

# Establishing Maternity in Egg Donations: A Halakhic Perspective

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## **I. Medical Background**

The first successful oocyte (egg) donation was performed in the early 1980's; this success ushered in a new tool for the treatment of intractable infertility.<sup>1</sup> In conjunction with improvements made to conventional in vitro fertilization<sup>2</sup> (IVF), the procedure has become safer and less invasive, thus making it more attractive to potential donors. Currently, IVF utilizing a donor egg accounts for 10% of all IVF procedures done in the U.S.<sup>3</sup> Outcomes have been described positively, implantation and pregnancy rates of egg donor cycles have been found to be as good as or better than conventional IVF cycles.<sup>4</sup> Risks associated with egg donation are primarily due to multiple gestations, but

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1 Klein J, Sauer MV. Oocyte donation. *Best Pract Res Clin Obstet Gynaecol* 2002;16:277-291.

2 In vitro fertilization is an assisted reproductive technology involving ovarian stimulation, egg retrieval, fertilization, embryo culture, and the transfer of the embryo to the uterus.

3 Klein *ibid.* 278

4 *Ibid.* 285

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there is also an association with higher rates of pregnancy-induced-hypertension and cesarean section. Dr. Jeffery Klein, a practicing reproductive endocrinologist, concludes that “egg donation today is associated with the highest success rate among the assisted reproductive options and has allowed patients with otherwise intractable infertility an opportunity to conceive.”<sup>5</sup>

There is a wide range of medical indications for utilizing oocyte donation, including women with premature ovarian failure or reduced ovarian reserve; women over the age of 45 requiring conventional IVF; women with repeatedly failed IVF attempts or abortions; and women with genetic diseases such as Turner’s syndrome.<sup>6</sup> In the past, couples with heritable diseases were the primary users of donor eggs but the advent of preimplantation genetic diagnosis (PGD), a procedure in which the embryo undergoes genetic testing prior to implantation, should reduce the need for donor eggs. The most controversial use of donor eggs is for women who are past normal menopause. Research has shown that older patients have achieved similar outcomes to younger patients.<sup>7</sup> However, there are significant financial and psychosocial considerations for older patients that must be taken into account, and therefore most programs limit recipient age to 55.

The primary source of donor eggs has changed over the years. Formerly, extra eggs from IVF cycles were the major source of donor eggs (and this source remains the only legal

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5 Ibid. 286

6 Ibid. 278

7 Ibid. 279

method in Israel).<sup>8</sup> Currently, eggs from women known to the recipient or anonymously recruited are the most common method of obtaining donor eggs in the U.S.<sup>9</sup> Donors known to the recipient may include close friends, siblings, parents, or even children from a previous marriage. Anonymous donors are screened for desired phenotypic characteristics of the receiving couple. A proper history and physical of donors should screen for any infectious disease, heritable conditions, and diseases like diabetes, atherosclerosis, and familial cancers. Additionally, protocols require the donor to be less than 35 years old and preferably less than 30 years old. Risks to the donor are generally minor, usually consistent with patients undergoing a conventional IVF cycle with a lower risk of Ovarian Hyperstimulation Syndrome (OHSS).<sup>10</sup> A study of 1000 donor cycles showed seven serious problems leading to two hospital admissions for OHSS, but no fatalities.

The goal of the egg donation cycle is to synchronize the menstrual cycles of both the donor and recipient. At the start of the cycle, the donor is given injectable hormones for recruitment of multiple eggs, along with GnRH agonists or antagonist to prevent an LH surge<sup>11</sup> in the donor.<sup>12</sup> At the same time, the recipient is given at least two weeks of estrogen to prime the uterus for pregnancy. Prior to implantation of the embryo, progesterone is administered

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8 Ibid. 281

9 Ibid.

10 OHSS is a complication of overstimulation of the ovary from many fertility medications that leads to ovarian enlargement, fluid accumulation in the abdomen, nausea, and diarrhea. Severe cases can lead to fluid buildup in the lung space and respiratory distress.

11 The hormonal event that leads to ovulation

12 Klein *ibid.* 284

to the recipient. Studies have shown that the optimal embryo transfer is the implantation of a 4-8 cell embryo along with the administration of 4-5 days of progesterone.

Despite the great success oocyte donation has had in providing infertile couples with an opportunity to conceive, the lack of a maternal genetic contribution is a continuing obstacle that has led researchers to find new ways of maintaining the genetic integrity of the mother. One such approach is termed Ooplasm transfer, which consists of injecting donor cytoplasm into the recipient's egg in order to overcome an extranuclear implantation problem.<sup>13</sup> The second approach, germinal vesicle transfer, inserts the nucleus of an immature oocyte into an enucleated donor oocyte that is matured in vitro.<sup>14</sup> Both of these procedures have led to successful live births in rabbits but have yet to be attempted in humans. These future procedures have the potential to offer a couple struggling to conceive a powerful new tool, but they will also introduce a slew of new ethical questions since these techniques further manipulate the egg and produce children who have components from different mothers. As such, if conception defines maternity, one would be required to define what part of the cell is critical, further complicating the issue.

## **II. Introduction and Ovarian Donation**

The discussion in Jewish law regarding egg donation revolves around determining maternity. The determination

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13 Ibid. 286 - fertility problems that arise from the portion of the egg outside the nucleus can be remedied by exchanging that portion of the cell with a donor's cytoplasm.

14 Ibid. - in this technique, only the nucleus is transferred into an egg of the recipient, this leaves the other components of the cell including the mitochondrial DNA belonging to the recipient.

of maternity hinges on whether conception or parturition (birth) establishes maternity. If conception determines maternity then the donor would be considered the mother, but if parturition determines maternity then the recipient would be considered the mother.

One of the first cases found in the responsa that relates to oocyte donation refers to a case report in a medical journal from the early 20<sup>th</sup> century. The article claimed to have restored fertility to a previously barren woman by transplanting an ovary. When Rabbi Benjamin Weiss<sup>15</sup> heard of the above case, he responded that if the case were in fact true, the child would be considered the recipient's child in all respects. Rabbi Weiss's ruling is based on a Talmudic passage regarding the laws surrounding a fledgling tree grafted onto a mature tree. The Talmud<sup>16</sup> states that if a fledgling tree is grafted onto a mature tree, the seedling is considered part of the mature tree with regards to the laws of *Orlah*, so that one is not required to wait three years to eat fruit from the grafted fledgling tree.

Rabbi Eliezer Waldenberg<sup>17</sup> applies Rabbi Weiss's ruling to our case of oocyte donation. Rabbi Waldenberg extends the reasoning of a seedling or transplanted organ being absorbed by the recipient to an implanted embryo. Rabbi Waldenberg concludes that in the case of egg donation, the embryo would become an inherent part of the recipient and thus would be considered her child. However, Rabbi Aviad Trop does not accept Rabbi Waldenberg's extension of ovarian transplant to embryo implantation.<sup>18</sup> Rabbi

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15 *Vayalket Yosef* 10 (1908) no. 9

16 Tractate *Sotah* 43b

17 *Shut Tzitz Eliezer*, vols. 15:45 and 19:40

18 Rabbi Aviad Trop, "Surrogate Motherhood," *Ateret Shlomo*, Vol. 5, p. 106.

Trop explains that ovarian transplant, like other organ transplants, is essential to the life of the fetus and the recipient and becomes an inherent part of the recipient; therefore no maternal relationship develops with the organ donor. In contrast, an embryo has already established a maternal relationship at conception, so the implantation will not act to uproot that relationship. Accordingly, Rabbi Trop believes that in the case of egg donation the egg donor would be considered the mother of the child.

Rabbi JD Bleich<sup>19</sup> offers a third understanding of Rabbi Weiss's responsa by introducing the possibility of dual maternity. His reasoning is derived from a passage in Tractate *Chulin*<sup>20</sup> that describes the classification of offspring born to two different species. One opinion in the Talmud states that since the mother nurtures and sustains the embryo, the mother determines the species of the offspring. Another opinion states that the "seed of the father" needs to be taken into consideration. Based on these two opinions, one can envision the need to consider two mothers in the case of egg donation. There is certainly a maternal relationship established with the gestational mother through the nurturing of the embryo. However, there is an additional maternal relationship established with the genetic mother at conception. This relationship is parallel to the paternal relationship established in the Talmud, as the "seed of the father" should be considered in the same way fathering the case of egg donation.

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19 Rabbi JD Bleich, *Contemporary Halachic Problems*, Vol. 4, pp. 257-258.

20 Tractate *Chulin* 79a

### III. The Rationale for Parturition Determining Maternity

#### a. The Case of Twin Converts

The Talmud in *Yevamot*<sup>21</sup> quotes the Amora *Rava* that if twin boys were conceived by a non-Jewish mother who later converted to Judaism during the pregnancy, the twins are considered to be maternal brothers. Due to the conclusion of the Talmud, which states that the twins are considered brothers, Rabbi Z.N. Goldberg<sup>22</sup> concludes that this can only be the case if parturition determines maternity. Since following a conversion the familial ties of the convert are severed, the twins can only be considered maternal brothers if maternity is indeed established at birth, as any relationship established at conception would be severed with the conversion. Thus, Rabbi Goldberg reasons that in a case of embryo or fetal transfer the gestational mother, and not the genetic mother, would be considered the mother of the child according to Jewish law.

Rabbi Goldberg's understanding of the Talmud is assuming that a fetus in utero is considered a distinct being separate from its mother. Since the conversion serves to sever any relationship established prior to the conversion, parturition must determine the maternity of the twins. However, if one views the fetus as merely an appendage of the mother, then no proof can be brought regarding maternity from the above case, since the severing of familial ties during conversion only applies to relationships outside oneself. For example, after conversion one still retains the right to one's own property, still remains liable

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21 Tractate *Yevamot* 97b

22 Rabbi ZN Goldberg, *Techumin*, vol. 5, pp.248-259 (1984)

to prior infractions, and still is responsible to repay any loans. Therefore, the twins can conceivably be brothers even if conception determines maternity because the twin's relationship with the mother would be unchanged by the conversion. Rabbi Goldberg<sup>23</sup> circumvents this issue by claiming that the Talmud is most likely following the opinion that a fetus is a distinct being, separate from its mother. This understanding is based on *Rava*, who is the Amora quoted in the case, ascribing to the position of the fetus being separate from the mother.

In spite of this, several sources dispute the ability to use the case in *Yevamot* to learn that parturition determines maternity. Rabbi Trop<sup>24</sup> raises doubt by showing that a number of commentaries, namely *Rashi*, *Ritva*, and *Nemukei Yosef*, all opine that the principle of a convert losing all previous familial relationships does not apply between a mother and her fetus, or between one fetus and another. Therefore, according to these commentaries no proof can be learned from the Talmud in *Yevamot* regarding parturition establishing maternity. Furthermore, in a discussion regarding a case in which it is unknown if the mother was pregnant prior to conversion, Rabbi Shmuel Rizovsky and Rabbi Shimon Skop both reason that even if one views the fetus as being separate from the mother an additional conversion would not be required because the fetus and mother are converted as one.<sup>25</sup> Thus, according to this understanding no proof regarding maternity can be learned from the case of the twin converts.

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23 Ibid. p. 255

24 Rabbi Aviad Trop, *ibid.*, pp. 109-110

25 Ibid.



## **b. The Case of a Minor Convert**

The Talmud in *Ketubot*<sup>26</sup> discusses a case where a minor is converted to Judaism through the court. Is this conversion valid on a Biblical level, or is it only a Rabbinic enactment? *Tosafot* in tractate *Ketubot*<sup>27</sup> explain that conversion through the court operates through the principle of “agency” and since a minor cannot appoint an agent, the conversion must operate at a Rabbinic level. *Tosafot* add that a fetus would still be converted at a Biblical level. Rabbi Akiva Eger explains this last statement of *Tosafot*<sup>28</sup> only according to the opinion that a fetus is an appendage of the mother. As such, the conversion of the fetus is considered an extension of the mother’s conversion. If *Tosafot* believed that the fetus was considered a separate entity, then there would be no reason to distinguish a fetus and a regular minor, and the conversion would only operate at a Rabbinic level. Accordingly, it must be that *Tosafot* interpret the Talmud in *Yevamot* as considering the fetus to be a limb of the mother. This discussion adds to the objections of Rabbi Trop in deriving proof of maternity from the case in *Yevamot*. However, this objection can be refuted with the opinion of *Tosfot HaRosh*, who states that the conversion of the fetus would operate at a Biblical level even if one views the fetus as independent from its mother, against Rabbi Akiva Eger’s distinction. Thus, *Tosafot* can indeed interpret the case in *Yevamot* according to the opinion that a fetus is separate from the mother, while still concluding that the conversion of the fetus operates at a Biblical level.

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26 Tractate *Ketubot* 11a

27 *Tosafot*, *Ketubot* 11a, *s.v. Matvilin*

28 Chidushei Rabbi Akiva Eger, *ibid.*, *s.v. Ve’haTosfot Lo*

## IV. The Rationale Against Parturition Establishing Maternity

### a. The Case of a Fetus Inheriting

Rabbi Trop<sup>29</sup> quotes a discussion in the Talmud that is at odds with the opinion of maternity being established at birth. The Talmud in *Niddah*<sup>30</sup> states that a neonate inherits its mother if the mother dies postpartum. However, if the fetus dies in utero with the mother then the neonate does not inherit because he is considered to have died prior to the mother. Rabbi Trop explains that by implication, had the fetus not be considered dead before the mother, the fetus would have indeed inherited its mother. For this conclusion to be true, the Talmud must believe there is a maternal relationship in existence prior to birth. Rabbi JD Bleich<sup>31</sup> refutes this proof brought by Rabbi Trop by reasoning that if the mother was considered to die before the fetus, the fetus would have been considered born at that moment. Furthermore, even if there is a maternal relationship in existence in utero, the relationship established at birth may supersede or even supplant the gestational one.

### b. The Case of *Chalav Treifah*

Rabbi ZN Goldberg<sup>32</sup> presents another source in the Talmud that implies gestation establishes maternity before birth. The Talmud<sup>33</sup> excludes milk extracted from a

29 Rabbi Aviad Trop, *ibid.*, p.113

30 Tractate *Niddah* 43b

31 Rabbi JD Bleich, *ibid.*, p.243, note 13

32 Rabbi ZN Goldberg, *ibid.*, p.249

33 Tractate *Chulin* 113b

slaughtered animal from the prohibition of milk and meat. This is due to the verse “you shall not cook a kid in the milk of its mother” (exodus 23:19), which implies that the animal must have the potential to become a mother, thus excluding a slaughtered animal. Rabbi Akiva Eger extends the discussion of the Talmud to live animals, questioning whether an animal that cannot carry a fetus to term should also be excluded from the prohibition like a slaughtered animal. In his discussion, Rabbi Eger uses another statement in the Talmud<sup>34</sup> that concludes paternity is established after the first trimester, and so too maternity should be established after the first trimester. Rabbi Goldberg believes this reasoning can be extended to a case of a transferred embryo, which would develop a maternal relationship during gestation.

Rabbi JD Bleich<sup>35</sup> also discusses the cases brought in *Chulin* regarding maternity and the prohibition of milk and meat. Rabbi Bleich focuses on the Talmud’s statement that a female animal that has never given birth before and lactates is included in the prohibition, yet a male animal that lactates is excluded. The rationale behind this ruling is the female animal has the potential to become a mother while a male animal does not have this potential. *Rashi* clarifies that the Talmud is dealing with a case of a nulliparous but gravid<sup>36</sup> animal that is close to parturition. Additionally, a parous animal that ceases lactation but produces colostrum<sup>37</sup> later on is excluded from the Talmud’s question because the

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34 Tractate *Sanhedrin* 69a

35 Rabbi JD Bleich, “*Chalav Treifah* and the definition of maternity,” *Benitivot ha’Halacha*, vol. 3, pp.47-48

36 An animal that is pregnant but has not yet given birth yet to a living child.

37 Early breast milk that is rich in protein

status of motherhood attained after the first birth remains. Rabbi Bleich argues that Rabbi Eger's distinction is only true in a case of a nulliparous animal that cannot carry a fetus to term. A gravid animal that is close to parturition is at best considered a potential mother, as only parturition classifies the animal a mother. As such, Rabbi Bleich concludes that neither conception nor gestation alone can determine maternity; rather, only parturition determines maternity in the case of surrogacy – to the exclusion of the genetic mother.

### **c. The Case of Two Wombs**

The Talmud in *Chulin*<sup>38</sup> cites a case of a woman with two wombs, in which the fetus leaves the first and enters the second. The Talmud does not resolve which womb is considered to have given birth. According to one opinion presented in the Talmud, if the fetus is not conceived in the womb and later delivered from the womb, the womb is considered a virgin womb because the fetus is not its own. Even according to the opinion in the Talmud that the womb is not considered a virgin womb, maternity is still not implied. The case is just displaying that a fetus that is not the womb's own can still render the womb "broken." Rabbi Ezra Bick<sup>39</sup> uses this case to show that parturition alone is not sufficient in determining maternity. However, Rabbi ZN Goldberg believes that no proof can be brought from the above case, as no maternal relationship can develop in the second womb because the fetus is considered born from the first one. Secondly, the Talmud is dealing

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38 Tractate *Chulin* 58a

39 Rabbi Ezra Bick, *Techumin*, vol.7, pp. 266-270

with a case where the fetus died, and therefore the second womb is not the mother because it has neither conceived nor nourished the fetus.

#### **d. The Case of the Pregnant Convert**

The Talmud in *Yevamot*<sup>40</sup> discusses a case of a convert who is pregnant at the time of the conversion. The Talmud concludes that child does not require a separate conversion because the mother is not considered a barrier to the immersion, as the fetus is considered a natural growth of the mother. Rabbi Mordechai Ralbag<sup>41</sup> infers from the question of the Talmud that parturition is not the determinate of maternity. He explains that since the mother is Jewish at the time of birth, the fact that the Talmud assumes the child requires immersion implies that birth from a Jewish mother is not sufficient. Rabbi Ralbag continues that the question of maternity revolves around the status of the fetus in relation to the mother. According to the opinion that the fetus is merely an appendage of the mother, then there is no maternal relationship between the fetus and the mother, and only parturition will establish one. However, if one views the fetus as being distinct from the mother in utero, then conception will establish maternity. Rabbi Ralbag goes on to compare this case in the Talmud, *Yevamot* 78b, with the case of the twin converts, *Yevamot* 97b, discussed previously. Rabbi Ralbag explains that the Talmud here is under the opinion that the fetus is distinct from the mother; therefore, since at the time of conception the mother was not Jewish the child requires

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40 Tractate *Yevamot* 78b

41 Rabbi Mordechai Ralbag, *Ateret Shlomo*, vol.8, p.204

its own conversion. In contrast, the case in *Yevamot* 97b is under the assumption that the fetus is an appendage of the mother, and therefore the maternal relationship is established at birth, when the mother is Jewish.

Rabbi Aviad Abraham Kurtztag<sup>42</sup> refutes any proof from the case of conversion, as there is a distinction between determination of nationality and maternity. He explains that nationality is determined at conception, while maternity is determined at birth. Therefore, the fetus is not Jewish at conception and needs a conversion as it is unaffected by the birth. By implication, this distinction would complicate a scenario where a non-Jewish egg donor was used for a Jewish couple. Rabbi Abraham Issac Kilav<sup>43</sup> explains that since the Talmud rules that the fetus is Jewish only because it was converted along with its mother, had the conversion not taken place the child would not have been considered Jewish, despite its mother being Jewish. In a case of a non-Jewish egg donor, there is no conversion of the mother, so at birth, there is no maternal relationship with the Jewish recipient and the child will not be Jewish and thus will be the child of the egg donor. However, in a case of a Jewish egg donor and recipient, the baby is considered Jewish at conception and would be the child of the recipient, as maternity will be established at birth.

## V. A Conceptual Model

Rabbi Ezra Bick<sup>44</sup> finds the textual arguments brought so far to support conception, gestation, or parturition

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42 Rabbi Aviad Abraham Kurtztag, *Ateret Shlomo*, vol. 4, pp.173-175

43 Rabbi Abraham Issac Kilav, *Techumin*, vol. 5, pp.260-267

44 Rabbi Erza Bick, *ibid.*

as the determinant of maternity to be lacking as they do not directly fit the modern model of assisted reproductive technologies. In this approach, Rabbi Bick explains that first a conceptual construct is created and then one gleans from the text which way Jewish law would sway in the discussion. As such, he develops two conceptual approaches to understand Judaism's understanding of maternity. The first model focuses on the biological perspective of the parents, in which genetic material from each parent is used to produce the child. In this case, the mother's role and father's role are equivalent, and just as the sperm donor would be considered the father, so too the egg donor would be the mother. The second approach is a more "agricultural model" of conception, in which the male's seed is placed into a fertile environment. Here the role of each parent is not parallel, as paternity focuses on the donation of genetic material, while maternity is more a focus of nurturing the fetus, rather than the mother's genetic contribution. According to this model, the gestation of the fetus is the primary determinant, and it follows the recipient of a donor egg would be considered the mother as it is her body that nourishes and develops the child.

## **VI. Summary and Conclusion**

The central question in the discussion of Jewish law as it relates to egg donation is determining maternity. As is the case with applying Jewish law to any new technology, one must scour through seemingly unrelated laws to determine Jewish law's view of the topic. With the advent of egg donation, one has the ability to create a scenario in which the genetic mother is distinct from

the gestational mother. As such, determining the status of maternity according to Jewish law is the key to coming to a *halachic* conclusion regarding this new technology. As can be expected in a discussion applying unrelated laws to a new technology, there are sources that seem to support both possibilities; namely, that fertilization or parturition determines maternity. When there is a real question of a Jewish couple who needs to utilize an egg donor, an experienced Rabbi needs to be consulted who can synthesize scientific knowledge with Judaism's viewpoint, based on the discussions in the primary Jewish sources.