“A little more than kin, and less than kind”

Property and Contract Concepts and AHR
“To be, or not to be?”

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Magnitude of AHR in Canada and globally

Surrogacy research:
- potential exploitation
- legal regimes—penal, transactional, relational and clinical
- international surrogacy
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# of Can. surrogates who have refused to give up a baby
Cautionary Tales

- Margaret Atwood’s *The Handmaid’s Tale* (1985).
- The *Baby M* Case
  - At trial (1987), contract law principles prevailed.
  - On appeal (1988), the “best interests of the child” test was used. Father got custody, surrogate/genetic mother got access and the commissioning mother could not adopt.
5

# of babies born each day to surrogates in the USA
10% of couples have infertility issues
3000

# of surrogacy agreements drafted by one Toronto lawyer
$10,000

Typical fee paid to an egg donor
1,000,000

# of embryos in storage in the USA
$682 million

Lam class action settlement
$138 million

Est. value of int’l surrogacy industry in India
Blacks are goods and property; it is madness to accuse these well-serving, honorable men of murder. The case is the same as if wood had been thrown overboard.
Royal Commission on New Reproductive Technologies (1989-93)

- Consent impossible until after the birth.
- Surrogacy exploits vulnerable women.
- Surrogacy commodifies women and children.
6. (1) No person shall pay ... a surrogate mother...

7. (1) No person shall purchase ... sperm or ova from a donor

   (2) No person shall purchase ... an in vitro embryo
Loss of stored gametes
Lam v. UBC (2015) BCCA

Plaintiffs’ interest in their sperm had enough of the qualities of a property interest to be considered property within the meaning of bailment legislation.
Stored gametes on relationship breakdown

Absent an agreement, parental obligations should not be imposed on a resisting party except perhaps in circumstances where the other party has no other way of becoming a parent.
JCM v. ANA 2012 BCSC

....use of stored gametes turns on whether procreation creates a parental obligation on the party who wants to restrain procreation. Where it does not, the gametes must be treated as property.
Surrogacy (Paid or Unpaid)
• Is non-payment exploitative?
• Impact of racism, classism and homophobia
• International intended parents
• Access to appropriate medical care
• Parentage laws
• Reimbursement model concerns
• Family pressure to act as a surrogate
The Concern: Capacity to Consent

The RCNRT concluded that the physical and hormonal changes of pregnancy may “affect her thoughts and feelings about what she is doing and the foetus she is carrying, [and] these effects cannot be predicted precisely before pregnancy begins”.
Use IVF in surrogacies

1994: 50%  2004: 5%
What does the research show?

- Very few women regret the decision to participate.
- Rarely refuse to hand over the child.
- Overwhelming majority express feelings of pride and accomplishment.
Psychological Profile

- Standardized psychological profiling tests have consistently found that surrogate mothers are well within normal ranges on these tests.
- Surrogate mothers tend to be more likely than the general population to be self-sufficient, independent thinkers, non-conforming extraverts. They are self-aware, stable, and optimistic.
- One study that reviewed the medical files of 98 surrogate mothers at one British clinic concluded that all of the mothers “had a confident psychological framework regarding pregnancy and birth”.

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“I haven’t thought of [the child] as mine, because she is not mine, she never has been.”

“I almost felt guilty for not feeling bad about giving up the baby.”
The Concern: Exploitation

- “often have little education, little or no income, and very little personal security”. Christine Overall (1993)
- “...minority women increasingly will be sought to serve as “mother machines” ..... It’s a new, virulent, form of racial and class discrimination”. Anita Allen (1991)
- “…poor, uneducated third world women and women of color... can be hired more cheaply. They can also be controlled more tightly.” Barbara Rothman Katz (1989)
What does the research show?

- Most are Caucasian, Christian and in their late 20s - early 30s. Most have finished high school and some are university educated.
- They have modest (not low) family incomes and relatively stable financial situations. None are on social assistance.
- Women of colour are under-represented as surrogate mothers.
The Concern: Commodification

- “...little self-determination if she cannot find sustaining and dignified work and resorts to surrogacy as a final economic resort.” (Raymond, 1993)

- “reproductive prostitution” and “a form of slavery.” (Overall, 1993)

- “...economically and socially vulnerable women as at its disposal for a price.“ (Allen, 1991)
What does the research show?

Money is not the prime motivator
Relationship with the Commissioning Parents

“...the surrogacy business...intends to keep the inseminated women under constant surveillance by his private detectives throughout the nine months of their pregnancies.” Gena Corea (1988)
What the research shows

- The relationship between surrogate mothers and commissioning parents are very good.
- Pre-conception agreement on issues such as medical issues (abortion and fetal reduction); information sharing, conduct and diet, expenses, insurance, details of turning the child over, parentage, and post birth contact.
Which Canadian court has the highest number of surrogacy-related reported cases?
Objectives of A Regulatory Regime

- To ensure that women contemplating surrogacy have the informed ability to make that decision.

- To ensure that they have the capacity to be able to resist the pressure to participate in surrogacy or to be controlled by others during the pregnancy.
- Informed consent
- Screening and counseling
- Independent legal advice
- Statutory provisions on personal autonomy and privacy
- State-insured health care
- More uniformity on birth registration
- International protocols
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