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The Right to Parenthood and the Best Interests of the Child: A Perspective on Surrogate Motherhood in Jewish and Israeli Law

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THE RIGHT TO PARENTHOOD AND THE BEST INTERESTS OF THE CHILD: A PERSPECTIVE ON SURROGATE MOTHERHOOD IN JEWISH AND ISRAELI LAW

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"Give me children or else I die . . . Behold, my maid Bilhah, go in unto her; that she may bear upon my knees, and I also may obtain children by her." Genesis 30:1,3

INTRODUCTION

This article will address the attitude of Jewish and Israeli law with regard to the legal and moral issues raised by the practice of surrogate motherhood. At the outset, it should be emphasized that the term "surrogate mother" is a misnomer. As employed in legal literature,[1] a surrogate mother is a woman who produces a child for a couple[2] by becoming artificially impregnated, carrying the fetus to term, and surrendering all parental rights to the child upon birth. However, since she is actually the biological mother of the child,[3] a more precise label would be

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1. A great deal has been written on the legal issues raised by surrogate motherhood, even before the current controversy over Baby M. *See, e.g.*, Note, *Contracts to Bear a Child*, 65 CALIF. L. REV. 611 (1978)[hereinafter "Note, *Contracts to Bear a Child*"]; Black, *Legal Problems of Surrogate Motherhood*, 16 NEW ENG. L. REV. 373 (1981); Waldington, *Artificial Conception: The Challenge for Family Law*, 69 VA. L. REV. 465 (1983); Stumpf, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L.J. 187 (1986)[hereinafter "Stumpf"].

2. This article will attempt to deal only with agreements between a married couple and a surrogate mother. This assumption, of course, does not preclude the possibility that such an agreement can be initiated by an individual, a homosexual couple, or an unmarried couple, and in dealing with existing cases these situations do arise. *See infra* note 40.

3. This study does not include the possibility of *in vitro* fertilization in which an egg is taken from the husband's wife, fertilized by the husband's semen, and implanted in

"surrogate wife," because she performs the procreative function for the husband of the adoptive couple in the place of his legal wife. The change in terminology is not mere semantics, because it directs our attention to the fact that surrogate motherhood is not new to the 1980s, but instead existed as far back as biblical times. In that era, however, the surrogate mother was legally wed, prior to engaging in intimate relations, in addition to the sterile wife, unlike today's surrogate mothers whose contractual status is temporary, not sacred.

Following an examination of the religious duty of procreation, which might sanction the practice of surrogate motherhood, this study will focus upon the legal problems in Israeli law for determining the status of a child conceived through such methods. Israeli law, while built upon religious principles of marriage and divorce,[4] does not necessarily follow religious law in issues of public policy.[5] Even if the practice of surrogate motherhood is not repugnant from a religious perspective, it must still be scrutinized from a secular point of view.

THE RELIGIOUS DUTY TO PROCREATE: SURROGATE MOTHER OR SURROGATE WIFE?

Biblical Law

Marriage in ancient Israel was polygamous. In addition, concubinage also existed. Accordingly, high birthrates were assured and marital sterility was not a problem.[6]

Sarah, Abraham's wife, had borne him no children. She gave her servant maid, Hagar, to Abraham: "Behold now, God hath restrained me from bearing, go in, I pray thee, unto my handmaid it may be that I shall obtain children by her. And Abraham hearkened to the voice of Sarah. And Sarah, Abraham's wife took Hagar the Egyptian . . . and gave her to Abraham her husband to be his wife."[7] This transaction culminated in the birth of Ismael.

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the surrogate mother's womb. In this case, the surrogate mother is the gestational mother, but not the genetic mother.

4. P. SHIFMAN, FAMILY LAW IN ISRAEL (Hebrew 1984).

5. P. Shifman, *Marriage and Cohabitation in Israel*, 16 ISR. L. REV. 439 (1981) (citing I. ENGLARD, RELIGIOUS LAW IN THE ISRAEL LEGAL SYSTEM 168-77 (1975)).

6. E. NEUFELD, ANCIENT HEBREW MARRIAGE LAWS 118-32 (1944).

7. *Genesis* 16:1-3.

This same custom is reflected by Rachel, Jacob's wife. In grief for her barrenness, Rachel gave Bilhah, her maid, unto Jacob, saying: "Behold my maid, Bilhah, go in unto her, and that she may bear upon my knees, and I also obtain children by her."[8]

One can infer that where a barren wife "gave" her maid to her husband for the purpose of bearing children, it was the custom for such children to be adopted by the wife of their father, who thereby became their foster mother. The concubine thereupon relinquished all rights to the child, who became the legal child of the foster mother according to law. Hence, it was Rachel who gave the names Dan and Naphtali to the two sons born to Bilhah from Jacob.[9] "When Leah saw that she had left bearing, she took Zilpah, her maid, and gave her to Jacob to wife"[10] and Leah named the two sons borne by Zilpah.

Adoption by the legal wife did not protect the child from abuse. After Hagar conceived, she became contemptuous of Sarah who, in turn, abused her. After Sarah had borne Isaac, she demanded the expulsion of Hagar and her son. Abraham reluctantly banished Hagar to the desert where she and Ishmael were saved from death by divine intervention.[11] Later, Abraham disinherited Ishmael; he gave his entire estate to Isaac while the sons of his concubines received only token gifts and were sent away.[12] In the case of Jacob, however, there was no discrimination between the children of his wives and those of his concubines; together, they were the progenitors of the twelve tribes of Israel.

The biblical tradition reflected in these legends illustrates a striking similarity to the general practice of other nations at that time. The Patriarchs lived in the region of Harran, where the custom of concubinage was also practiced, and whereby the wife, if childless, had to provide her husband with a handmaid in order to bear children. This custom provided that the master's wife would have authority over the child of the maidservant, in conformity with Abraham's practice regarding Hagar and Ish-

8. *Genesis* 30:3-4.
9. *Genesis* 30:6-8.
10. *Genesis* 30:9-13. The children were named Gad and Asher.
11. *Genesis* 16:5-16. *Genesis* 21:9-19.
12. *Genesis* 25:5-6.

mael.[13] The practice followed that of other nations of the Near East.

Talmudic and Post-Talmudic Law

Talmudic law adduced the biblical precedent of Abraham. Sarah gave Hagar "to Abram her husband for a wife," in order that a child be born "after ten years."[14] Under the Talmud, if a man marries a woman who fails to give birth within ten years, he must take additional steps to fulfill his duty of procreation.[15] He is required either to divorce her or to take a second wife. [16] Polygamy, as well as divorcing one's wife against her will, was prohibited by the eleventh century ban of Rabbi Gershom.[17] Under appropriate circumstances, however, a man could obtain special dispensation permitting him to take a second wife.[18] Such a release would be justified where, due to his wife's sterility, the husband is prevented from fulfilling the commandment to "be fruitful and multiply."[19] In such a case, the husband, in theory, is not only permitted, but obligated, to take a second wife in order to fulfill this commandment.

In practice, however, many scholars opposed the bigamous solution to the problem of childlessness, contending that the religious duty to procreate should yield to the need to maintain happiness and harmony in marital relations.[20] In one case, a man was advised to remain with his barren wife and compensate for not procreating by raising an orphan in his home.[21]

On one occasion, the concept of a surrogate wife was realized in a different way; it was suggested that the man tempora-

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13. E. NEUFELD, *supra* note 6, at 130-32; 12 ENCYCLOPEDIA JUDAICA 1287-88.

14. *Genesis* 16:3.

15. *Yevamot* 64a.

16. *Id. Rashi* (R. Solomon Yitzhaki, d. 1105).

17. D. FELDMAN, BIRTH CONTROL IN JEWISH LAW 37-41 (1968)[hereinafter "D. FELDMAN"].

18. *Id.* at 40-45.

19. According to Jewish Law, the commandment to procreate had been originally imposed upon men only. On the logic of this position, see D. FELDMAN, *supra* note 17, at 53-56. On the ramifications of this commandment in terms of the liberty of women to use contraceptives, see R. BIALE, WOMEN AND JEWISH LAW 198-218 (1984).

20. D. FELDMAN, *supra* note 17, at 41-45.

21. Responsa *Big'dei Khuna* (Fiorda 1807), *Even Hatzer*, No.1 *cited in Pit'hey T'shuvah* (Abraham Zvi Eisenstadt, d.1868), Commentary to the *shulanm Arukh, Even Hatzer*, No. 154, sec.(27); D. FELDMAN, *supra* note 17, at 45.

rily divorce his wife and marry another woman conditionally for as long as was necessary to have children, then return to his first wife.[22] In practice, the idea that a childless marriage should be dissolved unconditionally had been limited to circumstances of marital rift. Conversely, the ideal of domestic peace and the undesirability of divorce justified, the continuation of a marriage despite the presumed primacy of procreation as one of the objectives of marriage.

In the State of Israel, bigamy is prohibited by secular law.[23] Rabbinical authorities may, however, permit a person to take a second wife in exceptional circumstances. Upon the granting of such permission, the secular criminal penalties for bigamy no longer apply.[24] In one case, the Chief Rabbi refused a request made by a husband to allow him to marry a second wife in spite of the fact that the infertile first wife had consented to her husband's request. The High Court of Justice refused to interfere with the Chief Rabbi's interpretation of Jewish law which precluded bigamous marriage.[25] The biblical acceptance of a surrogate mother gave the woman the status of a surrogate wife; a status which is no longer available under modern laws prohibiting bigamy.

The use of extramarital relations in order to fulfill one's religious duty to procreate is strictly forbidden by Jewish law. Would the result be different if the man had no sexual relationship with the mother who became impregnated by artificial insemination? In order to answer this question, one must first consider the general attitude of Jewish law toward artificial insemination.

Artificial insemination with the semen of a third-party donor is considered by most rabbinic opinions to be both repugnant and contrary to Jewish ethics for a variety of reasons, particularly the possibility of incest and the difficulty in tracing the child's genealogy.[26] Where the risk of incest is minimal, some

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22. Responsa *Me'il Tz'dakah*, No.33, by R. Jonah Landsofer of Prague (d.1712); D. FELDMAN, *supra* note 17, at 42.

23. *See* Shifman, *The English Law of Bigamy in a Multi-Confessional Society: The Israeli Experience*, 26 AM. J. COMP. L. 79 (1977).

24. P. SHIFMAN, *supra* note 4, at 178-80.

25. Beeton v. The Chief Rabbi, 30(1) P.D. 309 (High Court 1975).

26. *See* Shifman, *Paternity of Children Born of Artificial Insemination*, 10 Mishpatim 63 (Hebrew)(1981); F. ROSNER, MODERN MEDICINE AND JEWISH LAW—STUDIES IN TO-

scholars approve of artificial insemination in order to preserve marital harmony and family integrity. If the surrogate mother is married, rabbinic opinion opposes the surrogacy arrangement, on the ground that it could lead to incest and doubts as to the identity of the father who is presumed to be the woman's husband. Moreover, some scholars hold that the implantation of a married woman with semen from a man other than her husband is tantamount to adultery.[27]

Limitation of surrogate motherhood to unmarried women would minimize formal religious doubts as to the propriety of this practice. The identity of the father does not lie in doubt and an unmarried woman cannot be an adulteress. By artificial insemination of the surrogate mother, the man is fulfilling his duty to "be fruitful and multiply," without engaging in illicit relations. If this argument is correct, the procurement of a surrogate mother would be looked upon as a religious duty!

The difficulty lies, however, in the fact that the issue of the legitimacy of surrogate motherhood cannot be resolved on formal, technical grounds alone. Permitting such an arrangement creates a discrepancy between marriage and procreation which in the long run could lead to sexual permissiveness and disintegration of the family. Although rabbinic opinion has not yet addressed itself to the religious problems created by surrogate motherhood, several conclusions can be drawn from the parallel debate on test-tube babies. Rabbi Waldenberg believes this

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RAH JUDAISM 89-106 (1972); Drori, *Artificial Insemination: Is it Adultery?*, in JEWISH LAW AND CURRENT LEGAL PROBLEMS 203 (N. Rakover ed. 1984).

27. The commentators based themselves mainly upon the prohibition contained in the verse in *Lev.* 18:20:

> "And thou shalt not implant thy seed into thy neighbour's wife, to defile thyself with her." There are some who hold that adultery is prohibited because of the fear that the uncertainty surrounding the child of an adulterous union and the resultant confusion could lead to incest. Thus, in the above verse, they emphasize the words "and thou shalt not implant thy seed" and consider it to be adultery when a strange man implants his semen in a married woman, even though sexual intercourse has not taken place. Another approach stresses that the prohibition falls upon the desire to be implanted with strange semen, even without sexual intercourse, and as such, it is not sexual relations which are prohibited—as in the case of incest—but rather the implantation of seed.
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> An opposite approach regards sexual relations as being the basis for the prohibition of adultery, and therefore interprets the verse to contain a prohibition on "lying carnally."

Drori, *supra* note 26, at 204-06 (footnotes omitted).

technique to be strictly forbidden because a man cannot fulfill his duty "to be fruitful and multiply" by any means other than sexual intercourse.[28] Rabbi Neventzal, who disagrees with this line of reasoning, expresses the view that the mere fact that a child had been conceived by artificial techniques does not lessen the value of a man fulfilling his duty of procreation. On the contrary, Rabbi Neventzal believes that the prohibition of test-tube conception techniques denies the husband the opportunity to fulfill his duty to procreate and might precipitate a serious challenge to marital harmony.[29]

Unfortunately, allowing a husband to fulfill his duty to procreate by the use of a surrogate wife does not resolve the fundamental question: Can the father deny the parental rights of the child's biological mother?

PARENTAL RIGHTS OF THE PARTIES UNDER ISRAELI LAW

Biological Parenthood and Social Parenthood

One of the main issues to be resolved in the context of surrogate motherhood is who are the legal parents of the child. Fundamental concepts of Jewish and Israeli law which define legal parenthood conflict with modern legal theories which claim that the mentally conceiving parents have rights superior to all other parties.[30]

Traditional Jewish and Israeli law do not recognize the concept of an illegitimate child; children born in or out of wedlock are treated equally. Furthermore, unmarried parents are not, in principle, denied any rights toward their children. The factual, biological relationship is a sufficient basis for vesting parental

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28. SEFER ASIA 84-92 (Hebrew 1976). *See also* JEWISH MEDICAL LAW 106-10 (A. Steinberg M.D. ed., D. Simons M.D. trans. 1980).

29. *Sefer Asia* at 92-93.

30. *See, e.g.*, Stumpf, *supra* note 1, at 207:

> Especially in situations where both the initiating parents and the surrogate mother want the child, case-by-case determinations of which set of parents might provide the best home environment would be unnecessarily intrusive and arbitrary. In surrogate parenting cases, the initiating parents should be the designated legal parents with sustained rights to the child. Indeed, in most cases of procreative collaboration, the parties will agree—and the legal presumptions proposed here reflect—that the initiating parents should raise the child as initially planned.

(footnotes omitted).

rights, and the fact that the parent is unmarried does not by itself derogate his or her parental rights if he or she is willing to take responsibility for the child.[31] It seems that the encounter of the courts with artificial insemination and other new reproductive technologies necessitates a change in the traditional definition of parenthood from a purely biological definition to a socially oriented one.

Although many scholars of Jewish law are reluctant to recommend the use of new reproductive technologies, modern Israeli secular law has taken no stand as to their morality. The emerging viewpoint of Israeli law seems to be that upon the actual birth of a child to a surrogate mother, the best interests of the child must be the primary concern since the child bears no responsibility for the manner in which it was conceived. Furthermore, Israeli law will likely adopt the viewpoint that in a modern state, society should not be allowed to interfere in intimate matters of procreation by regulating reproductive technology. According to this view, the couple's decision is a personal one, based on their right to privacy, and must not be exposed to state interference. The first decision of the Israeli Supreme Court concerning Artificial Insemination by Donor (AID) resulted in recognition of the legality of an agreement between spouses concerning the performance of artificial insemination.[32] By recognizing the agreement and regarding it as imposing upon the husband the duty to support the child, the court has adopted by implication an approach which does not condemn, *a priori,* artificial insemination from a donor to a married woman whose husband gives his full consent to the act. This inference is important as a signal that the court ignored the attitude of most religious scholars to AID.[33]

The process which produced the present state of the law on AID in the United States may eventually emerge in Israel. In the United States the first step in the positive recognition of AID was taken on the basis of contract law.[34] Later, the idea was

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31. P. Shifman, *The Status of the Unmarried Parent in Israel Law*, 12 ISR. L. REV. 194 (1977).

32. Salma v. Salma, 34(2) P.D. 779 (Civ. App. 1980).

33. P. Shifman, *First Encounter of Israeli Law with Artificial Insemination*, 16 ISR. L. REV. 250 (1981).

34. Gursky v. Gursky, 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. Kings Co. 1963).

formulated and institutionalized in case law[35] and legislation[36] that a husband who consented to artificial insemination should bear the unequivocal status of father even without reliance on implied contract theory.[37] While the general legal doctrine behind this rule does not totally replace the idea of biological parenthood with consensual parenthood, the mere fact that the wife was fertilized through artificial insemination is not decisive. There is no dispute that where Artificial Insemination by Husband (AIH) is performed the husband is the father of the child although the wife's pregnancy was the result of artificial insemination.[38] Conversely, the mere fact that a person gave his consent to take parental responsibility for a child does not grant him the status of parent to the child. If, for instance, a husband gave his consent to sexual relations between his wife and another man, he would not be considered, on the basis of his con-

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The court found that Mrs. Gursky was induced by her husband's consent to be artificially inseminated and thus relied to her detriment upon her husband's wishes. The court chose to invoke the contract doctrine of equitable estoppel and found Mr. Gursky primarily liable for support of the child. 39 Misc.2d at 1088-89, 242 N.Y.S.2d at 412; *Cf. In re* Karin T. v. Michael T., 127 Misc. 2d 14, 484 N.Y.S.2d 780 (Fam. Ct. 1985) (contract entered into by respondent—a woman who attempted to change her feminine identity and live and act like a man and a father—with the mother and the doctor must *inure* to the benefit of the children); R.S. v. R.S., 9 Kan. App. 39, 670 P.2d 923 (Kan. Ct. App. 1983) (The court held that a husband who consents to his wife being artificially inseminated is *estopped* from denying that he is the father of the child and has thus, impliedly agreed to support the child).

35. People v. Sorenson, 68 Cal. 2d 280, 437 P.2d 495, 66 Cal. Rptr. 7 (1968); *In re* Adoption of Anonymous, 74 Misc. 2d 99, 345 N.Y.S.2d 430 (Sur. Ct. Kings Co. 1973).

36. *See, e.g.*, N.Y. DOM. REL. LAW § 73 (McKinney 1977); CAL. CIV. CODE § 7005 (West Supp. 1980).

37. *See* People v. Sorenson, 68 Cal. 2d 280, 437 P.2d 495, 498-99, 66 Cal. Rptr. 7, 10-11 (1968). This case involved statutory construction of § 270 of the California Penal Code. CAL. PENAL CODE § 270 (West 1983). In controversy was the definition of the term "father." The court found the determinative factor was not limited to traditional concepts of a biological or natural father, but rather whether there exists the legal relationship of father and child. The court reasoned that it would be unfair to consider an anonymous donor of sperm as the "natural father," as he is "no more responsible for the use made of his sperm than is the donor of blood or a kidney." *See also In re* Adoption of Anonymous, 74 Misc. 2d 99, 105, 345 N.Y.S.2d 430, 435-36 (Sur. Ct. Kings Co. 1973) (The court held that a child born of consensual artificial insemination during a valid marriage is a *legitimate* child entitled to the same rights of a naturally conceived child.)

38. The courts might, however, rule otherwise regarding AIH that took place after the death of the husband. If a wife was impregnated with semen deposited by her late husband in a sperm bank, it is submitted that the child could not legally be considered his son, since he did not take an active role in conception.

sent, to be the father of the child conceived in that situation.[39] Why, then, is a child conceived by AID deemed to be the child of the mother's husband, rather than the donor who supplied the semen for his conception? In the context of surrogate motherhood, the donor of the egg parallels the sperm donor in AID who consented in advance to relinquish all parental rights to the child.

To evaluate this problem, compare the case of a single woman using semen donated by a friend with the typical situation of a married couple employing AID. As to the former situation, a New Jersey court ruled that the friend who donates semen was the natural father of the child.[40] The court held that it is in the child's best interest to have two parents whenever possible and, therefore, no distinction should be made between natural and artificial conception.[41]

The result presumably would have been different if the semen came from an anonymous donor.[42] In the New Jersey case,

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39. *See In re* Marriage of L.M.S. v. S.L.S., 105 Wisc. 2d 118, 312 N.W. 2d 853 (1981) (a husband who consented to having his wife impregnated through sexual relations with a surrogate father, has the legal duties and responsibilities of fatherhood, including support); *In re* Adoption of McFadyen, 108 Ill. App. 3d 329, 438 N.E. 2d 1362 (1982), *cert. denied* 460 U.S. 1015 (1983) (presumption of husband that he was the biological father of the child born to his wife was rebutted where the husband had a vasectomy and wife had relations with other men).

40. C.M. v. C.C., 152 N.J. Super. 160, 377 A.2d 821 (Juv. & Dom. Rel Ct. 1977). A donor of semen, which was used by an unmarried woman to artificially inseminate herself, sued to obtain visitation rights to the child born as a direct result of the artificial insemination. The court found the anonymity of the sperm donor to be the dispositive factor. By donating his semen anonymously, the donor impliedly gives it without taking on such responsibilities for its use. In such a situation, the person who consents to the use of the sperm, not his own, is responsible for fathering the child. For example, when a husband consents to his wife's artificial insemination from an anonymous donor, he takes upon himself the responsibilities of fatherhood. *Id.* at 167, 377 A.2d at 824. But in this case, the donee received the semen from a friend, someone she knew and dated for two years. This friend intended to assume the responsibilities of parenthood when the child was conceived. Therefore, because of his consent and active participation in the procedure leading to conception, he will be treated as the natural father of the child and will be entitled to visitation rights. *Id.* at 166-68, 377 A.2d at 824-25.

41. The court took no position as to the propriety of the artificial insemination between unmarried persons. It was concerned only with the best interests of the child in granting custody or visitation. For such consideration, the court will not make any distinction between a child conceived naturally or artificially. *Id.* at 166-67, 377 A.2d at 824-25.

42. By donating his semen anonymously, the donor impliedly gives it without taking on such responsibilities for its use. *Id.* at 167, 377 A.2d at 824.

the donor's active participation in the procedure leading to conception was cited as the basis of placing the responsibilities of fatherhood upon him.[43] An anonymous donor to a married couple, on the other hand, has no direct contact with the procedure or the mother. Although he is the biological father, he may not assert any rights with regard to a child born through the use of his semen because he did not consciously participate in the child's conception.[44] Although he supplied semen and placed it at the disposal of the doctor, the decision became the doctor's whether to use this semen, if at all, and if used, with which woman.[45] The wife's husband, who actively participates in and consents to his wife's artificial insemination, will be treated as the child's legal father, instead of the donor who has relinquished control over the procreational use of his sperm. Surprisingly, some Jewish law scholars support this view.[46]

In brief, the general test under American law of the status of a parent is whether he actively participated in the child's conception, regardless of whether that conception took place artificially or naturally. When applying this test to a case involving surrogate motherhood, both genetic parents of the child, namely the husband and the surrogate mother, actively participated in the conception of the child: the husband by supplying his sperm, and the surrogate mother by supplying an egg, becoming impregnating, and carrying the fetus to term. While the husband's wife may assume a prominent role in the various stages leading to the birth of the child, and even take the initiative in seeking a

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43. "C.M.'s consent and active participation in the procedure leading to conception should place upon him the responsibilities of fatherhood." *Id.* at 168, 377 A.2d at 825.

44. "[A] child conceived through heterologous artificial insemination does not have a "natural father," as the term is commonly used. The anonymous donor of the sperm cannot be considered the "natural father," as he is no more responsible for the use made of his sperm than is the donor of blood or a kidney. . . With the use of the frozen semen, the donor may even be dead at the time the semen is used." *Id.* at 164, 377 A.2d at 823. (quoting People v. Sorenson, 68 Cal. 2d 280, 66 Cal. Rptr. 7, 10, 437 P.2d 495, 498 (1968).

45. By statute in California a "donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived." CAL. CIV. CODE § 7005, subd. (b). In Jhordan C. v. Mary K., 224 Cal. Rptr. 530, 179 Cal. App. 3d 386 (1986) (because Mary did not obtain Jhordan's semen through a licensed physician, and because the parties by all other conduct presented Jhordan's status as a member of the family, the court held Jhordan to be the baby's legal father).

46. Rosner, *supra* note 26, at 98-99.

surrogate mother, this does not *automatically* guarantee her status as the child's mother, since another woman, who is the biological mother, was so directly involved in the child's conception and birth. In other words, despite the tendency of courts and legislators to accommodate the needs of people trying to realize their right to parenthood through recent reproductive technologies, biological motherhood is still the starting point in the legal definition of parenthood.

All legislation on these matters must begin with a general theory of parenthood. Statutes have been enacted in many states in the United States in attempts to solve the legal problems of AID. Their scope, however, is generally limited to those situations where a married couple agrees to artificial insemination. By addressing one specific set of facts, these laws have not retained the flexibility required to address various situations. The provision that "the donor of semen provided . . . for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived,"[47] was clearly aimed at absolving donors of legal responsibility for children born as a result of the use of their smen. Ironically, by applying this provision to the situation of surrogate motherhood, although the child is biologically the husband's, proof of paternity becomes virtually impossible.[48] The husband as well as the surrogate mother should be considered the child's parents inasmuch as both actively participate in the conception.

Waiver of Parental Rights by the Surrogate Mother

Assuming that, *ex definitio,* the surrogate mother is the legal mother of the child, what is the value of her waiver of parental rights and her advance consent to surrender the child for adoption by the husband's wife?

A distinction should be made between two different concepts in a surrogate motherhood contract: the agreement of the surrogate mother and the husband to *produce* a child; and the agreement of the surrogate mother to surrender the child and

47. CAL. CIV. CODE § 7005(b) (West 1983); *see also* 41 UNIF. PARENTAGE ACT § 5(b), 9A U.L.A. 593 (1973).

48. Note, *Contracts to Bear a Child, supra* note 1, at 614.

her parental rights to the child. The agreement of the surrogate mother and the husband to produce a child will not likely be treated as repugnant to public policy in Israel where both the civil right to privacy and the religious duty to procreate coincide and the strong economic incentive of the surrogate mother to cooperate with the couple does not render the agreement immoral exploitation. On the other hand, payment given to the surrogate mother in exchange for releasing the child for adoption will likely invoke the criminal law against the sale of babies. The Israeli Adoption of Children Law, 1981, provides that "[a] person who otherwise by permission of the court, offers or gives, or requests or accepts, any consideration in money or money's worth for an adoption . . . is liable to imprisonment for three years."[49]

Nevertheless, surrogate motherhood is not necessarily prohibited by this provision inasmuch as it does not forbid payment for services rendered. The mother's consent to surrender the child for adoption may be invalidated, however, by a court on her application on the ground that it had been given before the birth of the child.[50] She would not be bound under Israeli law by her undertaking since, under the Supreme Court ruling, an agreement between parents that their child will not be recognized as the child of both parents has no validity.[51]

If the surrogate mother changes her mind and refuses to surrender the child, the court will be called upon to decide the custody dispute by determining the best interests of the child. Israeli law espouses the tender-years doctrine which gives the natural mother custodial preference concerning children up to six years of age unless there are special reasons to rule otherwise.[52] Grounds for paternal custody for a child under six years of age can be found if the father can raise the child in a two-parent family.

In the absence of lengthy post-natal bonding between mother and child, the psychological attachments of the infant are far more difficult to determine, thus frustrating predictions

49. Section 32, Penal Law, 1977, section 364, prohibits relinquishing the custody of a minor for profit.

50. Adoption of Children Law, 1981, section 10.

51. Merhav v. Sharleen, 26(1) P.D. 701, 704 (Civ. App. 1972).

52. Legal Capacity and Guardianship Law, 1962, section 3.

of best interests.[53] In such a case, the court should do justice between the parties. Optimally, legal custody should be granted to the adoptive couple, because they have no other chance to realize their right to parenthood.[54] While the agreement is legally void if the natural mother refuses to surrender the child, it still retains moral weight. The best interests of the child require that the court be guided by moral directives. The emotional trauma of a custody suit may cause more harm to the child than good from placement of the child with the more appropriate parent. The tender-years doctrine favoring the natural mother is a simple solution which disregards the fitness of any of the parties as parents. A presumption in favor of the adopting couple—the biological father and adopting mother—based on the surrogacy agreement, is also simplistic but ensures that the child will have a two-parent family. This final doctrine may be the only solution under Jewish and Israeli where the two-parent family is the most favored situation.

53. Note, *Contracts to Bear a Child, supra* note 1, at 621.

54. This consideration does not apply if the motivation for the surrogate motherhood agreement was not infertility of the husband's wife but rather her desire to avoid pregnancy as a matter of her own convenience. In such a case, it is submitted that no presumption of preference should be made in favor of the couple.