CA 5587/93

Daniel Nahmani

v

1. Ruth Nahmani

2. Assuta Ltd Private Hospital

3. Attorney-General

The Supreme Court sitting as the Court of Civil Appeals

[30 March 1995]

Before Vice-President A. Barak and Justices D. Levin, I. Zamir, T. Strasberg-Cohen, Ts. E. Tal

Appeal on the judgment of the Haifa District Court (Justice H. Ariel) on 2 September 1993 in OM 599/92.

Facts: Ruth and Daniel Nahmani, a married couple, were unable to have a child because of an operation that Ruth underwent. They therefore decided to try *in-vitro* fertilization of Ruth's ova with Daniel's sperm and implanting the fertilized ova in a surrogate mother. Under Israeli law, surrogacy was not permitted and *in-vitro* fertilization was only permitted for implantation in the mother. Because of the great expense of the *in-vitro* fertilization procedure in the United States, the couple petitioned the Supreme Court, sitting as the High Court of Justice, to allow the *in-vitro* fertilization procedure to be conducted in Israel, for the purpose of surrogacy in the United States. In that proceeding (HCJ 1237/91), a consent judgment was given allowing the *in-vitro* fertilization procedure to be done in Israel. The procedure was carried out at Assuta Hospital.

Subsequently, Daniel left Ruth and went to live with another woman, who bore him a child. Ruth applied to Assuta Hospital to release the fertilized ova into her possession for the purpose of the surrogacy procedure in the United States, but Daniel opposed this. Assuta Hospital therefore refused to release the fertilized ova. Ruth applied to the Haifa District Court for an order against the hospital to release the fertilized ova, and in its judgment the District Court gave such an order.

Daniel appealed the judgment of the District Court to the Supreme Court.

Held: (Majority opinion — Justice T. Strasberg-Cohen, Vice-President Barak, Justice D. Levin, Justice I. Zamir) Although a spouse's right to be a parent is a basic right, this right does not impose a duty on the other spouse to help realize this right.

If a spouse does not perform the customary marital duties, these cannot be enforced and the only remedy is divorce. It is not proper legal policy to force someone to be a parent against his will.

The consent of Daniel Nahmani to the *in-vitro* fertilization procedure created a 'weak' agreement that cannot be enforced under the strict laws of contract. In addition, the consent to the procedure did not imply consent to continue the procedure even after a separation.

(Minority opinion — Justice Ts. E. Tal) The husband was estopped from opposing the continuation of procedure by promissory estoppel, since he gave his consent, his wife reasonably relied on this consent, and she did so irreversibly, by fertilizing her ova with her husband's sperm.

Appeal allowed by majority opinion, Justice Ts. E. Tal dissenting.

Basic Laws cited:

Basic Law: Human Dignity and Liberty.

Statutes cited:

Adoption of Children Law, 5741-1981, s. 10.

Contracts (General Part) Law, 5733-1973, ss. 25, 26, 28(a), 28(b), 28(c), 39.

Contracts (Remedies for Breach of Contract) Law, 5731-1970, ss. 3(1), 3(2), 3(4), 18(a).

Legal Capacity and Guardianship Law, 5722-1962.

Penal Law, 5737-1977, ss. 361, 362, 363, 365.

Regulations cited:

Public Health (*In-vitro* Fertilization) Regulations, 5747-1987, rr. 8(b), 8(b)(3), 9(a), 11, 14(b).

Israeli Supreme Court cases cited:

[1] HCJ 5688/92 *Wechselbaum v. Minister of Defence* [1993] IsrSC 47(2) 812.

[2] CA 413/80 *A v. B* [1981] IsrSC 35(3) 57.

[3] CA 391/80 *Lasserson v. Shikun Ovedim Ltd* [1984] IsrSC 38(2) 237.

[4] CA 614/76 *A v. B* [1977] IsrSC 31(3) 85.

[5] CA 5464/93 *A v. B (a minor)* [1994] IsrSC 48(3) 857.

[6] CA 451/88 *A v. State of Israel* [1990] IsrSC 44(1) 330.

[7] CA 488/77 *A v. Attorney-General* [1978] IsrSC 32(3) 421.

[8] CA 232/85 *A v. Attorney-General* [1986] IsrSC 40(1) 1.

[9] CA 577/83 *Attorney-General v. A* [1984] IsrSC 38(1) 461.
[10] HCJ 693/91 *Efrat v. Director of Population Register at Ministry of the Interior* [1993] IsrSC 47(1) 749.
[11] CA 294/91 *Jerusalem Community Burial Society v. Kestenbaum* [1992] IsrSC 46(2) 464.
[12] CA 245/85 *Engelman v. Klein* [1989] IsrSC 43(1) 772.
[13] CA 427/86 *Blass v. HaShomer HaTzair Kibbutz 'Dan'* [1989] IsrSC 32(3) 323.
[14] CA 243/83 *Jerusalem Municipality v. Gordon* [1985] IsrSC 39(1) 116.
[15] CA 647/89 *Schiffberg v. Avtalion* [1992] IsrSC 46(2) 169.
[16] CA 416/91 *Maman v. Triki* [1993] IsrSC 47(2) 652.
[17] HCJ 1635/90 *Jerzhevski v. Prime Minister* [1991] IsrSC 45(1) 749.
[18] CA 13/75 *Blumenfeld v. Hadar Plast Company Ltd* [1975] IsrSC 29(2) 452.
[19] CA 170/74 *Hister v. Fleischer* [1975] IsrSC 29(1) 132.
[20] CA 202/92 — unreported.
[21] CA 154/80 *Borchard Lines Ltd, London v. Hydrobaton Ltd* [1984] IsrSC 38(2) 213.
[22] CA 554/83 *Atta Textile Company Ltd v. Estate of Zolotolov* [1987] IsrSC 41(1) 282.
[23] CA 528/86 *Polgat Industries Ltd v. Estate of Yaakov Blechner* [1993] IsrSC 47(3) 821.
[24] CA 719/89 *Haifa Quarries v. Han-Ron Ltd* [1992] IsrSC 46(3) 305.
[25] CA 479/89 *Coptic Mutran v. Halamish — Government-Municipal Corporation for Housing Renovation in Tel-Aviv-Jaffa Ltd* [1992] IsrSC 46(3) 837.
[26] CA 256/60 *Frankel v. American Overseas Food Centers Inc.* [1961] IsrSC 15 442.
[27] CA 381/75 *Berkovitz v. Gavrieli* [1976] IsrSC 30(1) 442.
[28] CA 3833/93 *Levin v. Levin* [1994] IsrSC 48(2) 862.
[29] HCJ 243/88 *Gonzales v. Turgeman* [1991] IsrSC 45(2) 626.

Israeli District Court cases cited:

[30] CC (Jer.) 574/70 *Klinger v. Azrieli Avramovitz Co. Ltd* [1975] IsrDC 5735(1) 356.

Australian cases cited:

[31] *Walton Stores (Interstate) Ltd. v. Maher* (1988) 164 C.L.R. 387.

American cases cited:

[32] *Davis v. Davis* 842 S.W. 2d 588 (1992).

[33] *Roe v. Wade* 410 U.S. 113 (1973).

[34] *Griswold v. Connecticut* 381 U.S. 479 (1965).

[35] *Eisenstadt v. Baird* 405 U.S. 438 (1972).

[36] *Planned Parenthood v. Danforth* 428 U.S. 52 (1976).

English cases cited:

[37] *Central London Property Trust Ltd v. High Trees House Ltd* [1947] KB 130.

[38] *Amalgamated Property Co. v. Texas Bank* [1982] QB 84 (CA).

Jewish Law sources cited:

[39] Babylonian Talmud, Tractate *Kiddushin* 30b.

[40] Genesis 15, 2; 30, 1.

[41] Mishnah, Tractate *Yevamot* 6, 6.

[42] Rabbi Moshe ben Maimon (Maimonides), *Mishneh Torah*, *Hilechot Ishut*, 15, 5.

[43] Rabbi Yosef Karo, *Shulhan Aruch*, *Even HaEzer*, 154, paras. 1, 3, 4.

[44] *Responsum* of Rabbi Shaul Yisraeli in Dr Avraham Steinberg ed., *Encyclopaedia of Jewish Medical Ethics*, vol. 4, pp. 40-41.

[45] *Responsum* of Rabbi Shalom Shalush, 'Fertilization in a Surrogate Womb', in *Orchot*, the magazine of the Haifa Religious Council, no. 39, p. 31.

[46] Rabbi Meir Abulafia, *Yad Rama*, on Babylonian Talmud, Tractate *Sanhedrin*, 72b, 91b.

[47] Rabbi Shelomo Yitzhaki (Rashi), Commentary on Babylonian Talmud, Tractate *Sanhedrin*, 72b.

[48] Babylonian Talmud, Tractate *Yevamot*, 65b, 69b

[49] D. Sinclair, 'The Prohibition of Abortion', *Jewish Law Annual* 5, 177.

[50] A. Steinberg, 'Artificial Abortion according to Jewish Law', *Asia* 1, 107.

[51] Rabbi Ovadia Yosef, 'Termination of Pregnancy according to Jewish Law', *Asia* 1, 78.

[52] Mishnah, Tractate *Bava Metzia*, 6, 1

[53] Babylonian Talmud, Tractate *Bava Kama*, 100a, 108b.

[54] Rabbi Yosef Karo, *Shulhan Aruch*, *Hoshen Mishpat*, 306, 6.

[55] Mishnah, Tractate *Ketubot*, 7, 10.

[56] Rabbi Moshe ben Maimon (Maimonides), *Mishneh Torah*, *Hilechot Gerushin* (Laws of Divorce), 2, 20.

[57] Rabbi Yitzhak bar Sheshet Perfet (Rivash), *Responsa*, 127.

[58] Dr Avraham Steinberg ed., *Encyclopaedia of Jewish Medical Ethics*, vol. 2, the entry '*In-vitro* fertilization', at p. 115 *et seq*..

For the appellant — D. Har-Even.

For the first respondent — Z. Gruber.

For the third respondent — M. Rubinstein, Director of Civil Department at State-Attorney's Office; P. Shretzki, Senior assistant and Director of Civil Matters at Haifa District-Attorney's Office; Dr K. Shalev.

JUDGMENT

Justice T. Strasberg-Cohen

1. 'There are three partners in a man, the Holy One, blessed be He, his father and his mother' (Babylonian Talmud, Tractate *Kiddushin* 30b [39]). In this case, a rift has occurred between two of the partners, and in an area where spouses have autonomy — the field of family planning and giving birth — the court is asked to intervene and give its opinion. The difficult question on which the court's decision is required is: does the wife, Ruth Nahmani, have the right to take possession of ova that were removed from her body and that were artificially inseminated with the sperm of her husband, Daniel Nahmani, for the purpose of implanting them in a surrogate mother, when the husband opposes this? (The fertilized ova are frozen and in storage at Assuta Hospital; the procedure is known as *in-vitro* fertilization — IVF).

We are confronted with a complex and multi-faceted issue whose legal aspect cannot entirely encompass it. The issue is replete with emotional, human, personal and inter-personal, psychological and sociological factors and raises questions of morals, religion, ethics, social values and legal norms. On a similar subject, President M. Shamgar said in his article 'Questions relating to fertilization and having children', 39 *HaPraklit* (1990), 21:

> 'These questions are particularly sensitive, for they directly touch the raw nerve of existence. The vast majority of the various legal questions are naturally taken from life, but there are matters that directly attack the problematic nature of our human existence, frontally and not from the side…'

The question before us is one of these, and when considering it we must be extremely cautious, taking special care not to incorporate anyone's moral or philosophical outlooks, whatever these may be, into the outlook based on the purpose of our legal system (HCJ 5688/92 *Wechselbaum v. Minister of Defence* [1], at p. 827; CA 413/80 *A v. B* [2], at p. 80).

Indeed, as the trial judge said, any decision is likely to harm one of the parties, and we must find the 'most appropriate, correct and just solution in the circumstances of the case' so that the harm will be less severe; but in doing so, we must find the correct and just solution that is consistent with our approach with regard to basic human rights in our society, their ramifications on the inter-personal aspect of family life and parenthood, the degree of involvement that befits the proper public law policy with regard to State involvement in the legal system on matters of relations between spouses in the complex and sensitive area of having children. Only a consideration of all of these and more can lead us to an 'appropriate, correct and just solution'. How shall we do this?

Justice Elon said in CA 391/80 *Lasserson v. Shikun Ovedim Ltd* [3] at p. 264:

> 'We have a major rule that a legal system cannot be sustained merely by the body of the law. The body of the legal system needs a soul, and sometimes even an "extra soul": this soul will be found by the legal system in the form and the image of various ethical norms, which are based upon the supreme principle of doing what is upright and good, and the principle of good faith is one of the most important and special of these ethical norms.'

2. Because of the public importance of the question, the trial court ordered the Attorney-General to be joined as a party to the action in order that he might express his opinion. The action of the respondent was therefore against the appellant, the hospital in which the fertilized ova are being stored and the Attorney-General.

This is the first case of its kind that has reached the courts in Israel, and even in the Western world there are only a few cases that have been submitted

for a judicial decision. Nonetheless, the matter has been discussed by philosophers, researchers, doctors and lawyers, and it has been the subject of research, committees and articles; in several countries it has also been the subject of legislation, and there is also a recent judgment of the Supreme Court of Tennessee in *Davis v. Davis* (1992) [32].

In that case, *in-vitro* fertilization was performed for a married couple, who were subsequently divorced. Each of them remarried, and the woman, who initially wanted the ova for implanting in her body, finally sought to donate them to a childless couple. Her request was not granted. The court was confronted with a question similar to ours, and it analyzed it from the viewpoint of the basic rights of the couple, their contractual rights, the 'status' of the fertilized ova and a balance between the interests of the parties. In that decision, Justice Daughtrey began by saying that although she does not have any legislation or legal precedent to help her and guide her in the dispute about the right to the fertilized ova of the estranged spouses, there is a large amount of scholarly material proposing various models for dealing with fertilized ova when unexpected events happen, such as divorce, death, economic reversals or the absence of a desire to continue the procedure. The models range between two extremes: at one extreme are those that hold that in such a case all the fertilized ova should be handed over for the use of the donors of the genetic material or to others for the purpose of implantation, and at the other extreme are those who believe that every fertilized ovum should be destroyed automatically. Between these two approaches is a broad range of other proposals, which although they may provide an easy solution — and this is their attraction — it is impossible to adopt any of these as a perfect solution if we consider the relevant constitutional principles, public policy, the outlook on life that has not yet been created, advanced technology and ethical considerations that have developed in response to scientific knowledge. Considering all of these does not leave room for easy answers to the question before us (see: C.M. Browne & B.J. Hynes, 'The Legal Status of Frozen Embryos: Analysis and Proposed Guidelines for a Uniform Law', 17 *J. Legis* (1990), 97; J.A. Robertson, 'Resolving Disputes over Frozen Embryos', *Hastings Center Report*, 1989; L.B. Andrews, 'The Legal Status of the Embryo', 32 *Loy. L. Rev.* 357, 1986-87).

We should therefore focus our consideration of the question with a cautious legal approach, while giving proper weight to all the relevant fields, and without extending the horizon unnecessarily; it would, moreover, be presumptuous to determine rules and norms that affect unforeseen and

unexpected situations that the astonishing advances in genetic engineering may bring before us.

Synopsis of the facts

3. Daniel and Ruth Nahmani were married in March 1984. Three years later, Ruth Nahmani was compelled to undergo an operation and as a result of this she lost her ability to have a normal pregnancy. At the beginning of 1988, the couple decided to try and bring children into the world by means of *in-vitro* fertilization of Ruth Nahmani's ova with Daniel Nahmani's sperm and implanting the ova in the womb of a surrogate mother. Under regulation 11 of the Public Health (*In-vitro* Fertilization) Regulations, 5747-1987 (hereafter — the Regulations), 'A fertilized ovum may only be implanted in the woman who will be the mother of the child', and since it was not possible to implant the ova in the body of Ruth Nahmani, the couple applied to a surrogacy clinic in California, U.S.A., and when they discovered that the cost of the treatment was greater than they could afford, they decided that the fertilization stage would be done in Israel and the surrogacy stage in the United States. This plan also met with difficulties because of the Regulations. The couple then jointly petitioned this court (HCJ 1237/91), and their petition ended in a consent judgment on 6 May 1991, to the effect that the *in-vitro* fertilization would be done in Israel. Since surrogacy is not permitted in Israel, the couple made an agreement with a surrogacy clinic in the United States, which almost entirely deals with the financial aspect. An additional embryo transfer agreement was supposed to be signed after the surrogate mother was found, but in the end it was not signed because of the rift that developed between the parties. In 1992, Daniel Nahmani left home and went to live with another woman, and in April 1993 she gave birth to his daughter. Since 1992, there has been litigation between the Nahmani couple: maintenance and reconciliation actions on the part of the wife and divorce actions on the part of the husband. The Haifa Rabbinical Court recommended reconciliation, but reconciliation was never achieved. The parties are still married. The family unit has broken up, and they are living separately; Daniel Nahmani has established a new family unit.

When Ruth Nahmani applied to Assuta Hospital and asked for the fertilized ova to be released for the purpose of implanting them in a surrogate mother in the United States, the hospital refused to release the ova because of the opposition of Daniel Nahmani, which he expressed in writing both to the hospital here and to the surrogacy centre in the United States. As a result of this development, Ruth Nahmani filed an action in the Haifa District Court to receive her ova. The learned trial judge, Justice H. Ariel, found in her favour

by holding that the hospital must allow here to use the fertilized ova to continue the procedure of implantation in a surrogate mother, and that Daniel Nahmani must refrain from interfering in the continuation of the procedure.

On this decision Daniel Nahmani appealed before us.

The findings of the judgment and the arguments of the parties

4. The learned judge focused in his decision on the contractual element and reached the conclusion that Daniel Nahmani gave his prior agreement to the procedure of the fertilization for all its stages, including the implanting of the fertilized ova in the womb of the surrogate mother, and that from the moment when the procedure was begun, he could not go back on it, and his further consent was not needed, and he must refrain from interfering in the continuation of the procedure. He cannot rely on a change of circumstances — separation from his wife and establishing a new family unit — as a reason to be released from his consent, since he himself created the circumstances upon which he wishes to rely. The trial judge also added that if the position of the husband were accepted, he would have a 'trump card' to obtain unfair advantages in his relationship with his wife with regard to the separation. The learned judge also found support for his position in the Regulations, from which he deduced that there is no need to obtain the consent of the husband prior to the surrogacy procedure when the case involves a married woman.

The arguments of counsel for the parties are numerous and encompass a large number of issues, and they refer to the opinions of scholars, case-law, legislation, analogies from other fields of law and comparative law, which in their opinion have ramifications on the case before us. The arguments encompass the field of basic rights, contracts, torts, property law, the status of the fertilized ova, the question of public policy and proper legal policy. I do not intend to restate all the arguments that were raised; I will mention the main arguments briefly and I shall proceed to try and focus on the most important ones.

The appellant argues that the freedom to decide whether to be a parent is a basic right, and this right should not be denied or restricted. Therefore, parenthood should not be forced on him against his will. In so far as the matter relates to his consent to the procedure, this procedure was based on joint parenthood in the future and he should not be compelled to continue the procedure in the new circumstances that have arisen. He argues that even if his consent should be regarded as an agreement between himself and his wife, it is not enforceable, and his consent is required at every stage, both here and in the

United States, and even the Regulations require this, and he should not be compelled to give this consent. Even the balance of convenience works in his favour. With regard to the fertilized ova, they have no independent future right to life without the consent of the two spouses. In any event, the court should not intervene in this sensitive matter which is entirely subject to the autonomy of the individual.

The Attorney-General agrees with the position of Daniel Nahmani and puts the emphasis on basic rights, on the autonomy of the family and the individual, on the need to preserve a person's freedom and his dignity in so far as this concerns the development of his personality, determining his fate, planning his family and having his children. His position is that Daniel Nahmani should not have parenthood forced upon him and that such coercion is contrary to public policy, the proper legal policy, the principle of equality between human beings and between the sexes, and the basic rights of the individual.

The respondent relies on the judgment given by the District Court and its reasoning, emphasizes the suffering she has endured, the wrong she has been caused, her chances of being a mother that are being taken away from her and her legitimate desire for a child which ought to be protected. According to her, the appellant created the new circumstances which he wants to use in order to be released from the undertaking that he gave previously and on which she relied; as a result of this reliance, she began the whole procedure and carried out her share of it; therefore, he should not be allowed to revoke his consent.

5. I will first comment on several statements of the trial court.

The learned judge held, *inter alia*, that 'when the journey towards birth has begun, the husband should not be allowed to shuffle the cards and drive the wife crazy…', 'if he is allowed to do this, he will have control over the woman and at any moment that he wishes… he may change his mind with a unique right of veto'; that if he is allowed to change his mind, this will make the woman putty in his hands, and give him a tool with which to dominate, humiliate and even blackmail her. This is a harsh description which, if it is a true reflection of reality, would be contrary to the principle of equality between people and between the sexes and violate human dignity and liberty, which are fundamental principles of our legal system. But I think that this description of the trial judge, which he regarded as the outcome of a situation in which the husband is allowed a right to revoke his consent, is inconsistent with the facts and with the real legal position. From a factual viewpoint, apart from the actual opposition to the continuation of the procedure, an opposition which undoubtedly causes Ruth Nahmani suffering, grief, frustration and

disappointment, the trial judge does not point to any abuse, humiliation, extortion or similar acts on the part of Daniel Nahmani towards his wife, and I too could not find any basis for this in the evidence. The trial judge himself said that 'the husband's opposition is not a ruse, he is truly expressing his position that he no longer wants a child from his wife… his position is genuine and principled, and it is consistent with his outlook against the "one-parent" family'. From a legal viewpoint, the case should be examined on the basis of full equality between the sexes. What does this mean? Consider the opposite case; the initial position is the same, but the wife is the one who leaves the husband and begins a new relationship with a companion from whom she has a child. Subsequently, the husband is the one who becomes sterile and wants to achieve parenthood and become a father by means of the fertilized ova, whereas the wife objects to her ova, which were fertilized by the husband's sperm with her consent, being implanted in a surrogate mother's womb for the same reasons that the husband raises today to explain his opposition. What would we say then? I think that the correct solution should suit both situations and both sexes and should be considered on the basis of equality in principle, while considering any relevant difference, and without neglecting the harder role — physically and emotionally — of the woman in the procedure of fertilizing the ova.

The question of consent, in every respect, is central to this case, but as will become clear further on, there is no agreement between the parties about the fate of the procedure in the case of separation; therefore, I will first consider the question of parenthood and the constitutional rights of the Nahmani couple from the viewpoint of basic human rights. This question is a dominant factor in deciding the question whether Ruth Nahmani is entitled to continue the fertilization procedure despite her husband's opposition.

Parenthood and basic rights

6. Much has been written throughout history about the centrality of parenthood in human life. In the Bible, our ancestress Rachel says: 'Give me children or else I die' (Genesis 30, 1 [40]); Abraham our ancestor turned to heaven in his anguish and said: 'What will You give me, seeing that I am childless' (Genesis 15, 2 [40]). The first of the 613 commandments of Jewish law is the commandment to be fruitful and multiply. In literature, philosophy, poetry and the other forms of expression in human culture, we find expressions of the force of the desire to bring children into the world as an integral part of self-fulfilment.

Parenthood is a status that involves many rights and duties which can change the personal status of a person and significantly influence his life from psychological, emotional and economic viewpoints. It imposes on the parent a duty to care for the child until he becomes an adult and, more than this, it creates a lifelong psychological and emotional bond with the child and imposes on the parent responsibility for his safety, welfare, growth, education and other needs.

This is discussed by Professor P. Shifman. In describing this responsibility, he says the following:

> 'It is long-term, in that it extends over the whole period that the child is a minor, and even more than this, and the concrete characteristics of this responsibility cannot be predicted and defined precisely in advance, since they change according to the development and needs of the child that exist at different times. The duty to the child cannot be discharged by an individual act but it requires continuing and devoted behaviour. This duty is not merely material in essence, i.e., to care for the physical needs of the child, but it is also, and maybe especially, emotional and educational…' (P. Shifman, *Family Law in Israel*, vol. 2, The Harry Sacher Institute for Research of Legislation and Comparative Law (1989), 174).

The responsibility of a parent to a child is protected not only by civil sanctions but also by criminal sanctions (see sections 361, 362, 363 and 365 of the Penal Law, 5737-1977); see also the Legal Capacity and Guardianship Law, 5722-1962. With regard to the status of a parent, Justice Shamgar said:

> '… Being included in a social group, or in a defined class of people, sometimes leads to obligations of such critical significance and so crucial from a social and public viewpoint, that it is impossible to allow someone who is included in the group or in the class of people to cast off, by means of a mere contractual arrangement, the burden of an obligation of this kind' (CA 614/76 *A v. B* [4], at p. 93).

For the approach of President Shamgar, see CA 5464/93 *A v. B (a minor)* [5], at p. 863:

> 'According to legal and social outlooks, a parent, who is liable for maintenance under the personal law… cannot exempt himself from this duty by contract. In any event, even if he does this, the

> said contract cannot stop the child from applying to the court in order to sue for his maintenance. However, from the viewpoint of the legal validity and the applicability of section 30 of the Contracts (General Part) Law, such a contract that speaks of an exemption from all responsibility amounts to a gross and unacceptable dereliction of the parental duty towards his child; giving recognition to this dereliction amounts to adopting an approach that violates the human dignity of the child. It, in effect, cancels the basic legal and moral duty of the parent, which reflects our belief that in so far as the living are concerned (as opposed to the dead — see Ecclesiastes 3 19), man is superior to the animal.'

Basic rights

7. The basic rights that are a normative basis for examining the question before us have been a fundamental element of our legal system for a long time. These are substantive provisions of positive law, some of which are now embodied in the Basic Law: Human Dignity and Liberty. The relevant rights for this case are the human rights protecting a person's freedom, dignity, body, private life and the freedom to develop personality. The right to parenthood is derived from the right to self-determination, freedom and dignity. 'The right to parenthood is a basic human right to which every person is entitled' (CA 451/88 *A v. State of Israel* [6], at p. 337). In principle, the autonomy to raise a family, family planning and having children is an aspect of privacy. Human freedom includes the freedom of independent decision in matters of marriage, divorce, having children, and every other issue in the field of privacy and autonomy of the individual. This was discussed by Justice Ben-Itto in CA 413/80 *A v. B* [2] *supra*, at p. 81:

> 'Conception, pregnancy and birth are intimate events, which are entirely within the province of privacy; the State does not intervene in this field except when there are significant reasons, founded on the need to protect the right of the individual or a serious public interest.'

The scholar H. Fenwick writes in this respect:

> 'Personal autonomy has been clearly recognized for some time in the USA as strongly linked to privacy; in *Doe v. Bolton* (1973) Douglas J. said: "*The right to privacy* means freedom of choice in the basic decisions of one's life respecting marriage, divorce,

> *procreation*, contraception, education *and upbringing of children*".' (H. Fenwick, *Civil Liberties*, London, 1993, 295 (emphases supplied).

See also *Roe v. Wade* (1973) [33], at p. 726; M. Shamgar, in his article *supra*, at p. 27; *Davis v. Davis* [32], at p. 601:

> '… a right to procreational autonomy is inherent in our most basic concepts of liberty…'

The decision to be a parent is the right of a person by virtue of his being autonomous and responsible for his decision and the results of his actions; therefore the right to decide must, in principle, be his, without any State intervention. See *Griswold v. Connecticut* (1965) [34], at pp. 1688-1689; *Eisenstadt v. Baird* (1972) [35], at p. 453:

> 'If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.'

Prof. Shifman says in this regard:

> 'The basic attitude of Western legal systems is that society may not, in the absence of significant reasons, intervene in intimate questions of having children. *The assumption embodied in this approach is that a person is entitled to realize his desire to be a parent or not to be a parent as a personal decision that he may make by virtue of his right to intimacy*' (P. Shifman, 'Parent against one's will — false representation about use of contraception', 18 *Mishpahah* 1988, at p. 459; emphases supplied).

This approach is enshrined in the recognition that the family is 'the most basic and ancient social unit in human history, which was, is and will be the element that protects and ensures the existence of human society…' (Justice Elon in CA 488/77 *A v. Attorney-General* [7], at p. 434; see also: *Davis v. Davis* [32], at p. 601 and the citations there; CA 232/85 *A v. Attorney-General* [8]; CA 577/83 *Attorney-General v. A* [9].

8. *The right to be a parent does not impose a duty on either of the spouses to be a parent and does not impose a legal duty on one spouse to help the other to be a parent*:

> 'Even though having children appears to be one of the purposes of marriage, *it is not a purpose that can be realized by means of enforcement*. Spouses that do not perform their customary duties to one another are not compelled to do so (except with regard to maintenance), and their only remedy is divorce' (CA 413/80 *A v. B* [2], at p. 85; emphases supplied).

Even Jewish law, which imposes a commandment to be fruitful and multiply on the man, but not on the woman (Mishnah, Tractate *Yevamot*, 6, 6 [41]), does not see fit to enforce this if he does not perform his duty. The refusal gives the wife grounds for divorce but not grounds for enforcement and coercion (Maimonides, *Mishneh Torah*, *Hilechot Ishut*, 15, 5 [42]; Rabbi Yosef Karo, *Shulhan Aruch*, *Even HaEzer*, 154, 4 [43]).

The yearning for motherhood is a deeply and strongly emotional expression of the desire to achieve parenthood. Even if we assume that it is stronger than the yearning for fatherhood (and there are those who dispute this), it in itself cannot impose a duty on the other spouse to help achieve this yearning, except for a moral duty in the inter-personal sphere, which derives from the marriage itself whose purpose is to establish a family and bring children into it.

In contrast to the right to be a parent stands the right not to be a parent, and these two are intertwined and lie at the centre of basic human rights. The right to be a parent and the right not to be a parent are two sides of the same coin, two constitutional rights that are derived from the right to freedom and self-fulfilment (see *Davis v. Davis* [32], at p. 601). Nonetheless, realizing the right to be a parent involves imposing significant and serious psychological, emotional, moral and economic burdens for one's whole lifetime, and a person cannot escape them, whereas realizing the right not to be a parent leaves the *status quo* as it was. It follows that the weight of the demand to refrain from enforcing parenthood is stronger in balancing the right not to be a parent against the right to be a parent. When the freedom to be a parent is set against an unwillingness to be a parent, it would not be proper for the legal system to act to force parenthood on someone who does not want it. This is a violation of human liberty, autonomy and a person's right to make his own decision not to be a parent if he does not want to be one.

The desire to minimize State intervention in relationships within the family unit, whether directly or through the legal system, emphasizes the right of autonomy of this unit, which is protected against intervention both in the relationship between the family unit and the State and in the relationship between the members of the family unit *inter se*. The situations that require

intervention are usually sensitive and complex, and intervention is required when a crisis occurs in the family unit that needs State intervention through the courts in order to resolve it, in cases where the parties themselves have not succeeded in doing so.

Equality

9. The principle of equality between human beings, including between the sexes, is one of the basic principles of our constitutional regime. Equality with regard to parenthood is expressed in legislation whose purpose from a social viewpoint is to allocate equal parenting tasks to the two parents (except of course on a biological level) (see F. Raday, 'Labour Law and Labour Relations — Trends and Changes in 1988', *Labour Law Annual*, vol. 1 (1990), 161, 172, and the statutes cited there. With regard to the trend to promote equality in parenting, see also the draft Women's Employment Law (Amendment — Paternity Leave), 5755-1994 (a private draft law).

A woman is entitled — in certain circumstances — to have an abortion. She does not need her husband's consent, and she may do it notwithstanding his opposition. The right of a woman to her own body is what gives her the freedom to terminate a pregnancy without the husband's consent (CA 413/80 *A v. B* [2] *supra*. See also C. Shalev, 'A Man's Right to be Equal: The Abortion Issue', 18 *Isr. L. Rev.*, 1983, 381). I accept the position of Prof. Gans who deduces from this the right of the husband to terminate the fertilization procedure without the consent of the wife. According to him, the right of the wife to abort the embryo at the beginning of the pregnancy (according to those who hold that she has such a right) must necessarily be matched by the right of the husband to stop the proceedings leading to the implanting of his wife's ova that were fertilized by his sperm in a surrogate mother. The source of the right is the man's control of his life and the right to plan it (see Ch. Gans, 'The Frozen Embryos of the Nahmani couple', 18 *Tel-Aviv Uni. L. Rev.*, 1994, at p. 83; see also P. Shifman, *Family Law in Israel*, vol. 2, at p. 213, whose position is the same as that of Gans).

From the fact that the husband has no right to prevent an abortion that the wife wants, the trial court sought to deduce that Daniel Nahmani has no right to prevent the continuation of the fertilization procedure which the wife wants. It seems to me that the logical deduction is the opposite one, namely: just as the husband cannot oppose an abortion by the wife, so the wife cannot oppose the husband's demand to stop the fertilization proceedings. It seems to me that the reason for not giving the 'father' the right to oppose an abortion lies not merely in the fact that in a pregnancy we are concerned with the woman's right

to her body (a consideration which does not exist in a case of *in-vitro* fertilization; with regard to this reason, see *Planned Parenthood v. Danforth* (1976) [36], at p. 2842), but for an equally important reason, which is a refusal to impose parenthood on the wife (see *Roe v. Wade* (1973) [33], at p. 727).

It can therefore be said that just as it is not possible to impose parenthood on the wife who does not want it, so it is not possible to do this with regard to the husband. Moreover, if during the pregnancy — which is a much more advanced stage than *in-vitro* fertilization before implantation — the wife may terminate it without the husband's consent, this is *a priori* the case with regard to termination of the *in-vitro* fertilization procedure before implantation. It follows that also by virtue of the principle of equality we should refrain from imposing parenthood.

10. When we speak of equality, we are conscious, aware and sensitive of the more difficult role of Ruth Nahmani — both physically and emotionally — than that of Daniel Nahmani in the *in-vitro* fertilization procedure and her evident expectations for the conclusion of the procedure and achieving the desired goal. However, this procedure is merely the beginning of the journey on which the couple set out when they made their joint decision, whereas the issue that we must decide is whether to impose the continuation of that journey for the rest of his life on someone who no longer wants it. This coercion exists even if the desired child grows up with the mother without any relationship with the father who will live in another family unit, since the bond of parenthood cannot be severed.

Public policy and proper legal policy

11. The imposition of parenthood is contrary to 'public policy' and proper legal policy, in that it is inconsistent with the basic values protected by our legal system, some of which are now enshrined in the Basic Law: Human Dignity and Liberty. 'Public policy' means the central and essential values, interests and principles which a given society at a given time wishes to uphold, protect and develop' (HCJ 693/91 *Efrat v. Director of Population Register at Ministry of the Interior* [10], at p. 778). '"Public policy" is the result of balancing and considering conflicting values' (CA 294/91 *Jerusalem Community Burial Society v. Kestenbaum* [11], at p. 534; see also: CA 245/85 *Engelman v. Klein* [12], at p. 785; CA 427/86 *Blass v. HaShomer HaTzair Kibbutz 'Dan'* [13], at p. 325). 'The principle of private law concerning public policy examines these questions by reflecting in essence all the basic outlooks of the society, including the weight and status of human rights' (A.

Barak, 'Protected Human Rights and Private Law', *Klinghoffer Book on Public Law*, The Harry Sacher Institute for Research of Legislation and Comparative Law, I. Zamir ed. (1993), 163, 200). The same is true of legal policy (see CA 243/83 *Jerusalem Municipality v. Gordon* [14], at p. 131).

Irrevocable consent to being a parent amounts to a full and eternal waiver of the right not to be a parent. Such a waiver is a waiver of a basic right, with regard to which it has been said: 'Indeed, we allow individuals — in clearly defined areas — to waive to some extent (but not completely and utterly) their basic rights' (*Jerusalem Community Burial Society v. Kestenbaum* [11], at p. 535). A complete denial of the right of Daniel Nahmani to revoke his consent to be a parent, by enforcing his undertaking, amounts to the creation of a complete and all-embracing waiver by him of a basic right. In general, giving legal force to this by adopting the enforcement mechanism of the legal system is inconsistent with public policy and with proper legal policy.

The revocability of a 'waiver' in the personal sphere can be seen from the question of waivers in adoption. Parents may agree to give up their child for adoption, and their consent is usually irrevocable because of the consideration of 'the best interests of the child' and the interest of the parents who are about to adopt him. If the parents gave their consent before the child was born, the court may cancel their consent, because a person cannot be held to a waiver made in such a sensitive and personal field, in the absence of real awareness of the nature of the waiver with regard to a child that has not even been born. If the consideration of 'the best interests of the child' leaves the scales balanced, the right of the natural parents will prevail and their revocation of their consent to adoption will be recognized, even if they gave it after the child was born (CA 577/83 *Attorney-General v. A* [9], at p. 477; see the Adoption of Children Law, 5741-1981, section 10).

From all of the aforesaid it can be seen that from the viewpoint of constitutional rights, a decision with regard to parenthood requires the consent of both parents, and without such consent the court should not compel someone to take a step which will end in parenthood against his will. The court system should not compel someone to be a parent even if originally he agreed to this and then changed his mind. This is the case even if we think that he ought to behave otherwise. Not everything that we expect people to do from the viewpoint of 'And you shall do what is upright and good' should be enforced by judicial order. Just as it is unthinkable that parenthood should be imposed by natural methods, so parenthood should not be imposed by

technological methods. Not everything that is possible from a technological viewpoint is proper from an ethical viewpoint.

12. Hitherto we have discussed basic rights; but I think that consideration of the question before us from the viewpoint of human rights is insufficient to decide it, for we are not concerned with a couple where one of the spouses wishes to bring children into the world and the other opposes this, and the law does not force itself on the 'objector'; we are concerned rather with spouses who have gone a long way together and given their genetic material from which ova were fertilized and put in frozen storage, in order to bring a child into the world with the help of a surrogate mother. Should the husband be forced to continue the procedure even in this situation? I suspect that he should not. The reasoning for this position requires consideration of the nature of the consent of the spouses and the legal regime within which it operates.

Before I consider the nature of the consent of the Nahmani couple, I will consider the need for the consent of spouses to *in-vitro* fertilization in foreign legal systems and in our legal system.

The need for consent to in-vitro *fertilization in foreign legal systems*

13. The question of consent has been considered in various legal systems, whether in legislation, recommendations of committees or case-law. In most enlightened countries there can be seen an unambiguous approach that requires the *informed consent* of the two spouses to performing the fertilization procedure at each stage. Because *in-vitro* fertilization is a complex procedure that is carried out in stages which may extend over a period of time, if the relationship between the spouses is disrupted and they quarrel about the fate of the fertilized ova, the general tendency is to demand the consent of both parties for the continuation of the procedure. In England and Western Australia we find statutes that require a valid consent of the donors of the genetic material before use is made of it *and these grant a right to revoke the consent* (as long as no use has been made of the fertilized ova). In England, see the Human Fertilisation and Embryology Act, 1990 (Schedule 3, section 4). According to this statute, effective consent is required, and this implies the possibility of *changing one's mind and revoking the consent*, at every stage before the fertilized ova are used. Revocation of consent by one of the parties to the agreement requires the institution that is storing the fertilized ova to destroy them. See K. Stern, 'The Regulation of Assisted Conception in England', 1 *European Journal of Health Law* (1994), 60. In Western Australia, see the Human Reproductive Technology Act, 1991, sections 26(1)(a)(i) and 22(4). A similar approach is implied by the Ontario Law

Reform Commission. See B. Dickens, 'Canada: The Ontario Law Reform Commission's Project on Human Artificial Reproduction', *Law Reform and Human Reproduction*, S.A.M. McLean ed., Aldershot (1992), at pp. 47, 69, recom. 27). In Canada and the United States we find another approach that is expressed, according to which the two donors of the genetic material must *agree in advance* about the future of the fertilized ova in unexpected contingencies such as a *dispute* or *death*. See, in Canada, recommendation 5(1) of the report *Medically Assisted Procreation — Law Reform Commission of Canada*.

This approach was adopted in *Davis v. Davis* [32], where it was pointed out that *agreements* with regard to the future of fertilized ova *in the event of divorce*, death, etc., are valid. The enforcement of agreements that expressly regulate the future of fertilized ova *in the event of unforeseen contingencies* is also advocated by the American scholar Prof. Robertson, (see J.A. Robertson, 'Resolving Disputes over Frozen Embryos', *Hastings Center Report*, 1989). A similar approach can be seen in the recommendations of the Reform Commission in the State of New South Wales, Australia: C. Corns, 'Deciding the Fate of Frozen Embryos', *Law Inst. J.* (1990), at 272, 275.

The approach of the countries that require consent of the two spouses, allow it to be revoked and regulate the destruction of ova in the absence of consent or at the end of a certain period is derived, *inter alia*, from their approach to the 'status' of the fertilized ova. Those who do not recognize the independent right of the ova to develop towards 'life' do not think that the State has an interest in protecting the 'life' that they do not have, and they regard the genetic donors as persons with a 'quasi-property' right in the joint genetic material. Therefore, according to them, they should be given *joint* control over the fate of the ova and the use thereof. A different approach can be found in the State of Louisiana in the United States which recognizes the right of the ova to continue to develop. Disputes between the spouses are decided in accordance with the interest of the fertilized ova (La. Rev. Stat. 9:131). The right to the fertilized ova is granted to the spouse who is interested in developing them. The trial court in *Davis v. Davis* [32] decided similarly. This is an approach that is not adopted by most countries in the Western world, and it has met with harsh criticism from the Court of Appeals in that case, and from scholars (see G.J. Annas, 'A French Homunculus in a Tennessee Court', *Standard of Care: The Law of American Bioethics*, New York (1993), 71, on the status of the fertilized ova, *infra*).

*The Public Health (*In-vitro *Fertilization) Regulations*

14. In Israel the question of *in-vitro* fertilization has not been regulated by statute, only in regulations. From the relevant regulations, we shall cite in full regulations 8(b)(3) and 14(b), which state:

> '8. (b) …
>
> …
>
> (3) If the woman in whom it is intended to implant the ovum is divorced, and the ovum was fertilized with the sperm of her husband before her divorce — the ovum may be implanted in her only after the consent of her former husband has been obtained.'
>
> '14. (a) …
>
> (b) Every act involved in the *in-vitro* fertilization of a married woman shall be done only after obtaining the consent of her husband.'

The trial judge found support in the regulations for his view that the consent of the husband is not needed to continue the procedure, since he held that his consent was given to the whole procedure *ab initio*. It seems to me that the regulations do not support this position and that the hospital may not deliver the ova to Ruth Nahmani so that she may continue the procedure, when Daniel Nahmani has expressed his vehement opposition to its continuation. Why is this?

We are dealing with subordinate legislation of the Minister of Health which does not purport to regulate inter-personal relationships between spouses. The arrangement in the regulations is designed for the bodies that handle *in-vitro* fertilization and the manner in which they must deal with this sensitive subject. The question of receiving fertility treatments is complex, and in addition to its medical aspect it has social and moral aspects. The subordinate legislator does not appear to me to be a source of inspiration for resolving these question in a case of a dispute between spouses. The regulations do not have any direct application in our case since surrogacy is forbidden in Israel, and they cannot apply to a situation which they expressly prohibit. Giving the ova to one of the spouses for implantation in a surrogate mother in the United States constitutes a stage in the surrogacy procedure which is forbidden here and which is supposed to carried out there. The regulations also do not purport to regulate a situation in which one of the spouses *revokes his consent*, even if this was

given *ab initio*. In such a situation, the medical institution does not have the ability to make a decision, and in the absence of an agreement between the spouses with regard to what will be done with the fertilized ova in a case of a dispute, the institution cannot make an immediate decision.

Moreover, the wording of the regulations cannot support the determination of the trial judge. The text of the regulations is not unambiguous. The interpretation of regulations 8(b)(3) and 14(b) as regulations that make the husband's consent unnecessary is not the only reasonable construction of these regulations. In any event, regulation 14(b) requires *every act involved* in the *in-vitro* fertilization of a married woman to be done only after obtaining her husband's consent. I think that this is a provision that expresses the spirit and purpose of the regulations. Regulation 8(b)(3), which refers to a divorced woman, includes an arrangement that is intended to clarify that despite the severance of the relationship between the couple, the additional consent of the former husband is required. This regulation does not make his consent unnecessary during the marriage. It can also be said that a state of separation is similar to divorce, and that the revocation of the husband's consent is connected to this separation, and therefore regulation 8(b)(3) should be applied also in such a case. Moreover, regulation 8(b)(3) contains an idea of the impossibility of permanent consent, since a change in circumstances that casts doubt upon the continued existence of consent requires an additional consent. In any event, one should not deduce from regulation 8(b)(3) anything about the right of the husband to revoke his consent even if it was given *ab initio*. At most it can be said that the regulations do not consider this situation (it should be noted that the legality of the regulations is under review, in another respect, in a petition for a show-cause order that has been filed in this court).

The public commission

15. It is not only in regulations that we find reference to the issue of *in-vitro* fertilization. A professional public commission was appointed in June 1991 by the Ministers of Justice and Health to examine the question of *in-vitro* fertilization and it was composed of renowned experts in all the fields relevant to the issue. The commission considered the matter and in July 1994 submitted a report to the Ministers. This report was submitted in this case by the Attorney-General with the consent of the other parties. With regard to consent, the commission unanimously recommended that:

> '… in the absence of *joint and continuing consent*, no use should be made of the fertilized ova that were frozen until the end of the freezing period agreed by the spouses *but consent that was given*

> *at the beginning of the treatment shall be deemed to continue as long as neither of the spouses revokes it in writing*' (emphases supplied).
>
> 'The Commission considered the possibility that the genetic mother or the genetic father would have no other way of realizing genetic parenthood. But giving permission to have a child in such a situation, without joint consent, means forcing fatherhood or motherhood, both from the legal viewpoint and from the emotional viewpoint, in that there will be a child who is born without their consent. The commission was of the opinion that a man or woman should not be forced to be a father or mother against their will, even if they initially consented to this' (see the *Report of the Professional Public Commission for Examining the Issue of* In-vitro *Fertilization* (1994), 36).

16. The approach of Jewish law with regard to consent is not uniform. Although in the past there was no *direct* consideration of the issue of consent in the circumstances before us, there is such consideration in modern times. Rabbi Shaul Yisraeli, who was a member of the Council of the Chief Rabbinate and a member of the Great Rabbinical Court, thought that a husband has the possibility of revoking his consent. He says:

> 'Since the husband is separated from the wife and the child who will be born (if at all) will no longer grow up in the joint home of the husband and the wife, we can understand his opposition to giving the fertilized material to a surrogate mother in order that a child may be born as planned. Since a drastic change has occurred, as compared with the position at the time the reciprocal undertaking was made, he should be regarded as being "under duress" when he argues that in such a situation the undertakings can no longer bind him, since he did not give his undertaking for such a case. And he should not be compelled to agree to give over the frozen material so that it may continue to develop, as the wife wants, because she argues that this is her only and last chance whereby she may have a child who will be her child from a biological point of view. Although the wife's position is understandable, it seems to me that from a legal viewpoint we should not compel the husband — who is the second partner and who also has a share and rights with regard to the fertilized

> material — to consent to what the wife is asking' (*Responsum* of Rabbi Shaul Yisraeli in Dr A. Steinberg ed., *Jewish Medical Encyclopaedia*, vol. 4, pp. 41-42 [44]).

This was also the opinion of Rabbi Shalom Shalush, a member of the Haifa Regional Rabbinical Court (*Responsum* of Rabbi Shalom Shalush, 'Fertilization in a Surrogate Womb', in *Orchot*, the magazine of the Haifa Religious Council, no. 39, p. 31 [45]). In discussing the question of a petition made by a husband for an order prohibiting the implantation of ova fertilized by his sperm in a surrogate mother, he held that this fertilization should be prevented and the husband's petition should be granted, and that preventing such fertilization did not involve a prohibition of killing an embryo.

It follows that most legal systems and our legal system also require in principle the consent of both spouses for performing *in-vitro* fertilization at every stage. The question is whether Daniel Nahmani gave such consent, and, if so, can he revoke it?

The consent of the Nahmani couple

17. I accept that the Nahmani couple agreed, in the relationship between themselves, to carry out the *in-vitro* fertilization procedure in order to bring a child into the world. This finding is supported by the evidence, and is implied by the actions done by the spouses towards this goal. The consent was partially implemented, and at the stage before implantation in the surrogate mother, Daniel Nahmani expressed his opposition to the continuation of the procedure. The consent, in so far as it concerns the relations between the spouses, was not directed only at carrying out the technical medical procedures of *in-vitro* fertilization, but it should be regarded as consent to parenthood, consent to share together, over the years, the feeling of responsibility and commitment involved in the concept of parenthood. Precisely for this reason it should not be said — as is implied by the trial judge — that since for the purpose of the technical procedures no consent is required in addition to that which was given *ab initio*, it is possible to continue the procedure that will lead to enforced parenthood, notwithstanding the opposition.

What is the status of the consent that was given; what is its scope, what is its nature? Is it subject to any legal framework, and if so, what is that framework? Was an agreement made between the parties, and if so what is its basis and what are its implications? What are the ramifications of the change of circumstances that occurred subsequently on this agreement? Is the person

who gave his consent entitled to revoke it and what is the remedy that can be granted, if any?

The status of the consent as an agreement

18. In principle, the autonomy of the human being implies his freedom to act and change his position, whether by way of a disposition in private law or by way of carrying out an act to change his personal status, such as marriage, divorce, having a child, etc.. The question of the status of an undertaking to change one's personal status is problematic. In analyzing the essence and purpose of the contract, the scholars Friedman and Cohen say that '… a benefit to the human psyche — the emotions, dignity, the spirit, entertainment — does not lie within the traditional province of the sphere of contracts' (D. Friedman & N. Cohen, *Contracts*, Aviram Press, vol. 1 (1991), 328). These remarks can be illustrated by the status of a promise of marriage in Israeli law, which is a clear example of an emotional partnership. A promise of marriage is a promise to change personal status. It begins with a joint decision that lies within the personal-intimate sphere. In CA 647/89 *Schiffberg v. Avtalion* [15] and in CA 416/91 *Maman v. Triki* [16] the problems that arise from classifying a promise of marriage as a binding contract were emphasized. The President mentioned the criticism made by scholars with regard to this classification (see: Friedman & Cohen, *supra*, at pp. 368-369; N. Cohen, 'Status, contract and inducing breach of contract', 39 *HaPraklit* (1990), 304, 317; P. Shifman, *Family Law in Israel*, vol. 1, The Harry Sacher Institute for Research of Legislation and Comparative Law (1984), 125-134) and the absolute freedom of a person when deciding whether to enter into marriage was emphasized. The President pointed out that this cause of action is not popular, but uprooting it in its entirety is a matter for the legislator. In several countries the contractual cause of action of breach of promise of marriage has been repealed in legislation. England enacted the Law Reform (Miscellaneous Provisions) Act, 1970, and approximately twenty States in the United States have repealed it. The promise of marriage is therefore, in our legal system, a binding contract, *but a breach thereof does not entitle the injured party to enforcement or damages for loss of expectation, merely to compensation for damage suffered.* The ideological basis for this can be found in the article of Prof. G. Tedeschi, 'Some aspects of the concept of contract', *Essays in Law*, The Harry Sacher Institute for Research of Legislation and Comparative Law (1978), 54. There we find that the classical contract involves an exchange, and therefore it inherently contains a conflict of interests, whereas in marriage this is not the case. *The joint enterprise which is a means* in a commercial-

economic partnership is *the purpose itself of marriage* (*ibid.*, at p. 71). See also Shifman, *Family Law in Israel*, vol. 1, at pp. 131-132, *which focuses on the predominantly emotional elements* that characterize the promise of marriage. In his opinion, a promise of marriage does not constitute a contract because of its internal content. *Living together is the decisive element of the arrangement.*

19. It is not merely the promise of marriage that the law regards as a special category of agreement. Even other kinds of agreements fall into a special category; for example, the political agreement. I do not intend to discuss the classification of this agreement, which I believe is disputed (see the opinion of Prof. Cohen, in her article 'The Political Agreement', 1 *HaMishpat* (1993), 59, and contrast with the opinion of Prof. G. Shalev, in her article 'Political Agreements', 16 *Tel-Aviv L. Rev.* (1991), at p. 215). I intend to consider general remarks and questions that were raised by this court with regard to the political agreement, which are relevant to the classification of the agreement before us. HCJ 1635/90 *Jerzhevski v. Prime Minister* [17] considered the political agreement, which Justice Barak regarded as a binding legal agreement, and he raises — in the course of the legal analysis — general questions that are appropriate in this case:

> 'Do the laws of contract apply wherever the parties wish them to apply, or are there perhaps areas that the laws of contract do not reach, despite the wishes of the parties? This question is not new. Thus, for example, in German law it is accepted that certain types of agreements do not fall into the sphere of the laws of contract of private law…
>
> …
>
> A similar idea is expressed by Flume, who says: "The area of human relations in the family, and the human relationships of love, friendship and social intercourse 'simply cannot be' the object of a legally binding agreement" (W. Flume, *Allgemeiner Teil des Bürgerlichen Rechts*, 82, vol. II, 1965)' (*ibid*., at p. 837).

Prof. Cohen, in her aforementioned article with regard to political agreements, also raises questions that are pertinent to our case:

> '… What is the law with regard to these agreements? Is there a duty to uphold them or is there no such duty, and each party may uphold it, if he wishes? Perhaps there is even a duty not to uphold

> them? If there is a duty to uphold them, what is their scope and what are the remedies available to each party for non-compliance?...' (*ibid.*, at p. 61).

Contracts are classified by Prof. Cohen as 'perfect', 'weak', 'void', 'not binding' and 'unjusticiable' contracts.

> 'The legal system protects an agreement that imposes an obligation recognized by law… *the question when the law regards a contract as perfect and when it regards it as weak, void or not binding, depends on a variety of reasons. The main reason lies in the purpose of the laws of contract.* The contract is a social mechanism, whose main purpose is the creation and distribution of wealth… for this purpose the laws of contract recruit the enforcement power of the State… what is *outside their scope* [the scope of the laws of contract] *represents change, discretion, choice, freedom.* Areas where the law wishes to leave freedom of action or discretion are unsuited to the application of the laws of contract. Other reasons *that influence the question whether we are concerned with a contract and what is its degree of validity depend on the intentions of the parties*, the amount of benefit from the contract as opposed to the damage that it is likely to cause *and the background against which it was made*' (*ibid.*, at pp. 62-63; italics and square parentheses supplied).

English law accepts the approach that an intention to create a binding legal relationship is sufficient to create a contract, *but when we are concerned with a social agreement or an agreement within the family, there is a presumption, which can be rebutted by the doctrine of reliance, that there is no intention to create a legal relationship* (see the criticism of Friedman and Cohen, *Contracts*, vol. 1, at pp. 371-373).

20. In our case the agreement was made in special circumstances, on an intimate, personal and sensitive matter that lies within the sphere of the human psyche. Notwithstanding, I do not think that this case does not involve any agreement whatsoever. The Nahmani couple expressed consent, determination and resolve with regard to a very serious matter and they took steps to carry out their consent. When two persons continue to give their consent and do not revoke it, their wishes should be respected and the agreement should be acted upon in so far as it concerns matters that they have agreed (provided that they indeed agreed them). Such an agreement — as long as the parties still agree

with regard to it — is valid vis-à-vis third parties such as the medical institution or other parties involved in the *in-vitro* fertilization procedure, and these should respect the joint wishes of the parties (within the framework of the law). Notwithstanding, we are not concerned with an ordinary contract but with an unique contract. It certainly does not fall into the category of 'perfect' contracts. Since it has contractual elements, it can be classed among the 'weak' contracts. Therefore the legal framework that applies to it will also not be the framework of the laws of contract in the strict and narrow sense.

21. From the little said by the Nahmani couple in their testimony in court, no consent can be deduced with regard to a situation in which the family unit would break up. Daniel Nahmani said in his testimony:

> 'There were beautiful moments and because of those moments beautiful things were done, and afterwards things changes and the mere fact that we came to separate… when Ruth started this procedure with me I never said or even hinted that we would separate or stop, but the intention that we had then was valid at that time. I do not agree with you that Ruth knew that this procedure would be completed to its end. There were many times that Ruth and I spoke about a situation that we might have a major dispute and certainly the procedure would be stopped… the consent was given when we lived together and we tried to build a family unit; this consent became void from the moment that we separated' (pp. 22, 27, 29 of the court record).

Ruth Nahmani says in her affidavit that was submitted as evidence-in-chief:

> 'The yearning for children, joint children and the willingness to fight… in order to realize our right to be parents to children and to bring children into the world, was shared by us — my husband and me — throughout the procedure…' (paragraph 16 of the affidavit).

In her cross-examination she added:

> 'What guided me and Daniel was the strong desire to be parents… it does not matter when he did it, out of desire, out of love, the moving force was joint, equal, complete…'; 'in 1990 the question of divorce never arose' (pp. 11, 16 of the court record).

Even if what was said reflects the true position from the viewpoint of each of the two spouses, it is totally impossible to derive from this that there was a

consent between the parties that the procedure would continue in any event, in any situation and in all circumstances. Certainly we cannot deduce a *joint intention and joint consent* to continue the procedure after separation. It can even be said that the aforementioned statements have a different tone. It can therefore be said that we are not dealing with a case of consent with regard to the fate of the ova if and when a crisis would happen in the marriage, as it did. Here we should remember that if we were dealing with an agreement with regard to the fate of the ova in the event of separation, we would still have to consider whether this could be revoked and whether it could be enforced. This question does not require a decision in this case.

What is the consequence of the absence of consent in these circumstances?

There are several possibilities: first, to regard the agreement as an agreement whose basis has collapsed or as an agreement which has exhausted itself; second, to fill the 'lacuna' in the agreement; third, to deduce an implied consent on the part of Daniel Nahmani to the continuation of the procedure even in a set of circumstances completely different from the one which existed at the time that the consent was given. Below I will consider each of these possibilities as potential mechanisms for deciding the difficult problem before us.

Collapse of the basis of the agreement

22. As stated, the case before us is not one of consent between the parties with regard to the fate of the continuation of the procedure, should the family unit break up. What we know clearly is the background in which consent was given and the circumstances in which the husband revoked it. The consent was given when the married couple were living together and trying to create a larger family by bringing a child into the world. The consent was revoked after the family unit collapsed, Daniel Nahmani left the home and instead established a new family unit.

What are the ramifications of the change in circumstances on the validity of the consent of Daniel Nahmani? The doctrine which is closest to the case before us is the doctrine of frustration, which is expressed in section 18(a) of the Contracts (Remedies for Breach of Contract) Law, 5731-1970. A strict application of the doctrine of frustration in our case raises problems. Section 18(a) gives the person in breach of contract a defence argument when performance of the contract has become impossible or fundamentally different from what was agreed. 'Only a radical change in circumstances will justify a finding that the party in breach is exempt from the consequences of the breach'

(CA 13/75 *Blumenfeld v. Hadar Plast Company Ltd* [18], at p. 456). As a rule, an event that frustrates a contract is an event external to the contract, over which the parties to the contract have no control. When the frustration is initiated by a party to the contract, the initiator cannot rely on this protection. In addition, there must be no anticipation of the circumstances that frustrate the contract and also an inability to anticipate them, conditions that have been interpreted very narrowly so that the defence of frustration has to a large extent lost its applicability. Thus Israeli case-law has followed English case-law, in which the scope of the exemption when events that frustrate the contract occur is narrow, in view of the outlook of absolute liability. In German and Continental law, the basic attitude to the rules of frustration is more flexible. These systems emphasize human behaviour and the element of absence of fault as a decisive criterion for granting the exemption. Even American law, whose source of inspiration is English law, mollified the requirement of absolute liability, by basing the doctrine of frustration on the more flexible risk criterion. In Israel, the Codification Committee considered, *inter alia*, a less strict application of the laws of frustration in the spirit of American law, but its deliberations have not yet been included in the law (for an analysis of the doctrine of frustration in Israeli positive law and different legal systems, see G. Shalev, *Laws of Contract*, Din, 2nd edition (1995), 497-510; see also D. Katzir, *Remedies for Breach of Contract*, Tamar, vol. 1 (1991), 210-226).

23. A strict application of the doctrine of frustration makes a decision in this case difficult, and if we were concerned with an ordinary contract it is questionable whether this would be possible. But we are concerned with a special contract, and a strict application of the doctrine of frustration is not necessary and is even undesirable. In this category of contracts, the change in Daniel's emotional relationship with his wife and his unwillingness to bring a joint child into the world when they are no longer together and after he has established a new family should be regarded as an event that frustrates the contract. *Prima facie*, an external look at the crisis — Daniel leaving the home and establishing a new family unit — points to Daniel Nahmani as the 'creator' of the new circumstances on which he wishes to rely in order to be released from his consent. In this sense, an accusatory finger is directed at him in order to deny him the right to revoke his consent. However, I think that in view of the nature of the relationship we are considering, the case cannot be decided in this way. Support for this can be found in the modern approach of 'no-fault divorce', in which consideration of the external symptoms that

characterize a family crisis is not a comprehensive one. One of the fundamental ideas on which this outlook is based is that:

> 'The belief that it is possible to find fault only with one of the spouses and to place the blame for the crisis having occurred on that spouse alone has also been discredited… Therefore fault as it appears to an outsider, with the court imposing a moral judgment on such a tangled and complex set of relationships, should not be regarded as everything' (Shifman, *Family Law in Israel*, vol. 1, at p. 300).

The approach of 'no-fault divorce' is not universally accepted. It is a disputed issue that we are not required to resolve. It is not the framework of our deliberation. We are not sitting in judgment on the acts of Daniel Nahmani in the moral sphere and 'punishing' him for his behaviour. These are not the criteria for deciding the question whether he has a right to object to the continuation of the procedure. The relationship between spouses is not static. It is by nature dynamic and subject to crises. The feelings of spouses are not always stable. They may change even without any connection to a complex procedure such as *in-vitro* fertilization. An initial consent to this procedure is not an informed one in the full sense of the word because of the inability to foresee — emotionally and psychologically — what will happen in the future. Spouses do not always deal successfully with the difficulties in their lives together, especially when they are faced with a procedure such as in this case, with its emotional, physical and economic difficulties and the subjective and objective problems that it involves.

24. In any event, even if the crisis was created by Daniel Nahmani, and even if the Rabbinical Court suggested a reconciliation that he did not accept, and even if I personally have reservations about his behaviour, none of these can deny him the right to revoke his consent as a result of a dramatic change of circumstances as stated. The destruction of the family unit is an undisputed fact, and a child who is born into the world will be born without his father wanting him, to a *de facto* one-parent family in which only his mother will act as a parent. The consent in this case derived its validity from, and is based on, a functioning relationship. Admittedly the collapse of this relationship is not an external event within the accepted sense in the doctrine of frustration, but in view of the special character of the agreement and the major importance of its foundation built on the depths of human emotion, this collapse is sufficient to amount to an act that frustrates the agreement. Remarks in a similar vein were made by Justice H. Cohn in CA 170/74 *Hister v. Fleischer* [19], at p. 134:

> 'The learned judge held that this agreement was frustrated merely because "the good relationship that prevailed between the plaintiff and the defendant when the agreement was made was a basis for making it", and the continued existence of this good relationship is "the basis for performing the agreement". When this relationship was irreversibly undermined, the "basis of the agreement" was undermined, and it should therefore be regarded as frustrated. *I agree, with all due respect, that an agreement that provides for the parties to the agreement to live together in one apartment can be regarded as frustrated if the relationship between them collapses to such an extent that they can no longer live together*' (emphasis supplied).

See also CA 202/92 [20] in which it was held that the basis for an undertaking to give a gift is a personal relationship between the donor and the recipient and therefore it is a personal basis, and when it collapses the undertaking is frustrated (in that case the beneficiary of the gift died and his heirs were denied it on the basis of this reasoning). See also Shifman, *Family Law in Israel*, vol. 1, where he suggests that a fundamental change in feelings should be regarded as an act that amounts to frustration with regard to revoking a promise of marriage. He says:

> '… in the case before us the breach is a result of the subjective will of the man, but it can be said that the individual will that accompanies marriage is a substantial part thereof… when a man marries a woman whom he originally thought he loved but is now hated by him, performance of the contract, even if it is at all possible, is nonetheless fundamentally different from what was agreed' (*ibid.*, at p. 138).

It can therefore be said that when we are concerned with a special agreement, which is not an ordinary contract and is based on an intimate emotional relationship, fundamental changes in the feelings and emotions that underlie this relationship and dramatic changes in the life of a person as a result should be regarded as changes which can change the performance of the agreement into something fundamentally different or even impossible. Someone who has undergone such changes should not be forced to be bound by his original consent.

A contract that is unenforceable (section 3(1) of the Contracts (Remedies for Breach of Contract) Law)

25. Were it not possible to regard the drastic change in circumstances as frustration of the original agreement, would it be possible to enforce the continuation of the procedure? I think that the answer to this is no, in view of the special character of the agreement before us.

When their life together collapsed, the Nahmani's original plan became impracticable in the circumstances that had been created, and it is therefore unenforceable. Such a situation is regulated by section 3(1) of the Contracts (Remedies for Breach of Contract) Law, which determines that one of the exceptions to the rule of enforcement exists when 'the contract is unenforceable'. The agreement before us is unenforceable in the sense that it cannot be carried out within the framework that was intended for its performance, namely the framework of a functioning marriage between the Nahmani couple. Not every agreement that cannot be performed within the framework intended for its performance becomes an 'unenforceable' contract, but this is not the case here, where we are concerned with an agreement whose essence, nature and character distinguish it from the ordinary agreement. Admittedly it may be said that the agreement is enforceable in the sense that physically the fertilization procedure can be continued, but because of its special character it cannot be carried out within the framework in which the parties agreed to carry it out, which is a joint family unit into which the child will be born if the procedure succeeds. The agreement is based on an intimate personal relationship and married life. The continued existence of this relationship is the heart and soul of the spouses' original plan to bring a child into the world by means of *in-vitro* fertilization. When the relationship was severed, the contract is no longer enforceable within the framework intended for its performance. No enforcement measure of the court can restore the family unit, and in the absence of this unit the original consent that was based on it is unenforceable.

When a contract is unenforceable, the question of responsibility is irrelevant. This has been discussed by Professor Yadin, who said: 'According to the text of the law, it is irrelevant who or what caused the contract to be unenforceable… it is also irrelevant whether the party in breach — or the injured party — is responsible for the contract being unenforceable…' (U. Yadin, 'The Contracts (Remedies for Breach of Contract) Law, 5731-1970', *Commentary on Laws relating to Contracts*, G. Tedeschi ed., 2nd edition (1979), at p. 55). These remarks were adopted by Justice Bejski in *Lasserson*

v. Shikun Ovedim Ltd [3] *supra*, where he clarified that this is also the position in case-law (*ibid*., at p. 250). The responsibility for the occurrence of the event that makes the performance of the contract impossible is relevant only with regard to the other remedies, but not the remedy of enforcement (Yadin, *ibid.*, at p. 55). When the performance of the contract becomes impossible, there is no longer any basis for the remedy of enforcement.

Filling a lacuna in the agreement

26. The question before us can be examined from another angle. So far we have considered the consent given in a specific set of circumstances, which was frustrated as a result of completely different circumstances. Let us now examine another aspect of the issue, namely the possibility of regarding the agreement as an agreement that has a lacuna in that it does not make any provision for the fate of the procedure in the event of separation. It seems to me that we cannot fill the lacuna by means of a stipulation that gives consent to the whole procedure in a case of separation.

In our case, the consent to the *in-vitro* fertilization procedure left a lacuna, and the silence of the parties on the question of separation is not in my opinion a 'negative arrangement'. A lacuna may, in principle, be filled under the Contracts (General Part) Law, 5733-1973 (sections 25-26). In our case, we cannot rely on these sections, even by way of analogy, for the purpose of completing the agreement. We cannot ascertain the intentions of the parties when they made the agreement with regard to the change in circumstances that occurred, and we cannot say that they had common intentions; we cannot ascertain the intentions from the circumstances and certainly we cannot do so according to any practice that prevailed between the parties or any accepted practice in agreements of this sort, since there is no practice in this area. We therefore have a situation in which the parties did not consider a specific interest — the fate of the fertilized ova — in the event of separation:

> 'Their silence reflects a lacuna and raises the question: what field of law should properly be applied? Our assumption for this purpose is that it is not impossible that the contract has "run its course" and has now become, in so far as this interest is relevant, merely a historical fact. We now describe as a "lacuna" a situation in which applying the "conventional" rules of interpretation leads to the conclusion that the contract did not consider that interest, and we consider, within the framework of the laws of contract, intervention by means of "recruiting" the techniques that allow formal or informal intervention in the

> contents of the contract' (M. Deutch, 'On Legal Genes and Competition of Rights: The Relation Between the Law of Contract and Unjust Enrichment Laws', 18 *Tel-Aviv Uni. L. Rev.* 557 (1994), 566. See also note 41 which refers to intervention in contracts by means of the laws of good faith, implied terms and normative outlooks on fairness).

In our legal system, the judge may, in appropriate circumstances, complete the agreement, when he is satisfied that the parties did not agree with regard to the lacuna (D. Friedman & N. Cohen, *Contracts*, vol. 1 (1991), 220; CA 154/80 *Borchard Lines Ltd, London v. Hydrobaton Ltd* [21], at p. 224; CA 554/83 *Atta Textile Company Ltd v. Estate of Zolotolov* [22], at p. 303). '… The court is not authorized to "make a new contract, which is different in its nature, content, scope and application from the one made by the parties themselves" (CA 79/76, at p. 753)' (CA 528/86 *Polgat Industries Ltd v. Estate of Yaakov Blechner* [23], at p. 826). The doctrine of the implied term, which we absorbed from English common law, has lost its status since the enactment of the Contracts (General Part) Law. The Contracts (General Part) Law put another tool at our disposal, the principle of good faith stated in section 39 (CA 719/89 *Haifa Quarries Ltd v. Han-Ron Ltd* [24], at p. 312, and CA 479/89 *Coptic Mutran v. Halamish — Government-Municipal Corporation for Housing Renovation in Tel-Aviv-Jaffa Ltd* [25], at p. 845. On the question of filling a lacuna and the implied term, see also R. Ben-Natan (Kleinberger), 'The Law of the Implied Term in Present Law — A further study', 17 *Mishpatim* (1987), 571). What is implied by the principle of good faith with regard to filling a lacuna in a contract is that *it must be filled in a way that realizes its subjective and objective purpose*: E. A. Farnsworth, *On Contracts*, Bolton, vol. 2 (1990), 305. Good faith was not intended to change a contractual arrangement and does not create a new contract between the parties. Good faith demands that a contract is given a meaning that is consistent with the joint intentions of the parties and with the basic principles of the legal system.

Completing the agreement by means of a stipulation that the consent of the Nahmani couple to adopt the procedure of *in-vitro* fertilization should be regarded as consent to continue the procedure even after separation does not realize the subjective and objective purpose of the agreement. It cannot be said that continuing the course of action that the parties determined in the agreement leads, according to its internal logic, to a completion according to which the procedure will continue even in a case of separation. It cannot be

determined that this is implied by the joint intentions of the parties, and it cannot be said that such a stipulation is implied by the basic principles of the legal system with regard to the basic rights of the parties and each one of them, as set out above. Such a completion cannot counteract a 'blatant breach of the balance of mutual rights' (Justice Mazza in *Coptic Mutran v. Halamish* [25] *supra*, at p. 846).

Enforcement

27. Even if I thought that the original consent between the spouses was that the procedure should continue even in the new circumstances that have been created (and I do not think this), there still arises the difficulty of enforcing this consent, since the significance of this is not merely enforcing the consent to deliver the ova to Ruth Nahmani, but forcing parenthood on a person who does not want it. I suspect that enforcement of this consent is contrary to sections 3(2) and 3(4) of the Contracts (Remedies for Breach of Contract) Law. Section 3(2) of the law denies an injured party the right of enforcement if 'enforcement of the contract means compelling someone to do, or to receive, personal work or a personal service'. As Professor Shalev explains, 'the origin of the rule that denies enforcement of personal work and service lies in the laws of equity, according to which contracts for a personal service should not be enforced. The reason for these laws is to be found in the protection of individual rights' (Shalev, *Laws of Contract*, at pp. 528-529). *The law is not interested in forcing on someone a relationship that he does not want* (see J. D. Calamari & J. M. Perillo, *The Law of Contracts*, 2nd edition (1977), 677). This enforcement is likely to inflict a real injury on a person's individual freedom and require an involvement for which the person is unprepared. Moreover, where the relationship requires cooperation and a healthy relationship, the law cannot bring these about by means of enforcement orders (see: CA 256/60 *Frankel v. American Overseas Food Centers Inc.* [26], at p. 95; CC (Jer.) 574/70 *Klinger v. Azrieli Avramovitz Co. Ltd* [30], at p. 363; CA 381/75 *Berkovitz v. Gavrieli* [27]; J. Chitty, *On Contracts — General Principles*, London, 26th edition (1989), 1212).

The law denies the remedy of enforcement '… for work that must be done specifically by the person who made the commitment — whether we are speaking of a singer, an artist or a surgeon, or whether we are speaking of a cleaning lady or a factory worker…' (U. Yadin, 'The Contracts (Remedies for Breach of Contract) Law, 5731-1970', *Commentary on Laws relating to Contracts*, G. Tedeschi ed., at p. 57).

28. Against this background it can be said that *a priori* the agreement before us should not be enforced, since its personal elements far exceed the personal elements of any contract for a personal service. It is inconceivable that a writer who breached his undertaking to write a book should be compelled to continue writing the book when he no longer wishes to do so. Once he has breached his undertaking, the other party may avail himself of various remedies, but not the remedy of enforcement. If this is the case with a literary creation, then with the ultimate creation — bringing a child into the world — it should certainly be the case. The future personal involvement of someone who becomes a parent is a very significant and long-term obligation.

Someone may argue that this is not so, for Ruth Nahmani is not demanding that Daniel Nahmani do anything apart from not preventing her from continuing the procedure and from raising the child who will be born, if at all. This argument cannot be accepted, since, when Daniel Nahmani takes on the status of a parent, he will be liable for all the duties of the parent, and he will not have any legal possibility of evading these (CA 5464/93 *A v. B (a minor)* [5]). Moreover, we cannot know what may happen in the future that will compel Daniel Nahmani to be significantly involved in the raising of the child whom he does not want, with all the commitments and ramifications that this implies. Such an involvement ensues from the very status of a parent even if the child is not brought up by him. Even from a normative viewpoint the law expects that the parent should take an active role in raising his child. It follows that such an agreement is unenforceable.

29. It can also be said that enforcing the consent of Daniel Nahmani to enter into the status of a parent, despite the fact that he has revoked it, is unjust within the sense of section 3(4) of the Contracts (Remedies for Breach of Contract) Law, which provides that a contract should not be enforced if the enforcement is 'unjust in the circumstances of the case'. Considering whether the enforcement is just or unjust in the circumstances of the case is done on two levels: on a personal level — the relationship between the parties to the agreement — and on a public level — the effect of the enforcement on the public interest and the basic values of society.

Justice Zamir said in CA 3833/93 *Levin v. Levin* [28], at pp. 877-878:

> 'According to its wording, the section does not require a narrow conception of justice, which is limited to the relationship between the parties to the contract, as opposed to a wide conception of justice, which also includes considerations of the public interest. The language of the law also does not require a narrow scope for

> the circumstances of the case that includes only the situation and behaviour of the parties to the contract. According to the language of the section, the circumstances of the case may also include external circumstances, and these *inter alia* may include circumstances relating to the public interest. *The language of the section does not prevent the court from asking whether enforcement of the contract is unjust in view of the effect of the enforcement, in the circumstances of the case, on the public interest, including the basic values of society*.
>
> This is certainly the case when one considers the purpose of the law. "Every legal system tries to uphold the public interest. This consideration constitutes a moving force in the development of common law, and it is a central consideration in the interpretation of legislation". See A. Barak, *op. cit.*, at p. 524. *The public interest also includes the protection of the basic values of the legal system*… It should not be assumed that this section was intended to compel the court to order the enforcement of a contract if considerations of justice between the parties so require, even if the enforcement may harm the public interest, such as access to the courts. On the contrary, the interpretation that upholds the purpose of the law, which also includes the public interest, *requires that when the court considers whether to enforce a contract, it also takes considerations of the public interest into account… It follows that justice in section 3(4) of the Contracts (Remedies for Breach of Contract) Law is not merely personal justice, but also includes public justice*' (emphases supplied).

I agree with this approach, which is also found in other legal systems where, in an action for enforcement of a contract, the court takes into account considerations of the public interest. I will not repeat the personal circumstances and the constitutional and public aspects that were set out in detail above. On a personal level, our sympathy lies with Ruth Nahmani, but sympathy does not create a right. On a public level, enforcement conflicts with basic human rights, and therefore it is inconsistent with the public interest and proper legal policy, which we considered at length above. For 'public policy' in a contractual context, see *Jerusalem Community Burial Society v. Kestenbaum* [11], at pp. 533-535. It can therefore be said that even within the

framework of section 3(4) of the Contracts (Remedies for Breach of Contract) Law, the agreement under consideration should not be enforced.

Several additional issues deserve attention, and I will consider these briefly:

Estoppel

30. An additional argument raised by Ruth Nahmani is the argument of estoppel. This argument has two aspects, the factual aspect and the legal aspect. On a factual level, a person making an argument of estoppel by representation or promissory estoppel must prove that a clear representation was made to him, he acted on it, adversely changed his position and that it was reasonable for him to do so. It follows that there must be a representation or a promise, reliance and a causal relationship between the two (Friedman and Cohen, *Contracts*, vol. 1 (1991), 91-92; G. Shalev, 'Promise, Estoppel and Good Faith', 16 *Mishpatim* (1986), 295, 296-308). For the requirement of causation, see G. Spencer Bower and A. K. Turner, *The Law Relating to Estoppel by Representation*, London, 3rd edition (1977), 102-103.

In our case, there is — from a factual viewpoint — no basis for the argument that Daniel Nahmani made a representation or gave a promise that the procedure would continue even in a case of separation. In this context, I have already considered the evidence and the testimonies of the parties themselves, and I will not add anything. It also cannot be deduced that the consent to the procedure, which was given when they were living together, implies consent to the continuation of the procedure even in the event of a separation. Moreover, it is not possible to hold that Ruth Nahmani entered into the process in reliance on such a promise or representation and that she would not have begun the procedure if she had taken into account the risk of separation and refusal. She took into account the risks that the procedure would fail, which she knew, and nonetheless decided to begin it; it can be assumed, *a fortiori*, that she would not have been daunted from beginning the procedure by a risk of separation and a refusal to continue the procedure which did not exist at all at the time of the consent to begin it. Therefore, I am of the opinion that the factual basis does not exist for applying the doctrine of estoppel. In addition, the legal aspect does not allow us to apply the doctrine. On this level, the existence of a promise and the contents of the promise are of paramount importance, and these are lacking in this case. This doctrine is applied when a promise or a representation exist, but for some reason they are not legally valid (such as non-compliance with a requirement of writing, where such a requirement exists). But in the absence of a promise or a representation upon which one may rely, the doctrine of estoppel should not be applied, since

its purpose is to give binding legal force to promises that do have such force (Prof. N. Cohen, 'Contract Law and Good Faith in Negotiation: Formalism versus Justice', 37 *HaPraklit* (1986), 13; see also Shalev, 'Promise, Estoppel and Good Faith', 16 *Mishpatim* (1986), 295, 298-300).

Moreover, estoppel cannot provide more than the laws of contract can provide. The usual remedy under this doctrine is reliance damages and not enforcement, and if it is not possible to compensate, it is still not possible to grant a remedy of enforcement if under the laws of contract this remedy would not have been granted, since there is no basis for granting it as explained above (Friedman & Cohen, *Contracts*, vol. 1 (1991), 92-93, 637-642). Also from the viewpoint of the public interest, one cannot achieve through estoppel what cannot be achieved under the general law, for reasons of 'public policy' (Shifman, *Family Law in Israel*, vol. 1, at p. 85; A. Bendor, *The Doctrine of Estoppel in Administrative Law* (doctoral thesis), at p. 45 and the references cited there).

It should be noted that the argument of estoppel is used in English law as a defence argument, whereas in American law it is used also as an argument of the plaintiff. In our legal system the question has not yet been decided, although it has been raised, and it appears that scholars follow an approach similar to the American one, which I tend to adopt in the appropriate circumstances (see Friedman and Cohen, *Contracts*, vol. 1, at p. 44).

In view of the aforesaid, the argument of estoppel cannot, in my opinion, succeed in this case.

The difficulties involved in the in-vitro *fertilization procedure*

31. One of the arguments made by counsel for the Attorney-General is that one should take into account the many difficulties still involved in the *in-vitro* fertilization procedure which is the first stage of bringing a child into the world. I do not consider these difficulties in themselves an obstacle to granting the relief sought by Ruth Nahmani, were she to have a right to receive what she is seeking. We are in the pre-surrogate stages, and the path to completing the procedure is long, arduous and uncertain, from the medical, legal and economic viewpoints. From a medical viewpoint, the success rate is currently low; from a legal viewpoint the institute in the United States requires the consent of both spouses to carry out the implantation, and they must be married and living together (see the unsigned surrogate agreement, plaintiff's exhibit 3). The problems that arise with regard to the status of the child, the surrogate mother, the need for consent to hand over the child, the factual and

legal conflict between the status of the surrogate and the status of the genetic mother with regard to their maternal status and the legal status of the child are complex and cannot be easily solved. All of these are without doubt real problems; but were I to think that Ruth Nahmani had a right to force parenthood on Daniel Nahmani through the court, I would not regard these difficulties as an obstacle in her path to trying to achieve motherhood.

An alternative possibility of achieving motherhood

32. Another argument that was raised was the possibility that Ruth Nahmani could achieve motherhood in another way. I do not accept the argument that Ruth Nahmani could become a mother in a different way, and for that reason she is not entitled to force Daniel Nahmani to continue the procedure. It is almost certain that this is her last chance of achieving biological motherhood. One must take account of her age, her physiological condition, her small chances of success in a new fertilization, the need to find an unrelated donor (when she is still married) or to resort to the adoption of a child that is not hers, the time factor, and the emotional and physical effort involved in all of these. All of these are unattractive alternatives, and they cannot be compared with the use of her ova, fertilized with the sperm of her husband during their married life, which are ready for implanting. Therefore, were I to think that Ruth Nahmani had a right to continue the procedure against the wishes of Daniel Nahmani, I would not regard this argument as an obstacle in her path.

The 'status' of the fertilized ova

33. As stated, the status of the fertilized ova has ramifications for the question of consent. I will consider this only from the viewpoint of the question whether their status can support the position of one of the parties. If the approach is — as in most Western countries — that the ova do not have a right to 'life', then controlling their fate lies with the two persons who contributed their genetic material; if however the approach is that they do have an independent right to develop into 'life', the spouse who wishes to continue the process will have a right to them.

I shall not presume to make a comprehensive analysis of this complex subject to which different societies at different times attribute different elements which are not only in the sphere of law. We are concerned here with the sphere of philosophical, social and theological outlooks on the nature of man and his creation. There are some who try to derive the status of fertilized ova from the status of the embryo. The legal status of these, including their

right to continue to develop, is not regulated in Israel by legislation. The Legal Capacity and Guardianship Law does not apply to them, according to the definition of the term 'man' in that law. In the aforementioned article of the President (M. Shamgar, 'Questions relating to fertilization and having children', 39 *HaPraklit* (1990) 30), he reviews the question of 'Who is a man' in various countries and at various times, beginning with the philosophical school of the Pythagoreans, and he continues through the Middle Ages down to the present day. From this review we see that across a section of human civilization the date on which man begins his existence is recognized to be no earlier than the stage of implantation. This is not the only opinion, and there is another approach that life begins from the moment of fertilization (*ibid*., at pp. 30-31). We also find a legal survey of the different approaches to this subject, in so far as it concerns abortions, in CA 413/80 *A v. B* [2], at p. 81 (see also the Report of the Professional Public Commission for Examining the Issue of *In-vitro* Fertilization, at p. 52). In *Davis v. Davis* (1992) [32] the issue was considered comprehensively and in depth. The court there reached the conclusion that the fertilized ova are not 'property' nor are they a 'person' or an embryo, but a 'pre-embryo'. They belong to an intermediate category, and although they should be treated with dignity because of the potential for life that they contain, the State has no interest in protecting their 'life' and in compelling the donors of the genetic material or either of them to continue the procedure against their will. The countries that do not regard the fertilized ova as 'persons' require the consent of both donors of the genetic material to all stages of the procedure of fertilization, and they allow each party to revoke his consent. They also order the destruction of the fertilized ova in the absence of consent or at the end of a certain period. This is the law in England, Western Australia, France, the recommendations for reform in Canada, Ontario and New South Wales (the law in these jurisdictions was mentioned above when we considered the law in foreign countries — paragraph 13; with regard to the law in France, see C. Byk, 'France: Law Reform and Human Reproduction', *Law Reform and Human Reproduction*, S.A.M. McLean ed., 131, 160). There are other opinions, and States such as Louisiana and Victoria recognize the right of the fertilized ova to protection of their 'life' (see La. Rev. Stat. 9:122, 9:129, 9:130 (Louisiana); the Infertility (Medical Procedures) Act (Victoria); L. Waller, 'Australia: The Law and Infertility — the Victorian Experience', *Law Reform and Human Reproduction*, *supra*, at 17, 25).

34. The approach of our legal system is like the approach of most Western countries.

In ancient Jewish law sources, a situation of *in-vitro* fertilization was not considered and could not have been considered. The status of fertilized ova can be deduced from an analogy with the status of the embryo. There is a distinction between the stage from which someone who injures an embryo is like someone who injures a person, and the stage at which this is not the case. In Jewish law, we find a distinction between determining the time when 'the soul enters from a theological viewpoint' and the prohibition of abortion from a legal viewpoint. Rabbi Meir Abulafia, one of the leaders of Spanish Jewry in the thirteenth century, writes that the soul enters the body at the moment of fertilization (Rabbi Meir Abulafia, *Yad Rama*, on Babylonian Talmud, Tractate *Sanhedrin*, 91b [46]). However, with regard to the abortion of an embryo on account of a danger to the mother's life, he holds that the embryo is not a person in its own right until it comes out of his mother (Rabbi Meir Abulafia, *Yad Rama*, on Babylonian Talmud, Tractate *Sanhedrin*, 72b [46]): 'But as long as it is inside, it is not a person and the Torah is not concerned about it' (see also Rabbi Shelomoh Yitzhaki (Rashi), Commentary on the Babylonian Talmud, Tractate *Sanhedrin*, 72b [47]). Rabbi Hisda says that until the fortieth day of pregnancy, the embryo is 'mere water' (Babylonian Talmud, Tractate *Yevamot*, 69b [48]). According to most contemporary authorities, fertilized ova have not reached the stage where the prohibition of 'abortion' applies. Even according to the minority of authorities who hold that the prohibition of abortion applies also to an early stage of the pregnancy, it is doubtful whether this prohibition includes a prohibition of destroying a fertilized ovum before it is implanted in a woman's womb (with regard to the prohibition of abortion, see: D. Sinclair, 'The Prohibition of Abortion', *Jewish Law Annual*, 5 177 [49]; A. Steinberg, 'Artificial Abortion according to Jewish Law', *Asia* 1, 107 [50], and also a responsum of Rabbi Ovadia Yosef, 'Termination of Pregnancy according to Jewish Law', *Asia* 1, 78 [51]).

The Regulations indicate a similar approach to that of Jewish law and the approach of most countries of the Western world as expressed in legislation, the recommendations of the various commissions and case-law. According to regulation 9(a), the fertilized ovum shall be frozen for a period that does not exceed five years. The commission that examined all the aspects of the issue recommended that after the storage period the ova could be used for research or could be destroyed. It follows that according to their approach, too, the ova do not have a right to 'life' that should be protected. In conclusion, for our purposes the fertilized ovum is not at a stage when it should have its 'life' protected, since it does not have life in the accepted meaning of this expression (see also Report of the Professional Public Commission for Examining the

Issue of *In-vitro* Fertilization, 1994, at p. 59). There is therefore no basis for recognizing the right of the fertilized ovum as a positive right that imposes a duty on its 'parents' to continue the procedure that will lead it to develop into human life, and the State has no interest in protecting its 'life' by compelling one of the donors of the genetic material to continue the procedure (it is possible that the fertilized ova will be entitled to protection against genetic manipulations and against trading in them, etc.).

The best interests of the child

35. The Attorney-General also based his position on the principle of the best interests of the child. The need to consider the best interests of the child also arises, in his opinion, from the Regulations that consider, *inter alia*, problematic situations from the viewpoint of the composition of the family into which the child will be born (regulation 8(b)). According to this argument, the court should not facilitate the birth of a child into a dispute and a one-parent family, when the starting point of the child yet to be born raises so many problems. The factor of the best interests of the child was considered also by the Commission, which recommended that the consent of both spouses should be required for the implanting also for the reason 'that children being born into a dispute should not be encouraged' (Report of the Professional Public Commission for Examining the Issue of *In-vitro* Fertilization, 1994, at p. 36). The best interests of the child as a preferred consideration with regard to the question before us can be seen also in the approach of several European countries such as Germany, Austria, Sweden, Norway and Switzerland, as opposed to approaches that give greater preference to the technical developments and the advancement of these, such as the approach in Spain, England and France (for these approaches, see R. Andorno, 'Procréation Médicalement Assistée', *Revue Internationale De Droit Comparé* (1994), 142, 145).

We are not required to take a principled stand with regard to the question of the weight that should be attributed in general to the best interests of the child for the purpose of making a decision on the variety of questions involved in artificial fertilization in general and *in-vitro* fertilization in particular. It is sufficient for me to say that in this case I do not think that this aspect has great weight.

Were Ruth Nahmani entitled to have here wishes granted and the procedure were successful, a child would be born to a couple who were married when the child was created, and he would have two parents. According to the finding of the trial judge, on the basis of his impression of Ruth Nahmani, she is a very

positive woman who would fulfil her role as a mother in the best possible way. The fact that the child who is yet to be born would grow up with his mother, while his father has a family of his own, is a common phenomenon in Israel. One-parent families are accepted in our society with understanding and are even entitled to various forms of assistance. Unfortunately, there are many children being raised in our society by one of their two parents, whether because of divorce or death or because the family was a one-parent family *ab initio*. I am not unaware that in all those cases where the separation or death occur after the child is born the starting point of his life is a family unit that appears protected, whereas in our case the starting point begins with a 'deficit'. Notwithstanding, in view of the reality in our society and the personal details of Ruth Nahmani, I would not attribute weight to the question of the best interests of the child to the point that I would deny her what she wishes *for this reason*; this, unfortunately, she cannot receive for other reasons set out in this opinion.

Conclusion

36. If I have taken the trouble to consider the problem before us from various starting points and from different legal aspects, this is mainly because I have been mindful throughout of the distress and personal circumstances of Ruth Nahmani; but with every sympathy for her position, we cannot grant her application and force fatherhood on Daniel Nahmani. A person cannot always rely on the court system to help him in times of distress. The relationship between spouses should be based on love, friendship, understanding, support, trust and consideration. Sometimes this relationship collapses, expectations fade, hopes vanish and dreams are shattered. Not in every case can the victim find a remedy for his injuries in court orders, where enforcement is impossible, is improper in view of the circumstances and under the law, and is inconsistent with the basic rights of the individual in our society.

In this respect, the remarks of Vice-President Elon with regard to a similar problem (taking a child from an Israeli couple who wished to adopt her and returning her to her biological parents in Brazil), are apt. In describing the relationship between 'law and justice, difficulty and pain' Justice Elon said:

> 'The difficulty lies in the pain of loss in the hearts of the respondents. After it became clear to them that they would not bring a child into the world, and after they were told that they would not be placed on the list for adopting a child in Israel, they set all their hopes on what they had been told, that they could adopt a small girl conceived and born in a distant land, in

> Brazil… It is painful that this has been their fate — the suffering of love, and suffering because of love' (HCJ 243/88 *Gonzales v. Turgeman* [29], at pp. 653-654).

For these reasons, I can only recommend to my colleagues to allow the appeal, overturn the judgment of the trial court, and dismiss the claim of Ruth Nahmani, without an order for costs.

Vice-President A. Barak

I agree.

Justice D. Levin

I agree.

Justice I. Zamir

I agree.

Justice Ts. E. Tal

1. The couple began jointly and with one mind on the painful path of *in-vitro* fertilization. Together they struggled against the health authorities to be allowed to have a child through a surrogate mother abroad (HCJ 1237/91).

Subsequently, the husband left the home and established a new family with another woman, who even bore him a child, The wife remained alone, and her only hope was to have a child from her and her husband's fertilized ova. Therefore she asked Assuta Hospital to give her the ova that were frozen there, in order to continue, on her own, the procedure that they began. The hospital refused because of the husband's opposition. The wife petitioned the trial court against the hospital and against the husband. The court (Justice H. Ariel) granted her petition and rejected the husband's opposition. This is the basis for the appeal before us.

2. The human situation before us lies mostly in the social-moral sphere and only to a small extent in the legal sphere. But society has no tools for making decisions and enforcing them in the moral and social sphere, so it leaves the problem for the court to solve.

I have read the excellent and well-constructed opinion of my colleague, Justice Strasberg-Cohen; in her well-reasoned opinion she suggests that the husband's appeal should be allowed.

But there is not always only one legal solution. Sometimes different potential solutions compete with one another. This is particularly the case with a painful human problem like the one before us. And where there is such a competition, we should, in my opinion, prefer the solution that appears to be more just.

In our case, by means of the separation that the husband created and his opposition to the wife's petition, he is trying to extinguish her last spark of hope to be a mother, while he himself has established a new home and has been blessed with a child. If there is a solution that can also give the wife her desire, I think that that is the more just solution, and it should be preferred.

3. The opinion of Justice Strasberg-Cohen is based — in a nutshell — one two points:

— Fatherhood should not be forced on the husband against his will, since this involves a violation of basic rights.

— A 'weak' and essentially unenforceable agreement, an agreement that was made when they lived in harmony and there was no agreement as to what would happen when there was no harmony, should not be enforced against the husband. In such a situation, 'sitting and doing nothing is preferable'.

In my remarks below, I will try to justify a different approach, which will lead to a different solution.

4. *The right of the husband not to have fatherhood forced on him against his will*

It is indeed one of the basic rights, which concerns the protection of human liberty, dignity, privacy and autonomy, to make decisions in the field of family and parenthood. But this right is not absolute, and there are cases where it is overridden by the liberty, dignity, privacy and autonomy of others.

Consider, for example, a person from whom a woman has conceived without his knowledge, as in the Biblical case of Lot, or who was deceived into thinking that the woman was taking effective contraceptive measures, which she did not take. There is no doubt that such a person has a good reason not to have fatherhood forced on him against his will. Nonetheless, his autonomy is overridden by her autonomy and that of her body, his dignity by her dignity, and his privacy by her privacy, and even if, like Job, he will curse

the 'night that gave birth to man', in the end he will be a father against his will, with all the obligations imposed on a father towards his child, from which none are exempt. This should certainly be the case here, where the husband gave his informed and willing consent to be a father, and only later changed his mind.

One might say that the two cases are different. In the former case the right of the husband is countered by the preferred right not to interfere actively with the body of the wife.

To this we can reply: first, in our case the wife took an additional step and allowed a very serious and painful interference in her body in order to *bring about* the present position. If we allow the husband to change his mind at this stage, the result is that, from a retrospective viewpoint, the interference in the wife's body was for nothing, and her dignity and privacy were violated. That is not all. The right of the wife and her desire to be a mother are also basic rights relating to her liberty and dignity, privacy and autonomy, and why should these be secondary to those of the husband? Who has measured parenthood and weighed motherhood? On the contrary, there are indeed reasons why he should be secondary to her, since he changed his mind after a serious violation of her dignity, privacy and body, and 'anyone who changes his mind has the lower hand' (Mishnah, Tractate *Bava Metzia*, 6 1 [52]).

5. *The proper legal policy*

My colleague, Justice Strasberg-Cohen, is of the opinion that 'it would not be proper for the legal system to act to force parenthood on someone who does not want it'.

From the appellant's viewpoint, we are not concerned with forcing biological parenthood on him. The procedure leading to biological parenthood began willingly. If the court does not intervene — as I indeed propose — the non-intervention will not involve any compulsion. On the contrary, the intervention of the court which leads to the procedure being stopped, is itself biological compulsion, which forces infertility on the wife. Therefore, in a paraphrase of my colleague's remarks, 'it would not be proper for the legal system to act to force infertility on someone who does not want it'.

But the crux of the matter is not enforcing parenthood but forcing obligations that derive from fatherhood. In other words, is it proper to allow the biological procedure to continue, when at the end of it, if it is successful, it will impose an emotional burden and financial obligations on the appellant, against his will.

Let us assume that the agreement (by implication and by behaviour) between the spouses is weak and unenforceable and requires renewed consent at every stage — and let us ignore it for a moment as if it had never existed. Does there currently exist any legal norm that can guide us in deciding the said question of enforcing obligations?

Such a norm does not exist, and my colleague's statement that it would not be proper for the legal system to act to enforce parenthood is in itself the creation of a new norm. We are therefore in the sphere of 'developing the law', about which Prof. A. Barak wrote:

> '… In Israel, this activity [of developing law] is regarded as belonging to the judiciary, which acts according to a variety of considerations, some of which are ethical in character and some of which have the nature of legal policy…' (A. Barak, 'The Different Kinds of Legal Creation: Interpretation, Filling a Lacuna and Development of the Law', 39 *HaPraklit* (1990), 267, 286).

What are the considerations of ethics and legal policy for creating a norm in a situation where the wishes of the husband and the wishes of the wife conflict? On the one hand, we must consider the autonomy of the husband who no longer wants the planned child and also the emotional and financial inconvenience of the husband if the child is born. On the other hand, we must consider the autonomy of the wife, who wants the planned child and her right to be a parent, which is one of the most basic human rights among the existential aspirations of the individual and society as a whole.

In principle, it seems to me that the ethical and the legal-policy considerations tip the scales the other way. For we are not talking of forcing parenthood on a person against his will, as explained above, but of the opposite question, whether we should create a new legal norm that will allow the husband to force infertility on the wife.

The court is obliged to decide between these two evils: 'forced parenthood', or more correctly 'forced obligations of parenthood', on the one hand, and infertility, also forced, on the other hand. We cannot evade our duty by adopting a policy of 'sitting and doing nothing', because both decisions will result in one of these two evils. In the case before us, for the reasons stated above, the norm which does not compel infertility is in my opinion preferable. Moreover, infertility, which is enforced, constitutes the absolute opposite of the most basic and fundamental right of a woman. 'Forced' parenthood, on the

other hand, imposes emotional burdens and various obligations, which are not to the parent's liking. In this 'balance of evils', the inconvenience of 'forced' parenthood is in my opinion insignificant when compared with the absolute denial of the fundamental right to be a parent.

In summary, the husband originally agreed to be the father of the child who would be born to the wife by means of *in-vitro* fertilization. Now he has changed his mind, but against his right not to continue the procedure that will, possibly, lead to his parenthood, we have the right of the wife which in my opinion is preferable, and his right is set aside in favour of her right.

6. *The contractual aspect*

From the contractual aspect, the 'agreement' does indeed have the weaknesses that my colleagues listed. It is 'weak' and it was made when there was harmony between the spouses, it does not state what will happen if a separation occurs, the agreement is on the borderline between an enforceable and unenforceable agreement, and it has all the other aspects that my colleague attributed to it.

But from the procedural aspect, the trial court was not asked for a remedy of enforcing the agreement. The petition, by means of an originating motion, was directed against the hospital to release the ova and against the husband not to object thereto. In these circumstances, I accept the wife's argument that the husband is estopped from objecting. When an argument is estopped, we assume that the argument, on its merits, may be a good one. But because of the behaviour of the person making the argument towards the other party, the reliance of the other party on that behaviour and a change in the position of the person so relying as a result, we do not allow the person making the argument to be heard on that argument.

In our case, the wife underwent a serious and painful invasive procedure to her body in order to extract the ova, on the basis of the consent of the husband to fertilize them. When they were fertilized, the wife was deprived of any alternative, such as fertilizing them with the sperm of a 'donor'. She changed her position irreversibly on the basis of his behaviour. It follows that even if he has good arguments about the unenforceability of the agreement and about the need for renewed consent at every stage on the way to parenthood and all his other arguments, as elucidated so well by my colleague, these may not be heard and we do not allow the husband to make them.

The estoppel we are concerned with is promissory estoppel which was developed in England, and was accepted — in an even wider form — in

American law. This estoppel, in recognized circumstances, prevents a person from denying a promise that he gave to another in order that the other would rely on it and act on it, when the other did indeed rely on it and change his position.

The common element in this estoppel and the classic estoppel (estoppel by representation) is the element of reliance. In one case there is a change of position relying on a promise and in the other a change of position relying on a factual representation.

> 'From a modern viewpoint it may be said that the two types of estoppel are designed to protect a reliance interest. The common element of reliance provides an ethical basis for the rules concerning the various kinds of estoppel. Indeed, both estoppel by representation and promissory estoppel are based on principles of justice and equity, logic and fairness, and both of these contain elements of proper morality and human relations' (G. Shalev, 'Promise, Estoppel and Good Faith', 16 *Mishpatim* (1986), 295, 296).

See also M.P. Thomson, 'From Representation to Expectation: Estoppel as a Cause of Action', 42 *Cambridge L. J.* (1983), 257, 277:

> 'Equitable estoppel is a rule of fairness by which the courts protect the reliance and expectations of innocent parties from defeat by those who have induced those reliances and expectations.'

Incidentally, it can be said that the modern 'reliance interest' was recognized already in Talmudic law. Jewish law holds that someone who gives free advice which turns out to be erroneous is exempt from paying. But if the person asking said to the adviser: 'See, I am relying on you', the adviser is liable to pay (Babylonian Talmud, Tractate *Bava Kama*, 100a [53]. This is also the ruling of Rabbi Yosef Karo, *Shulhan Aruch*, *Hoshen Mishpat*, 306, 6 [54]: 'If a person shows a coin to a dealer and he says it is genuine and it turns out to be counterfeit… he is liable to pay even though it was gratuitous [advice], provided that the person said to the dealer *I am relying on you, or there was a statement to the effect that he was relying on his inspection and would not show it to others*'.

Whereas in a case of the classic estoppel an element of damage or adversely changing one's position is required for it to apply, the promissory estoppel is applicable even without this, since it applies, according to Lord

Denning, 'even if there is no damage to the recipient of the promise' (Shalev, 'Promise, Estoppel and Good Faith', 16 *Mishpatim* (1986), 295, 296). It is universally agreed that it is sufficient that an injustice is suffered by the recipient of the promise (*ibid.*, note 7).

This is not the place to discuss at length the history of this doctrine, and I will satisfy myself with the main points. It began in England, in the opinion of Lord Denning in *Central London Property Trust Ltd v. High Trees House Ltd* (1947) [37].

Since then this doctrine has become stronger and discarded provisos and restrictions, so that it has become a major and simple rule. Lord Denning, this time as Master of the Rolls, listed many kinds of limitations that formerly restricted the rules of estoppel, such as: it is merely a rule of evidence, estoppel does not create a cause of action, estoppel does not exempt one from the need for consideration, etc.. These limitations were 'buried' and the rule was left a simple one:

> 'All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption — either of fact or of law — whether due to misrepresentation or mistake makes no difference — on which they have conducted the dealings between them — neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands' (*Amalgamated Property Co. v. Texas Bank* (1982) [38], at p. 122).

In American law, this rule is expressed in its widest form (Restatement, 2nd, Contracts §90(1)), and it gives the recipient of the promise not only the right of estoppel but also the right of enforcement. In Australia also the High Court has ruled in favour of a recipient of a promise by virtue of promissory estoppel, which served in that case as the cause of action (*Walton Stores (Interstate) Ltd. v. Maher* (1988) [31]; see also S. Gardner, 'Equitable Estoppel, Unconscionability and the Enforcement of Promises', 104 *L. Q. Rev.* (1988), 362).

In *Walton Stores (Interstate) Ltd. v. Maher*, the respondent, Maher, erroneously thought that a binding agreement had been made between him and the appellant company, and relying on this he changed his position (he

destroyed a building on his land in order to erect a building that would be leased to the company). According to the majority opinion, promissory estoppel applied to this case in Maher's favour (according to the minority opinion, the classic estoppel applied in this case). *Inter alia* the court said:

> 'In all cases where an equity created by estoppel is raised, the party raising the equity has acted or abstained from acting on an assumption or expectation as to the legal relationship between himself and the party who induced him to adopt the assumption or expectation… Though the party raising the estoppel may be under no mistake as to the facts, he assumes that a particular legal relationship exists or expects that a particular legal relationship will exist between himself and the party who induced the assumption or expectation. The assumption or expectation may involve an error of law. *Thus a promissory or a proprietary estoppel may arise when a party, not mistaking any facts, erroneously attributes a binding legal effect to a promise made without consideration*' (*Walton Stores (Interstate) Ltd. v. Maher* (1988) [31], at pp. 420-421; emphasis supplied).

Similarly, in our case the wife has changed her position, irreversibly, in reliance on the consent of her husband to act jointly with her to bring a child into the world in the way that they began. It is clear that the wife's reliance was on the husband's consent to bring a child into the world in the way that they began, and not on his partial consent to the first stage only, with a possibility of changing his mind. If *both* parties did not think about a possible change of circumstances, this means that they also did not think about stages and changes on the way, but about the final goal. The two parties did not think that the agreement was weak and unenforceable. As in Maher's case, here too no binding agreement was made, but the wife acted in reliance on what she thought was an agreement 'to the end'; and the wife changed her position, on the basis of the consent to that final goal.

The essence of estoppel is not the validity or the content of the promise, but the reasonableness of the reliance. When the wife reasonably relied on the husband's promise, something that the husband should have anticipated — and which he did in fact anticipate — he is estopped even if the exact contents of the promise did not extend to all the circumstances as they turned out. After a reasonable reliance and an irrevocable change in the wife's situation, the law provides that the extent of the estoppel will be determined in accordance with that reasonable reliance.

The scholars Friedman and Cohen are of the opinion that this principle was absorbed in our law before the Contracts (General Part) Law (D. Friedman & N. Cohen, *Contracts*, vol. 1, at pp. 531-533). Even 'today, despite the enactment of the Contracts Law, case-law continues to make use of the doctrine of promissory estoppel, whether independently, or as a part of the principle of good faith…' (*ibid.*, at p. 533; see also the citations there to the decisions of the Supreme Court).

It seems to me, therefore, that the husband is prevented and estopped from arguing against the wife that he may revoke his consent, even if we are indeed concerned with a 'weak' agreement that is, by nature, of doubtful enforceability. We are not dealing with the enforcement of an agreement, but with estopping the husband from objecting to the continuation of the procedure.

It is true that the circumstances have changed, as a result of the separation that has occurred. But the husband is also estopped with regard to this argument, since it is he who has changed the situation. I am not looking to find him 'guilty', but someone who effects a change cannot argue that he is entitled to benefit from the change that he himself made, to the detriment of the other party (cf. section 28(a) and (b) of the Contracts Law (General Part); admittedly under sub-section (c) this rule does not apply when that party was free, under the terms of the contract, to act as he did, but the assumption that in the present case the husband was free to change the situation is precisely the assumption we are being asked to make).

7. Moreover, from the contractual viewpoint, the agreement under discussion is an agreement of behaviour. In the absence of an express agreement, we *assume* that it did not include an undertaking to continue the procedure even if the spouses would undergo a separation.

This assumption is not necessarily correct. To the same degree we could have assumed that the husband — out of ethical considerations — agreed to fulfil the one and only hope of the wife to become a mother in any situation, even if a separation would occur. This is not a mere speculation. It has strong support in the 'unwritten terms' that Jewish law attributes to such a situation. Let me explain.

Jewish law has accepted the doctrine that a husband should not be forced to divorce his wife except in the cases listed in the Mishnah 'And these are the cases where we compel him to divorce: someone afflicted with boils, etc.' (Mishnah, Tractate *Ketubot*, 7, 10 [55]). This is also the rule in *Shulhan*

Aruch (Rabbi Yosef Karo, *Shulhan Aruch*, *Even HaEzer*, 154, 1 [43]). But there are also exceptions to this rule. In one of these — where a 'wife comes with an argument' that she has been married for ten years and had no children from her husband, and she wishes to be divorced on the grounds that she needs support in her old age and someone who will take care of her funeral arrangements — we compel the husband to divorce her, so that she may marry another, from whom perhaps she may have a child. The Talmud recounts the case of a wife who came to Rabbi Ami and asked to be divorced. He rejected her request and said that a woman is not commanded to be fruitful and multiply. She said to him: 'In her old age, what will happen to such a woman?' He said: 'In such a case, we certainly use enforcement'. Similarly there was a case of a wife who came to Rabbi Nahman and after she argued that she needed a 'support and someone to bury her', Rabbi Nahman ruled that in such a case the husband is compelled to divorce her (Babylonian Talmud, Tractate *Yevamot*, 65b [48]).

However, compelling a divorce in a case where the law does not allow this amounts to an 'artificial' divorce and is invalid. This is stated by Maimonides (Rabbi Moshe ben Maimon, *Mishneh Torah*, *Hilechot Gerushin*, 2, 20 [56]):

> '… If the law does not allow him to be compelled to give a divorce and a Jewish court made a mistake or if they were inexpert judges and forced him to divorce her — it is an invalid divorce.'

One might ask the following question: if a 'wife comes with an argument' that is not listed in the Mishnah at all and the husband is compelled to divorce her, how do we compel him to divorce her and are unconcerned that the divorce is artificial?

This question was discussed by Rabbi Yitzhak bar Sheshet, one of the most prominent arbiters of the fourteenth century in Spain and Morocco (Rabbi Yitzhak bar Sheshet, *Responsa*, 127 [57]). He explains that the enforcement applied by the court is not, in fact, for the husband to perform the divorce but for him to fulfil one of his obligations to his wife, such as the duty of marital intercourse. If, however, he is unwilling or unable and he chooses to escape the enforcement by means of divorcing her, this is a divorce of his own free will.

> 'And this is like a case of someone to whom money is lent, and he was imprisoned for that debt, and his wife's relations said to him: if you divorce your wife, we will pay that debt and you will be released from prison. He agrees to this and divorces her willingly.

> Would anyone say that this is an artificial divorce, because he did it in order to get out of prison? No, since he was not imprisoned in order to divorce her, but on account of his debt, and the divorce is not artificial but voluntary' (*ibid*. [57]).

But in a case where he may be compelled to carry out his obligations, such as her maintenance, and she does not want a divorce, we compel him to carry out his obligation to support her.

> 'Someone who says that he will not provide food and support is compelled to provide support. And if the court cannot compel him to provide support, such as in a case where he does not have the wherewithal to support her and does not want to work to earn money to support her, if she wishes, he is compelled to divorce her immediately and give her the *Ketubah*. This is also the law with regard to someone who does not want to have marital intercourse' (Rabbi Yosef Karo, *Shulhan Aruch*, *Even HaEzer*, 154, 3 [43]).

It can therefore be seen that the 'primary' enforcement is to carry out the obligation. The enforcement to divorce is merely a 'secondary' enforcement.

The secondary enforcement to divorce a 'wife who comes with an argument' implies that the husband has the primary duty — above and beyond his obligation under the commandment to be fruitful and multiply — to give a child to his wife if she wishes one, so that she may be able to be supported in her old age and when she dies; and where the primary enforcement to carry out the obligation can be done, he is compelled to carry it out. In summary, the enforcement is to carry out the obligation. And if the performance of the obligation can be achieved by enforcement — such as the obligation to support the wife — he is compelled to perform the obligation. Even an obligation that cannot in practice be achieved by means of enforcement (such as the duty of marital intercourse) is enforced, but if the husband chooses to divorce her with her consent, it is a valid divorce.

This is why I said above that this 'agreement of behaviour' between the spouses includes not only a consent to try and bring a child into the world when there is harmony between them, but also an obligation to give her a child to support her, even if they separate.

Admittedly, here the impediment to having a child originates with the wife. Thus it may be argued that in such a case we would not compel a husband to divorce her, since she would not have a child even with a different husband.

But after he agreed to enable her to have a child, knowing the true facts, and knowing that the impediment came from her, this consent becomes once again an absolute obligation. It can be proved from the discussion in the Talmud (Babylonian Talmud, Tractate *Bava Kama*, 108b [53]) that a moral duty that a person undertakes to another becomes a binding legal duty.

In our case we are not concerned with compelling the husband to perform a divorce, since the wife does not want a divorce, but with compelling him to carry out his moral duty to her, and it is similar to a case where we compel him to support her. What is the enforcement here? It is estopping him from objecting to the continuation of the procedure that was begun with consent.

8. I am not unaware of the responsum of Rabbi Shaul Yisraeli, mentioned in the opinion of my colleague, which concludes that the husband should not be compelled to continue the procedure. The Rabbi considered the matter in detail from the viewpoint of divorce, whereas it is clear that the consent of the husband to the cooperation happened when there was harmony between them and the child that would be born would grow up with both parents in one home. Now that a separation has occurred, it is like being 'under duress', and since the circumstances have changed, the husband is entitled to change his mind.

I am not of sufficient stature to disagree with the Rabbi, but even under Jewish law different approaches are possible, and these lead to different solutions. The problem is a new one and was not considered in this form in the responsa of Medieval and Modern scholars. Contemporary scholars are considering this law by means of various analogies, and there are arguments in both directions.

It cannot therefore be said that 'Jewish law' has a clear position on this matter.

9. I will conclude as I began. There are cases where a man has the obligations of fatherhood forced on him, even if he did not agree to this *ab initio*, and his basic rights are overridden by values and the basic rights of the wife. This is certainly the case where he agreed to fatherhood *ab initio*, as in the case before us.

Since as a result of his behaviour and his consent — irrespective of any fault — the wife changed her position irrevocably, so that she was deprived of any option of having her ova fertilized by the sperm of a donor, the husband is estopped from opposing the continuation of the process, even if he has arguments that are good in themselves. This is the very essence of estoppel,

that it silences good arguments. Arguments that are not good do not need to be estopped.

We can read into the implied agreement that was made by the behaviour of the parties a moral undertaking of the husband to agree to the demand 'Give me children or else I die'. Such an undertaking, when the wife 'comes with an argument', can be enforced by estopping the opposition of the husband.

Since this solution seems to me more just, as it did to Justice Ariel in the trial court, I would suggest that we deny the husband's appeal.

In all of the above I have not considered the problems relating to such a child, when he is born, from the viewpoint of his family ties in Jewish and civil law. There are many opinions in this regard as to whether the child is deemed the child of the woman who gives birth to him or the child of the genetic mother. And what is the law with regard to marrying the relations of both of these, and the intestacy of both of these and his father's intestacy (see a synopsis of the opinions on this subject in Dr Avraham Steinberg ed., *Encyclopaedia of Jewish Medical Ethics*, vol. 2, the entry '*In-vitro* fertilization', at pp. 115 *et seq*. [58].

We do not need to consider all these, since the argument of a 'support for my old age' does not depend on motherhood in Jewish or civil law, but on the reality of the mother raising the child. If indeed she succeeds in raising her genetic child in her home, this will, in so far as it is possible, fulfil the woman's yearning and needs.

I am not unaware of the Public Health (*In-vitro* Fertilization) Regulations, but these regulations are not necessarily an obstacle to the continuation of the procedure, since they do not apply precisely to the case before us (where there is no divorce).

Indeed, the Professional Public Commission for Examining the Issue of *In-vitro* Fertilization recommended in 1994 that the whole procedure should be carried out only with joint and continuing consent. Certainly this should ideally be the case, as explained in the Commission's Report and in the opinion of my colleague. When the recommendations of the Commission are incorporated in binding rules, all those who need *in-vitro* fertilization will know *ab initio* what to expect. But we are dealing with a special case, *post factum*. If my approach is correct, the recommendations of the Commission should not be an obstacle for Mrs Nahmani.

I therefore propose that we deny the appeal.

Appeal allowed by majority opinion, Justice Ts. E. Tal dissenting.
28 Adar II 5755
30 March 1995.