MARGALIT YEHEZKEL, *Determining Legal Parentage: Between Family Law and Contract Law*. Cambridge: Cambridge University Press, 2019, pp. 316, IBSN 978-1-108-42272-7, £85 (hbk).

Over the past fifty years, advances in assisted reproductive technology (ART) have allowed many to become parents, with or without a genetic link. These technological advances have challenged definitions of parenthood and family, such that determination of legal parentage is no longer as straightforward as identifying a marriage into which a child is born or family into which a child is adopted. While individuals may intentionally decide to procreate through the use of various ARTs, this intention and desire is not considered as a valid means of acquiring legal recognition as a parent, such that determination of legal parentage is a pressing concern in family law.

In his book, Dr Yehezkel Margalit proposes determining legal parenthood by agreement (DLPBA) as a means of resolving the parentage dilemmas that have arisen out of ART. The book focuses on its validity, benefits, the range of individuals who could be recognised as parents, and the consequences for various forms of ART and ‘children born “the old-fashioned way”’ (p. 2). Divided into seven chapters, Margalit argues that DLPBA can be used to independently acquire legal parenthood, or as a supplement to traditional methods, and application thereof would enhance our understanding of parenthood by providing variations in legal parental status.

To begin, in Chapter One, he presents the socio-legal background of ARTs when looking at parenthood, describing the various social and medical changes that have allowed for the separation of marriage from fertility and sexuality (p. 14). Advances in ART exacerbate this, as gamete donors and gestational surrogates fracture genetic and social parenting, in ways that require patchwork legislative regulation and *ex post* sporadic judicial solutions (p. 22). Procreation through ART is intentional, and this intentionality is so substantial, that those conceiving a child through such methods should be respected and recognised by the law (p. 23). This first chapter ends by establishing the importance of legal parenthood, for both the child and the parents, demonstrating how the law has too narrowly dealt with the determination of parenthood in the United States and other countries, to the detriment of the best interests of the child.

Chapter Two explores various forms of ART, looking at who should be the legal parent of the ART-conceived child and clarifying the role of DLPBA in current law. Margalit asserts that the role of DLPBA in positive law is strengthening (p. 29), and uses eight case studies which present ‘the most prevalent, challenging, and important issues in this field’ (p. 27) to demonstrate his claim. These case studies are: (1) artificial insemination by husband (AIH), (2) artificial insemination by donor (AID), (3) *in vitro* fertilisation (IVF) with or without egg donation and egg sharing, (4) domestic surrogacy, (5) international surrogacy, (6) same-sex marriage, (7) disposition agreements regarding frozen embryos, and (8) multiple parenthood and other futuristic ART (p. 28-9). However, rather disappointingly, as Margalit condenses his discussion on the last case study on multiple parenthood and other futuristic scenarios, into one page, it almost felt shoehorned in to cover his bases.

For each case study, Margalit briefly describes the medical process before examining societal views on the ART and the law’s response to the process. He claims the shift from status to contract was ‘dramatic in its pervasiveness and speed’ (p. 35), each case study is underpinned by an analysis of contract principles used to resolve parenthood disputes. Most of these case studies are picked up in the last chapter, where he demonstrates how application of DLPBA would be the best possible response to their dilemmas.

Arguably, the discussion regarding domestic surrogacy is the strongest, as it provides an excellent backdrop for discussion of DLPBA, as many enter into surrogacy contracts regardless of their enforceability. Margalit explores the various intrinsic contractual problems of surrogacy contracts, namely, unequal power between the parties, change of heart, and changed circumstances. As surrogacy is now an increasingly permissible practice, the issue is how such contracts should be executed in the best possible way (p. 54).

After presenting the case studies, Chapter Three provides an overview of the objections to DLPBA in the positive legal system, arguing the traditional resistance to this model is rooted in coerced parenthood. The notion of coerced parenthood refers to instances where parenthood is imposed on the genetic progenitor, despite a lack of consent. *Prima facie*, this indicates that DLPBA should be rejected, as under American law, it would deprive an individual of their constitutional right to parent (p. 78). Margalit explores the philosophical-ethical-legal arguments for coerced parenthood and its consequent parental obligations, focusing on whether there is a moral obligation to pay for child support. Concluding that the philosophical-bioethical infrastructure for such a postulate is complex and ill-defined, Margalit then turns to discussing the justifications for narrowing DLPBA to prominent social norms: the best interests of the child and the desire not to impose the financial burden of child maintenance on society as a whole. He holds that DLPBA is influenced by these social norms, and not an abstract process (p. 85), and should be restricted to comply with these norms.

Margalit dedicates the rest of Chapter Three to the anti-commodification argument, restricted to two contentions and following on from the research of prominent ART scholars Margaret J Radin and Elizabeth Anderson. The first contention maintains an absolute distinction between the intimate realm of the family and the marketplace, ensuring that procreation is not evaluated only by its economic market value. The argument is that doing so would dehumanise women and children, as well as strip procreation and parenthood of altruism and care. The second contention objects to the existence of a reproductive market, which would cause detrimental objectification and commodification of children.

The chapter concludes rather abruptly, with Chapter Four dedicated to presenting the arguments supporting DLPBA. He argues this normative model can be easily reconciled with other models of establishing legal parenthood, in light of privatisation of the family, as it achieves more egalitarian spousal and parental structures and prevents traditional inherent discrimination. DLPBA would allow for the best legal parent to be found, as it would recognise the individual who intended, desired and agreed to serve as the legal parent, which fits well with the best interests of the child (p. 103). This fits with modern family law, which explicitly emphasises the autonomy of family members. He enumerates a number of justifications for his argument that recognition of regulated and narrow DLPBA would preserve the best interests of the child, in light of the privatisation of the family and the parent-child realm specifically (p. 103).

Chapter Five picks up Chapter Three’s discussion about the responsibility aspect of legal parenthood, as Margalit looks at conceptualising parenthood as a right and entitlement. Although historically legal parentage was driven by marital status, recently, there has been growing recognition of individuals who assume parental obligations as legal parents. DLPBA would assist these individuals in fulfilling their rights, without concern for their marital status, allowing for *post factum* (partial) legal recognition for those who assume parental obligations.

Chapter Three’s objections to DLPBA are refuted in this present chapter; a chapter that feels out of place, and is structured differently. He posits that while contract and intent should determine parenthood, to preserve the best interests of the child, the legal consequences of parenthood should be status-based; he refers to this framework as modern status, as opposed to the traditional presumption-based status imposed by the state. Modern status is ‘the ultimate path of compromise between traditional status and full freedom of contract’ (p. 128), as it is a status for all intents and purposes—since its obligations are imposed and cannot be opted out of—but admission to it is voluntary, evidenced by an agreement. Those who opt into this legal status should be obligated with parental undertakings, and this would be facilitated by DLPBA. This normative framework allows for the possibility of legal parents opting in or out, in line with the best interests of the child, in recognition of the contacting parties’ desire to procreate (p. 133).

Attention is then shifted onto refuting the anti-commodification argument, with reference to modern contract law. Margalit focuses on the first contention presented in Chapter Three, which reject price-tagging procreation. He argues that a dichotomous view of family and market is futile, as modern contract law has penetrated family law and vice-versa. Instead of the superficial and unnecessary binary drawn, Margalit suggests regulation on contracts and payments, as existence of the market should be endorsed, provided it is strictly and comprehensively regulated (p. 142).

The penultimate chapter addresses the theoretical and practical infrastructure of DLPBA, beginning with an overview of the previous five chapters. This discussion provides Margalit with the opportunity to demonstrate how DLPBA would be helpful in keeping pace with the shifts in society and family, while promoting the best interests of the child. After illustrating how society and the law fills parental status with parental obligations and rights, Margalit asks whether parental rights flow from obligations or vice-versa.

He argues that three types of legal parental status should be distinguished: full legal parental status, with all rights and obligations; partial legal parental status which can be acquired by fulfilling the obligations but without receipt of the full spectrum of benefits; and no parental status, which excludes the individual from parental obligations and rights (p. 160). Parental status would be determined by an individual’s explicit or implied initial intent or agreement. Through this functional differentiation, parental responsibility would be strengthened, sending the message to society that parental rights are awarded after fulfilment of obligations, but not because children are their parents’ possessions. The role of freedom of contract in dictating parental status or variant thereof is discussed. In non-traditional families, private regulation would fill the gaps left by traditional legal status, allowing parental rights to flow from the extent to which an individual fulfils their parental obligations (p. 161).

In terms of the practical aspects of DLPBA, Margalit argues that a narrowed scope of freedom of contract, heavily regulated, is applicable, as the best interests of the child must prevail (p. 173). He proposes judicial preauthorisation for agreements between individuals intending to become parents, as this would allow for monitoring of unconscionable clauses, and avoids exploitation and duress (p. 178). Additionally, he proposes administrative preauthorisation, similar to Israel, as well as establishment of a central registry (p. 181).

The final chapter refers back to most of the case studies presented in Chapter Two, demonstrating how application of DLPBA would be the best possible response to their dilemmas, and how his normative conclusions fit with recent movements in judicial opinion and legislation. Multiple parenthood and other futuristic ART are outside the scope of the book, and AIH does not raise any issues as to who should be considered the legal father.

With AID, Margalit argues that modern status should be incorporated into parentage determinations, as procreation is purposeful, and this would give greater freedom of contract to opt in an anonymous donor as a legal parent or to opt out a known sperm donor from this status; this fits well with recent court opinions and legislation in California, New Mexico and the District of Columbia (p. 191). Similarly, in IVF and egg donation, Margalit maintains that freedom of contract should be recognised, validating an agreement as to which woman will be assigned legal motherhood (p. 197); this is seen in the 2017 revision of the Uniform Parentage Act.

As with Chapter Two, the most impactful discussion is seen when discussing domestic surrogacy. Modern contract law conceptualises contracts in public terms, inserting communal and social values, with its flexibility and complicity allowing for solutions to problems frequently raised in domestic surrogacy agreements. Applying modern contract law principles, Margalit provides solutions to the three dilemmas raised in Chapter Two, unequal power between the parties, change of heart, and changed circumstances. The doctrine of unconscionability is seen as remedying issues of unfairness between the parties, and could be implemented proactively and retroactively to prevent the signing of any unconscionable contracts (p. 209). The theory of relational contracts holds that during the initial contract formation, there is no real ability to foresee the obligations and rights under the contract, resulting in mandatory performance only when necessary (p. 215). The doctrine of changed circumstances recognises that the agreement may be adjusted in response to changed circumstances (p. 217).

After his detailed discussion on domestic surrogacy, Margalit turns to international surrogacy, likening it to international adoption, and recommending international cooperation to remedy its problems. He suggests comprehensive international regulation, akin to the Hague Adoption Convention, which would focus on the three parties to surrogacy—the intended parents, surrogate, and child (p. 225)— and provides six main fundamental aims for the proposed Convention (p. 229). He briefly outlines the advantages and drawbacks of his proposal, adding that supplementary domestic regulation is necessary to help address some of these needs.

The focus shifts to the possibility of implementing DLPBA when establishing same-sex parenthood, discussing how respecting contracts for parenthood, subordinate to the best interests of the child, helps the judiciary enforce private agreements without intruding into the private sphere (p. 235). Finally, when looking at disposition agreements regarding frozen embryos, Margalit’s normative model would allow for a third normative alternative where disputes arise, allowing for a middle ground between the current accepted possibilities of either full parental status or non-parental status (p. 243).

The book is on the whole very well-written, with excellent signposting throughout, and clear progression from one argument to the next. At the beginning of (almost) every chapter, Margalit provides an outline of its focus and how it fits in with the rest of the book, and at the end, he summarises the chapter succinctly and alludes to the following chapter. The only exception is Chapter Five, where Margalit refutes the objections to DLPBA presented in Chapter Three, which does not fit within this clear and structured framework. Following Chapter Four, the chapter wherein he presents the reconciliation of DLPBA with other models of establishing legal parenthood, he launches right into his counterarguments, without any introduction or conclusion.

On the whole, in this book Margalit presents an alternative model to the current framework for determining parenthood, one that takes into account the parties’ intentions, in line with the overall shift in favour of individual autonomy and the privatisation of the family. The different case studies presented provide an opportunity to explore the ways in which ART has transformed the family, and the resultant legal dilemmas. By presenting—then refuting—the objections to DLPBA, Margalit posits a strong alternative normative framework that promotes individual autonomy and the best interests of the child simultaneously. His approach allows the reader to question the traditional dichotomy drawn between family and market, as well as how parenthood is understood. Future research could build on this model, looking to the lived experiences of those in non-traditional families, where parenthood is determined by agreement, thereby allowing for an exploration of how family—and parenthood—is understood.

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