Introduction

1. BACKGROUND

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. Furthermore, technological innovations have partially segregated marital relations from fertility. Therefore, it is not surprising that the scholarly literature, legislation, and judicial precedents produced in recent decades contain a variety of models that presume to determine legal parentage. However, in my opinion they do not coherently resolve the dilemma regarding the determination of legal parentage in all of its manifestations. The validity, possible advantages, and appropriate scope of the legal recognition of determining legal parenthood by agreement (DLPBA) is the essence of this book.

This departure from traditional marriage and parenthood statuses demands a reliance on private ordering to determine legal parentage. In order to bridge the gap between this social need and prevailing normative laws, couples and parents have sought to privately regulate their familial relationships by private agreement and contracts. Many scholars justifiably maintain that the law has failed to catch up with rapid social and technological changes affecting the family and that traditional legal norms fail to supply sufficient tools to cope with these changes. Indeed, in certain states, legislatures and judges have preferred to regulate familial relationships through rigid, formalistic ordering based on traditional bionormative models and have rejected private agreements that are contrary to that model.

In the customary positive law as well as in the scholarly literature it is customarily claimed that there are two major methods of establishing legal parentage: the birth of a child, certainly when born into a marital unit, and adoption. The flip side means that the law does not consider intention, desire, and agreement to serve a legal parent as a valid method of acquiring the status of parent, with its attendant obligations and rights. At most, it is possible to find scattered instances of this insight but without any coherently developed legal-philosophical foundation. This working premise is well reflected in the traditional judicial and statutory resistance toward using DLPBA, namely coerced parenthood, which may appear in two forms – paternity fraud and statutory rape. In both cases, the common denominator is that the will, intention, and desire of the progenitor, especially the male, not to be the legal parent of the conceived child is rejected out of hand.

2. THE CENTRAL THEMES AND CLAIMS OF MY RESEARCH

This book seeks to rebut the common legal-social convention and working premise of customary positive law, which a priori rejects any sort of DLPBA either normatively or practically. Normatively, in my opinion, we should recognize an additional legitimate and important method of acquiring legal parentage: intentional parenthood. My argument is that this proposed normative model is the most suitable, flexible, and just normative doctrine for resolving the various modern dilemmas that surface in the context of different fertility procedures, as well as for children who were born "the old-fashioned way." In my opinion, the first signs of its implementation can be found already in contemporary legislative actions, judicial decisions, and the scholarly literature.

In the scientific literature one can also find some prominent objections to DLPBA, which bitterly resist any practical implementation of my normative model due to several normative justifications, such as the possible damage to society as a whole as well as to women's and children's interests. Moreover, there are additional justifications for narrowing and subordinating DLPBA to prominent social norms, such as the best interests of the child (BIC) and protection of his or her rights. Arguments can be advanced also regarding the possible internal or external contractual problems of the agreement, as well as the anti-commodification argument. In my opinion, we can deal with those pitfalls and disadvantages of my normative model and refute them one by one. Nevertheless, I will pay a great deal of attention to these critiques in presenting a much more nuanced normative doctrine, which is aimed at coping well with these obstacles that confront DLPBA.

It bears emphasis that I am definitely not endorsing unfettered and unregulated freedom of contract, even more so when one of the individuals is interested in opting out from his or her legal parentage. In the name of preserving the BIC and his or her rights, we should a priori recognize only agreements regarding the addition of a potential parent (opt-in) or the replacement of one legal parent by another. Therefore, the option of allowing any legal parent to opt out from parental status, leaving the child without a caring and supportive parent, may be very problematic. Consequently, we should not recognize such freedom of contract due to the severe potential damage that may accrue to parental status. Similarly, any such parental agreement should be embodied in a binding legal contract and should be prospectively confirmed by judicial or administrative inspection. The main target of this inspection should be, *inter alia*, to ensure that the terms do not harm the child and that the child is recognized as the legal child of the intending parents. For example, the recognition of too many intending parents should be prevented. Instead, only two individuals will acquire full parentage status and accept full responsibility for the child and the satisfaction of his or her everyday needs.

This book demonstrates that there is a descriptive and normative meta-story regarding the determination of legal parentage, which clearly indicates a shift away from monolithic and binary legal parenthood, based on the enshrinement of the marital status and the traditional bionormative parental structure, to much more intentional and functional parenthood, which first and foremost is subordinated to the BIC. In my opinion, it would be more accurate to argue that since time immemorial the determination of legal parentage has been a compromise between the desire, intention, and will to become a legal parent and other societal concerns.

The normative meta-story regarding the development of the process of establishing legal parenthood is well reflected in the historical description of this process. The roots of DLPBA can be found in the two main methods of determining parentage: the birth of a child, certainly when born into a marital unit, and adoption. In my opinion, the true and deep meaning of the first traditional method of being determined as a legal parent – the marital presumption – is the desire, will, and intention to become a legal parent. In other words, this presumption is actually based on the intention of the married man to become the legal father of his wife's children, to all intents and purposes, even though they may not be his genetic offspring and not infrequently are the result of an adulterous sexual relationship. Similarly, having a conjugal relationship with a woman, especially if it occurs in an intact

marriage, reflects the explicit or at least implied intention of the man to accept the obvious possible ramifications of his action.

Similarly, the second traditional method of acquiring legal parentage, via adoption, is actually another delicate implementation of DLPBA. Intention and agreement are central elements on both sides of the process of adoption as it is only following the intention and agreement of the biological parents to hand over their child to another couple (inasmuch as the adoption isn't coerced by the state) and the parallel intention and agreement of the adoptive parents to substitute for the former, that the adoption can be legally recognized. The intentions, desires, and agreements of the various parties to this parental institution initiate the whole process by transferring legal parentage from the biological to the adoptive parents. Put differently, DLPBA underpins both sides of the adoption. Consequently, despite the comprehensive legal rhetoric and conception that DLPBA should be rejected out of hand, this book will reveal that, practically speaking, society and the judiciary have already validated, albeit only unofficially, such parental agreements.

In addition, in the past decades, science and biomedical technology have developed significantly, expanding the options of deviating from the bionormative familial structure using assisted reproduction technologies (ART). In my opinion, the intentions, or to be more accurate DLPBA, have become more and more central in this context. Consequently, this should be the most important element, morally and legally, and not merely another factor that should be brought into the general calculus. In the traditional spousal and parental structures, having conjugal relations did not necessarily end with any procreative result. In ART, however, where the different possible implementations of DLPBA are significantly broadened, the intentions should be accordingly respected and recognized since the sole and exclusive goal of engaging in these procedures is to produce a child, even though there are third parties to such procedures without whom the entire endeavor would be futile.

This book's main argument is that DLPBA is a legitimate and central method of acquiring legal parentage, either independently or as a supplement to one of the existing methods. Therefore, a priori, any individual who has intended, desired, and agreed to serve as the legal parent of any given child should be determined as his or her legal parent, and the state should respect and recognize their parental status and should not block their access to becoming legal parents. Those individuals who are eager to become parents not infrequently must undergo very tough, painful, and unsafe procreative procedures, both physically and mentally. More than for any other reason, their entitlement to fulfill these basic rights to procreation and parenthood is justified by their initial agreements to beget a child via such artificial

and complex methods. This entitlement is even intensified as opposed to the traditional married heterosexual, whose "unplanned descendants" not infrequently were produced unintentionally and only by chance, which may render both the pregnancy and the resulting child undesirable.

In my opinion, in the modern era the traditional conceptualization of parental status as monolithic, rigid, and binary cannot be defended. First and foremost, we should examine the scope of the intention and desire to actually serve as the child's legal parent and that will determine the appropriate legal status that will be awarded to that individual. Consequently, we should differentiate between full legal status, with its derivative full range of parental obligations and rights, only partial parental status, which entails only some of these obligations and entitlements, and even the status of no legal parent, without any consequential obligations and/or rights.

Nonetheless, the initial agreement must be subordinated to the BIC and preservation of his her rights, the ultimate factors in any dilemma concerning the parent–child relationship, in order to thoroughly prevent any harm to them. In the past, preserving the spousal and parental structures was the ultimate public concern. Consequently, parental status was awarded exclusively to couples who produced their child "the old-fashioned way" or alternatively by adopting a child. Nowadays, however, following the demise of these interests, we should recognize the strength of these agreements in light of the BIC and protection of his or her rights, the prominent current doctrines in the field of parent–child relations.

Thorough inspection and the narrowing of freedom of contract reflected by DLPBA will take into consideration the BIC and protection of his or her rights. Subordinating the parents' interests to the child's will send a clear message indicating the most important parameters for determining legal parentage. Particularly, this public supervision will not enable the validation of any agreement that could be detrimental to the BIC. Moreover, freedom of contract within the limits of the BIC accords well with the two simultaneous shifts in opposite directions, in the fields of spousal and child–parent relationships respectively. Whereas in the first context we have witnessed in the last few decades a major shift in favor of allowing more room for private ordering, in the latter context we can see the opposite trend. In my opinion, in the modern era, the best normative model is a modest one that, on the one hand, enables freedom of contract to establish legal parentage, but, on the other hand, painstakingly preserves the BIC while maintaining all his or her rights.

It is crucial that this private agreement be strictly and thoroughly scrutinized by either a judicial or administrative inspection. Such public inspection is acutely necessary in light of my desire to create an incentive

for every individual, regardless of gender, marital status, and/or sexual orientation, to acquire the type of legal parentage that accords with his or her actions as a legal parent of the child. This conception fits well with another aspect of the privatization of the family – the application of the human rights discourse, including the rights to get married and be a parent, which has intensified the need for DLPBA. The latter is the best way to enable, on the one hand, a sort of "freedom of contract" to determine the identity of the legal parent and the range of his or her parental obligations and rights. On the other hand, however, we should subordinate these arrangements and agreements to public norms, first and foremost the BIC and preservation of his or her rights.

3. THE STRUCTURE OF THE RESEARCH

This book has seven chapters. In Chapter One – "The Shift in the Traditional Family Structure, Modern ART and How They Are Undermining the Accepted Models for Determining Legal Parentage" – I will briefly describe the sociological-legal background for the lay reader who is not familiar with these shifts, in light of the variety of familial structures we have witnessed in the last few decades. I will then explore the different aspects, importance, and consequences of determining the legal parentage of a given child, going on to discuss the aggravation of this dilemma in the modern era, or in other words, why it has become even more challenging and troubling since ART have become much more prevalent and accepted as legitimate procedures.

Against this background, in Chapter Two – "An Overview of the Current ART, the Dilemmas It Surfaces and the Role of DLPBA in the Positive Law" – I will enumerate the immense ethical-legal dilemmas ART bring to the fore, first and foremost who should be determined as the legal parent of an artificially conceived child, and explicate the role of DLPBA in the current positive law. The discussion will focus on the following seven test cases, which, in my opinion, are the most prevalent, challenging, and important issues in this field: artificial insemination either by husband (AIH) or by donor (AID); 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. A priori, the role of DLPBA, if any, in the positive law regarding the parent–child relationship is very limited and fragile. In my opinion, however, a thorough survey of the most up-to-date statutes and verdicts in various countries around the globe will yield a far more complex picture.

In Chapter Three I will provide an "Overview of the Objections to DLPBA in the Positive Legal System." I assume that one legal matter more than others reflects the traditional judicial and statutory resistance toward the use of DLPBA, namely coerced parenthood, which may appear in two forms – paternity fraud and statutory rape. In both cases, the common denominator is that the will, intention, and desire of the progenitor, especially the male, not to be a legal parent of the conceived child is rejected out of hand.

Likewise, in both the legal and philosophical literature, legal parenthood is treated as an absolute moral postulate and therefore nonnegotiable; consequently, it is impossible to add to or delete any of the parental obligations. Moreover, in legislation, court verdicts and academic writing, one can find several prominent objections to allowing unregulated and unfettered DLPBA. Put differently, although "freedom of contract" is generally recognized in this unique relationship, nonetheless its usage is still narrowed and minimized in light of various social values, first and foremost the fear of severely harming the BIC. Another utilitarian argument claims that if we allow DLPBA, it will probably badly harm the parent–child relationship and the comprehensive parental obligation to provide all the child's needs.

Besides those contentions regarding the preliminary question whether intentional parenthood is possible at all and what its appropriate limits are, there are additional critical arguments concerning the problematic and insufficient nature of intentional parentage in light of feminist critique and other ethical-philosophical justifications. As regards the latter, I will enumerate the claims of Margaret J. Radin and Elizabeth Anderson, two of the most prominent scholars who have written extensively about the anti-commodification and inalienability arguments.

Conversely, in Chapter Four – "An Overview of the Arguments that Support DLPBA" – I will enumerate the substantial potential advantages of my normative model as an exclusive new model for establishing and/or determining the legal parenthood of any conceived child in the modern era. I will begin by arguing that DLPBA can easily be reconciled with the other current models for establishing legal parentage. Thus, even if my model is not exclusively accepted as the sole model for establishing legal parentage, it may strengthen the other current models and at the least can be reconciled with them. I will elaborate how my normative model fits well with the privatization of the family, a phenomenon of the last decades. I will then discuss one of the most meaningful consequences of this privatization process – the rise of the human rights discourse, including the rights to procreate, parent, and raise children. Finally, I will enumerate the other positive advantages of my normative model as regards achieving more egalitarian spousal and parental

structures and preventing the traditional inherent discrimination based on income, class, gender, sexual orientation, or marital status.

In Chapter Five – "Refuting the Objections to DLPBA in the Positive Legal System" – I will revisit the pitfalls and disadvantages of my normative model, enumerated previously in Chapter Three, and try to refute them one by one. *Inter alia*, I will argue that no acute harm accrues to legal parentage if we conceptualize the parental status as modern status, and similarly refute the anti-commodification argument.

In Chapter Six – "The Theoretical and Practical Infrastructure of DLPBA" – I will proceed a step further from a normative aspect. I will start my discussion by giving a descriptive and normative overview of my discussion in the previous five chapters and will then elaborate on the correlation between fulfilling the parental obligations and being recognized as a legal parent; the appropriate freedom of contract in dictating the contents and range of the parental status, to be determined from among a variety of parental statuses and consequent ranges, should derive from the range of fulfillment of the parental obligations. Finally, I will enumerate the following required practical aspects of implementation of DLPBA: the need for a written agreement; the limits of the agreement, with "freedom of contract" subordinated to the BIC; and the mechanism of inspecting the agreement – either judicial preauthorization or administrative inspection and approval.

In Chapter Seven – "Implementing DLPBA in the Various Scenarios" – I will return to the scenarios enumerated in Chapter Two – sperm donation, ova donation, domestic and international surrogacy, same-sex marriage, and disposition agreements regarding frozen embryos – and elaborate on the appropriate implementation of my normative model as the best possible response to the various complicated and problematic dilemmas.

1

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

INTRODUCTION

The notion of intentional parenthood is not an entirely new academic and judicial innovation since it was first and extensively discussed in 1990 by Marjorie M. Shultz in her seminal article: *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*.[1] Since then this doctrine, which I define as determining legal parenthood by agreement (DLPBA),[2] has been endorsed by numerous legal and sociological scholars.[3] In 2015 it was even claimed that

[1] Marjorie M. Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, Wis. L. Rev. 297 (1990).

[2] *See, e.g.*, Yehezkel Margalit, *Towards Establishing Parenthood by Agreement in Jewish Law*, 26(2) Am. U.J. Gender Soc. Pol'y & L. 647 (2018); Yehezkel Margalit, The Jewish Family – Between Family Law and Contract Law 135–73 (Cambridge University Press, 2018); and more extensively Yehezkel Margalit, *Bridging the Gap Between Intent and Status: A New Framework for Modern Parentage*, 15(1) Whittier J. Child & Fam. Advoc. 1 (2016).

[3] For the growing acceptance of DLPBA in recent decades, see the additional leading articles that maintain that, in the modern era, intentional parenthood is the best model for determining legal parenthood, particularly in the context of reproductive technology, see 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, 413–20 (1991); Alexa E. King, *Solomon Revisited: Assigning Parenthood in the Context of Collaborative Reproduction*, 5 UCLA Women's L.J. 329, 367–99 (1995); Jesse M. Nix, *"You Only Donated Sperm": Using Intent to Uphold Paternity Agreements*, 11 J. L. & Fam. Stud. 487, 494 (2009); Andrea E. Stumpf, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 Yale L.J. 187, 192–208 (1986); Katherine M. Swift, *Parenting Agreements, the Potential Power of Contract, and the Limits of Family Law*, 34 Fla. St. U. L. Rev. 913, 930–57 (2007); Deborah H. Wald, *The Parentage Puzzle: The Interplay Between Genetics, Procreative Intent, and Parental Conduct in Determining Legal Parentage*, 15 Am. U.J. Gender Soc. Pol'y & L. 379, 388–89 (2007); Mary Patricia Byrn & Erica Holzer, *Codifying the Intent Test*, 41 Wm. Mitchell L. Rev. 130 (2015); Heather Kolinsky, *The Intended Parent: The Power and Problems Inherent in Designating and Determining Intent in the Context of Parental Rights*, 119 Penn St. L. Rev. 801 (2015).

> Since Johnson [a seminal verdict delivered in 1993], over 20% of disputed ART parentage cases have applied the intent test, and over 74% of disputed ART parentage cases have awarded parentage to the intended parents, regardless of which test the court used to determine parentage. In addition, since Professor Shultz published her article, every model parentage act that has been drafted in the United States has incorporated the intent test to determine legal parentage for children conceived via ART.[4]

Although I have not conducted any comprehensive empirical research to establish whether these amazing and challenging figures are accurate or maybe just an exaggeration, it seems that it is only recently that the centrality, feasibility and efficacy of this unique doctrine have been grasped by legislators, judges, scholars, and even laymen[5] as making it best suited to determining legal parentage in the modern era. Thus, it is not surprising that different jurisdictions inside the United States, such as California,[6] as well as in Canada, such as Victoria (British Columbia's Family Law Act),[7] have implied DLPBA in their most up-to-date statutes and verdicts. Finally, the Uniform Parentage Act (UPA) just recently, at July 2017, was revised again for the third time since 1974.[8]

Various scholars, such as Dara E. Purvis,[9] Martha M. Ertman,[10] and Melanie B. Jacobs,[11] have dedicated their research to promoting the implications of

[4] *See* Byrn & Holzer, *supra* note 3, at 113–14. *See also* Mary Patricia Byrn & Lisa Giddings, *An Empirical Analysis of the Use of the Intent Test to Determine Parentage in Assisted Reproductive Technology Cases*, 50 Hous. L. Rev. 1295, 1309 tbl.1, 1318 (2013).

[5] *See* the fascinating updated numbers of artificially conceived children who can be brought into the world only following DLPBA, such as a sperm/ova donation and/or surrogacy agreement, etc., mentioned and discussed in Martha M. Ertman, Love's Promises: How Formal and Informal Contracts Shape All Kinds of Families xix (2016).

[6] As in Cal. Fam. Code § 7611-3 (2017).

[7] Family Law Act [SBC 2011] Chapter 25, www.bclaws.ca/civix/document/LOC/lc/statreg/–%20F%20–/Family%20Law%20Act%20[SBC%202011]%20c.%2025/00_Act/11025_03.xml. For a discussion of the jurisdictions of California, British Columbia, and the United Kingdom, see Haim Abraham, *A Family Is What You Make It? Legal Recognition and Regulation of Multiple Parents*, 25 Am. U.J. Gender Soc. Pol'y & L. 405 (2017).

[8] *See* Uniform Parentage Act (2017), www.uniformlaws.org/shared/docs/parentage/UPA2017_Final_2017sep22.pdf (hereinafter: UPA); Douglas NeJaime, *The Nature of Parenthood*, 126 Yale L.J. 2260 (2017) passim; Jeffrey A. Parness & Matthew Timko, *De Facto Parent and Nonparent Child Support Orders*, 67 Am. U. L. Rev. 769 (2018); Courtney G. Joslin, *Nurturing Parenthood Through the UPA (2017)*, 127 Yale L.J. F. 589 (2018).

[9] *See* Dara E. Purvis, *Intended Parents and the Problem of Perspective*, 24 Yale J. L. & Feminism 210 (2012); Dara E. Purvis, *The Origin of Parental Rights: Labor, Intent, and Fathers*, 41 Fla. St. U.L. Rev. 645 (2014).

[10] *See* Martha M. Ertman, *Private Ordering Under the ALI Principles: As Natural as Status*, in Reconceiving the Family 284 (Robin F. Wilson ed., 2006); Martha M. Ertman, *AALS Section on Contracts: New Frontiers in Private Ordering: Mapping the New Frontiers of Private Ordering: Afterword*, 49 Ariz. L. Rev. 695, 700 (2007) and more extensively Ertman, *supra* note 5.

[11] *See* Melanie B. Jacobs, *Applying Intent-Based Parentage Principles to Nonlegal Lesbian Coparents* 25 N. Ill. U. L. Rev. 433 (2005); Melanie B. Jacobs, *Intentional Parenthood's Influence: Rethinking Procreative Autonomy and Federal Paternity Establishment Policy*, 20