

WHAT'S IN A NAME? A CONCURRENCE AND DISSENT TO THE RESPONSUM OF RABBI DICKSTEIN ON RITUAL PRACTICE FOLLOWING A STILLBIRTH

Rabbi Ben Zion Bergman

This paper was submitted as a concurrence and dissent to "Jewish Ritual Practice Following a Stillbirth," by Rabbi Stephanie Dickstein. Concurring and dissenting opinions are not official positions of the Committee on Jewish Law and Standards.

The Committee on Jewish Law and Standards of the Rabbinical Assembly provides guidance in matters of halakhah for the Conservative movement. The individual rabbi, however, is the authority for the interpretation and application of all matters of halakhah.

Rabbi Dickstein has presented a sensitive and sympathetic response to the anguish of a family that has suffered the tragedy of a stillbirth. No one can, or will, dispute the fact that such an event can be devastatingly traumatic. Nor would anyone dispute the concept that appropriate ritual or rituals could be extremely beneficial in helping the stricken couple confront their tragedy. Furthermore, it is especially important that such ritual have its roots in traditional Jewish practices so that (1) the tradition is not silent but rather made relevant to the couple in their hour of need, and (2) the Jewish community is involved, thus strengthening the couple's ties to the community, and preventing what could otherwise be felt as abandonment.

I therefore basically concur with Rabbi Dickstein's responsum. However, there is one element in particular in her proposal which prevented me from voting in favor of her paper and led to my abstaining in the vote.

Rabbi Dickstein writes: "The baby should be given a Hebrew name, and that name should be included in the [burial] service. . . . At some later time the grave should be marked with a stone that includes the name chosen by the parents for their child." It is with this element in the responsum that I find myself in serious disagreement.

My disagreement is prompted by two considerations – one practical but less compelling, and the other more theoretical but, to my mind, most compelling. First the practical consideration:

Most couples on the verge of parenthood begin quite early to think of possible names for the prospective child. Today, since the sex of the child can be ascertained in utero, and many avail themselves of that knowledge, only one name or set of names has to be chosen. Many

then, in anticipation, begin to refer to the fetus by the name they have chosen to be bestowed when it is born. I even know of couples who, even before it was medically possible to ascertain the sex of the child, were so set in their minds that it was going to be of a certain gender, that they began to use the name they had chosen for that eventuality. (Often they were surprised.) Now, among Ashkenazic Jews it is customary to name a child after a deceased relative. This is considered an honor to the memory of the deceased. If a name is going to be bestowed upon the stillborn, the name would almost certainly be the one which had been chosen in anticipation and which the parents had used in speaking of their prospective child.

I hasten to point out that it is no honor to a deceased relative to have a נפל (a stillborn) named after one. Additionally, that effectively preempts the use of that name for future children to be born in the extended family. My brother's name is Leibel, and I have a whole pack of cousins named Leonard, or Louis, or Libby, or Lillian, etc., all of whom were named after my paternal grandfather, Leib Yitzchak. Had the birth of these been preceded by a stillbirth upon whom the name had been bestowed, my grandfather's name would never have been carried by a living descendant. Superstitious though it might be, it would certainly have been considered inappropriate to give a living child the same name as one who had never lived. And for Sephardim who bestow honor upon living relatives by naming children after them, it is similarly no great honor to have a נפל named after one's self, and might similarly result in the loss of the use of that name for children born subsequently.

The other consideration, as noted above, is theoretical albeit more compelling. Rabbi Dickstein, quite correctly, makes the point that nothing in her paper should be construed as inimical to our position on the permissibility of abortion. Yet that could be a result of creating a practice of officially bestowing a name upon a stillborn.

A child when born is at first only a living mass of protoplasm arranged in the form of a human child, not vastly different from other newborns. Unique "personhood" develops. The first element of "personhood" by which we distinguish this blue-eyed or brown-eyed, blonde, brunette, or bald child from others similarly endowed, is by bestowing a name. Before that, the baby is only a baby. A name makes him or her a person.

Now, the so-called "pro-life" forces have attempted to invoke the Fourteenth Amendment in support of their position against abortion. The Fourteenth Amendment states: "Nor shall any State deprive any *person of life*, liberty or property, without due process of law; nor deny to any *person* within its jurisdiction the equal protection of the laws" [emphases added]. The crux of their position is whether the fetus can be defined as a person. If the fetus is considered a person, its "right to life" is protected by the Fourteenth Amendment, and an abortion could be performed only after "due process of Law" in each case. Legal commentators have refuted the position on the basis that neither legally nor philosophicaly can the unborn fetus that has never lived be termed a person. The problems inherent in defining the fetus as a person and therefore entitled to Fourteenth Amendment protection were already noted in *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705 (1973) fn. 54.

Since a name begins to invest a child with "personhood," bestowing a name upon a stillborn is equivalent to considering the stillborn as a "person," which, in light of the above, would give substantiation to the claim of the anti-abortion forces. Hence, by making the giving of a name a standard part of the Jewish ritual practice following a stillbirth, we serve to vitiate our position regarding abortion.

I therefore find myself in fundamental disagreement with that element in Rabbi Dickstein's proposal and would vigorously urge that it be deleted from any ritual practice prescribed by the CJLS in the case of a stillbirth.