The last few decades have witnessed dramatic changes affecting the institutions of family and parenthood. If, in the past, the classic family was defined sociologically as a pair of heterosexual parents living together under one roof along with their children, different sociological changes have led to a rapid and extreme transformation in the definitions of family, marital relations, parenthood, and the relationship between parents and children. Dr. Yehezkel Margalit explores whether and to what extent there is room, legally and ethically, for the use of modern contractual devices and doctrines to privately regulate the establishment of legal parenthood. This book offers intentional parenthood as the most appropriate and flexible normative doctrine for resolving the dilemmas which have surfaced in the field of determining legal parentage. By using the certainty of contract law, determining the legal status of parenthood will be seen as the best method to sort out ambiguities and assure both parental and children rights.

Determining Legal Parentage

BETWEEN FAMILY LAW AND CONTRACT LAW

YEHEZKEL MARGALIT
Netanya Academic College
Contents

Preface vii
Acknowledgments ix
Table of Cases x
Table of Legislation xvi
Introduction 1

1 The Shift in the Traditional Family Structure, Modern ART, and How They Are Undermining the Accepted Models for Determining Legal Parentage 9

2 An Overview of the Current ART, the Dilemmas They Surface, and the Role of DLPBA in the Positive Law 27

3 Overview of the Objections to DLPBA in the Positive Legal System 71

4 An Overview of the Arguments that Support DLPBA 98

5 Refuting the Objections to DLPBA in the Positive Legal System 127

6 The Theoretical and Practical Infrastructure of DLPBA 143

7 Implementing DLPBA in the Various Scenarios 183

Conclusions 258

Bibliography 261
Index 310
Preface

This book deals with the nexus of modern contract law and current family law for resolving the various dilemmas that have surfaced in the field of determining legal parenage. The essence of the research explores whether and to what extent there is room, legally and ethically, for the use of modern contractual devices and doctrines to privately regulate the establishment of legal parenage. This book offers intentional parenthood, which I define as determining legal parenthood by agreement (DLPBA), as the most appropriate, flexible, and just normative doctrine for resolving those dilemmas. Although this doctrine is certainly not an academic and judicial innovation, it seems that only recently its centrality, feasibility, and efficacy have been grasped by legislators, judges, scholars, and even laymen as making it best suited to determining legal parenage in the modern era.

This book starts its exploration in Chapter One by looking at the shift in the traditional family structure, modern assisted reproduction technologies (ART), and how they are undermining the accepted models for determining legal parenage. In Chapter Two I provide an overview of the current ART and the dilemmas it surfaces. Inter alia, I enumerate the following scenarios: artificial insemination either by husband or by donor; in vitro fertilization (IVF) with or without egg donation and egg sharing; domestic and international surrogacy agreements; same-sex marriage; disposition agreements regarding frozen embryos; and finally multiple parenthood and other futuristic ART. In Chapter Three I elaborate the objections to DLPBA in the positive legal system, and after exploring the arguments in support of DLPBA in Chapter Four, refute those objections one by one in Chapter Five. In Chapter Six I discuss the theoretical and practical infrastructure of DLPBA, and against that background, in Chapter Seven, I return to these challenging scenarios in elaborating the appropriate implementation of my
normative model as the best possible response to the various complicated and problematic dilemmas.

This book summarizes the results of my writings over the last decade in both family law and contract law. The research commenced in 2007 with the writing of my Ph.D. Dissertation entitled: “Determining Legal Parentage by Agreement.” Following that major research project, my thinking has progressively developed in over twenty publications in various law reviews in the United States, to be drawn together in this book.
Acknowledgments

First and foremost, I am grateful to my Ph.D. dissertation supervisor, Professor Shahar Lifshitz, former Faculty of Law Dean at Bar-Ilan University. Professor Lifshitz is a world-renowned expert in both family and contract law. I warmly thank him for opening the gate for me to the scholarly research of these developing and challenging fields. Professor Shahar Lifshitz has been my mentor throughout.

I accomplished writing this book as faculty and senior lecturer in Netanya Academic College. I am sincerely thankful to the College and to Professor Sinai Deutch, currently Senior Vice President, Director and Dean of the Law School.

Special thanks are due to my colleagues Professor Naomi R. Cahn, Professor I. Glenn Cohen, Professor Shahar Lifshitz, and Professor Douglas NeJaime, who provided me with helpful comments while I was writing this book. I am grateful also to Mr. Ruvik Danieli for his enormous assistance in the linguistic editing of the book.

During the last decade, while writing the book, I spent huge amounts of time at the Law Library at Bar-Ilan University. I am grateful for the help of the library staff. I would like to thank my dear parents, Shlomo and Chana Margalit, and my in-laws, Shmuel and Chana Burkash, who have served as second parents to me, and my children – Shira, Hallel, Yehonatan-Zvi, and Eitan-Reuven – who taught me throughout the years how deep and meaningful the parent–child bond can be. Finally, I want to thank from the depths of my heart my beloved wife Hagit, who over the last few decades has proven to me how enormous and experiential true spousal love can be.
Table of Cases

Buck v. Bell, 47 S.Ct. 584 (1927).
Casbar v. Dicanio, 666 So.2d 1028 (Fla.App. 4 Dist. 1996).
Table of Cases

D.M.T. v. T.M.H., 129 So. 3d 320 (Fla. 2013).
Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992).
Doe v. Doe, 710 A.2d 1297 (Conn. 1998).
Ferguson v. McKiernan, 940 A.2d 1236 (Pa. 2007).
Gartner v. Iowa Dep’t of Pub. Health, 830 N.W.2d 335 (Iowa 2013).
Gerhardt v. Estate of Moore, 150 Wis.2d 503 (Wis. 1989).
Heart of Adoptions, Inc. v. J.A., 965 So.2d 189 (Fla. 2007).
Hecht v. Superior Court, 59 Cal.Rptr.2d 222 (Cal.App. 2 Dist. 1996).
Heidbreder v. Carton, 645 N.W.2d 355 (Minn. 2002).
### Table of Cases

In Interest of R.C., 775 Pa. 2d 27 (Colo. 1989).
In re Adoption of K.F.H., 844 S.W.2d 343 (Ark. 1993).
In re Custody of H.S.H.-K., 533 N.W.2d 419 (Wis. 1995).
In re Guardianship of H.I., 834 A.2d 922 (Me. 2003).
In re J.B. v. Superior Court, 59 Cal. Rptr. 3d 688 (Cal. 2004).
In re J.M.H., 169 Pa. 3d 1025, 1026 (Kan. 2007).
In re Marriage of Moschetta, 30 Cal.Rptr.2d 803 (Ct. App. 1994).
In re Marriage of Rooks, No. 15CA0900, 2016 WL 6123561.
In re Marriage of Witten, 672 N.W.2d 768 (Iowa 2003).
In re MC, 123 Cal.Rptr.3d 856 (Cal. Ct. App. 2011).
In re Nicholas H., 28 Cal.4th 56 (Cal. 2002).
In re Paternity & Maternity of Infant T, 991 N.E.2d.
In re Paternity of M.F., 938 N.E.2d 1256 (Ind. Ct. App. 2010).
In re R.C., 775 Pa. 2d 27 (Colo. 1989).
In re Roberto D.B., 923 A.2d 115 (Md. 2007).
Table of Cases xi

Johnson v. Calvert, 5 Cal.4th 84 (Cal. 1993).
Maria B. v. Superior Court, 13 Cal.Rptr.3d 494 (Cal.App. 3 Dist. 2004).
Markov v. Markov, 360 Md. 296 (Md. 2000).
Morris v. Morris, 932 So.2d 1007 (Fla. 2006).
Table of Cases

Nili in re the Minors A. and B. V. Alon (Tel Aviv Family Court) 37745-14-03 (not published, 27 April, 2014) (Heb.).
Raffopol v. Ramey, 12 A.3d 783 (Conn. 2011).
Sharon S. v. Superior Court, 73 P.3d 554 (Cal. 2003).
Stanton v. Willson, 1808 WL 85 (Conn. 1808).
Stiver v. Parker, 975 F.2d 261 (6th Cir. 1992).
Straub v. B.M.T. by Todd, 645 N.E.2d 597 (Ind. 1994).
Surrogate Parenting Assocs., Inc. v. Commonwealth ex rel. Armstrong, 704 S.W.2d 209 (Ky. 1986).
### Table of Cases

<table>
<thead>
<tr>
<th>Case</th>
<th>Cite</th>
<th>Court/Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States v. Windsor</td>
<td>133 S. Ct. 2675</td>
<td>(2013)</td>
</tr>
<tr>
<td>Van Valkinburgh v. Watson</td>
<td>480, 480</td>
<td>(N.Y. Ch. 1816)</td>
</tr>
<tr>
<td>Wallis v. Smith</td>
<td>130 N.M. 214</td>
<td>(N.M.App. 2001)</td>
</tr>
<tr>
<td>Weaver v. Guinn</td>
<td>31 P.3d 1119</td>
<td>(Or. Ct. App. 2001)</td>
</tr>
</tbody>
</table>
Table of Legislation

ABA Model Act Governing Assisted Reproductive Technology § 201(2)(j); § 501(a)–(b); § 501(3)(e); § 502(1); § 7 Alternative A; § 1002(1), www.americanbar.org/content/dam/aba/administrative/family_law/committees/artmodelact.authcheckdam.pdf.


All Families are Equal Act (2016).

ALM GL ch. 209 C; § 11 (2010).

American Law Institute (ALI) § 2.03(1)(c); § 2.08(1)


Cal Fam Code § 367(g); § 7611–3; § 7613(a)–(b) (2009); § 7650.


Table of Legislation

Neb. Rev. Stat. § 43-104.01(5).
Restatement (Second) of Contracts § 164; § 175; § 177; § 191; § 208; §§ 261–72.
Restatement (Second) of Torts § 46 cmt. b; § 436A (1965).
S. B. 183, 49th Leg., 2d Sess. (N. M. 2010).
Tex. Fam. Code Ann. § 160.706(a)–(b); §§ 160.751–63; § 160.7031(a) (West 2007).
Unif. Parentage Act (UPA), the explanatory note § 102(10); § 2, 9B U.L.A. 287, 296; § 201(a)(1), 9B U.L.A. 309; § 4(a)(4); § 5, 9B U.L.A. 295; § 6(d), 9B U.L.A. 303; § 609; § 703; § 706(a)+ (b)+ cmt.; § 707; § 801(a)
Uniform Commercial Code (U.C.C.) § 2-302; § 2-615(a), c. 1.