Surrogate Parenthood: Between Genetics and Intent

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INTRODUCTION

In an era of stunning technological progress, the notion of ‘parentage’ has become increasingly contentious in the Western world. With leaps and bounds in the field of genetics and assisted reproduction technologies, parenthood as a concept drifts even further from assumptions of biological gestational connection or genetic similarity.¹

In Israel, a pro-natal and ‘child-centric’ society that very much values the idea of raising a family, the current legal landscape remains hostile to the use of third-party reproductive methods such as adoption and surrogacy by certain groups such as gay couples, single individuals, and people with disabilities. Under current law, prospective parents from these groups have no choice but to leave Israel in order to have their children; many go on ‘reproductive tours’ to developing countries and rely on systems of surrogacy there, withstanding tremendous financial, physical, and emotional stress. During the deadly earthquake in Nepal in April 2015, in fact, Israel sent official aircraft and assistance to the country to aid dozens of Israeli men, their newborn babies, and pregnant surrogates who were caught up in the disaster—stirring the old debate within Israeli legal and social circuits about the morality and legitimacy of surrogacy.²

Just a few weeks before the Nepal earthquake, the Israeli Supreme Court handed down its decision on the Ora Mor Yosef case. The case revolved around a disabled single woman, Ora Mor Yosef, who could not bear a child due to her impairment and

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therefore used the services of an altruistic surrogate. After exhausting all other options, Ora was forced to bring a child into the world who was not genetically related to her; she arranged for the surrogate to be impregnated with a sperm and an egg, both of which had been donated to her. After the child was born, she was given immediately to foster care because, as Welfare Ministry officials argued, Ora was neither genetically nor gestationally connected to the baby. During the trial, the Israeli court emphasized the importance of a genetic tie between the baby born of a surrogacy procedure and its parent, stating that without a genetic-biological connection, no child–parent relationship could be declared. Ora never saw the baby, which lost all legal connection to her. Ironically, the baby was ultimately given to a foster family that did not have any genetic connection to her either.

This paper discusses, through comparative analysis, the requirement that a genetic tie exists between babies and their prospective parents in surrogacy cases. It compares and applies an American model of ‘parenthood by intent,’ as established by California courts and manifested in the 1998 Buzzanca case, to the case of Ora Mor Yosef. I will show how the adoption of the parenthood by intent model could have served the Israeli court in its decision and produced a different, arguably more just, result.

Section I gives an overview of the requirement regarding genetic connections between babies produced through surrogacy and their prospective parents. In Section II, I provide an overview of the Ora Mor Yosef case. In Section III, I describe the development of the parenthood by intent model in American law. In the fourth and final section, I explore how the implementation of the American model could have been applied to the Ora Mor Yosef case and have influenced the Court’s decision.

I. SURROGACY AND THE GENETIC TIE

Despite being a contentious issue, with many concerned about the legitimacy and ethics involved in the process, surrogacy has gained wide acceptance in the United States and other Western countries and is currently used widely as a tool for reproduction. It has specifically become a means allowing parenthood to those historically denied the chance, such as single individuals, gay couples, people living with infertility, and people with disabilities.

The dispatch of Israeli aircraft to evacuate a few dozen surrogate Israeli babies from Nepal indicates surrogacy’s popularity in Israel, a pro-natal country where having a child and raising a family produces significant social capital and even serves as a ticket

3 There have been countless articles written on the ramifications and ethical hazards of surrogacy, specifically from a feminist standpoint. See e.g., Melissa Lane, Ethical Issues in Surrogacy Arrangements, in SURROGATE PARENTHOOD: INTERNATIONAL PERSPECTIVES 121, 126–28 (Rachel Cook, Shelly Day Sclater & Felicity Kangas eds., 2003); Seema Mohapatra, Achieving Reproductive Justice in International Surrogacy Market, 21 ANIMALS HEALTH L. 191, 192 (2012).


to being considered an effective member of society. Although most of the babies had been born to Israeli gay couples and singles who were forced to go abroad because Israeli law highly restricts the use of surrogacy and adoption, the state seems to have felt some responsibility to these prospective parents it sent away to developing countries in order to have their children and by that help fulfill the ethos of building the Jewish state.

The underlying rationale in favor of surrogacy as opposed to adoption is that it allows for a genetic connection between the prospective parent and the child. The genetic tie is clearly significant to prospective parents, many of whom go to great lengths in order to establish it. Some even argue that the genetic tie is crucial for the child’s identity formation and drives the search by adopted children for their biological parents.

There are, however, instances in which the genetic–biological connection between the child and her prospective parents in surrogacy is not present, like in the cases of Ora Mor Yosef and Buzzanca, discussed later. Those cases complicate the definitions and perceptions of parenthood. It is safe to say that the absence of a genetic tie does not predict that the child’s welfare will be compromised nor that a deep, emotional, and caring relationship cannot arise between parent and child. Such a relationship has been observed in many adoption cases, as well as instances in which babies have been accidently ‘switched at birth’ and raised by non-biological parents. It has been argued that the desire for parenthood stems not simply from an interest in procreation but from the longing to rear children and develop a meaningful relationship with them — experiences that do not depend on a biological–genetic connection.

Nevertheless, the majority of American courts and legislators still view the genetic tie as a significant and superior factor when determining parental rights (despite the use of the parenthood by intent model in other US jurisdictions, discussed later). So does the Israeli legal system.

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12 Abigail L. Perdue, For Love or Money: An Analysis of the Contractual Regulation of Reproductive Surrogacy 27 J. CONTEMP. HEALTH L. & POL’Y 279, 310 (2011); Adrienne Asch, Licensing Parents: Regulating Assisted Reproduction, in FAMILIES—BEYOND THE NUCLEAR IDEAL 123, 130 (Daniela Cutas & Sarah Chan eds., 2012); Hurwitz, supra note 11, at 154, 156.
13 PAUL LAURITZEN, PURSUING PARENTHOOD: ETHICAL ISSUES IN ASSISTED TECHNOLOGY 74 (1993); Daniel Statman, The Right For Parenthood: An Argument for a Narrow Interpretation, 10 ETHICAL PERSP. 224, 225 (2003).
A recent case in Israel has shown the importance regarded to the genetic tie in the Israeli law. In April 2015, the Israeli Supreme Court rejected the parental and custody rights of a single disabled woman who had a baby girl through surrogacy but did not have any genetic connection to her.

II. THE ORA MOR YOSEF CASE

Ora Mor Yosef is a Jewish-Israeli woman living with muscular dystrophy. She lives independently in Dimona, a southern Israeli town in the Negev desert, alongside her supportive family. Ora held a lifelong dream of becoming a mother, though she knew that she would not be able to carry a child herself, due to her physical disability. In her early forties, Ora decided to have her eggs harvested from her ovaries to be used for in vitro fertilization (IVF) so she would then be able to have a child through third-party reproductive technologies. Because of medical hazards related to her age and disability, many doctors rejected Ora’s request, but she finally found a doctor who successfully harvested a few eggs. Three of those eggs were inseminated with the sperm of Ora’s partner at the time, producing three embryos that were immediately frozen.

Ora was evaluated for parental capacity and efficacy by the state and found to be a fit parent; she and her then partner applied for surrogacy through Israel’s strictly regulated process, but were denied because they were not married through the rabbinical court. Very soon after, the couple broke up.

A close relative of Ora’s had volunteered to serve as her altruistic surrogate and to carry a baby for her. The two women traveled to California in order to try to impregnate the surrogate with one of the three frozen embryos. Unfortunately, the procedure did not work. As a result, all of the embryos containing Ora’s genetic material were lost.

Since Ora is not considered a candidate to adopt unrelated children under Israeli law because of her status as a single woman, she had to become resourceful. She procured a sperm donation from an acquaintance who waived all of his parental rights and an anonymous egg donation from a woman outside of Israel. Ora and the surrogate then traveled to India where the IVF treatment took place; an embryo was created and successfully implanted in the surrogate’s uterus. After spending 10 days in India, the two women returned to Israel in hopes of giving birth to the child in their home country.

When Ora sought to register the unborn baby as her child, her request was immediately denied: state officials claimed that no relationship existed between Ora and the baby because there was no genetic or gestational connection between them. Ora then filed for a declaratory judgment decree, asking the family court to recognize her as the mother and guardian of the baby. About a month later, a baby girl was born and immediately put into foster care. The family court held that the baby would remain in foster care and not be put out for permanent adoption until a decision on Ora’s parental status was made. However, Ora was never allowed to see the baby.

15 The altruistic agenda behind the surrogacy in Ora’s case makes the situation less vulnerable to ethical concerns and feminist critique, see: Brenda M. Baker, A Case for Permitting Altruistic Surrogacy 11 HYPATIA 34, 42 (1996). However, scholars who reject the idea of surrogacy still object to altruistic surrogacy within a close circle of friends or relatives, claiming that truly informed consent cannot be given in those circumstances, see e.g., Matthew M. Tieu, Altruistic Surrogacy: the Necessary Objectification of Surrogate Mothers 35 J. MED. ETHICS 171, 171 (2009).

16 Birenbaum-Carmeli & Carmeli, supra note 8, at 139, 140.
After many long legal proceedings, all of which rejected her request for recognition as the baby’s mother through a declaratory decree, Ora ended up before an extended panel of seven justices on the Israeli Supreme Court. The Court unanimously rejected Ora’s appeal. As the family court and the district court before it had done, the Court decided that the case did not fit any of the four recognized foundations for a parent–child relationship under Israeli law: genetic connection, gestational connection, adoption, or recognition of the parent’s spouse as the second parent due to their relationship. The Court was specifically concerned about paving the way for an immoral market bringing children with ‘no roots’ or ‘a clear identity’ into the world. As the Court stated, concerns about potential child trafficking justified Israeli law’s refusal to recognize ‘parenthood by contract’, i.e., a private contractual agreement to bring a baby into the world without having the state oversee the process.

The Court has also refused to give Ora any special status in the baby’s adoption proceedings, proceedings she has the right to start in the family court. Ora’s chances of convincing the court that denied her parental status in the first place, however, were slim, given that Israeli law generally forbids single individuals from adopting and that Ora was forbidden to see the baby or to have any relationship with her in the almost three years since she was born and put into foster care.

The formalistic decision on the case had an ironic result: the Court denied Ora parental status due the lack of a genetic tie while entrusting the baby to a foster family and later to permanent adoptive parents who do not hold any biological connection to her either. This end result can be understood as a punishment for Ora, who made the court face a fait accompli in this case (by going to court after the pregnancy had already started), and a warning for other Israelis who might attempt to bring babies into the world using private surrogacy contracts.

In the United States, the issue of parenthood by contract is treated in varying ways, but often far less restrictively than in Israel: some states enforce such contracts, some ban them, and many states have no laws regarding these contracts at all. This heterogeneous legal landscape has given American courts much more liberty in deciding cases around surrogacy and parentage. This in return has created the model of parenthood by intent, a concept that most likely would have helped Ora get custody of the baby she worked so hard to bring into the world.

17 For the family court decision, see File No. 50399-12-12 Family Court (BS), M.Y v. Anonymous (June 20, 2013), Nevo Legal Database (by subscription) (Isr.); for the district court decision, see File No. 59993-07-13 DC (BS), Anonymous v. Anonymous (Jan. 22, 2013), Nevo Legal Database (by subscription) (Isr.).
18 Regular panels in the Israeli Supreme Court are composed of three justices. In these circumstances, former Chief Justice Grunis decided that an extended panel of seven justices should adjudicate the case. See File No. 1118/14 CA, Anonymous v. Ministry of Social Affairs and Social Services (May 13, 2014), (unpublished) (Isr.).
19 File No. 1118/14 CA, Anonymous v. Ministry of Social Affairs and Social Services (Apr. 1, 2015), Nevo Legal Database (by subscription) (Isr.) [hereinafter: ‘the Supreme Court decision’].
20 Id. at articles 7–8 to Justice Neal Hendel’s opinion.
21 Id. at articles 18–19, 21 and 25 to Justice Hendel’s opinion; article 4 to Chief Justice Miriam Naor’s opinion; article 2 to Justice Esther Hayut’s opinion, Id.
22 Article 5 to Justice Salim Joubran’s opinion, Id.
III. THE AMERICAN MODEL OF PARENTHOOD BY INTENT

The concept of parenthood by intent was first articulated by the Supreme Court of California in the case of Johnson v. Calvert. That case involved a heterosexual couple who contracted with a surrogate to serve as their gestational carrier; she had no genetic connection to the baby. After an embryo was created from the couple and inserted into the surrogate through IVF, the relationship between the couple and the surrogate, now pregnant, deteriorated. Several months later, the surrogate demanded that the couple give her the final payment (which was not contractually due until after the child’s birth), threatening that she would not relinquish the baby to them unless they did so. The Calverts then turned to the court seeking a declaration that they were the parents of the child, while the surrogate filed for a petition declaring herself as the mother, both sides relying on the Uniform Parentage Act (UPA), which recognizes both gestational and genetic ties as potential presumptions of motherhood. When the case reached the Supreme Court of California, it decided that

> when the two means [gestation and genetic tie] do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law.

The Court reasoned that, since the baby would have never been born without the intention of the Calverts, they should be recognized as the parents and that this decision coincided with the best interests of the child.

A year later, the California Court of Appeals recognized the model of parenthood by intent in the case of In re Marriage of Moschetta, which involved another dispute between prospective parents and a surrogate who made a claim for the baby. However, this case involved traditional surrogacy (as opposed to gestational surrogacy): the sperm of the prospective father had been used to create the pregnancy along with the egg of the surrogate and thus the surrogate had a genetic connection to the baby. The court decided that the intention of the parent is determinative only when the genetic mother and the gestational mother are two different women. Since the surrogate had both connections, she was declared the natural and legal mother of the child.

The recognition of parenthood by intent went a step further in the case of In Re Marriage of Buzzanca. Luanne and John Buzzanca were a married heterosexual couple who contracted with a surrogate as their gestational carrier. Since both Luanne and John were infertile, the embryo implanted into the surrogate’s uterus was created out of the genetic material of two anonymous donors, with no genetic connection to either member of the couple. By the time the baby, a girl named Jaycee, was born, the couple had separated; Luanne took full custody of the child at birth. John did not want anything to do with the baby, so Luanne petitioned for an Order to Show Cause to be declared Jaycee’s legal mother, obtain sole custody of her, and receive child support from John.

24 5 Cal. 4th 84, 19 Cal. Rptr. 2nd. 494 (1993). See also Spivack, supra note 23, at 102.
25 Id. at 94; Id. at 500.
27 Id. at 900, 901; Id. at 1231.
29 Id. at 1415; Id. at 284.
It is important to mention that the surrogate in this case did not make a claim for Jaycee—similar to Ora Mor Yosef, in which both the surrogate and the sperm donor, while represented in court, relinquished their rights regarding the baby, and asked the state to give the baby back to Ora.

In the Buzzanca case, the trial court came to ‘the extraordinary conclusion’ that Jaycee does not have lawful parents, as the surrogate could not be considered her mother and neither John nor Luanne had any genetic connection to her.\(^{30}\) The California Court of Appeals, however, used the model of parenthood by intent, originally developed in Johnson, to declare Luanne and John Jaycee’s legal parents. Because there was no genetic tie between the parents and the baby, however, the court had to go further in its reasoning. It found statutory authority for a mother’s claim to legal parenthood in section 7613 of the Family Code in the UPA, which states that an infertile husband who consented to artificial insemination of his wife by another man’s sperm is the father of the baby who is born as a result; the sperm donor has no legal claim to paternity.\(^ {31}\) The court drew a comparison between the case of an insemination and the surrogacy initiated by the Buzzanca couple, recognizing Luanne as Jaycee’s legal mother:

In the present case Luanne is situated like a husband in an artificial insemination case whose consent triggers a medical procedure which results in pregnancy and eventual birth of a child. Her motherhood may therefore be established “under this part,” by virtue of that consent.\(^{32}\)

With regard to John’s status, the court stated that the same reasons for recognizing Luanne as Jaycee’s lawful mother applied to him as well:

In the case before us, there is absolutely no dispute that Luanne caused Jaycee’s conception and birth by initiating the surrogacy arrangement whereby an embryo was implanted into a woman who agreed to carry the baby to term on Luanne’s behalf. In applying the artificial insemination statute to a gestational surrogacy case where the genetic donors are unknown, there is, as we have indicated above, no reason to distinguish between husbands and wives. Both are equally situated from the point of view of consenting to an act which brings a child into being.\(^{33}\)

The court has also acknowledged that recognizing Luanne and John as Jaycee’s parents coincides with trends in public policy and the intention of the legislature to recognize and establish legal parenthood with the commitment and responsibility for the child that goes along with it, so that the burden of taking care of the child will not fall on the taxpayers. The court concludes its leading opinion by explaining how this decision coincides with the best interests of the child:

Even though neither Luanne nor John are biologically related to Jaycee, they are still her lawful parents given their initiating role as the intended parents in her conception and birth...Fortunately, as the Johnson court also noted, intent to parent ‘correlates significantly’ with the child’s best interests.’ That is far more than can be said for a model of law that renders a child a legal orphan [as concluded by the trial court].\(^{34}\)

\(^{30}\) Id. at 1412; Id. at 282.

\(^{31}\) Id. at 1416–18; Id. at 285–86.

\(^{32}\) Id. at 1425–26; Id. at 288.

\(^{33}\) Id.

\(^{34}\) Id. at 1428; Id. at 291.
Although Buzzanca is considered ‘the most far-reaching of surrogacy cases, in terms of overcoming genetics’, the idea of parenthood by intent has manifested itself in American jurisdictions other than California. The law that governs surrogacy contracts in Nevada states: ‘[a] person identified as an intended parent in a [surrogacy] contract must be treated in law as a natural parent under all circumstances’. The law in Arkansas is similar to the statutory rule used by the Buzzanca court and states that a child born to a surrogate is presumed to belong to the biological father and the intended mother as long as the couple is married. In the next section, I draw the connections between Buzzanca and Ora Mor Yosef, speculating on how the logic and suppositions about parenthood employed in the former might have affected the outcome of the latter.

IV. LOOKING AT ORA MOR YOSEF THROUGH BUZZANCA EYES

It is easy to see a resemblance between Ora Mor Yosef and Buzzanca. Similar to Luanne Buzzanca, Ora Mor Yosef sought first and foremost to bring a baby into the world for whom she would be the mother. Both Ora and Luanne initiated the baby’s existence by coordinating the formation of an embryo to be transplanted into a gestational surrogate. Ora does not have a genetic-biological connection to the baby, but she feels an emotional bond and responsibility for her well-being—after all, the baby would not be alive if not for her. In Ora’s case as well as Luanne’s, moreover, there was no attempt to establish the surrogate or the sperm donor as the ‘true’ parent, given that both had explicitly relinquished their parental rights. This aspect of the case may well have been the deciding factor in the Buzzanca decision, but, unfortunately, seems to have had little effect in Ora’s case.

Eventually, the Israeli Court decided to give the baby to parents who were not genetically connected to her and were not disabled. By doing so, it delivered an unsettling message about the capacities (or alleged lack thereof) of people with disabilities and single individuals to serve as parents. This message goes beyond the personal ramifications of the decision for those directly involved with the case: namely, preventing the child from forming a meaningful relationship with Ora and with the surrogate herself, who is Ora’s relative and lives close to her, which would have strengthened her feelings of belonging and identity.

Interestingly, the Buzzanca court and the Israeli court had quite different opinions about the bigger public policy implications of the cases before them. While the American approach focused on the implication of leaving the child to be a burden on

35 Halperin-Kaddari, supra note 9, at 323, 324.
36 Spivack, supra note 23, at 104.
40 For a critique and analysis of the Ora Mor Yosef case from a disability legal studies perspective, see Dorfman, supra note 6, at 77, 83.
41 For an analysis of how American law discriminates against single people with regard to reproductive policies, see Strorrow, supra note 39, at 646, 664.
42 A relationship between the baby and the gestational surrogate who carried her is recommended in the literature, see Asch, supra note 12, at 132; Mary Lydon Shanley & Sujatha Jesudason, Surrogacy: Reinscribing or Pluralizing Understandings of Family?, in Families—Beyond the Nuclear Ideal, supra note 12, 110, 118.
taxpayers, the Israeli court focused more on fears of potential child trafficking. The
different perceptions of the ramifications of recognizing parenthood by intent indicate,
perhaps, deeper cultural differences between the societies, given American individual-
ism and Israeli pro-natalism. Nevertheless, this threat of child trafficking did not man-
ifest itself in the specific circumstances of Ora’s case, who had been found to be a fit
parent and was never accused of harboring any criminal intent. It is therefore surpris-
ing that child trafficking loomed so large in the court’s decision and was discussed by
multiple justices. Abstract fear of horrific consequences seems to have influenced the
justices more than rational consideration of the facts before them.

CONCLUSION
When people seek to become parents, especially in pro-natal societies such as Israel,
many start by trying to have a child connected to them genetically. As the Ora Mor
Yosef case clearly demonstrates, however, this is not always possible. Although Ora tried
more than once to bring a biological child into the world, she was forced to give up on
the genetic tie and coordinate a surrogacy procedure that would allow her to become a
mother. I argue that those unique circumstances should have been taken into account
and tilted the scale in Ora’s favor, especially given broader definitions of parenthood
currently in circulation.

The Israeli Supreme Court, unlike the California Court of Appeals, did not recog-
nize Ora as the legal mother of the baby. Instead, it emphasized the importance of the
genetic tie in creating a parent–child relationship, refusing to take up the model of par-
enthood by intent that triumphed over genetics in the Buzzanca case and has even been
translated into legislation in some American states. If it had done so, it would have saved
Ora, the baby, the surrogate (who supported Ora’s bid for parenthood), and the foster
family (who took care of the baby for almost three years without the guarantee of be-
coming her permanent guardians) much grief and heartache.

Such a decision would have also done justice to groups who are denied the oppor-
tunity to become parents, such as single individuals, gay couples, and people with dis-
abilities, by a ‘normative void’ in Israeli law. The Court’s decision has preserved the
paradoxical nature of the genetic tie: ‘at once a means of connection and a means of
separation. It links individuals together while it preserves social boundaries.’

A change in Israeli legislation is required: one that will take into account the model
of parenthood by intent, bridging the gap between the advancement in technology and
social attitudes towards parenthood, and preventing similar cases from occurring.

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43 Article 6 to Justice Hanan Melcer’s opinion in the Supreme Court decision, supra note 19; Dorfman, supra
note 6, at 77, 80.