

2015

Surrogates in Quebec: The Good, the Bad and the Foreigner

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Citation Details

Régine Tremblay, "Surrogates in Quebec: The Good, the Bad and the Foreigner" (2015) 27:1 CJWL 94-111.

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Surrogates in Quebec: The Good, the Bad, and the Foreigner

Régine Tremblay

En 2002, le régime québécois d'établissement des relations parent-enfant a été transformé dans l'objectif de le rendre plus égalitaire. Malgré les réformes, une règle préexistante—elle-même justifiée par l'égalité des femmes—est demeurée intacte : la nullité absolue des conventions de gestation pour autrui. Cet article expose comment cette règle a mené les juges à empêcher, dans certains cas, l'établissement de la filiation des enfants nés de mères porteuses et comment, dans d'autres, cette nullité a forcé les juges à appliquer des solutions créatives, bien qu'incertaines. L'article explore les décisions des tribunaux québécois à travers les portraits des femmes porteuses tracés par les décideurs—la bonne, la mauvaise et l'étrangère. Le bref aperçu des décisions démontre que le poids accordé à certains éléments juridiques (l'importance de la déclaration et de l'attestation de naissance, la flexibilité des vices du consentement, l'état matrimonial de la femme porteuse, l'état civil des parents d'intention, etc.) au détriment de certains autres doit être remis en question. L'article examine comment des préjugés et stéréotypes deviennent décisifs lorsque des règles juridiques sont incertaines, exposant ainsi un discours problématique sur des enjeux délicats (féminité et maternité, droit de l'enfant et orientation sexuelle).

Quebec's legal regime for the establishment of parent-child relationships was substantially modified in 2002 in order to achieve equality. Reforms left untouched, however, an existing rule justified by women's equality: the absolute nullity of surrogacy agreements. The article shows how the rule has led judges to preclude the filiation of children born of surrogacy in certain situations and how it has forced judges to apply creative, albeit unpredictable, solutions in others. It explores the decisions of Quebec courts, through the portraits of surrogates traced in the decisions—the good, the bad, and the foreigner. The brief overview of cases exhibits how similar and different facts have an inconsistent impact on the ratios of the decisions. The weight given to some legal elements (the importance of the

I would like to thank Brenda Cossman, Robert Leckey, Alexandra Popovici, Lionel Smith, and the external reviewers for their sensitive and helpful comments as well as Rodrigo Garcia and Jean-Frédéric Hübsch for their research assistance for this project. This article was presented on 13 April 2013 in Montreal. I am grateful for the comments and suggestions of Jonathan Herring, Maneesha Deckha, and the other participants.

declaration and attestation of birth, the possibility of considering the consent of the father vitiated, the single surrogate versus the surrogate in a relationship, the civil status of the intended parents, and so on) to the detriment of others is problematized. The article depicts how labels and stereotypes predominate in legal reasoning when legal rules are not clear, creating problematic discourses about sensitive topics (womanhood and motherhood, children's rights, and sexual orientation).

Introduction

The regime for the formal establishment of parent-child relationships in the province of Quebec was substantially modified in 2002 in order to achieve equality. Reforms to filiation—the legal bond connecting child and mother or child and father—in Quebec provided a means for same-sex couples to adopt and for lesbian couples to conceive using donated sperm and clarified the filiation of children born of assisted procreation. This “successful” reform in terms of equality left untouched an existing rule justified by women’s equality, namely what the civil law calls the absolute nullity of surrogacy agreements.¹ Surrogacy raises questions about what is left after an equality-driven reform. Since 2002, in line with the rise of sexless reproduction (that is, reproduction disconnected theoretically and practically from sexuality), surrogacy has attracted much attention in Quebec. In 2014, the Quebec Court of Appeal rendered judgment in its first surrogacy case,² lower Quebec courts have rendered nine decisions,³ scholarly articles on the issue abound,⁴ and the topic has been covered in various media.

This article does not argue for or against surrogacy. Instead, it challenges conceptions and understandings about parentage, gender roles, and sexuality using surrogacy as the principal locus of analysis. The exploration is discursive and metaphorical; it tackles the jurist’s imagination. It proposes a new narrative on an issue

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1. *Civil Code of Québec*, LRQ, c C-1991, art 541 [CCQ] : “Any agreement whereby a woman undertakes to procreate or carry a child for another person is absolutely null.”
 2. *Adoption—1445*, 2014 QCCA 1162 [*Adoption—1445*].
 3. There are nine recent reported decisions: *Adoption—07219*, 2007 QCCQ 21504; *Adoption—091*, 2009 QCCQ 628; *Adoption—09367*, 2009 QCCQ 16815; *Adoption—10489*, 2010 QCCQ 19971; *Adoption—10329*, 2010 QCCQ 18645; *Adoption—10330*, 2010 QCCQ 17819; *Adoption—09185*, 2009 QCCQ 8703; *Adoption—09184*, 2009 QCCQ 9058; *Adoption—12464*, 2012 QCCQ 20039 (appeal: *Adoption—1445*, 2014 QCCA 1162).
 4. To name but a few: Michel Tétrault, “De choses et d’autres en droit de la famille: La jurisprudence marquante de 2008-2009: La filiation” in *Développements récents en droit familial* (2009), vol 308 (Cowansville, QC: Service de la formation continue du Barreau du Québec, 2009) 153; Benoît Moore, “Maternité et substitution de filiation en droit québécois” in *Liber Amicorum: mélanges en l’honneur de Camille Jauffret-Spinosi* (Paris: Dalloz, 2013) 859.

that has been extensively studied. Refraining from drawing any firm legal conclusions—the small pool of decisions available makes generalization hazardous—I want to speculate about the ways in which an uncertain legal norm—the absolute nullity of surrogacy agreements—makes space for problematic labels to enter legal reasoning. I show how the absolute nullity of surrogacy agreements in Quebec has led judges to preclude the filiation of children born of surrogacy in certain situations and how it has forced judges to apply creative, albeit unpredictable, solutions. A central historic argument running through the text is that Quebec's regime on filiation is a powerful device to control or hierarchize sexual behaviours and that surrogacy could be its new power tool.

The article is divided into two parts. The first part describes the basics of Quebec's parentage regime and provides an overview of the law on surrogacy. It contextualizes the origin, location, and maintenance of the article about surrogacy agreements in the *Civil Code of Québec*.⁵ The second part analyzes the decisions on surrogacy in Quebec and questions the multiplicity of the results reached by the courts. Decisions are categorized by their outcomes, but the emphasis falls on the portraits of surrogates—the good, the bad, and the foreigner. This part posits filiation and surrogacy in Quebec's legal discourse as spaces for ambivalence, ambiguities, and contradictions. Through the article, I explore parent-child relationships in a post-equality fashion through the prism of surrogacy. I claim that surrogacy embodies the new taboo of filiation: sexless reproduction.

Filiation and Surrogacy in Quebec

Filiation

A few words are in order to demystify filiation and its related concepts since it is different from what the rest of Canada conceptualizes as parentage and it is central to the issue of surrogacy. Surrogacy offers an occasion for scrutinizing the establishment of filiation and its underlying principles. In Quebec, the legal bond between the child and the parent(s), which entails various rights, duties, and obligations on both the parent(s) and the child, is unitary. Generally speaking, one cannot be a parent for the purposes of some laws but not others. This bond is called filiation, and, on the orthodox reading, a child can have no more than two parents.⁶ Thus, a child can have two paternal filiations, two maternal filiations, a maternal and a paternal filiation, or only one of them (either maternal or paternal).

The *CCQ* distinguishes three types of filiation: “filiation by blood,” the filiation of children born of assisted procreation, and filiation by adoption. A central principle of modern civil law in Quebec is that “all children whose filiation is established

5. *CCQ*, *supra* note 1.

6. The principle is at Art 532, para 2 *CCQ*.

have the same rights and obligations, regardless of the circumstances of birth.”⁷ This foundational principle is fairly recent. Until the eighties, the *CCQ* drew distinctions between legitimate and illegitimate children. As will become apparent later in this article, surrogacy potentially touches all types of filiations and the legal responses to it threaten the principle of children’s equality. Steps must be taken for a child to enter the legal world. Filiation is not a factual situation. It creates a legal status and depends on administrative procedures or on the decision of a judge. As such, a few actors have roles in establishing or denying filiation, depending whether it is contested or not: potential parents, state officials, and judges. There is an undeniable public dimension to filiation. For present purposes, adoption can be addressed briefly, and more will need to be said about the establishment of filiation of the other two kinds.

As in common law jurisdictions, adoption produces a new bond of parentage as the result of a judgment made in the best interests of the child.⁸ It generally replaces all prior bonds of filiation. In testimony to the legislature’s apparent desire to recognize the equality of same-sex couples, the *CCQ* has made plain since 2002 that same-sex couples may adopt.⁹ The other relevant point is that Quebec law provides a mechanism for “second-parent adoptions,” by a process known as “special consent to adoption.”¹⁰ Special, as opposed to general, consent allows the parent to give consent to the child’s adoption in favour of a designated person, exceptionally without affecting the parent’s bond of filiation to the child. A child’s parent may grant special consent for the adoption of his or her child only in favour of certain individuals. It may be given in favour of the parent’s spouse by marriage or by civil union—a civil union is a formally recognized union in Quebec civil law, open to same-sex and opposite-sex partners. In the case of unmarried cohabitants or *de facto* spouses, they must have lived together for three years in order for one to consent to the other’s adoption of his or her child.¹¹

Filiation by blood applies in the case of so-called “natural” reproduction. It is the *CCQ*’s base regime and is the successor of the former legitimate filiation. The *CCQ*’s chapter on the filiation of children born of assisted procreation is the upshot of reforms in 2002, arguably propelled by new reproductive choices. This regime contains innovative provisions, including ones allowing a woman to be a child’s sole legal parent by intention and providing means for two women to establish themselves directly as the mothers of a child born to them by assisted procreation from birth. That is, the regime allows for socially or biologically infertile couples to create families without using adoption mechanisms: sexless reproduction becomes more and more important. While much could be said about this regime,¹² one key

7. Art 522 *CCQ*.

8. Art 543 *CCQ*.

9. Art 578.1 *CCQ*.

10. Art 555 *CCQ*.

11. *Ibid.*

12. Robert Leckey, “‘Where the Parents Are of the Same Sex’: Quebec’s Reforms to Filiation” (2009) 23:1 *International Journal of Law, Policy and the Family* 62.

point for present purposes is that it embodies a legislative will to confer equal parenting possibilities on female couples while implicitly excluding the possibility that a male couple might become a child's parents from birth. Specifically, this important reform left untouched the provision about the absolute nullity of surrogacy agreements. The other essential observation is that the provisions on the filiation of children born of assisted procreation largely reproduce the processes set out regarding filiation by blood, making it possible to address these processes together in what follows next.

For both filiation by blood and the filiation of children born of assisted procreation, the *CCQ* outlines processes for establishing parentage that are not gender-neutral. Instead, they bear on the woman who gives birth to the child. The civil law classifies these processes as forming part of what it calls the law of persons. Generally speaking, the person who assists the woman when she delivers is referred to as the *accoucheur*.¹³ It is often a doctor, a mid-wife, or a nurse. The *accoucheur* must draw an "attestation of birth" stating "the place, date and time of birth, the sex of the child, and the name and domicile of the *mother*."¹⁴ The attestation does not include equivalent details about any man,¹⁵ and the woman who gave birth is already referred to as the mother. Two copies are made; one goes to the Registrar of Civil Status¹⁶ and the other to the person(s) who must

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13. Note that "accoucheur" is an English term. See Centre Crépeau, "Guide to the English Terminology in the Civil Code of Québec" *McGill: Centre Crépeau*, <www.mcgill.ca/centre-crepeau/fr/terminology/guide/accoucheur>.
 14. Art 111 *CCQ* [emphasis added]. Some scholars believe that Article 111 is the foundational element of the mother-child relationship at law. With all due respect, this view minimizes the fact that legal parentage is a legal construct that differs from a natural phenomenon. For more details, see Régine Tremblay, *Mother? A Portrait of Legal Motherhood in Canada* (LLM thesis, University of Toronto, 2010), Library and Archives Canada <www.collectionscanada.gc.ca/obj/thesescanada/vol2/OTU/TC-OTU-25826.pdf>.
 15. Édith Deleury and Dominique Goubau, *Le droit des personnes physiques*, 5th ed (Cowansville, QC: Yvon Blais, 2014) at 376. Except in limited situations, it is impossible for a child to be born of an unknown female or an unknown mother. There is a positive obligation on third parties to declare who carried and gave birth to the foetus, and the information is kept on file. While it is largely impossible to be born of an unknown mother in Quebec, it is not the same in all civil law jurisdictions. For example, in France, it is possible to have an "*accouchement sous X*," meaning that almost no one could ever trace back who carried and gave birth to the fetus.
 16. "The Directeur de l'état civil is the body from which Québec citizens can obtain official documents related to civil status events—certificates, copies of acts and attestations of birth, marriage, civil union and death. It is under the purview of [the] Ministère de l'Emploi et de la Solidarité sociale and is headed by the registrar of civil status, the sole public officer of civil status in Québec, whose mandate is provided for in the *Civil Code of Québec*." Quebec, Directeur de l'état civil, "About us," *Ministère de l'Emploi et de la Solidarité sociale*, <www.etatcivil.gouv.qc.ca>.

declare the birth. The second step is the “declaration of birth.” The general rule is that “[o]nly the father or mother may declare the filiation of a child with regard to themselves,” but there is an exception in the case of spouses by marriage or by civil union: such formally recognized spouses may declare filiation for one another.¹⁷ The “declaration of birth” is a standardized document that has to be sent to the Registrar of Civil Status within thirty days from birth.¹⁸ The Registrar of Civil Status, relying on the attestation and declaration of birth, produces an “act of birth.” The “act of birth” is an official document establishing, among other things, the relationship between a child and his or her parent(s). Unlike the common law statutes about vital statistics, the registration of birth in Quebec creates a legal status, and the “act of birth” is crucial in this sense.

How do these steps fit into the larger legal operation of establishing a child’s filiation? Normally, the filiation is proven by the “act of birth.”¹⁹ If the attestation and declaration of birth do not match, no act of birth can be issued. In cases where there is no act of birth, filiation may be proven by what the civil law calls “un-interrupted possession of status.”²⁰ Possession of status

is established by a combination of facts adequate to indicate the relationship of filiation between the child and his or her parents (arts. 523, 524 *C.C.Q.*). Such facts include whether the supposed parents treat the child as their own, whether the child is reputed to be theirs and what name the child bears.²¹

In essence, the fact of acting parentally from a child’s birth can establish the legal bond of filiation. If neither an act of birth nor uninterrupted possession of status establishes a filiation, one may arise from the presumption of paternity or maternity for the birth mother’s formal spouse²² and voluntary acknowledgement.²³ Uninterrupted possession of status also has another effect. Where it confirms the filiation denoted by the act of birth, it renders that filiation immune to challenge of any kind.²⁴

If the administrative process fails or if the “act of birth” and “possession of status” do not match, interested parties can ask a judge to declare the filiation. The same can happen when new documents need to be issued—for example, if an adoption takes place. A judge would have to decide, using the rules of family law, who should be vested with filiation. In light of the evidence submitted by the

17. Art 114 *CCQ*.

18. Art 113 *CCQ*.

19. Art 523 *CCQ*.

20. Art 523, para 2 *CCQ*.

21. France Allard et al, eds, *Private Law Dictionary of the Family and Bilingual Lexicons* (Cowansville, QC: Yvon-Blais, 1999) *sub verbo* “possession of status of (a) child.”

22. Arts 525 and 538.3 *CCQ*.

23. Voluntary acknowledgement is limited in scope; see Arts 526 and 527 *CCQ*.

24. Art 530 *CCQ*; *Droit de la famille—09358*, 2009 QCCA 332, [2009] RDF 37.

parties and according to the relevant legal principles, judges decide who the legal parents of a child are.

Surrogacy

Article 541 is located in Book 2 (“The Family”), Title 2 (“Filiation”), Chapter I.1 (“Filiation of children born of assisted procreation”). It affirms the absolute nullity of surrogacy agreements—that is, rather than speaking to the parentage of a child born of a surrogacy arrangement, it focuses, using the language of the civil law of obligations, on the undertaking made among adults. Absolute nullity corresponds roughly to what a common lawyer would call voidness. Absolute nullity probably requires a court order, which voidness, in principle, does not. Declaring a juridical act’s absolute nullity is the civil law’s strongest sign of disapproval.²⁵ It is a “[n]ullity arising in the formation of a juridical act which sanctions the violation of a rule designed to protect the public interest.”²⁶ Absolute nullity and public order are powerful notions in the civilian mind; they lie somewhere between law and morality.

All kinds of agreements are encompassed in Article 541. Thus, the agreement is said to be null whether it is onerous (for payment) or gratuitous. It does not matter whether the agreement is for procreation or gestation or whether it is commercial, altruistic, intrafamilial, international, with heterosexual intended parents, with non-heterosexual intended parents, with a single intended parent, or any other variation. The provision was born in 1991 with the enactment of the *CCQ*, but its legal baptism only happened with the coming into force of the *CCQ* in 1994. Contracting to have a child with some genetic connection to one or both of the intended parents is much older than that, but its history lies beyond the scope of the present analysis. The original text (1991) of Article 541 of the *CCQ* read as follows: “Procreation or gestation agreements on behalf of another person are absolutely null.”²⁷ The article was then slightly modified in 2002²⁸ and now stipulates that “[a]ny agreement *whereby a woman undertakes* to procreate or carry a child for another person is absolutely null.”²⁹ The analysis of the surrounding debate shows that the legislature thought no substantive amendment was proposed.³⁰ Yet, while

25. A juridical act is defined as a “[m]anifestation of intention of one or more persons in a manner and form designed to produce effects in law.” France Allard et al, eds, *Private Law Dictionary and Bilingual Lexicons: Obligations* (Cowansville, QC: Yvon Blais, 2003), *sub verbo* “juridical act.”

26. *Ibid* at *sub verbo* “absolute nullity.”

27. Former Art 541 (1991) *CCQ*.

28. *An Act Instituting Civil Unions and Establishing New Rules of Filiation*, LQ 2002 c 6, art 30.

29. Art 541 *CCQ* [emphasis added].

30. Bill 84, An Act Instituting Civil Unions and Establishing New Unions of Filiation, 36th Leg, 2nd Sess, Quebec (22 May 2002).

in its old formulation, agreements involving sperm donation were also null (since giving sperm is covered in the notion of procreation), it is now the surrogate who gets all the attention. The emphasis is on the woman who undertakes. This new text put women and surrogates at the forefront and telegraphed ideas about motherhood. Article 541 is consistent with the notion that “[m]otherhood is supposed to be natural, normal, and normative”³¹ and that surrogacy is “deviant, unnatural, and inappropriate”³² on account of its “break[ing] the assumed closed link between genetics, gestation, and social motherhood.”³³ Surrogacy “involves the woman concerned alienating that which is regarded as naturally bonded to her.”³⁴

The stipulation of surrogacy agreements’ absolute nullity is the source of much of the confusion around surrogacy agreements. On one reading of Article 541, it refers simply to a surrogacy agreement’s unenforceability. On another, associated with characterizations of Article 541 as “prohibiting” surrogacy, it indicates that surrogacy is a practice so repugnant to public order that officials must do nothing to condone it. These general orientations cash out into more precise legal positions. When and how does Article 541 apply? According to some, the provision is only relevant if the parties ask for enforcement of the agreement.³⁵ For others, it is when the surrogate receives a sum of money.³⁶ How does it impact filiation? If parties attempt to use adoption to establish the child’s filiation—on which more is provided later in this article—does Article 541 vitiate the necessary consent to adoption? If it vitiates consent to adoption, whose consent does it vitiate: that of the father, of the surrogate, or of the intended mother? Why and with what effect?³⁷

Article 541 blurs the principles governing the establishment of filiation. Strictly speaking, absolute nullity does not mean that a surrogacy agreement is illegal or unlawful, only that it has no enforceable legal effects. So how might filiation be established for a child born to a woman acting as a surrogate? Article 541 says nothing about this. This situation creates difficulties for judges who are left with a

31. Samantha Ashenden, “Reproblematising Relations of Agency and Coercion: Surrogacy” in Sumi Madhok, Anne Phillips, and Kalpana Wilson, eds, *Gender, Agency, Coercion* (New York: Palgrave Macmillan, 2013) 195 at 211 [footnotes omitted].

32. *Ibid.*

33. *Ibid.* at 197.

34. *Ibid.*

35. *Adoption—09367*, *supra* note 3 at para 23; and *Adoption—07219*, *supra* note 3, at para 7.

36. If money is paid under an agreement that is null, the money is recoverable according to general principles (Arts 1554, 1699 *CCQ*).

37. The provision raises many other questions, among them whether it discriminates against male partners who wish to have a child and whether it is redundant or wrongly placed in family law, rather than the law of obligations, given its focus on the agreement and the civil law’s general notion that obligations contrary to public order are null.

child, a provision stating that the contract in itself is absolutely null, and nothing to guide them in making the decision about the child's filiation. So far, in a case of surrogacy, the establishment of filiation in court has been made as follows. The filiation of the intending father, who is often the child's genetic father, is generally established under the general regime of filiation by blood. He is on the declaration of birth and the act of birth. Possession of status will match with the official documents. Filiation is established, and no one discusses it. Even though the spectre of absolute nullity hovers over the agreement between the father and the surrogate, paternal filiation is never jeopardized. The establishment of maternal filiation, however, is a mess. The Registrar of Civil Status tends not to deliver an act of birth since the attestation of birth and declaration of birth do not match. The attestation of birth will identify the woman who gave birth, in these cases, the surrogate. The declaration of birth states who claims to be the parent or parents, so in a situation of surrogacy it will not mention the surrogate. Or it could temporarily match. Indeed, the declaration could be filled by the surrogate, and then all the parties could happily head to court and ask for a "second parent adoption" to proceed. Establishing maternal filiation for the intending mother through adoption by special consent is the prevailing solution to the conundrum of how to recognize her at law. In such cases, special consent requires the consent of the surrogate and of the father as well as the judge's conclusion that the adoption advances the child's best interests. Whatever the exact steps taken and whether documents match or not, the court will have to make a decision about the maternal filiation. As the next part illustrates, efforts to regularize the filiation of a child born as the result of surrogacy are not always successful. In the face of contrary decisions, the vesting of maternal filiation, a child's identity and kinship, and the impact of Article 541 are uncertain.

Before turning to the portraits of surrogates that emerge from the judgments, it is worth noting two lines of inquiry that are under-represented in the discourse. One would be an inquiry directly focused on the best interest of the child in surrogacy situations.³⁸ As we will see in the next section, Article 541 has sometimes acted to preclude establishing the filiation of children, with judges being unsure of the interaction between the absolute nullity of the contract and the establishment of the filiation of the resulting child, especially the maternal filiation. Relatedly, a challenging discourse about the rights to know one's origins and genetic connections is also emerging.

The other inquiry would examine the legal and social construction of maternity. Why do we ask an additional element for the mother, namely her inscription on the attestation of birth as well as the declaration of birth? The field for "father" on the act of birth relies solely on the declaration of birth. For the father, there is no

38. Michelle Giroux, "Le recours controversé à l'adoption pour établir la filiation de l'enfant né d'une mère porteuse: entre ordre public contractuel et intérêt de l'enfant" (2011) 70:2 *Revue du Barreau* 509 at 538ff; Moore, *supra* note 4.

obligation to be on the attestation and no biological testing is necessary. The state will process the administrative documents irrespective of his biological implication. This treatment, which emerges from the overview of filiation in the preceding section, creates a double standard that is problematic for those sensitive to the narratives and stereotypes that attach to motherhood. The two lines of inquiry merge when surrogacy is understood as a new example of the penalization of children for the reproductive choices of their parents. The particularly harsh legal mechanisms resulting from some current interpretations of Article 541 seek to dictate adult reproductive conduct, result in differentiated treatment of children, and have mobilized a discourse about what constitutes a good use of women's reproductive capacities.

Portraits and Assumptions

In this part, the cases are divided as to their outcomes, but the focus is on the conceptions and understandings about parentage, gender, and sexuality. The wording and the reasoning of the cases exemplify ways in which an uncertain legal norm makes space for problematic labels. An examination of selected decisions brings out three different figures of surrogates: the good, the bad, and the foreigner.³⁹

The Good Surrogates

In the case law analyzed, the good surrogates tend to be portrayed by the courts as altruistic and generous women. Sometimes they are married, and they have obtained their husbands' consents or are members of the intended parents' extended family. They generally are implanted with a fertilized egg from a donor, thus increasing the risk factor of pregnancy (sometimes, they even bear twins). The lack of "genetic involvement" has led judges to state that the only thing they were doing in court was confirming the *true* maternal filiation of the child. The idea of a *true* maternal filiation undermines the fact that legal motherhood is a legal construct. In all cases involving good surrogates, the filiation of the child or children is made possible through a declaration of adoption in favour of the spouse of the father (the intended mother) despite the existence of Article 541 of the *CCQ*.

The first case, *Adoption—07219*,⁴⁰ happened in 2007 in the judicial district of Sherbrooke and was decided by Justice Michel Dubois. It is implicit from the

39. For another effort to use judicial texts to draw out stories of post-equality life, see Kim Brooks, "Cameos from the Margins of Conjugality" in Robert Leckey, ed, *After Legal Equality: Family, Sex, Kinship* (Abingdon, UK: Routledge, 2014) 99 [Leckey, *After Legal Equality*].

40. *Adoption 07219*, *supra* note 3.

decision that it was a gestational contract, but the court is not explicit on this issue. The surrogate had been married to the intended mother's brother for more than ten years. The intended parents were married, and the spouse of the surrogate consented. The pleadings were simple, moving, credible, and used "*les mots du coeur*."⁴¹ Dubois J also mentioned that he was asked to perform an act of faith and that the child should consider himself as a beautiful gift.⁴² In a ten-paragraph decision, he decided that the intended mother should be recognized as the legal mother through special consent to adoption. He pointed out that Article 541 of the *CCQ* was not raised and that these proceedings were not an abuse of the institution of adoption.

The second and third cases involved twins and were brought forward by the same individuals. *Adoption—09184*⁴³ and *Adoption—09185*⁴⁴ (referred to together as *Adoption—09814*) took place in Riviere-du-Loup in 2009 and were decided by Justice Claude Tremblay. Again, the case included a gestational agreement, and the surrogate was part of the extended family. The surrogate was the married spouse of the intended mother's godfather. The intended parents were in a de facto relationship, and they wanted their first child. The pregnancy was difficult, and the surrogate had to spend a fair amount of time in the hospital. She appeared on the declaration of birth, but no act of birth was produced in court. Tremblay J carefully analyzed the facts and the law, keeping in mind all possible scenarios. He noted that the surrogate performed an act of pure altruism and of extreme generosity and that acting as a surrogate was an uncommon gift and that the parties did not carry out any reprehensible act. He highlighted the gratuitous nature of the agreement. After stating that "*la mère génétique est certes plus 'mère biologique' que la 'mère porteuse'*"⁴⁵ and that "*il m'apparaît tout à fait souhaitable de permettre à cet enfant, qui représente l'avenir de notre société, de bénéficier de tous les avantages de sa véritable filiation maternelle,*"⁴⁶ he ordered the adoption to proceed. This interpretation is both highly conservative and progressive. On the one hand, relying on biology and true maternal filiation is conservative and is reminiscent of a classical understanding of filiation rooted in nature. On the other hand, splitting the true maternal filiation from giving birth to the foetus is highly progressive for civil law.

Finally, *Adoption—10489*,⁴⁷ *Adoption—10329*,⁴⁸ and *Adoption—10330*⁴⁹ were also "successful." In *Adoption—10329* and *Adoption—10330* (referred to together

41. *Ibid* at para 52.

42. *Ibid* at para 9.

43. *Adoption—09184*, *supra* note 3.

44. *Adoption—09185*, *supra* note 3.

45. *Ibid* at para 7.

46. *Ibid* at para 24.

47. *Adoption—10489*, *supra* note 3.

48. *Adoption—10329*, *supra* note 3.

49. *Adoption—10330*, *supra* note 3.

as *Adoption—10329*—these cases involved twins and were brought forward by the same individuals)—the gestational surrogacy agreement was gratuitous, the pregnancy was arduous, and the surrogate was a friend of the intended parents. The surrogate was single, and she was on the act of birth. Distinguishing the cases from one another and acknowledging that the agreement between the parties was of absolute nullity, Justice Françoise Garneau-Fournier concluded that the adoption could proceed. As for the last case, *Adoption—10489*, the surrogate was a married woman acting “gratuitously,” and her husband consented to the adoption.⁵⁰ Justice Denyse Leduc said the parties were in good faith and that the court’s role was to give to the child his or her *true* maternal filiation.

In all of these cases, despite the existence of Article 541 of the *CCQ*, judges established the filiation of the children. The *CCQ*’s provision on the absolute nullity of surrogacy agreements was not the focal point, and judges navigated around it. Most surrogates were in a relation of interdependence with a man who consented to the process and were close to the intended parents. The agreements were all gratuitous. Several of the pregnancies were risky. There is recurring usage of quasi-biblical words: the judges speak of pure generosity, faith, altruism, and of the gift of life. As the next part shows, however, in other situations, even where all of the parties consented, the outcomes were less harmonious.

The Bad Surrogates

The case law includes two portrayals of “bad surrogates.” In both cases, even if no written contract was made, there was an explicit monetary exchange. The judges seemed uncomfortable with surrogates who got paid for their reproductive services. In the first case, the labels given to the surrogate are harsh. It is less obvious in the second case. However, the emphasis put on the money betrays images and stereotypes about womanhood, motherhood, and reproduction.

Adoption—091 happened in Sherbrooke in 2009.⁵¹ The same judge as in *Adoption—07219* decided it. This time, Dubois J was not pleased with the behaviour of the parties. The procreation agreement (traditional surrogacy hypothesis) was onerous, meaning it involved the payment of money. The intended parents were living in a marriage-like relationship, and the intended mother already had two children from a previous relationship. The parties conducted Internet research to find a surrogate and identified “a fertile woman who was in good health and available.”⁵² She already had five children and had acted as a surrogate in the past. She was not married and had no partner or spouse. The parties made an oral agreement, and

50. It is disputable whether or not the agreement was gratuitous (see *supra* note 3 at para 9), but Leduc J decided so.

51. *Adoption—091*, *supra* note 3.

52. *Ibid* at para 9.

the surrogate received \$20,000 to cover “inconvenience and expenses.”⁵³ The surrogate was on the attestation of birth, but only the father signed the declaration of birth. The field for the mother on the declaration of birth was left blank. The intended parents and the surrogate then asked the court to proceed with a second-parent adoption in favour of the intended mother, as in all of the previous cases. In a surprisingly long decision in comparison to the ten paragraphs rendered two years prior, Dubois J denied the application of the intended mother with costs, making it the only decision about surrogacy in Quebec in which all of the costs were borne by the intended mother. Specifying that “the facts submitted as evidence . . . were communicated in an honest, transparent way,”⁵⁴ he described the enterprise unforgettingly. Indeed, Dubois J mentioned that “[t]he evidence reveals a *convoluted* [“*alambiqué*”] parental project carefully planned between the applicant and the father of the child,”⁵⁵ that the parties “decided to make a deal with her [the surrogate],”⁵⁶ and that

[u]nless one chooses to wear blinders, however, it is not possible to dissociate the question of the validity of this consent (Exhibit R-2) from the preceding steps *concocted* by this couple in carrying out their parental project. The consent was vitiated because it formed part and parcel of an *illegal* undertaking and was *contrary to public order* . . .

It is not always in the interest of the left hand not to know what the right hand is doing.⁵⁷

Dubois J also went further, asking: “Must one, in the name of a so-called ‘right to a child,’ endorse the *abuse of the institution of adoption*?”⁵⁸ and continued stating that “[t]his child is not entitled to a maternal filiation at any cost.”⁵⁹ The reasoning was different from the previous cases. The monetary exchange might have disturbed Dubois J. Even if no one asked for the agreement to be enforced, Article 541 of the *CCQ* became central in his reasoning. In addition, the act of birth became essential in the analysis. These two elements were virtually absent from all of the other decisions. Dubois J denied maternal filiation by adoption on the basis that the consent of the father to special adoption was vitiated. The act of birth was issued with the “mother” field left blank, leaving a child with only one parent at law, yet two parents in fact. This situation is rare in Quebec civil law.

53. *Ibid* at para 15.

54. *Ibid* at para 34.

55. *Ibid* at para 5 [emphasis added, unofficial translation by SOQUIJ].

56. *Ibid* at para 10.

57. *Ibid* at paras 57-58 [emphasis added].

58. *Ibid* at para 61 [emphasis added].

59. *Ibid* at para 77.

Maternal filiation through adoption was also denied in *Adoption—12464*.⁶⁰ The intended parents were a married couple entering into a surrogacy agreement for the second time.⁶¹ The gestational surrogacy agreement involved the ova of an unknown donor. The intended parents paid the surrogate and the unknown donor.⁶² The latter was found via the Internet. The surrogate was a friend of the family, and she had acted as a surrogate for their first child. It is unclear if she was a friend of the family before the first surrogacy took place. Nothing else is known about her, except that she received \$9,000. Justice Dominique Wilhelmy, reproducing the conclusions of Dubois J, decided that the consent of the intended mother was vitiated⁶³ and that the adoption could not proceed. She used excerpts of Dubois J's decision, including those cited earlier, using again the stereotyped labels. It is impossible to know why the vitiated consent shifted from the intended father in *Adoption 091* to the intended mother in *Adoption—12464*. One can read between the lines that Wilhelmy J is almost begging the legislature or the Quebec Court of Appeal to clarify the situation, which eventually happened.

The Foreign Surrogate

The last portrait depicted in case law is that of the foreigner. There is only one reported case where the parties decided to contract with a surrogate outside of Quebec. Justice Louis Grégoire rendered *Adoption—09367* in 2009 in Montreal.⁶⁴ It is implicit from the decision that the surrogacy agreement was a procreation contract—in other words, that the surrogate provided genetic material (traditional surrogacy). The intended couple were male partners in a civil union, and the surrogate was from California. Little is known about her besides the fact that she was a foreigner. The intended fathers paid for the services and expenses, and all of the steps were taken in California, a state in which surrogacy agreements are neither illegal nor null. The surrogate came to deliver in Quebec and signed the attestation of birth. There is no mention of the declaration birth in the decision. It seems that an act of birth was issued and that the surrogate was on it, but it is unclear. The judge insisted that the entire contractual dimension was addressed outside Quebec and that the parties were honest, transparent, and in good faith about the whole

60. *Adoption—12464*, *supra* note 3.

61. *Ibid* at para 9.

62. *Ibid* at para 16.

63. Further research on the issue on consent would be helpful. Why is it, in one case, the consent of the father who is vitiated and, in the other case, the consent of the intended mother? The consent of the intended mother appears to be rooted in her relation with the father (see Art 555 *CCQ*). It is far from certain that Art 541 *CCQ* should appropriately operate as a vice of consent to adoption.

64. *Adoption—09367*, *supra* note 3.

process. He stated that the filiation of the child was established—since the filiation is established by the act of birth—and that, in accordance with Articles 522 and 523 of the *CCQ*, all children whose filiation is established have the same rights. As such, not only was it in the best interest of the child to order the adoption in favour of her second father, but it was also lawful. He added that the nullity of the agreement envisioned in Article 541 of the *CCQ* should only affect the contracting parties and that the child is not a party to the agreement.

While the reasoning is creative, sensitive, and aimed at ensuring that the child was treated equally with other children, the tango between the law of filiation and the law of obligations is unclear, and the future resolution of other such cases is unpredictable. The judge offered filiation to the second male parent as a beautiful gift—I am borrowing his words here. It is clear from the facts that the biological reproduction of the intended parents was impossible. It is striking that, no matter what the ratio is, the surrogate is completely absent from the picture. The judicial malaise perhaps seems less salient since the adopting woman is lacking—no one is disputing the label “mother.” It is so far from traditional reproduction that no one disagrees. Obviously, if a child has two fathers, filiation is a legal construct. Why can one not reach the same conclusion when women are involved?

Narratives of motherhood, womanhood, and reproduction are put forward in the analysis of the decisions about surrogacy in Quebec. It is difficult to predict how Article 541 of the *CCQ* will influence future decisions—sometimes it vitiated consent, sometimes it was not mentioned at all. There is another storyline: judges are doing the best they can with a law that does not seem to be in the best interests of the parties involved nor in the best interest of the children involved. Whichever tale is favoured, the regulatory gap around surrogacy seems to create space for labels attached to the new taboo of filiation: sexless reproduction. Sexless reproduction is particularly harsh on women since they are the ones most disrupting the equilibrium.⁶⁵

Conclusion

The contemporary experience of surrogacy is reminiscent of Quebec’s past, in terms of who can be vested with filiation. Filiation that is the result of a surrogacy agreement joins a list of others—adoptive filiation (with no biological reproduction), illegitimate filiation (reproduction out of wedlock), same-sex filiation, and single mother filiation, all reproductions without sex or without sex in the proper time and place—which have been conscripted in the regulation of adults’ sexual,

65. See also the exploration of expectations that the sexuality of gay parents be appropriately disciplined, namely anxieties around foster or adoptive parents in an open relationship. Daniel Monk, “Sexuality and Children Post-Equality” in Leckey, *After Legal Equality*, *supra* note 39, 200.

conjugal, and reproductive choices. Indeed, while reproduction out of wedlock once was the moral obstacle to establishing legal filiation, the new taboo seems to be reproduction without procreative sex. The brief overview of cases in Quebec exhibits how similar and different facts have an inconsistent impact on the ratios of the decisions. The weight given to some factors to the detriment of others is hardly justifiable (the importance of the declaration and attestation of birth, the possibility of considering the consent of the father vitiated, the single surrogate versus the surrogate in a relationship, the civil status of the intended parents, and so on). Labels and stereotypes are also imported, creating problematic discourses about womanhood and motherhood, children's rights, and sexual orientation.

In those cases where children's filiation is not established, adults are cast into categories, and children's rights are jeopardized. The idea that "*les enfants n'ont pas droit à une filiation maternelle à tout prix*" sounds like a modern twist on the penalization of children because of the behaviour and morality of their parents.⁶⁶ Intentionally or not, the law has the perverse effect of promoting a certain set of gendered values and fostering problematic gendered assumptions about women, mothers, and reproduction. The decisions and the vocabulary used in the decisions portray motherhood as the ultimate personal fulfilment for both the surrogate and the intended mother. The surrogates in *Adoption—091* and *Adoption—12464* are depicted as outlaws to this principle. This personal fulfilment, in order to have effects in law, should be gratuitous.⁶⁷ The situation promotes tricky expectations about the nature of maternity and womanhood and the worth of women's work.⁶⁸ Even if the judges are probably not doing it consciously, the question of who is more a mother than the other, or of who is the true mother, recurs in their decisions. Motherhood is a subversive locus, and many feminist writings highlight problematic

66. *Adoption—091*, *supra* note 3 at para 77.

67. For critique of the altruism discourse, see Louise Langevin, "Réponse jurisprudentielle à la pratique des mères porteuses au Québec; Une difficile réconciliation" (2010) 26:1 Canadian Journal of Family Law 171. Under the *Assisted Human Reproduction Act*, SC 2004, c 2, a female cannot become a surrogate if she is under twenty-one years of age (s 6(4)) and "[n]o person shall pay consideration to a female person to be a surrogate mother, offer to pay such consideration or advertise that it will be paid" (s 6(1)). Gratuitous surrogacy agreements are thus possible in common law Canada.

68. Adrienne Rich, *Of Woman Born: Motherhood As Experience and Institution* (New York: Norton, 1976); Shulamith Firestone, *The Dialectic of Sex: The Case for Feminist Revolution* (New York: Morrow, 1970); Yu-Fen Chang, *Radical Feminists on Motherhood: Adrienne Rich and Shulamith Firestone Reconsidered* (Master's thesis, National Central University of Taiwan, 2003) [unpublished]. Other readings focusing on the "ethic of care" propose other assumptions. See, for example, Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, MA: Harvard University Press, 1983).

assumptions about motherhood and womanhood.⁶⁹ Not only does it create a false hierarchy between “mothers,” it leaves untouched the fact that parenting in Canadian law is not and has never been solely about biology or genetics.⁷⁰ The creation of knowledge and understandings through stereotypes is destined to an unhappy ending. The legal question to solve is when and how to establish a parent-child relationship, which is a legal construct, and nothing else. Decisions also have an important effect on children’s rights in Quebec. Equality among children born of surrogacy agreements in Quebec law is jeopardized in many ways, the obvious one being the denial of their maternal filiation.

What now with Article 541? Clearly, understanding the effect of the existing provision is difficult with these judgments and with the interaction of public order, absolute nullity, consent to adoption, principles of filiation, and the law of persons. It creates problems, but are there any solutions forthcoming? Could these agreements be relatively, rather than absolutely, null, making them akin to being voidable in the common law? That would allow the surrogate to keep the baby if things turned out badly with the intending parents, and she wanted to do so. It would mean that promises to pay money would be unenforceable since no one is bound by their agreement. Nullity refers to the failure to produce binding legal effects, but it is not illegality. It should therefore have no legal impact on issues about consent to adoption. Some problems would of course remain unsolved. For example, what happens if the intended parents do not want the child anymore, as where the child is born with a severe disability or health issues? Or what has to be done with the rules about expulsion of the fetus? Is it realistic, with the advent of all new reproductive technologies, to maintain a system of maternal filiation centred on giving birth to the fetus? Is it fair, especially in comparison with the principles governing the establishment of paternal filiation? We need to think more perceptively around these issues. They might be symptomatic of bigger problems in the law of filiation in Quebec. We cannot hide anymore behind Article 541 of the *CCQ*.

The aim of this article was not to argue in favour or against the absolute nullity of surrogacy agreements in Quebec. Neither was it to propose solutions, to expose any truth about filiation or surrogacy, or to comment on *Adoption—1445*,⁷¹ which

69. Interesting readings on assumptions relating to motherhood include Elisabeth Badinter, *Le conflit: La femme et la mère* (Paris: Flammarion, 2010); and Amber E Kinser, “Introduction” in Amber E Kinser, ed, *Mothering in the Third Wave* (Toronto: Demeter Press, 2008).

70. From a civilian standpoint, see *Massie c Carrière*, [1972] CQ 735; from a common law perspective, see Susan B Boyd, “Gendering Legal Parenthood: Bio-Genetic Ties, Intentionality and Responsibility” (2007) 25 Windsor Yearbook of Access to Justice 63; for a text including both common law and civil law, see Angela Campbell, “Conceiving Parents through Law” (2007) 21 International Journal of Law, Policy and the Family 242.

71. *Adoption—1445*, *supra* note 2.

was not yet rendered when this article was written. The objective was to illustrate three main elements: (1) that surrogacy challenges conceptions and understandings about parentage, gender roles, and sexuality; (2) that uncertain legal norms, arising out of the absolute nullity of surrogacy agreements, make space for problematic labels and narratives to enter legal reasoning; and (3) that the recognition or ignorance of the filial status of children born of surrogacy could be a new twist on the never-ending tendency to stigmatize children in order to penalize the reproductive, conjugal, and sexual choices of their parents in Quebec law. This article has explored the ways in which, despite legislative efforts in 2002, equality has not been achieved for children. Likewise, while equality among women is presumed with Article 541 of the *CCQ*, when it comes to surrogacy, Article 541 embodies the conceptual difficulty that allows problematic assumptions about womanhood, motherhood, parenthood, and sexuality to become crucial in the outcomes of the cases. The situation of non-regulation or the complete denial of a social practice by lawmakers is not promoting fair and sound legal adjudication. As such, further thought is needed when it comes to surrogacy in Quebec in order to reach sensitive legal results. We are not yet “after equality.”