

**THIS FINAL EXAM CONSISTS OF 6 PAGES
PLEASE ENSURE THAT YOU HAVE A COMPLETE EXAMINATION**

**THE UNIVERSITY OF BRITISH COLUMBIA
PETER A. ALLARD SCHOOL OF LAW**

FINAL EXAMINATION – April 2022

**LAW 359 002 & LAW 559D 002
Family Law**

Professor Erez Aloni

TIME ALLOWED: 3 hours



NOTES:

1. This exam is semi–open book. Students may use instructor’s slides, self-prepared course outlines, copies of cases covered in class, relevant statutes, and any student-prepared notes, *but nothing else*. No books, commercial outlines, or other texts are permitted.
2. This exam has 3 questions, worth a total of 100 points. The first question is worth approximately 45 points, question 2 is worth approximately 35 points, and question 3 is worth approximately 20 points.
3. The time allocation next to each question is a recommendation only; you should divide your time as you think best. The recommended time for questions 1 and 2 is an hour each; the recommended time for question 3 is 30 minutes. The total exam time is 3 hours, so you should use the extra 30 minutes as you wish.
4. If anything in any question seems ambiguous or erroneous to you, say so clearly in your answer and indicate any assumptions you are making to resolve the possible ambiguity or error in order to address the question. Make only reasonable assumptions. If you feel additional information is required to answer a question, please indicate what additional information is necessary and why you believe that it is necessary.

Good Luck!

QUESTION I

Recommended time: 60 minutes

David was wrongfully convicted of a crime. In his last and final trial, in 1985, he was acquitted. David spent 45 months in prison for a crime that he did not commit. The inquiry report that followed his exoneration described these months as “extremely hard time.”

In 1990, David started cohabiting with Alexa. They married in 2000. When the couple met, Alexa was working full time as a travel agent. She left the job as soon as she became pregnant, a couple of years after they moved in together; they now have three children together. In the years that followed, on occasion she provided daycare and briefly did telephone solicitations for an NGO. For the most part, however, Alexa assumed the role of homemaker and mother to their children. After his time in prison, David suffers from post-traumatic stress disorder and will likely continue to do so for the rest of his life. He hasn't worked since 2001, due to mental and physical health problems. Alexa has been a supportive partner during all these years, not only by taking care of the kids but also by supporting David's mental health and his efforts to become an advocate in favour of criminal law reform that would reduce the risk of wrongful conviction.

David's wrongful conviction led to a number of consequences affecting his family as well as himself. At one time, their home was set on fire while the family was inside. The family believes this was the result of publicity surrounding the inquiry into the wrongful conviction. The event traumatized all family members.

Following an inquiry about his wrongful conviction that concluded in 2001, David was awarded a total of \$2,647,000, comprised of: \$1.75 million in nonpecuniary damages; \$100,000 for past wage loss (all incurred prior to the commencement of his relationship with Alexa); and \$197,000 for counselling for David, Alexa, and their children. In addition, court-ordered interest was added to the award. David has attended counselling, although the details and expenses are not clear, but Alexa and the kids have not.

David received the settlement funds in 2002, except for \$640,000, which was used by the province toward the purchase of an annuity for David's benefit (an annuity is a financial product that pays out a fixed stream of monetary disbursements to an individual). It provides him with a monthly nontaxable amount of \$3,961.22. When calculated for the payment of income tax, it is the equivalent of \$56,000 annually. David cannot access the annuity other than through his receipt of the monthly stipend, which terminates upon his death. There is no survivor's benefit.

Of the remaining funds, \$600,000 went toward the purchase of their matrimonial home. An additional \$400,000 was used for renovating the property. Initially, the home was listed in David's name only, but in 2005 he transferred the title property (title) into their joint names (Alexa and him), according to him, “to make sure that his three children were financially secure should anything happen to him.”

Of the remaining sum David received, approximately \$1 million was invested in his name alone, using an investment advisor, into several different investment accounts. These investments are, at the time of the trial, worth \$1.4 million dollars.

David and Alexa separated in 2018, and each seeks a divorce. At the time of trial, the value of the house is \$1,675,000 with no mortgage. Since the parties' separation in 2018, Alexa has taken residence in the basement suite of their home—but they do not have any meaningful relationship beyond the management of the household. Alexa has also earned a modest income doing deliveries for DoorDash since 2019 or 2020 (around \$5,000 annually). David is 68 years old, and Alexa is 60 at the time of the trial. They have made no claims for child support, as the kids are at the age of majority.

You are clerking in the BC Supreme Court, which hears the case. Your judge asks you to write a memo about their claims, with an emphasis on their financial obligations upon divorce. Discuss their possible arguments for getting a divorce, division of property, and spousal support, and, as much as possible, try to evaluate what the specific rulings would look like.

QUESTION II

Recommended time: 60 minutes

Frank and his wife, Leslie, have been married since 2011. During the first eight years of marriage, they wanted to have children but were unable to conceive. They made several trips to India in 2017 and 2018 hoping to have a child by assisted reproductive technology. Among other things, they tried in vitro fertilization (IVF), relying on a surrogate. Until they met Phoebe Buffay, their efforts were unsuccessful.

Phoebe met Frank and Leslie in the spring of 2016 while those efforts were still underway. Phoebe was then a single mother with two children of her own from another relationship. Phoebe says that she and Frank soon became close friends and then lovers.

Phoebe states that although she was having an affair with Frank, she also became close friends with Leslie. Phoebe reports that she “felt like a bit of a buffer” between Leslie and Frank as they struggled with their fertility challenges. Stranger still, she says that she “wanted to support their marriage,” and, to that end, in February 2018 she offered to serve as a surrogate so that the couple could have a child of their own.

After further discussion, the three agreed to enter into a surrogacy arrangement of some kind. Leslie and Frank have produced text messages exchanged between them in the spring and early summer of 2018 anticipating that Phoebe would donate her eggs and serve as the couple's surrogate. For example, Phoebe texted Leslie as follows:

a) June 15, 2018: “Your and Frank’s baby [is] going to be this cute!!!!” [attaching a photograph of Phoebe and her son as a toddler];

- b) June 30, 2018: “.... These are your babies I’m just carrying them”; and
- c) July 2, 2018: “I’m so excited to carry your babies for you”; “I’m so excited to give you your babies”; and “I can’t wait to watch you be the best momma”.

The couple signed a written surrogacy agreement dated June 15, 2018, which they prepared and signed together but without the benefit of legal advice. The document states as follows:



June 15, 2018

Surrogacy contract:

Surrogate: Phoebe Buffay

Intended parents: Leslie B and Frank B Jr.

Details on the surrogacy:

Both the surrogate and the parents have spoken about the surrogacy. After multiple attempts with IVF, we have decided to go through the surrogate avenue. Phoebe, a personal friend, has without any pressure volunteered to be a surrogate. We will try the in-home insemination kit for the pregnancy. Phoebe has gone to her doctor for a review to see if she is able to do this medically. Intended parents have agreed to pay for all medical expenses, lost wages, clothing, and any additional costs incurred for this pregnancy. Phoebe is psychologically fit to carry out the pregnancy when it does happen. This contract is being set out before any attempts are made at the in-home insemination kit. Phoebe will be available for any lawyer appointments.

The intended parents also take full responsibility for the child once born even if there are any birth defects. Phoebe agrees to a healthy lifestyle like she has now after getting pregnant.

Signed:

Lisa B

Frank B Jr.

Phoebe B



According to Phoebe, however, they did not follow the planned sketched out in the agreement. Instead, she says, David suggested to her that he impregnates her naturally. Phoebe has produced a text message from Frank dated July 25, 2019, in which acknowledged that the child, Chandler, was indeed conceived by means of sexual intercourse between them. Leslie and Frank admit that the child was conceived by intercourse.

During the pregnancy, Phoebe kept assuring them that she was serving as a surrogate. For example, in a text message dated January 12, 2019, Phoebe wrote, “U guys need to start adoption papers... there’s a lot of paperwork involved ... you guys should start the process asap ...”

Chandler was born in May 2019. A week later, Phoebe signed a declaration in front of a notary, as follows:

.....

I, Phoebe Buffay of [address] hereby declare that I made a written surrogacy agreement on the date of June 15, 2018, with intended parents Leslie and Frank, and that this surrogacy agreement was made prior to the conception of Chandler.

And I further declare that in this surrogacy agreement it states that I will be the birth mother of a child conceived through assisted reproduction and that on the Child’s birth:

I will not be a parent of the Child;

I will surrender the Child to the intended parent(s); and

the intended parent(s) will be the Child’s parent(s).

And I further declare that:

Before the Child was conceived, no party to the surrogacy agreement withdrew from the agreement or died; and

I surrender all parental rights to the Child to Leslie and Frank.

Signed: Phoebe Buffay

.....

After the birth, Phoebe continued to play a role in Chandler’s life for the first three months. She says that she breast-fed him, changed his diapers, played with him, read him stories. But as Phoebe became too demanding of time with Chandler and of playing a larger role in his life, Leslie and Frank tried to minimize her time. Over the following months, the relationship between Phoebe and the parents continued to worsen. And since November 2019 they have refused to allow Phoebe to see Chandler at all.

In December 2019, Phoebe arrives at your office and tells you her story. She asks for a way to be recognized as a parent. Advise Phoebe on her possible parentage claims, explaining the different legal doctrines, statute and case law that support her arguments as well as the obstacles. Make sure to discuss also the parental claims that Leslie and Frank will make, their possible arguments, and likelihood of success.

Question III

Recommended time: 30 minutes

In her book, *Legal Recognition of Non-Conjugal Families: New Frontiers in Family Law in the US, Canada and Europe*, Nausica Palazzo states:

The level of care and commitment amongst individuals has not diminished, despite marriage rates falling in the West: people are investing in relationships outside of marriage and of the traditional model of family it embeds. Think of non-conjugal relationships of friends or relatives that lack a sexual component.

And in the conclusion of the book, she states,

It is likely that Canada is the jurisdiction which has the greatest potential to introduce legal protections for non-conjugal families.

Do you agree with this prediction? To what extent does Canadian law already recognize non-conjugal relationships? What types of past legal processes and existing doctrines support the conclusion that Canadian law is ripe for recognition of non-conjugal families? What types of underlying values embedded in Canadian family law support such advancement? What values and doctrines might stand in the way of such recognition?

END OF EXAMINATION