THE ESTABLISHMENT OF MATERNITY AND SURROGATE MOTHERHOOD IN JEWISH AND AMERICAN LAW

Author:Henter Leda-Andrea, Master Student
At "International and European Community Law "
Faculty of law,"Nicolae Titulescu "
University, Bucharest ,andreahenter @ yahoo. com

This Note analyzes surrogate motherhood under both legal systems , as well as the general rules for establishing maternal identity . In analyzing how Jewish law treats surrogate motherhood that Jewish law focuses on conception and implantation in establishing maternal identity .

The American law section summarizes the case law in this field and points out the analytic disharmony between the different court opinions .

The Note concludes that while Jewish law has maintained both analytically clear definition and consistent application of rules to establish maternity and paternity .

American law has not; instead it has chosen to focus on the individual equities of the parties before the court, thus sacrificing consistency for equity .

I. THE ESTABLISHMENT OF MATERNITY AND SURROGATE MOTHERHOOD.

A. Jewish Law.

According to Jewish Law, maternity, like paternity, is irrevocable established as belonging to the natural parent . It is beyond the power of a court of law to rearrange the parent-child relationship to create a parental relationship which mirrors the custodial one . Although it is true, that certain rabbinically created institutions associated with parenthood are transferred when custody is transferred, all biblically mandated duties, rights, obligations, and prohibitions of motherhood are uniquely the natural mother's and cannot diminished by the transfer of custody. *The first type* is that of the now famous Baby M. case . This occurs when a woman provides the ovum and her uterus to carry the fetus to term . The father provides his sperm .The result is a child conceived through artificial insemination . The father and his wife agree to raise the child as their own, and the mother agrees to waive her custody rights in favor of the sperm provider and his wife . The "surrogate" mother is the genetic mother as well as the person in whom ovulation, conception, pregnancy, and birth occur .

A second type of case involves the donation of an ovary to a woman whose ovaries are not functioning . In this case, the child conceived from such a donation is genetically related to the donor, but is the product of ovulation, conception, pregnancy, and birth from the surrogate mother . *A third case* occurs when a single egg is removed from the genetic mother and implanted in the surrogate mother . Conception then occurs in the surrogate mother, or more likely, in a test tube . Although ovulation occurs in the genetic mother, the surrogate mother again carries the child to term and gives birth to it . *A fourth type* of case is that of a fetal transplant . The genetic mother's ovum is naturally fertilized . The fetus then transferred into the surrogate mother's uterus . The surrogate mother carries the child to term . The child is genetically identical to its genetic mother .

According the Jewish law there is no doubt that in the *first type* case, where the mother is both the genetic and biological mother, she is also the legal mother and the sperm provider is the legal father . This situation is no different from an artificial insemination case; it is wrongly called "surrogate "case .The sperm donor's wife, if she was to raise the child, would have the status of adopted mother, with all of the attendant privileges and obligations .

The *remaining three cases* are far more difficult than the first one because the different aspects of motherhood have different criteria .

Although Jewish law does not automatically employ genetics to answer all question of lineage. This can be proven from three examples, each from different area of law .

The first example is from the laws of conversion . According to Jewish law, the role is that one who converts to Judaism loses all legal ties based upon her genetic relationships, and it is as if she were born anew . Accepting this rule, the *Talmud* acknowledges that according to biblical law, one who converts can marry his mother or sister, or her father or brother, assuming they also convert . The rabbis in the time of the *Talmud* prohibited these marriages only because they feared that people would mock Judaism by saying that converts join Judaism in order to engage in these previously prohibited relationships . The rabbis did not prohibit these relationships on the grounds that they involved sexual relations between genetically close relatives .

The second example of Jewish law's rejection of genetics is the dispute over whether genetic fatherhood has any legal status in animal husbandry law . A large number of decisions maintain that the law does not recognize any link, any connection at all between a male and its progeny . Even though the bible, when dealing with the prohibition against killing an animal and its child on the same day, says :"a male animal (*oto*) and its male child (*beno)* should not be slaughtered on the same day . Furthermore, the refusal to acknowledge the male lineage is true even if one knows with certain the paternity of the animal . A number of decisors disagree and maintain that Jewish law does not assign legal significance to fatherhood in animals .

The third example comes from the laws of *orla* . According to Jewish, it is not permissible to use the fruit growing on a newly planted fruit tree during the first three years of the tree's life . Although there is a considerable talmudic debate on the topic, all decisors agree that a graft from a tree which is six years old and not obligated in *orla*, onto another tree two years old and obligated in *orla*, legally makes the grafted branch part of the two year old tree .This is true even though the branches are still growing fruit of the old tree and genetically unrelated to the host .

Discussions of the last three types of host motherhood have generated a considerable amount of literature among the current periodidal of Jewish law . When the topic was first raised, one of the primary sources discussed was a *Midrash* . The *Midrash* was quoted by a biblical commentary *Targum Yonatan ben Uziel* on *"Genesis 29:22"*, where Dina, Jacob's eleventh child, was born, *Targum Yonatan* states that originally Dina was conceived in Rachel's womb, but God transferred her after conception to Leah's, so that Rachel could give birth to Joseph . Yet the Bible still unquestionably refers to Leah as Dina's mother and Rachel as Joseph's mother . This *Midrash* states that who gives birth to the child is the mother .

Although two other problems exist in reference to this particular *Midrash* : first it is written in the *Talmud* in a form which does not mention surrogate motherhood, which seems to indicate that the *Targum Yonatan's* version is not accurate . Furthermore, this text appears for the first time in the *Targum Yonatan*, whose authorship is unknown . As more scholarship is generated on the topic of surrogate motherhood, it is unlikely that this *Midrash* will be dispositive, or even significant, in the ultimate decision on the law .

A number of talmudic sources have been cited as relevant to the issue of surrogate motherhood . The *first* such piece is located in *Yevamot 97b* .

Twin brothers who were converts, or similarly, emancipated slaves, may neither participate in *chalitza* or a *levirate marriage* ; nor are they punishable for marrying their brother's wife . If, however, they were not conceived in holiness but were born into holiness they may neither participate in *chalitza* nor a *levirate marriage* and are guilty of a punishable offense if they marry they brother's wife .Rabbi *Rashi*, commented on the final words of this *talmudic* passage, states that the two brothers are prohibited from marrying each other's wives since they were born to the same Jewish mother and thus, are related to each other as half brothers, so they have a legally

recognized mother in common . It is critically important to realize that the law only recognizes the mother because she gave birth to these children; her genetic relationship with the children has been legally severed by her conversion – as is the case of any convert who, upon conversion, loses all previously established genetic relationships . Thus, it appears, that the *Talmud* legally recognizes "motherhood" as being established only because of parturition and birth . *Rashi* explains that these children are Jewish because "this woman is like any other Jewish woman who gives birth". The analogy between the *talmudic* passages dealing with conversion and those dealing with surrogate motherhood indicates that Jewish law determines motherhood based upon birth, at least when conception is legally insignificant, which in a surrogate motherhood case would be when conception occurs in a test tube .

An equally significant proof that birth dispositively determines motherhood can be deduced from a number of other text dealing with converts and conversion . Most commentators adopt the intuitive explanation that the child is Jewish because it is born from a Jewish because it is born from a Jewish mother .So the *Talmud* says that the birth is the key in establishing motherhood, actually the time when a child is born, in this way conception is not legally significant .

Rabbi *Nachmanides* understands this *talmudic* section in a different way . He claims that the child is only Jewish because, underwent an immersion when its mother was immersed . This immersion converted both the fetus and its mother .The Rabbi claims that this whole *talmudic* piece only follows the opinion that a fetus is never legally part of the mother .He advances the idea that; normally conversion requires first circumcision and then immersion in a *mikva* (ritual bath), claiming that if the order is inverted, the conversion is still valid .Here is the main point where he is contradicted . Many commentators disagree with this point of view and try to prove that an immersion before circumcision is not valid .

Rabbi *Chaim Ozer Grodzinski,* in his responsa, states that *Nachmanides* seems to be of the opinion that conception is the critical time – and birth only relates back to conception . Among the modern day commentators there is considerable disagreeement over whether or not the law is actually in accordance with *Nachmanides*

The law in fact, codified contrary to his position on the issue of establishing maternity . Furthermore the following commentators clearly disagree with *Nachmanides* position on the establishment of maternity : *Maimonides, Menachem ben Meir,* Rabbi *Asher ben Yechiel,* Rabbi *Shlomo ben Adret, Tosaphot,* Rabbi *Yom Tov Alashveli,* Rabbi *Yosef Habib,* and Rabbi *Aharon Halevi* . Accepting that the law is codified against *Nachmanides,* it appears that Jewish law focuses on birth, rather than genetic relationships.

One other source supports the position that conception, rather than birth, fixes motherhood . The *Talmud,* when discussing the law of first-born asks what the law is if one takes a fetus from one womb and places it in the womb of another . Which womb is excused from the law of first born? The *Talmud* answers that it does not know the answer to this question (*teku).* *Maimonides* explains the question as follows: if one removes a fetus from its mother's womb and places it in the womb of another, it is understood that the conception-mother is excused from having another first born; the question is, Is the mother that received that fetus also excused? Thus, according to the *Maimonides,* the person in which conception occurred is clearly the mother – at least when the fetus is removed within 40 days after conception, when its removal would excuse its mother according to the laws of first born .

Rabbi *Ezra Bick,* in a recent article in "*Techumin*", adds a most important rule to the host motherhood equation. He states that: a fertilized egg, once removed from the womb of its mother, is born and no reimplantation in another womb can change who its mother is – since motherhood is fixed at the time of birth and the baby was born upon removal from the womb . According to

this analysis, when ovulation, conception, and birth (removal from the womb) all occur in one person, that one person is the mother and reimplantation or rebirth in another does not create a new mother . Thus, according to Rabbi *Bick's* analysis, a woman who after conception transfers her fetus to another to carry the fetus to term remains the mother of the resulting child, notwithstanding the fact that the child was carried in another womb .

The fetus, in order to be considered "born" must be removed from its human mother after at least forty days following conception . Before day forty it is considered "mere water" and is not even considered a fetus .This is a very important rule, even if one did not accept the forty day rule as applying in this context, Rabbi *Bick's* rule would still not apply until implantation (day 7) at the very earliest .

Thus , three rules can be deduced to determine the mother in surrogate or host motherhood cases :

1. If conception occurs in a woman's body, removal of the fetus after implantation (and according to most authorities, after 40 days) does not change the identity of the mother according to Jewish law . The mother would be fixed at the time of removal from the womb and would be the woman in whom conception occurred .
2. Children conceived in a test tube and implanted in a host carrier are the legal children of the woman who gave birth to them since parturition and birth occurred in that woman, and conception is not legally significant since it occurred in no woman's body .
3. Children conceived in a woman who had an ovarian transplant are the legal children of the woman who bore them .

B. American Law .

Although surrogate motherhood is a topic which has generated much interest in the legal, as well as non-legal literature, only *five* court opinions have been issued evaluating the appropriate legal response to the institution of surrogate motherhood . Besides the now famous *Baby M.* case in *New Jersey* , three other courts have issued published opinions concerning surrogate motherhood. These *five* opinions contain widely divergent views on the legal issues relating to surrogate motherhood in the United States .

The first opinion, Doe v. Kelley , issued in 1981, discusses a state's right to regulate monetary payments in surrogate motherhood contracts . In this case, a married couple contracted with an unmarried woman to conceive through artificial insemination of the man's sperm . The woman contractually promised that she would consent to the child's adoption by the father's wife and that she would waive all custody rights in return for the payment of $ 5,000 and expenses .

The issue was whether this type of contract violated the Michigan statute prohibiting the payment of money in connection with adoption or related procedures .

The court initially acknowledged that the decision to bear or beget children has been held to be a fundamental right, protected under the United States Constitution and cited *Maher v. Roel* in support .The statute in question, does not directly prohibit (plaintiffs) from having the child as planned . It acts instead to preclude plaintiffs from paying consideration in conjunction with their use of the state's adoption procedures .

Thus, the court ruled that while it was constitutionally permissible for a woman to be surrogate mother and artificially inseminated by the sperm of a person she is not married to, it is nonetheless, well within a state's powers to prohibit any of the parties from receiving financial benefit from such conduct . The court further stated that the adoption laws of *Michigan* explicitly prohibit deriving an economic benefit from the transfer or waiver of custody rights . Thus, *Michigan law* prohibits payment as an inducement to waive custody rights in a surrogate motherhood contract .

The second case, analyzing surrogate motherhood is a *Kentucky case* . This case, " Surrogate Parenting Associates", *Inc. v. Kentucky Supreme Court* in a procedurally interesting way . The Attorney General of Kentucky challenged the corporate charter of " Surrogate Parenting Associations Inc. ", arguing that the organization was incorporated for illegal purposes – the promotion of surrogate motherhood for pay . He requested that the court revoke the corporate charter of the organization . In response, the court evaluated surrogate motherhood from a number of different perspectives . The court primarily focused on whether surrogate motherhood violated the *Kentucky adoption statutes,* prohibiting the payment of money as an inducement to a transfer of custody .

The court stated that it believed that the *Kentucky* legislature had not intended to prohibit commercial payment in surrogate motherhood contracts in the same manner that they prohibited commercial transactions in adoption . The court did note that various protections of the adoption law do apply to surrogate motherhood; for example the surrogate mother is free to change her mind after she signs the contract and refuses to surrender the baby . The *Kentucky Supreme Court* did note that the legislature had the power to regulate surrogate motherhood if it so wished.

Two judges dissented from the opinion . *The first dissent,* by *Justice Vance,* focused on the technical statutory interpretation of the *Kentucky adoption statutes* . It attempted to demonstrate that the *Kentucky legislature* intended to regulate surrogate motherhood when it regulated adoption . *The second,* by *Justice Wintersheimer,* was more policy oriented, claiming that it was repugnant to the morals of the state to allow payment to a woman in return for the waiver of her custody rights .He stated that: the procedure endorsed by the majority is nothing more than a commercial transaction in which a surrogate mother receives money in exchange for terminating her natural and biological rights in the child .

He further stated that although he is sympathetic to the plight of infertile couples, it seems no worse than that of couples who wish to adopt . The policy against allowing payment for adoption of children should also prohibit payment to a surrogate mother in return for her transfer of custody rights .

The third case to consider the issue of surrogate motherhood is the *1986 New-York case,* in the matter of adoption of a Baby Girl *L .J* . This case involved a child born to a woman artificially inseminated by a donor who wished to have custody of the child and have his spouse adopt the child . The court discussed two distinct issues . The first concerned the appropriateness of granting custody to the biological father and his wife, rather than the surrogate mother . The second concerned the payment of fees in such a situation . The court stated that, when deciding issues of custody, it should be based solely on the best interests of the child . The court concluded that on the facts of the case, which were not described, it was appropriate to grant complete custody to the biological father and his wife rather than the surrogate mother. It granted this adoption without any visitation rights to the surrogate mother. The court noted that it would be improper to decide the custody issue here in any manner other than the "best interest of the child", in order to discourage future surrogate motherhood transactions . Such an action penalizes the one child in front of the court for the benefit of society as a whole . The surrogate court thought the issue was beyond its jurisdiction and that it was statutorily limited to a best interest of the child analysis . The court noted that it is also illegal to transfer or accept compensation with the placing of a child for adoption or to assist, for a fee, a parent, relative or guardian of a child arranging for adoption . After reviewing the *Michigan* and *Kentucky cases* discussed above, the court stated that the *New-York* statute most closely resembled the *Kentucky* statute . The court

agreed with the *Kentucky Supreme Court* that the legislature did not intend to regulate surrogate motherhood in the same manner that it regulated adoption .

The *New-York court* ruled that surrogate motherhood contracts are enforceable in New-York to the extant that they provide for monetary payment to one of the parties .

Recently there were two *New Jersey opinions* of In re *Baby M. case* . In this case, a father and his wife brought suit to enforce the provisions of the surrogate parenting agreement between the parties which mandated that the surrogate mother transfer custody of the resulting child she bore- an act which the mother refused to do . Plaintiffs sought to compel the surrender of the infant, to restrain any interference with their custody, and to terminate the surrogate mother's parental rights. *The New Jersey Superior Court,* in an extremely long, factually detailed opinion, decided the case on grounds radically different from the previous three opinions . It stated that the adoption laws have no bearing on the issue of surrogate motherhood, because the *New Jersey* legislature did not intend to regulate surrogate motherhood . The court maintained that the only legally significant item in the dispute was the contract signed between the two parties which it found to be a valid contract .

The court noted that while there was a constitutional right to conceive, both through coital and non-coital means, contracts between private parties limiting such rights are constitutional .

The surrogate and parenting agreement is a valid and enforceable contract pursuant to the laws of *New Jersey* . The rights of the parties to contract are constitutionally protected under the *14th Amendment of the United States Constitution* . This court further finds that *Mrs. Whithead* has breached her contract in two ways : 1). By failing to surrender to *Mr. Stern* the child born to her and *Mr. Stern* the child born to her and 2). By failing to renounce her parental rights to the child .

On appeal, the *New Jersey Supreme Court,* grounded that the principles of adoption and custody, should be applied in surrogacy cases . The *New Jersey Supreme Court* accepted the reasoning of the *Michigan* appellate court case discussed above .

Accepting that the termination of the natural mother's parental rights was improper, the court stated that *Mrs. Stern's* adoption of *Baby M.* was nullity because: the surrogancy contract creates, it is based upon, principles that are directly contrary to the objectives of our laws . It guarantees the separation of a child from its mother; it looks to adoption regardless of suitability; it totally ignores the child; it takes the child from the mother regardless of her wishes and her maternal fitness; and it does all of this, it accomplishes all of its goals, through the use of money .

The court then reinstated *Mrs. Whitehead's* parental rights . The *New Jersey Supreme Court* opted for the adoption/custody model of surrogate motherhood- totally rejecting the model created by the lower court . In *New Jersey,* surrogacy contracts are not enforceable, and contracts for payment are arguably criminal . The court specifically approved of voluntary surrogacy arrangements with no financial remuneration .

Thus, *three different types of analysis* have been used in surrogate motherhood cases in the United States . The *first type of analyses* maintains that adoption legislation in the appropriate model for evaluating surrogacy agreements and that in the absence of specific legislation regulating surrogate motherhood, the courts should apply adoption law as needed . The *second type of analyses* denies this, rather it maintains that only key concepts should be incorporated from adoption in order to prevent manifest injustice . The *third type of analyses* is the *Superior Court* opinion in *Baby M. case* when the court decided surrogate motherhood issues based on contract law rules and denied that adoption law has any validity in the rules of surrogate motherhood .

C. Comparison between both legal systems regarding surrogate motherhood .

American Law is confronting the *first type of surrogacy case* – where the surrogate mother is also the genetic mother . The other cases much difficult where the identity of the natural mother is in doubt, have not even been taken into consideration . The main problem in this issue is whether surrogacy is similar or just analogous to adoption .

Jewish Law on the other hand, is confronted with only a single issue – who is the natural parent . This law focuses on two discrete time periods : conception and birth . If conception occurs in a woman, even if the fetus is implanted in another, the place of conception establishes motherhood . If conception occurs in a test tube, Jewish law focuses on birth as estabblishing motherhood . Once parenthood is established, it cannot be changed by a court of law .

II. AMERICAN JURISPRUDENCE REGARDING SURROGATE MOTHERHOOD .

A. Saddie has two " biological " mothers .

Judge declares both woman of a same –sex couple equal parents . *California Superior Court Judge Michael Ullman* declared that two women, thanks to in - vitro fertilization (IVF), are both "natural " parents to their new born child , *Saddie Karpay-Brody* . The $ 10,000 IVF procedure allowed *Lisha Karpay-Brody's* egg, fertilized with the sperm of a donor who yielded all parental rights, to be implanted into *Ellen Karpay-Brody* , who carried the child to term . One of the women has a genetic connection to the child and the other has a gestational one . The couple is registered in a domestic partnership in California . The *Superior Court's* decision gives full legal and biological rights over the child equally to both women, including child support, inheritance rights, hospital visitation and access to health insurance .In a word this couple is considered being a " *family*". California law AB. 205, which *Gov. Gray Davis* signed into law shortly before he was ousted in the recent recall election, came into effect in January 2005 . It will allow rights to homosexual couples, clarifying ambiguities in previous laws concerning homosexual adoption and custody rights .

B. Interior Ministry must register two mothers for one child .

May 30 , 2000 .

The *Supreme Court* was required by the *Interior Ministry* to register two women, who are parents in a lesbian relationship, as the mothers of one child . The two women *Ruti* and *Nicole Berner-Kadish* , have lived together for seven years and hold American and Israeli citizenship, they were married in a Conservative service in California . *Ruti* bore a son after undergoing artificial insemination, following a joint decision made by the couple. *Nicole* adopted the boy in a California court, both women are registered as his parents on the child's birth certificate .In this case only one women was biologically connected to the child, the other women wasn't .

C. Race and advanced reproductive technology mistakes .

This is a case of a women who received embryos accidentally in a *Manhattan fertility clinic* . The instance discussed upon the *Fasano/Rogers case* , involves four parents, trying to determinate who would deemed to be the legal parents of one child . The two couple went to a fertility clinic and two children were born; the Roger's embryos were implanted in Donna Fasano, along with the Fasano's embryos, without the permission of the Rogerses or the Fasanos. The facts challenge ideas of parenthood in general; specifically what it means to be the "mother " of a child that genetically is not connected with the woman who gave birth to that child .and the issue of race in determining motherhood .Donna Fasano on December 29, 1998, gave birth to two male infants, of two different races . One of the child is black, the genetic child of the Rogers. In April 1999, when *Akeil*, the little black boy was three months old, DNA testing confirmed that Akeil was the genetic child of the Rogers . During weeks of negotiating the custody of the child, he remained with the Fasanos . The issue between the two arguing sets of parents were that the Fasanos wanted to maintain a contact with the child guaranteed in writing,

the Rogers would have to agree upon this .Signed on April 29, 1999, when Akeil was four months old, the agreement between the Rogerses and the Fasanos contains ; regulating visiting of the child .

After long deliberations at the *New-York Supreme Court (Appeals Court)* and the *Court of Appeals (Supreme Court)* on May 8, 2001 the court terminated the visitation of the Fasanos with Akeil, officially ending his relationship with the Fasanos . Akeil's custody was transferred from the Fasanos to the Rogerses, to the genetic parents . Mrs. Fasano essentially was a surrogate mother to Akeil , giving up voluntarily the custody of Akeil .

III. CONCLUZIONS .

Being a surrogate mother is a hard decision , especially when it comes the time to waive the child . In most of the cases these women are treated and considered "vessels for making babies".

The reality is rough because during the pregnancy is establishing a bound , a strong connection between the surrogate mother and the child who is carried in the women's womb. That is why in many cases there were serious disputes upon the fact that after the child's birth these women did not want to renounce the child, even when there were money involved or contracts upon that . Often in the custody cases is used the " best interests of the child ", but in many cases this issue is not taken in account . Adults sometimes are conducted by they selfish interests and needs . It is also rough for the genetic parents , because in many cases they had to agree their child being raised by a "stranger" genetically not connected with the child .The *surrogate motherhood* raises many unresolved questions so as : who is the "real" mother of the child, if the surrogate mother should be given certain "rights" upon the carried child, or the existence of contracts with payment in trade of the pregnancy .

My final opinion about this issue on what I'm certain is that a child with two mothers is not acceptable, it is a psychological harm. A child can have only one mother to raise and take care of him/her . It is hard to decide upon the equity, the legality and the morality of the surrogate motherhood especially when money are involved in exchange for carrying the pregnancy out . In the future we will probably assist at further developments of this issue .

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