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Halakhic Approaches to the Resolution of Disputes Concerning the Disposition of Preembryos

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The development of new reproductive technologies over the past 15 years or so has offered great hope to many infertile couples. Along with the blessings they bring, however, these technologies are also a source of major ethical dilemmas.¹ For the Jew whose every decision is guided by *devar Hashem*, it is Halakha to which he or she must turn. The specific topic of this article concerns the preembryo, a particular configuration of human cells that did not exist in externalized form until the advent of in-vitro fertilization (IVF) in the late-1970's.

In-vitro fertilization may exist in various forms, but at its simplest, it involves extracting immature eggs (oocytes) from a woman's ovaries, placing those eggs in a petri dish supplied with nutrients, obtaining sperm from a donor, fertilizing the egg in the dish, and transplanting the fertilized ovum into the woman's uterus (usually at the 48–72 hour developmental stage). If all goes well, the embryo will implant and a pregnancy will ensue and be

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This is an abridged form of a longer work-in-progress that will address the issues of preembryos in a more comprehensive manner. The author wants to express his appreciation to Dr. Joel B. Wolowelsky for his assistance in unearthing hard-to-find source material.

detectable within 10–14 days after the transfer. Since the procedure was first introduced in 1978, over 25,000 IVF babies have been born. The average take-home baby rate is 17%; 19% for women under 39, 6.6% for older women. “Preembryo” is the term often used for a fertilized ovum that has not yet been transferred into a uterus.²

Although in the natural course of ovulation, a woman’s ovaries release only one egg at a time, the modern IVF procedure extracts multiple oocytes to raise the probability of successful fertilization.³ As a consequence, several eggs may be fertilized. Multiple eggs may be transferred for implantation, cryopreserved (frozen) for future use in another reproductive cycle, donated to other infertile couples, used for experimentation and research, destroyed, allowed to thaw, or just kept in storage, which will effectively result in their destruction with the passage of time. At least under American law, all of these options are legal possibilities, though the locus of dispositional authority in the event of disagreement has not been definitely identified.

The existence of literally thousands of preembryos in freezers raises difficult problems. What happens if both or any one of the gamete (egg or sperm) donors die? What if they get divorced? Are frozen embryos “children,” subject to a custody determination, or marital property? Do preembryos have inheritance rights? In light of the Jewish restrictions on abortion, must all preembryos be implanted? May they be donated? In the event of a donation (whether permissible or not), whom does Halakha regard as the parents? Must thawed preembryos be buried? Are they considered “human life” for purposes of *hillul Shabbat*, etc.? What about *yibum*? A number of these issues have been discussed extensively; some have not.

Space limitations do not permit a full consideration of all these problems. This article will focus on only one, albeit one that has received considerable attention in the United States, Israel (in both the religious and secular courts), and Australia: who has ultimate decisional authority over preembryos if the husband and wife are divorced, deadlocked, or dead?⁴ As a background to a fuller understanding of this issue, however, it may be helpful to briefly summarize some of the general halakhic principles concerning IVF technology.

I. General Considerations on the Use of IVF Technology

The halakhic literature on assisted reproductive technologies is quite large and cannot be fully surveyed here. Much of it concerns artificial insemination, where either husband or donor sperm is inserted vaginally or into the uterus.⁵ Many of the halakhic concerns with AIH (Artificial Insemination with Husband's Sperm), particularly those involving the methods by which sperm is procured, apply equally to in vitro fertilization.⁶

Subject to careful supervision of the physician, waiting periods, and exploration of alternatives, AIH is generally regarded as a halakhically permissible procedure through which paternity can be established and the mitzvah of *peru u-revu* or at least *lashevet* can be fulfilled.⁷ By and large, most *posekim* have assimilated IVF to AIH and have permitted its utilization subject to the same limitations.⁸ A notable exception is Rabbi Eliezer Waldenberg, who maintains that IVF is an impermissible procedure and that even *ex post facto*, one does not fulfill the mitzvah of *peru u-revu*.⁹ He argues that IVF is more problematic than AIH in a number of distinct respects: (1) unlike AIH, where all sperm is deposited into the vagina or uterus, IVF transfers only the fertilized ova, with the rest of the sperm discarded, thus violating the edict against *hashhatat zera* (wanton destruction of male seed).¹⁰ (2) One does not fulfill the mitzvah of procreation where fertilization occurs outside of the womb. This independently creates a violation of *hashhatat zera*.¹¹ (3) There is neither a paternal nor even a *maternal*¹² relationship with an IVF-offspring. Rabbi Moshe Sternbuch¹³ also denies paternal identity in cases of IVF, and consequently, prohibits the practice as violative of *hashhatat zera*. R. Yehuda Gershuni¹⁴ agrees with Rabbis Sternbuch and Waldenberg that there is no paternal bond between a sperm donor and an externalized embryo even if later brought to term, but he nonetheless permits the procedure; since IVF does in fact result in the creation of a physical human being, albeit one that is not halakhically related to the genetic parents, it is a fulfillment of the prophetic statement, "He did not create the world to be void, but He formed it so that it would be settled" [*lashevet yetsara*] (*Isaiah* 45:18). R. Gershuni argues that even the mere fulfillment of *lashevet* is enough to prevent the emission of the seed from being *levatala*.

As noted, Rabbis Waldenberg, Sternbuch, and Gershuni are de-

cidedly in the minority. Virtually all contemporary *posekim* have concluded, first, that the egg and sperm providers do have a parental relationship with an IVF-generated offspring; second, that the procedure, if undertaken for procreation by an otherwise infertile couple,¹⁵ does not violate the prohibitions against *hashhatat zera*; third, that one may fulfill, through any resulting offspring, either the mitzvah of *peru u-revu*, or, at the very least, the “lesser” mitzvah of *lashevet*.¹⁶ These will be the assumptions on which this article is predicated.

II. What Can Be Decided: Options for the Disposition of Preembryos

A married couple who participate in an IVF program will have a number of options regarding the disposition of fertilized ova: (1) implanting all or some of the preembryos, (2) destroying or at least not implanting them, (3) experimentation, (4) donating them to an infertile couple, or possibly to an unmarried woman desirous of being a mother, or (5) using a gestational surrogate who agrees to carry the embryo/fetus to term and then return the baby to the couple whose egg and sperm have been united. Under the laws of most states, all of these options are legitimate, although some are subject to varying degrees of governmental regulation.¹⁷

This article will not address the halakhic permissibility of these options other than to note that some choices are less problematic than others.¹⁸ At one extreme, most contemporary *posekim* (who have written on the subject) have allowed the destruction or at least the passive discarding of “unwanted” preembryos, ruling that the strictures against abortion apply only to embryos or fetuses within a woman’s womb and not to preembryos existing outside of it.¹⁹ Experimentation on preembryos not destined for implantation would appear to be permitted as well. By contrast, embryo donation to infertile couples—whether Jewish or non-Jewish—or to a single woman, raises numerous halakhic and ethical complexities and has not to date received widespread halakhic sanction.²⁰ (Indeed, in a worst-case scenario—embryo donation to a married Jewish couple—such donation may even constitute the commission of halakhic adultery and result in the birth of

mamzerim.²¹) The Chief Rabbinate of Israel recently gave its qualified approval to the use of a gestational surrogate who meets certain conditions,²² but whether the Rabbinate's ruling will be accepted by other *posekim* and what effect it will have on the growth of surrogacy within the Torah-observant community remain to be seen.²³

While this article limits its focus to the problems of deadlock and disagreement between the parties, it must be emphasized that the issue of *who* decides becomes relevant only if the decision under question is within the range of alternatives that Halakha legitimates. It makes little difference *who* has the right to make dispositional decisions if Halakha does not permit a decision to be made. This itself suggests that, in a halakhic system, the problem of deadlock assumes somewhat less significance than it does in a secular society where the right to make decisions concerning reproduction is well-nigh absolute. Nevertheless, Halakha clearly permits some, if not all, choices to be made and it is therefore necessary to identify who gets to make them.

III. Who Decides: Davis v. Davis and the Nahmani Case

In *Davis v. Davis*,²⁴ a Tennessee couple experiencing infertility employed in vitro fertilization to produce a number of fertilized ova which were cryopreserved for future implantation. The couple eventually were divorced, and the husband no longer desired to have children from his former spouse. Concerned that this could have been her last chance for a pregnancy, Mrs. Davis petitioned the trial court to award her "custody" of the frozen preembryos. The trial court, ruling that "human life begins from conception," treated the embryos as "children," saw the issue as one involving custody and, as such, to be resolved by reference to the "best interests of the children." Since it was undoubtedly in the children's (embryos') best interest to be born²⁵ (at least in the absence of genetic defect or the like), the judge awarded custody to Mrs. Davis. The judge's ruling was reversed by the Tennessee Appellate Court and later its Supreme Court. (To date, the case has not gone further.) Treating preembryos as human life, stated the Tennessee Supreme Court, would be inconsistent with the constitutional principles governing abortion, which generally per-

mit termination of a pregnancy.²⁶ However, the potential of these preembryos to be implanted and come to fruition as fully developed human beings necessitates that they be regarded as more than mere property. The Tennessee Supreme Court concluded that the constitutionally protected rights of privacy, which include both the right to procreate and not to procreate, indicate that ultimate dispositional authority should reside with the gamete providers, for they are the ones who will or will not become parents. If they both agree, their wishes should be respected by hospitals, IVF clinics, and courts.²⁷ If they are presently in disagreement, the courts should follow the terms of any prior agreements the parties may have executed. In the event that no such agreement exists (and indeed this was the case in *Davis*), a balancing of the respective benefits and burdens of each of the parties must be undertaken. The court concluded that normally, the party *not* wanting implantation should prevail. The burdens and responsibilities of unwanted parenthood are considered to be greater than the burden on a person who desires to be a parent and who is temporarily denied that right. The person who wants to be a parent has alternatives that may be pursued with other partners, adoption, etc., while the person "shackled with involuntary parenthood" has no way of escaping at least the moral obligation of a parenthood relationship. The court therefore sustained Mr. Davis's veto.

The analysis in *Davis* has received widespread approval in both the legal and medical communities.²⁸

An Israeli secular court, however, originally went the other way.²⁹ An Israeli couple had been infertile for a number of years. The woman had a hysterectomy and could not carry a child. They had agreed to an IVF program which, after fertilization, would transfer the zygotes to a surrogate. Because of marital discord, the husband no longer desired that the frozen embryos be transferred. The District Court of Haifa, taking account of the pain and suffering of the woman in undergoing the laparoscopic extraction of eggs, her inability to carry children on her own, her biological clock, and the potential of male abuse, ruled that an agreement to participate in an IVF program *was* an agreement to allow implantation and that that decision was irrevocable (at least on the part of the man) as soon as the eggs have been extracted. Admittedly, the *Nahmani* case, unlike *Davis*, involved a couple that

were still married. Indeed, the Haifa court specifically noted that, had the Nahmanis been formally divorced, the result would have been different. Yet it is equally clear that, insofar as the *Davis* case is concerned, the marital status of the parties is irrelevant. The basic approach of *Davis* is that participation in an IVF program carries no obligation to complete it. The basic approach of the trial judge in *Nahmani* cuts the opposite way.³⁰ How would Halakha approach the resolution of these disputes?³¹

IV. A Halakhic Approach To The Resolution of Preembryo Disputes

If Halakha does not permit disposal of embryos, then no one has the right to decide their disposal. Assuming, however, as do most *posekim*, that destruction of preembryos is permitted,³² the question becomes one of decisional authority: whose desire governs in case of a deadlock?

It is important to note that the halakhic question of deadlock will generally run in one direction only: where the wife or former wife desires implantation, while the (former) husband does not. Where the wife desires to terminate the IVF protocol but the husband wants to continue, it is highly unlikely that the husband could demand that an unwilling woman be impregnated, if for no other reason than that pregnancy and childbirth are life-threatening conditions.³³

With a bit of imagination, however, one could conjure up circumstances under which the (former) husband's desire to continue the process *might* be given credence even over the wife's objections. What if the husband desires to use a gestational surrogate within the guidelines authorized by the Chief Rabbinate? Could the wife veto that decision? Or what if husband and wife are now divorced, but the husband wants the preembryos generated from the first marriage transferred and implanted to a new spouse? Assuming that this might be intrinsically acceptable,³⁴ could the first wife stop it from going forward?

There are a number of general approaches that one may draw upon to answer these questions, but none of them are fully satisfactory. I have not been able to formulate a definitive approach,

but would like to offer five models that may furnish a framework for analyzing these difficult issues.

Before proceeding to these models, however, one further assumption must be articulated. For reasons of space, this paper will assume, but not prove, the existence of both a maternal and a paternal relationship towards the preembryo, *i.e.*, that it has both a halakhic father and mother, or conversely, that neither party bears such a relationship.³⁵ In short, one party is no more or less a parent than the other. I recognize that this assumption may be questioned, and some may regard a differential definition of parenthood as a key in determining who has final decisional authority. A Talmudic passage in *Yevamot* is often cited to demonstrate that although paternity arises upon conception, maternal bonds are not generated until birth.³⁶ Standing alone, this passage might lead to the conclusion that the female egg contributor should have no say in the disposition of the preembryo simply because, in the eyes of Halakha, she is not yet a mother. A perusal of other passages indicates, however, that such a dichotomy is not compelling.³⁷ Indeed, proof could be brought from *Sanhedrin* 69a that no *paternal* bond can exist until the conclusion of the first trimester,³⁸ and a comment of R. Akiva Eiger seems to apply the same standard to the maternal bond as well.³⁹ This would indicate that *neither* party has parental rights in a preembryo, a stage well below first trimester development. Conversely, one could look at the law of *demei veladot* (see *Exodus* 21:22), awarding financial compensation for the death of prenatal life to the father, and (according to Rambam), where the father has died, to the mother, and conclude that *both* parties have full parental rights prior to birth.⁴⁰ To make matters even more confusing, mention should also be made of a recent view, based on a *pesak* of R. Shaul Yisraeli, that would deny the existence of *any* parental bond until there is embryo transfer and uterine implantation.⁴¹ Rather than maternity arising from birth and paternity from conception (as implied from Rashi's comments in *Yevamot*), and in lieu of a unified "first trimester" test (as suggested by *Sanhedrin* 69a and R. Akiva Eiger), a single standard based on implantation would define the moment at which both maternity and paternity arise.⁴² This too would lead to the conclusion that no one "parent" would have greater presumptive authority than the other, for vis-a-vis the preembryo which is not yet *in utero*, neither has halakhic

parental status. (This interpretation of R. Yisraeli's view, however, is problematic in a number of respects and requires further analysis.⁴³)

In short, the question of decisional authority in the event of deadlock cannot necessarily be resolved by asking which of the two parties is halakhically regarded as a parent; if the answer is "both" or "neither," alternative bases for priority would have to be identified.⁴⁴ I will now endeavor to suggest what those bases might be.

Model #1: Halakhic Lacuna. Assuming that both or neither have parental status, it is possible that there is no one that Halakha vests with definitive decision-making authority. Except in the case of an *eved kena'ani*, a human being cannot be owned by another human being. Indeed, not only do parents not own their children, one does not even own one's own body. Thus, as Rabbi Shlomo Yosef Zevin pointed out in a classic halakhic study of the *Merchant of Venice*,⁴⁵ Antonio's contract with Shylock to forfeit a pound of flesh in the event of default is halakhically unenforceable not merely because it is *forbidden* to wound oneself, but because one's body is not property that can be subject to disposition.⁴⁶ For the same reason, although one can, by explicit waiver, forego rights to compensation in the event of personal injury, one cannot authorize the commission of such injury *ab initio*.⁴⁷ The concept heard so much in the abortion debate or the "right to die" movement—that one has the absolute right to control one's body—is patently false in Halakha.

A preembryo can be characterized in a variety of ways. But whether we regard it as the human cells of the gamete providers or the beginnings of a separate human entity (and a distinct genome), it is not a "property interest" that can be controlled or disposed of. "*Ein damim le-ben horin.*"⁴⁸

Let me emphasize that I am most decidedly *not* speaking about *issur ve-heter*. Certainly, some of the philosophical considerations stated above could, in fact, be the basis for prohibiting disposal and requiring implantation. Yet my point here goes beyond that: even if we assume that the externalization of the embryo from the body means that there is in fact no affirmative obligation of *hatzala*, no obligation of *kevura*, and no *issur hana'a*, and that therefore a range of options may exist, neither the gamete providers nor anyone else is vested with presumptive decision-making au-

thority, since human tissue—and certainly, potential human beings—are not capable of being “owned.”⁴⁹ In essence, even if Halakha permits choices to be made, it says nothing about who gets to make them, which in effect provides free reign for private agreement or regulation by the state.⁵⁰

Model #2: Paternal Authority. There is one Biblical source that may on some level suggest paternal “ownership” of children prior to birth in spite of the fact that once born, they are no longer property. This is the Halakha of *demei veladot*, which awards financial compensation for the wrongful death of the fetuses to the father, not mother.⁵¹ (Although the Torah speaks of the husband, the Talmud in *Baba Kama* 43a makes clear that such compensation is payable even where impregnation occurred out of wedlock. The Jerusalem Talmud adds the qualification that the relationship be one in which marriage is at least possible *ex post facto*, excluding, for example, pregnancies arising from incest or adultery).⁵² If we posit that the husband’s entitlement to *demei veladot* rests on some sort of prenatal property right in the embryo or fetus, then perhaps the husband (or at least father) should have the final say.

Even if this line of reasoning were to be accepted, its application would be limited. If, for example, the man wanted the preembryos to be implanted but the woman refused, it is obvious that for reasons of *sakkana*, she has the right to decline.⁵³ If, however, the woman desires implantation but the man wants to back out, as was the case in *Davis*, arguably the man’s veto should be controlling. Moreover, to the extent that Halakha may permit preembryo donation for experimentation, perhaps the husband should have the authority to decide whether and how. Finally, perhaps the father should have the right to transfer the preembryos to his new wife or employ a gestational surrogate.⁵⁴

Using *demei veladot* as a predicate, however, is highly questionable on a number of fronts. First, as a matter of formal Halakha, it is not at all clear that there is *demei veladot* for damage to a preembryo or even for a pregnancy of less than forty days’ duration.⁵⁵ Second, if there is a property right belonging to the father, it can exist only where there is a paternal relation. According to some opinions, there is no paternal relation to IVF-produced embryos, and thus no “father” to assert this property right.⁵⁶

Let us assume, however, that in accordance with the majority of

posekim, a paternal bond does exist from the moment of fertilization. The question then becomes, does the entitlement to *demei veladot* presuppose some type of prenatal ownership or property in the fetus, or is it a stand-alone privilege of compensation not derivable from, or related to, any interest in property?

One might suggest that this is a subject of dispute between Rambam and Ra'avad.⁵⁷ The Halakha is clear that if a pregnant woman was injured, as a result the fetus was killed, and the father died subsequent to the death of the fetus, the right to collect *demei veladot* passes to his heirs just as any other debt would. What is the law, however, if the father dies first and then the fetus is killed? According to Rambam, the *demei veladot* are not payable to the husband and instead belong to the mother. Ra'avad disagrees and awards *demei veladot* to the heirs of the father even where he predeceases the fetus. While there are various approaches in understanding the reason and the source of this *mahlaket*, one explanation may be based on these two ways of understanding *demei veladot*. According to Ra'avad, the entitlement to *demei veladot* is based on a preexisting (albeit limited) ownership or property right in the body of the fetus itself. The father is compensated because in a limited but literal sense, "his property" was damaged. Accordingly, when he dies, that "property interest" passes to the heirs, who will similarly be entitled to compensation if "their" property gets destroyed. Rambam, on the other hand, regards the entitlement to *demei veladot* as a free-standing personal right of the father, bearing no relationship to a property interest in the fetus; indeed, there is no property interest in the fetus. Hence, if the father predeceases the fetus, there is nothing for his heirs to inherit. (Why the mother gets *demei veladot* instead of no one is a question left for another time.⁵⁸) Thus, even if the *demei veladot* analogy is relevant, at most it is valid only according to Ra'avad, not Rambam.

R. Shaul Yisraeli has offered an alternative explanation for Rambam's view.⁵⁹ He points out that Rambam omits the rule that even an unmarried father collects *demei veladot*. While *Minhat Hinukh* assumes that Rambam agrees with the law despite his failure to codify it,⁶⁰ R. Yisraeli asserts that according to Rambam, if the man was unmarried to the mother or was divorced before the *havala*, the *demei veladot* would go to the woman. Fundamentally, the fetus is regarded as the mother's property, subject only to

paramount rights of her husband. When the marriage terminates, by death *or* divorce, the right to *demei veladot* reverts to her. According to this understanding, Rambam too may concede the concept of “property rights,” but vests the right in the woman, subject to her husband’s paramount rights deriving from *ishut*.⁶¹ Ra’avad vests the right directly in the father; marital status would thus be irrelevant.

R. Yisraeli further asserts that whether the father would get *demei veladot* in an IVF pregnancy followed by implantation⁶² would depend on this analysis. According to Ra’avad, *demei veladot* would still go to the husband; according to Rambam, they would go to the woman, since her marital status does not obligate her to conceive and bear children via IVF.

What is significant, and indeed counterintuitive, is that according to Ra’avad, not only would the father have dispositional authority (whether married or not), but the right to exercise such authority would pass to his heirs, *i.e.*, the preembryo’s brothers would have a right to veto its implantation over the desires of their mother. According to Rambam, however, there are a range of possible outcomes: either the fetus/preembryo is not “property” at all, in which case no one is vested with definitive decisional authority (the first approach), or the fetus is fundamentally the mother’s property, subject to the husband’s paramount right of compensation (R. Yisraeli’s approach). In that case, it is clear that at least in the event of death or divorce, the decision would be the mother’s, and possibly this would be so even if the husband were alive and married, since his paramount rights may be limited to compensation alone.⁶³

Using *demei veladot* as a paradigm for dispositional authority is admittedly a highly questionable approach.

Model #3: “Given” to Woman as a Gift. When sperm is procured for use in an IVF program in order to try to achieve fertilization and implantation, one can argue that in fact, the clinic acquires it for the benefit of the woman; halakhically, it becomes her property. According to this analysis, not only could she demand implantation of an embryo, but even impregnation with sperm. Indeed, in a letter approved by R. Yisraeli, it was ruled that in the event of the husband’s death, the woman on whose behalf the sperm was procured has the right to have it utilized.⁶⁴ (Ironi-

cally, however, R. Yisraeli himself takes a contrary position in a case of divorce or even of marital discord.⁶⁵)

To say that it is exclusively the woman's property seems to ignore the fact that the decision to bear children cannot be regarded as exclusively a "gift" to the woman. There is no particular reason to characterize the clinic's procurement of sperm as a *zekhiya* on behalf of the woman, at least in an exclusive sense. There are obviously two parties involved, and the notion of *kinyan* does not establish a preference of one party over the other.

Model #4: Paradigm of Child Custody. Halakha is replete with rules governing decision-making when parents are deadlocked.⁶⁶ In the event of divorce, Halakha provides various rules of custody subject to the overarching goal of protecting the best interests of the child. Obviously, some of the child custody rules make no sense in the preembryo context (for example, there is no "boy" or "girl" to consider), and in light of the fact that maternity may not yet have been established,⁶⁷ there may not be two parents entitled to equal say. Consequently, this may either lead to the father, being the only parent, having the controlling voice, or to the *bet din* making its own determination as to what the best interests of the child are. Presumably, this determination will normally lead to a decision in favor of implantation,⁶⁸ but in some cases, *e.g.*, serious genetic disease, may permit discretion to be exercised the other way. (Of course, if best interests truly becomes relevant, could the *bet din* intervene against the wishes of both gamete providers? Could they do so in the case of an already-born child?)

*Model #5: Joint Venture.*⁶⁹ Perhaps this would be the most sensible way of analyzing an IVF "transaction." Recognizing that no one "owns" a human being *per se*, Halakha may nevertheless regard an agreement to participate in an assisted reproductive program as essentially a joint venture, with each spouse contributing a component to achieve a desired result. By analogy to mercantile ventures, partnerships are created when the respective contributions of the partners are commingled into an indistinguishable mass.⁷⁰ Once a partnership is created, each partner is normally bound to keep his assets committed to the affairs of the partnership until the partnership's goals are accomplished or its term expires.

The partnership analogy does not definitively resolve all dispositional questions, but does furnish useful guidelines. According

to *Shulhan Arukh H.M.* 171:1, a partner is entitled to demand a division of partnership assets at any time, but only if the partnership assets are capable of physical division. In the case of fields, gardens, buildings, etc., this requires that the asset be large enough to enable each partner to retain something useful and productive. If the entity is not large enough, the partner who wants to leave must give the other the option to buy out his interest or to let him buy it out (*gud* or *agud*). In effect, one partner cannot unilaterally take away the benefits of the partnership by compelling a forfeiture. A fertilized egg is analogous to a *sade she-ein ba din haluka*—an entity not subject to physical division—in which case a partner does not have the right to take back his contribution. Moreover, because of the non-economic nature of that contribution, neither would the partner have the right to demand compensation or buy the other party out.⁷¹ The analogy to business partnerships would thus suggest a result contrary to *Davis*: that in the absence of express agreement, the husband would not as a matter of course be able to withdraw his consent. Note, however, that contrary to the decision of the Haifa District Court, this inability of the husband to withdraw does not arise from the moment of the agreement nor from the extraction of the sperm and egg, but only from their mixture in the petri dish. No binding partnership is formed until the respective contributions are commingled. There would certainly be no limitation on revocation merely because sperm was deposited. Thus, frozen embryos would be treated quite differently than frozen sperm.⁷²

Taking the partnership analogy further, there may be a number of instances where revocation may be proper. Under Anglo-American law, contractual obligations may be voided if there has been the failure of a basic assumption upon which the contract was predicated.⁷³ This is true not only if such failure existed at the time of the agreement (in which case the contract at the time of its inception was a nullity), but also if circumstances changed subsequently. Halakha similarly recognizes avoidance based on changed circumstances.

The Mishna⁷⁴ states that if one hires workers to transport musical instruments for a wedding or funeral and they wrongfully retract, the aggrieved party may hire other workers and charge the contract breakers with the difference. (This is similar to the familiar expectation damage recovery under Anglo-American law.⁷⁵)

The workers are liable for the extra costs they compelled the owner to incur. Nevertheless, if the reason they retract is because of a significant change of circumstances, such as illness or death of a family member, even though performance was not rendered physically impossible, the workers incur no liability, since it was never their intention to assume a binding commitment in the event of such a contingency.⁷⁶ In effect, the nonoccurrence of such a contingency should be regarded as an *implied* term in the agreement.

R. Yisraeli convincingly argues that when husband and wife consent to an IVF program and establish their "joint venture" (which halakhically they are not obligated to do), their agreement is normally predicated on one of a number of common assumptions: (1) that they will dwell together as husband and wife, (2) that the child will be raised in a two-family household, or (3) at the very least, that the relationship between the parties will be such that each will desire that the other be the parent of their child. If the parties subsequently divorce, the common assumptions behind the agreement have failed, and thus, the unwilling partner is permitted to terminate his obligations under the partnership even in the case of a *sade she-ein ba din haluka*. This is analogous to the common law defenses of impossibility, commercial impracticality, and frustration of purpose.

In sum, the following conclusions emerge:

(1) In the event of an unforeseen marital breakup, the husband or the wife should have the right to stop the process from going forward, as the *Davis* court held.

(2) Marital discord short of divorce may perhaps be treated differently (thus, the Israeli case may be different than the one in Tennessee).

(3) The argument of changed circumstances and implied conditions or limitations should be valid only if the subsequent event was unforeseeable and unexpected, thereby qualifying as an *oness* (unanticipated contingency not within the contemplation of the parties). Where the parties at the time of the contract are clearly aware of a significant possibility that the contingency may occur and fail to provide for its occurrence, the implication would be that the commitment is absolute. One can imagine that in many cases of IVF, the parties are already in a state of discord and are attempting IVF as a last-ditch effort to save a marriage in trouble.

While this practice may be quite unwise, it would effectively preclude the use of *oness* as a means of blocking the procedure from going forward.⁷⁷

(4) Where the claim of *oness* is not available either because of its foreseeability or because the agreement expressly provides that the process will continue, the (former) wife's right to demand implantation would exist only until her remarriage, since after that point, implantation would raise halakhic concerns of adultery or *mamzerut*.⁷⁸ Nor would she then have the right to demand the use of a gestational surrogate over her (former) husband's veto (even within the guidelines of the Chief Rabbinate⁷⁹), since that is an alternative that goes beyond the scope of the original partnership undertaking.

(5) The husband should always have the right to block the use of his sperm prior to fertilization since no "partnership" has yet been formed by commingling.⁸⁰

(6) The partnership/joint venture model would validate, and indeed encourage, express advance directives.

(7) In all cases (even when *oness* is not applicable), the woman may refuse to go forward with implantation for considerations of *sakkana*.

(8) In no case could the (former) husband demand over his first wife's objections that preembryos be implanted in a new wife or in a gestational surrogate, since both alternatives go beyond the scope of the original partnership agreement. In the event that the first wife has no objection, however, or if a prior agreement so provides, it is possible that either procedure may be halakhically permissible even if the first wife has already remarried.

V. The Application of Partnership Law Upon Death

Davis and *Nahmani* dealt with deadlock because of divorce or marital discord. Neither case addressed the issue of death: what if the husband has died? Would the widow have the right to have the embryos implanted? Most ethicists have assumed a right of survivorship, meaning that whichever gamete provider survives has the authority to determine disposition.⁸¹ How would Halakha deal with death?

Using the partnership paradigm, *i.e.*, viewing the combination

of egg and sperm as the formation of a joint venture to achieve procreation, does not afford a clear resolution. Rambam rules in *Hilkhot Sheluhin veShutafin* 5:11 that a partnership terminates upon the death of one of the partners even when the partnership was explicitly established for a fixed term that has not yet expired. He cites this in the name of the *Geonim*, and according to *Kesef Mishne*, this is also the view of Rosh, Ramban, Rashba, and Ritva in the name of "his teacher." On its face, this expressly rules out the notion that the surviving party has any "right of survivorship." But what is supposed to happen?

The reason Rambam gives for his ruling is that immediately upon death, the heirs are the owners of the decedent's share in the partnership and may thus force a dissolution. This reasoning may not be applicable to preembryos, which, particularly according to Rambam, are arguably not "property" susceptible to inheritance.⁸² As such, the woman's right to pursue the objectives of the joint venture, *i.e.*, attempt a pregnancy, should remain intact at least until her remarriage.⁸³ (Once she remarries, however, implantation may raise problems similar to embryo donation in general.⁸⁴) Conversely, since there is no longer a partnership, she should be equally free to decline implantation (which in any case could not be forced on her because of *sakkana*) and have the embryos thawed or destroyed regardless of any agreement to the contrary or the wishes of the heirs.

Once we proceed beyond those two choices, matters become less clear, at least from the perspective of *hilkhot shutafut* (partnership law): could the woman decide to donate the embryos to an infertile couple (assuming such a choice in the abstract is halakhically permitted)?⁸⁵ Could she employ a gestational surrogate (single, *etc.*) within the guidelines of the Chief Rabbinate? What if the mother has died and the father wants to implant the preembryo into the womb of his *new* wife or to use a gestational surrogate?⁸⁶

In the absence of an agreement authorizing these alternatives, neither embryo donation (even if permitted), surrogacy, nor implantation in another spouse can be regarded as an objective of the joint venture, and are thus inconsistent with the objectives and purposes for which the respective contributions were made. Given the fact that the "partner" is dead, however, and the fact that his heirs apparently have no proprietary interest in the pre-

embryos, what halakhic principle disables the woman or the man from such unilateral action? Who would the *tove'a* (claimant) be?

Property and partnership concepts make no sense when applied to a noninheritable joint venture with one of the partners dead. What might be relevant, however, is the religious and moral duty of *mitzvah le-kayeim divrei ha-met*—"There is an obligation to fulfill the wishes of the decedent."⁸⁷ As such, if a person donated a portion of his body for a specific purpose (although in terms of "ownership," the sperm was not truly his), there is a religious obligation to respect those wishes and not use the property in a manner inconsistent with those wishes. There are many authorities who would limit this mitzvah only to cases where an *intervivos* escrow was established (*hushlash mi-tehila le-kakh*) and not where there is merely a verbal declaration.⁸⁸ Nevertheless, it is obvious that participating in the IVF program and the handing over of the sperm or the egg to the clinic constitutes the very type of escrow that the principle requires. Thus, it would be morally improper for the wife to donate either the embryo or frozen sperm to a third party even if, in the abstract, such donation might be permitted.⁸⁹ This is supported by R. Yisraeli's ruling.⁹⁰ For similar reasons, surrogacy could not be employed unless the father would have consented had he been alive.

It should be noted that the application of *mitzvah le-kayeim divrei ha-met* to egg, sperm, or embryos is not entirely obvious. First, it is possible that the principle applies only to the disposition of assets acquired by inheritance. Thus, while the mitzvah may morally bind a son to respect his father's wishes concerning money received from the father, it would not extend to money the son earned on his own. If, as we assume, neither sperm nor preembryos constitute "property," perhaps *mitzvah le-kayeim divrei ha-met* is inapplicable. Second, to the extent that *mitzvah le-kayeim divrei ha-met* rests on considerations of *kibud av ve-eim*, it could arguably be a binding directive only on lineal offspring, imposing no responsibility on a surviving spouse. At least with respect to the second contention, however, the halakhic sources clearly support the extension of the mitzvah to all third parties, not only children.⁹¹

Admittedly, *mitzvah le-kayeim divrei ha-met* may be somewhat of a slim reed. Even where it applies, at most it is a religious and moral obligation, but not one that is halakhically enforceable (though

in 20th-Century America, where no religious obligations are enforceable, this may be a theoretical distinction without a practical difference). Nevertheless, at least as a moral directive, the principle of *mitzvah le-kayeim divrei ha-met* would apply not only to bind the wife to the husband's wishes in the event of his death, *i.e.*, precluding her use of the embryos or sperm in a manner inconsistent with his express or implied wishes, but would apply equally to binding the husband to the wishes of the wife, *e.g.*, preventing him from donating the embryos for implantation into another woman, either a surrogate or a second wife, unless it can be ascertained that this would be his first wife's desire. While it is true that a husband inherits his wife's "property interests," the embryos are fundamentally not property. Even if they were, the religious duty of *mitzvah le-kayeim* remains intact as it does for all heirs. Indeed, this religious directive would govern even if both parents died.⁹²

Application of These Principles to Frozen Sperm: The only difference between frozen sperm and preembryos is that donating sperm does not yet effect a joint venture by virtue of commingling. As such, even in the absence of a divorce, the husband would be able to terminate his involvement.⁹³ The principles of *mitzvah le-kayeim divrei ha-met*, however, would appear to be identical. Thus, if, for example, it was the husband's wish that his sperm be used to fertilize his wife's ovum after his death, his heirs would be morally bound not to object, notwithstanding the potential diminution of their inheritance. (The wife, however, could always decline pregnancy on the grounds of *sakkana*.)

Limitations on Dispositional Authority: A final point is obvious but deserves reiteration. Any rule requiring deference to the wishes of the *met* is conditional on those wishes not conflicting with Halakha generally. To the extent that Halakha prohibits donations of sperm, egg, or embryos to third parties because of considerations of adultery, *mamzerut*, unknown parentage, or the like,⁹⁴ those choices will not be validated because of *mitzvah le-kayeim divrei ha-met*. As a practical matter, then, according to the views that prohibit embryo donations, *mitzvah le-kayeim divrei ha-met* cannot be used to permit them⁹⁵ even if the decedent expressly indicated such a preference; the principle can be invoked, however, to permit a surviving spouse to receive the sperm or embryo even over the objection of the heirs.

NOTES

1. The most comprehensive discussion of these dilemmas from a secular perspective appears in a document entitled *Ethical Considerations of Assisted Reproductive Technologies*, prepared by the American Fertility Society, an organization of physicians who specialize in treating infertility. The document is periodically updated, with the most recent version issued in November 1994. Another important source is a report issued under the auspices of the National Institutes of Health, *Final Report of the Human Embryo Research Panel* (September 22, 1994). A recent book that summarizes basic medical, ethical, and halakhic considerations in fertility treatment is Dr. Richard Grazi (ed.), *Be Fruitful and Multiply* (Genesis Jerusalem Press, 1994).

2. Technically, immediately after fertilization, the fertilized ovum is known as a zygote. The zygote becomes a true preembryo only after cleavage, which occurs shortly after fertilization. The preembryonic stage lasts until implantation into the uterine wall, which commonly takes place within 10–14 days after fertilization. (Obviously, in the case of an IVF frozen embryo, implantation can occur only after transfer to a uterus, which may occur years later.) Upon implantation, the embryonic stage begins. This stage lasts for around eight weeks, by which time there is at least rudimentary development of differentiated organs. After that point, the organism is termed a “fetus.” See *Ethical Considerations* (cited in note 1) (Nov. 1994), 29S–31S. This usage is not consistently followed, and the terms “embryo” and “preembryo” are often used interchangeably.

3. The best chance of achieving an IVF pregnancy involves the transfer of 2–4 embryos. Fewer than two greatly reduces the chance of pregnancy. More than four increases the risk of multiple gestation, which may pose dangers to mother and fetus. In order to obtain the optimal number of embryos, eight or more eggs are routinely retrieved, and recovery of more than 20 is increasingly common. See Wood, *et al*, “Factors Influencing Pregnancy Rates Following In-vitro Fertilization and Embryo Transfer,” 43 *Journal of Fertility and Sterility* 295 (1985), for some of the recent references pertaining to this subject.

4. Although the relevant literature will be cited extensively in the course of the discussion, it may be useful to mention at the outset some of the recent references pertaining to this subject. The only halakhic responsum that I have seen that directly deals with the question of decisional authority, albeit partially, is an article by Rabbi Shaul Yisraeli (z.t.l.), “*She'eilat haBa'alut al Beitsit Mufarit Lifnei Hashtala beRehem haEim*,” appearing as an appendix to volume 4 of the *Entsyclopedia Hilkhatit Refu'it*, pp. 37–44 (A. Steinberg, ed.).

R. Yisraeli also authored an earlier article discussing paternity in the event of postmortem insemination, "*Avhut beHazra'a she-lo keDarka*," 33 *Torah sheBe'al Pe*, pp. 41–46 (5752), which is pertinent in cases of the husband's death. See text at notes 41–43. Finally, Dr. Joel B. Wolowelsky was kind enough to make available to me two very interesting letters issued by Machon Eretz Chemdah, an Israeli *kollel* and "think tank" devoted to contemporary Halakha and headed by R. Yisraeli, in response to a number of questions submitted to the Machon by Dr. Wolowelsky concerning frozen sperm and preembryos. The first letter, dated 9 *Tevet* 5754, was written by Rabbis Ehrenreich and Carmel but bears R. Yisraeli's signature of approval. The second letter of 22 *Tevet*, issued as a brief follow-up clarification, was signed by Rabbi Carmel alone. The contents and conclusions of these documents will be discussed at notes 41–43 and 80.

Mention should also be made of a recent decision of the Rabbinical Court of Haifa discussed at note 30.

5. Artificial insemination with husband's sperm (AIH) may be a helpful procedure for men who have low sperm counts, since it allows the combination of several ejaculates and may also be indicated when a woman's fertile period around ovulation precedes the date she can go to the *mikva*. See generally Dr. A. Steinberg, "Artificial Insemination in the Light of *Halakha*," *Sefer Assia* 128–141 (1982) and Rabbi A. Cohen, "Artificial Insemination," 13 *Journal of Halakha and Contemporary Society* 43 (Spring 1987).

6. The issues raised by AIH included: (1) whether or not the husband has a paternal relationship to the child; (2) whether or not a child conceived through AIH is a fulfillment of the Torah commandment of *peru u-revu* or at least the prophetic edict of *lashevet*; (3) whether the methods that were employed for the procurement of semen violated the edicts against *hashhatat zera* and what alternatives could minimize the prohibition; and (4) fear concerning substitution or mixing with donor semen.

7. See, for example, *Teshuvot Maharsham* III, no. 268; *Minhat Yitzhak* I, no. 51; Rabbi Shlomo Zalman Auerbach, I *Noam* at 157 (5718); *Seridei Eish* III, no. 5; *Tzitz Eliezer* IX, no. 51; *Yabia Omer* II, *E.H.* no. 1. See also the excellent summary in *Nishmat Avraham E.H.* 1:5. [*Lashevet* is the shorthand expression for the prophetic exhortation, "*Lo tohu bera'a lashevet yetsara*" ("He did not create the world to be desolate, but rather inhabited"—*Isaiah* 45:18), an exhortation that may be binding even on those not obligated in *peru u-revu*, e.g., women, and that may be fulfilled even in ways that *peru u-revu* cannot be. See *Tosafot*, *Hagiga* 2a and *Baba Batra* 13a, *s.v. kofin*; *Minhat Hinukh*, end of Mitzvah One; and note 16.]

8. See Rabbi Ovadia Yosef, I *Tehumin* at 287; Rabbi Avigdor Neben-

zal, 34 *Assia* (Tishrei 5743); Rabbi Shmuel Wozner, *Shevet haLevi* V, no. 47 (although one may not desecrate Shabbat to save the preembryo because of the low probability of its ever coming to term).

9. *Tzitz Eliezer* XV, no. 45.

10. The prohibition against the wanton destruction of male “seed” is based on *Nida* 13a and is codified in *Shulhan Arukh, Even HaEzer* 23:1. See also *Genesis* 38:7 and Rashi’s comments.

11. There is a variation of IVF termed Gamete Inter-Fallopian Transfer (GIFT), where the egg and sperm are mixed together in the petri dish but are then placed in the fallopian tube, where fertilization takes place. It would be interesting to know what Rabbi Waldenberg would rule concerning GIFT, since fertilization does indeed take place *kederekh kol ha-aretz*.

12. Even where the egg donor carries the baby to term and is thus both the genetic and birth mother.

13. *BiShvilei haRefu’a*, no. 8 (*Kislev* 5747), p. 33.

14. *Kol Tzofayikh*, pp. 361–367.

15. Whether AIH or IVF may be undertaken by a couple who already have the minimum son and daughter but desire to have more is a matter of dispute. Compare the views of Rabbi Auerbach (even where he has a son and daughter, a man may be permitted to obtain sperm in order to fulfill the imperative of *lashevet* or where his wife is in significant psychological distress in not having more children) cited in *Nishmat Avraham E.H.* 23:1 (however with the qualifying term “*yitakhen*”—it *may* be possible) with the contrary view of Rabbi Eliyahu Bakshi-Doron, the present Sephardic Chief Rabbi of Israel (then Rav of Haifa), who ruled that the ban on *hashhatat zera* can be lifted only for the Torah commandment of *peru u-revu* and not for the lesser mitzvah of *lashevet*. Letter to Dr. Joel B. Wolowelsky, Dec. 15, 1991. Rabbi Moshe Feinstein also seemingly subscribes to this restrictive view. See *Iggrot Moshe E.H.* IV, no. 73. Note, however, that both Rabbi Feinstein and Rabbi Bakshi-Doron are addressing the use of sperm procurement for *testing*, not actual *procreative* use. The latter may be considerably more lenient. Note, too, that any halakhic distinction between *peru u-revu* or *lashevet* must assume that one fulfills *peru u-revu* through AIH or IVF. This too is a matter of controversy. See next note.

16. It appears to be unresolved whether one can fulfill the Torah command of *peru u-revu* through either AIH or IVF. Rabbi Auerbach in his *Noam* article states that the matter is not clear. The *Arukh leNer to Yevamot* 10a explicitly rules that one does not fulfill *peru u-revu* in the absence of a sexual act. On the other hand, Rabbi Bakshi-Doron apparently assumes that *peru u-revu* is fulfilled, since he permits the procedure only to achieve this purpose. See also *Minhat Hinukh, Mitzvah One*, who

notes that the mitzvah of *peru u-revu* is not marital intercourse *per se* but the actual having of children; the act which generates those children is nothing more than a *hekhsher mitzvah* (a necessary preliminary). Under this analysis, it should be a matter of indifference whether children are created through intercourse, AIH, or IVF; *peru u-revu* should be fulfilled irrespective of the method employed.

The foregoing assumes a *paternal* bond. If one adopts the views of Rabbis Waldenberg, Sternbuch, and Gershuni, that sperm contributors do not have paternity in IVF cases, it is clear that there is no mitzvah of *peru u-revu*, though, as noted, Rabbi Gershuni even here would concede the mitzvah of *lashevet*.

17. See Robertson, "Reproductive Technology and Reproductive Rights: In the Beginning—The Legal Status of Early Embryos," 76 *Virginia Law Review* 437 (April 1990) and Eggen, "The Orwellian Nightmare Reconsidered: A Proposed Regulatory Framework for the Advanced Reproductive Technologies," 25 *Georgia Law Review* 625 (1991).

18. I hope to address these halakhic issues in my longer work-in-progress. See footnote on page 1 of this article.

19. See Rabbi Mordechai Eliyahu (the former *Rishon leTziyyon*), "Discarding Fertilized Eggs and Fetal Reduction," 11 *Tehumin* (1991); Rabbi Chaim David HaLevi (Ashkenazic Chief Rabbi of Tel Aviv), "On Fetal Reduction," *Assia* 47–48 (12:3–4) (1990); Rabbi Moshe Sternbuch, *BiShvilei haRefu'a*, no. 8 (Kislev 5747), p. 29. This also appears to be the implicit assumption of Rabbi Shaul Yisraeli in an essay published as an Appendix to *Entsyklopedia Hilkhaitit Refu'it*, vol. 4. See text at notes 69–80.

20. Some of these complexities—which may also apply to sperm and egg donations as well as the use of a surrogate—are spelled out in Rabbi J. David Bleich, "In Vitro Fertilization: Questions of Maternal Identity and Conversion," *Tradition* 25(4), Summer 1991, p. 82; Rabbi Ezra Bick, "Ovum Donations: A Rabbinic Conceptual Model of Maternity," *Tradition* 28(1), Fall 1993, p. 28; and Rabbi Bleich's rejoinder at "Maternal Identity Revisited," *Tradition* 28(2), Winter 1994, p. 52. See also Volume 5 of *Tehumin* (5744), which contains major discussions of this issue by Rabbis Zalman Nechemiah Goldberg, Avraham Kilav, and Zerach Warhaftig and *Nishmat Avraham* (App. Vol.) *E.H.* 22:2 at p. 186.

21. Whether or not children born to married women from third party sperm donors were *mamzerim* was the subject of a long-standing debate. Compare, e.g., *Iggrot Moshe E.H.* I, no. 71 (child is not a *mamzer*) with the well-known contrary position of the Satmar Rav in *HaMaor* 15(9):3–13 (1954). A number of *posekim* have stated that a child born from Jewish donor semen is a *safek mamzer*. See Rabbi Auerbach in *I Noam, Tzitz Eliezer* IX, no. 51. See also the extensive review in Rabbi Alfred Cohen's article

cited in note 5. The point here is that whatever problems exist with the use of third party *sperm* should apply equally to the use of third party *embryos*. I will address this point at greater length in my forthcoming work. See footnote on page one of this article.

22. As reported in *HaAretz* (February 14, 1995). Among the necessary conditions: (1) the surrogate be single and not bear a relationship to the sperm contributor that would be halakhically incestuous, *e.g.*, a sister or even a sister-in-law; and (2) records be kept detailing the identities of both the surrogate and the egg donor (the mother who will raise the child) so that the child will not marry relatives of either.

23. See generally *Nishmat Avraham* (App. Vol.) *E.H.* 5(2) who records a number of negative views concerning the use of surrogates.

24. 842 S.W.2d 588 (Tenn. 1992).

25. But *cf. Eruvin* 13b: *noah lo le-adam she-lo nivra yoter mi-she-nivra* ("It is better for a person to have never been created"), and explanation of Maharsha.

26. See *Roe v. Wade*, 410 U.S. 113 (1973) (ruling by Supreme Court that women have an absolute constitutional right to terminate pregnancies before the first trimester). The Tennessee Court understood *Roe* to mean that a person has a constitutional right *not* to be a parent and as such, prospective fathers, as well as mothers, may invoke its protections. There is, however, an alternative understanding of *Roe*. Professor John A. Robertson of the University of Texas Law School, a leading expert in this area, has argued that *Roe* merely protects the bodily integrity of a woman in not being forced to carry an unwanted pregnancy, but does not preclude other state inventions to protect fetal or embryonic life once it is outside of a woman's womb. Robertson, cited in note 17, 453 n.46. The court's ruling that it would effectively be unconstitutional to compel a *father* to be a parent against his will clearly rejects Professor Robertson's reading. Note, however, that *Davis* is only the opinion of a state supreme court and is not binding in other jurisdictions.

27. The concept that the gamete providers have ultimate decisional authority over the disposition of preembryos (whether or not that is a constitutional necessity) has been recognized by other cases as well. See *York v. Jones*, 717 F.Supp. 421 (E.D. Va. 1989).

28. See Robertson article cited in note 17 (approving the "balance of equities" test but noting that where a woman has no alternative opportunities to reproduce, it may be fairer to award preembryos to the party for whom they represent the last chance.). The *Davis* approach is consistent at least in part with the guidelines of the American Fertility Society and the American College of Obstetrics and Gynecology, which validate the use of advance agreements, but do not address the default rules, *i.e.*, what happens when no such agreement was executed.

29. See *Nahmani v. Nahmani*, District Court of Haifa, Case No. 599/92 (1992), reversed by High Court of Justice, Case No. 55877/93 (28 Adar II, 5755; March 30, 1995).

30. Significantly, however, the decision of the Haifa District Court was reversed by the Israeli High Court of Justice (its Supreme Court), which cited *Davis* with approval. Similarly, in a parallel action brought by Mr. Nahmani in the rabbinical courts, the *Bet Din* of Haifa ruled that the IVF process should be discontinued, though much of their analysis rested on their condemnation of gestational surrogacy.

31. The following discussion of *Nahmani* is limited to the issue of decisional authority and will not address the use of a "surrogate womb."

32. See note 19.

33. See *Shulhan Arukh, Orach Hayyim* 330:1. Indeed, a woman could not be forced to agree to implantation under secular law either, because of her rights under *Roe v. Wade*. See text at note 26.

34. This type of "embryo donation" does not raise the adultery and *mamzerut* issues that arise when the embryo is donated to a different couple. This too will be addressed in my forthcoming work.

35. It is important not to confuse the point in the text with two other points that were made earlier. First, the majority of *posekim* accord full maternity and paternity rights to parents of IVF-babies once the child is born. See text at note 15–16. Second, where the genetic egg donor is not the same person who carried and delivered the baby, there is halakhic uncertainty as to whom the mother is, though a majority of authorities would regard the birth mother as having maternal status. See articles cited in note 20. The question now being addressed, however, is not who the mother is *when* the child is born, but whether there is any mother or father at all *before* the child is born. Is there a halakhically-cognizable parental bond that exists prior to a child's being born, and which person has it? When does a parent become a parent? As noted in the text, this issue becomes relevant on the issue of decision-making authority only if maternity and paternity have different definitions. To the degree both or neither are parents, such definitions furnish no guidance in cases of deadlock.

36. *Yevamot* 97b. The Gemara states that if a non-Jewish woman converted while pregnant, the children that are born after she became Jewish (*horatam she-lo bi-kdusha ve-leidatam bi-kdusha*) are regarded as half-siblings from the same mother but are not regarded as sharing a common father. As Rashi explains, since the paternal bond is generated at the moment of conception, the conversion of the mother, which constitutes a valid conversion of the children, erases all prior familial relationships based on the principle of *ger she-nit-gayer ke-katan she-nolad dami*, "a convert is a newly-born entity." Once the conversion is effective, how-

ever, a new *maternal* bond is forged by virtue of birth. On its face, this text supports a split definition of parenthood. See also *Megilla* 13a, *Rashi s.v. be-sha'a*.

37. The most that the Gemara establishes is that even if a preexisting bond can be erased by conversion, a new maternal bond can be established by birth. The fact that viable birth is a sufficient condition for maternity does not prove it is a *necessary* one. It is entirely possible that, in the absence of conversion, a full maternal bond can exist even during pregnancy and even with respect to preembryos.

38. See next note.

39. See comments to *Yore De'a* 87. According to the Mishna in *Hullin*, milk that is obtained from an animal after its death is not subject to the prohibition of being consumed with meat. This is based on the fact that the Torah prohibits only the milk of an animal that has the capacity to be an *aim* (“mother”). What about milk that is obtained from a live animal that is a *tereifa*? Rabbi Akiva Eiger tentatively suggests that although a *tereifa* is incapable of giving birth, it is capable of carrying a pregnancy at least through the first trimester, and at that point would indeed be considered an *aim* just as, according to *Sanhedrin* 69a, the father would be deemed an *av*. Thus, R. Akiva Eiger equates “maternity” and “paternity.”

[To fully understand the import of his comments, the relevant passage in *Sanhedrin* must be cited. *Sanhedrin* 69a states that a child cannot become a *ben sorer u-more* after the age of 13 years and three months. Since the child is described as a *ben*, this excludes someone who already has the capacity to be an *av*. A boy is generally incapable of impregnating a woman until he reaches the age of majority at 13. If he would impregnate a woman, the fetus would not be discernable until the end of the first trimester. The Talmud therefore concludes that the earliest moment at which a child acquires the capacity to be an *av* is not at the age of 13, when impregnation and conception could take place, but only three months later, when the pregnancy would be physically recognizable. Thus, contrary to the implication of the *sugya* in *Yevamot*, that paternity arises upon conception, *Sanhedrin* 69a delays paternity to a much later stage.

R. Akiva Eiger’s use of *Sanhedrin* 69a to establish an identical definition of *maternity* again departs from the implication of the Gemara in *Yevamot*, but in the opposite direction. While *Yevamot* seems to say (but see note 37) that the maternal bond arises no earlier than birth, R. Akiva Eiger understands that it too arises no later (and no earlier) than the end of the first trimester.]

40. See text following note 51 for a fuller discussion.

41. The use of the phrase “based on” is deliberate. Rabbi Yisraeli

himself never explicitly recorded such an opinion, but his views have been so interpreted by the directors of Machon Eretz Chemdah, a *kollel* that was under his leadership. In an article written in 5752, R. Yisraeli concluded that a child conceived from sperm after the death of the sperm donor bore no relationship to the donor and would not be entitled to share in the donor's estate, since conception did not take place in the donor's lifetime. See *Torah sheBa'al Pe*, vol. 33, pp. 41–46 (5752). A follow-up letter signed by Rabbi Carmel, the director of Machon Eretz Chemdah, contained the following language: "The conclusion that there is no relationship between a sperm donor and his sperm once he dies, applies equally to an egg that was fertilized in a test tube during the husband's lifetime." Letter, Machon Eretz Chemdah to Dr. Joel B. Wolowelsky (22 *Tevet* 5754) (my translation). While this subsequent "clarification" was signed only by Rabbi Carmel and not Rabbi Yisraeli, Rabbi Carmel has reported that the clarification was sent with Rabbi Yisraeli's approval and represents his halakhic position as well. Letter, Machon Eretz Chemdah to Dr. Joel B. Wolowelsky (25 *Elul* 5755).

42. Thus, the implication of the law of *demei veladot*, that both father and mother have parental rights prior to birth—at least according to Rambam, who awards mother *demei veladot* if father died—applies only to an embryo or fetus that is carried *in utero* and not to an externalized preembryo. See also note 55–56.

43. The problems are two-fold. First, Rabbi Yisraeli's own conclusion that there is no paternity when conception takes place after the death of the sperm donor is based on a ruling of *Noda biYehuda* I, *E.H.* no. 69, that a child that is born as a result of post-mortem fertilization (*kelitat hazera*) is not considered a child of the decedent and would not exempt its mother from *yibum* or *halitsa*. That very *teshuva* specifically states that in all other respects, including inheritance, incest with relatives *etc.*, a full paternal relationship does exist. As R. Yisraeli noted, he was applying the *Noda biYehuda's pesak* further than the *Noda biYehuda* himself was willing to go. Second, the conclusion of Machon Eretz Chemdah extending this already-extended *pesak* to the preembryo appears incorrect. The absence of paternity in the *Noda biYehuda's* case was based on the lack of *kelitat ha-zera me-hayyim*. *Kelitat ha-zera*, which Hazal say may occur up to 72 hours after intercourse, appears to refer to "fertilization" or "conception," not "implantation," which could occur up to two weeks later. See note 2. In the case of preembryos, there has been a *kelitat ha-zera* and as such, both the *Noda biYehuda* and R. Yisraeli would recognize a parental bond.

In support of the Machon, it might be stated that to the extent the Halakha permits the indiscriminate destruction of preembryonic life, see note 19, that factor alone suggests that it is not a human being sus-

ceptible of forming bonds with a "father" or "mother." It is questionable, however, whether the laws governing abortion are directly relevant in determining parentage.

44. The fact that decisional authority over frozen embryos need not be correlated to parental status is further borne out by the rulings of Rabbi Shaul Yisraeli. Although he would deny any paternal status until implantation (according to the understanding of Machon Eretz Chemdah), he was nevertheless willing to give father veto rights based on the law of partnership. See text further at notes 69–80 (Model #5).

45. See Rabbi Shlomo Yosef Zevin, "*Mishpat Shylock leOr haHalakha*," *LeOr Halakha*, pp. 310–338. [But cf. comments of Rabbi Shaul Yisraeli in *HaTorah veHamedina*, Vol. 4–6, p. 106.]

46. See *Shulhan Arukh haRav*, H.M., *Nizkei haGuf veNefesh* 4.

47. See *Baba Kama* 92a, as explained by the reference in the preceding footnote.

48. See *Baba Kama* 84a: *ben horin mi it lei demei* ("Does a free man have a market value?").

49. Whether a person can "own" human cells has posed problems in American law as well. See, e.g., *Moore v. Regents*, 51 Cal. 3d 120, 739 P.2d 479 (Cal. 1990).

50. See *Shakh*, H.M. 73:39 (*dina de-malkhuta dina* legitimates secular governmental regulation only when *Din Torah* furnishes no applicable rule). Cf. comments of Hazon Ish, quoted in *Hitorerut*, pp. 41–42 (1988), who denied the possibility of such a lacuna.

51. See *Exodus* 21:22 and text at note 40. This Halakha was previously cited merely to establish the existence of paternal and maternal bonds. I am now suggesting that it can also be utilized to establish a hierarchical priority in decision-making.

52. The *Yerushalmi* is quoted in *Tosafot*, s.v. *Aflu*, B.K. 43a.

53. See text at note 33.

54. See text at notes 22 and 34.

55. Even if a paternal relationship towards preembryo exists, there are two other reasons why *demei veladot* liability could not be imposed. First, embryos, implanted or not, that are less than 40 days old, have the status of *mayim be-alma*; this alone may preclude any tort liability for their wrongful destruction. Second, the amount awarded as *demei veladot* is calculated not on the basis of damage to the fetus, but on the basis of damage to the woman's person. The perpetrator pays the difference in value between a woman bearing child and a woman without child. See *Rambam*, *Hilkhot Hovel uMazik* 4:2. While this measure could indeed suggest liability for the destruction of an *implanted* embryo even if it less than 40 days old, it would preclude liability for destruction of an externalized preembryo, since there is no damage to the woman's market

value. See also *Minhat Hinukh*, no. 49 (whether Noahides have *demei veladot* liability) and next note.

56. There are three distinct reasons why paternity, and hence liability for *demei veladot*, may not exist. First, according to Rabbi Waldenberg, there is never a paternal relationship to an IVF-generated offspring even if it is implanted and brought to term. See text at note 9. Second, according to Rabbi Akiva Eiger, one does not acquire the status of *av* until the completion of the first trimester, and the preembryo has not yet reached that state. See text at note 39. Third, according to one understanding of the *Noda biYehuda*, no paternity can exist prior to uterine implantation. See text at note 42–43. (This understanding, however, is probably incorrect).

57. See *Hilkhot Hovel uMazik* 4:1–4 and comment of Ra'avad to *Halakha* 2.

58. See, for example, *Levush Mordekhai B.K.* no. 26 and *Marheshet* II, no. 38(4) for representative explanations of this point.

59. See Appendix to *Entsyclopedia Hilkhait Refu'it*, vol. 4, pp. 29–35.

60. *Minhat Hinukh*, no. 49.

61. An analogy, albeit one drawn from rabbinic law, is the husband's right for the duration of the marriage to any income generated from property the wife inherited or brought into the marriage (*peirot nikhsei melog*). See *Ketubot* 79a.

62. For the two reasons stated in footnote 55, there would be no *demei veladot* at the preembryo stage.

63. This, of course, assumes the existence of a *maternal* relationship towards the preembryo. As noted before, *Yevamot* 97b is often cited to demonstrate that no maternal relationship exists until birth. See note 36. Such an interpretation, however, appears flatly inconsistent with Rambam's view, which awards *demei veladot* to the mother in the event of the husband's death, an award that is sustainable only if she is in fact the mother. In any case, the Gemara in *Yevamot* may be understood in alternative ways. See note 37.

64. The 5754 letter is cited in footnote 4.

65. See Appendix to *Entsyclopedia Hilkhait Refu'it*, vol. 4, pp. 37–44.

66. A good survey of these rules appears in Broyde, "Child Custody in Jewish Law: A Pure Law Approach," *Jewish Law Ass'n Studies* VII (1994) and Herring, "Child Custody," II *Jewish Ethics and Halakha for Our Times* 177 (1989).

67. See text at note 36.

68. But see *Eruvin* 13b cited in note 25. Cf. *Sota* 20a (life with prolonged pain preferable to death).

69. This approach is articulated in R. Yisraeli's article, Appendix to *Entsyclopedia Hilkhait Refu'it*, vol. 4, pp. 37–44.

70. See *Shulhan Arukh Hoshen Mishpat* 176:2.

71. See also *Gittin* 31a and *Shulhan Arukh H.M.* 176:14 (if a partnership was formed for the sale of wine and the established market days arrive, one partner may not stop the other partner from carrying out the purposes of the partnership. The fertilization of an ovum and the woman's readiness to receive it constitute the equivalent of the *yom ha-shuk*—the market days).

72. Note, too, that the inability to withdraw would fall only on the husband; the wife could always refuse to participate on grounds of *sak-kana* and indeed, this would probably be the case even if there were an express agreement to the contrary. Moreover, at least in the absence of an express agreement, the woman could at most demand implantation; she could not insist on embryo donation or surrogacy, since those alternatives are beyond the scope of the original undertaking.

73. See, for example, §2-615 of the Uniform Commercial Code applicable to contracts for the sale of goods.

74. *Baba Metzia* 75b-76a.

75. See Farnsworth, *Contracts* (2nd Ed.), pp. 871-875.

76. See *Shulhan Arukh H.M.* 333:5.

77. The distinction between unforeseen circumstances and those that were reasonably foreseeable emerges from *H.M.* 334, particularly paragraphs 1 and 4. If one hired a worker to irrigate a field from a specific water source and that water source unexpectedly dried up in the middle of the day, where the event was equally unforeseeable to both parties, the obligation of the owner to pay is discharged. Although not expressly stipulated, the continued existence of the water supply is taken as an implied condition of the agreement. If, on the other hand, both parties are aware of the risk but elect to contract anyway, the commitment to pay is treated as absolute.

78. See note 21. This is true only if the first husband has paternity over IVF-generated offspring, which is the view of most *posekim* and the assumption of this article. According to Rabbi Waldenberg, who would deny paternity, there could, of course, be no *mamzerut* or adultery. See text at notes 81-92 with respect to problems arising after death.

79. See text at notes 22-23.

80. In the letter of 9 *Tevet* 5754 from Machon Eretz Chemdah cited above at note 4, Rabbi Yisraeli concluded that in the absence of changed circumstances, the husband must allow his wife access not only to the preembryos, but even to his sperm. The result in this letter appears inconsistent with the joint venture approach articulated in his article.

81. See, e.g., Robinson cited above at note 17.

82. See text at note 57 (Rambam's opinion regarding *demei veladot*—if father died before fetus was killed, heirs do not get *demei veladot*). More-

over, even according to Ra'avad, who awards *demei veladot* to the heirs, their inheritance rights in the fetus may be limited to compensation and not extend to any presumptive veto.

83. My hesitancy on this point is based on a concern that it would normally be contrary to Jewish ethical norms to facilitate a woman's bearing children out-of-wedlock. Nevertheless, while this consideration may preclude either sperm or preembryo donations to single women, it should have no application to a widow who desires to carry the preembryo created by her own egg and husband's sperm.

84. See text at notes 21–23. As therein noted, this article does not purport to discuss whether embryo donation is permitted or not. To the extent, however, that embryo donation is prohibited because it constitutes adultery and generates *mamzerut* by causing a Jewish married woman to bear a child from a man other than her husband, this concern applies with equal force to implantation within the womb of the egg donor herself once she marries another man. Whether in fact such donation causes *mamzerut* and if it does, whether this is the case even after the death of the sperm contributor, is discussed in my upcoming work.

85. This of course is itself a major question that needs to be resolved. See note 21 and note 84.

86. Interestingly enough, apart from the partnership concerns elucidated in the text, there appears to be no halakhic impediment to implantation in Wife #2. Because she is married to the father, there is obviously no issue of adultery, *mamzerut*, or unknown paternity. The only halakhic concern would be the need for the child to be aware of his genetic mother for purposes of incest, but since both the father and the birth mother have that information, this problem would be obviated by simply telling the child.

87. See, e.g. *Gittin* 15a; *Baba Batra* 151a.

88. See *Shulhan Arukh H.M.* 252.

89. As noted, for the most part, this may be prohibited anyway, but see note 84 (after husband's death, embryo donation may not raise *mamzerut* problems).

90. This is true notwithstanding Rabbi Yisraeli's ruling that a sperm contributor bears no paternal relation to a child born from postmortem insemination or implantation of an embryo. His wishes must still be respected. While R. Yisraeli does not indicate why, I would suggest that *mitzvah le-kayeim divrei ha-met* may apply.

91. It is clear, for example, that *mitzvah le-kayeim divrei ha-met* binds the escrow agent. See *Rama*, end of *H.M.* 252.

92. This was the situation in the well-known *Rios* case. Dr. and Mrs. Rios, a Los Angeles couple, had three frozen embryos in an IVF clinic in Melbourne, Australia. They both died in a plane crash, leaving an

estate of several million dollars. This case triggered a world-wide discussion regarding the need for advance directives addressing these various contingencies. In May 1985, a California Superior Court found that the embryos were not legal heirs of Dr. Rios' estate, since the sperm was procured from a donor, and in 1987, they were made available for adoption. See New York Times 12/5/89, §L at 35, Col. 1.

93. *Query*: would that mean that the obtaining of sperm was therefore *le-vatala*?

94. See text at notes 21–23.

95. The exception would be Rabbi Yisraeli, who apparently would allow postmortem donation of sperm on the grounds that the donor bears no paternal bond to the resulting offspring but only if the husband so provided in his will or otherwise. See text notes 41–43 and at note 90 and my forthcoming work.