel KEANE, "The Surrogate Parenting Contract" in *The Reproductive Technologies*, *loc. cit.*, note 5, Document I, 102, 113.

45. S.Q. 1964, 12-13 Eliz. II, c. 66, s. 1, and art. 441 C.C.Q.

46. See s. 156, *Health Services and Social Services Act*, L.R.Q., c. S-5.

47. In the context of artificial insemination, Jean-Louis BAUDOIN contends that consent is necessary to preclude later allegations of adultery or mental cruelty as possible grounds for divorce in Canada: BAUDOIN, *loc. cit.*, note 9, 120. BOWAL, *loc. cit.*, note 36, 15 agrees that the husband's consent to the arrangement would be an effective bar to divorce proceedings on the grounds of adultery.

why she must be. Interestingly, Brophy's Kentucky standard form provides for a married surrogate,⁴⁸ as does the "sample contract form" published along with the California draft legislation on surrogate motherhood,⁴⁹ though in her complete article on the subject, Theresa Mady takes the position that the surrogate need not be married.⁵⁰ Practically speaking, physician Philip Parker's data on surrogate mothers revealed that 44% of applicants were unmarried⁵¹ (though this figure does not necessarily imply a success rate at that level).

Including the social mother as a party ensures not only her consent to the arrangement, but also secures both her promise to undergo the necessary psychological screening and her pledge to accept the child after the surrogate gives birth. Brophy, on the other hand, excludes the social mother from her Kentucky Surrogate Family Services Inc. standard form so the latter will not be perceived as a "baby-buyer", thereby rendering the contract void.⁵² This problem can be circumvented, we submit, by a clear effort to characterize the agreement as a contract of service.⁵³

We contend that an unmarried natural father can enter into a surrogate motherhood arrangement alone, based on an analogy with article 598 C.C.Q., found in the chapter of the Code dealing with adoption:

"Any person of full age may, *alone* or jointly with another person, adopt a child." (our emphasis)

Again, the best interest of the child must be respected if the arrangement is to have any hope of being enforceable.

Though in principle an unmarried man has the right to enter into a surrogate motherhood arrangement alone, the chances that the contract would stand up to a challenge in the courts would no doubt be better if he were married. People would be more disposed to view the arrangement in the best interest of the child if the child had a social mother as well. Indeed in a recent policy

48. K.M. BROPHY, *loc. cit.*, note 34, 266.

49. *The Reproductive Technologies*, *loc. cit.*, note 5, Document III, 120.

50. T. MADY, *loc. cit.*, note 37, 332.

51. P. PARKER, "Motivation of Surrogate Mothers: Initial Findings", (1983) 140 *Am. J. Psych.* 117.

52. K.M. BROPHY, *loc. cit.*, note 34, 266.

53. See our discussion, *infra*, note 70, and accompanying text.

paper, the liberal United Church of Canada said the practice should not be carried out "except in circumstances where the biological and social father and the social mother-to-be have a stable marital relationship so that the newborn child would find loving acceptance by both parents; and every reasonable expectation would exist that both would parent the child as it grew up."⁵⁴ Moreover, in commenting on the American situation, Mady notes a bias towards married couples and, not surprisingly, against homosexuals.⁵⁵ We repeat that whatever the marital status or sexual orientation of a prospective natural father, the key Quebec criterion would most likely be the best interest of the child.

PARAGRAPH II: SCREENING

(1) *Medical Screening*

The surrogate mother and the natural father hereby declare and promise that they have individually undergone medical evaluation by _____ M.D. and _____ M.D., and that these physicians have attested in writing to the said parties' medical and physical fitness to enter into and to carry out this agreement.

(2) *Psychiatric Screening*

The surrogate mother, the surrogate's husband, the natural father and the social mother hereby declare and promise that they have individually undergone psychiatric evaluation by _____ M.D. and _____ M.D., and that these physicians have attested in writing to the said parties' mental and emotional fitness to enter into and to carry out this agreement.

The purpose of medical screening of the surrogate mother and the natural father is to ensure their fertility and to minimize the possibility of any untoward medical event which might frustrate the intention of the parties. Some authors contend that the medical examination should include genetic counselling to inform the parents-to-be of the likelihood of the birth of a deformed or handicapped child.⁵⁶ In a May, 1983 "Statement of Policy", the American College of Obstetricians and Gynecologists recommen-

54. UNITED CHURCH OF CANADA, *Brief on Surrogate Motherhood in The Reproductive Technologies*, *loc. cit.*, note 5, Document II, 84.

55. T. MADY, *loc. cit.*, note 37, 347n.

56. See, e.g., T. MADY, *loc. cit.*, note 37, 348, and K.M. BROPHY, *loc. cit.*, note 34, 277.

ded that the participating physician undertake genetic screening as part of the preliminary evaluation process.⁵⁷ Needless to say, this aspect of the procedure raises the further ethical issues connected with genetic engineering and might in the end jeopardize the enforceability of the arrangement before a court already hesitant about the depersonalized nature of surrogate motherhood. We suggest that the limited genetic review currently used in Quebec hospitals' A.I.D. procedure serve as a guideline.⁵⁸

A similar notion underlies the need for psychiatric screening: it is intended to minimize the possibility of frustrating the parties' intentions. According to Parker, whose work in the area of psychiatric counselling is most useful, the psychiatrist should conduct interviews and evaluations of all the participants to help ensure that the parties to the contract

"are competent and voluntarily and freely making an informed choice, free of coercion and undue influence. The psychiatrist should assist the parties in examining and weighing the possible psychological advantages and disadvantages."⁵⁹

We suggest that a complete inquiry be made into both the motivations of the surrogate⁶⁰ and those of the prospective parents. Where reasons on both sides are perceived from the outset as being "legitimate", a court might be less likely to later find the contract contrary to public order and therefore absolutely null. Mady notes that where the surrogate's only motivation is financial, the relationship begins to resemble a contract for the sale of a child, which has traditionally been held to be unenforceable.⁶¹ However, where the surrogate's reasons include sheer altruism, the desire to be pregnant and the need to resolve internal psychological conflicts,⁶² and where the couple's motiva-

57. "Ethical Issues in Surrogate Motherhood" in *The Reproductive Technologies*, *loc. cit.*, note 5, Document III, 23, 24.

58. See the discussion of this delicate question in Jean-Louis BAUDOIN, *loc. cit.*, note 9, 132.

59. P. PARKER, *loc. cit.*, note 39, 354.

60. "Patricia" stated in "La première mère porteuse française", *Parents*, (Oct. 1984) 46 at 53: "On ne fixe pas un prix pour un enfant Je ne le ferais pas pour rien non plus. Cet argent me motive un peu, mais ce n'est pas pour cela que je le fais, ce n'est pas pour l'argent".

61. T. MADY, *loc. cit.*, note 37, 325.

62. P. PARKER, *loc. cit.*, note 51, 117 cites these as common motivations.

tion is what Mady terms "necessity",⁶³ a court might be more likely to decide that the contract is legitimate. If screening includes a positive evaluation of the prospective parents' home environment, as University of Toronto Professor Bernard Dickens argues it should,⁶⁴ a court would be that much more likely to view the arrangement as legitimate and therefore enforceable.

Psychiatric screening has another benefit: it reduces the chance that the contract will be breached. The parties' sense of their responsibility towards one another is revealed prior to the commencement of their twelve month contractual relationship. Attorney Noel Keane includes counselling provisions in the surrogate motherhood contracts he drafts, since "such counselling, besides serving its main purpose of helping the surrogate over what might prove to be a difficult time, may also head off disagreements which might break the transaction apart".⁶⁵ Preliminary screening might, for example, reveal an applicant to be likely to either abort or keep the child rather than perform the contract as stipulated. Given that problems of enforceability present themselves when one party breaches and the other seeks performance, any effort to avoid breach at a preliminary stage would be most useful. Screening is not only desirable from the point of view of the public interest in the transaction, but also from that of the private interest in performance.

PARAGRAPH III: SERVICES TO BE RENDERED BY THE SURROGATE

This agreement constitutes an innominate contract of service whereby the surrogate mother undertakes and promises as follows

- (1) that she shall be artificially inseminated by the natural father under the supervision of _____ M.D.;
- (2) upon becoming pregnant, she shall carry the embryo/fetus [hereinafter referred to as the "child"] until delivery and that such delivery shall occur in the Province of Quebec; and
- (3) as soon thereafter as is medically possible, the surrogate and her husband shall take whatever action necessary to renounce and terminate their respective rights to the child.⁶⁶

63. T. MADY, *loc. cit.*, note 37, 324.

64. Bernard DICKENS, *loc. cit.*, note 25, 78.

65. Noel KEANE, *loc. cit.*, note 44, 110.

66. This clause is based loosely on those proposed by K.M. BROPHY, *loc. cit.*, note 34, 267 and the California legislature, *supra*, note 5, 121.

This clause represents the essence of the transaction. Read in conjunction with the surrogate's undertaking to give up the child and the would-be parents' promise to accept full parental responsibility, it amounts to the "basic agreement between the parties".⁶⁷

Given the role of artificial insemination in the arrangement, there has been a certain tendency in the literature to assimilate the surrogate mother procedure with A.I.D., especially among those authors predisposed to arguing the legality of the surrogate motherhood agreement. Bowal's view is typical: "A.I.D. is really the flipside of surrogate motherhood."⁶⁸ Yet comparing the surrogate's role in the surrogate motherhood arrangement with the deposit of a sperm donor at a sperm bank reveals the dissimilarity between the two procedures.⁶⁹ The extent of the surrogate's participation exposes her to psychological and physiological risks far beyond those of a sperm donor. Although notionally there appears to be common ground between the two technologies, the practical differences are such that arguments for the legality of surrogate motherhood based solely on the legality of A.I.D. are untenable. There is, however, one very basic similarity which does justify a parallel. Both techniques are eminently defensible in their therapeutic use as a treatment of infertility. This is the foundation for the recognition of A.I.D. as a legitimate reproductive technique and, we contend, it should be the grounds on which surrogate motherhood is recognized as legal and in the public interest.

PARAGRAPH IV: CONSIDERATION

In consideration for the services provided herein by the surrogate mother and the surrogate's husband, the natural father and the social mother promise as follows:

- (1) to pay all medical expenses of the surrogate mother and the surrogate's husband directly connected with the pregnancy;

67. K.M. BROPHY, *loc. cit.*, note 34, 258.

68. Peter BOWAL, *loc. cit.*, note 36, 13. For a similar view, see, e.g., S.M. PATTERSON, *loc. cit.*, note 37, 386.

69. For an excellent comparison, see, e.g., David ROY, *loc. cit.*, note 27, 150-2, and American College of Obstetricians and Gynecologists, *supra*, note 57, 23-4.

- (2) to pay all other expenses necessarily incidental to the pregnancy, not including lost income, these expenses not to exceed _____ ; and
- (3) to pay the surrogate mother and the surrogate's husband together the sum of _____ per month for a period of 12 months following the successful insemination of the surrogate mother.

The parties further agree that

- (4) no claim shall be made following the period 12 months after the successful insemination of the surrogate; and
- (5) all monies paid under this agreement are in consideration for services and are not to be construed as payment for the purchase of the child or for the renunciation of parental authority to that child.

The consideration clause is perhaps the most delicate of those in the surrogate motherhood contract. Unless the parties ensure that the consideration is not prohibited or contrary to public order and good morals, the contract will have no effect.⁷⁰ Furthermore, the object of the obligation must conform to the same rules of public order,⁷¹ as well as being itself an "object of commerce".⁷² To circumvent these two problems we have made an effort to characterize the contract as an innominate contract of service.

Bowal explains that the fee can be regarded in four different ways:

"(1) the payment to purchase a child; (2) payment to purchase the surrogate mother's consent to adoption (by the father's wife); (3) payment for the surrogate mother's promise to voluntarily terminate or abandon her parental rights over the child; or (4) payment 'for services'."⁷³

Are these characterizations satisfactory in Quebec law? Little need be said as to the clear illegality of a contract for the sale of a child. Although article 20 C.C. may be stretched to permit the sale by the surrogate of her ovum as a "part of the body susceptible to regeneration", the sale of a child would be "offensive to fundamental principle"⁷⁴ and contrary to public order and good morals, irrespective of the fact that the natural father would be one of the 'buyers'. Equally, if the payment were perceived

70. Arts 989 and 990 C.C.

71. Art. 1062 C.C.

72. Art. 1059 C.C.

73. Peter BOWAL, *loc. cit.*, note 36, 20.

74. DICKENS, *loc. cit.*, note 25, 82. See s. 135.1(a) of the *Youth Protection Act*, L.R.Q., c. P-34.1.

to be for the purchase of the surrogate's consent to adopt (in cases where adoption was necessary), this too would be contrary to public order and good morals.⁷⁵ In any event, the right to withdraw such consent within thirty days of the date on which it was given, as set out in article 609 C.C.Q., would undoubtedly compromise the enforceability of a contract for the purchase of consent for adoption. Finally, we note that the same problem arises if the fees are characterized as payment for renunciation of parental authority by the surrogate. The parties cannot privately agree to oust parental authority, which vests in a child's mother and father by operation of law pursuant to articles 645 *et seq.* C.C.Q. Jean Pineau explains the impossibility of renouncing parental authority:

“[I]l est impossible de se soustraire ou de déroger conventionnellement: en ce sens, l'autorité parentale est de l'ordre public puisqu'elle échappe à la volonté des personnes intéressées.”⁷⁶

The Civil Code of Quebec does allow for the delegation of parental authority,⁷⁷ but this cannot be used as a substitute for renunciation. Delegation can never completely strip parents of their status as “titulaire de l'autorité parentale”.⁷⁸ Furthermore, there

75. Under s 135.1(a) of the *Youth Protection Act*, L.R.Q., c. P-34.1, any person who gives or receives a payment for obtaining the adoption of a child is guilty of an offence and is liable, on summary proceedings, for a fine of up to \$10,000.

76. Jean PINEAU, *La famille* (1982), para. 326. See, also, *Stevenson v. Florent* [1925] S.C.R. 532, 535.

77. Art. 649 C.C.Q.

78. Jean PINEAU, *op. cit.*, note 76, para. 331. In a recent unreported case, *Protection de la Jeunesse-143* (9 Septembre 1984) 500-41-000353-840, the Quebec Youth Court was asked to consider the enforceability of a contractual delegation of parental authority between a natural mother and prospective adoptive parents. Rivet J. was categorical in refusing to allow a permanent delegation of parental authority: “Cette délégation ne peut être faite de manière permanente ou définitive” (*Id.*, 5). In *obiter*, she called into question the validity of the private arrangement between the parties: “Nous mettons sérieusement en doute la validité de cette délégation de l'autorité parentale [...] puisque cette délégation est complète” (*Id.*, 7). This reasoning demonstrates the inappropriateness of delegating parental authority to achieve the desired ends in a surrogate motherhood arrangement. Nonetheless, we note parenthetically that Rivet J. based her decision not on the validity or invalidity of the delegation of authority, but rather on the basis of the perceived best interest of the child in question. This criterion, we have argued, must be the very foundation of an enforceable surrogate motherhood contract. Interestingly,

is little doubt that delegation of this sort can be revoked at any time.⁷⁹ Payments cannot, therefore, be in exchange for renunciation or delegation of parental authority. Accordingly, the fees paid to the surrogate are expressly in consideration for services rendered under the contract.

Other possible characterizations of the transaction are equally unsatisfactory. Diana Brahams notes the description of "womb-leasing",⁸⁰ and though this is a possible characterization for surrogacy by embryo transfer, it does not properly describe the surrogacy by the A.I.D. method. Although with some imagination the language of articles 1600 *et seq.* C.C. can be construed to fit the womb-lease concept, the idea of leasing a person, rather than a moveable or immovable, smacks of slavery and is highly inappropriate. The special contract of deposit, governed by article 1794 *et seq.* C.C., presents a similar incongruity.

As a 'contract of service', the arrangement is most apt to be viewed as acceptable by the courts: "The most benign interpretation of a paid surrogate motherhood agreement is that it is a service transaction."⁸¹ We chose to characterize it as an innominate contract of service since the ambit of the relationship between the parties extends beyond that of the contract for lease and hire of service in the Civil Code, and judges may feel shy to pigeon-hole the contract as such. We have drafted the agreement so that the surrogate and her husband offer their services and are paid accordingly on a monthly basis, for a period of 12 months. The surrogate is paid to become pregnant and carry the child rather than to sell the child. The period of 12 months is intended to cover the time from the insemination of the surrogate mother, through pregnancy and delivery, to a time thereafter when any immediate post-delivery medical or psychological

part of Madame Justice Rivet's order in *Protection de la Jeunesse-143* was to have the 'contractual' parents evaluated "comme famille d'accueil potentielle" (*Id.*, 9), the result being that the private arrangement between the parties was not entirely unsuccessful.

79. "D'après les principes généraux du mandat et de l'ordre public, il est évident que la révocation d'une délégation d'autorité parentale est toujours possible": G. TRUDEL et R. DesROSIERS de LANAUZE, *Code civil du Québec: comparé et coordonné au Code civil du Bas-Canada*, Livre II, (1981), 201.

80. D. BRAHAMS, *loc. cit.*, note 4, 727.

81. DICKENS, *loc. cit.*, note 25, 84. This solution is embraced by the majority of commentators. See, e.g., T. MADY, *loc. cit.*, note 37, 331.

problems could be attended to.⁸² Alternatively, it is of course possible to set the commencement of the 12 month payment schedule at the time of the initial screening of the parties.

By characterizing the consideration as fees for services rendered, the parties maximize the likelihood that the clause will be enforced in the event of a dispute between them. In the case of breach by the natural father to pay the costs of the pregnancy or the fee to the surrogate, "recovery would be fairly straightforward, since these expenses either will be delineated in the contract, or easily ascertained by assessing the costs of medical care".⁸³ The action by the surrogate would be the usual action for inexecution based on 1065 C.C. The situation where the would-be parents not only refuse to pay the amounts due but also refuse to accept the child is more complicated.⁸⁴

The 'services' characterization is by no means a panacea. There are, of course, services such as prostitution which the public has an interest in prohibiting. Furthermore, if courts take a dim view of the surrogate motherhood arrangement itself, this view is not likely to be improved by framing it as a contract of service. The courts may strike down the service contract as an effort by the parties to do indirectly what they cannot do directly. As Bowal remarks, "the distinction between this 'service' to bear children for others and the sale of babies as market commodities is arguably one more of form than substance".⁸⁵

The consideration clause raises another fundamental problem: should the state condone a commercial relationship at all? We see no objection to the commercial aspect of the arrangement. Indeed deposits by sperm donors are often done on a commercial basis,⁸⁶ and we have already noted that article 20 C.C. might be invoked to justify the commercial transaction. Many commentators, however, contend that the potential for exploitation of surrogates precludes the commercialization of the arrangement. In a recent policy paper, for example, the United Church of Canada stated:

82. Noel KEANE, *loc. cit.*, note 44, 109 suggests as a minimum a 6 week post-delivery period.

83. T. MADY, *loc. cit.*, note 37, 338.

84. See, *infra*, note 91 and accompanying text.

85. Peter BOWAL, *loc. cit.*, note 36, 23.

86. G. ANNAS, *loc. cit.*, note 4, 23.

“We see surrogate mothering for profit as having some analogy to prostitution, a form of rent-a-womb, and this explains our refusal to condone it except in the narrowest circumstances.”⁸⁷

Our position is that the preliminary screening in the contract would weed out inappropriate surrogates and diminish the possibility of exploitation.

The consideration clause imposes the responsibility for medical expenses on the would-be parents. Would these expenses, including those of preliminary and post-delivery psychiatric counseling, be covered by the Quebec statutory health insurance plan? We contend that insofar as the technique is a treatment of infertility, its costs should be covered under section 3(a) of the *Health Insurance Act*.⁸⁸

“The cost of the following services rendered by a professional shall be assumed by the Board on behalf of every resident of Quebec:

(a) all services rendered by physicians that are medically required.”

We have also included a promise that the surrogate be reimbursed for reasonable expenses which are necessarily incidental to the pregnancy, up to an agreed limit, and expressly excluding lost income. The precise details as to the amount of money changing hands is, of course, always a matter of negotiation.

PARAGRAPH V: REGULATION OF THE CONDUCT OF THE PREGNANCY

(1) The surrogate mother hereby agrees and promises to take all reasonable precautions during the pregnancy to ensure the health of the child, including, without limitation:

(a) adherence to all medical instructions given to her by _____
_____ M.D.; and

(b) abstention from cigarettes, alcoholic beverages and any narcotics not authorized by the above-named physician.

(2) The surrogate mother hereby agrees and promises not to procure her own miscarriage by any means except where a majority of the members of the therapeutic abortion committee at an approved hospital decide that the continuation of the pregnancy of the surrogate mother would or would be likely to endanger her life or health.

This clause regulates the conduct of the pregnancy in two ways: subparagraph (1) sets the ground rules for the pre-natal

87. UNITED CHURCH OF CANADA, *loc. cit.*, note 54, 85.

88. L.R.Q., c. A-29.

health care of the surrogate, while (2) prevents her from obtaining an abortion except under conditions prescribed by law. Again, a complete screening of prospective surrogates would be the best assurance that both aspects of this clause would be respected. With regard to pre-natal health, the would-be parents would most likely take injunctive proceedings under articles 751 *et seq.* of the Quebec Code of Civil Procedure⁸⁹ in the case of breach. Damages, apart from being difficult to quantify, would be unsatisfactory relief. The courts, however, can be expected to shy away from ordering an injunction that they would find impossible to enforce.

In subparagraph (2), the surrogate's ability to breach the contract by seeking an abortion is limited to those circumstances set out in the Criminal Code.⁹⁰ In the event that the health of the mother is threatened, no court would hold the mother contractually bound to see the pregnancy to term. More problematic is an abortion sought by the surrogate mother because she has had a change of heart. In theory, section 251 of the Criminal Code prevents abortion on demand and obviates the need to take injunctive proceedings to hold the surrogate to her end of the bargain. We chose to include a 'no-abortion' clause nonetheless, if for no other reason than its persuasive value.

PARAGRAPH VI: RISK

- (1) The surrogate mother and the surrogate's husband hereby agree and promise as follows:
 - (a) that their signatures to this agreement evidence their full and informed consent to its terms, including their understanding of the risks involved; and
 - (b) to assume all risks connected with the performance of their obligations under this agreement.
- (2) The natural father and the social mother hereby agree to pay the cost of a fixed-term life insurance policy for the surrogate mother, in the amount of _____ and payable to the beneficiary named by her. This policy shall expire at the end of the twelve months covering the term of this agreement.

Risk has been allocated on a *quid pro quo* basis. The surrogate assumes the risk of death or injury after having given in-

89. L.R.Q., c. C-25.

90. R.S.C. 1970, c. C-34, s. 251.

formed consent to the arrangement and, in exchange, the couple undertakes to insure her life for the term of the agreement. Parties can, of course, choose to allocate risk otherwise.

PARAGRAPH VII: TERMINATION AND RENUNCIATION OF PARENTAL AUTHORITY

The surrogate mother and the surrogate's husband hereby agree that for all purposes including, without limitation, the purposes of filiation, the drawing up of the act of birth, the exercise of parental authority for the child, and any adoption proceedings initiated by the surrogate mother, should such proceedings become necessary:

- (1) they voluntarily acknowledge that the natural father is the father of the child;
- (2) they voluntarily acknowledge that the social mother is the mother of the child; and
- (3) they hereby renounce and terminate all parental authority, parental rights and parental obligations they may have in respect of the child.

PARAGRAPH VIII: ACCEPTANCE OF PARENTAL AUTHORITY

The natural father and the social mother hereby agree that for all purposes including, without limitation, the purposes of filiation, the drawing up of the act of birth, the exercise of parental authority for the child, and any adoption proceedings initiated by the surrogate mother, should such proceedings become necessary:

- (1) they voluntarily acknowledge that the natural father is the father of the child;
- (2) they voluntarily acknowledge that the social mother is the mother of the child; and
- (3) they hereby accept all parental authority, parental rights and parental obligations in respect of the child normally incumbent on the mother and the father.

Because the ties created and renounced between parent and child by these clauses are out of step with traditional family relationships, they may prove to be the most difficult to enforce in the case of breach. It is the transfer of parental authority from the surrogate couple to the would-be parents which causes critics of surrogate motherhood to fear for the sanctity of marriage and for the institution of the family. Pope Pius XII expres-

sed the sentiment well in 1949: "Only marriage partners have mutual rights over their bodies for the procreation of new life, and these rights are exclusive, non-transferable and inalienable."⁹¹

The clauses themselves have two objects: first, to establish the filiation of the child in accordance with the parties' "reproductive intention"; and, second, to set out clearly the lines of parental authority. The case for the enforceability of both purposes is founded on the concept of the best interest of the child. Where the contractual terms represent a scheme for filiation and parental authority in keeping with the child's best interest, the contract should be enforceable.

The question of filiation pursuant to a surrogate motherhood agreement is an immensely complicated one, the consideration of which merits a study of its own.⁹² We shall limit ourselves to the basic issues raised by Paragraphs VII and VIII of the standard form.

The goal of the contracting parties is to establish the natural father as the true father of the child and the social mother as the true mother. This may be achieved by means of the first and foremost proof of filiation, the act of birth:

"Paternal and maternal filiation are proved by the act of birth, *regardless of the circumstances of the child's birth.*"⁹³

The parties therefore agree to register the names of the intended parents on the act of birth. We take the "regardless of the circumstances of the child's birth" language as license to use the act of birth as a mechanism to establish the filiation intended by the parties in the agreement. If the natural father and the social mother are both registered on the act of birth, the formality of adopting the child is avoided.⁹⁴

Can the act of birth be manipulated to reflect the filiation intended by the parties to the surrogate motherhood agreement? Filiation is, of course, established by operation of law and not

91. Cited in David ROY, *loc. cit.*, note 27, 160.

92. For an excellent general discussion of establishing filiation, see Jean PINEAU, *op. cit.*, note 76, paras 261 *et seq.*

93. Art. 572, para. 1, C.C.Q. (*our emphasis*).

94. Noel KEANE, *loc. cit.*, note 44, 113, and K.M. BROPHY, *loc. cit.*, note 34, 244, suggest that the adoption model is used in the United States. This is an alternative for Quebec parties with its own special problems.

by the intention of would-be mothers and fathers. Although the Civil Code has no provision which precludes the use of the act in this manner,⁹⁵ it may be prudent for the contract to provide for adoption as an alternate means of securing the desired filiation of the child. Indeed, if the function of the act of birth is to prove "le fait de l'accouchement et le fait de l'identité de l'enfant considéré avec celui dont la prétendue mère a accouché" as Pineau suggests,⁹⁶ it may be impossible to register the social mother's name as the child's mother. Section 45 of the *Public Health Protection Act*,⁹⁷ which requires that the physician attending the child's birth draw up a "declaration of birth" in the manner prescribed by regulation, presents a further and more difficult problem. There is little doubt that the name of the natural mother must figure on this "declaration".⁹⁸ Furthermore, the civil status officer who draws up the act of birth must have an "attestation of the declaration of birth" remitted to him. This procedure may preclude the registration of the social mother's name on the act of birth and require the additional cumbersome step of adoption proceedings to be initiated by the social mother. Accordingly, we have introduced at Paragraphs VII and VIII provisions to facilitate the adoption of the child should that become necessary. The social mother's husband is the natural father and consequently need not himself adopt the child. The social mother, if she must adopt the child to secure the child's proper filiation, will not be able to do so simply on the strength

95. Art. 54 C.C. requires that the "names, surnames and occupation and domicile of the father and mother" be set forth in the act of birth. In and of itself this language does not prevent listing the natural father and the social (rather than the biological) mother as parents if this is to be the child's filiation.

The rules regarding acts of birth are among those to be changed under Bill 20, *An Act to add the reformed law of persons, successions and property to the Civil Code of Quebec*, 5th Sess., 32 Leg., Que., 1984, currently before the National Assembly of Quebec. Insofar as the new system may confound the registration of the social mother on the act of birth, using the act as a mechanism to establish the filiation intended by the parties may be impossible under the proposed regime. Section 117 of Bill 20 requires the "accoucheur" to prepare an "attestation of birth" setting out the name of the "mother", which presumably refers to the natural mother. Then the father and mother "declare" the child's filiation, pursuant to section 120.

96. Jean PINEAU, *op. cit.*, note 76, para. 264.

97. L.R.Q., c. P-35.

98. See R.R.Q. 1981, c. P-35, r.1, ss 9 *et seq.* and Form SP-1.

of the terms of the contract. The adoption will only take place where it is in the interest of the child and in the manner prescribed by law.⁹⁹ Once granted, the adoption would create the same rights and obligations as filiation by blood.¹⁰⁰

A further problem is the possibility of disavowal or contestation of the intended filiation. Article 587 C.C.Q. establishes an irrebuttable proof of filiation when the act of birth and the possession of status of the child are consistent. This would not apply to the surrogate motherhood arrangement since the possession of the status is not "uninterrupted", as required by article 572, para. 2, C.C.Q.

Can the natural father disavow paternity? The short answer is no. Firstly, his name appears on the act of birth thereby establishing him as the child's father. To disavow paternity, the natural father must contradict the act of birth, generally recognized as the first order means of proving filiation.¹⁰¹ Furthermore, he has signed a voluntary acknowledgement of paternity at Paragraph VIII of the contract which, though it has limited importance as proof of paternity,¹⁰² may have a convincing persuasive effect in the contractual relations between the parties. Finally, given that the child was conceived through artificial insemination, article 586 C.C.Q. may be invoked as a bar to an action for disavowal:

"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."¹⁰³

99. Arts 595 *et seq.* C.C.Q.

100. Art. 628 C.C.Q.

101. Jean PINEAU, *op. cit.*, note 76, para. 264.

102. Art. 579 C.C.Q. directs that the mere acknowledgement of paternity binds only the person who made it. Furthermore, in the event that the child's paternal filiation is established in favour of another person (say, for example, the surrogate's husband), the acknowledgement by the natural father will not alone disprove this established filiation.

103. Given that this application of art. 586 C.C.Q. no doubt goes well beyond its original legislative purpose, it may be inappropriate to invoke the provision in these circumstances. Indeed, in *Report on the Quebec Civil Code* Vol. II, (1978) t. 1, Book 2, art. 281, the Civil Code Revision Office commented that the intent of the provision is to protect the "strictest confidentiality surrounding artificial insemination", which clearly has no bearing in the surrogate motherhood arrangement where the natural father openly undertakes to participate. Nonetheless, the fact that the

Similarly, the surrogate's husband would have a difficult time contesting the natural father's claim to paternity reflected in the act of birth. The Civil Code does provide that where a child is born during a marriage or within three hundred days of the dissolution or annulment of the marriage, the husband of the child's mother is presumed to be the father.¹⁰⁴ Can the surrogate's husband invoke this presumption of paternity to substantiate a claim that he is the rightful father? Whatever the status of this presumption vis-à-vis the act of birth as a means of proving filiation,¹⁰⁵ we suggest that article 586 C.C.Q. might again be invoked, given the use of artificial insemination in the arrangement, to bar the surrogate husband's action for contestation of paternity.

The issue of the maternity of the child is a more complex problem given that the surrogate is, in fact, the biological mother of the child. The social mother has voluntarily acknowledged that she is the mother, which acknowledgement binds her by virtue of article 579 C.C.Q. The significance of this acknowledgement is again limited by article 580 C.C.Q. The acknowledgement cannot, on its own, contradict the act of birth if the act names the surrogate mother as the child's parent. Again, the real value of including this acknowledgement in the contract is its persuasive effect on the surrogate mother. More difficult is a possible contestation of maternity by the surrogate mother herself. Given that the act does not conform with uninterrupted possession of status, the filiation can be contested at any time and by any means.¹⁰⁶ As a defence, the social mother could raise the contract and the surrogate's renunciation of parental authority, since "[e]very mode of proof is admissible to contest an action concerning filiation".¹⁰⁷ Though this would undoubtedly give rise to the wider question of the legality of the contract and the effectiveness of the renunciation, we contend that, at the end of the

child was conceived through artificial insemination should not on its own constitute grounds for disavowal.

104. Arts 574 *et seq.* C.C.Q.

105. Jean PINEAU, *op. cit.*, note 76, para. 266 explains the incongruity of a system of establishing filiation which sets as the primary means of proof the act of birth and yet still provides for a presumption of paternity which may conflict with the filiation established in the act.

106. Art. 588, para. 1, C.C.Q.

107. Art. 592 C.C.Q.

day, filiation would be decided according to the terms of the contract if that result was in the best interest of the child.

The complicated rules regarding filiation for Quebec surrogate motherhood arrangements reinforce the necessity of obtaining full and informed consent from all the parties involved. Although the filiation of the child is established by operation of law (and not by the whims of fathers and mothers), it can be seriously thwarted by a party who chooses not to cooperate as originally agreed.

This same 'best interest' criterion would be the deciding factor in the case of any breach of these provisions of the contract. Breach here falls into two distinct and problematic categories: first, the refusal of the surrogate or her husband to renounce the child according to the terms of Paragraph VII of the contract; and, second, the refusal of the contractual parents to accept the child pursuant to their undertaking at Paragraph VIII.

It is most likely that the social parents would seek specific performance of the contract as a remedy for a post-delivery breach of the contract by the surrogate. Most authors are not sanguine about the couple's hopes of gaining parental authority in these circumstances: "[I]t is doubtful", says Bowal, "that the father could succeed by relying on the surrogate's promise to hand over the baby."¹⁰⁸ Yet it is arguable that courts would be just as likely to decide that the baby should be handed over. Whatever the status of the two 'mothers' as parents, it is clear that the natural father enjoys the "rights and duties of custody, supervision, and education of their children" based on article 647 C.C.Q. In theory, his right to custody is the same as that of the biological mother. In any event, the natural father's petition to the court for custody would be decided upon in the best interest of the child.¹⁰⁹ This interest may just as easily be served by enforcing the surrogate's initial renunciation as by allowing her to keep the child. Whether the parties' contractual arrangement meets with the best interest of the child will depend on the circumstances of each case.

108. Peter BOWAL, *loc. cit.*, note 36, 26.

109. This was the criterion chosen by the Michigan Court of Appeals in their consideration of the surrogate motherhood arrangement in *Syrkowski*, *supra*, note 42, 93: "Interest in the welfare of the child must continue to be of paramount interest to the people of this state".

If the would-be parents refuse to accept parental authority and its correlative responsibilities, the surrogate would most likely be unsuccessful in an action to enforce the strict terms of the contract. Mady comments that

“[s]pecific performance is unlikely since a court would not force H and W to accept an unwanted child, thereby jeopardizing the child’s best interest.”¹¹⁰

This situation is particularly unpalatable where the child is born with a birth defect. Brahams suggests that though the surrogate could not force acceptance, the contractual parents would be held financially responsible whether the child stayed with the surrogate or was institutionalized.¹¹¹

PARAGRAPH IX: SEVERABILITY

If any provision of this agreement is null or unenforceable, that provision shall be deemed severable and shall not cause the nullity or unenforceability of the whole of this agreement.

PARAGRAPH X: GOVERNING LAW

This agreement shall be governed by the laws of the Province of Quebec and the laws of Canada applicable therein.

PARAGRAPH XI: LANGUAGE

Les parties aux présentes déclarent avoir expressément exigé que cette convention ainsi que tout document s’y rapportant soient rédigés en langue anglaise. The parties hereto have expressly demanded that this agreement and all documents related hereto be drawn up in the English language.¹¹²

110. T. MADY, *loc. cit.*, note 37, 338.

111. D. BRAHAMS, *loc. cit.*, note 4, 728.

112. This clause is inserted as a safeguard against any challenge based on s. 55 of the *Charter of the French Language*, L.R.Q., c. C-11, which requires that all contracts be drawn up in French unless the parties expressly agree otherwise.

IN WITNESS WHEREOF, the parties agree this _____
day of _____, 198

the surrogate mother

the natural father

the surrogate's husband

the social mother

CONCLUSION

We have presented what we believe to be a workable surrogate motherhood contract for would-be parents and surrogates in Quebec. We have suggested that the principle of freedom of contract is sufficient to support the agreement and allow the parties to realize their "reproductive intent".

The questions of validity and enforceability which would arise if the agreement were challenged turn on the court's perception of the state interest in public order and good morals at play in the arrangement. We have argued that when surrogate motherhood is used as a treatment of infertility, respecting the best interests of both the surrogate mother and the child, the contract should be enforced. The public interest can be safeguarded and the likelihood of enforceability can be reinforced by a contractual term providing that the parties be fully screened before embarking on the arrangement. The special problems which arise with respect to clauses requiring the exchange of money in connection with the transaction and the renunciation of parental authority can be circumvented by careful drafting.

The reality is that surrogate motherhood will continue to be resorted to by Quebec couples bent on having children. Until the legislator chooses to intervene directly, the onus will be on the law of contract to regulate this new reproductive technology and the unique family relationships it creates. We suggest that the institution of contract is sufficiently flexible to adapt to this new scientific and social challenge. The contract we have presented is by no means impregnable, but it will give Quebec parties a workable standard form by which they can agree to have babies.

APPENDIX I: SAMPLE CONTRACT

PARAGRAPH I: PARTIES

THIS AGREEMENT IS MADE THIS _____ day of _____, 198____, by and among

_____ (hereinafter the "surrogate mother");

and _____ the lawful husband of the surrogate mother (hereinafter the "surrogate's husband");

and _____ (hereinafter the "natural father");

and _____ the lawful wife of the natural father (hereinafter the "social mother").

PARAGRAPH II: SCREENING

(1) *Medical Screening*

The surrogate mother and the natural father hereby declare and promise that they have individually undergone medical evaluation by _____ M.D. and _____ M.D., and that these physicians have attested in writing to the said parties' medical and physical fitness to enter into and to carry out this agreement.

(2) *Psychiatric Screening*

The surrogate mother, the surrogate's husband, the natural father and the social mother hereby declare and promise that they have individually undergone psychiatric evaluation by _____ M.D., and _____ M.D., and that these physicians have attested in writing to the said parties' mental and emotional fitness to enter into and to carry out this agreement.

PARAGRAPH III: SERVICES TO BE RENDERED BY THE SURROGATE

This agreement constitutes an innominate contract of service whereby the surrogate mother undertakes and promises as follows:

- (1) that she shall be artificially inseminated by the natural father under the supervision of _____ M.D.;
- (2) upon becoming pregnant, she shall carry the embryo/fetus [hereinafter referred to as the "child"] until delivery and such delivery shall occur in the Province of Quebec; and
- (3) as soon thereafter as is medically possible, the surrogate and her husband shall take whatever action necessary to renounce and terminate their respective rights to the child.

PARAGRAPH IV: CONSIDERATION

In consideration for the services provided herein by the surrogate mother and the surrogate's husband, the natural father and the social mother promise as follows:

- (1) to pay all medical expenses of the surrogate mother and the surrogate's husband directly connected with the pregnancy;
- (2) to pay all other expenses necessarily incidental to the pregnancy, not including lost income, these expenses not to exceed _____; and
- (3) to pay the surrogate mother and the surrogate's husband together the sum of _____ per month for a period of 12 months following the successful insemination of the surrogate mother.

The parties further agree that

- (4) no claim shall be made following the period 12 months after the successful insemination of the surrogate; and
- (5) all monies paid under this agreement are in consideration for services and are not to be construed as payment for the purchase of the child or for the renunciation of parental authority to that child.

PARAGRAPH V: REGULATION OF THE CONDUCT OF THE PREGNANCY

- (1) The surrogate mother hereby agrees and promises to take all reasonable precautions during the pregnancy to ensure the health of the child, including, without limitation:
 - (a) adherence to all medical instructions given to her by _____ M.D.; and
 - (b) abstention from cigarettes, alcoholic beverages and any narcotics not authorized by the above-named physician.
- (2) The surrogate mother hereby agrees and promises not to procure her own miscarriage by any means except where a majority of the members of the therapeutic abortion committee at an approved hospital decide that the continuation of the pregnancy of the surrogate mother would or would be likely to endanger her life or health.

PARAGRAPH VI: RISK

- (1) The surrogate mother and the surrogate's husband hereby agree and promise as follows:
 - (a) that their signatures to this agreement evidence their full and informed consent to its terms, including their understanding of the risks involved; and
 - (b) to assume all risks connected with the performance of their obligation under this agreement.

- (2) The natural father and the social mother hereby agree to pay the cost of a fixed-term life insurance policy for the surrogate mother, in the amount of _____ and payable to the beneficiary named by her. This policy shall expire at the end of the twelve months covering the term of this agreement.

PARAGRAPH VII: TERMINATION AND RENUNCIATION OF PARENTAL AUTHORITY

The surrogate mother and the surrogate's husband hereby agree that for all purposes including, without limitation, the purposes of filiation, the drawing up of the act of birth, the exercise of parental authority for the child, and any adoption proceedings initiated by the surrogate mother, should such proceedings become necessary:

- (1) they voluntarily acknowledge that the natural father is the father of the child;
- (2) they voluntarily acknowledge that the social mother is the mother of the child; and
- (3) they hereby renounce and terminate all parental authority, parental rights and parental obligations they may have in respect of the child.

PARAGRAPH VIII: ACCEPTANCE OF PARENTAL AUTHORITY

The natural father and the social mother hereby agree that for all purposes including, without limitation, the purposes of filiation, the drawing up of the act of birth, the exercise of parental authority for the child, and any adoption proceedings initiated by the surrogate mother, should such proceedings become necessary:

- (1) they voluntarily acknowledge that the natural father is the father of the child;
- (2) they voluntarily acknowledge that the social mother is the mother of the child; and
- (3) they hereby accept all parental authority, parental rights and parental obligations in respect of the child normally incumbent on the mother and the father.

PARAGRAPH IX: SEVERABILITY

If any provision of this agreement is null or unenforceable, that provision shall be deemed severable and shall not cause the nullity or unenforceability of the whole of this agreement.

PARAGRAPH X: GOVERNING LAW

This agreement shall be governed by the laws of the Province of Quebec and the laws of Canada applicable therein.

PARAGRAPH XI: LANGUAGE

Les parties aux présentes déclarent avoir expressément exigé que cette convention ainsi que tout document s'y rapportant soient rédigés en langue anglaise. The parties hereto have expressly demanded that this agreement and all documents related hereto be drawn up in the English language.

IN WITNESS WHEREOF, the parties agree this _____
days of _____, 198

the surrogate mother

the natural father

the surrogate's husband

the social mother