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SURROGACY IN ISRAEL: A Model of Comprehensive Regulation of New Technologies

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Fifteen percent of the population of the United States (and of Israel) are infertile. Unlike earlier generations who had little choice but to live with this limitation, the accelerating development of new reproductive technologies has provided an ever increasing number of options for these couples, options unthinkable even two decades ago. (Baby Louise, the first test tube baby has just turned 27.[1]) These new technologies came onto the scene precisely as traditional principles of family law have been transformed by the women's movement (enhanced by another technological fix—contraception) and the gay rights movement. The result is a high level of uncertainty as to the legal status of the various parties to the new arrangements, particularly those who have moved ahead of the law by participating in a surrogate mother arrangement.

The institutional response to this situation varies widely from essentially no regulation (California) to complete prohibition to partial or piecemeal regulation. The only jurisdiction that has legalized surrogacy, while regulating it under a complex and comprehensive regulatory scheme, is Israel. The genesis of this scheme, in the experiences and ideologies of the individuals responsible for this Surrogate Motherhood Agreements Law[2], is the subject of Professor D. Kelly Weisberg's new book, *The Birth of Surrogacy in Israel*.[3]

This chronicle is valuable on several levels. First it provided a sort of pilot program of how a complex regulatory scheme can be effective at managing this controversial, but often deeply desired practice. Secondly, it illustrated the impacts of technology on the core structures of society. Finally, and perhaps most significantly, it exemplifies a deep legal history of how individuals have lasting effects on legal development.

The book, which was researched while Professor Weisberg was a Visiting Professor of Law at Hebrew University, begins with an in-depth description of the first two cases of surrogacy which occurred immediately after the

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1 *Test Tube Baby Comes of Age*, BBC NEWS, July 25, 1999, http://news.bbc.co.uk/2/hi/uk_news/403116.stm.

2 Surrogate Motherhood Agreements (Approval of Agreement and Status of Newborn) Law 5756-1996, 1996, S.H. 1577, 176 (unofficial English translation available from Aryeh Greenfield Publications, P.O. Box 7422, Haifa, Israel 31070).

3 D. KELLY WEISBERG, THE BIRTH OF SURROGACY IN ISRAEL (2005).

passage of the law. In each case Weisberg provided a vivid journalistic portrait of the parties, both the intended parents and the surrogates and their partners. The contrasting experiences of these two sets of participants led to several changes in the regulations under the statute. The first contract between the infertile couple,[4] Rachel and Ben and Sara, their surrogate, resulted in healthy twins for the intended parents and a looming feeling of exploitation on the part of the surrogate. The surrogate's perception of being ill-used was a result of the intended parents' efforts to control all aspects of her life during the pregnancy and left her to feel as if her role was that of "a paid domestic".[5]

By contrast, in the second case 40 year old surrogate Hanna sustained a warm relationship with the intended parents, Naomi and Dan, which continued long after the birth. In fact, she indicated a willingness to carry a second child for them. The very particular experiences of these two families acted as a sort of pilot for implementing regulations under Israel's newly passed statutes. After these two cases the regulations were fine tuned to standardize the contract (but not the level of compensation), to provide additional personal privacy for the parties and to limit both the age of the surrogate (between ages 22 and 40)[6] and the number of times she can be a surrogate (no more than twice, both for the same family).

Having illustrated the real world impact of the legislation, Weisberg then explores its genesis. In many ways, the legal treatment of surrogacy throughout the world developed in reaction to the notorious case of *In re Baby M.*[7] In that case, the surrogate mother (who was the source of the ovum as well as the carrier of the baby), refused to fulfill her contract with the intended father (source of the sperm) by refusing to relinquish the baby to him. His wife, having no genetic relationship to the child, had no legal connection to the transaction. Ultimately the intended father sued for custody of the child; after months of unrelenting publicity the New Jersey Supreme Court ruled that the surrogacy contract, arranged by a commercial surrogacy center, was invalid because its enforcement constituted "baby selling". The Court granted the father custody based on the same standards as any other custody dispute—the best interests of the child. This spectacle, together with the public reaction to baby selling, generated an immediate response worldwide.[8] Australia, Britain, France, Germany *and* Israel banned commercial surrogacy.[9]

4 The names of individuals who were not part of publicized legal cases were changed to preserve their privacy.

5 WEISBERG, *supra* note 3, at 29.

6 Ultimately, in the interests of the child, the ages of the intended parents were limited as well, in that the intended father could be no older than 59 and the intended mother no older than 48.

7 *In re* Baby M, 537 A.2d 1227 (N.J. 1988).

8 Immediately thereafter, 27 state legislatures considered bills to restrict or outlaw surrogacy. These were often prefaced by comments that one of the purposes of the legislation was to "avoid a Baby M case". WEISBERG, *supra* note 3, at 38.

9 Britain has since recognized private surrogacy arrangements but still bans payment

In Israel the ban was accomplished by a series of three regulations issued by the Health Ministry, which, without ever mentioning the term "surrogacy", had the practical effect of banning it. In short order, many of the numerous infertile couples in Israel began circumventing the law by traveling to the United States (particularly California), where surrogacy centers operated. While effective, these pilgrimages were not without problems. The most obvious is the expense of travel, as well as of the surrogacy arrangements themselves, limiting the procedure to wealthier couples. The second, which continues to complicate the practice, is that Jewish law provides that the religion of a child is that of the birth mother. Thus, if the surrogate is not Jewish, the child potentially loses his or her Jewish identity.[10]

The unsatisfactory nature of this state of affairs was dramatically brought to the attention of Israeli politicians and public by another high profile case, that of Ruti and Danny Nachmani. Ruti was unable to carry a child, having lost her uterus to cervical cancer, but since her ovaries were not damaged she was able to have her egg fertilized with her husband's sperm to produce an embryo, which was genetically connected to both herself and her husband. After numerous requests to the Health Ministry to allow the first portion of the process (in vitro fertilization of her eggs) to take place in Israel (which would save the Nachmanis substantial money and time), they sued the Ministry, asserting that the Ministry[11] rules were promulgated without proper authority and that the rules lacked a "reasonable basis."

Fearing the results of a judicial decision, the Ministry settled the case, allowing the egg to be fertilized in Israel so long as the implantation in the surrogate took place abroad. This waiver of the rules was granted solely to the Nachmanis.[12] In addition, the Ministry agreed to set up an expert committee to investigate the whole practice of surrogacy.

This committee, named the Aloni Commission after its chair, laid the groundwork for the legislation that was ultimately passed. Weisberg's detailed description of the parties who were appointed again highlights the impact that individual personalities make in the development of the law. The key example of this is Ministry of Justice Attorney Carmel Shalev, who after graduating from Hebrew University in Jerusalem, acquired a post-graduate degree from Yale University. Her doctoral dissertation examined

of compensation to the surrogate for her services. It is allowed in parts of Australia, but continues to be banned in France as well as *inter alia* China, Italy and Vietnam. *Id.* at 203-04.

10 *Id.* at 56.

11 *Id.* at 74.

12 *Id.* at 91-92. This victory turned out to be a pyrrhic one for Ruti Nachmani because after the embryos were created and frozen, but before they could be implanted, the marriage broke up and Danny refused to allow the embryos to be implanted. Ruti initiated a second high profile lawsuit that she ultimately won, but attempts at implantation were not successful. (This is often the case when frozen embryos have been stored for a lengthy period.)

surrogate motherhood from a feminist perspective, concluding that by recognizing a woman's right to contract, including the right to receive economic compensation for supply of reproductive services, surrogacy empowered rather than enslaved women.[13] Not only was Shalev appointed to the commission herself, but her boss, the Minister of Justice, accepted many of her recommendations for other appointees. These included, in addition to two physicians appointed by the Health ministry, professors of psychology, sociology and medical ethics. Three of the members were women and as the sociologist member, Lela Amis commented, "This was the first committee in the history of Israel, to study issues that were related to women that actually was composed of half women members."[14] Even more startling, three of the four were self proclaimed feminists. Their influence was further enhanced by the fact that one of the two rabbis appointed resigned after being named one of Israel's two chief rabbis.

The resulting 135 page report dealt broadly with fertility issues, including right of access to fertility treatments, definitions of parenthood and information and privacy concerns on the part of both parents and of children. The committee recommended that surrogacy be permitted, then proposed a structure under which it should be regulated. This included setting up a government committee providing for psychological examination and counseling for all parties, and setting the amount of payment allowed to surrogates by government regulation. If the surrogate revoked her consent, the contract would not be enforceable, and if the couple refused custody, the surrogate should have first right of refusal. Two minority reports also supported surrogacy, but disagreed on the details, particularly on issues such as who should be allowed to serve as a surrogate. This report was expected by most parties to languish on bureaucratic desks because of its controversial nature and the expected opposition of religious parties.

The fact that the exact opposite result occurred is directly attributable to another strong woman, Michal Zabaro. Michal, who was born without a uterus, filed suit against the Health Ministry challenging the validity of its regulations. After the suit was made public, 49 other couples joined as plaintiffs in the case. After several months of legal maneuvering the Supreme Court ordered the regulations cancelled in five and one half months (the interim allocated to allow the government time to enact new legislation).[15] Acting with amazing speed, particularly given the deeply controversial nature of the matter, the Knesset enacted the legislation within eight months of the Court's ruling. This is particularly remarkable because of the strong beliefs of the various constituencies. The religious parties were deeply suspicious of surrogacy because of concerns about incest and adultery.[16]

13 CARMEL SHALEV, BIRTH POWER: THE CASE FOR SURROGACY (1989).
14 WEISBERG, *supra* note 3, at 99.
15 *Id.* at 127.
16 Under the interpretations of Jewish law by some rabbis, artificial insemination of a

Feminist organizations also had strong, but sometimes contradictory, views on whether surrogacy protects or exploits women. The "liberal feminists" (like Carmel Shalev) were in favor of believing that by affirming women's ability to contract they are empowered and recognized as autonomous persons. By contrast the "radical feminists" took the position that in a paternalistic society, women's freedom to contract is an illusion and that surrogacy is simply another opportunity for men to take control of women's bodies.[17] As a result of this split, they had less influence on the final shape of the law than in the Aloni Commission recommendations.

The *Surrogacy Law* that finally passed reflected (as might be expected) both the general concerns that have been raised about surrogacy, particularly by the Aloni Commission, and Israel's unique status as a Jewish state. Weisberg does an excellent job of explaining how the final law emerged. At the same time as both traditional Jewish culture and Israel's political situation militate toward laws that encourage reproduction, the inclination of the religious parties is profoundly conservative. As a result, the legislation reflects many of the Aloni Commission recommendations, such as an approvals committee made up equally of men and women, also requiring that a surrogate be unrelated to either of the intended parents and of the same religion. Similarly it only allows gestational surrogacy and prohibits the use of sperm other than that of the intended father. These requirements reflect the Rabbinates extreme concern about the possibility of incest and illegitimacy.

Weisberg concludes that generally surrogacy itself is a positive development and that the Israeli law has been a success. She points out that under the law 78 children have been born and that there has been no instance where the surrogate has attempted to breach the agreement.[18] In her concluding chapter she provides a very interesting and useful discussion of the current practice of surrogacy worldwide, noting that the growth of the Internet has facilitated the matching of infertile couples with potential surrogates.

The Birth of Surrogacy in Israel is a valuable resource not only for family and contract lawyers, but is useful for attorneys and legal scholars with broader concerns than the practice of surrogacy itself. At the most basic level it provides a template of a comprehensive system regulating the sensitive area of reproductive technology. While it exemplifies many useful ideas, it also has peculiarities generally not likely to be compatible which other jurisdictions. For example, the requirement that the surrogate be unmarried and that the sperm must come from the intended father reflects a religious concern related to a technical definition of adultery not shared

married surrogate with a fertilized egg from an intended couple would constitute adultery because the sperm was from a man not her husband. *Id.* at 192-93 (for the basis of the concern regarding sex with a genetic relative).

17 *Id.* at 147-48.

18 *Id.* at 202. The Approvals Committee has approved 169 of 191 applications.

in much of the world. On the other hand, aspects of surrogacy that have troubled many scholars and legislators were relatively uncontroversial in Israel, particularly those revolving around payment to the surrogate beyond expenses and her right to change her mind after the baby is born (the Israeli law allows reneging only under very limited circumstances)

On a broader level, the book provides a comprehensive study of the impact of technological change on the core structures of society. As we follow the historic progression from artificial insemination, to in vitro fertilization, to surrogacy, first with the birth mother's ovum, then to gestational surrogacy, we see the definition of family transforming. The social aspects of parenthood have been gradually uncoupled not only from sexual intercourse, but from childbearing and the genetic raw materials. The resulting possibilities have not only allowed couples with reproductive limitations to have genetically connected children, but also enabled male gay couples to form families with genetic links.[19]

By presenting the personal history that shaped the personalities of the key players throughout the process that ultimately resulted in the *Surrogacy Law*, Weisberg illuminated the importance of individuals in legal development. In effect, it suggests that Thomas Carlyle's "Hero Theory" of history is at least as applicable to legal events as to military ones. While this law is the culmination of social forces from feminism to the profound importance Judaism places on family, both its enactment and its particulars are the product of a complexity of forces not usually available in the legislative history of even the most well documented legislation.

19 Ginta Bellafante, *Surrogate Mothers' New Niche: Bearing Babies for Gay Couples*, N.Y. TIMES, May 27, 2005, at A1. The surrogates interviewed in the article suggest that working with gay couples is particularly satisfying because it does not require dealing with the emotional needs of the intended mother, who may have struggled, often for a number of years, to bear a child.