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## Unborn Children and Family Law in Ontario

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The topic of unborn children is one rife with controversy and strong opinions. It is a confusing area where what a person considers being morally right, may not have any reflection in the legal system. Whenever an individual has a concern, or question, in regard to an unborn child they should contact a family law lawyer. These individuals are experts in the legal system and will be able to determine what is legal, and what is not. Individuals in such situations should attempt to discuss these problems in a calm and reasonable way with each other to ensure they can maintain a good working relationship when the child is born. Mediation, arbitration, or collaborative family law are all viable methods a family law lawyer would be familiar with, and could help a couple resolve a problem without resorting to acrimony.

### Canadian Jurisprudence

In a number of different situations, an individual may seek to limit a pregnant woman, for the sake of the unborn child. In the case of *Winnipeg Child & Family Services v. G (D.F.)* the Supreme Court of Canada definitively determined the answer to these kinds of questions. In this case, Winnipeg Child and Family Services applied to a court to have a pregnant woman, who was addicted to sniffing glue, put in protective custody until the birth of her child. The trial court initially agreed, but upon the case being appealed the Supreme Court of Canada stated that no court has the power to restrict an individual's freedom based on the needs of their unborn children.

This has been a constant theme throughout Canadian jurisprudence. In the case of *Dobson v. Dobson*, the Supreme Court of Canada held that there is no duty of care between mother and child. This means that no child could sue their mother for negligence if the Mother's actions harm the child while it is in the womb. The *Criminal Code of Canada* gives a clear line for when an unborn child is considered a human:

- 223.** (1) A child becomes a human being within the meaning of this Act when it has completely proceeded, in a living state, from the body of its mother, whether or not
- (a) it has breathed;
  - (b) it has an independent circulation; or
  - (c) the navel string is severed.



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The Supreme Court of Canada has been clear in their jurisprudence that an unborn child's interests do not trump that of the pregnant mother. There has not been a large amount of jurisprudence on this topic, since these issues rarely find their way into the court system.

### **An Application to some Common issues**

In many cases, individuals around a pregnant individual might seek various help from the courts to prevent certain behaviour. A father may seek to restrict a pregnant woman's relocation from a jurisdiction. The importance of this should not be underplayed. Where the child is born and begins their life would have an immense impact on what jurisdiction would be considered to be the child's *habitual residence*. In order for a court in Ontario to have jurisdiction over a child for custody under the *Children's Law Reform Act*, or child-support under the *Family Law Act* requires the child to be habitually resident in the province of Ontario. It would be highly unlikely that any court would prevent a woman from relocating, based on the claim by a father. The father could apply for custody after the child is born, and the court will make the determination based on the best interest of the child. The main effect will be in determining which court will have jurisdiction.

Further, regardless of an individual's behaviour, a court is unlikely to restrict their freedom based on the needs of the unborn child. The family of a woman might worry about her lifestyle choices, or some of the substances she consumes, but the court will not make any court orders in this regard. If the individual is not doing anything illegal the court has no recourse against them. Such behaviours might, however, be relevant in determining custody of the child. In determining custody, both the *Family Law* and the *Divorce Act* consider an individual's past behaviour to be relevant, where it goes to their skill as a parent.

### **Conclusion**

In general, the concept of limiting the freedom of a mother based on the interests of her unborn child is not possible in Canada. This is a long held position by the Supreme Court of Canada. Ultimately, most couples facing issues in regard to a child should attempt to resolve the issues between themselves. With the oncoming birth of a child, even parents who are no longer together will have a relationship for the rest of their lives. It would serve the child's best interest that the parents come to an agreement with regard to their issues in order to avoid undue hostility. A family law lawyer would be able to advise an individual about the alternatives to court which a couple might pursue to resolve any problems between them.