

State Interference in the Autonomy of the Family Unit: Between Parenthood Rights and the Values of the State of Israel

Yossi Green

Abstract

The right to parenthood, which is the most basic element of all, is not written in any book. Nevertheless, it stands at the pinnacle of all constitutional rights, as does the right to health, which is no less important than other human rights. Technological innovations in the field of fertility create tension between these two basic rights, and pose a complex challenge for the legislature, inasmuch as the very existence of medical technology is not sufficient cause to use it indiscriminately.

This paper suggests a balance between the longing for parenthood and the right to fertility treatments of four groups in Israeli society that maintain various arrangements of family units, and therefore require medical intervention to create pregnancy. On one hand, the right to parenthood is ranked very high in the hierarchy of rights. On the other hand, the legislature has imposed limitations on fertility treatments funded by the state, limitations that prevent access to the treatment by certain groups in the population.

The conclusions of the paper are that single-parent families should be allowed to enter a surrogacy agreement, if it can be proven that the single parent has the parental capacity to provide for the future child's needs and wellbeing. Concerning families that want to realize their parenthood at an advanced age by means of egg donation, the age limitation specified by the law is reasonable and proportional. Pertaining to single-sex family units, they should not be allowed to enter a surrogacy agreement in Israel. However, considering changing reality and their growing number, there is no option but to allow a parallel procedure abroad under two conditions. One basic condition is that the arrangements of the surrogacy procedure abroad are determined in a law that is separate from the Arrangements Law, and which makes it clear that the arrangement in no way implies recognition – whether direct or indirect – of single-sex marriages or the legitimacy of such family units. The second condition is that the surrogacy arrangement abroad is supervised by the state. *Halachic* problems, should they arise, are solvable. With regard to special needs individuals who maintain a family unit, their right to use medical assistance should derive from the best interests of the future child and from their parental capacity. If these are assured, their right to parenthood increases, which is not the case if the forecast is that they will be unable to ensure the future child's best interests.