Revisiting The Role of Marriage and Conjugal Relationships in Determining Parenthood: A Comparative and Normative Analysis

[*Tentative Title*]

**Introduction**

The determination of motherhood was always considered to be certain, but the determination of fatherhood has traditionally proved elusive. Nonetheless, the “presumption of marital paternity exists in Anglo-American law and the civil law of continental Europe, as well as in Latin American and Middle Eastern legal systems. It is ‘as close to a cultural universal in law as we get.’” (Milanich at p. 197). It was this presumption that provided the necessary certainty.

Indeed, the presumption of marital paternity is as close as possible to a universal cultural law. It can be interpreted either as a proxy for biological paternity or as signalling the significance of the marital relationship, in and of itself, as a factor in determining parenthood. Since the last decades of the 20th century, along with the increase in children born out of wedlock, reproductive technologies, and same-sex families, legal systems have had to reinterpret this presumption of marital paternity, choosing between marriage and genetics. In this article, we will review and analyze the different solutions offered by the U.S. and Israeli legal systems, along with presenting normative justifications for the interpretation that the marital relationship (or in its modern version, the conjugal relationship), and not pure genetics, is the core issue in determining parenthood.

Considering marriage as a factor in the determination of parenthood may seem archaic and conservative, especially when evaluated in the context of the increasing number of children born out of wedlock and into families of diverse types. Nonetheless, in this article, we argue that while marriage per se is becoming less relevant in determining parenthood, relationships between prospective parent-partners is becoming more relevant, and should be relevant with respect to a recognition (or lack thereof), of each party as a parent. In essence, we offer a new understanding of traditional laws linking marriage and paternity, and suggest how to reform them to correspond to the realities of modern family life. We argue that the presumption of paternity, and similar rules that connect marriage and parenthood, should not be understood as proxies for a biological relationship, but rather as examples of the centrality of conjugal relationships. We therefore suggest establishing a presumption that when adults are involved in a long-term, committed relationship, and a child is born in the context of this relationship, the parties to said relationship are presumed to be the child’s legal parents. The most obvious example that comes to mind is that of opposite- or same-sex couples, whether married or not, who have a child together.

We chose the U.S. and the Israeli legal systems, because, on the surface, each system has chosen a different, even contrary, basis for determining parenthood and paternity: Israeli law emphasizes biology, while the United States, reflecting its common law origins, gives preference to marriage. Whereas traditional common law linked paternity to marriage, Israeli law has never made paternity contingent on the parents’ marital status. Instead, Israeli law has based paternity on biology, namely, on a genetic relationship between a man and a child (an approach most likely influenced by traditional Jewish law). However, closer examination indicates that Israel’s legal reality is somewhat more complex. Under Israeli laws of evidence, marriage to the expectant mother became a significant factor in determining paternity. At the same time, North-American systems started recognizing unwed biological fathers as legal fathers, although a relationship with the expectant mother continues to affect a biological father’s status as a father.

This article will delve into the relevant laws of the Israeli and U.S. legal systems, demonstrating the law’s complexity as well as developments of recent decades. In addition, this article will focus on the leading parental recognition models, or at least on trends representing the more dominant models of recent years.

Together with presenting the law, this article will illustrate various approaches to recognizing parenthood, comparing and contrasting the biological and the conjugal relationship-based models. The article will present the ideological justification behind each approach and the respective advantages of each, and identify the social interests they protect.

The emerging picture indicates that notwithstanding the genetic model’s increasing strength over the last century, the model that connects, as Milanich defines it, parenthood identification and the “body,” not only has many advantages for our era, but it continues to serve a central legal role.

In light of the model’s advantages, we will propose that the presumption of a conjugal relationship be applied in law, and we shall examine its expression (in correspondence with existing laws) in a variety of challenging situations in the context of determining parenthood in the modern era.

**A. Defining Parenthood – U.S. Law**

[*Authors’ internal note*: Insert parts of Ayelet’s paper with the necessary adaptations & updates]

**B. Defining Parenthood – Israeli law**

To date, Israeli has no law defining maternity, paternity, or parenthood in general.[[1]](#footnote-1) There is some specific legislation addressing the question of defining parenthood in relatively rare circumstances, such as procreation by surrogacy, or ovum donation.[[2]](#footnote-2) In addition, Israel’s Ministry of the Interior has issued some internal guidelines,[[3]](#footnote-3) some of which are not even publicly available,[[4]](#footnote-4) referring to the definition of parenthood in specific instances. Case law has also failed to address the question of defining parenthood in an orderly manner; rather, at most, courts have been called upon to adjudicate concrete cases relating to defining parenthood in some special circumstances. Moreover, even the question of the formal procedure to institutionalize parental relations in general is not regulated in Israeli law.[[5]](#footnote-5) We note that the definition of parenthood forms no part of “personal status issues,” and therefore it is not regulated by the personal-religious laws applicable to Israeli citizens and residents in a number of personal status issues, including questions of marriage and divorce.[[6]](#footnote-6) Nonetheless, the religious rules of personal law do indirectly affect the nature of any civil legal decision relating to a definition or establishment of parenthood by influencing the design and precedents of the law.

In this section, we review the principles of Israeli law concerning the definition of parenthood, as far as they can be understood from current legislation and case law, and identify existing lacunae. As we shall demonstrate, Israeli law’s starting point for defining parenthood is a biological relationship. However, reliance on a biological relationship is becoming increasingly less relevant, and alternative or complementary connections are emerging and becoming incorporated into the law. ~~This review demonstrates that Israeli law faces a crossroads in its approach to defining parenthood~~.

**1. Parenthood by Virtue of Childbirth and Procreation** **– The Biological Test as the Default Option?**

As noted, there is an absence of explicit primary legislation defining who a parent is and of overall regulation regarding how to ascertain or institutionalize the issue of determining parenthood matters. Nevertheless, various statements in case law and legal literature relate to motherhood by virtue of childbirth and paternity by force of procreation as the default options.[[7]](#footnote-7) That is, the woman who was pregnant and gave birth is the mother, and the person who impregnated her will be defined as the father. The test of birth and procreation is based, ostensibly, on a biological-genetic relationship with the child. The man who impregnated the woman is the genetic father, and the assumption is that the birth mother is also the child’s genetic mother.[[8]](#footnote-8)

Identifying the biological parent as the legal parent is a social-legal decision, supported by a variety of justifications. First and foremost is the idea that a person whose actions led to the birth of a child should bear a parent’s legal responsibilities towards that child, including the duties to care for and support the child. At the same time, the natural assumption is that the person who acted, initiated and/or invested biological resources wishes to ensure the best interests of the descendant created by their personal action.[[9]](#footnote-9) It is for good reason that people turn to assisted reproductive technologies to conceive a child who is genetically related, or related by virtue of procreation, to the intended parent.[[10]](#footnote-10) Thus, the unique connection between a parent and their biological offspring is important to the parent personally and not only to the child. For this reason, identifying the biological parent as the legal parent is also the result of a perspective focusing on the adults and the totality of family relationships. Naturally, today, the biological test is deeply intertwined with the importance attributed to genetics in Western culture. In this context, the importance placed on **the biological-genetic element** in determining parenthood stems from the recognition (and sometimes even the exaggeration) of the significance of identity and genetic origin. It is clear that the existence and strength of this genetic relationship – a “blood bond” – draw their power, *inter alia*, from social-cultural elements. Finally, we note that the Israeli system’s emphasis on the biological aspect is tied to basic concepts of Jewish law [*Halacha*].

As already noted, the starting point in Israeli is based on the existence of a genetic relationship. However, when moving from the theoretical question of defining parenthood to that of actually applying it in law, particularly the need for evidentiary proof of genetic paternity, a more complex picture emerges. As we shall demonstrate in the following sections, along with the default option emphasizing childbirth and procreation as the foundation for recognition of parenthood, Israeli law is creating other default options for such recognition (or is in the process of creating them).

**2. Paternity: Two Default Options: Genetics and Intimate Relationships**

According to the default option based on procreation, it is apparently necessary to prove who impregnated the woman, namely, which individual male is the one with a genetic connection, in order to establish his status as a parent in law. However, in practice, **proving** a genetic parenthood relationship between a man and a child is rarely required. The inquiry into the genetic connection between the alleged father and the child involves the nature of the relationship between the expectant mother and the potential father, especially the existence or absence of matrimonial bonds between them. When the child’s mother is married, Israeli law assumes that her husband is the child’s father.[[11]](#footnote-11) Ostensibly, one can claim that this assumption involves an assumption or estimation that the woman’s husband is also the procreating father (the genetic father); however, it is obvious that this is not necessarily the case.

Moreover, as noted above, the rules of Israeli law concerning the definition and establishment of parenthood are affected by personal-religious law, even though the civil law is indeed the applicable law. For example, according to Jewish law, a child born to a married woman whose father is not her husband is at risk of being declared a bastard under religious law. Thus, it is arguable that the civil law’s assumption of the husband’s paternity is directly influenced both by the *halacha* and by the desire to protect the child from the consequences of the religious law. In fact, the strength of the threat of being declared a bastard is so severe that the civil law, first by means of case law, and later by enactment,[[12]](#footnote-12) almost absolutely prohibits genetic testing to determine paternity in circumstances in which a Jewish woman was married to a Jewish man at the time of conception, thereby essentially preventing any determination of a genetic relationship between a man other than the husband and the child.[[13]](#footnote-13) Moreover, even if the husband, the wife, or any other person for that matter, presents genetic findings stating that another man is the father, the courts will refuse to admit such findings.[[14]](#footnote-14) This, in practice, weakens the relationship between the assumption of paternity with respect to the husband and the genetic connection, replacing it with a social basis for the existence of this assumption.

One can see, therefore, that although the starting points for defining paternity differ in Israeli and in common law, with the former based on a genetic relationship, and the latter on a matrimonial relationship to the mother, in practical terms, both approaches reach similar conclusions that confer significant weight to the matrimonial bonds between the parents as a relevant consideration in defining legal paternity.[[15]](#footnote-15) As we will argue later, strong normative justifications support considering the relationship between the potential parents when determining legal parenthood. The traditional approach, which links paternity to a matrimonial relationship with the mother, whether directly in the very definition of paternity, or by means of legal evidence leading to the recognition of the husband as the legal father, is an expression of this normative element, much more so than the justification focusing on the fear of illegitimacy.

However, it is not only when the mother is married that does the law not demand genetic evidence to establish paternity. In the absence of marriage, the mother and the man who claims to be the father, can, with the mother’s consent, petition for him to be registered as a parent. In these circumstances, the registration is carried out by the registration clerk (at the hospital or at the Population and Immigration Authority), based on the man’s statement given with the mother’s consent. However, according to existing law, such registration establishing legal parenthood is not conclusive evidence of fatherhood (whether the child’s parents are married, single, or same sex). However, even according to The Population Registry Act, the registration constitutes at least *prima facie* evidence of its veracity with respect to the matter of the parent’s legal status.[[16]](#footnote-16) In practice, registration with the Population Registry as a child’s parent confers all parental rights and authorities upon the registered person, and subjects him to the parental duties and responsibilities. Until the year \_\_\_\_\_\_, the declaration by the mother and father concerning the father’s paternity was a general paternity declaration, and the issue of any genetic relationship between him and the progeny whose paternal parenthood was being established did not have to be addressed.[[17]](#footnote-17) In our opinion, the joint general declaration by the expectant mother and intended father, as practiced until recently, expressed (and in our opinion, still expresses) recognition of the importance of the relationship between the intended parents for the purpose of determining their status as parents.

In Israel, genetic testing to substantiate paternity is conducted only in instances of a dispute between the mother and the alleged father, or when no paternity was entered on the record following birth (and the mother was unmarried). In such circumstances, according to the procedures of the Population and Immigration Authority, judicial intervention to register the father becomes necessary after time passes.[[18]](#footnote-18) In such circumstances, even if there is an agreement between the parties to register the man as the father, and certainly when such agreement is lacking, genetic testing may be required.

The starting point of a biological default option as the basis for defining parenthood, together with the establishment of an alternative default option, also exists in Israeli law with respect to the definition of maternity. This process started with cases of assisted reproduction, and later evolved to include same-sex families.

**3. Maternity: Biology and Intent**

In circumstances of “natural” birth, the genetic mother (whose ova produced the embryo), is also the expectant mother, and is also destined to be the psychological parent and caregiver.[[19]](#footnote-19) In circumstances of a “natural” birth, without the assistance of another maternal party, such as an egg donor or surrogate, maternity is based on the biological default option, and does not require proof. Israeli law, possibly under the influence of Jewish law,[[20]](#footnote-20) has never required the mother to receive recognition as the mother. The child born to her “naturally” was recognized as her child for all intents and purposes, regardless of her marital status.

However, procreation by agency of ovum donation or surrogacy challenges the very reliance on a biological relationship, since the intended and social parenthood could be distinct from the biological-genetic connection, and the biological connection itself may also divided. Two different women could potentially have a biological contribution – the genetic mother, the women who produced the ova, and the physiological mother who carried the pregnancy to term. Another woman may take part in the process of planning the procreation, with the intention of being the mother in actual fact. Which one of these women does the law recognize as the legal mother? And does the law facilitate recognition of more than one legal mother? Israeli law does not provide an orderly and comprehensive answer, notwithstanding the fact that the legislature addressed the matter in two enactments: The Eggs Donation Law (5770-2010), and the Embryo Carrying Agreements Law (“The Surrogacy Law,” 5756-1996). The Eggs Donation Law defines the recipient, who is supposed to be the mother, as the legal mother, whether she carries the pregnancy herself, or whether she is the intended mother under the Surrogacy Law.[[21]](#footnote-21) This can be viewed as limited recognition in Israeli law of the “intention” element (the intention to become a parent that drives the process of begetting the child), as relevant to the definition of parenthood, giving intent precedence over a genetic relationship.[[22]](#footnote-22)

The intention test was created in the context of assisted reproduction technologies, and is intended to help identify the person seeking to become a parent in the absence of a biological relationship while concurrently identifying the party who does have a biological relationship as a “non-parent” – the “other.” The main use of the intention test is as a “tie-breaker,” when the law must decide between two women both claiming the status of “mother,” or two men claiming the status of “father” (in circumstances in which the law does not recognize dual maternity or paternity). **The absence** of an intention to be a parent serves as the basis to reject the parental status of a sperm donor, ovum donor, or a surrogate in the context of a contractual agreement to gestate an embryo. The parties who planned to be the parents, who dreamed of, initiated, and acted to bring a child into the world with the intention of raising them, are recognized at law as the parents, based on this intention and initiative.[[23]](#footnote-23)

The intention test has many advantages, both on the level of public policy, and on the more private level of the family. It reflects the rights and liberties of the individuals establishing a family, is consistent with the child’s best interests, and promotes both equality and gender neutrality, as well as family pluralism, all currently perceived as values worthy of protection. At the same time, it is not the “be all and end all,” and does have a few disadvantages. Intention and planning are sometimes privileges available only to economically well-established families, who possess knowledge, are educated, and have a higher degree of control over their lives.[[24]](#footnote-24) In reality, not every child is born intentionally and with advance planning. In fact, information from other countries demonstrates that most pregnancies are unplanned (however, this does not mean that they are unwanted).[[25]](#footnote-25) Moreover, and this point is also true for planned reproduction, intention may be difficult to prove, particularly when two or more are involved in the procreative process. In time, a gap is created between their respective desires, or sometimes such gap existed from the outset and they disagree on the desire to identify each other as parents.

As already noted, the Eggs Donation Act adopted the intention test to deny parental status to the ovum donor and grant parental status to the donation recipient when she also carried the pregnancy to term. When the egg recipient cannot carry the pregnancy and seeks the aid of a surrogate to carry the pregnancy, Israeli law does not recognize her maternal status on the basis of the test of intention.[[26]](#footnote-26) In the absence of a genetic contribution or physiological contribution in the from of gestating the embryo, under existing law in Israel, a woman can be recognized as a mother only if she applies to be the mother jointly with the genetic father, and the two have entered into a co-parenting agreement under the Surrogacy Law, satisfying all its terms and conditions. In this sense, to the extent that Israeli law has adopted the intention test, it is only to a limited degree, as a tie-breaker between two women who could claim parenthood on a biological basis, on the basis of carrying the pregnancy, or on the basis of donating genetic material. In fact, the Surrogacy Law is vague on the question of defining maternity, as well as on the definition of paternity.

**4. A Parenthood Decree by Force of the Surrogacy Law**

In the regulation of parenthood under the Surrogacy Law regarding children born as a result of surrogacy contracts in Israel, one can find a legislative basis for the element of intention, the biological relationship, and the conjugal relationship between the couple, which we seek to recognize as a guiding principle for determining parenthood in the context of this article. The law, the regulations promulgated thereunder,[[27]](#footnote-27) and the rules issued by the Committee, whose function it is to prospectively approve all surrogacy contracts,[[28]](#footnote-28) were all intended to create a tight framework for contractual engagements, ensure supervision, provide maximum protection for all parties involved, and to protect society’s interests.[[29]](#footnote-29) At the end of the process and after childbirth, parenthood is recognized through a decree of parenthood issued by the court in a judicial proceeding in accordance with the law.[[30]](#footnote-30)

The child’s intended parents will routinely be recognized in the parenthood decree – the parents “who had the intention,” who dreamed, initiated, and acted to cause his birth – while the surrogate, who wanted to help them (without intending to be a mother herself) will not be recognized as the legal mother. In exceptional circumstances (usually when the surrogate recants her intention of not wanting to be the mother) the law, in principle, permits recognition of the surrogate as the child’s legal mother by means of a judicial order, always subject to the child’s best interests.[[31]](#footnote-31) It should be noted that, to date, almost three decades following the law’s enactment, to the best of our knowledge, there has not been a single instance of a dispute concerning the identity of the legal parents of a baby born by surrogacy proceedings in Israel, and, therefore, also no instance in which the surrogate was recognized as the legal mother.

The law prohibits use of ovum donated by the gestational woman.[[32]](#footnote-32) At the same time, the law demands a genetic relationship between the new-born and at least one of the intended parents. To the extent that the intended parents are a couple – a man and a woman – the law demands that the intended father’s sperm be used in the fertilization act,[[33]](#footnote-33) and when the intended mother is a single mother, the law demands use of her own ovum.[[34]](#footnote-34) Thus, the Israeli legislator ensures a genetic relationship with at least one of the intended parents, and the relationship of the surrogate gestating the embryo is reduced to a physiological one.[[35]](#footnote-35) In this way, the law gives expression to the biological relationship in the definition of parenthood.

However, just as the law does not fully correspond to the intention test, neither does it fully correspond to the principle of a genetic relationship. This is reflected in the demands set forth in the law, under which, even when the intended parents are genetically related to the child, a legal process of issuing a decree of parenthood will still be conducted to grant them the legal status as parents.[[36]](#footnote-36) However, we argue that the judicial process to establish parenthood under the Surrogacy Law was mandated in view of considerations that are external to Israel’s parenthood definition laws. Procreation by aid of a gestational surrogate is a controversial birth option. Different legal systems have addressed the challenges posed by the ethical and moral complexities involved in procreation by aid of an agreement to carry an embryo in different ways. Israeli law, which was among the first to regulate this type of procreationthrough primary legislation, dealt with these complexities by establishing a double-stage control process: at the beginning of the process by approving the contract by a committee; and following the conclusion of the process, through judicial proceedings to declare the legal status of the intended parents.[[37]](#footnote-37) Concern for the interests and rights of the surrogate, which, in our opinion is a goal of paramount importance, can be done at the beginning of the process, over the course of the pregnancy, and possibly even after childbirth, with the law facilitating the establishment of the parental status of the intended parent or parents by means of formal proceedings which are not necessary judicial.[[38]](#footnote-38)

Regardless, when a decree of parenthood is granted to the intended father who is genetically related to the embryo, concurrently, and in the setting of the same proceedings, a decree of parenthood acknowledging his partner’s maternity is also granted, even if she has no genetic relationship with the child. The law does not draw any distinction between the person who is genetically related to the child and the person who is not related in the context of the process of recognizing their status as parents. The law does not require separate legal proceedings to establish the intended mother’s maternity, and her status as a parent is connected with establishing the parental status of the intended father, who is also the genetic father. It is our understanding that this position expressed by the law is another expression of the fact that the importance of the genetic connection relevant to defining parenthood is losing ground, concurrent with the rise of the element of intention, and even more, the relevance of the conjugal relationship in Israeli parenthood law. Another expression of this can be found in the legal tool of parenthood decree judgments, issued on the basis of “a connection to the connection.”

**5. Judicial Parenthood Decrees on the Basis of “A Connection to the Connection”**

A judicial decree of parenthood recognized by the Supreme Court in the **Mamet-Magged** affair[[39]](#footnote-39) has turned into a customary legal tool for establishing parenthood in circumstances of procreation by international surrogacy contracts, for the purpose of recognizing the non-genetic parent, the partner of the genetic parent (both in same-sex families and in families headed by opposite sex partners). This measure was also recognized in circumstances of begetting a child by a same-sex female couple, when one of them gave birth to a child conceived with the aid of a sperm donor, yet her partner accompanied her throughout the process, due to a desire to be a joint parent with her.[[40]](#footnote-40) The judicial decree of parenthood constitutes a kind of “unlikely form” of an adoption decree.[[41]](#footnote-41) On the one hand, it is based on a judicial order, namely, the court’s involvement is necessary for a recognition of parenthood. On the other hand, this option does not need to meet the thresholds prescribed by the Child Adoption Act, and as such, does not require satisfying minimal time requirements,[[42]](#footnote-42) and sometimes does not even involve the need for reports by social workers, whose function is to assess the character, nature, and quality of the family unit.[[43]](#footnote-43) The judicial decree of parenthood establishes parenthood on the basis of the test referred to as “A Connection to the Connection.” This term was coined by Justice Hendel **In Re Jane Doe** (2015),[[44]](#footnote-44) wherein it was explicitly explained that this basis for recognition of parenthood at law drew on the “social recognition of the status of the conjugal relationship, and the close connection that person has to the genetically related person.”[[45]](#footnote-45) One can therefore see that issuing decrees of parenthood on the basis of a “Connection to the Connection” continues the trend we have already identified, giving increased weight to the conjugal relationship in the setting of the law’s definition of parenthood.

**6. Interim Summary**

We have thus far demonstrated that Israeli law does not define maternity, paternity, or parenthood in general, and fails to systematically address the question of institutionalizing parenthood in law. How then, if at all, should the existence of a relationship relevant to establishing parenthood be judged? We saw that Israeli law’s ostensible starting point was that the definition of parenthood is founded on a biological relationship with the child, but that this approach has been challenged, and that, together with the biological relationship, additional options for establishing parenthood have been found. Thus, the husband of the mother is recognized as the father by virtue of marriage, and the law refuses to explore the issue of his biological relationship with the child. The Eggs Donation Law adopts the test of intention, even if just as a tie-breaker between two women with a biological relationship to the child. Finally, the Surrogacy Law, on the one hand, does not automatically recognize the parenthood of those with a genetic relationship to the child, but on the other, does recognize parenthood on an alternative basis, whether by virtue of intention, or the conjugal relationship between the couple (or a combination of both).

These circumstances demonstrate that Israeli law, similar to U.S. law, is now at a crossroads in relation to questions pertaining to the definition and institutionalization of parenthood. If in the past the law did not need to address the matter comprehensively, both assisted reproduction technologies and the social changes the institution of the family is undergoing have brought with them an opportunity to rethink these questions in depth. In the next part of the article, we will present our normative position in support of an interpretation positing that the relationship between the potential parents constitutes an independent relationship for the purpose of identifying the child’s legal parents, and deserves greater emphasis at law today.

**3. An Old-New Conceptualization of the Parenthood Determining Tests: The Status of Conjugal Relationships**

**Introduction**

In this chapter we focus on the normative argument: Why should the nature of the relationship between potential parents constitute a consideration for the purposes of defining parenthood at law? First we will present the argument and the reasons underlying it. On the basis of the broader normative argument, which focuses on the relationship between the parents, we will propose that the law recognize an express presumption, which we will refer to as the “Relationship Presumption.” According to this presumption, when a child is born into a conjugal relationship, both parties to said relationship will be considered subject to all the legal duties and responsibilities regarding the child, and at the same time, entitled to all parental rights from the moment of birth; that is, they become the child’s legal parents. Finally, in the last part of this section, we will revisit the currently existing law and demonstrate how our proposal in fact actually continues implementing principles that have already been recognized in U.S. and Israeli law to institutionalize parenthood on the basis of the conjugal relationship between the parents.

**1. A Relationship Between Potential Parents as a Consideration in Defining Parenthood**

Our claim is that the relationship between potential parents should constitute a consideration in the legal definition of parenthood. Namely, the nature of the relationship is relevant to the legal status of “parent” as one of a number of possible default options to identify the legal parent whether biological or based on intention.[[46]](#footnote-46) It should be emphasized that we are not advocating this relationship as an exclusive consideration to replace the biological one, which is still a central element in determining parenthood at law. Nor are we advocating this relationship as a necessary consideration in the absence of which one cannot be recognized as the parent. Rather, this is just one consideration which the law should take into account, independently and separately, and in some cases, it should suffice to confer parental status.[[47]](#footnote-47)

The starting point for a discussion concerning the weight attached to the conjugal relationship between the potential parents in defining parenthood is the biological relationship’s failure to constitute an **exclusive** basis for defining parenthood. As we demonstrated in previous sections of this article, the biological relationship, even when it occupied central stage,[[48]](#footnote-48) was never the *sole* basis for recognition of parenthood at law, in particular with respect to paternity. The test of conjugal relationships was also an element of the determination of parenthood, as was the test of intention. Common law systems, from the outset, defined paternity on the basis of marriage to the birth mother [insert something specific about the US]. In contrast, the Israeli legal system, that based paternity on the genetic relationship, linked the fact of marriage to the mother to paternity (at least with respect to Jewish women), through rules to prove and institutionalize paternity. The circumstances of modern realities, in which many children are born with the aid of gamete donation (sperm or ova), the intention test pushed the genetic relationship aside in relevant instances.[[49]](#footnote-49)

As already noted, the intention test has already started to permeate various legal systems, and even in the academic literature, the element of intention, meaning, the intention to become a parent that drives the process of conception and childbearing, has become a relevant consideration in identifying the legal parent.[[50]](#footnote-50) In our opinion, in many instances, focusing on the intention element, notwithstanding the justifications in support of it, results in a lack of clarity as well as other difficulties.[[51]](#footnote-51) Suffice it to say that in practical terms, there is difficulty in substantiating and proving the existence of an intention to become a parent in situations in which it was not formally expressed, or, when disputes regarding its existence or absence arise in hindsight.[[52]](#footnote-52) For example, in a number of cases, two mothers in same-sex couples separated, and only one (the one with the genetic-biological relationship) was recognized as the child’s parent after birth, and the legal status of the “additional mother” was never registered while they were still involved in their conjugal relationship.[[53]](#footnote-53) In such cases, the relationships between the mothers served as an indication of the existence of an intention on the part of the “additional mother” to become a parent together with the recognized mother.[[54]](#footnote-54) Our proposal seeks to recognize the conjugal relationship as an independent factor when contemplating parenthood recognition, not only as an indication of the existence of an intention to become a parent; that is, we argue that the intention to become a parent should **also** viewed as a meaningful element.[[55]](#footnote-55)

The proposal to view a conjugal relationship between intended parents as an independent consideration for the purpose of recognizing parenthood at law was first raised by Blecher-Prigat. Her proposal was based on years of scholarship advocating that parental relations are not only vertical, between parent and child, but also horizontal, between two people who are jointly acting as parents.[[56]](#footnote-56) In the vast majority of cases, the law recognizes that a child has not one single parent, but two. This relationship between the parents is increasingly occupying central stage at law, imposing mutual obligations on the parents toward one another, especially duties to cooperate in satisfying parental responsibilities toward their shared children. There are also more and more discussions in legal academic literature about the conjugal relationship between adults connected by virtue of being parents to shared children, as well as a growing perception that a relationship between joint parents creates a deep commitment between them, a commitment not governed by the current ideology supporting easy and clean separation that characterizes conjugal relationships.[[57]](#footnote-57) Parents are committed to supporting the parental relations of each one of them toward the child, even when they live separately and are not in an conjugal relationship. There are even legal systems that recognize economic obligations these parents have to one another by virtue of the parental relationship (as opposed to obligations based on conjugal relationships).[[58]](#footnote-58)

This understanding of parenthood as establishing a significant long-term commitment, which includes obligations to cooperate, and possibly even mutual financial obligations, should, in our opinion, also have implications on how parenthood is defined at law in the first place. In other words, since parenthood is not only a vertical relationship between parent and child, but in many cases, a horizontal one between the joint parents, a relationship that is not easy to sever or dismantle from the normative aspect, it seems appropriate that the connections contemplated by the law in defining legal parenthood will not only be the relationships between the intended parent and child, but also connections between the intended parents as joint parents. The introduction of the relationship factor as a component in the definition of parenthood as a parallel and complementary element to Blecher-Prigat’s proposal incorporating values ​​of concern, mutual responsibilities, and caring as basic values ​​in the construction of parenthood.

The matrimonial bond, certainly in the past, constituted unequivocal expression of a deep and long-term commitment to the care for the shared children, whether economic support, or concern for the child’s physical and emotional needs. Today, it is no longer appropriate to base the definition of parenthood on *matrimonial bonds* only, given the persistent increase in conjugal life relationships, as noted by Clare Huntington in the United States, relationships characterized by long-term mutual commitments outside marriage, and a growing number of children born into them.[[59]](#footnote-59) It is true that in Israel marriage is still an important social institution, and most children are born to married parents, but due to the control exercised by religious law over marriage in Israel, many couples cannot marry, and others prefer not to. Therefore, also in Israel, it is no longer appropriate to base the legal definition of parenthood only on the legal relationship of marriage. However, this does not imply that the claim concerning the importance of a conjugal relationship between people who are destined in the eyes of the law to be parents together should be abandoned. The mere understanding that the relationship between the intended parents is significant to define each one of them as a parent, is right and proper, and should be afforded a measure of expression which better reflecting the realities of today.

This position linking the horizontal relationship between the joint parents, usually couples,[[60]](#footnote-60) to their status as parents, could be similarly explained as being a reasonable predictor of a real commitment to care for the child.[[61]](#footnote-61) It can be assumed that a relationship based on values ​​of responsibility, dependence, and mutual concern before childbirth – one characterized by the fact that both parties in the couple rely emotionally and financially on each other – will embody such values after childbirth as well, through a shared commitment to shoulder the responsibilities associated with raising the child who was born into such a relationship.

Another advantage of this position, which seeks to shift the emphasis from biology to the nature of the relationship between the parents, lies in offering a gender-neutral alternative that facilitates recognition of a variety of familial configurations.[[62]](#footnote-62) Such a position strives to shape the legal institution of parenthood to correspond to the rich tapestry of family configurations recognized in the modern era, including families comprising two mothers or two fathers.[[63]](#footnote-63)

Most children are born in the setting of a conjugal relationship, and many even grow up in the bosom of that very same relationship. In this sense, our proposal reflects social reality. It is appropriate that the law reflect this social-familial reality of children’s lives, for the child’s benefit, as well as for the benefit of other family members.[[64]](#footnote-64) Recognizing this reality preserves a measure of certainty and stability in the child’s life, and protects them from the shocks that may accompany their parents’ separation. This idea also correlates to the social realities of a couple’s life. The relationship test, which emphasizes the relationship between the mother and her male or female partner, and between the father and his male or female partner in determining their parentage, assumes (based on common sense) that couples go on the parenting journey together. This aspiration is inherent to the relationship,[[65]](#footnote-65) and in many instances, couples choose to institutionalize their conjugal relationship as a preliminary step before producing offspring.[[66]](#footnote-66) A logical assumption, certainly in the context of the cultural characteristics of society in Israel, is that young couples living together as a family, whether married or common-law spouses, will have children together.[[67]](#footnote-67)

It is important to emphasizes that we are not making any claim to justify the recognition of two parents for every child in all circumstances. Our argument is not a normative argument in favor of recognizing two parents, according to which the law should aspire to ensure that every child has more than one parent (but not more than two). Our argument in this context is based on current sociolegal realities. We recognize single parenthood, and even support the possibility of recognizing multiple parents. Thus, considerations relating to the relationship between the potential parents (or the absence thereof) may result in recognition of single parenthood or deny the parental status of a particular person. However, these are not the situations we deal with in this article. Our article focuses on the typical situations in which children are born in the setting of a conjugal relationship, whether same-sex or opposite-sex couples, and whether they are related by virtue of genetics or birth to both parties in the relationship, or to only one of them.

The strengths of this position, which, as mentioned, seeks to connect the conjugal relationship to the status of parenthood, and reflects the advantages of this connection, are ever more apparent in face of the weaknesses of other models. These include the model advocating identifying a parent on the basis of a biological relationship, which no longer corresponds to the pluralistic social-familial reality, as well as the model that emphasizes the element of consent or intention, which may, as described above, intensify disagreements between parents (or persons claiming to be parents), thus threatening the stability of the child’s life as well as their welfare.

**4. Parenthood by Virtue of a Conjugal Relationship in Existing Law**

Now we will revisit the law existing in the United States and Israel and the relationships that serve as a basis for defining parenthood in these systems. In particular, we seek to focus attention on the recognition which already exists in the law to institutionalize parenthood on the basis of a conjugal relationship between the intended parents, which we have discussed in the previous section on developments in the two jurisdictions regarding the definition of parenthood. In the discussion below, we will explain why our proposal can be viewed as continuing the existing legal trend, and therefore, as both feasible and worthy of adoption within the framework of existing case law.[[68]](#footnote-68)

**The existing law in the United States**

.... [check that there are no repetitions here]

**The existing law in Israel**

[check that there are no repetitions here – there is some kind of repetition, but it seems to me to be part of a focused summary that can serve us]

As we demonstrated in the previous section, matrimonial bonds play a significant role in the determination of recognition of a husband’s legal paternity. We further suggested that it is proper to understand the role of marriage in defining paternity (and parenthood in general) as expressing conjugal relationships in the context of the laws defining parenthood. There are those who interpret this approach as reflecting an assumed genetic relationship between the mother’s husband and the child.[[69]](#footnote-69) Such interpretation is possible, of course. However, we believe, for the many reasons raised in the previous section, that an alternative interpretation, which we suggest as more normatively suitable to today’s realities, should be adopted. We believe that the role of the marital relationship as an expression of the relationship presumption (and the importance of the relationship between potential joint parents in general) is a more appropriate interpretation than the model that views marriage as evidence of nothing more than genetic paternity.

We further demonstrated that Israel’s Surrogacy Law expresses the role relationships play in parenthood law in Israel by jointly institutionalizing both intended parents’ parenthood (whether they are both genetically related to the new-born, or if only the father is). The law does not demand separate proceedings to establish maternity; when a decree of parenthood is issued for the prospective father, concurrently, and within the same legal proceedings, a decree of parenthood acknowledging the maternity of his partner is also granted, even if she is not genetically related to the child. In fact, we claim that in light of Israel’s Surrogacy Law, the trend of relying on biological relationships for the purpose of defining parenthood is weakening, accompanied by the increased importance of conjugal relationships in making this determination. This trend is all the more significant since the law was applied to a same sex couple in July 2021, in the setting of the Arad-Pinkas judgment.[[70]](#footnote-70) Until the Arad-Pinkas case, only an opposite-sex couple (or single women) could secure the assistance of a surrogate to have children. Since the law required that the intended father also be the genetic father, when the couple also turned to an ovum donor, the person who was genetically related to the child was a known fact, as was who was not genetically related (a single mother was required to be genetically related to the child). Today, following the Supreme Court judgment, homosexual couples may also have children in Israel with the assistance of a surrogate. True, the law demands that the sperm of one of them be used in the fertilization process (and, in any event, the desire that one of them be genetically related to the child is a major motive for seeking surrogacy in the first place), but it is not a necessity to know who the genetic father is for the purposes of recognizing parenthood and the related issue of issuing a decree of parenthood for both fathers. In fact, even in the Mamet-Magged case, the Supreme Court recognized the interests of same-sex couples to remain ignorant about which one of them is the child’s genetic parent, or at least, to leave this as a private matter.[[71]](#footnote-71) Thus, legal recognition of the parenthood of both fathers by means of issuing them with decrees of parenthood will be done jointly for the genetic parent and his partner, and both will be considered as equal status parents in the eyes of the law, without the genetic relationship being raised at any stage of the process of granting parental status.

The role of the conjugal relationship in defining legal parenthood is expressed clearly and explicitly using by the “Connection to the Connection” test. As noted previously, Justice Hendel, who coined this term in the case of **Jane Doe** (2015), expressly explained that this basis for recognizing parenthood was in line with the “social recognition of the importance and status of the conjugal relationship.”[[72]](#footnote-72) Justice Hendel added that: “Sometimes a person will be recognized as the new-born’s parent by force of the conjugal relationship he is in prior to the pregnancy and childbirth with the person who is genetically related to the new-born.”[[73]](#footnote-73)

Thus, the fact of the couple’s relationship is actually intertwined into most of the contexts in which the question of parenthood definition arises, including: the paternity of a man married to the expectant mother; the parenthood of a couple who entered into an agreement to gestate an embryo, whether they be a man and a woman or a same-sex couple; and the parenthood of a female couple when one of them is also the biological mother. Explicitly recognizing the parents’ relationship, together with recognizing a biological relationship offers a pathway for restructuring Israeli parenthood law that has been lacking to date.

One comment in summarizing this section involves another context that highlights the relationship between being a couple and parenthood involves the issue of post-mortem reproduction. Israeli case law in recent years, as well as the Attorney General’s original guidelines, published in 2003,[[74]](#footnote-74) highlight the connection between parenthood and being part of a couple. From the outset, the Attorney General’s guidelines focused on the interest of a surviving partner of procreating from the sperm of a deceased partner, acknowledging that use of a deceased’s sperm for procreation is more for the sake of the partner requesting it.[[75]](#footnote-75) The guidelines connect the fact of being part of a couple to procreation, stating that “the desire to produce descendants is naturally intertwined with the identity of partner to such act of creation,”[[76]](#footnote-76) so much so, that in the spouse’s absence, under the guidelines, there is no scope to comply with such a request.[[77]](#footnote-77) It is true that with time, the courts have expanded the right to request use of the deceased’s sperm to the deceased’s parents in circumstances in which the deceased had no partner during his lifetime, or even when he had a partner who refused to use the sperm.[[78]](#footnote-78) However, this development has been limited in recent years, with the Supreme Court refocusing on the right of the partner only.[[79]](#footnote-79) In this sense, both the Attorney General and the Supreme Court have emphasized parenthood as an element related to being part of a couple – one arising from the conjugal relationship and inextricably intertwined with it.[[80]](#footnote-80)

**5. The Conjugal Relationship Presumption**

In light of the normative position expressed in the previous section, whereby a relationship characterized by a long-term commitment, responsibility, and mutual care, warrants serving as the basis for a recognition of parenthood, and since we believe that family law should draw on pre-defined tools and limit judicial discretion in the determination of specific cases,[[81]](#footnote-81) we propose introducing a legal presumption that when a child is born into an conjugal relationship, not necessarily limited to a married couple of opposite sexes, then both parties constituting the couple are the parents.

One of the principal advantages of basing a parenthood determination on conjugal relationships, such as a biological relationship or an informal marriage to the mother, is the ability to establish parental status at law according to a system of clear and easy-to-prove rules that limit judicial discretion to determine the status of a person as a parent in each and every case (especially in light of the current scientific ability to determine a genetic relationship between an adult and a child), thereby better ensuring certainty and stability. Each of the authors of this article has argued extensively elsewhere about the importance of founding family law on a system of rules and limiting open standards that allow excessive discretion to decide cases.[[82]](#footnote-82) This is particularly important in the system of laws related to defining parenthood, since certainty with respect to the parental status generally serves the best interests of children, since their legal parents are the ones who bear legal responsibilities for the child and are subject to a variety of duties a parent owes their child.[[83]](#footnote-83) Certainty and stability in relation to the identity of those bearing the responsibilities and subject to parental obligations for children is critical. Naturally, also from the potential parents’ point of view, certainty about their legal status toward their children is of paramount importance, both in light of the meaning parenthood gives their personal identity – in particular, to the manner in which this identity develops in accordance with the legal status attributed to such identity – as well as in light of the meaning that formal recognition of parenthood confers on the relationship’s dynamics between the various persons comprising the family unit.[[84]](#footnote-84)

Ostensibly, an argument pertaining to the importance of a relationship between two adults who may be parents together as a consideration in the definition of the parental status of each one of them is contrary to our preference for determining parenthood at law based on clear rules, in view of the difficulty of characterizing and identifying a “sufficient relationship” to serve as a basis for recognizing parenthood. However, we claim that help can be found in the legal tool of presumption in order to transform the laws of defining parenthood that attribute importance to relationships into laws based on rules.[[85]](#footnote-85) The presumption that determines legal paternity as based on marriage to the mother is, in our eyes, a paradigm for such a presumption, on the basis of which one can design the proper presumption, and adapt it to the contemporary realities of family life. As discussed herein, we propose prescribing that a child born into a conjugal relationship, namely, when the expectant mother or the begetting father are in a conjugal relationship characterized by mutual, long-term commitment, it is presumed that both parties constituting the couple are the child’s parents.

In our humble opinion, to give the conjugal relationship due weight, a relationship capable of supporting such legal presumption should have started becoming established at least one year before the date of conception,[[86]](#footnote-86) which can be gleaned from the couple’s cohabitation in the context of a family-type relationship.[[87]](#footnote-87) It could be possible to reduce this timeframe if the couple chose to institutionalize their relationship by means of a marriage ceremony recognized by the local legal system or by any foreign legal system in which the marriage ceremony was performed.[[88]](#footnote-88)

As already suggested, our proposal does not deny recognition of legal parenthood based on other relationships that are not founded on a prolonged period of intimacy that began at least a year before conception. For example, we expressed the opinion (which was not discussed in depth in this article) that an intention to have a child and assume all parental responsibilities for this child should also serve as a factor in recognizing legal parenthood. Thus, it is possible that a couple in a relationship for less than a year could still intend to become joint parents and could substantiate the biological parent’s partner’s parental status on the basis of the intention test. Similarly, when a woman is impregnated a result of casual sex, in circumstances in which she and the man who impregnated her are not in any intimate relationship, we do not claim that recognition of the man’s parental status should be denied due to the fact that there is no conjugal relationship between the parties. Thus, in circumstances in which the conditions for recognizing parenthood on the basis of the relationship presumption are not satisfied, legal parenthood could still be recognized.[[89]](#footnote-89) An extended relationship characterized by mutual commitment **is not a necessary condition** to recognize parenthood, as far as we are concerned; what we do claim is that **it is a sufficient condition to raise a presumption of parenthood**. ~~Since Israeli paternity laws are founded on case law and procedures issued by the Ministry of the Interior, rather than legislation, there is no difficulty in adopting the legal presumption we propose in the setting of precedent~~.

**6. Applying the Relationship Presumption in General and in Complex Circumstances**

Applying the relationship presumption is relevant in our opinion especially in circumstances in which a couple have a child together and at the time of birth the couple is living together and there is no dispute between them regarding their identity as joint parents. The relationship presumption would recognize the partner as a parent, even absent any genetic relationship to the child. This reality, relevant to the large majority of cases in which couples have a child, will be explained at the end of this section.

Applying the relationship presumption can also provide a solution in cases in which a child is born into the family setting of an intimate relationship, but only one member of the couple is biologically related to the child and no proper proceedings to settle the parental status of the other partner near the time of birth were ever conducted. In such a case, if a dispute arises as to the partner’s status as a parent, in circumstances in which the relationship comes to an end, there would be no need for a trial of evidence regarding the intention of each one of the respective (former) partners, and the very fact of the previous relationship and procreation in its context would raise a presumption regarding the partner’s parental status. Such circumstances often concern same-sex couples, and in particular female couples, but similar issues can also arise in relation to a man’s parental status in circumstances of a relationship with a woman without being married, and if over the course of their life together, the woman gave birth assisted by sperm donation due to fertility problems of the man. Again, if the status of the man as father is not settled near the time of birth, ending the relationship may result in a challenge to his legal status as parent.[[90]](#footnote-90) According to our proposal, his paternity will be established by presumption. [What about instances of infidelity?]

Next, we will address the situation in which a biological parent’s spouse declares a desire not to be recognized as parent, or if a biological parent objects to his or her partner’s parenthood. The complexity that arises in these circumstances stems from the conflict between relationship and intention. We believe that it is right and proper to permit a couple to stipulate certain conditions with respect to the relationship presumption,[[91]](#footnote-91) but this must be done explicitly and before conception, the decisive date for the purposes of the relationship presumption, as explained above. Setting this rule does impose a measure of burden on the objecting party (be it the biological parent or the partner), to object explicitly and before the date of conception,[[92]](#footnote-92) lest the spouse be recognized as parent in a dispute following the birth.[[93]](#footnote-93) However, we believe that this rule that permits a couple to set limitations with respect to the relationship presumption in a clearly defined manner embodies the proper balance in the potential conflict between relationship and intention. The rule opens up the possibility for a couple to realize their understandings in relation to the partner’s parenthood if done expressly, thus potentially reducing the need to resort to litigation relating to any issue arising retrospectively and after the fact of birth, as the issue of agreement is not always easily assessed. This rule takes into account the realities that having a child in the setting of a conjugal relationship may be motivated by a variety of reasons, sometimes complex and even contradictory, but these should not deny a recognition of parenthood for the partner who participated, explicitly or implicitly, in the procreation process. Often relationships in crisis can result in having a child in the expectation that a baby will help repair the relationship, or in the setting of an ultimatum by one of the spouses. If in each of these circumstances we permit discussion of the question of the agreement to have a child, we risk uncertainty as well as lack of uniformity, in particular regarding regulation of the status of same-sex couples.

Other dilemmas may arise in the setting of a conflict between a biological relationship and the relationship presumption. We saw that in the circumstances of a married couple, a man and a woman, the law (in the United States as well as in in Israel) does not necessarily give preference to the genetic relationship. Thus, before conducting a genetic test to determine any genetic relationship, or the absence thereof, connecting the husband and child, the court will consider the child’s best interests [this is true in Israel, what is the situation in the United States?].[[94]](#footnote-94) However, with respect to female couples, will the law adopt a similar approach under circumstances in which one of the partners becomes pregnant following intercourse with a man outside the conjugal relationship? And what of the situation in which a female couple enters into a contract with a man to have a child together, with the intention that the child have three parents? If the law does not recognize multiple parents, will one of the three not be recognized as a parent. In such an event, should the genetic relationship necessarily override the conjugal one? We note that at least some legal systems [we should be specific] attribute no parental status to the genetically related man, and will construe him as a sperm donor. We believe that in some cases it would be proper to recognize more than two parents, and absent such recognition, the question of a determination between the genetically related person and the person in the intimate relationship cannot be carried out based on a general rule, but each case must be decided on its own merits.

The discussion in this section dealt with implementation of the relationship presumption in the **retrospective** regulation of parental status, and mainly addressed circumstances in which a dispute erupts between potential parents. However, the main use we foresee in relation to the application of the relationship presumption is relevant, as previously mentioned, to circumstances in which recognition of parental status and the institutionalisation thereof is applied for **prospectively, and immediately after birth**.

1. Ayelet Blecher-Prigat and Ruth Zafran “‘*Children are a Joy*’: *Parenthood by Assisted Reproductive Technology – Same Sex Couples*” [Hebrew] **The** **Gay Community’s Rights in Israel: Law, Sexual Orientation, and Gender Identity** 395 (Editors: Einav Morgenstern, Yaniv Lushinsky, Alon Harel, 2016) (Hereinafter: “**Blecher-Prigat and Zafran: ‘*Children are a Joy*’**”). This chapter is based on ... [↑](#footnote-ref-1)
2. See the Embryos Carrying Agreement Law (Agreement Approval and the Status of the New-born) Act 5767-1996 (hereinafter: the “**Surrogacy Law**”), as well as the Eggs Donation Act 20210-5770. For an examination of the dilemmas surrounding the definition of parenthood in circumstances of surrogacy or ovum donation, see Ruth Zafran “*The Family in the Genetic Era – A Definition of Parenthood in Instance of Procreation by Assisted Reproductive Technology as a Test Case*” [Hebrew] **Haifa Law Review** **B** 223, at 234 (2005) (hereinafter: Zafran “**Family in the Genetic Era**”). [↑](#footnote-ref-2)
3. See on this point “The Procedure for Registration of Births in Israel” Ministry of Interior – Population and Immigration Authority (Procedure No. 2.2.0001), available to view at: <https://www.gov.il/blobfolder/policy/birth_registry_in_israel_procedure/en_2.2.0001.pdf> (hereinafter: the “**Procedure for Registration of Births in Israel**”), as well as Population and Immigration Authority Procedure No. 2.2.0008 “Procedure for Registration of Persons Born in Israel, and Registering Persons Entitled Thereto on the Population Registry” (1.12.2020) [www.gov.il/policy/policy\_registration\_of\_birth\_registry/en.2.2.0008.pdf](http://www.gov.il/policy/policy_registration_of_birth_registry/en.2.2.0008.pdf) (hereinafter: the “**Procedure for Registration of Persons Born in Israel**”). For criticism of this regulatory manner, see Zvi Triger “*Regulation of Fertility Services in Israel*” **Regulating Regulation: Law and Policy** [Hebrew] 269, 287–288 (Editors: Yishai Blank, David Levi-Faur and Roy Kreitner, 2016) (hereinafter: Triger “**Regulation of Fertility Services**”). [*Translator’s Note*: It appear that the original text errs in the name of the first editor of this publication - <https://www.nli.org.il/he/books/NNL_ALEPH003944432/NLI> - g.m.] [↑](#footnote-ref-3)
4. See the “Overseas Procedure” issued by the Ministry of the Interior, which is not publicly available, which regulates the determination of parenthood in international surrogacy cases. *HCJ* 566/11 **Mamet-Magged v. Ministry of the Interior** *Pey-Daled Samech-Vav* (3) 493 (2014) at para. 8 of the opinion of Deputy Chief Justice Naor (hereinafter: “**In re Mamet-Magged**); Ruth Zafran & Dafna Hacker, *Who Will Safeguard Transnational Surrogates’ Interests? Lessons from the Israeli Case Study*, 44 L. & Soc. Inquiry 1141 (2019). [↑](#footnote-ref-4)
5. As described in the article, parenthood is a “legal institution.” The law determines who the legal parents are, whether said legal determination is that parenthood at law be based on a genetic-biological relationship, or whether legal parenthood be based on other affiliations. [↑](#footnote-ref-5)
6. Moreover, in principle, the Supreme Court has created civilian paternity detached from the concrete tests of some or other personal law; see *Civil Appeal* 3077/90 **Jane Doe v. John Do**, *Pey-Daled* *Mem-Tet*(2) 578 (1995). [↑](#footnote-ref-6)
7. *Ibid.*, at pp. 315-316. [↑](#footnote-ref-7)
8. Zafran “*Family in the Genetic Era,*” *supra.* Note 4, at pp. 234-235; Ayelet Blecher-Prigat and Dafna Hacker “*Parents or Strangers: The Ideal and the Existing Legal Status of Parents’ Partners*” [Hebrew] **Hebrew University Law Review** *Mem* 5, 9 (2010) (hereinafter: “**Blecher-Prigat and Hacker,** ‘**Parents or Strangers**’”). [↑](#footnote-ref-8)
9. This assumption, as Ruth Zafran has emphasized in her writings, is based on two arguments: first, regarding the element of imagination and continuity; and, second, an argument of a proprietary nature, related to a person’s desires, as the owner of their own body, to control its products. See on this matter *ibid*. at p. 232, Note 24, and the literary source cited therein. [↑](#footnote-ref-9)
10. See Blecher-Prigat, *supra.* Note 17, at 152. [↑](#footnote-ref-10)
11. Israeli case law has no presumption by force any Supreme Court precedent, stipulating that the mother’s husband is the father; rather, this emanates from birth registration procedures set by the Ministry of the Interior (see hereinafter Note … ). As we noted at the beginning of the chapter, there is no legislation in Israel defining parenthood, neither is there case law addressing the question. Therefore, we use the term “assumption” rather than “presumption.” [↑](#footnote-ref-11)
12. S. 28E of Genetic Information Act 2000-5761. [↑](#footnote-ref-12)
13. In special circumstances, which we shall not discuss extensively herein, when a special need to recognise a different father does arise, the courts have found creative solutions to do so, such as adoption or recognition of a ‘psychological parent.’ See *Family Case* (Haifa Family Affairs Court) 31880-07 **A.G.Z. v. A.Z.** (Published in Nevo, 5 Nov 2013). These measures are often employed also in circumstances unrelated to illegitimacy, for instance, in the Muslim community, see *Family Case* (Nazareth Family Affairs Court) 29182-07 **M.Y. v. N.Z.** (Published in Nevo, 27 Feb 2017) (hereinafter: “**In re M.Y.**”). [↑](#footnote-ref-13)
14. S. 28 of the Genetic Information Act. If the mother or husband (including divorcé, to whom the mother was married at the time of conception) refuse his registration as the father, no one will be registered as the father in respect of that child, and no genetic test will be permitted, other than by court order; this will only be ordered in rare cases. [↑](#footnote-ref-14)
15. The position recognizing the husband as father in not unique to Jewish couples. See, for example, **In re M.Y.**, *supra.,* Note 25; *Family Case* (Tiberius Family Affairs Court) 27090-01-19 **A.A.Z. v. H.M.** (Published in Nevo, 28 Oct 2011). [↑](#footnote-ref-15)
16. S. 3 of the Population Registry Act 1965-5725. [↑](#footnote-ref-16)
17. Today, the procedures require the father to further declare that he is the genetic father of the descendant; however, this is a recent change intended to thwart any legal battle to recognize maternity in respect of the expectant mother’s female partner (refer to Zur-Weisselberg and the relevant part of the joint article). [↑](#footnote-ref-17)
18. See Ss. 3, 4.9 and 4.10 of the Population and Immigration Authority Procedure No. 2.2.0007 “Procedure for Adding Details of the Father of a Minor Resident of Israel to the Population Register” (5 Aug 2020) [www.gov.il/BlobFolder/policy/adding\_parent\_to\_minor\_israeli\_register\_2014/he/2.2.0007.pdf](http://www.gov.il/BlobFolder/policy/adding_parent_to_minor_israeli_register_2014/he/2.2.0007.pdf) (hereinafter: “**Procedure for Adding a Father’s Details**”). [↑](#footnote-ref-18)
19. This part is taken from Blecher-Prigat and Zafran, “*Children are a Joy,*” *supra.* Note 3, at 422–430. [↑](#footnote-ref-19)
20. This idea was common to all legal systems in ancient history, and especially with respect to the maxim of Roman Law “*Mater semper certa est*” (Maternity is always certain). The idea was preserved in modern legal systems in which the parturient woman is automatically the legal mother. See Triger, *Crimes Against the Patriarchy*, *supra.* Note 11. [↑](#footnote-ref-20)
21. Ss. 2 (Definition of “**Donee**”), 11, and 42(a) of the Eggs Donation Act. [↑](#footnote-ref-21)
22. Yehezkel Margalit “*Anticipating the Determination of Legal Parenthood by Consent in Israel*” [Hebrew] **Hebrew University Law Review** *Mem-Bet* 835, 857–858 (2012) (hereinafter: “**Margalit** ‘**Legal Parenthood by Consent’**”). [↑](#footnote-ref-22)
23. It is important to draw attention to the confusion we detect in relation to the difference between the intention test and the consent test. The consent test was introduced into Israeli legal discourse by Yehezkel Margalit. See: Yehezkel Margalit “*Determining Legal Parenthood by Consent as a Solution to the Challenges of Determining Legal Parenthood in the Modern Era*” [Hebrew] **Haifa Law Review** **F** 553 (2012) (hereinafter: “**Margalit** ‘**Parenthood Determination’**”); Margalit, “*Legal Parenthood by Consent,*” s*upra.* Note 34. Margalit emphasises the contractual element in family law, especially in the context of defining parent-children relationships. In his view, we should not be satisfied with assumed or implied intention, and he proposes to establish parenthood on an explicit contract between the parents, a contract duly drafted and approved by a competent authority. *Cf*. Yehezkel Margalit “*Legal Parenthood, Law and Justice – Suitable Normative Boundaries for a Judicial Parenthood Decree*” **Hebrew University Law Review** *Mem-Zayin* 113, 117 (2017). However, relying on an agreement requires some default option, a starting point, from which the parties seek to deviate by agency of the agreement. It appears that Margalit posits the starting point to be that the persons who have a biological relationship to the child are those who are initially entitled, and they can agree to waive this affiliation or share it with others. We believe, as aforementioned, that there is no natural or self-evident default option, and that the default options themselves should be discussed. A separate question is whether to permit the parties to deviate by consent from the default option prescribed at law. On this point, Israeli law’s position is that parenthood is not a private matter given to the parties’ discretion; however, this article does not discuss that matter. [↑](#footnote-ref-23)
24. There are those who believe that the power gaps between the parties should be addressed in the setting of the intention test, see, for instance, Libby Adler, *Inconceivable: Status, Contract, and the Search for Gay & Lesbian Parenthood*, 123 Penn State Law Review 1, 27–33d (2018) (To the extent that gay and lesbian parenting rights increasingly rely on contract, critiques of contract should be on our radar. Issues of bargaining power ...... are all worth careful attention.” [↑](#footnote-ref-24)
25. Blecher-Prigat, *supra.,* Note 17. [↑](#footnote-ref-25)
26. We believe, that the court’s position in *Family Case Leave to Appeal* 1118/14 **Jane Doe v. The Ministry of Welfare and Social Services** (Published on the Judiciary’s Website, April 1, 2015) (hereinafter: “**In re Jane Doe 2015B**”)), when the court refused the possibility of acknowledging the maternity of a women who instigated the procreative act by agency of three parties outside the family unit – an ovum donor, a sperm donor, and a surrogate, needs to be revisited. [↑](#footnote-ref-26)
27. The Embryo Gestation Agreements (Agreement Approval and the Status of the New-born) (Notices, Applications and Orders) Regulations 1998-5758; The Embryo Gestation Agreements (Agreement Approval and the Status of the New-born) (Registration in the Ledger) Regulations 1998-5758. [↑](#footnote-ref-27)
28. See the list of guidelines published on the **Ministry of Health’s** website - [www.health.gov.il/Services/Committee/Embryo\_Carrying\_Agreements/Pages/Surrogacy.aspx](http://www.health.gov.il/Services/Committee/Embryo_Carrying_Agreements/Pages/Surrogacy.aspx) - “Applying To The Committee For The Purposes Of Receiving Recognition Of Entitlement Under The Agreements Act” (July 2020), “Process Suitability Conditions For The Couple And Surrogate” (February 2018), “Preparation of The Documents Necessary for the Purposes of Submission of the Application for Approval of the Embryo Gestation Agreement” (November 2018), and more. [↑](#footnote-ref-28)
29. The embryo gestation process encompasses social, emotional, and ethical complexities, in view of the presence of a third party who in practice carries the pregnancy. See on this point: Nofar Lipkin and Etty Semama “*From Act of Heroism to Shelf Product: Creeping Normalisation of Surrogacy in Israel*” [Hebrew] **Law and Government** *Tet-Vav* 435 (2013). For a review of the unique complexities relating to overseas surrogacy proceedings, see Ruth Zafran & Dafna Hacker, *supra.* Note 6. For a review of the unique complexities relating to the intended parents overseas, see Zvi Triger “*A Different Journey: The Experiences of Israeli Surrogacy Parents in India*” [Hebrew] **Theory and Criticism** 44, 177 (2015). [↑](#footnote-ref-29)
30. S. 11 of The Embryo Gestation Agreement Act. Scholars disagree in relation to the identity of the parents of a child born by means of an embryo gestation agreement, at the moment of birth. According to one approach – supported by Zafran in “*Family in the Genetic Era*,” *supra.* Note 4 – it seems that such child may have more than two parents at the time of their birth: The parturient mother (who carried the pregnancy) by force of the act of childbirth; the intended father, by virtue of the genetic relationship to his descendant, combined with the element of intention; and his partner, the intended mother, by virtue of her relationship with him combined with her intention to become a mother. A different approach suggests that the child does not have even a single parent at the time of his birth. One could say that at least on the ideological level, this approach is undesirable, and any situation in which a child is born but has no parents at the time of his birth should not be tolerated. [↑](#footnote-ref-30)
31. S. 13(a) of The Embryo Gestation Agreement Act. [↑](#footnote-ref-31)
32. S. 2(1) of The Embryo Gestation Agreement Act. [↑](#footnote-ref-32)
33. S. 2(2) of The Embryo Gestation Agreement Act. According to the wording of the law, ​​the intended father’s sperm should always be used for fertilization. However, following the Supreme Court’s judgment in **In re Arad-Pinkas** decreeing that the law should also apply to same sex couples, it is understood that only one of the intended fathers can be genetically related to the child, and therefore the law should be interpreted so that a genetic relationship to one of the parents is necessary. See: *HCJ* 781/15 **Arad-Pinkas v. The Committee for Approval of Embryo Gestation Agreements**, para. 6 (Published in Nevo, 11 Jul 2021). [↑](#footnote-ref-33)
34. *Ibid*. [↑](#footnote-ref-34)
35. A position expressed by the legislator – opposing use of reproductive cells, both ova and sperm – has been reinforced recently in *HCJ* 781/15 **Arad-Pinkas v. The Committee for Approval of Embryo Gestation Agreements** (Published in Nevo, 3 Aug 2017) [*Translator’s Note*: Please note the date difference as compared with the preceding footnote – g.m.] (The judgment rejected a petition from a single woman, who, due to a medical problem, could not carry a pregnancy, or even donate her own ova; she argued against the requirement of a genetic relationship in surrogacy proceedings under the Surrogacy Law). [↑](#footnote-ref-35)
36. S. 11 of The Surrogacy Law. [↑](#footnote-ref-36)
37. Zafran & Hacker, *supra.* Note 6. [↑](#footnote-ref-37)
38. For a discussion of the disadvantages of a judicial process to institutionalize parenthood after birth, and the fact that the interests of the surrogate are also worth protecting, see Noy Naaman, *Timing Legal Parenthood* (forthcoming) (update) (hereinafter: “**Naaman**”). [↑](#footnote-ref-38)
39. In re Mamet-Magged, *supra.* Note 6. A judicial parenthood decree was developed several years earlier in the case of a couple of women. In this regard, see *Family Case* (Tel Aviv Family Affairs Court) 60320-07 **T.Z. v. The Attorney General – Tel Aviv District Prosecutor’s Office** (Published in Nevo, 4 Mar 2012), in which Judge Miller paved the way for using judicial parenthood decrees, although with respect to recognition of parenthood on the basis of a genetic relationship (in that instance, the case concerned a female couple, one of whom carried the fetus, and the other donated the ova). [↑](#footnote-ref-39)
40. *Adoption Case* (Tel Aviv Family Affairs Court) 57740-12-13 Jane Doe v. The Attorney General (unpublished, 1 Mar 2015). In these legal proceedings, the position of the Attorney General was submitted to the brief, according to which, in the circumstances of procreation with the assistance of an anonymous sperm donor, the State agrees to grant a decree of parenthood to the partner of the biological mother. This position was published in the setting of “Press Release: The Attorney General Does Not Object to the Grant of a Parenthood Decree to Recognize the Female Partner of the Biological Mother as an Additional Mother” (Ministry of Justice Spokesperson, 8 Feb 2015). The decision was preceded by *obiter dicta* from the Supreme Court (Justice Fogelman) that, in principle, a judicial parenthood decree can be issued also in relation to the biological mother’s partner. See Family Matter Leave to Appeal 2890/14 **Jane Doe v. Jane Doe**, para. 7 to Justice Fogelman’s opinion (published on the Judiciary’s Website, 2 Sep 2014). It is possible that said *obiter dicta* paved the way for the expansion of the model in relation to female couples about a year later. *Family Case* 57740-12-13 **Jane Doe v. The Attorney General** (unpublished, 1 Mar 2015) (hereinafter: “**In re Jane Doe 2015A**”). [↑](#footnote-ref-40)
41. Zafran “*The Family in the Genetic Era*,” *supra.* Note 4, at 223, Note 144. [↑](#footnote-ref-41)
42. For further reading on this point, see Noy Naaman “*Timing Parenthood at Law - The Judicial Parenthood Decree as a Test Case*” [Hebrew] *Kaf-Heh* **Law and Government** (update) (hereinafter: “**Naaman, ‘Timing Parenthood’**”). [↑](#footnote-ref-42)
43. The requirement for a report was limited over the years in two stages: First by the court, and then by the Attorney General and the Ministry of Welfare and Labour. See *ibid.*, at Note 77, and accompanying text. [↑](#footnote-ref-43)
44. **In re Jane Doe 2015B**, *supra.* Note 38, para. 7 to the opinion of Justice Hendel. We clarify, that the phrase was coined after the practice of issuing judicial parenthood decrees, notwithstanding the absence of a report, with respect to homosexual couples, became a common occurrence at the Family Affairs Courts during 2014. [↑](#footnote-ref-44)
45. *Ibid*. [↑](#footnote-ref-45)
46. This claim has first raised by Blecher-Prigat, *supra., Note 17.* [↑](#footnote-ref-46)
47. *Ibid*. at 140 and 154-157. [↑](#footnote-ref-47)
48. Refer to the book by Milanich. [↑](#footnote-ref-48)
49. Naturally, dilemmas may arise in instances of conflict between the various relationships. Take, for example, the case of a woman in a long-term, committed relationship with a man or a woman, who falls pregnant due to casual sex with a different man. Assume that the expectant mother’s permanent partner is interested in being recognized as the parent of the child born as a result of said sexual encounter, but the genetic father also wants to be recognized as the legal father. Is the law to give priority to the partner of the mother or to the genetic father? Or perhaps, in such circumstances, should the court recognize multiple parents? These are important questions, but in this article, we focus on the principled argument that supports the addition of the conjugal relationship as a consideration in defining parenthood, and we will relate to the most common instances in which the issue of considering a relationship arises. [↑](#footnote-ref-49)
50. Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and The Functional Approach to Parentage*, 53 Hastings L.J. 597, 599 (2002); Jacobs, *supra.* Note 16, at 465.

    Should we incorporate Douglas here and anywhere else? [↑](#footnote-ref-50)
51. Is there anything in American literature that puts forth such criticism? We need to incorporate [↑](#footnote-ref-51)
52. Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 Boston U. L. Rev. 227, 282 (2006); Dara E. Purvis, *Intended Parents and the Problem of Perspective*, 24 Yale J.L. & Feminism 210, 249 (2012); Jessica Feinberg, *Restructuring Rebuttal of the Marital Presumption for the Modern Era*, 104 Minn. L. Rev. 243, 274 (2019). [↑](#footnote-ref-52)
53. We debated how to call the mother, the institutionalization of whose maternal status is at the heart of the article. Our belief, extensively presented in this article, is that when a child is born into a conjugal relationship, both parties to said relationship are equal parents. The term we chose, the “*Additional Mother*,” reflects the existing legal and factual reality; we are aware that the expression itself may strengthen different approaches that grant superiority to the biological mother, as the “natural” mother, one whose status does not require recognition, or one who is higher up the parental hierarchy that the non-biological mother. In the absence of a different alternative, and in view of the necessity to “mark” for the purposes of discussing the mothers [*Translator’s Note*: Since the Hebrew text here does not contain ניקוד, it is impossible for me to know whether the intention here is “the mothers” or “maternity / motherhood” – g.m.] in a distinct manner, one will be referred to as the “biological mother” or the “expectant mother,” and the other will be referred to as the “additional mother” or the “partner.” [↑](#footnote-ref-53)
54. It is interesting to note how the conjugal relationship is tested, such as by means of displaying the fact of relationship to the entire world by unifying surnames. See *Post* *Settlement Legal Action* (Ashdod Family Affairs Court) 8095-04-18 **Mami v. Mother**, para. 51 of the verdict (Published in Nevo, 1 Mar 2020) (Where the unification of surnames was discussed as an indication of consent to raise the child together) (hereinafter: “**In re Mami**”). [↑](#footnote-ref-54)
55. Intention was not recognized in Israel directly as an exclusive factor for recognition of legal parenthood, even though it constitutes, as aforementioned, a “tie-breaker” in circumstances of assisted reproduction, at least in the context of couples of opposite genders, when aided by sperm or ovum donors, and in the context of embryo gestation agreements under local law. For its applicability limitations in Israel see **In re Jane Doe 2015B**, supra., Note 38. *Cf*. Shahar Lifshits “*Rejection of Paternity by Consent*” **Hebrew University Law Review** *Nun-Alef*, text accompanying Note 64 (expected to be published in 2021) (hereinafter: Lipschitz “**Rejection of Paternity by Consent**”) Foreign literature [↑](#footnote-ref-55)
56. Ayelet Blecher-Prigat, *The Costs of Raising Children: Toward a Theory of Financial Obligations Between Co-Parents*, 13 Theoretical Inquiries L. 179, 193–196 (2012); Ayelet Blecher-Prigat *“From Conjugal Relationships to Co-Parenting - A Legal Framework to Regulate the Economic Relations Between Joint Parents”* [Hebrew] **Law and Business** *Yud-Tet* 821, 848 (2016). Another researcher who expresses this position in a clear and resolute manner is Merle H. Weiner, in her book: See Merle H. Weiner, A Parent-Partner Status for American Family Law (2015). *Cf*. Merle H. Weiner, *When a Parent Is Not Apparent*, 80 U. Pitt. L. Rev. 533 (2019). [↑](#footnote-ref-56)
57. *Ibid*. [↑](#footnote-ref-57)
58. And there were even suggestions to expand the system of mutual obligations beyond the joint parents’ relations, and include in it the new partners of said parents, to the extent they have became significant parental figures in their own right. See on this point: Ruth Zafran, *Step-Parent as Fiduciary* (update). [↑](#footnote-ref-58)
59. Claire Huntington argues that we live in a *“*post-matrimonial*”* era, in which marriage is no longer the basis for family life. See Clare Huntington, *Post-marital Family Law: A Legal Structure for Nonmarital Families*, 67 Stan. L. Rev. 167, 169–175 (2015). While Huntington discusses this trend in the context of the United States, it seems that this trend has not passed over Israeli society and constitutes an integral part of the postmodern sociological permutations the family institution is undergoing even there. More than two decades ago, the sociologist Sylvie Fogiel Bijaoui identified this trend in Israeli society, supporting it with the facts of declining marriage rates alongside an increase in the number of children born out of wedlock and the normalization of common household management without benefit of marriage. See Sylvie Fogiel Bijaoui *“Families in Israel: From Kinship to Post-Modernism”* [Hebrew] **Sex, Gender, Politics** 107 (Editors: Dafna Jezraeli et al., 1999). See also Sylvie Fogiel Bijaoui *“The Personal, The National, The Global – A Contemporary Look at Families in Israel”* [Hebrew] **Scales of Justice** *Yud-Gimel* 15, 22–24 (2020). [↑](#footnote-ref-59)
60. It is also possible that close relationships that are not intimate by nature can serve as a basis for recognition of joint parenthood. In this context, see Blecher-Prigat, *supra.* at Note 17. [↑](#footnote-ref-60)
61. With respect to the commitment to nurture, maintain, and protect a loving family relationship, and long-term dependence and responsibility as elements in the process of identifying the legal parent, see Ruth Zafran *“The Relationship Discourse as the Foundation for Determining Family Matters: A Number of Comments on Care and Justice”* [Hebrew] **Sentences About Love** 605 (Editors: Orna Ben-Naftali and Hannah Naveh, 2005) (hereinafter: “**Zafran** ***‘*Relationship Discourse’***”*); Zafran *“The Family in the Genetic Era,”* *supra.* Note 4. (Check if there is anything suitable in English) [↑](#footnote-ref-61)
62. This claim received significant attention in literature in recent years, see, for example, Douglas Nejaime, *The Nature of Parenthood*, 126 Yale L.J. 2260, 2268 (2017); Courtney G. Joslin, *Nurturing Parenthood Through The UPA*, 127 Yale L.J.F. 589, 560-562 (2018). [↑](#footnote-ref-62)
63. To date, no distinctive study related to the LGBTQ community has ever been conducted, which includes same-sex couple households. See Rami Schwartz, ***National Statistics on the LGBTQ Community and Same-Sex Households – A Comparative Review*** (The Knesset Research and Information Centre, 3 Dec 2020) [fs.knesset.gov.il/globaldocs/MMM/9819fd22-85e0-ea11-8118-00155d0af32a/2\_9819fd22-85e0-ea11-8118-00155d0af32a\_11\_16528.pdf](https://fs.knesset.gov.il/globaldocs/MMM/9819fd22-85e0-ea11-8118-00155d0af32a/2_9819fd22-85e0-ea11-8118-00155d0af32a_11_16528.pdf). However, it is possible to point to an increase in same-sex families, from the increase in the number of published judgments relating to decrees of parenthood issued to such families. [↑](#footnote-ref-63)
64. Look for support in theoretical literature. [↑](#footnote-ref-64)
65. *Cf*., **In re Mamet-Magged**, *supra.* Note 6, at paragraphs 1–2 of Justice Danziger’s opinion; **In re Jane Doe 2015B**, *supra.* Note 38, at para. 8 of Justice Hendel’s opinion. [↑](#footnote-ref-65)
66. Israeli statistics show that 92% of children live with two parents, and that only 11% of all families with children under the age of 17 are single-parent families, most of which are families of divorced parents, who apparently started the family when they were a couple. See: Central Bureau of Statistics “*Press Release: Families in Israel – Data for Family Day*” 6 (10 Feb 2021) <https://www.cbs.gov.il/he/mediarelease/DocLib/2021/047/11_21_047b.pdf> [↑](#footnote-ref-66)
67. An unequivocal expression of this assumption can be found in Section 8 of the Attorney General’s Guidelines Regarding Post-Mortem Sperm Collection and Use, from 2003: *“*A child is born in the natural order, by an agreement between a man and a woman. When a couple – a man and a woman, live together, and create a family unit, then it naturally and customarily follows, at least in Israeli society, that at some point they will have a child.” The scholar Kinneret Lahad argues that procreation is an expected milestone in the relationship of every Israeli couple (when the fact of relationship itself is a similarly expected milestone). See in this context Kinneret Lahad, *A Table for One – A Critical Reading of Singlehood, Gender, and Time* (2017), p. 26*–*37. We note that with respect to parenthood / non-parenthood, despite the fact that it is increasing, it is still considered rare in Israel, and in particular, an anomaly; see Orna Donath, *“Nothing to Do with Me: Choosing Life Without Children in Israel”* (Editor: Ronen Wodlinguer, 2011). [↑](#footnote-ref-67)
68. Shahar Lifshits *“Rejection of Paternity by Consent*,*”* *supra.* Note 65, the text accompanying Note 40. [↑](#footnote-ref-68)
69. This interpretation was expressed in the opinion of the Supreme Court Justices in the **Zur-Weisselberg** High Court of Justice case, *supra*. Note 2. See the discussion below in Chapter D1. [↑](#footnote-ref-69)
70. *HCJ* 781/15 **Arad-Pinkas v. The Committee for the Approval of Embryo Gestation Agreements** (Published in Nevo, 27 Feb 2020) (hereinafter: “**In re Arad Pinkas 2020**”). [↑](#footnote-ref-70)
71. In re Mamet-Magged, *supra*. Note 6, paragraphs 20–21 in the opinion of Deputy Chief Justice Naor; paragraph 6a in the opinion of Justice Arbel. And seemingly also Justice Joubran (*ibid*. at paragraph 42 in his opinion) and Justice Rubinstein (*ibid*. at paragraph 11(d) in his opinion) agreed on the importance of this interest. [↑](#footnote-ref-71)
72. See **In re Jane Doe 2015B**, *supra.* Note 56, para. 8 in the opinion of Justice Handel. [↑](#footnote-ref-72)
73. *Ibid.* [↑](#footnote-ref-73)
74. *“Post-Mortem Sperm Collection and Use”* **Attorney General*’*s Guidelines** (October, 2003; Guideline No.: 1.2200) <https://www.justice.gov.il/Units/YoezMespati/HanchayotNew/Seven/12202.pdf>(hereinafter: the “**Attorney General’s Guidelines**”). [↑](#footnote-ref-74)
75. *Ibid.*, at Section 3. [↑](#footnote-ref-75)
76. *Ibid.*, at Section 19. [↑](#footnote-ref-76)
77. *Ibid.* [↑](#footnote-ref-77)
78. For a review of case law developments on this point, see Yehezkel Margalit: *“Dying to Stay Alive – On the Desired Normative Limits of Exercising the Deceased’s Will for Post-Mortem Reproduction”* *Caf-Daled* **Law and Business** 223 (expected to be published in 2021). [↑](#footnote-ref-78)
79. *Family Case Leave to Appeal* 7141/15 **Jane Doe v. Jane Doe** (Published in Nevo, 22 Dec 16). However, it is important to note that the lower courts are expressing their displeasure regarding the restricting trend dictated by the Supreme Court, and they advocate granting the deceased’s parents some form of status in such decisions. [↑](#footnote-ref-79)
80. For a position opposing the emphasis on the conjugal relationship in post-mortem reproduction, see Zvi Triger, *“The Death of One is the Life of the Other: Post-Mortem Reproduction with the Sperm of a Deceased Man by His Parents, and the Ideology of Israeli-Jewish Parenthood*,*”* **Theory and Criticism** 49, 67 (2017). Triger is willing to go so far as to recognize the grandparents who initiated the pregnancy from their deceased son’s sperm as the descendant*’*s parents. [↑](#footnote-ref-80)
81. Laufer-Ukeles & Blecher-Prigat, *supra.* Note 52, at 464–465; Lifshits, *“Rejection of Parenthood by Consent”* [Hebrew], *supra.* Note 65, at 33. [↑](#footnote-ref-81)
82. Blecher-Prigat and Hacker, *“Parents or Strangers*,*”* *supra.* Note 12, at 22. Ruth Zafran “*Siblings at Law*,” Tel Aviv University Law Review *Mem-Alef* 5, 58 (2018); Naaman “*Timing Parenthood*,” supra., Note 54. [↑](#footnote-ref-82)
83. The Legal Capacity and Guardianship Act defines the parents as the child’s natural guardians. This definition confers on the parents both duties and the right to care for the child*’*s physical and mental wellbeing, including their education, residence, and religion. The law stipulates that the minor is obliged to obey their parents concerning the guardianship, and show them respect. See Ss. 14–16 of The Legal Capacity and Guardianship Act 1962-5722. At the same time, additional laws, as well as case law pertaining to them, confer on parents additional rights and obligations, including the right to determine the child*’*s nameand the duty to pay child support. See Tali Markus *“Do You Need (Only) Two to Tango? On the Possibility of Recognising More than Two Parents for One Child”* **Hebrew University Law Review** *Mem-Daled* 415, 421 (2014). [↑](#footnote-ref-83)
84. For a discussion of the importance of the correlation between self-perception and the legal identity attributed to such identity, with emphasis on the time of birth, see, Naaman, *supra.* Note 50. [↑](#footnote-ref-84)
85. Blecher-Prigat, *supra.* Note 17, at 153–154. [↑](#footnote-ref-85)
86. It is interesting to note by way of example amendments effected by the Canadian Federal Provinces. See, for instance, Section 8 of the Ontario Province All Families Are Equal Act 2016. This section defines the date of conception as the decisive date for the purposes of the relationship, regardless of the length of time the couple was in an intimate relationship previously. See All Families Are Equal Act (Parentage and Related Registrations Statute Law Amendment), S.O. 2016 c. 23 § 8(1) (Can.), (*“*If the birth parent of a child conceived through assisted reproduction had a spouse at the time of the child*’*s conception, the spouse is, and shall be recognized in law to be, a parent of the child”). Moreover, in the definitions section, the law prescribes the definition of the term *“*Spouse*”* as also including a partner: “Spouse” means the person to whom a person is married or with whom the person is living in a conjugal relationship outside marriage; (“conjoint”). [↑](#footnote-ref-86)
87. Blecher-Prigat, *supra.* Note 17, at 153–154. In contrast, for instance, from roommates who are not in a conjugal relationship. [↑](#footnote-ref-87)
88. We acknowledge the apprehensions relating to use of the criterion of getting married as a criterion capable of shortening the time span. On the one hand, use of the criterion may contradict one of the rationales on which the model is based (equality between the variety of family configurations), as same-sex couples cannot get married in Israel. Use of this criterion may also be problematic in the eyes of those individuals who choose to refrain from entering into the institution of marriage for ideological reasons, both in Israel and in the United States. On the other hand, thereare arguments in support of use of the marriage criterion to shorten the necessary term. To date, in circumstances of assisted reproduction by sperm donation, the expectant women’s husband does not need to resort to judicial proceeding for his parenthood to be recognized, since the marriage raises a presumption of the existence of a genetic relationship (see ... in respect of U.S. law, and … in respect of the law in Israel). Therefore, failing to establish the criterion could disadvantage same-sex couples who are legally married (having wed overseas), but who fail to satisfy the time test in the presumption. To properly balance both sides of the argument, as well as to make the mechanism more efficient, we believe that it is right and proper for the institution of marriage to shorten the necessary time. [↑](#footnote-ref-88)
89. Margalit *“Legal Parenthood by Consent*,*”* *supra.* Note34. [↑](#footnote-ref-89)
90. See, for example, *Family Case* 10681/98 **John Does v. John Do** (Published in Nevo, 19 Sep 2000). [↑](#footnote-ref-90)
91. In Israel, S. 3 of the Child Adoption Act 1981-5741, stipulates: “There is no adoption other than by a man and his wife together.” In the District Court’s judgment in the **Yaros-Hakak** affair (*Tax Appeal* (Translator’s Note: I believe there is an error in the letters describing the type of legal proceedings – g.m.) (Tel Aviv District Court) 10/99 **Jane Doe v. The Attorney General** *Pey-Mem* 5761 831 (2001)), the court repeated the petitioners’ submission that the section should be interpreted as emphasising the word “together” (and not emphasising the combination “man and wife”). Thus, the purpose of the section is to prevent a situation whereby a married man seeks to adopt a minor by himself, but his partner would bear no parental responsibilities whatsoever. This interpretation was rejected by a majority opinion at the District Court, and was not repeated on appeal to the Supreme Court (**In re** **Yaros-Hakak**, *supra*. Note 52). However, even if we accept this interpretation, that does not necessarily rule out the possibility of having a child but only one of the couple serving as the child’s legal parent. Adoption law is concerned with the best interests of living and existing children, whereas in reproduction law, both as a matter of existing law and as a matter of what the desirable law should be, the best interests of the child not yet born cannot be a factor. [↑](#footnote-ref-91)
92. A question that comes up here relates to the burden he must meet. Does the objecting party need to express his or her opposition verbally, or in writing? Can an expression of objection be made just between the parties themselves, or is it necessary to express it in the presence of an external party, such as a lawyer or a judicial entity? [↑](#footnote-ref-92)
93. Such dispute may arise in retrospect after childbirth. A decision in circumstances of dispute, we believe, should be always be heard by the courts. [↑](#footnote-ref-93)
94. Section 28D of the Genetic Information Act. [↑](#footnote-ref-94)