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NINTH GENERAL ISSUE OF GENDER AND SEXUALITY LAW: ARTICLE: MORE THAN ONE MOTHER: DETERMINING MATERNITY FOR THE BIOLOGICAL CHILD OF A FEMALE SAME-SEX COUPLE--THE ISRAELI VIEW

NAME: RUTH ZAFRAN*

BIO:

* Visiting Scholar, The Center for the Study of Law and Society, University of California at Berkeley Law School; Assistant Professor of Law, Radzyner School of Law, Interdisciplinary Center (IDC), Herzliya, Israel. I would like to thank Amnon Reichman, Joel Linsider, Noam Peleg, Hanit Lugassy, and Tamar Fisher for all their assistance. I would also like to thank the Center for the Study of Law and Society in Berkeley and the IDC of Herzliya for their support. This Article develops ideas published previously in Ruth Zafran, Determining Maternity for the Biological Child of a Female Same-Sex Couple, 3 HAIFA L. REV. 351 (2007) (Hebrew). (c) 2008, Ruth Zafran.

SUMMARY:

... The article also considers the various judicial avenues for establishing parenthood: a court decree pursuant to the Adoption Law, a parenthood order pursuant to the Surrogacy Law, and a maternity declaration pursuant to a suit filed under the Family Court Law. ... Israeli law in principle protects the identity of the egg donor, stating that "a clinic conducting in vitro fertilization activities shall not provide information related to the identity of a sperm donor or an egg donor." ... The 1960 Adoption Law was intended to create a mechanism for the placement of children whose birth parents could not care for them and for recognizing the "substitute" parents as parents for all intents and purposes. ... A central reason for severing the donor's parental tie is a practical one: to avoid creating disincentives to sperm donation, lest the technology become unavailable to people who could not establish families without it. ... Severing the parental tie between sperm donor and offspring is essential if we are to ensure continued sperm donations, for a potential donor may decline to donate if concerned that he will end up subject to enforced parenthood and exposed to a whole range of obligations. ... Even though its decision smoothed the way to recognizing the same-sex partner's motherhood, it tied the justification for issuing the adoption decree to the existence of ongoing de facto maternal relations. ... The Court inquired into whether issuing such a decree, in the circumstances before it, would promote or impede the best interests of the children; it did so by comparing the children's well-being (emotional and otherwise) on the premise that legal recognition was granted to the de facto family unit, and on that premise it was denied.

TEXT:

[*115] INTRODUCTION

The Israeli media recently reported that the Health Ministry had permitted a woman to be impregnated with an egg donated by her female partner of ten years' standing. The egg was harvested from the partner in the course of fertility treatments and was fertilized in vitro by sperm from an anonymous donor. n1 The couple decided to undergo this procedure not for a medical reason; rather, they wished to share in the process of bringing their child into the world. One would **[*116]** provide the egg and the other would carry the pregnancy and give birth. They did so with the intention of jointly raising their child as equal parents.

This procedure was made possible as a result of the confluence of two sets of circumstances: the technological developments that have made it possible for childbirth to occur without sexual rela-

tions n2 and the growing openness in Israeli society to gay and lesbian family units. This case and its possible future permutations in Israel and elsewhere are the subject of this Article. n3

Among the questions raised by childbirth under the foregoing circumstances is the legal determination of parenthood. From a biological point of view, three persons participate in the process: the genetic mother, who, through her egg, contributes one-half of the child's genetic make-up; the genetic father, who contributes, through his sperm, the other half of the genetic make-up; and the mother who bears the child, carrying her n4 in her womb for nine months (sometimes referred to in this Article as the "gestational mother" n5). Yet is biology the decisive factor as a legal matter? Is choice? Is dual motherhood a possibility? Could three people be recognized as joint parents? This Article is centered on those questions. n6

There is surprisingly little literature on these questions. While the issues are similar in the United States and elsewhere, American legal scholarship, to the extent that it addresses the determination of parenthood in cases of joint **[*117]** biological motherhood, tends to center solely on American cases. n7 An important dimension of legal cross-pollination and critique is thus not realized. n8 This Article will provide an opportunity to transcend jurisdictional boundaries by detailing the legal state of affairs in Israel. Normatively, I propose a conceptual mode of analysis that may be brought to bear on the determination of parenthood. This approach, while developed in the Israeli context and with Israeli legal norms and procedures in mind, invites non-jurisdiction-specific discussion and analysis. Put more ambitiously, the proposed solution to the challenges faced by the Israeli legal system could be applicable, *mutatis mutandis*, to other common law jurisdictions facing similar challenges.

In considering how parenthood should be determined in the case described above, the article describes, in Part I, the existing Israeli legal arrangements regarding the formation of parental relations that are likely to be relevant in these circumstances and clarifies which of them, if any, can be reasonably applied to this case. In this context, the article examines the regulation of various assisted reproductive technologies--artificial insemination with donated sperm, in vitro fertilization with a donated egg, and surrogacy--all of which have a bearing on the situation at hand. It also considers adoption as an alternative means for establishing a parental relationship. As will become clear in the course of the analysis, existing law in Israel, as in many other jurisdictions, cannot provide an adequate response to the question of how parenthood should be determined in a case of birth participated in by two women.

Part II of the article turns to the proposed solution. After developing the normative approach to the case at hand and the criteria that should guide the determination of parenthood in similar cases, the article returns to the existing law and seeks support for the conclusion in constitutional provisions, particularly in the rights that protect family life (as part of the right to human dignity). Mindful of the aforementioned advantages of comparative law, support will also be gleaned from existing law in California, where a series of court decisions handed down in 2005 dealt with similar questions of determining legal motherhood of same-sex couples.

Having formulated the desired resolution of the problem--the recognition of both women as legal mothers--and having considered its grounding in the law, the article turns, in Part III, to an analysis of the legal procedures for recognizing joint motherhood. It examines the tools available to the administrative agency authorized to register parenthood and suggests some necessary amendments to the enabling legislation. The article also considers the various judicial avenues for establishing parenthood: a court decree pursuant to the Adoption Law, a parenthood order pursuant to the Surrogacy Law, and a maternity declaration **[*118]** pursuant to a suit filed under the Family Court Law. Recognizing the need to amend the law, but realizing it might take some time, this final part considers which of the possible judicial measures constitutes a suitable mid-range solution pending legislative resolution.

I. DETERMINING LEGAL PARENTHOOD IN THE ISRAELI SYSTEM

In the case at issue, the birth was accomplished through in vitro fertilization and with the participation of three parties. To clarify the legal status of the resulting child and his connection to each of the three parties, I will examine four arenas within which a parental relationship may be established and assess which of them is the most pertinent to our case. Three of them--sperm donation, egg donation, and surrogacy--are within the overall rubric of artificially assisted birth; the fourth is the traditional one of adoption. It is evident that, notwithstanding the routine use of sperm donation, the in vitro fertilization method used in this case was unusual. The woman who wanted to bear the child did not provide the egg that was eventually fertilized. However, the woman who provided the egg was not an anonymous, disinterested egg donor; on the contrary, she wanted to serve as a second mother to the child. Nor is this a matter of straightforward surrogacy, for the woman carrying the pregnancy has no intention of giving up her connection to the child once he is born; she, too, wants to have life-long involvement with him. Given these differences between our case and the more typical sorts of artificially assisted pregnancies, as well as the desire of the two women to be recog-

nized as joint mothers, I will consider as well the use of adoption to establish a parental relationship. I will consider whether the Adoption of Children Law of 1981 n9 ("Adoption Law"), particularly given recent decisions allowing adoptions that result in two women sharing parenthood, provides a suitable response to the situation at hand.

Before examining the four categories noted above, I should first mention the basic rule for establishing parenthood under Israeli law. The law's basic assumption, though nowhere codified, is that legal parenthood is based on "natural" parenthood. When the birth results from sexual union between a man and a woman known to each other, the man who provides the sperm is by definition the father, and the woman who bears the child is the mother. n10 This fundamental rule, which establishes a "natural" test for defining parenthood and provides the background for various statutes and judicial determinations over the years, draws on concepts of Jewish law *(halakhah).* n11 As explained more fully **[*119]** below, *halakhah* does not directly govern the determination of parenthood under Israeli law, but courts have often relied on it when confronted with these questions. n12 Without going into great detail, it may be noted that Israeli law--in contrast to other legal systems--has never drawn a necessary connection between parenthood and marital status. Even a child born to an unmarried mother and a father with whom the mother has had a casual sexual liaison is considered the joint (legitimate) child of both parents. n13

The foregoing rules, tied in principle to the biological link between parent and child, apply in circumstances of coital reproduction. Where new technologies that allow for other sorts of reproduction are used, the legal results may differ. Here, too, we shall see that Israeli law is for the most part silent, and, with the exception of surrogacy, the applicable rules have not been codified by the Knesset (the Israeli parliament). In the absence of any such legal underpinning, courts have tended to look to religious law with regard to these issues; they have also taken account of comparative law. I turn now to the particulars.

A. BIRTH FACILITATED BY SPERM DONATION

1. Sperm Donation--Background and Legal Foundation

In the past, sperm donation was used as a means for enabling certain heterosexual couples to bear children. n14 Now, in Israel and throughout the world, it has become a procedure often used by women who want to establish single-parent or same-sex families, without the presence and future involvement **[*120]** of a father. Most often, the donated sperm is employed through artificial

insemination--a long-established, widely used, and simple technique. n15 In the instant case, the egg of one member of the couple was to be fertilized by donated sperm in vitro--a separate matter to be considered later. n16

As yet, no act of the Israeli parliament governs the use of artificial insemination and sperm donation. These procedures are instead regulated by Rules as to the Administration of a Sperm Bank and Guidelines for Performing Artificial Insemination ("the Rules") n17 issued by the Director-General of the Health Ministry. The Rules are periodically updated by the Health Ministry and distributed to the relevant clinics and medical centers. Despite the relatively low status of the Rules in the hierarchy of legal norms, n18 they nonetheless form the applicable body of law in this area as no primary legislation governing the activity exists.

Through the Rules, the Health Ministry dictates all aspects of how a sperm bank is to be operated and how artificial insemination is to be carried out. Among other things, the Rules specify how sperm donations are to be collected, n19 how the sperm are to be preserved n20 and their quality ensured, n21 and how donors and donees are to be registered and their identities protected. n22 The Rules' force has been called into question (with respect both to their content and the way in which they were issued), and one of them was overturned by the Israeli Supreme Court. n23 Nevertheless, most of the Rules (and some updates added through the years n24) remain in place, and they govern this field to this day.

According to media reports, the instant case involved an anonymous sperm **[*121]** donor. n25 It may be assumed, consistent with the Rules, that the donor transferred his sperm (in exchange for a fixed, modest sum of money) to the sperm bank, which served as a center for collecting, examining, preserving, and distributing sperm donations. The anonymity implies that the donor transferred his sperm to the bank without knowing who, if anyone, would receive it or when it might inseminate someone. The recipient, for her part, received some general information regarding the donor--factors that she might have considered in choosing among a range of donors such as, data regarding his age, education, and appearance--but she was not told his identity. n26 As we shall see in the next section, this anonymity affects the matter of paternity.

2. Establishing Paternity in Cases of Sperm Donation--The Existing Law

As noted, Israeli law assigns legal paternity to the biological father. Application of that rule in cases of artificial insemination would imply that the sperm donor is the father. The question, then, is

how that result is changed, if at all, by the absence of sexual relations and the use of assisted reproductive technologies.

When artificial insemination is performed with sperm from the male partner in a couple with the expectation that he and the mother will serve together as parents to the resulting child, the use of artificial insemination in no way changes his status as parent. The "begetting" test--or, in modern terms, the genetic link--indicates here, no less than in the case of unassisted pregnancy, that he is the father. The circumstances under which the child is conceived do not alter the fact of the child's paternity. As both the biological father and the father who intends to raise the child, he embodies all paternal functions, and he can expect to be considered the legal father. The same rule applies when the sperm is received from an acquaintance of the woman. When the inseminated sperm comes from a man whose identity is known (which is possible in Israel only on the basis of "personal recruitment") the provider of the sperm will be considered the father in all respects, even in the absence of any marital bond between him and the mother.

Where the sperm donor is anonymous, however, establishing paternity requires taking account of two players: the sperm donor and the mother's partner, if any, who wants to serve as the child's father. In considering the status of the anonymous sperm donor, a distinction must be drawn between the legal aspect and the practical one. From the legal aspect, the donor's status under Israeli law remains indeterminate to this day. The statutes do not treat the full range of situations in which parenthood may need to be established, nor has the question **[*122]** been exhaustively treated in the case law. n27 Invocation of general legal principles derived from *halakhah*, would suggest that the sperm donor be regarded as the legal father, for Jewish law links the father to his genetic offspring even where he and the mother are not a couple. n28 Therefore, if it became clear that a particular man was a child's genetic father, he would be declared the legal father as well. But this somewhat simplistic application of *halakhah* does not exhaust all possible solutions under it. The fact that the donor "renounced ownership" of his sperm by selling it to a third party and the absence of any tie between him and the mother might be taken into consideration according to Jewish law and might lead to the conclusion that the donor should not be deemed the legal father. n29

Israeli courts to date have been asked to consider only a small number of cases regarding the offspring resulting from artificial insemination. In each of them, the court chose to focus on narrow issues and declined to examine the question of paternity in depth. If one reads between the lines, however, one can discern hints that the courts' inclination is, in principle, to regard the sperm donor

as the father and to deny full paternal status to the mother's husband or partner who had agreed to the procedure. n30 Nevertheless, the latter could perform the role of father and assume specific parental obligations (such as child support) by reason of having agreed to the insemination. n31 It should be noted that according to the rules in effect since 1989, the mother's husband must agree to the procedure and declare that he is assuming paternal status. n32 One might say, paradoxically enough, that the signing of that document makes it harder to regard the husband as the legal father of the child, for under Jewish law, the absence of conclusive proof that artificial insemination had been used would have allowed for his paternity to be established on the basis of the marital paternity presumption. n33 Against that legal background, the absence of a man carrying out the role of father (as in the case of a single woman or a lesbian couple) makes it even harder **[*123]** for the donor to avoid the status of legal father.

As a practical matter, the difficulties caused by the donor's ambiguous legal status are tempered by the mechanism for ensuring his anonymity. In Israel, as noted, donations through a sperm bank must be anonymous; sperm acquired by the bank from a donor is provided to the woman without divulging either party's identity to the other. It follows that even if Israeli law as presently structured implies the possibility of regarding the donor as the legal father, the anonymity mechanism ensures his *de facto* absence from the picture and negates any realistic chance that he will be declared a parent. Sperm donation as practiced in Israel thus embodies the intention of all involved that the link between donor and resulting child be severed and denies them the ability to change their minds in that regard.

It follows that the existing law regarding parenthood in the context of sperm donation has no bearing on the situation I am considering here. At best, this law highlights the difficulty in establishing that the child has a known father; at worst, it indicates that the sperm donor is the legal father. Either way, it says nothing about the status of the mothers.

B. BIRTH FACILITATED BY EGG DONATION

1. In Vitro Fertilization--Background and Legal Regulation

In vitro fertilization, which came into use toward the end of the 1970s with the birth of the first test-tube baby in England, n34 led to a range of reproductive technologies that have developed over the past two decades. n35 Use of these technologies has made it possible for a pregnancy to result from the donation of an egg by one woman to another. Egg donation was a natural next step from in

vitro fertilization; the first instance of a pregnancy resulting from it was reported in 1984. n36 Egg donation involves the same procedure as in vitro fertilization; it differs only in that the implanted fertilized egg comes from a woman other than the one in whom it is implanted.

As yet, the Israeli parliament has not enacted legislation governing in vitro fertilization, with or without egg donation. The medical procedures are conducted **[*124]** in accord with Public Health (In Vitro Fertilization) Regulation 1987 n37 ("IVF Regulations") and guidelines promulgated from time to time by the Health Ministry. Scholars have questioned the legal force of the IVF Regulations, n38 and a small number of these regulations have been invalidated through the years by decisions of the Supreme Court. n39 But in the absence of any other legal framework, and similar to the case of artificial insemination, practitioners have regarded these regulations as governing their activity.

The IVF Regulations sought to deal with two modes of assisted conception: (1) in vitro fertilization that makes use of the mother's egg, and (2) in vitro fertilization combined with egg donation. In the latter case, an egg harvested from one woman is placed into the body of another, who carries the pregnancy and plans to raise the resulting child as her own in all respects. Surrogacy--in which the woman who carries the pregnancy does not intend to keep the child--is subject to legislation that will be considered separately. n40

The case before us raises several questions with respect to the identity of the egg donor. The IVF regulations provide that only a woman who is herself undergoing in vitro fertilization treatment may be a donor. n41 Under those arrangements, the donor is a woman who has agreed to transfer, for another woman's use, some of the eggs harvested from her ovaries in the course of her own efforts to become pregnant. That condition substantially limits the ability of members of a same-sex couple to pursue a birth in the manner described. In the case under consideration, it was reported that the woman from whom the eggs were drawn wanted to become pregnant (herself) through fertility treatments. She thereby satisfied the condition that the "donor" be a woman herself undergoing fertility treatment.

Another issue relates to knowing the identity of the egg donor. Under customary Israeli practice, egg donation is anonymous. n42 The case before us **[*125]** departed from that accepted practice by allowing for the transfer of genetic material between intimate partners. n43 The provision of genetic material on a personal basis, between two women who know each other and who intend to form a parental relationship with the resulting offspring, raises serious questions about the lawful-

ness of the authorization issued by the Ministry of Health. Without resolving the matter, n44 it should be noted that the law may be interpreted so as not to forbid an identified egg transfer. Israeli law in principle protects the identity of the egg donor, stating that "a clinic conducting in vitro fertilization activities shall not provide information related to the identity of a sperm donor or an egg donor." n45 Moreover, the law does not outline a process for obtaining a donation from an acquaintance--or any sort of identified donation--and, as noted, that sort of donation is not characteristic of Israeli practice. n46 Nevertheless, the IVF Regulations do not explicitly rule out the possibility of a personal donation by an identified donor. In that sense, the current regime, as set by the Regulations, may be interpreted as one that allows for a parallel track of identified donation by a "personal" donor.

Two other aspects of the case at issue ought to be noted: one pertaining to the underlying reasons for the donation and the other to the fact that we are dealing with the donation of two gametes (i.e., sperm and egg). Regarding the first, it is unknown whether, in the case at hand, the recipient suffered any medical condition warranting the donation or whether the sole reason for accepting the donation was the desire to bear a biologically shared offspring. In that context, it should be noted that the IVF Regulations do not specify that the use of egg donation is limited to cases of medical need. It is fair to assume, of course, that a heterosexual couple would turn to egg or sperm donation only where there was a medical justification, n47 but donation for other reasons is not forbidden.

The second issue, as noted, pertains to the donation of dual gametes. In vitro fertilization of one woman's egg by donated sperm and implantation of the **[*126]** resulting embryo in the uterus of the woman's partner means that we are dealing here with "double donation"--donation of both sperm and egg. In the past, Israeli regulations precluded double donation, meaning that a single woman in need of a donated egg could not make use of that technology. n48 The IVF Regulations provided that "a donated egg shall not be implanted in a woman unless it was fertilized by sperm of the woman's husband." n49 The requirement was intended not only to make it more difficult for unmarried women to bear children but also, it seems, to ensure that the offspring would be born into a family in which at least one parent was the child's genetic parent. That requirement was struck down by the Supreme Court, however, with the government's assent. n50 In the case before us, the concern about an offspring lacking genetic connection to her parents is obviated by the fact that the gamete is taken from a woman planning to act as the offspring's mother, even if she chooses not to carry her in her womb. n51

2. Establishing Motherhood in Cases of Egg Donation--The Existing Law

Like artificial insemination, in vitro fertilization per se does not affect the determination of parenthood. When the fertilized egg is that of the woman who intends to carry the pregnancy and care for the resulting child, the applicable law sees the biological mother as the legal mother, as well. n52 The "unnaturalness" of the fertilization--its taking place outside the body and with the intervention of a medical staff--has no bearing on who is regarded as the parent. The three maternal functions--genetics, pregnancy, and care for the child--continue to be embodied in one woman who sees herself as the mother and is entitled to be recognized as such.

In vitro fertilization with a donated egg is a different matter. Medical intervention fragments the maternal functions such that both women take part, biologically, in the offspring's birth. One donates the egg, thereby providing half of the future child's genetic make-up. The other bears the pregnancy, thereby serving as the gestational mother who carries the fetus in her womb and brings him to birth. Each woman contributes substantively to the birth of the child; in the absence of either, the child would not be born.

Although the IVF Regulations say nothing about parenthood in a case of egg donation, their underlying premise is that the woman who gives birth is the mother. n53 That premise also underlies accepted practice: following the birth, the gestational mother is registered as a matter of course as the child's mother. The **[*127]** Population Registry official relies on the report generated by the delivery room and has no practical way of inquiring into the use of gamete donation in any given case. n54 Even though in vitro fertilization can only take place in a regulated clinic, n55 no central registry of egg donation exists. Fertility clinic data are separate from delivery room data, and mothers are registered at the time of birth on the basis of the birth having taken place. n56

As a matter of law, while the gestational mother's status as a legal mother has not been conclusively determined by statute, the premise underlying the various legislative instruments n57 regards her as the "natural mother" and therefore accords her the status of legal mother as well. n58 This result reflects the special significance of the fetus-mother relation n59 and is also consistent with the general assumption (albeit inapposite in this case) that the gestational mother is likewise the genetic mother. As in the case of sperm donation, anonymity helps, both conceptually and practically, to undo the linkage between donor and offspring. It allows the gestational mother to appear as the child's "natural" mother and limits the possibility that her status as legal mother will be challenged.

The position that regards the gestational woman as mother appears to correspond with the view of *halakhah*, n60 and it is reflected in the provisions of other legal systems. n61

One might ask whether the gestational woman's status as mother is in any way **[*128]** changed by the use of an egg from an identified source or by the fact that she carried the fetus on behalf of another woman (as well as on her own behalf). In our case, the gestational woman intended to be the mother, albeit not the exclusive mother. The egg donor, meanwhile, did not intend to sever her connection to the offspring; her identity was known, and she wanted to play a mutual role in caring for the child. Existing law offers no answer to the question of who should be regarded as the mother in such circumstances. It cannot determine whether the egg donor's identity and her intention to serve as mother changes the expected standing of the gestational mother, and it certainly provides no existing basis for recognizing both women as mothers. It could be argued that the gestational mother carries the fetus on behalf of her partner, in which case the circumstances would approach those of surrogacy. In the next section, I consider these circumstances and how they bear on the question of motherhood.

C. BIRTH FACILITATED BY SURROGACY

1. Surrogacy Agreement--Background and Legal Regulation

A surrogacy agreement is designed in principle to enable a couple or a single woman unable to carry a pregnancy to employ the services of another woman and bear the child through her. In its modern version, the surrogacy arrangement often uses the intended parents' egg and sperm. Where the intended mother's egg is unusable, a third-party donation is sometimes used. In these cases, the resulting child bears no genetic relation to the gestational woman. In other cases, typically referred to as "traditional surrogacy," n62 the surrogate carries a child who bears her genes along with those of the intended father.

In Israel, surrogacy agreements are regulated by the Surrogacy Law. n63 While authorizing surrogacy agreements in principle, the statute also subjects them to the oversight of a professional committee that must approve surrogate agreements before they can be carried out. The committee is appointed by the Minister of Health and comprises professionals from the fields of medicine, welfare, law, and religion. n64 In reviewing an agreement, the committee must verify that the agreement meets the statutory requirements. Among other things, it must confirm that the surrogacy arrangement is needed for medical reasons; that the surrogate satisfies the conditions set by the law,

including those related to her family status; n65 that all parties have undergone psychological evaluation or counseling; that the agreement was entered into on the basis of informed consent; and that the payment made to the surrogate, consistent with the statutory standard, does not **[*129]** amount to salary or the purchase of services but represents only reimbursement of out-of-pocket expenses and compensation for lost income, for time, and for pain and suffering. n66

The result of limitations imposed by the statute is that surrogacy arrangements in Israel can take only two forms: either use is made of sperm and eggs from the intended parents, or use is made of an egg donated by a third party. n67 In all cases, the statute requires use of the intended father's sperm. n68 The arrangement is available only to heterosexual couples; it may not be used by people wanting to establish a single-parent or same-sex family unit. n69 In addition to obtaining the committee's approval in advance of the medical procedure, the parties, following the child's birth, must also petition the court to establish their status. n70

Israeli Surrogacy Law is unique in that it authorizes surrogacy arrangements in principle, yet it imposes a complex system of before-the-fact professional oversight and after-the-fact judicial ratification. Other legal systems, if they have considered the matter at all, n71 have forbidden agreements to carry fetuses; n72 some have done so by criminalizing the practice, n73 and others by imposing civil sanctions such as invalidation of the agreement or refusal to ratify the parenthood of the intended parents in the event the surrogate has a change of heart. n74 Still, other legal systems have permitted the practice subject to conditions specified in the law. n75

2. Establishing Parenthood in Cases of Surrogacy

Once a surrogacy agreement has been executed, the court must determine who should be considered parents of the resulting child. At least three and sometimes **[*130]** four parties were involved in the birth: the surrogate mother who carried the child; the intended mother, who initiated (along with her husband) the surrogacy arrangement and who, in most circumstances, is also the genetic mother; the intended father, who is necessarily the genetic father; and the egg donor, in those cases where the intended mother's eggs could not be used. Very soon after the birth, the court is called upon to determine the child's legal parents. The statutory mechanism ensures a high degree of certainty with regard to parenthood, though it leaves the court discretion to consider changes in circumstance.

In cases involving an egg donation, the statute does not consider the donor to be a potential legal mother. She is not a party to the agreement, and the implied premise is that she will take no part in the contest for the status of parent. As for the other three parties, the statute distinguishes between two basic situations: on-going agreement among the parties on the one hand, and the onset of misgivings on the other. Right after the birth, the intended parents must petition the court for a "parenthood order." n76 In the absence of objection by the surrogate mother or other special circumstances, the intended parents will be recognized, via the order, as the child's parents "in all respects," and the surrogate's connection to the child will be severed. n77

If, however, the surrogate has misgivings about giving up the child and wants to back out of the agreement and assert her maternity, she can do so if she can demonstrate that circumstances have changed and that the change justifies her backing out--as long as the child's welfare is not thereby impaired. n78 On its face, the law appears to favor a judicial decree recognizing the intended parents as the sole parents; implicit within it, however, is the possibility of recognizing all three participants as having parental status. In that context, the statute specifies that if the surrogate's withdrawal from the agreement is ratified, the court should declare her the mother, but "it may include in the order directives regarding the child's status and relations with the intended parents or with one of them." n79 One possible but not exclusive interpretation of the statute would suggest that its underlying premise is that the parenthood of all three agents is recognized and that the court's intervention is needed, in contexts of continued agreement just as in contexts of misgivings, to declare which of the three is to be formally recognized in each situation that may arise. n80

The foregoing regulatory scheme is of little relevance to the case of a birth with two women. The case may be seen as a type of agreement for joint birth: one woman carries the genetic child of the other, with the understanding that the other will ultimately be recognized as the mother as well. Yet in contrast to the situation in an agreement under the Surrogacy Law, these women do not intend that the **[*131]** gestational mother's connection to the child be terminated with the child's birth. Moreover, the terms of the arrangement in our case preclude the Surrogacy Law's applicability. As noted, the Law does not permit a single mother or a non-heterosexual couple to contract with a surrogate and requires that fertilization be with the sperm of the intended mother's male partner, the intended father.

Still, the statute, in the mechanism it creates for establishing parental status by court order and in the potential it embodies for recognizing the motherhood of two women, provides an important

point of reference for the test case at hand. I will return to this mechanism in Part III of the Article, which deals with the way in which parenthood should be established.

D. ADOPTION

1. Adoption--Background and Legal Regulation

The Adoption Law lays the basis for the establishment of a legal parenthood relationship by means of a court's adoption order. The 1981 Adoption Law replaced a 1960 statute n81 which had introduced, for the first time in Israel, civil regulation of the institution of adoption. n82 The 1960 Adoption Law was intended to create a mechanism for the placement of children whose birth parents could not care for them and for recognizing the "substitute" parents as parents for all intents and purposes. n83 This arrangement covers children put up for adoption by their parents n84 and children removed from the custody of parents unqualified to provide proper care. n85 The 1981 Adoption Law defines the conditions for terminating a child's ties to her birth parents and determines when and how legal, adoptive parenthood may be established. n86

As in the case of the legal structures previously discussed, the model contemplated by the legislator was that of the heterosexual family. The purpose of adoption was to find a home and family for a child bereft of parents; the family sought was one headed by a man and a woman whose relationship was grounded in marriage. n87 Such a family was considered the ideal one to take in an adopted child and ensure her welfare. Moreover, adoption was meant to serve the needs of an existing child abandoned by her parents. It was not designed to provide the legal basis for recognizing the parenthood of a couple who conceive the child and raise her, and it was not meant to serve as a vehicle for the intentional creation of **[*132]** new (alternative) families. n88

2. Parenthood Through Adoption

The Adoption Law establishes a two-stage process through which a biological parental relationship may be superseded by an adoptive relationship. But while the biological parents are replaced by adoptive parents, the former retain, in all instances, some limited tie to the adoptee: the adoptee remains the legal heir of her biological relatives; n89 remains bound by the applicable prohibitions on marriage to biological relatives; n90 and becomes entitled, upon attaining the age of majority, to certain information about her roots. n91 But these limited nods to biological parenthood do not de-

tract from the legal parenthood established with respect to the adopter. It follows that the issuance of an adoption decree establishes a complete parent-child relationship.

The foregoing general rule is subject to qualification, however, where the court in its decree specifies that the adoption is to be "open." n92 The definition of "open adoption" can vary, and the arrangement can encompass different sorts of connections among the parties. It is characterized by information sharing and/or contact between the adoptive and the biological parents around the time of the adoption or after, sometimes with the adoptee's involvement in an ongoing connection. n93 The generally accepted form of adoption in the Israeli system is closed adoption. n94 Only rarely and in special circumstances is adoption made open, as in the case of relatively older children who know their parents and siblings and have had a chance to form significant bonds with them. n95 Open adoption will likely be relevant where the adoptive parent is the spouse of a **[*133]** biological parent; in such cases, the legal connection with the biological parent is maintained along with the connection to the adoptive parent; n96 hence the relevance here of open adoption.

Use of the adoption mechanism to establish parenthood in the case at hand--a use that, until just a few years ago, would have seemed unimaginable--may well be possible today, given recent decisions by the Israeli Supreme Court that have recognized adoption by lesbian couples. In the first case, *Brenner-Kadish v. Interior Minister,* n97 the court dealt with the registration of a foreign adoption decree. The second case, *Yaros-Hakak v. Att'y Gen.,* n98 involved the adoption by a woman of her female partner's child. It is difficult to disregard the substantive change in Israeli law wrought by these two cases. n99

In *Brenner-Kadish*, the court was called upon to consider the entry in the Israeli population registry of a California court's adoption decree. n100 The California decree and the registration authorized under it declared that the petitioner was the mother of the child born to her partner through artificial insemination of donated sperm. The Israeli Interior Ministry denied the request of the two women to be listed as mothers in the population registry, arguing that the listing would be "erroneous on its face" and technically impossible; n101 but the Supreme Court, by majority decision issued in 2000, granted the petition and held that the adoption should be recognized and registered in Israel. n102 It based its ruling on the Interior Ministry's usual practice (under which valid foreign adoption decrees were registered without consideration of their meaning or lawfulness under Israeli law), on the rules of private international law, and on the **[*134]** need to ensure consistency of status. n103 Although the ruling explicitly avoided any substantive evaluation of dual motherhood or

same-sex adoption, it ultimately recognized the adoption for registration purposes, directing that two women be listed as joint mothers in the Israeli population registry. n104

The 2005 *Yaros-Hakak* decision may be of even greater significance. That case dealt with two women who had lived as an established couple for many years. By mutual agreement (which was crystallized in a written contract they signed after their first child was born), they each bore a child through anonymous sperm donation and raised the children together, assuming full parental responsibilities. Their agreement provided for them to care for and support their mutual children. To ensure their status as a family, the women ultimately sought, by means of official adoption, to anchor each one's relationship to her partner's biological child. The Family Court (the relevant court of first instance) denied their petition, n105 and the District Court majority denied their appeal. n106 The path to granting their petition was cleared by the Supreme Court, in a decision issued by an expanded panel of judges. n107 The Supreme Court remanded the case to the court of first instance and rejected the state's refusal to recognize the possibility that a woman might adopt her female partner's children. n108 Ultimately, the adoption decree was issued by the Family Court to which the case had been remanded. n109

Although the Supreme Court enabled that form of adoption to be used in principle, it did so cautiously, on narrow grounds, and it refrained from opening a broad path to adoption by same-sex couples. In light of the wording of the Israeli statute, which limits adoption to heterosexual (married) couples, n110 the Supreme Court relied on a narrow exception included in section 2(3) of the statute for a different purpose, that of enabling adoption by a single parent. n111 Although the statutory conditions for adoption by a single parent (the adoptee's parents must be deceased and the adopter must be an unmarried relative of the adoptee) were not satisfied in this case, the court relied on a provision authorizing departure from these conditions where warranted in special circumstances for the welfare of the **[*135]** child. n112 The court made clear--and thereby may have impeded reliance on its decision in our case--that the adoption would be permitted in view of the existing *de facto* parental relationship and to ensure the best interests of the child. In its view, the welfare of the child in the *Yaros-Hakak* case dictated that a family relationship that already existed as a practical matter be recognized officially by the state. n113

Reliance on the underlying rationale of *Yaros-Hakak* implies that an adoption decree in the circumstances here under review would be issued only after parental relations between the child and

the genetic mother had existed for an extended time. It follows that in the absence of such a relationship, it would be difficult to rely on the decision. n114

II. THE NORMATIVE QUEST--WHO SHOULD BE DECLARED THE CHILD'S PARENTS?

A. THE NEED FOR LEGAL REGULATION

The examination of the current Israeli regulatory arrangements shows their inadequacy for resolving the question of parenthood in our test case. Although the existing rules governing assisted reproduction may provide the underpinnings for a definition of parenthood, they do not offer a clear framework for establishing parenthood in a case of joint birth to a female couple. The rules contemplate a heterosexual couple, and they provide no theoretical framework for determining parenthood in cases diverging from the model. The Adoption Law was not intended to provide a mechanism for establishing a homosexual family, and certainly not for legally anchoring the relationship between parents and their offspring (i.e., children brought into the world in an act of mutual reproduction). It is doubtful whether our case--in which two women want to be recognized as the mothers of a newborn--would be encompassed within the court's interpretation of the Adoption Law in *Yaros-Hakak.*

Still, my conclusion about the inadequacy of current Israeli law may assume that which needs to be proven. A close reading of the existing law suggests at least a prima facie solution: a child born to a woman from another's egg that had been fertilized by sperm from an anonymous donor has one mother, the woman who bore him. Recognition of her partner--the egg donor--as a mother would be **[*136]** possible, under existing law, only after-the-fact, once a psychological parenting relationship between her and the child had developed. It would be accomplished by the court's issuance of an adoption decree, if the court found adoption to be in the best interests of the child.

Given the existing law's limitations, this part of the article will examine the question of who should be declared the parent of a child born in this way. It will consider whether the result seemingly implied by the existing law--recognizing as the newborn's mother only the woman who carried the pregnancy--is appropriate or whether there is room for some other decision.

In view of the need to determine parental status, it seems preferable to do so when the child is born. A clear legal determination enhances the stability of the unit into which the child is born and should be useful in resolving any disputes that might arise. Whatever one's view on the substantive issues (preservation or termination of the sperm donor's paternal status; granting exclusive or joint maternal status to the woman who carried the child; granting exclusive or joint maternal status to

the genetic mother), all might agree that the matter should be legally resolved. The desire for legal regularization n115 is consistent with the desire to ease, to the extent possible, the need to resolve family disputes. A lack of regularization could open the door to conflict among those competing for parental status, lead to increased litigation, and threaten the welfare of the child, who would be born into a state of legal, if not familial, uncertainty. n116 Regularization cannot preclude a family crisis, but it can ease its prompt resolution and may avoid litigation by encouraging negotiated settlement.

Even where disputes among the parents are not a concern, the child's needs and those of his caregivers cannot be fully met unless the *de facto* parenting arrangements are recognized *de jure*. Even when family life is proceeding normally, the need to recognize parenthood will arise in both practical and symbolic contexts. As a practical matter, legal recognition will allow a parent to exercise full authority and discharge all duties with respect to the child, whether in dealings with the government or with other people. As a symbolic matter, recognition of parenthood can confirm the relationships that exist between parent and child.

The need for official determination of parenthood becomes even greater in circumstances of family crisis. Where one parent dies or the parents separate, official recognition of parenthood is necessary to protect the child's rights and relational welfare. For example, if the *de facto* mother dies without having been **[*137]** recognized legally as a parent, the child may have difficulty in confronting legally recognized heirs. Where it is the legally recognized mother who dies, her partner may find herself called upon to prove her maternity in a confrontation with another party who may try to displace her. n117

Where the relationship between the partners runs aground, the legal mother might try to deny her former partner any custodial or even visitation rights with respect to the child. The former partner might then ask the court to recognize her maternity, but the ensuing proceeding would likely take time, during which she and (more importantly) the child would be unable to maintain contact. In some situations, such a proceeding could lead to an extended separation between mother and child--obviously a harmful situation. In the converse situation, the non-legal mother might attempt to shirk her responsibilities and leave the child without the economic support to which he is entitled. For all these reasons, legally recognized parenthood should be determined at the time of the child's birth. The arrangements need to enable those preparing to bring a child into the world to know what type of family they may design for themselves.

B. THE SUGGESTED LEGAL REGULATION--MAPPING AND BALANCING THE INTERESTS

In this part, I attempt to clarify the standing of each agent taking part in the birth of the child. The inquiry begins with the simpler question of the sperm-donor father's legal status. It then turns to the status of the female partner who bears the child and, finally, to that of the female partner who provides the egg. After sketching the interests of these parties, I outline the considerations that should govern the resolution of conflicts that may arise. I argue that there are four such considerations: the will of the parties; n118 the welfare of the parties as it is affected by flourishing family relationships; n119 the best interests of the child; n120 and the goal of enabling people who want to establish families to do so. n121

[*138] 1. The Father: The Paternal Status (or Lack thereof) of the Sperm Donor

At the outset, let me state my view that the paternal connection of a man who has donated or sold his sperm via an intermediary, such as a sperm bank, must be severed. n122 I believe that such severance, as a matter of law, should take place *ab initio,* namely at the time the donation is made, and not be subject to *post-facto* case-by-case determination after a child is born. It follows that the severance will be a matter of general application, regardless of whether the woman receiving the donation is planning to raise the child with her male partner, with her female partner, or as a single-parent.

This arrangement offers several advantages. To begin, a regime that severs the sperm donor's parental tie corresponds to the original intention and presumed will of the parties: the mother, the donor, and the second intended parent, if any. Where the donation is via a sperm bank to a woman and her female partner, neither the donor nor the recipients expected at the start to bind the donor to the offspring and turn him into a father. Any other approach would contravene the couple's plan to establish an autonomous family unit, in which they would serve as exclusive parents to the offspring. The donor provides his sperm to the sperm bank with no expectation of being a father (except in the barest genetic sense), and establishing a paternal link between him and the offspring would contravene his intention. Beyond the direct harm occasioned by contravening the parties' intentions, the prospect of discouraging future sperm donations and the use of donated sperm exists.

Severing the legal connection between sperm donor and child may have additional implications for ensuring the family relationships. Some argue that severing the sperm donor's paternal connec-

tion should be a precondition to establishing a legal parental relationship for the intended second parent (be it a father in a heterosexual couple or a second mother in a lesbian couple). That, of course, would not be the view of those willing to recognize three legal parents. n123

Moreover, severing the sperm donor's paternal connection would also seem to be warranted by the best interests of the child. In the case of a woman wanting to raise her offspring with her male partner, the best interests of the child call for denying the donor paternal status, especially when the donor himself is uninterested in such status. The widespread understanding of child development, which underlies the importance of preserving the stability of the family unit, maintaining existing ties, and avoiding tension between parental figures, would seem applicable here as well. n124 Imposing the parenthood of an additional father, **[*139]** something desired by none of the parties, would be ill-advised and might unnecessarily disrupt the familiar social relationships among the mother, her male partner, and the child. At that point the ties between the offspring and the sperm donor are limited to genetics; and while those links are not unimportant, they do not reflect emotional relationships that have already emerged. A similar stance is warranted in the case of a woman planning to raise the child in a same-sex family unit. Granting paternal status to a sperm donor to whom the mother and her female partner have no connection, against their will and against his, is inconsistent with the best interests of the child. The child's welfare is provided for within the autonomous same-sex family unit through the devoted care of two significant parental figures. n125

Some argue that the paternity of the sperm donor should be denied recognition only where the family is already headed by a mother and father, but not where the child would otherwise be fatherless. n126 On that view, the family contemplated in our case "suffers" from two "defects": it lacks a father and it is headed by a lesbian couple. With regard to the first, some people emphasize the hardships likely to be suffered by a child raised without a father; n127 but in doing so, they rely primarily on the model of the single-parent family, citing the results of studies showing significant impairment in the development and welfare of children who grow up fatherless. n128 Their second point pertains to the specific characteristics of a lesbian family, and stresses the alleged harm inherent in having two women act jointly as parents. n129

These arguments can be responded to on several levels. First, the psycho-social claims and the research studies on which they are based are questionable. The findings of harm to children raised in the absence of a father figure are drawn from study groups having little relevance to the situation here considered. Many of the studies examined single-parent families following divorce, n130 and

those studies failed to isolate, as distinct variables, the effects of the divorce process itself and of the quality of family life before and after the divorce. Accordingly, it is hard to tell whether the findings of impaired child development and welfare in these families are attributable to the absence of a father or to the circumstances of the family's dissolution. Some of the studies were of one-parent families by necessity, involving women who "found themselves" pregnant, without the **[*140]** support of their partners. n131 Their situation, it is fair to say, differs substantially from that of women who choose, consciously and deliberately, to bring a child into the world in the absence of a father; among other things, single-parent families "by necessity" are often subject to socio-economic stresses. In this context, the element of the father's absence was not isolated from the other characteristics of the family, and reliance here on these studies' findings seems problematic. Second, studies over the years have examined the situation of children raised in same-sex families and have shown that such children are as well-off as children raised in two-parent, heterosexual families. n132

But the premise that same-sex families do not fall short in quality would not itself close the door on the sperm donor's claim to be recognized as father, especially if he asserts that claim. n133 In contrast to the situation in which the state, contrary to the donor's wishes, urges recognition of his paternity, it is possible that where the donor himself wishes to be recognized as father, the benefit enjoyed by the child through the presence of an additional parental figure might exceed the harm occasioned by the interjection of an additional parent against the mothers' wishes. The man's readiness to carry out his role as father and the advantages to the child of an additional support network (emotional as well as economic) may outweigh the harm of impeding familial harmony. This aspect should be examined in psychological studies. Similarly, separate studies are needed to examine the difference (if any) between adding a father to a family headed by a two-women couple and adding a father to a family headed by a single mother or by a heterosexual couple. At this stage, given the paucity of these cases, psychological research does not provide enough data to reach a conclusion.

A central reason for severing the donor's parental tie is a practical one: to avoid creating disincentives to sperm donation, lest the technology become unavailable to people who could not establish families without it. n134 Given the importance of family ties to both the individual and society, n135 the regulatory regime must help people who want to establish families do so. That obligation dictates facilitating the availability of alternatives to people having difficulty bearing children **[*141]** naturally. Severing the parental tie between sperm donor and offspring is essential if we are

to ensure continued sperm donations, for a potential donor may decline to donate if concerned that he will end up subject to enforced parenthood and exposed to a whole range of obligations. n136 That concern appears even more pronounced when the donation would be used in a single-parent family or one headed by two women, given that no other father is in the picture. n137 Concern about forced fatherhood would not only detract from the willingness of men to serve as sperm donors but would also deter a woman from using donated sperm, lest the donor's paternity be imposed against her will. This weighty, practical argument requires a legislative determination that the sperm donor lacks all parental standing, whatever the nature of the family unit established with his assistance. n138

2. The Mothers

As mentioned above, a primary, though not an exclusive, consideration in the determination of parenthood is the parties' intention at the commencement of the reproductive process and their ongoing commitment to that intention until legal parenthood is established. The case treated in this article presupposes that the women taking part in the birth intended from the outset that each would serve as a mother. n139 This section will consider the force of that intention and how to treat an ensuing dispute that puts an end to the mutual desire for joint parenthood before that parenthood is established.

a. The Status of the Gestational Mother. Existing Israeli law acknowledges the status of the woman who carries the pregnancy (the gestational mother) as a legal mother, even in the absence of a genetic link to the offspring. That conclusion **[*142]** follows from the law as applied in the context of egg donation, n140 and it appears that the Surrogacy Law does not call it into question. n141 Recall that the Surrogacy Law--which does not apply directly in our case--requires court intervention to sever the parental tie of the gestational mother. It therefore stands to reason that the Surrogacy Law also assumes the maternal status of the pregnancy carrier. n142 Not only does that result follow ineluctably from existing law regulating similar practices, it is also the desirable result. The criteria considered above--the will of the parties; their personal welfare insofar as it is pertains to flourishing family relationships; the best interests of the child; and the goal of enabling people who want to establish families, if necessary, by means of artificial reproductive technologies--can be applied here as well. n143 These criteria strongly suggest that the gestational mother should be recognized as legal mother.

The gestational mother invested her mental and physical strength in bearing the child, and she intended and still desires to be considered a mother. Her partner shared that intention as well. The two of them, partners in a stable, intimate relationship, wanted to bring a child into the world and raise it through their shared love. That intention indicates both the will and the need to recognize the gestational mother's maternity. n144 The result also corresponds to the child's need to be considered the daughter of the woman who brought her into the world. Once the child is born, recognition of the gestational mother as legal mother is consistent with the child's need to be cared for by the one considered to be the mother, that is, the one whose relationship to her will enjoy legal protection. Legal recognition will enable her to fulfill her responsibility to the child without obstruction and will ensure the stability and continuity of the relationship. From the child's point of view, recognizing the gestational mother's legal maternity will protect the child's rights. In the narrow sense, it will protect the child's right to economic support by her, the child's inheritance if she dies intestate, and the gestational mother's relationship with the child on the emotional, care-giving level. That result provides the needed platform for the development of the child and for the flourishing of family relationships, which constitute the most important criteria in deciding questions of parenthood. n145

b. The Status of the Genetic Mother. The review of existing law showed that the status of the woman providing the egg is more problematic than that of the gestational mother, for there is neither statute nor presumption that firmly **[*143]** supports her legal standing as a mother. In contrast to paternity, determined in principle by the source of the sperm, maternity is determined, in Israeli law, by birth. The presumption that the woman bearing the child should be recognized as mother is supplemented by the conventional view that motherhood is a binary relationship and that parenthood is unique to one mother (and one father). That position would lead to only one conclusion: recognition of the gestational mother, and of her alone, as the offspring's mother.

That, however, may not be the desirable outcome, and it certainly contradicts the desires of the two women who cooperated to produce the birth. In our case--unlike accepted practice in routine egg donation n146 --there was intention neither to sever the "donor's" maternal connection nor to regard the gestational mother as the sole mother. Very much to the contrary, the egg was transferred to the gestational mother with the intention that both women take part in the biological formation of the offspring, who would then be deemed their joint child in every possible way. The genetic moth-

er is not an "outsider." It was her wish (and that of her partner) that she realize her parental status with regard to the child born to them.

But recognizing the motherhood of the genetic mother is not simply a matter of acting in accord with the parties' will--a will that might change, of course, by the time legal parenthood is determined. Recognizing the genetic mother as the legal mother provides an official imprimatur for the realities of the situation at the time of the birth. It recognizes the mutual reliance that began to take shape with the fertility treatments and ensures recognition of the bond that existed between the women throughout the course of the pregnancy and of the bond with the offspring that will develop over the course of the child's life. In that sense, recognizing the egg provider's maternity does not merely carry out the will of the parties and promote their wellbeing; it also follows from the goal of ensuring the best interests of the child. It is difficult to undermine the centrality of the emotional bond between the child and his genetic mother, a bond strengthened as the relationship between them deepens. Recognizing the genetic mother as a mother (in addition to the gestational mother) promotes the relationship between the child and a parental figure in his life. It protects, in the event the family unit is broken up, the relationships forged between the offspring and a *de facto* mother. It thus provides legal grounding for the genetic mother's responsibility--which stems from her initiation of the process that resulted in the child, her continued commitment during the pregnancy, and her assumption of a parental role following the child's birth. It confirms and establishes her commitment to provide on-going and lasting emotional and economic support for the child.

[*144] These concrete protections for the mother, the child, and their mutual relationships are consistent with the general purpose of enabling those who wish to establish families to do so. Fulfilling the women's personal wishes coincides with advancing the interests of society, which values the establishment of families.

C. RECOGNIZING JOINT MOTHERHOOD

Modern Western society confirmed and reinforced the standing of the heterosexual nuclear family, thereby declaring parenthood to be the exclusive status of two people--one mother and one father. n147 When the child was biologically unrelated to the parents (as in the case of adoption), the couple that assumed the social role of parents acted *in lieu* of the biological parents, seeking to replicate, as much as possible, the traditional unit. They would try to conceal the adoption and to represent the relationship as "natural" (for example, by adopting a child who physically resembled them).

Typically, they would try to ensure the exclusivity of their parenthood by severing all ties with the biological parents. n148

In recent decades, however, the once unassailable dominance of the "natural" model has been challenged. Technological advances have made it increasingly easy to separate the genetic source from the caregiver. Out-of-wedlock childbearing has come to be recognized as legitimate, and tolerance has grown for same-sex couples wanting to pursue their deepest aspirations by establishing parental relations. All of these factors have called into question the traditional definition of the family; they thus require a basic redrawing of its boundaries.

In defining the limits of the family and deciding whether relationships should be recognized as "family relationships," one must draw on the functional and emotional characteristics of the family unit. The importance of the family to the child, to the adult members, and to society as a whole calls for a legal regime that seeks to ensure the formation, quality, and preservation of family ties. n149 The emphasis must be on relationships premised on mutual concern, care, and long-lasting responsibility. n150 Taking these considerations into account in our case suggests the preferred result: recognizing the legal motherhood of both **[*145]** women. n151 This conclusion would require further consideration where, at the time parenthood is established, the two mothers no longer agree on joint motherhood; those cases will be considered below. n152

In the ensuing parts of this article I will broaden the scope of the investigation to include other sources of law, beyond those directly regulating family law and reproductive matters in Israel. I will argue that the conclusion suggested here--the recognition of joint motherhood--may be further anchored once constitutional principles and comparative law are engaged. n153

a. The Right to Become a Parent as a Constitutionally Recognized Right. The solution that recognizes the parenthood of both women is bolstered by the existing posture of Israeli constitutional law regarding the right to parenthood. n154 That right comprises several aspects, not all of them relevant to the test case before us. It encompasses the freedom to procreate, at the core of which stands the individual liberty to bring a child into the world through the use of one's biological faculties. n155 While the case before us does not directly raise the right to bear children (because the state permitted the couple to go forward with the in vitro fertilization and implantation) it does invoke another aspect of the right to parenthood--the right to act as a parent and to be recognized as such, to provide parental care, and to realize the parent-child connection. n156

In the case before us, in addition to providing the egg, the genetic mother has been the partner of the gestational mother and a joint caregiver to the newborn. Without legal recognition of the parent-child relationship, the genetic mother--who stands to serve as a psychological mother together with the gestational mother--might be unable to fully realize her parenthood. In that sense, the right to parenthood may serve as an impetus to legal recognition of parental **[*146]** relations--relations that were biological in origin and that began to take on a psychological dimension through the act of joint birth.

Further guidance in this connection may be found in a long line of cases decided by the Israeli Supreme Court in recent years. n157 In these decisions, the court has emphasized repeatedly the existence and force of both aspects of the right to be a parent, namely the liberty to procreate and the right to act as a parent to one's child. Justice Mishael Cheshin stresses the naturalness of the right, noting:

> The law of nature is that the natural mother and father keep the child, raise and love it, and tend to its needs . . . . That tie is more powerful than anything; it is beyond society, religion, or state . . . . It was not the law of the State that forged the rights of parents vis a vis their children or the world at large. The law of the State comes to something already in place, intending to protect the parenting instinct within us and tuning the "interest" of parents into a "legal right" under the law, the right of parents to keep their children. n158

Justice Ayala Procaccia likewise contributed much in recent years to reinforcing the constitutional status of the right to be a parent. Her decisions declare the centrality of the right to be a parent, especially when the parenthood is grounded on "ties of blood." Drawing a connection between natural law and the Basic Laws, n159 Justice Procaccia noted that "the law sees the tie between parent and child as embodying a natural right having a legal dimension." n160 Justice Procaccia went on to find a formal anchor for the right in the Basic Law: Human Dignity and Liberty, n161 which in many ways constitutes the Israeli constitution's bill of rights. Justice Procaccia holds that the right to be a parent "derives from the protection of human dignity, from the right to privacy, and from the fulfillment of the principle of the autonomy of the individual will, constituting one of the foundations of human dignity." n162

Along with the right to be a parent--which buttresses the biological parents' plea for legal recognition, for it was through their decision and efforts that the child came into the world--I may also speak of the child's right to have parents. The right to have parents--grounded in the United Nations Convention on the Rights of the Child, which Israel has ratified--entails the child's right to be recognized by her parents and, to the extent possible, to be cared for by them. n163 **[*147]** Clearly, the child's right to have parents does not dictate the identity of the individuals to be recognized as parents, and one may apply that right in various ways, depending on one's formulation of its core elements. n164

Formal legal recognition of parental relationships also has a symbolic aspect for both parent and child. Justice Dorit Beinisch of Israel's Supreme Court identified it as follows:

> When "human dignity" is a fundamental right, we must respect an individual's desire to actualize himself. For this reason, we should honor his wishes regarding the family unit to which he wishes to belong . . . . Similarly, a person's parents and children are part of his personality and social identity . . . . Of course, a person cannot choose his parents. However, a person's choice to relate to another as his child, or the choice to relate another as one's parent, is an expression of that person's personality. In appropriate circumstances, it is suitable to give this desire legal form. n165

b. Comparative Law--California. Israeli jurisprudence recognizes comparative law as a source of guidance in cases where domestic law does not provide a clear legal answer. This principle applies in family law matters as well. n166 Since the courts in California have treated the subject of this article and have done so in a rather convincing manner, this section will briefly outline the controlling cases on point and examine their reasoning.

American law in general allows consenting adults to make their own arrangements regarding the use of assisted reproductive technologies, subject only to specific state laws that address aspects of the process and deal in part with determining the parenthood of the resulting offspring. n167 The widely varied situations that grow out of the use of those techniques frequently compel the courts to fill in the blanks and resolve questions of parenthood in particular **[*148]** situations. The circumstances of one such case in California, *K.M. v. E.G.,* n168 resemble those of the test case before us.

In *K.M.*, the California Supreme Court considered a case in which two women in a domestic partnership had jointly brought twin girls into the world. n169 Eggs from one of the women had been fertilized by donated sperm and impregnated in the other, who carried the pregnancy to term; the court was asked to rule on the maternity of the partner who had provided the ova. From birth to age five, the twins had been raised by the two women in full cooperation, but the couple then separated. The gestational mother (who was the legally recognized mother) sought to deny the genetic mother all contact with the children. The courts were asked to rule on the genetic mother's parental status.

Reversing the decisions of two lower courts, the California Supreme Court held that while the maternity of the woman who had carried the pregnancy was not called into question, the woman who had provided the eggs was a legal mother in all respects as well. n170 Despite a dispute over the circumstances in which the eggs were provided (the gestational mother said they had been provided only as a donation, with no intention that the donor thereby become a parent) n171 and despite the genetic mother having signed a form waiving parental status, n172 a majority of the court declared her to be a mother on the strength of her biological link to the children. n173

The court's rationale was definitive: it drew a parallel between the status of the genetic mother and that of a father in a case of birth to a heterosexual couple. On the basis of California law, it held that if the genetic material is provided to a domestic partner with the expectation that the resulting child would be cared for jointly in the shared household, the parental status of the gamete provider cannot be annulled. n174 The court held that in these circumstances, the genetic mother cannot be ousted from her status as mother, and any waiver she may have signed--regardless of whether she gave informed consent or was under duress--will not be effective. n175 The court confirmed her status as mother without any need for an adoption decree. Its rationale, which took into account **[*149]** both the genetic tie and the intention to raise the child, was not grounded on the relationship forged between the genetic mother and the twins while she was acting as their mother. Thus, the court in effect puts the biological parents (if they were originally recognized as such) in place of the adoptive parents.

K.M. provides an instructive example of the importance of determining and declaring legal parenthood close to the time of the offspring's birth. In that case, contact between the children and the genetic mother, who had raised them until the age of five, had been suspended for a lengthy period; only following the Supreme Court's ruling recognizing her motherhood, about four years after

the case was initially brought, could that contact resume. It goes without saying that so long a separation between a mother and her children, especially at a young age, is extremely difficult to bear, both for the mother and the children. It is fair to assume that a clear set of rules for determining and promptly declaring the identity of the legal mother(s) could limit disputes in cases such as these or facilitate their earlier resolution.

It is noteworthy that on the day the California Supreme Court issued its decision in *K.M.,* it also issued two other rulings effectively recognizing joint maternity on the part of women in same-sex relationships. n176 In *Elisa B.,* n177 the partner of the bio-genetic mother (i.e., the genetic mother who had also given birth to the twins) was recognized as an additional legal mother on the basis that she had acted as a parent in practice. The partner had accompanied the bio-genetic mother through the artificial insemination process and had raised the children with her in their home as if they were her children. The court recognized her as a mother and required her to provide child support; it held she could not be divested of maternal status simply because she had separated from her partner.

Similarly, in *Kristine H. v. Lisa R.,* n178 the bio-genetic mother of a child born to her from an identified sperm donation was estopped from revoking an earlier statement she had made with her partner--a statement which served as the basis for registering her partner as an additional legal parent of the child. n179 The court declined to consider the validity of the initial court determination of joint **[*150]** motherhood, n180 which had been based on the women's agreed declaration even before the child was born; instead, it ratified, in effect, the actual motherhood of the partner, who for two years had raised the child as her own. n181

Although the aforementioned case-law dealt with the recognition of motherhood *ex post,* after disagreement had arisen, its underlying rationale could *(a fortiori)* serve as a basis for the determination of parenthood *ex ante,* at the time of birth and when no dispute is present. Significantly, in all three cases, the court sustained the partner's status as mother without requiring an adoption procedure. Save for in case of Elisa B, the court did not rely on bonds forged between the woman and the children. The motherhood of both women was recognized by court decree on the basis of the statute dealing with determination of parenthood, n182 and the decisions rested on biological ties *(K.M.)* or on an agreement the parties were estopped from revoking *(Kristine H.).* n183

D. SOME ADDITIONAL THOUGHTS ABOUT DISAGREEMENTS

The bulk of the discussion presented thus far (but for the recent cases coming from California) addressed the circumstances under which motherhood should be determined when both members of the same-sex couple desire to be recognized as mothers and when each agrees that the other will also be recognized as such.

The result of the foregoing discussion, which calls for both women to be deemed parents in cases where they agree to their joint parenthood, requires additional inquiry in cases where there is no such agreement or where both parties request severance of the parental ties of one or the other. Like any relationship, an intimate relationship between two women may run into difficulties that lead to its dissolution. And while dissolution of the relationship does not necessarily imply a call to alter parenthood status, such a call may, in fact, ensue. If there is a dispute between the partners, the court will be called upon--as in the case of any disagreement over parenthood--to resolve the matter.

For purpose of analysis, it is helpful to distinguish between three scenarios: first, a dispute at or around the time of birth; second, a dispute long enough after the birth that significant parental ties have already crystallized; and, third, a dispute long after the birth, but without parental ties between the genetic mother and the offspring having crystallized.

Let me begin with the second situation, in which I believe the determination to be the simplest. The logic underlying this article suggests that once a significant parental tie has been forged between the child and her biological mother, courts **[*151]** should not sever that tie. That is the case even where the genetic mother herself wants to terminate the tie, and it certainly is so when she wants to preserve it. To the extent legal intervention is called for, it should not permit an agreement between the parents to terminate either of their parental ties to the child; parental relations should not be made severable merely by later agreement or by the desire of one of the parties to sever them. In such circumstances, parental ties that have been recognized, or would be recognized under the regime here proposed, could be severed only in accordance with the provisions of the Adoption Law, which sets forth a limited list of circumstances in which the parental tie might be ended. n184

When the wish to sever the parental tie (or to avoid having it recognized in the first instance) is expressed before or in close proximity to birth--before the second mother is or could be registered as a legal mother--the decision as to recognizing her maternity is more complex. The departure point for the analysis is the analogy to a case involving a male and a female parent who are known to each other. The law in such a case does not allow for severance of the parental tie, whatever the circumstances of the birth or the parties' intentions. Even if one of them does not want to be recog-

nized as a parent, and even if both of them want to limit parenthood to one party, the law does not (in principle) allow that result. n185 One may therefore ask whether there is any reason to distinguish between heterosexual and same-sex couples by allowing revocation of the agreed-upon joint parenthood in the same-sex case. In other words, should parenthood be a matter of revocable will? I would respond in the negative.

Even though the element of intent played an important role in grounding the model proposed by this article, I doubt that a later-developing shared intent to sever the genetic mother's parental tie would be legally effective. The legal status of the genetic mother, no less than that of the gestational mother, must be determined in a cogent manner. From the instant her maternity is recognized (or the conditions for such recognition have materialized), she should be able to renounce that status only by permission of the court and in accordance with the conditions specified in the Adoption Law.

On the practical level, it is possible, as it is possible in the case of a birth to a heterosexual couple, that where a change of heart occurs before the genetic mother is registered and no objection is voiced, the genetic mother may avoid registration and recognition as legal mother. It follows that in practice, where the two agree that the genetic parenthood will not be registered, the non-parenthood may take effect "of its own accord," basically because no one raises the issue. That position equates the standing of the genetic mother with that of the genetic father in cases of heterosexual parenthood. Where parenthood becomes a matter **[*152]** of dispute between the mothers, the court will have to decide by weighing the considerations outlined earlier. It seems to me that a woman who provides the child's genetic make-up with the intention of acting as the child's mother (in conjunction with the gestational mother)--matters that the court will have to ascertain as issues of fact--should on principle be declared a legal mother of the child.

A third possible case involves the situation in which the question of maternity is raised at a later point in the child's life, without substantive parental ties having been forged in the interim. Following the lapse of a specified time (a year from the child's birth might be reasonable), n186 parental status would have to be established before a court of law; it could no longer be set administratively. Once that point in time is reached, the determination of parenthood should be in the discretion of the court, even if there were an agreement between the parties--and certainly if a disagreement had arisen. In such circumstances, the court would likely consider not only the mother's genetic tie to the offspring and her original intention to act as mother, but also the overall family context of the

parties. Under the model proposed here, in such cases the court would be authorized to inquire into who acts *de facto* as parent and what sort of relationships exist between those competing for parental standing and between them and the child. The genetic aspect, though a central element in the determination of legal parenthood (especially when combined with an original intention to form parental ties) does not exhaust the field.

III. PROCEDURES FOR RECOGNIZING MATERNITY

Regulating the determination of parenthood entails not only a substantive component--that is, the conditions for establishing maternity or paternity--but also a procedural element: the process by which state agencies ascertain whether these conditions are met. If the default rule in situations such as those discussed in this paper is to recognize both women as legal mothers, there is no reason why it should not be carried out by the administrative agency authorized to register parenthood. That is the fastest, most effective way to legally establish parenthood soon after birth. Court intervention would be sought, as already noted, only where one (or, perhaps, both) of the mothers raised objections to recognizing the genetic mother as a legal mother, where a significant amount of time had elapsed since the birth, or where an additional player was involved in the birth, as will be explained below.

Of course, the administrative agency can register such parenthood only if it is empowered to do so by law. A fair reading of current Israeli law (keeping in mind the Registry's conservative interpretation of its powers) leads to the conclusion **[*153]** that the two women would be unable to secure recognition of their joint motherhood simply by appearing together before the official to register the birth. At the very least they will have to prompt the agency to consider a more creative interpretation of the letter of the law by petitioning the High Court of Justice to consider the case, n187 in which event the Attorney General might order the Registrar to register the mothers or the Court might consider the case on its merits. Given the views expressed in the cases discussed above, n188 the Court in that instance would likely support the petition.

Before submission of such a petition to the High Court of Justice, the Family Court, which has jurisdiction to decide disputes over parenthood, might also be asked to weigh in. It is clear that a request for determination of parenthood submitted to the Family Court would likely face legal hurdles. There are three recognized ways in which the Family Court can declare parenthood: by ruling on a request to be declared a parent under the Family Court Law, n189 by issuing an adoption decree under the Adoption Law, or by issuing a parenthood order under the Surrogacy Law.

Since seeking administrative review in the High Court of Justice raises no particular procedural issues, this part of the article will focus on the three possible tracks to establishing parenthood before the Family Court. First, though, let me consider the administrative process and outline some legislative amendments that would facilitate administrative action without necessitating recourse to court involvement.

A. REGISTRATION OF PARENTHOOD BY THE ADMINISTRATIVE AGENCY

The most direct and commonly used road to legal recognition of parenthood does not traverse the courts. Most children are born "naturally" to a couple who acknowledges itself as parents, and whose parenthood is officially recognized either in the hospital where the child is born or by filing a joint declaration to an official of the Population Registry. n190 The mother is registered automatically, by notice sent from the hospital, by reason of having given birth to the child. n191 If the mother and father are married, the father, like the mother, is registered without having to appear or provide written declaration. If the mother is unmarried, the **[*154]** father is registered on the basis of their written declaration. n192 In neither case is there a requirement that paternity or maternity be scrutinized; the registration is made in reliance on the birth (for the mother) and the marriage or joint consent (for the father). The father may submit his declaration later, though not more than one year after the birth. n193 Paternity may not be registered on the basis of such a declaration if the mother had been married to another man within three hundred days preceding the birth. n194

It should be borne in mind that clear rules regarding parenthood mean shorter and fewer cases. Such rules pertain, in the first instance, to the jurisdiction and discretion of the administrative agency. Their prompt implementation allows the process of identifying the legal parents to be completed as soon as possible after the child's birth, thereby promoting certainty and stability in a matter of import to the lives of child and parents alike.

To what extent, if any, can the process described above be used to establish the legal maternity of the same-sex partner who is the child's genetic mother? If the rule that the man can be registered as father on the basis of the parties' implied consent were applied to the circumstances of the case before us, it would permit registration of the woman on the basis of a joint declaration, without the need for judicial intervention. n195 Adopting such a practice would be the logical extension of a policy that recognized same-sex parents to the same degree and in the same manner as parents of opposite sexes. But while such a policy is supported by the principle of equality, which calls for disregarding differences based on sexual orientation, the differences between determining maternity

and determining paternity n196 make it doubtful that such a policy could exist under the current law.

For one thing, the rules designed to determine motherhood focus on the act of birth. True, the traditional premise is that the gestational mother is also the genetic mother, and thus the act of birth also represents genetic connection. But the emphasis is nonetheless on the gestation and delivery. Recognition of a non-gestational genetic mother on the basis of the two women's consent (and her genetic tie to the child) would require changing the rule, for it is obvious that the non-gestational mother did not bear the child. A second difference follows from **[*155]** the accepted idea that a child could not have more than one mother. n197 Given that parenthood is an exclusive state, it would not be possible to recognize the genetic mother, any more than any other mother, in addition to the gestational mother. It follows that when the woman who bore the child is present and recognized as legal mother, the conventional approach does not make it possible to recognize an additional woman as mother.

The foregoing implies that it would be quite difficult for the gestational mother's same-sex partner, even where she is the genetic mother, to convince the Registrar to recognize her as a legal mother. Allowing the registration of motherhood on the basis of a joint declaration may be sound policy (as I believe it is), but existing law and its underlying social concepts make it unlikely that the administrative agency would adopt it in Israel without statutory amendment or High Court of Justice intervention.

In light of this analysis, it seems desirable to formulate a legal rule that would make it possible to register the genetic mother as a parent on the basis of the two women's joint declaration. That declaration would have to be made with the consent of both women and reflect the fact that the second woman is the genetic mother. An additional factor to be taken into account would be the identity of the father. The proposal would limit registration of two mothers on the basis of their joint consent to cases in which the child was conceived through an impersonal sperm donation, without the involvement of the father. n198 Where the father is known and involved, the declaration regarding an additional mother would result in there being three parents. In my view, that alternative, even if allowed for, should be examined by the court.

B. JUDICIAL DETERMINATION OF PARENTHOOD

Given the administrative difficulties outlined above, it is likely that, in the case before us, judicial intervention would be necessary to determine parenthood. But even if (or when) the law and regulation are amended (or the Supreme Court intervenes and grants same-sex mothers treatment equal to that accorded to heterosexual couples), there will remain instances for which Family Court intervention is needed. These include cases in which there is conflict between the parties; in which the sperm donor appears and puts forwards claims regarding his paternity (or lack thereof); or in which more than a year has elapsed since birth (an interval that calls for examination of actual paternal ties). In this part of the article, I explore the possible procedures through which the court may tackle the issue.

[*156] 1. Adoption Decree

The Adoption Law, n199 as noted, formulates a mechanism for the creation of parental relationships by act of law. n200 With the issuance of an adoption decree, the court severs the biological parents' ties with the child by determining that the child is free for adoption and declares (in a separate proceeding) that the adopters are the child's legal parents. n201 A child can become legally free for adoption in two situations: where the biological parents consent n202 or where specified circumstances exist that warrant declaring a child available for adoption even in the absence of consent. n203 Those circumstances involve primarily abandonment or lack of capacity on the part of the biological parent. n204

It appears possible that an adoption decree could be used to establish the parenthood of the mother's same-sex partner under the following hypothetical. The child was born through the use of an anonymous sperm donation obtained through the intermediary of a sperm bank. The father is absent; his identity is unknown and his position regarding the adoption cannot be ascertained. These circumstances satisfy the conditions set in the Adoption Law for declaring the child available for adoption as far as the father is concerned. n205 And if that is the case, it is possible in principle to declare the mother's partner to be the second parent by adoption. That solution becomes even more appealing in light of the *Yaros-Hakak* precedent, which, as discussed earlier, allowed one partner to adopt the other's children. n206

This resolution of the matter, however, is less than satisfactory. For one thing, the circumstances of our case differ from those in *Yaros-Hakak* with respect to the parties' genetic affiliation. In our case, the question arises whether it would be proper to declare a woman to be the child's adoptive

mother when she is the genetic mother. While there is no technical bar to the issuance of an adoption decree when the adopting mother is also the genetic mother, I doubt that doing so would be substantively proper. Adoption is employed to forge a parental tie in the absence of direct biological ties. A person who brought the child into the world should be *prima facie* recognized as a parent without the legal construct of adoption. Moreover, issuing such an adoption decree might well be met with the objection of the genetic mother. Given that adoptive parenthood may be regarded in some circles as, in a sense, "second-rate," the mother might have reservations about being so labeled. One must take account as well of the economic costs and emotional hardships associated with going through an adoption process.

[*157] Another difficulty with the adoption route is grounded in the Israeli Adoption Law itself, whose conditions arguably do not suit this case. The Adoption Law establishes several prerequisites to issuance of an adoption decree, and satisfying those prerequisites in the case before us is somewhat problematic. Under the statute, an adoptive parent may be recognized as such only after a trial period of six months, n207 and only after meeting strict qualifying tests enforced by the welfare authorities responsible for applying the requirements. n208 Can the child's genetic (and intended) mother justifiably be asked to undergo these tests? And what would happen if a post-fertilization dispute between the two women led the gestational mother to change her mind about allowing the adoption? In these circumstances, would adoption be allowed without the gestational (legal) mother's assent? Conversely, if the genetic mother no longer wished to adopt the child, would it be right to free her from her commitment to the child simply because she had changed her mind? As I understand it, the position of the genetic mother, the partner of the gestational mother (at least at the time of conception), should correspond to that of the father in a situation of "natural" birth. She in her case, no less than he in his, took an active part in the creation of the offspring and is genetically tied to the child from conception. In the case before us, that genetic tie is supplemented by the intention and desire to bring a child into the world and act as his or her parent--a characteristic not always present when the birth is the result of sexual relations. The woman's parenthood, no less than that of the father in a case of birth resulting from sexual relations, should be recognized as reflecting the responsibility of the genetic mother.

A third difficulty associated with the use of the adoption procedure grows out of the reasoning of the Court in *Yaros-Hakak.* Even though its decision smoothed the way to recognizing the same-sex partner's motherhood, it tied the justification for issuing the adoption decree to the existence of

ongoing *de facto* maternal relations. The Court inquired into whether issuing such a decree, in the circumstances before it, would promote or impede the best interests of the children; it did so by comparing the children's well-being (emotional and otherwise) on the premise that legal recognition was granted to the *de facto* family unit, and on that premise it was denied. In other words, the Court relied heavily in its reasoning on the *de facto* parenting of the two mothers for several years. In that light, it becomes difficult to use the adoption alternative to issue a declaration of parenthood immediately after the birth, and the procedure would generate uncertainty by allowing time to pass while the question of parenthood was left open. In sum, I may say that given the substantive resolution suggested above, which calls for a declaration of joint motherhood immediately following **[*158]** the birth, the Adoption Law does not provide an optimal solution.

2. Parenthood Order Pursuant to the Surrogacy Law

Another procedural mechanism for recognizing parenthood under Israeli law is found in the Surrogacy Law. n209 As noted earlier, the statute allows a couple to contract with another woman to carry to term on their behalf, and transfer to them after birth, a child conceived through in vitro fertilization of the mother's (or a donor's) egg by the father's sperm. n210 The statute provides for an oversight mechanism and permits such agreements to be entered into only if certain conditions are met and the prior approval is obtained. n211 As explained earlier, the mechanism itself is not relevant to our case, for its conditions are not met and its underlying purpose differs from that of the birth under consideration here. Moreover, I do not think that the prior approval of the State should be required for a joint birth to a same-sex couple. Nevertheless, insofar as the regulatory regime pertains to establishing the parenthood of the intended parents following the conclusion of the surrogacy process, it may be suited as well to establishing parenthood in our case.

The statute provides that seven days following the birth, a parenthood order, in which the child's legal parents are determined, is to be sought from the Family Court. n212 In the normal course, the intended parents will be recognized by the order as the legal parents. The order's significance lies in its providing an exception to the usual legal rule recognizing the woman giving birth to the child as the mother. Moreover, the Surrogacy Law opens the door to establishing maternal ties with two or more women, by allowing the intended mother to retain ties to the child even when the gestational mother was declared to be the legal mother. n213

Though similar in some ways to adoption, the Surrogacy Law's mechanism for establishing parenthood is less convoluted. In some respects it is more intrusive; in others, more respective of the parents' autonomy. On the one hand, it involves the State in establishing parenthood. The court is required to intervene and declare who are to be the child's legal parents; it thereby acquires a considerable degree of discretion. But, on the other hand, the process is supposed to begin around the time of birth and to be completed, in the absence of dispute, quickly. In most instances, the role of the court will be limited to enforcing the parties' agreement and declaring the intended parents to be the legal parents. In some circumstances, however, a court could find that granting legal parenthood to the intended parents would be contrary to the best interests of the child. In such circumstances the court would be authorized to act in accordance with the best **[*159]** interests of the child and to refuse to confirm the legal parenthood of the intended parents.

The Surrogacy Law formulates an important route to establishing parenthood, and has implications, by analogy, for our case. First, as noted, it establishes a relatively quick and effective mechanism for judicial establishment of parenthood immediately following birth. Second, it opens the door, in principle, to establishing dual motherhood. The law allows for preservation of the surrogate's maternal ties even after the status of the genetic and intended mother is established. In that sense, a "parenthood order" or "order establishing the status of the child" n214 is well suited to our case if the parties maintain their agreement. In the event, however, that disagreement between the women arises before parenthood is established by law, the statutory mechanism allows for a wide exercise of the court's discretion, for the criterion to be applied is that of "the best interests of the child." n215 That criterion is vague, and a court hostile to same-sex families might allow its own position on the matter to intrude into its decision and torpedo the joint motherhood. Although the Surrogacy Law mechanism is more convenient than that of the Adoption Law and allows the possibility of a decision recognizing dual motherhood, the circumstances of our case and the relationship between the parties are not ones of surrogacy.

3. Judicial Resolution of Paternity or Maternity Suits

The default mechanism for resolving disputes over parenthood (usually disputes over paternity), and the final one to be discussed here, is a court proceeding for a declaration of parenthood. The application initiating such a proceeding is filed with the Family Court and relies on that court's jurisdiction to determine parenthood. n216 As noted, the rule of thumb in Israeli law is to recognize

paternity on the basis of genetic ties between father and child. A paternity petition filed by a woman who was not married at the time of conception will ultimately be decided through genetic testing that indicates whether the respondent is the father. Where the respondent declines to undergo testing, paternity will be decided on the basis of all the evidence, giving due weight to the refusal to be tested. If the mother was married at the time of conception, the court will probably respect the marital paternity presumption and declare the husband to be the father even without a confirmed genetic tie between him and the child. n217 In those circumstances, according to the approach accepted by the Family Court, the principle of best interests of the child dictates waiver of genetic testing. n218

[*160] We may ask whether the child's genetic mother could obtain, on the basis of existing law, a declaration of her maternity. The question is not a simple one; despite the seemingly persuasive analogy to the genetic father's standing, it is possible that the existing legal context would not allow for the issuance of such a declaration. Various factors might hinder a ruling in her favor: some judges may perceive joint maternity on the part of two women as "unnatural"; some may subscribe to the existing legal perception that the woman who bears the child is the mother; others may succumb to the position that the maternity of a particular child is a status unique to one woman. As in the case of other controversial family law issues, court rulings on this matter may be inconsistent, varying with the views of the presiding judges. Accordingly, reliance on this procedure in the absence of legislative direction is far from ideal. n219

Moreover, this default venue for resolving parenthood questions is a forum designed to accommodate fiercely contested applications, and it serves as the final resort of parties who have failed to resolve their disputes by other means. Accordingly, proceedings in the venue tend to be prolonged, expensive, and punishing. An application for a decree by consent may technically be brought before the court, but it does not represent its ordinary mode of operation. Moreover, even if the application is jointly presented, the Attorney General must be notified, and the state may object to the order on various grounds. n220

IV. THE JOYS OF HAVING PARENTS--How MANY ARE TOO MANY?

Before concluding, let me raise the following question: does recognizing the joint maternity of two women open the door to recognizing three or more parents? Once maternity is no longer a binary status and the recognition of two mothers is possible, does it necessarily follow that we no longer view parenthood of a particular child as a status that only two can share? And if the two-parent con-

struct is no longer beyond question, what can stop the "flood" of people seeking recognition as parents?

This question is of more than theoretical interest. In the circumstances of the case before us, the women were assisted by an anonymous sperm donor. It is possible, however, that the sperm would come from an identified donor, an acquaintance or friend of the women. n221 In Israel, when the sperm comes from an identified donor, the donor is considered to be the father even where fertilization is carried out in a regulated clinic. n222 In these circumstances, it seems to me, **[*161]** parenthood is no longer limited to two people; rather, we have three biological parents. All of them might request--and, on the analysis offered above, might well merit--recognition as parents.

Although the case before us does not require resolution of that issue, it warrants some attention. Without presuming to exhaust the discussion of the issue, it may be noted that there is no need to deny the genetic mother's request to be recognized merely because it would make her a third parent. Adherence to the model proposed here for the establishment of parenthood could well lead to recognizing three parents. In deciding who should be recognized as parents, the model considers factors such as: the will of the parties; the offspring's meaningful relations with the people in her life (as part of the child's best interests); the interest in finding solutions that will enable people wanting to establish families to do so; and the goal of preserving the family as a stable unit (that ensures care of the offspring and attendance to her needs). Application of these criteria to the circumstances of the case at hand imply that all three persons who took part in the birth could be recognized as parents.

It has been suggested that broadening parenthood in this way might open the floodgates to a stream of petitions by people citing a range of connections --biological, but primarily psychological--to the child as a basis for being recognized as a parent. This concern, however, seems to be unfounded. First, the solution suggested here is designed only for the complicated cases, where parenthood is unclear and there exist multiple candidates, all with parental affinity to the child. Second, at a time when many children lack the support of two parents, n223 there seems to be no reason to fear an excess of contenders. Even if there may be cases in which more than two people will seek to be recognized as parents, the substantive tests required by law will determine which of them--perhaps all--ought to be recognized and will ensure the needed stability in the life of the child.

Certainly, a need to recognize three or even four parents would sometimes burden the day-to-day life of the family, for it would require coordinating a larger number of players. But similar concerns arise when couples separate. n224 Declining to recognize the parenthood of one simply because doing so might make it harder for the other to function as a parent seems strained; after all, parents are parents. Put differently, the answer should look not toward denying parenthood but toward finding a way to ensure the relationships of the child with the parental figures in his or her life, maximizing the cooperation of the parties directed to the well-being of the child.

[*162] CONCLUSION

The changes taking place in Western societies, including Israel, are bringing about the formation of "new" families in a wide range of forms. Alongside the modern nuclear family comprising a married couple and their biological children--the model that even today remains the dominant one--other families of diverse sorts are arising: single-parent families, two-parent families, same-sex families, and even multi-parent families. n225 The existence of these families as "facts on the ground" requires legal evolution so as to clarify, among other things, the status of the individuals and to afford legal protection *de jure* to the parental relations that have come into existence *de facto.* These steps are needed in order to provide for the best interests of the child and the needs of the parents.

The goal of affording legal recognition to parental relations in the families at issue can be attained, in principle, in one of two ways. The first would call for examining the family unit afresh, starting from scratch. Such a general inquiry would call into question the nature of the family, the nature of parental relationships, and the manner in which they should be formulated today. Consequently, such an inquiry would necessitate a reshuffling of the deck and the development of a new basis for resolving fundamental questions of family structure. n226 In such an endeavor, legal precedent and existing provisions of law would play little role beyond pointing to possible problems that might need to be resolved. Such a back-to-basics approach to the question, though radical, is likely to prove conceptually coherent and ethically sound.

The alternative is a more cautious approach, relying on existing law and using interpretation to extract workable solutions from it. n227 It will espouse minor and concrete amendments to the law--such as the explicit empowerment of one or another agency to make certain determinations--rather than call for an overall reform. By its nature, this method stands to suffer from the limitations and inconsistencies of the prevailing state of affairs; it is less expansive but also less pretentious. Yet it

is possible that the two approaches may lead to similar substantive results, and, in that sense, the second view may be no less revolutionary than the first.

[*163] Within the context of this article, and because of the complexity of the question, I have sought to blend the two methods, gleaning from existing statutes and case law some basic principles that should govern the resolution of the situation at hand, and then offering modest (but significant) legislative amendments where such are called for. I identified four governing principles: the centrality of the family, the will of the parties, the welfare of the parties as affected by flourishing family relationships, and the best interests of the child. These principles led to the substantive result this article advocates: the recognition of joint motherhood immediately following the birth of the child. Procedurally, I argued that the preferable method for granting the recognition is through appearance before a registry official, who should be authorized to recognize one of the women as mother by reason of the birth and the other by reason of the genetic tie. Since the current regulatory scheme in Israel--and in similarly situated democracies--is incomplete, legislative intervention or creative Supreme Court interpretation is necessary in order to effectuate this design. Until then, the Family Court--or, in other democracies, the equivalent court of first instance--may be faced with having to determine parenthood, given its jurisdiction over the matter and its common law powers. This article attempted to chart some doctrinal milestones that may assist in the navigation of this unpaved path.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawCohabitationDomestic PartnersChildrenFamily LawPaternity & SurrogacySurrogacy-Assisted Reproduction ParentageHealthcare LawTreatmentReproductive TechnologyArtificial Insemination

FOOTNOTES:

n1 Meital Yasur-Beit Or, *Precedent: Lesbian Surrogacy Approved,* Y NET, Sept. 7, 2006, *available at* http://www.ynetnews.com/articles/0,7340,L-3300940,00.html (last visited Feb. 19, 2008).

n2 Artificial insemination (with or without a sperm donor) is an established technology. The literature shows its first use was no later than 1884, and it has been a common practice since the middle of the twentieth century. In vitro fertilization was successfully employed in humans for the first time in 1978, and it also has become quite widespread. *See infra* notes 15, 34-35.

n3 For similar cases in the U.S., see Heather A. Crews, *Women Be Warned, Egg Donation Isn't All It's Cracked Up To Be: The Copulation of Science and the Courts Makes Multiple Mommies,* 7 N.C. J.L. & TECH. 141 (2005); John G. New, *"Aren't You Lucky You Have Two Mamas?" Redefining Parenthood in Light of Evolving Reproductive Technologies and Social Change,* 81 CHI.-KENT. L. REV. 773 (2006); Diana Richmond, *Parentage by Intention for Same-Sex Partners,* 6 J. CTR FOR FAM., CHILD., & CTS. 125 (2005), *available at* http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/9_Richmond.pdf; Jennifer L. Rosato, *Children of Same-Sex Parents Deserve the Security Blanket of the Parentage Presumption*, 44 FAM. CT. REV. 74 (2006).

n4 For reasons of gender neutrality, I refer to the child as male or female alternately.

n5 The more familiar term "birth mother" seems inappropriate here, since it most often is used in contradistinction to "adoptive mother" and connotes the woman who conceived and gave birth to the child and then put it up for adoption. As used here, "gestational mother" connotes the woman who carries the pregnancy and gives birth to the child, but provides none of her genetic material; she is to be distinguished from the "genetic mother" who provides the egg, but does not carry the pregnancy.

n6 This Article, it should be clear, does not deal with the fundamental questions of whether the Health Ministry's decision was lawful under current Israeli law or whether it represents sound social policy. The starting point is that the procedure has become possible and that similar cases may be expected in the future, either in the context of existing law or of future modifications. On the underlying issue of whether the process should be permitted, see Catherine DeLair, *Ethical, Moral, Economic and Legal Barriers to Assisted Reproductive Technologies Employed by Gay and Lesbian Women,* 4 DEPAUL J. HEALTH CARE L. 147 (2000); John

A. Robertson, *Gay and Lesbian Access to Assisted Reproductive Technology,* 55 CASE W. RES. L. REV. 323 (2004); Michael S. Wald, *Adults' Sexual Orientation and State Determinations Regarding Placement of Children,* 40 FAM. L.Q. 381 (2006).

n7 *See supra* note 3.

n8 *See* Anne-Marie Slaughter, *A Global Community of Courts,* 44 HARV. INT'L L.J. 191, 201-02 (2003); *cf.* Amnon Reichman, *"When We Sit to Judge We are Being Judged": The Israeli GSS Case,* Ex Parte Pinochet *and Domestic/Global Deliberation,* 9 CARDOZO J. INT'L & COMP. L. 41, 90-103 (2001).

n9 Adoption of Children Law, 1981, S.H. 293 [hereinafter 1981 Adoption Law].

n10 *See* Pamela Laufer-Ukeles, *Gestation: Work for Hire or the Essence of Motherhood? A Comparative Legal Analysis,* 9 DUKE J. GENDER L. & POL'Y 91, 111 (2002).

n11 Aspects of Israeli family law, particularly those related to marriage and divorce, remain subject to the personal status (religious) law of the parties. In other words, Jewish couples are subject, with respect to marriage and divorce, to Jewish personal status law, part of the *halakhah;* and Muslim couples are subject to *shari'a* law. The Israeli legislature defers to these legal systems and adopts their pertinent provisions as binding Israeli law. The determination of parenthood is not subject directly to regulation by personal status (religious) law; it is, rather, a civil matter. Nevertheless, it has not been the subject of comprehensive civil legislation; accordingly, the courts have tended to find guidance in religious law analogies and interpretations. As a practical matter, the determination of parenthood is conceptually related to questions of marriage; the nexus involves the need to determine descent in order to know which marriages are forbidden by reason of consanguinity.

n12 *See* Ruth Halperin-Kaddari, *Redefining Parenthood,* 29 CAL. W. INT'L. L.J. 313, 316-17 (1999); Laufer-Ukeles, *supra* note 10, at 97-98.

n13 An exception to the exclusively biological definition of parenthood may arise when the mother is married to another man. In such a case, the presumption that her husband is the father comes into play and efforts are made to avoid identifying another man as the father, lest the child be deemed a *mamzer* under the *halakhah.* (A *mamzer* is the offspring of a union that is forbidden as adulterous or incestuous; *halakhah* forbids the *mamzer* to marry any Jew other than another *mamzer*. The category differs from the "illegitimate" child or "bastard" of Anglo-American law in that it does not include the offspring of a non-marital union that is neither adulterous nor incestuous.) Only when it is absolutely clear that the husband is not and cannot be the father (where, for example, he was away from his wife for an extended period or there are conclusive medical findings that he is incapable of fathering children), or when he denies his fatherhood at the time of the child's birth, will there be a finding that he is not the father. It is important to note that declaring the child to be a *mamzer* does not diminish his legal status as the child of his biological parents or detract from his rights as that child. For further elaboration, see Halperin-Kaddari, *supra* note 12, at 316-17; Pinhas Shifman, *First Encounter of Israel Law with Artificial Insemination,* 16 ISR. L. REV. 250, 252 (1981); Pinhas Shifman, *The Status of Unmarried Parent in Israel Law,* 12 ISR. L. REV. 194, 194-195 (1977).

n14 They might use it in cases where the father was infertile or where he had genetic defects that the couple wished to avoid transmitting to their children.

n15 *See, e.g.,* Kristin E. Koehler, *Artificial Insemination: In the Child's Best Interest?,* 5 ALB. L.J. SCI. & TECH. 321, 323 (1996).

n16 *See infra* Part I.B.

n17 HEALTH MINISTRY, RULES AS TO THE ADMINISTRATION OF A SPERM BANK AND GUIDELINES FOR PERFORMING ARTIFICIAL INSEMINATION (1979) [hereinafter Sperm Bank Administration Rules]. First issued in 1979, these rules have been updated several times since then. They may be viewed at the Health Ministry's website, http://www.health.gov.il.

n18 Technically speaking, the Rules rank below secondary (subordinate) legislation. Under the Israeli system, secondary legislation is legislation enacted by an administrative agency under powers given to it by primary legislation (i.e., an act legislated by the Knesset, the Israeli parliament) in order to implement the acts. Secondary legislation comes into force only if published in the official registrar. The Rules mentioned here were never published in the official publication and are not generated pursuant to an act of Parliament, but pursuant to a subordinate legislation. *See* Declaration of Oversight with respect to Goods and Services (Sperm Banks and Artificial Insemination), 1979, KT 3996, 1448-49; Public Health (Sperm Bank) Regulations, 1979, KT 3996, 1448.

n19 Sperm Bank Administration Rules 8, 12, and 26 (1989).

n20 *Id.* at 9, 10, 11, and 13.

n21 *Id.* at 26.

n22 *Id.* at 25.

n23 Directive 19(b) of the Rules was invalidated on the grounds that it denied equality before the law. It required unmarried women wishing to receive sperm donation to first undergo psycho-social testing that was not required of married women. *See* HCJ 2078/96 Weitz v. Minister of Health [1997] (not published).

n24 *See supra* text accompanying note 17. The updates are available at http://www.health.gov.il/forms/ search_result.asp (Hebrew) (last visited Feb. 19, 2008).

n25 Relly Saar, *Takdim: Zug Lesbiyot Yochlu Lehavi Bemeshutaf Yeled La'olam* (Precedent: Same-Sex Couple Could Bring a Child into the World Together), HAARETZ, Sep. 7, 2006, *available at* http://www.haaretz.co.il/hasite/spages/760232.html (Hebrew).

n26 *See* Public Health (In Vitro Fertilization) Regulation 1987, KT 5035, 978, § 1, 15(a); Sperm Bank Administration Rules 13, 14, 15(c), 21, and 25 (1989). In Israel there is no

mechanism through which the offspring may be provided identifying information about the donor in cases of impersonal donation.

n27 *See infra* notes 30-31.

n28 For a formulation of the paternity question in light of *halakhah,* see Chaim Povarsky, *Regulating Advanced Reproductive Technologies: A Comparative Analysis of Jewish and American Law,* 29 U. TOL. L. REV. 409, 416-34 (1998).

n29 On the status of the sperm donor according to the *halakhah,* see Daniel B. Sinclair, *Assisted Reproduction in Jewish Law,* 30 FORDHAM URB. L.J. 71, 71-75, 90-91 (2002).

n30 The decision that dealt with the proposed adoption of a woman's children, born to her through anonymous sperm donation, by her female partner, *see infra* Part I.D.2, proceeded on the premise that the donor should be regarded as an unknown father. *See* CA 10280/01 Yaros-Hakak v. Atty. Gen., [2005] IsrSC 59(5) 64 (opinion of Mazza, J., sec. 12; opinion of Barak, C.J., sec. 1); FamA (TA) 10/99 Anon. v. Att'y Gen., [2001] IsrDC 2000(1) 831, 855, 879.

n31 CA 449/79 Salmah v. Salmah [1980] IsrSC 34(2) 779; CC (BS) 139/78 Anon. v. Anon. [1979] IsrDC 1980(2) 388, 394-96.

n32 The physician is required to have the man and the woman sign a statement of agreement "that the child born as a result of the insemination will bear my/our name(s) and be considered my/our child in all respects, including support and inheritance." *See, e.g.,* MEIR HOSPITAL, ARTIFICIAL INSEMINATION DONOR-MARRIED COUPLE (2002), *available at* http://www.clalit.org.il/meir/Media/Images/SCM/Category/135_2_17.pdf (Hebrew).

n33 *See supra* note 13.

n34 LAWRENCE J. KAPLAN & ROSEMARIE TONG, CONTROLLING OUR REPRODUCTIVE DESTINY: A TECHNOLOGICAL AND PHILOSOPHICAL PERSPECTIVE 255 (1994).

n35 In simple terms, in vitro fertilization refers to a process for bringing egg and sperm together outside the mother's body, following which the fertilized egg is returned to the mother's body for implantation and gestation. *See id.* at 256-66; Francois Baylis, *Assisted Reproductive Technologies: Informed Choice, in* NEW REPRODUCTIVE TECHNOLOGIES: ETHICAL ASPECTS 47, 66, 100 (Canada Royal Commission on New Reproductive Technologies 1993); INMACULADA DE MELO-MARTIN, MAKING BABIES: BIOMEDICAL TECHNOLOGIES, REPRODUCTIVE ETHICS, AND PUBLIC POLICY (1998); Marvin F. Milich, *In Vitro Fertilization and Embryo Transfer: Medical Technology + Social Values = Legislative Solutions,* 30 J. FAM. L. 875, 877-80 (1991).

n36 Peter Lutjen et al., *The Establishment and Maintenance of Pregnancies Using in vitro Fertilization and Embryo Donation in a Patient with Primary Ovarian Failure,* 307 NATURE 174, 174 (1984); Yuval Yaron, et al., *Oocyte Donation in Israel: A Study of 1001 Initiated Treatment Cycles,* 13 HUMAN REPRODUCTION 1819, 1819 (1998), *available at* http://humrep.oxfordjournals.org/cgi/reprint/13/7/1819.

n37 Public Health (In Vitro Fertilization) Regulation, 1987, KT 5035, 978 [Hereinafter IVF Regulations]. The IVF Regulations state in their preface that they were adopted pursuant to sections 33 and 65(c) of the Public Health decree of 1940, together with section 32 of the Basic Law: The Government, 2001, S.H. 158, *available at* http://www.knesset.gov.il/laws/special/eng/basic14_eng.htm.

n38 PINHAS SHIFMAN, DINEI MISHPAHA BE-YISRAEL (FAMILY LAW IN ISRAEL--PART TWO) 155 (1989) (Hebrew); Mordecai Halperin, *Confidentiality of Information on Biological Parenthood--the Retreat from the Interim Report of the Aloni Commission,* 17 ASIYA 83 (1999) (Hebrew) (discussing HCJ 1237/91 Nahmani v. Minister of Health, [1992] (not published)).

n39 In one case, HCJ 5087/94 Zabro v. Minister of Health, [1995] (not published), the Court invalidated, with the State's assent, the regulations that prevented the use of a surrogate mother's services; it reasoned that the regulations should be grounded in statute. In *Weitz,* the court

invalidated, again with the State's assent, the regulations that limited the right of unmarried women to use in vitro fertilization measures; it found them contrary to the principle of equality. HCJ 2078/96.

n40 *See infra* Part I.C.

n41 IVF Regulations § 4.

n42 Ruth Landau, *The Management of Genetic Origins: Secrecy and Openness in Donor Assisted Conception in Israel and Elsewhere*, 13 HUMAN REPRODUCTION 3268, 3268 (1998); *see also* SUSAN MARTHA KAHN, REPRODUCING JEWS: A CULTURAL ACCOUNT OF ASSISTED CONCEPTION IN ISRAEL 134 (2000).

n43 In principle, egg donation need not be anonymous. Under some legal systems, it takes place between relatives or friends. Under other systems, as in the United States, the couple or the woman acquires the eggs through direct negotiation with the donor or through the intervention of a third party in a manner that discloses the donor's identity to them. Mark V. Sauer & Richard J. Paulson, *Oocyte Donors: A Demographic Analysis of Women at the University of Southern California*, 7 HUMAN REPRODUCTION 726, 726 (1992); Anne Reichman Schiff, *Solomonic Decisions in Egg Donation: Unscrambling the Conundrum of Legal Maternity*, 80 IOWA L. REV. 265, 270 (1995).

n44 It should be recalled that the starting point for this analysis is that the birth was, in fact, lawfully permitted. *See supra* note 6.

n45 IVF Regulations § 15(a).

n46 Physicians who administer fertility clinics in Israel have told me that confidentiality is routinely maintained. If any information is provided to the recipient, it is general information about the donor's age, origin, and appearance.

n47 Conventional practice uses egg donation in either of two circumstances: where there is concern about transmitting a genetic defect through one's own gamete or where other defects in the recipient's own ova--whether related to her age or to other fertility-impairing conditions--preclude her becoming pregnant without egg donation. John A. Robertson, *Technology and Motherhood: Legal and Ethical Issues in Human Egg Donation,* 39 CASE W. RES. L. REV. 1, 3-4 (1989).

n48 Halperin-Kaddari, *supra* note 12, at 332-33.

n49 IVF Regulations § 13.

n50 HCJ 2078/96 *Weitz;* HCJ 5087/94 *Zabro.*

n51 An offspring lacking genetic connection to his or her parents might experience "genealogical bewilderment." On that concept in the context of adoption, see ARTHUR D. SOROSKY, ET AL., THE ADOPTION TRIANGLE 113 (1978); H.J. Sants, *Genealogical Bewilderment in Children with Substitute Parents,* 87 BRIT. J. MED. PSYCHOL. 133, 133 (1964).

n52 *Compare supra* text accompanying note 13.

n53 *See generally* IVF Regulations § 11.

n54 Population Registry Law, 1965, S.H. 270 § 6.

n55 IVF Regulations §§ 1, 2(a).

n56 That situation is not free of problems. Not only does the lack of a registry impair the ability of the offspring to seek out her genetic mother (the egg donor), it may sometimes even keep the offspring in the dark about being the result of an artificially assisted conception. It also makes it harder to obtain statistical information and to conduct long-term medical studies. These problems have been alleviated in part by the independent registration mechanism instituted in 2005 with implementation of the Health Ministry's Executive Director Circular

56/2004, which establishes guidelines for in vitro fertilization laboratories and requires documentation of each fertilization. The registration, it should be clear, takes place on the individual laboratory level, not the national level. The Circular is available at http://www.health.gov.il/download/forms/a2636_mr56_04.pdf.

n57 Surrogate Motherhood Agreements (Approval of Agreement and Status of Newborn) Law, 1996, S.H. 176 [hereinafter Surrogacy Law]; Population Registry Law § 6; IVF Regulations.

n58 *See supra* text accompanying note 13.

n59 On the uniqueness of this tie, see DIANNE E. EYER, MOTHER-INFANT BONDING: A SCIENTIFIC FICTION (1992); MARSHEL H. KLAUS & JOHN H. KENNELL, MATERNAL-INFANT BONDING: THE IMPACT OF EARLY SEPARATION OR LOSS ON FAMILY DEVELOPMENT (1976); Marie Ashe, *Law-Language of Maternity: Discourse Holding Nature in Contempt,* 22 NEW ENG. L. REV. 521 (1988); John L. Hill, *What Does It Mean to Be a "Parent" ? The Claims of Biology as the Basis for Parental Rights,* 66 N.Y.U. L. REV. 353, 394-400 (1991).

n60 David J. Bleich, *In Vitro Fertilization: Questions of Maternal Identity and Conversion, in* JEWISH LAW AND THE NEW REPRODUCTIVE TECHNOLOGIES 46 (1997); Laufer-Ukeles, *supra* note 10, at 94-95, 105-12; Sinclair, *supra* note 29, at 99-101.

n61 The legal systems that have regulated the matter have sustained the gestational mother's status as legal mother. On the law in the United States and in Europe, see, e.g., CREATING THE CHILD: THE ETHICS, LAW AND PRACTICE OF ASSISTED PROCREATION 260, 281-282, 289, 312-313, 330, 333, 349 (D. Evans ed., 1996); S.M. CRETNEY, FAMILY LAW 197 (4th ed. 2000); Robertson, *supra* note 47, at 18-21; Schiff, *supra* note 43, at 271-73; Anne Goodwin, *Determination of Legal Parentage in Egg Donation, Embryo Transplantation, and Gestational Surrogacy Arrangements*, 26 FAM. L.Q. 275, 277 (1992).

n62 Khiara M. Bridges, *On the Commodification of the Black Female Body: The Critical Implications of the Alienability of Fetal Tissue,* 102 COLUM. L. REV. 123, 146 (2002).

n63 For discussion about the Surrogacy Law, see Halperin-Kaddari, *supra* note 12, at 318-21, 329; Laufer-Ukeles, *supra* note 10, at 95-98, 112.

n64 Surrogacy Law § 3.

n65 The intended parents should make an effort to find a surrogate mother who is unmarried. The surrogate mother must not be a family member of the intended parents. Surrogacy Law § 2(3).

n66 *Id.* § 6.

n67 *Id.* § 2(4).

n68 *Id.* § 2(4).

n69 *Id.* § 1 (defining intended parents as "a man and woman who are a couple, who contract with a gestational mother in order to bear a child").

n70 Some of the statutory limitations grew out of a desire to avoid direct conflict with *halakhic* principles, while others were included to promote the welfare of the parties, the best interests of the resulting child, or sound public policy. Halperin-Kaddari, *supra* note 12, at 319-20; Laufer-Ukeles, *supra* note 10, at 112-13; Carmel Shalev, *Halakha and Patriarchal Motherhood--An Anatomy of the New Israeli Surrogacy Law,* 32 ISR. L. REV. 51, 61, 64-69 (1998).

n71 Some U.S. states do not have statutes addressing surrogacy at all. Jeremy J. Richey, *A Troublesome Good Idea: An Analysis of the Illinois Gestational Surrogacy Act,* 30 S. ILL. U. L.J. 169, 184 (2005); Krista Sirola, *Are You my Mother? Defending the Rights of Intended*

Parents in Gestational Surrogacy Arrangements in Pennsylvania, 14 AM. U. J. GENDER SOC. POL'Y & L. 131, 137-38 (2006).

n72 John A. Robertson, *Reproductive Technology in Germany and the United States: An Essay in Comparative Law and Bioethics,* 43 COLUM. J. TRANSNAT'L L. 189, 210 (2004).

n73 Sirola, *supra* note 71, at 138.

n74 *Id.;* Richey, *supra* note 71, at 184-85.

n75 Laufer-Ukeles, *supra* note 10, at 98-104; Adam P. Plant, *With a Little Help from my Friends: The Intersection of the Gestational Carrier Surrogacy Agreement, Legislative Inaction, and Medical Advancement,* 54 ALA. L. REV. 639 *passim* (2003); Richey, *supra* note 71, at 172-178; Helene S. Shapo, *Assisted Reproduction and the Law: Disharmony on a Divisive Social Issue,* 100 Nw. U. L. REV. 465 *passim* (2006); Sirola, *supra* note 71, at 139.

n76 Surrogacy Law § 11.

n77 *Id.* § 12.

n78 *Id.* § 13(a).

n79 *Id.* § 13(c).

n80 Ruth Zafran, *The Family in the Genetic Era: Defining Parenthood in Families Created through Assisted Reproduction Technologies as a Test Case,* 2 HAIFA L. REV. 223, 267-68 (2005) (Hebrew).

n81 Adoption of Children Law, 1960, S.H. 96 (amended 1981).

n82 The institution of adoption had been employed earlier, but there was a need for judicial "creativity" in that it was subject to the laws of personal status which, at least for the Jewish

population, did not recognize the idea of adoption. *See* Daniel Pollack, et al., *Classical Religious Perspective of Adoption Law*, 79 NOTRE DAME L. REV. 693, 696-701 (2004).

n83 This is reflected in the legislative history, as evidenced by the explanatory note accompanying the original bill, drafted in 1958. *See* Draft bill Adoption of Children Law (no. 364), 1958, HH, 80.

n84 Adoption Law § 8 (1981).

n85 *Id.* § 13.

n86 *Id.* §§ 2-16.

n87 This is explicitly stipulated by the statute. *Id.* § 3.

n88 *See* CA 10280/01 *Yaros-Hakak*, IsrSC 59(5) 64 at § 11, 17 (Mazza, J., opinion).

n89 The laws provide, in addition to the mutual inheritance rights of adopter and adoptee, for the adoptee to inherit from biological relatives--though they do not inherit from the adoptee. Adoption Law § 16(3) (1981); Inheritance Law § 16, 1965, S. H. 446.

n90 Adoption Law § 16(2) (1981); *see also* BENZION SCHERESCHEWSKY, DINEI MISHPAHA [FAMILY LAW IN ISRAEL] 422 (4th ed. 1993) (Hebrew); Pinhas Shifman, *Kinship by Adoption: Where Adoption Differs from Natural Affinity*, 23 ISR. L. REV. 34, 40-41 (1989).

n91 Adoption Law §§ 29, 30 (1981); *see also* Shifman, *supra* note 90, at 43-47.

n92 Although the Israeli statute does not explicitly provide for the possibility of open adoption, Adoption Law § 16(1) has been interpreted to authorize the court to formulate an open adoption. *See* CA 4616/94 Att'y Gen. v. Anon. [1994] IsrSC 48(4) 298, 306.

n93 *See generally* SOROSKY, ET AL., *supra* note 51, at 207; Cynthia E. Cordle, *Open Adoption: The Need for Legislative Action,* 2 VA. J. SOC. POL'Y & L. 275 (1995); Amy L. Doherty, *Foster Care and Adoption: A Look at Open Adoption,* 11 J. CONTEMP. LEGAL ISSUES 591 (2000); Shirley K. Senoff, *Open Adoption in Ontario and the Need for Legislative Reform,* 15 CAN. J. FAM. L. 183 (1998); Tammy M. Somogye, *Opening Minds to Open Adoption,* 45 KAN. L. REV. 619 (1997).

n94 CA 653/95 Anon. v. Att'y Gen. [1995] IsrSC 49(2) 383, 390-92; CA 4294/91 Anon. v. Att'y Gen. [1992] IsrSC 46(4) 464, 471-72; CA 658/88 Anon. v. Att'y Gen. [1989] IsrSC 43(4) 468, 476; CA 20185 Anon. v. Att'y Gen. [1986] IsrSC 40(2) 337, 342; CA 345/76 Anon. v. Att'y Gen. [1976] IsrSC 31(1) 673, 675.

n95 *See* NILI MAIMON, DINEI IMUTS YELADIM [ADOPTION OF CHILDREN: LEGAL PRINCIPLES] 55 (1994) (Hebrew). And even in these cases, the court has not been quick to use the open adoption alternative. *See* CA 166/81 Anon. v. Att'y Gen. [1982] IsrSC 36(4) 321.

n96 CA 121/79 Anon. v. Anon. [1979] IsrSC 34(2) 253, 257. On the treatment of the issue in the United States, see Margaret M. Mahoney, *Open Adoption in Context: The Wisdom and Enforceability of Visitation Orders for Former Parents Under Uniform Adoption Act,* 51 FLA. L. REV. 89 (1999).

n97 HCJ 1779/99 Brenner Kadish v. Interior Minister [2000] IsrSC 58(2) 368.

n98 CA 10280/01 *Yaros-Hakak,* IsrSC 59(5) 64.

n99 Legal recognition of adoption by same-sex couples is consistent with a broader pattern in Israeli law of the last decade. In a series of legislative amendments and leading cases (primary among them is the Supreme Court decision in HCJ 721/94 El-A1 Israel Airlines Ltd v. Danielowitz [1994] IsrSC 48(5) 749, *available at* http://elyonl.court.gov.il/Files_ENG/94/210/007/z01/94007210.z01.HTM) the courts and the legislature have begun to dismantle the structure of the *de jure* discrimination on the grounds

of sexual orientation. However, currently same-sex couples are still unable to marry in Israel; if they marry in accordance with the laws of a jurisdiction that permits such marriage, such as in Canada, they may register as married in Israel (as determined by the Court in HCJ 3045/05 Ben-Ari v. Population Registry [2006] (not published)) although it is unclear whether such registration will entail the full rights and obligations that flow from the status, because the matter has not been litigated yet. In any event, the conclusion this article reaches, according to which joint parenthood of both mothers should be recognized, is not dependant upon recognition of their right to marry (or otherwise form a civil union, a domestic partnership, or any other form of legally recognized spousal unit). *See also infra* note 169.

n100 For an analysis of this decision, see Chanan Goldschmidt, *The Renowned Identity Card of an Israeli Family--Legal Implications of the Ruling on Adoption by a Same-Sex Couple*, 7 HA-MISHPAT 217, 246-51 (2002) (Hebrew).

n101 HCJ 1779/99 *Brenner Kadish,* IsrSC 58(2) at 372.

n102 *Id*

n103 *Id.* at 373-74.

n104 The ruling does not end the matter, however, for the Interior Minister has petitioned for further proceedings in the matter and that petition, as of this writing, remains pending. HCJ 4252/00 Interior Minister v. Brenner Kadish (pending).

n105 Fam (TA) 49/97 Anon. v. Att'y Gen. [1999] (not published).

n106 Fam (TA) 10/99 Anon. v. Att'y Gen. [2001] IsrDC 2000(1) 831.

n107 The Israeli Supreme Court usually sits on cases in three-judge panels. The Chief Justice, however, may direct the use of an expanded panel in cases he or she deems appropriate--typically, those raising complex or disputed questions.

n108 CA 10280/01 *Yaros-Hakak,* IsrSC 59(5) 64 at § 36 (Barak, C.J., opinion).

n109 Fam (TA) 48/97 Yaros-Hakak v. Att'y Gen. [1999] (not published).

n110 Adoption Law § 3 (1981) ("Adoption is limited to a man and his wife acting together.").

n111 *Id.* § 3(1)-(2) ("The court may grant an adoption decree to a single adopting parent if the adoptee's parents are deceased and the adopter is a relative of the adoptee and unmarried.").

n112 Where the court is satisfied "that doing so will be for the best interests of the child, it is authorized, in special circumstances and for reasons noted in its decision, to depart" from, among other things, the conditions of "death of the adoptee's parents and family relationship with the adoptee under § 3(2)." *Id.* § 25(2).

n113 The court noted that the comparison to be made was between a situation in which the child was living in circumstances of dual motherhood without an adoption decree and one in which he was living in such circumstances with the partner's motherhood officially recognized. CA 10280/01 *Yaros-Hakak,* IsrSC 59(5) 64 at § 17 (Barak, C.J., opinion).

n114 The appropriateness of adoption as a solution in the case before us, given both the differences and the similarities, will be examined below. *See infra* Part III.B.1.

n115 It is desirable, though not necessary, that the resolution be grounded in primary legislation.

n116 The premise of this article is that setting a relatively firm legal rule is valuable in itself; the analysis is devoted to clarifying what rule would be best. Clearly, once a uniform rule is set, even one allowing for certain exceptions, situations will arise in which the result dictated by the rule would be suboptimal. This is the price to be paid for formulating a set legal rule: the benefits of simplified decisionmaking in light of a general rule may harm one party or another in a specific case. The goal is to propose a rule (with some exceptions) that will produce the best result in the greatest number of cases.

n117 One can, for example, readily envision the potential conflict between a surviving partner, who is the child's genetic and psychological mother though not legally recognized as such, and the child's grandparents, who may want to take over the maternal role of their deceased daughter and either adopt the child or become legal guardians.

n118 *See* Schiff, *supra* note 43, at 277-80.

n119 *See* Katharine Bartlett, *Re-Expressing Parenthood,* 98 YALE L.J. 293 *passim* (1988); Matthew M. Kavanagh, *Rewriting the Legal Family: Beyond Exclusivity to a Care-Based Standard,* 16 YALE J.L. & FEMINISM 83 *passim* (2004).

n120 *See also* Barbara B. Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights,* 14 CARDOZO L. REV. 1747 *passim* (1993).

n121 On the importance of the family, see Ruth Handa Anshen, *The Family in Transition, in* THE FAMILY: ITS FUNCTION AND DESTINY 3 (1949); JAMES GARBARINO, CHILDREN & FAMILIES IN THE SOCIAL ENVIRONMENT 64-65 (1982); Mary Midgley & Judith Hughes, *Are Families Out of Date?, in* FEMINISM AND FAMILIES 55 (Hilde L. Nelson ed. 1997); Jason Mazzone, *Towards a Social Capital Theory of Law: Lessons from Collaborative Reproduction,* 39 SANTA CLARA L. REV. 1 *passim* (1998).

n122 It matters not in this regard whether the donation was made anonymously (as is the practice in Israel) or identifiably (which affords the offspring the possibility of acquiring information about the donor once they are adults).

n123 *See infra* Part IV.

n124 On the importance of family stability and family ties for children, see JOSEPH GOLDSTEIN, ALBERT J. SOLNIT, SONJA GOLDSTEIN & ANNA FREUD, THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE 19-20 (1996).

n125 For studies showing the quality of same-sex families and the development and welfare of children cared for within them, see sources cited *infra* note 133.

n126 Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage,* 113 HARV. L. REV. 835, 902-03, 906-07 (2000).

n127 Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children,* 1997 U. ILL. L. REV. 833, 857-60 (1997).

n128 DAVID POPENOE, LIFE WITHOUT FATHER: COMPELLING NEW EVIDENCE THAT FATHERHOOD AND MARRIAGE ARE INDISPENSABLE FOR THE GOOD OF CHILDREN AND SOCIETY 11-12, 37, 56-57, 77 (1996); A. Dean Byrd, *Gender Complementarity and Child-rearing: Where Tradition and Science Agree,* 6 J.L. & FAM. STUD. 213 *passim* (2004).

n129 Wardle, *supra* note 127, at 852-57.

n130 *Id.* at 855-56.

n131 *Id.* at 862-63.

n132 Studies have found that children raised in families headed by a lesbian woman (or homosexual man), including families headed by a same-sex couple, attain the same developmental level and enjoy the same degree of well-being as children raised in families headed by heterosexual couples. *See, e.g.,* Susan Golombok, *New Families, Old Values: Considerations Regarding the Welfare of the Child,* 13 HUMAN REPRODUCTION 2342, 2345 (1998); James G. Pawelski et al., *The Effects of Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-being of Children,* 118 PEDIATRICS 349, 349 (2006), *available at* http://pediatrics.aappublications.org/cgi/content/full/118/1/349; Michael Wald, *supra* note 6, at 395-400; *see also* Louise B. Silverstein & Carl F. Auerbach, *Deconstructing the Essential Father,* 54(6) AM. PSYCHOLOGIST 397 (1999) (recognizing the importance of the father but finding that children can flourish in families that lack a father).

n133 *See* Zafran, *supra* note 80, at 256.

n134 Lisa L. Behm, *Legal, Moral and International Perspective on Surrogate Motherhood: The Call for a Uniform Regulatory Scheme in the United States,* 2 DEPAUL J. HEALTH CARE L. 557, 590 (1999).

n135 On the importance of the family, see *supra* note 122.

n136 Anne Reichman Schiff, *Frustrated Intentions and Binding Biology: Seeking Aid in the Law,* 44 DUKE L.J. 524, 568 (1994).

n137 Michael L. Jackson, *Fatherhood and the Law: Reproductive Rights and Responsibilities of Men,* 9 TEX. J. WOMEN & L. 53, 64-65 (1999).

n138 It might be argued that the forgoing range of interests could be adequately protected by relying on the mechanisms of anonymity to avoid unwanted paternity claims, and that there is no need to legislate severance of the donor's paternal tie to the offspring. Two replies to that argument can be offered. First, the existing arrangements (of anonymity) are not codified in a statute and are therefore subject to judicial intervention. Accordingly, they do not provide adequate protection to the donor and the other parties. Second, the harm caused by the existing arrangement, which impairs the rights of offspring to ascertain their origins, tilts the scales against it and requires a regime that would make it possible to end anonymity. In those circumstances, the only choice is to ensure by law that revealing his identity will entail no consequences with respect to parenthood. Ruth Zafran, *"Secrets and Lies": The Right of AID Offspring to Seek Out their Biological Fathers,* 35 MISHPATIM 519, 568 (2005) (Hebrew).

n139 Although this article does not deal with the question of authorizing such a birth or with the circumstances in which such authorization might be granted, it may be noted that for purposes of subsequently recognizing both women as joint mothers, their intention should be expressed in writing at the time of the fertilization. A jointly signed document indicating their desire for joint parenthood and their awareness of what such joint parenthood entails will di-

minish future evidentiary difficulties. Arrangements such as these are already in place with respect to artificial insemination. *See supra* note 32.

n140 *See supra* Part I.B.2.

n141 *See supra* Part I.C.2.

n142 As mentioned earlier, the Surrogacy Law can be understood as not precluding the recognition of the maternity of the intended (genetic) mother, in tandem with the maternity of the gestational mother. *See supra* note 80 and accompanying text.

n143 *See supra* notes 118-121.

n144 Recognizing the gestational mother's maternity does not preclude the recognition of the other partner as a mother.

n145 In a different context *see* Kavanagh, *supra* note 119, at 117-31.

n146 On the desirable rule with regard to routine egg donation (when the gestational mother seeks exclusive maternal status, with or without the paternity of her male partner but certainly without involvement of an additional mother), see Malina Coleman, *Gestation, Intent, and the Seed: Defining Motherhood in the Era of Assisted Human Reproduction,* 17 CARDOZO L. REV. 497 (1996); Schiff, *supra* note 43.

n147 Kavanagh, *supra* note 119, at 87-91; Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families,* 78 GEO. L.J. 459, 468 (1990); Sanja Zgonjanin, *What Does It Take To Be A (Lesbian) Parent? On Intent and Genetics,* 16 HASTINGS WOMEN'S L.J. 251, 255 (2005).

n148 Even today, this desire is embodied in the preference of the closed model of adoption in the Israeli and other legal systems. *See supra* text accompanying notes 94-96. *See generally*

E. WAYNE CARP, FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION (1998); JUDITH S. MODELL, A SEALED AND SECRET KINSHIP: THE CULTURE OF POLICIES AND PRACTICES IN AMERICAN ADOPTION (2002).

n149 On the importance of family, see *supra* note 121.

n150 *Cf.* Kavanagh, *supra* note 119, at 117-31.

n151 For support of the same result on the basis of a range of rationales and arguments, see Ilana Hurwitz, *Collaborative Reproduction: Finding the Child in the Maze of Legal Motherhood,* 33 CONN. L. REV. 127 (2000); Melanie B. Jacobs, *Applying Intent-Based Parentage Principles to Nonlegal Lesbian Coparents,* 25 N. ILL. U. L. REV. 433 (2005); Ryiah Lilith, *The G.I.F.T. of Two Biological and Legal Mothers,* 9 AM. U.J. GENDER SOC. POL'Y & L. 207 (2001); New, *supra* note 3; Rosato, *supra* note 3.

n152 *See infra* Part II.D.

n153 Comparative law is standard practice in Israel, including in matters of family law. *See, e.g.,* HCJ 5587/93 Nahmani v. Nahmani, *available at* http://elyon1.court.gov.il/Files_ENG/95/010/024/z01/95024010.z01.htm; HCJ 721/94 *EL-AL Israel Airlines Ltd.,* IsrSC 48(5).

n154 On the religious and cultural aspects of the "right to be a parent" in the Israeli-Jewish context see Janie Chen, *The Right to Her Embryos: An Analysis of* Nahmani v. Nahmani *and its Impact on Israeli In Vitro Fertilization Law,* 7 CARDOZO J. INT'L & COMP. L. 325, 352-58 (1999); Laufer-Ukeles, *supra* note 10, at 120-22; Miryam Z. Wahrman, *Fruit of the Womb: Artificial Reproductive Technologies & Jewish Law,* 9 J. GENDER RACE & JUST. 109, 109 (2005); Ellen Waldman, *Cultural Priorities Revealed: The Development and Regulation of Assisted Reproduction in the United States and Israel,* 16 HEALTH MATRIX 65, 70-75 (2006).

n155 *See* Mary Lynne Birck, *Modern Reproductive Technology and Motherhood: The Search for Common Ground and the Recognition of Difference*, 62 U. CIN. L. REV. 1623, 1627-29 (1994); John A. Robertson, *Procreative Liberty and Harm to Offspring in Assisted Reproduction*, 30 AM. J.L. & MED. 7, 19-21 (2004); Robertson, *supra* note 6, at 326-333.

n156 *See* Birck, *supra* note 155, at 1637-42; Robertson, *supra* note 6, at 333-35.

n157 *See infra* notes 158, 160, 162.

n158 Civil Rehearing 7015/94 Att'y Gen. v. Anon. [1995] IsrSC 50(1) 48, 102.

n159 On Israel's Basic Laws, see Aharon Barak, *Human Rights in Israel*, 39 ISR. L. REV. 12 (2003).

n160 CA 3009/02 Anon. v. Anon. [2002] IsrSC 56(4) 872, 894.

n161 Basic Law: Human Dignity and Liberty, 1992, S.H. 150.

n162 CA 377/05 Anon. v. Biological Parents [2005] (not published), § 52 (Procaccia, J., opinion).

n163 United Nations Convention on the Rights of the Child, Sept. 2, 1990, 28 I.L.M. 1448, 1460 §§ 7, 8, 9.

n164 If the child's right to have parents implies the right to state recognition of the parental caregiver as parent, then legal recognition of the genetic mother might depend on her performing (or potentially performing) the parental role. If, however, the right to have parents encompasses, not only the right to receive parental care but also the right to establish identity, then the child may assert the right to have the genetic mother recognized as a parent due to the unique tie they share. For an interesting interpretation of the relevant rights, see James G.

Dwyer, *A Taxonomy of Children's Existing Rights in State Decision Making About Their Relationships,* 11 WM. & MARY BILL RTS. J. 845 (2003); Ya'ir Ronen, *Redefining the Child's Right to Identity,* 18 INT'L J.L. POL'Y & FAM. 147 (2004).

n165 CA 7155/96 A. v. Att'y Gen. [1997] P10, *available at* http://elyon1.court.gov.il/files_eng/96/550/071/n01/96071550.n01.htm. The case dealt with a request to recognize the adoption of an adult. The Adoption Law (§ 2) allows for adoptions of minors, and the court was called upon to interpret that clause so as not to preclude the adoption of adults when such an adoption is central to the identity of the child and the parents. Adoption Law § 2 (1981).

n166 *See* HCJ 5587/93, *Nahmani;* HCJ 721/94, *EL-AL Israel Airlines Ltd.,* IsrSC 48(5).

n167 Evelyne Shuster, *The Posthumous Gift of Life: The World According to Kane,* 15 J. CONTEMP. HEALTH L. & POL'Y 401, 419 (1999).

n168 117 P.3d 673 (Cal. 2005).

n169 It might be argued that the status of the women as domestic partners, which affords a status analogous to that of marriage, has significance with respect to the determination of parenthood. The existence of a marriage (or other analogous institution) may create a presumption of parenthood and obviate consideration of the parties' intentions or the nature of their relationships at the time of the birth. But that does not mean that the absence of marriage or its equivalent bars, *a priori,* recognition of relationships that have formed among parents and children. Either way, when the legal system does not allow for full recognition of same-sex couples (as is the case in Israel), the absence of recognition should not have implications for parental relations.

n170 *K.M.,* 117 P.3d at 682.

n171 *Id.* at 675-76.

n172 *Id.* at 676.

n173 *Id.* at 678.

n174 *Id.* at. 681.

n175 *Id.* at 682.

n176 The literature discusses these cases extensively. *See* Olga V. Kotlyarevskaya & Sara B. Poster, *Separation Anxiety Among California Courts: Addressing the Confusion over Same-Sex Partners' Parentage Claims,* 10 U.C. DAVIS J. JUV. L. & POL'Y 153 (2006); Micah Nilsson, *You Can't Force Her to be a Second Mom:* K.M. v. E.G., 10 U.C. DAVIS J. JUV. L. & POL'Y 479 (2006); Nicole L. Parness, *Forcing a Square into a Circle: Why are Courts Straining to Apply the Uniform Parentage Act to Gay Couples and Their Children?,* 27 WHITTIER L. REV. 893 (2006); Richmond, *supra* note 3, at 127-28; Jenny Wald, *Legitimate Parents: Construing California's Uniform Parentage Act to Protect Children Born into Non-traditional Families,* 6 J. CENTER FOR FAM., CHILD. & CTS. 139 (2005), *available at* http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/10_Wald.pdf; Emily Zapotocny, *My Two Moms: California's Supreme Court Decision in* K.M. v. E.G. *and Why Gay Marriage Offers the Best Protection for Same-Sex Families,* 21 WIS. WOMEN'S L.J. 111 (2006).

n177 Elisa B. v. Superior Court of El Dorado County, 117 P.3d 660, 670 (Cal. 2005).

n178 117 P.3d 690 (Cal. 2005).

n179 The statement said that Lisa (the mother's partner) "'is the legal second mother/parent' of the unborn child." *Id.* at 692.

n180 *Id.* at 695.

n181 The status of the identified sperm donor was not at issue and was not decided in that case.

n182 Uniform Parentage Act (UPA), CAL. FAM. CODE § 7600 et seq. (West, WESTLAW through 2007 Reg. Sess, Ch. 170).

n183 It is important to note that these decisions were issued without regard to the statutory amendment that, since the beginning of 2005, has provided couples in a registered same-sex domestic partnerships the same status as married couples. That status pertains, among other things, to relationships with a partner's children. CAL FAM. CODE § 297.5(d) (West, WESTLAW through 2007 Reg. Sess, Ch. 170).

n184 *See infra* note 204 and accompanying text.

n185 *See* Pinhas Shifman, *Involuntary Parenthood: Misrepresentation as to the Use of Contraceptives*, 4 INT'L J.L. & FAM. 279 *passim* (1990).

n186 The one-year period does not reflect a fully considered judgment of what the proper time should be; it is based on the standard fixed in the procedure mentioned below, see *infra* text accompanying note 195.

n187 Under Israeli law, the Supreme Court, sitting as the High Court of Justice, has original jurisdiction to hear petitions alleging that governmental agencies acted *ultra vires* or otherwise abused their discretion. *See* Basic Law: The Judiciary, 1984, S.H. 158, §15(c), (d), *available at* http://www.knesset.gov.il/laws/special/eng/basic8_eng.htm.

n188 CA 10280/01 *Yaros-Hakak,* IsrSC 59(5) 64; HCJ 1779/99 *Brenner Kadish,* IsrSC 58(2) 368.

n189 *See infra* note 216.

n190 *See* Population Registry Law §§ 6, 21; Regulations of the Population Registry (forms for birth and death notifications), 1972, KT 1267; Interior Ministry Procedure 2.2.0002, Procedure for registering birth and recognizing paternity in the case of an unmarried woman. These are available at http://www.pnim.gov.il/Apps/PubWebSite/publications.nsf/All/08B4B31E12953EA9422570B500382769/ILE/Publications.2.0002.pdf?OpenElement.

n191 Population Registry Law § 6.

n192 *Id.* § 21.

n193 Procedure 2.2.0007, Procedure for adding details with respect to the father of a minor residing in Israel and listed in the population registry, as updated 1 August 2005, *available at* http://www.pnim.gov.il/Apps/PubWebSite/publications.nsf/PrintDoc?OpenAgent&unid=47389FAE080DED78422570B500419F69.

n194 Population Registry Law § 22. In those circumstances, the parties would be required to petition a court to declare paternity. In ruling, the court would take account, among other things, of the best interests of the child and the concern about holding someone to be a *mamzer*. *See supra* note 13.

n195 As a practical matter, gender-neutral application of this rule might dictate an even more far-reaching result: it might allow for registration of the same-sex partner as an additional mother even where she lacks any genetic connection to the offspring. The voluntary registration of the father, as now practiced in Israel, does not require proof of a genetic tie to the child. However, it is clear that the current practice presumes the father's genetic paternity.

n196 *See supra* note 11 and accompanying text.

n197 *See* Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 *passim* (1984).

n198 The women's declaration before the registry official would have to deal with that aspect of the matter as well.

n199 *See generally* Adoption Law §§ 1-39 (1981).

n200 *See supra* Part I.D.

n201 Adoption Law § 16 (1981).

n202 *Id.* § 8.

n203 *Id.* § 13.

n204 *Id.* § 13(1)-13(8).

n205 *Id.* § 13(a)(1).

n206 *See supra* text accompanying notes 105-14.

n207 Section 6 of the Adoption Law fixes the trial period, while section 25 allows for exceptions from the duration of the period but not from the trial requirement itself. Adoption Law §§ 6, 25 (1981).

n208 Section 22 of the Adoption Law requires that prior to issuance of the decree, the court be presented with the report of the welfare agency evaluating the nature of the familial relationships. *Id.* § 22.

n209 Surrogacy Law, 1996, S.H. 176.

n210 *See supra* Part I.C.

n211 Surrogacy Law §§ 2-7.

n212 *Id.* § 11.

n213 *Id.* § 13.

n214 *Id.* § 14.

n215 *Id.* § 13.

n216 Family Courts Law § 1(4), 1995, S.H. 393.

n217 That result would be justified on the basis of the best interests of the child, in order to avoid having him declared a *mamzer* under *halakhah* or to preserve his relationship with someone he has long recognized as his father. *See also supra*, notes 13, 194.

n218 CA 548/78 Sharon v. Levy [1980] IsrSC 35(1) 736, 748-49.

n219 For example, one finds inconsistency in the decisions of first-instance Israeli courts related to requests to sustain familial agreements between members of same-sex couples.

n220 Capacity and Guardianship Law § 69, 1962, S.H. 120; Rules of Civil Procedure § 351a, 1984, KT 4685.

n221 *See, e.g., Kristine H.,* 117 P.3d 690. In *Kristine H.,* the court did not consider the father's status but noted that its decision to recognize two mothers (one of whom lacks any biological connection to the child) did not impair the father's rights.

n222 *See supra* Part I.B.

n223 Brenda Cossman, *Contesting Conservatisms, Family Feuds and the Privatization of Dependency*, 13 AM. U. J. GENDER SOC. POL'Y & L. 415, 441-58 (2005).

n224 In such situations, the child is often shared between two sets of parents, each comprising a biological parent and his or her new spouse acting as step-parent.

n225 On the situation in Israel, see Press Release, Central Bureau of Statistics, Mishpahot ve-Mishkei Ba'it be-Israel - Leket Netunim Likrat Yom ha-Mishpaha [Selected data for the Family Day, reporting data for 2005] (Feb. 13, 2007) (Hebrew), *available at* http://www.cbs.gov.il/hodaot2007n/11_07_021b.doc. On the situation elsewhere, see ELISABETH BECK-GERNSHEIM, REINVENTING THE FAMILY: IN SEARCH OF NEW LIFESTYLES (2002); STEPHANIE COONTZ, MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY OR HOW LOVE CONQUERED MARRIAGE 263-80 (2005); JANET L. DOLGIN, DEFINING THE FAMILY: LAW, TECHNOLOGY, AND REPRODUCTION IN AN UNEASY AGE (1997); MARY ANN MASON, ARLENE SKOLNICK & STEPHEN D. SUGARMAN eds., ALL OUR FAMILIES: NEW POLICIES FOR A NEW CENTURY 1-2 (1998).

n226 As an example of that mode of analysis, see Jill Handley Andersen, *The Functioning Father: A Unified Approach to Paternity Determination*, 30 J. FAM. L. 847 (1991); Marjorie M. Shultz, *Reproductive Technology and Intent-based Parenthood: An Opportunity for Gender Neutrality,* 1990 WIS. L. REV 297 (1990); Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage,* 53 HASTINGS L.J. 597, 639-48 (2002).

n227 *See* Garrison, *supra* note 126.