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Patriarchal Family Relationships and Near Eastern Law

Tikva Frymer-Kensky

The social relationships of the patriarchal narratives are placed in the context of the fundamental legal traditions and cultural milieu of ancient Mesopotamia.

The stories of Genesis are so much a part of our own culture, and so vivid in and of themselves, that we tend to treat them as timeless, almost universal, pieces of literature. Whether or not we regard them as sacred scripture, we analyze them for their literary structure, their moral import, and their psychological truths. In this there is a danger that we will forget that even though the very durability of the Bible proves its ability to transcend cultural and temporal boundaries, nevertheless it comes out of a specific cultural milieu and manifests many of the features of the culture from which it sprang.

This has been made abundantly clear during the last 100 years, during which time we have witnessed the discovery of the cuneiform culture, the dominant culture of the ancient Near East and the mother-culture—if you will—of Israel. There were published in short order such documents as the Gilgamesh Epic, which contains a flood story exceedingly similar to the biblical account, paralleling it in such detail as the sending forth of birds to determine the emergence of dry land. The discovery of the Laws of Hammurabi, with their close affinity to the Covenant Code of Exodus, must have seemed even more threatening to the traditional biblicalists of the time. The emergence of these documents at the beginning of Assyriological research effected a radical transformation in our perception of the Bible. There was an initial period of shock during which the similarities to Babylonian material seemed so vast as to be explainable only in terms of gross plagiarism. Now, however, the intimate relationship of Israelite culture to earlier and contemporary traditions is taken as axiomatic. Attention is increasingly focused on the nature of that relationship and on the ways in which Israel adapted, utilized, and transformed the cultural materials at hand.

This is all in the realm of ideas, and such comparisons serve primarily to illuminate the formal legal tradition and the great cosmological cycle of Genesis 1-11. The rest of the book of Genesis is of a very different order: we have an anthology of ancestral stories, centering first around Abraham (12:1-25:18), then Jacob (25:19-37:2a), and finally a coherent cycle of tales about Joseph and his brothers (37:2b-50:26). These stories are not uniform. In form they represent a wide variety of poetry and prose pieces; some of them are folkloristic. A whole school of Bible study, called form criticism, has developed to analyze these different forms and their import.

The stories are, furthermore, not all from the same stylus. It is now generally accepted that there are three main streams of tradition represented and partially united in the book of Genesis. There is a tradition that developed in the southern state of Judah and, which it is commonly believed, began to be composed in a unified form in the 10th century B.C.E. This tradition is usually referred to as J, originally because of its distinctive use of the tetragrammaton YHWH as the name of God in the patriarchal period, but better termed J for Judean. There is a second, parallel tradition that probably developed in the North and was composed in unitary form just slightly later than J. This tradition used to be called E or Elohist, because of the way it refers to God. Now, with our increased sophistication we usually refer to it as Ephraimitic, conveniently E. Finally there is a priestly recension of these origin-traditions, known as P, whose date of composition is still a matter of considerable dispute. To increase our sense of insecurity, we must remember that these traditions, sometimes called “sources” or “documents,” themselves represented compilations and unifications of other, earlier material, some of it oral, and some more probably written at a time contemporary with, or soon after, the events they portrayed.

Genesis, then, is a very complex book, and the question of how to understand and interpret the patriarchal stories is a complicated one. As is usual in biblical studies, the first publication and general acceptance of the theory of separate sources (which has come to be known as the “documentary hypothesis”) led to a period of such radical skepticism and doubt that some prominent groups of biblical scholars—most notably the school of Alm—refused to believe in the reliability and reality of any of the patriarchal narratives, maintaining that recoverable Israelite history first began with the entry into Canaan.

Paradoxically, it is the cuneiform evidence that elucidates and illuminates the patriarchal material, indicating its historical authenticity by demonstrating its fidelity to the cultural mores of the ancient Near East. There are many customs reflected in the patriarchal
tales that did not exist in classical Israel and must have seemed peculiar to the compilers of J, E, or P, not to mention the final composer of Genesis. The wide variety of documents that we possess from Mesopotamia, and from diverse cultures strung out along its periphery, has revealed these customs to us, indicating some of the subtleties of their meaning, and, in so doing, causing us to give more credence to the historical value of Genesis. In particular, the discovery in the 1920s of such peripheral centers as Ugarit, Alalah, and Mari provided us with enormous amounts of material with which to illuminate the patriarchal homeland of Haran. Among these, the city of Nuzi, an unimportant town (at that time) near the city of Arrapha (modern Kirkuk), had yielded thousands of documents from the private archives of one single prosperous family over a span of four generations, thus giving us our closest picture of family relationships in the Near East.

So many of the customs reflected in Genesis are paralleled by documents from Nuzi that it is tempting to think of all this as Hurrian law, unique to Haran, and learned there by the patriarchs. This was the view of Speiser (1964: 91-92 and passim) and was commonly accepted among scholars. However, new discoveries have tended to contradict this by indicating that the parallels first found in Nuzi are themselves paralleled elsewhere in the cuneiform cultures. Recently, reaction has set in and the "Hurrian hypothesis" has been attacked by van Seters (1975), who claims that the patriarchal narratives belong more properly in the first millennium, and by Thompson (1974), who denies the value of these comparisons in establishing the historicity of the patriarchal narratives. A careful study of the material indicates that the patriarchal stories are clearly a part of the general cuneiform tradition, and although the parallels may not enable us to pinpoint the date of the patriarchal era, they can illuminate the patriarchal stories themselves.

One of the key issues in the patriarchal narratives is the problem of succession and its accompanying inheritance of the covenant with God, an area in which we have particularly rich information from the cuneiform materials. Before studying this question, however, I would like to pause to give some picture of the various types of cuneiform evidence and the value of each to biblical studies. The first important body of cuneiform material bearing on the patriarchs is the cuneiform legal tradition, the so-called codes. Early in the Sumerian south there developed a tradition of composing collections of legal cases. The impetus for this was apparently scholarly and jurisprudential rather than statutory, and the compilers combined and elaborated upon legal type-cases that illustrated the ideal legal principles. These collections are commonly known by the name of the ruler who commissioned them, the first major identifiable one being the laws of Ur-Nammu, king of the city of Ur in southern Iran from 2111-2098 B.C.E. This collection is written in Sumerian, as are the laws of Lipit-Ishtar and the as-yet unidentified group known as YBT28. Around 1800 B.C.E. we begin to get such texts written in Akkadian, the Semitic language of Babylon. The first such collection known to us are the Laws of Eshnunna, a city on the Dyala River prominent at this time. In this case the laws are called by the name of the city because the king's name was apparently in the broken beginning of the tablet. The next is the Laws of Hammurabi, by accident of discovery the first one known to modern scholars, the most extensive and detailed of all these collections, and the one most often copied and studied in the schools of Babylonia. All of these codes are from southern Mesopotamia in its classical period. The tradition of the study of law through such documents spread from there to the other cuneiform civilizations, and we have such documents from Assyria, from the Hittites, and again from Babylonia in the Middle Babylonian period. In fact, we probably should consider the Book of the Covenant in Exodus to be a document in this tradition.

In all these law books the laws themselves may change. Certain type-cases, like the Goring Ox (criminal negligence) or the problem of two men brawling and accidentally hitting a pregnant woman who promptly miscarries (grievous battery without assault), illustrate important juridical situations. They therefore appear in the laws over and over again, not because of the frequency of such occurrences—pregnant women usually know enough to keep out of fights, and miscarriages are rarely caused by a blow—but because they illustrate well the principle involved. The penalties imposed may vary from society to society, and it is in the careful study of these changes and differences that we get some insight into the fundamental legal principles of these societies.

In addition to these groups of law-as-it-ought-to-be, we have a large assortment of humble documents of law as it was practiced daily: bills of sale, marriage contracts, law suits, court depositions, letters from creditors, adoption contracts, and so forth. These are harder to study because there are so many of them and they are not organized, but when sifted they yield close details about the nature of societal relationships in those days.

The family, as seen through these documents, is a large extended family which is patriarchal in residence, patripotestal in authority, and patrilineal in descent. This means that all the sons stay together in one household with the father, who remains the undisputed head of the family until his death. The father contracts marriages for his children. In the case of a daughter, he has unlimited authority to dispose of her in any way he sees fit, whether by contracting a marriage for her or even by giving her as a slave. He provides his daughter with a dowry, which she gets in lieu of an inheritance, and she leaves his house. The father is also expected to obtain wives for his sons, either by actively negotiating and contracting the marriage, or by acquiescing to it and providing the bridal payment. The daughter-in-law then enters the father's house and becomes a member of the family. The bond between the father-in-law and daughter-in-law is a very strong one and is, I believe, the strongest new legal relationship created by this marriage, which must be seen as a transfer of membership from one household to another. When the father dies the eldest son takes over as the head of the household: he is given the charge of the household emblems, insignia, and titles and presides over the management of the estate. The brothers may, for one reason or another, continue to hold the land in common for some period rather than divide the inheritance immediately, or they may divide the smaller
property, such as houses and orchards, and maintain corporate ownership of the productive land. Whether or not they divide immediately, they must first provide dowries for their unmarried sisters and insure the bridal payment (in some cases) for their younger brother from their joint holdings, only dividing the remainder of the property. The eldest son thereupon receives a preferential share at the division of the estate.

This, then, is the pattern. It is not unique to the ancient Near East but is rather a common pattern for patriarchal families in many societies. The distinctive character of Near Eastern law appears in the ways that this pattern is perceived and understood, for in the ancient Near East such apparently self-evident kinship terms as "son," "brother," and "eldest son" are not limited to their biological referents, but rather define special juridical relationships, relationships that can be created artificially through various types of adoption and specification. Problems and unusual situations are therefore resolved in characteristic Near Eastern ways.

Childlessness and Succession
A problem that must have arisen quite frequently is that of a childless man, as was Abraham for a very long time in his marriage to Sarah. He may choose to adopt a son, and adoption is very common in the Near East even though it does not seem to have been used in classical Israel. Adoptions are not confined to cases of childlessness, and we have a number of texts (e.g., HG iii 23 and vi 1425) in which it is quite clear that the adopter already has children. Adoptions may occur for a wide variety of reasons, and the adopted son, moreover, need be neither an orphan nor a child. He is frequently a member of the adopter's family (e.g., a nephew). Occasionally he may be a member of the household who is made a son and heir in return for taking care of the man in his old age and providing for him in his death. Such an arrangement may underlie Abraham's complaint in Gen 15:2-4 that, since he was childless, "Dammesek Eliezer" would inherit from him (Speiser 1964: 112; Prévost 1967: inter alia; for other interpretations of this difficult passage see Snijders 1958: 268-71; Thompson 1974: 203-30, and the literature cited there).

Adoption of an heir is not the only recourse a childless man has. In Genesis 16 Sarah gives Hagar, her own handmaiden, to Abraham, declaring her desire to produce a child through her. This is not the only time that a barren matriarch gives her handmaiden to her husband in the hope of bearing children: Rachel, also barren, gives Bilhah to Jacob. Here again the reason is so that she might have Bilhah give birth on her, Rachel's, knees and thus reproduce through her (Gen 30:3). When Bilhah thereafter bears a son, Rachel calls him Dan (30:6), declaring that God has thus vindicated (dn) her cause. We find allusion to this rather peculiar custom in the Laws of Hammurabi in a section dealing with a man who marries a 

naditu-priestess. This is a special class of women who may have been whores or nuns, but it is at least clear that whatever their sexual condition they were not legally allowed to have children. Here we find:

144. If a man married a 

naditu and that 

naditu has given a female slave to her husband and she (the slave) has then produced children: if that man then decides to marry a 

sugitu (a secondary wife),

they may not allow that man (to do so); he may not marry the 

sugitu.

145. If a man married a 

naditu and she did not provide him with children and he decides to marry a 

sugitu, that man may marry a 

sugitu, bringing her into his house—with that 

sugitu to rank in no way with the 

naditu.

146. If a man married a 

naditu and she gave a female slave to her husband and she (the slave) has then borne children: if later that female slave has claimed equality with her mistress because she bore children, her mistress may not sell her, (but) she may mark her with the slave-mark and count her among the slaves.

147. If she did not bear children her mistress may sell her.

Apart from the insights that this section gives us into the relationship between Sarah and Hagar, these provisions also indicate the reason behind this apparently peculiar custom. A woman was expected to bear children for her husband. If she could not do so, whether prohibited by law, as the 

naditu in Hammurabi, or otherwise incapable, he might marry another. Possibly to forestall this, the woman might give her own personal slave to her husband to bear the children for her. This hand-

maidens, although no longer a mere servant, must not become a rival to the original wife nor consider herself her equal.

One of our problems in interpreting the Laws of Hammurabi is that many of the domestic laws are cited only for the 

naditu, and for each provision we do not know whether that stipulation is unique to that class of women or typical of the status of all women. This is also the case with the grant of concubines, and we do not know if barren women in Babylonia also gave their husbands concubines. Elsewhere in the Near East, however, we find documents relating to ordinary women that also mention this custom. In an interesting adoption tablet from Nuzi (HSS V 67 [Speiser 1930: 31-32]) a man gave his son Shennima in adoption to Shuriha-ilu so that he could become his heir. As part of this adoption agreement, Shennima is given a wife, Keliminu. He must not take another wife, but if she does not bear children she will give him a woman from the Lulu-land (i.e., a slave girl) as his wife. The parallel is not exact, for Keliminu goes abroad to get a servant girl rather than give Yalampa, the handmaiden mentioned in the same text as part of her dowry, to her husband. Nevertheless, the custom is the same, and it seems to have had a long history in the ancient Near East. We have a contract from Nimrud, one of the capitals of the Neo-Assyrian Empire, in which a certain Amat-Assartu gives her daughter Subetiu in marriage to Milku with the proviso that should Subetiu prove barren she should take a slave girl and give her to her husband, the sons thus born being her sons (Parker 1954: 37-39; van Seters 1968: 406-8; Grayson and van Seters 1975: 485-86). We also have an Old Assyrian text from Anatolia (ICK 3, 1200 years earlier than the Neo-Assyrian text, that records the marriage between Lqipim and Hatala. If within two years she does not provide him with offspring, she herself will purchase a slave woman. Later on, after she will have produced a child by him, he may dispose of her by sale wheresoever he pleases (Hrozhyl 1939: 108-11; Lewy 1956: 8-10, and cf. text I 490 [Lewy 1956: 6-8] in which the man may himself buy a servant as a concubine).

These documents do not show uniform treatment of the proper rela-
tionship between the wife and the concubine, or the wife and the concubine's children. In Hammurabi the concubine who has borne children cannot be sold, although she can be demoted to the status of a slave. In the Old Assyrian text she can be sent away even after she has borne children, and this also seems to be indicated by the Neo-Assyrian text (according to the collation of line 46 by Postgate in Grayson and van Seters 1975: 485). In the Bible Sarah has Abraham send Hagar away, but only after much agonizing on his part and after the direct intervention of God. Similarly, the Neo-Assyrian text declares that the children born from the concubine are to be considered Subiutu's children. This is the intention expressly stated by Rachel, who gives Bilhah to Jacob so that she can produce through her (Gen 30:3) and then declares that God has heeded her pleas by giving her a son (30:6). In Nuzi the situation is unclear because the broken line of HSS V 67 can be restored either ú šerrī Geliminu-[1]ja umar “and Geliminu shall not send away the offspring” (Speiser 1930: 31, text 2:22) or, more probably, ú šerrī Geliminu-fm ja uwar “and Geliminu shall have authority over the offspring” (Speiser 1964: 120). It is clearly Sarah's intention to "be built up" by giving Hagar to Abraham (16:2 [Speiser 1964: 121]), but Ishmael is never treated as Sarah's child, and he is ultimately sent away with Hagar (perhaps for this reason). The proper intrafamily relationships may have been subject to local customs or individual contract, but it is clear that the concept of the barren wife giving her husband a concubine is well established in the Near East.

Succession and the First-born

As is often the case, no sooner does a couple adopt a child than the wife immediately becomes pregnant, and such adoptions have even been considered a treatment for infertility (Kardiman 1958: 123-26). When a hitherto childless man who has acquired a child either through adoption or by being given the female slave of his wife or by marrying another suddenly has children by his original (first) wife, many very complex questions arise about the status of the children and their relationship to each other. The boys are certainly brothers, and any attempt to deny this was considered a serious matter. We have the record of an Old Babylonian lawsuit from Nippur (Altbabylonische Rechtsurkunden 174) in which one brother claims that Shamash-Naṣir is not his brother, that his father did not really adopt him. Witnesses are called who prove that Shamash-Naṣir was truly adopted, and he is thereby reinstated to his inheritance. The brother who had attempted to deny him is himself disinherited. As an Old Babylonian text from Susa tells us (MDP 23 321:16): "According to the custom established by the gods Shushinaš and Ishmekarab that brotherhood is brotherhood and sonship is sonship, the possessions of my father PN now belong to me." The child of the slave or second wife and the adopted son are thus real children and share in the inheritance. But who is the "eldest son," the one who receives the double portion? When all the sons are adopted, the heirship of the first may be stipulated in the contract, and one of the conditions to an adoption in fact may be that the adopter does not adopt any more children. But when a man acquires a natural son the situation is quite different. On one Nuzi adoption tablet, in which a man adopts his own brother as his son-and-heir, we read (HSS V 7): "If a son of my own is born to me, he shall be the oldest, receiving two inheritance shares. Indeed, should the wife of Akabshenni (the speaker) bear ten sons, they shall all be major (heirs), Shelluni following after." The term here used for "major heir" is the same as "eldest": chronological age is not always the determining factor and the natural son may precede, as here, all adoptive children in status as eldest even though he follows them in date of birth.

Although we have no justification for assuming that natural children always superseded adoptive ones, such a stipulation is not confined to the one document just discussed. We mentioned before an adoption tablet (HSS V 67) in which Shuriha-ilu adopted Shennima and gave him a wife. There are other contingencies in this contract. If Shuriha-ilu does have a natural son, that son will be the eldest and will inherit the double portion, with Shennima coming next. This text is very interesting for yet another reason. It is clear-cut, and one would think that Shennima would have no trouble in...
putting forth his claim to be the heir. Yet when Shurria-ili was about to die, another text (HSS V 48) tells us that a dispute about succession did in fact arise. A committee then went to visit Shurria-ili, who was apparently on his deathbed, and said to him, “Now you are alive, and claims are being raised against you. Since you may die, point out your son to us that we may know him.” We must assume that Shurria-ili was not bound by the other document, which is not mentioned in this text, and could have appointed whomever he pleased. He does appoint Shennima (who is, incidentally, his nephew) as his son and heir. From this case one might infer that even though Esau had sold Jacob his birthright, Isaac could nevertheless have appointed Esau his heir when he announced his intention to make a deathbed pronouncement with the formulaic phrase, “Now that I have grown old and know not the day of my death” (Gen 27:2), a phrase used elsewhere for just this purpose (Speiser 1955: 252-53). However, we really should await more evidence on this point.

To get back to the crucial problem of inheritance, it is clear that an adoptive son could be displaced as the eldest by a natural son. Similarly, when there was contest between the sons of a prime wife and the children of a slave, there was in fact no contest. In the laws of Hammurabi we read:

170. If a man’s wife bore him children: if the father during his lifetime has ever said “my children” to the children that the slave bore him, thus having counted them with the children of the first wife (then), after the father has gone to his fate the children of the slave shall share equally in the goods of the paternal estate, with the first-born, the son of the prime wife, receiving a preferential share.

The parallel is not perfect, i.e., this law refers to the children of any slave, rather than specifically of a slave given by a wife to her husband in fulfillment of her marital obligations. Nevertheless, it seems clear that Isaac, as the son of Sarah the prime wife, could be legally considered the first-born even though he was chronologically younger than Ishmael. Sarah, however, is not really satisfied with this preferred status for her son—she does not want Ishmael to have any part in the inheritance, and wants him sent away. Such a situation is not unknown, for the Laws of Hammurabi continue:

171. If the father during his lifetime has never said “my children” to the children that the slave bore him; after the father has gone to his fate the children of the slave may not share in the goods of the paternal estate along with the children of the prime wife. Freedom for the slave and her children shall be effected, with the children of the prime wife having no claim against the children of the slave for service.

This is what Sarah wants to arrange while Abraham is still alive. He, however, is reluctant to do so, for we read in Gen 21:11, “the child was his also,” i.e., he had legitimatized the boy. This was the reason for his having slept with Hagar, which he did at Sarah’s request and for the express purpose of bearing legitimate children. God intervenes, for it was his will that Isaac should be sole heir to the covenant. In the narrative as it stands God had already told Abraham (Genesis 17) that Sarah would bear a son through whom the covenant would be renewed. God does not have to act arbitrarily against the laws and customs of his times in order to arrange his plan of having the son of Sarah inherit the covenant, for the times permit the choice of the son of the prime wife as the heir.

The situation is not much different when a man marries a second wife rather than take a slave girl as concubine. We have a Neo-Babylonian text (FS VI 3 1411 [Szlechter 1972: 106]) in which a man requests a girl named Kulla from her father, explaining that he has no children and that he is extremely desirous of having some. The contract stipulates that whenever Esagilbanata, the first wife of the man, has a son he will get two-thirds of the patrimony. When Kulla gives birth her son will get one-third of the patrimony. If the first wife has no children, then Kulla and her son are to inherit the entire property. Here we are not dealing with slave girl vs. mistress, but with two free-born women both married by proper contract. Nevertheless, the chronological age of the son does not matter: the son of the first wife is automatically the “first-born” and major heir.

This brings us a little closer to the most ticklish situation of all—the plight of Jacob with his two unequal wives and

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two handmaidens, twelve sons, a daughter, and the necessity of choosing a chief heir. Reuben, as we know, was born first, and quite obviously expected to be the preferred heir. Joseph, the first-born of the beloved Rachel, seemed to think that he ought to be considered the first-born; he naively let his brothers know it by telling them his dreams of glory and power and by flaunting the preferential treatment that their father had given him. Was he simply being an obnoxious spoiled brat, or did he really have a legitimate claim? Was Jacob simply behaving like a silly old man doting on the son of his beloved Rachel, or was something legally significant involved? The law of Deuteronomy is quite clear that should a man have two wives, one beloved and the other despised, he may not give preferential status to the son of the beloved wife but must take the chronologically older son as the first-born who gets the double portion. Deuteronomy may have been composed (in the main) long before its promulgation in 621 B.C.E., but not before Sinai, and neither God nor Jacob could be expected to be bound by laws not yet in force. Furthermore, Jacob did marry two sisters at the same time, a marriage forbidden by Lev 18:18. It is clear that neither the prescription in Leviticus nor that in Deuteronomy had any bearing on the patriarchal period, and we cannot simply assume that Joseph had no claim to be heir. Leah, it is true, was married first, but only by a ruse, and Rachel’s marriage agreement was made first. Rachel is clearly portrayed as the desired wife, and Leah has to ask Rachel to send Jacob to sleep with her in return for the mandrakes (Gen 30:14-16). Jacob did manage to choose Joseph as chief heir. Although he had been rather clumsy in his early preferential treatment of Joseph, particularly in the incident of the “coat of many colors,” in his old age he had learned to be cunning and devious. On his deathbed (where such pronouncements should be made) he adopted Joseph’s two children, Ephraim and Manasseh, as his own sons, making them equal to Reuben and Simeon, and declaring that any other sons would inherit from them (Gen 48:5). He thus bypassed Joseph in order to give him the double portion due an heir through his children, and in that way accorded him the right of the first-born.

The Bible contains a consistent motif of the choosing of the younger son over the older. Isaac and not Ishmael, Jacob and not Esau, inherit the Covenant; Joseph (through his children) and not Reuben inherits the double portion. Moses outshines Aaron, David, and not his elder brothers, rules, and Solomon, and not his elders, inherits. More examples could be added to this list. God’s plan unfolds through such choice, and primacy is not automatically achieved by birth rank. In order to achieve this aim, however, God does not have to act in an arbitrary or capricious manner, or to disorient society by disrupting the expected norms, for in the Near Eastern milieu the term “first-born,” like the terms “son,” “father,” “brother,” and “sister,” is essentially a description of a particular juridical relationship which may be entered into by contract as well as by birth. People adopt others as brothers, brothers adopt each other as sons, brothers adopt women as sisters, and the designation of an individual as “first-born” can also be a matter of choice.

This article is based on a paper delivered 9 May 1975 to a symposium on “Biblical Themes in Western Literature: Brothers in Conflict” at Wayne State University.

Note

1In standard translations the nādītū is usually translated “hierodule,” and suggītū is translated “lay priestess.” These, however, are misleading terms. There is no evidence that suggītū were priestesses of any type, and the term seems to be limited to secondary wives, particularly when a nādītū is prime wife. It is probably best to leave the terms untranslated.

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