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A Dissent to Rabbi Judith Hauptman, Rabbi Suzanne Brody and Jessica Rosenthal Chod, Esq., “An Alternative to Maternal Identity and the Status of Children Born Using a Gestational Carrier”

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The following paper was submitted, in January 2023, as a dissent to “An Alternative to Maternal Identity and the Status of Children Born Using a Gestational Carrier” by Rabbi Judith Hauptman, Rabbi Suzanne Brody and Jessica Rosenthal Chod, Esq. Concurring and dissenting opinions are not official positions of the Committee on Jewish Law and Standards.

There are terms employed in this teshuvah that express conceptual frameworks with which we disagree. First, the gestational mother, a term we deem more appropriate than gestational carrier, plays a significant role in the pregnancy and birth, and her contribution and status cannot be slighted or ignored. Second, the term “convert” is used repeatedly in this teshuvah for the ritual confirming the Jewish identity of the child: by employing this term for immersion in mikveh and the ritual of affirming the child’s identity, the authors spin the ritual in a way that entirely misjudges it, and incorrectly describes and evaluates both the situation of the child, the child’s family, and the Jewish community in which they live. We reject the use of that term for this situation completely: the ritual is that of affirmation of Jewish identity. Because the intended parents (or parent) seek to raise their child as Jewish yet the pregnancy was carried by a non-Jewish gestational mother, the child’s status needs to be affirmed through the ritual of immersion of mikveh and the intended parents (or parent) affirms the child’s Jewish identity before the welcoming committee of a beit din. The child was never of another religion, yet because Jewish identity for two millennia has followed that of the birth mother, the child’s status needs to be affirmed through mikveh and beit din.

The impression offered by this teshuvah is that there is something offputting by having to go to a mikveh. Immersion in a mikveh is positive; it is deeply spiritual and renewing. We welcome converts with open hearts, and their taking of Jewish identity through immersion mikveh is to be honored. We have reconceptualized immersion in mikveh for niddah by transforming it from tohorat hamishpahah to kedushat hamishpahah. See the responsa by Rabbi Miriam Berkowitz, Rabbi Susan Grossman, and Rabbi Avram Reisner:

Miriam Berkowitz, Susan Grossman, Avram Reisner, "Mikveh and the Sanctity of Family Relations" YD 183.2006a

Susan Grossman, "Mikveh and the Sanctity of Being Created Human" YD 183.2006b

Avram Reisner, "Observing Niddah in Our Day" YD 183.2006c

Miriam Berkowitz, "Reshaping the Laws of Family Purity for the Modern World" YD 183.2006d

Sofrei stam immerse to put themselves in the proper frame of mind and heart to write sifrei Torah, tefillin, and mezuzot, and a number of us immerse so as to prepare for special occasions, such as on the eve of the Sabbath or on the eve of Yom Kippur in order to cross a spiritual threshold in a state of renewal and affirmation.

What we derive from Mishnah Yevamot is different from what the authors argue on pages 10ff. They argue that when the egg and sperm interact, identity is set, but the mishnaic

texts in making a distinction between the time when the mother is not Jewish and when the mother is recognize that has an effect on the status of the child. The distinction drawn about the child whose (gestational) mother having converted during the course of the pregnancy means that the status of the child as Jewish in the case of a Jewish egg donor and a non-Jewish gestational carrier needs to be affirmed.

The authors agree that intent needs to be actuated through a ceremony. Immersion in a mikveh and declaration of intent before a beit din is the ritual in Jewish tradition of affirming Jewish identity when there might be a need for clarification. The beit din also provides a certificate of affirmation: this makes sense since just as the intended parents made an agreement through secular law that the child is the child of the intended parents, so too should there be a formal agreement and certification in halakhah through immersion in a mikveh and declaration of intent before a beit din.