

The Surrogate Challenge

I am fortunate to be a member of a beis din that is involved in conversion. This has given me the opportunity to enable sincere, committed individuals from all walks of life join *kneses Yisrael* and become a part of our great nation. I take this job very seriously and view it as a great privilege. Nevertheless, I frequently encounter challenges in this role. One such area of challenge is the groundbreaking and innovative technology now available through modern medicine in the treatment of infertility; technology that enables couples to bear children and enjoy the blessing of building a beautiful family. These innovations, however, present halachic questions that often extend to a beis din that is involved in conversion.

One issue that can cause infertility is a woman's inability to produce fertile eggs. The medical world has discovered methods to extract an egg from a donor and implant it, providing an otherwise infertile woman the ability to have a child. Additionally, some women can produce a fertile egg but for various reasons are unable to complete a full pregnancy. Medical technology now provides the ability to implant a fertilized egg in another woman, a surrogate, who can carry the fetus to term. In many of these situations, the egg donor or surrogate may be a non-Jew. Our beis din very often is required to determine whether or not children born as a result of

these technologies require conversion. While in the past, in vitro fertilization and surrogate motherhood were merely theoretical issues in the world of halacha and Gemara, they now are frequent issues facing today's batei dinim. When analyzing and understanding these issues, we will see that the discussions surrounding surrogacy and egg donation are relevant to understanding how we became a Jewish nation at Har Sinai.

The question that must be addressed is: which part of development is critical to producing a Jewish baby? Does halacha require a Jewish mother to deliver the baby, or is it more critical that the genetic material come from a Jewish mother, regardless of who carried the child to term? Chazal tell us that a child born to a Jewish mother is Jewish, but they do not specify what part of the process imparts the Jewish status onto the child.

Although the concepts of egg donation or surrogacy do not appear in the Talmud, some commentators on the Torah allude to a similar concept with the birth of Dina and Yosef. The verse uses peculiar language to describe the birth of Dina:

וְאַחַר יְלֵדָהּ בֵּית וְתִקְרָא אֶת שְׁמָהּ דִּינָה.

After, she bore a daughter and she called her name Dina.

Bereishis 30:21

The *Baal Haturim* notes that regarding Dina, the Torah never refers to *herayon* (pregnancy) as it does by the other children. He explains, based on a comment of Targum Yonasan, that Leah did not in fact conceive Dina, but rather Dina was conceived in Rachel's womb. At the same time, Yosef was conceived in Leah's womb. If Leah would have given birth to another boy, Rachel would have only had the opportunity to bear one of the *shevatim* (tribes), fewer than the maidservants. Leah had mercy on her sister and davened for a miracle. The Targum Yonasan states that Hashem performed a miracle and transferred Yosef to Rachel's womb and Dina to Leah's womb.

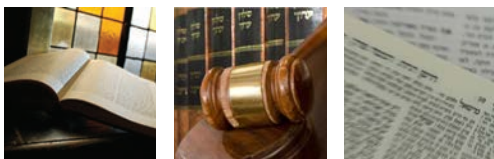
The *Tur* takes this idea one step further. The Torah (Bereishis 46:10) refers to one of the children of Shimon as "Shaul ben Hakena'anis." Rashi comments that this was a child born to Shimon and Dina. After Dina was captured by Shechem and was embarrassed publicly, Shimon resolved to marry



Rabbi Eli Belizon

Faculty, Stone Beit Midrash Program

Rabbi, Young Israel of Fair Lawn



PERSPECTIVES ON CONVERSION

Special Symposium • Shavuot 5777

her. This marriage is problematic, as it involves siblings that share a common mother, which is prohibited under Noachide law as well as Jewish halacha. How could Shimon marry his sister? The *Tur* resolves this issue by citing the above commentary, and argues that since Dina and Shimon were conceived by different mothers they are not considered siblings for the purpose of halacha (Noachide law only prohibits marrying a sibling from the same mother). The implication of these sources is that the Torah seems to consider the woman who conceives the child to be the mother. This could be extrapolated to our modern-day dilemma, and one may conclude that as long as the egg is from a Jewish mother, that child would not require conversion. The *Minchas Yitzchak* 3:114, points out that these sources are difficult to rely on for a few reasons. First, these sources are not traditionally meant to teach halacha, they are more aggadic texts. Additionally, the Gemara in *Brachos* 60a, has a different account of the story involving Leah. In the version in the Gemara, Leah had pity on her sister and prayed for her to conceive and deliver a boy. There is no mention of a fetus transfer or exchange.

The most compelling and direct source that helps to clarify our issue is one highlighted by Rav Zalman Nechemia Goldberg (*Techumin* Vol. V), one of the leading poskim in Eretz Yisrael. The Gemara in *Yevamos* 78b, discusses the issue of a woman who converts while she is pregnant. The Gemara explains that the *geirus* is effective not only for her but for the fetus as well. Many of the commentaries are bothered by this conclusion. A male convert must undergo circumcision prior to immersion in a mikveh. If this particular fetus is male, how could the mother's conversion be effective for

him as well? He is still uncircumcised at the time of the conversion. The Baalei Hatosfos (see Tosfos, *Yevamos* 47b, s.v. and *Matbilin* and *Kesuvos* 11a, s.v. *Matbilin*) offer an answer, which may serve to clarify our issue as well. The Baalei Hatosfos believe that when this child is born, the circumcision is not a circumcision of conversion. At the time of the mother's conversion the fetus undergoes conversion as well, regardless of the child's gender. Once the child is born and turns out to be a male, we circumcise him on the eighth day as we would any other baby that was born Jewish. The Ramban, *Yevamos* 47b, however, offers a different solution and explains that in general, this formal order of circumcision prior to immersion in the mikveh is not essential and although ordinarily recommended, the conversion is valid if the order was reversed. The conversion of the baby whose mother converted while pregnant is complete when the circumcision takes place. Thus there seems to be a fundamental dispute regarding how we view the conversion process of this fetus.

There is a major challenge to Ramban's opinion. The Gemara in *Yevamos*, 97b, discusses a similar case where a mother is pregnant with twins and converts mid-pregnancy. The Gemara states that these twins are considered to be full-fledged brothers for halachic purposes. This would only seem to make sense according to the Baalei Hatosfos. According to the Baalei Hatosfos, when the two babies are born, they are Jewish, and since they have the same mother, they should be considered full-fledged siblings. However, according to the Ramban, the two twins are not Jewish until the circumcision is performed. How can they be considered full-fledged siblings? Shouldn't we apply the rule

that *ger shenisgayer k'katan shenolad* — a convert is like a newborn child who has no halachic relatives?

Moreover, there seems to be a contradiction between the two passages in the Gemara. According to the first passage, the defining step in the determination of a child being Jewish would seem to be conception. If the child was not Jewish at the time of conception, he or she requires a conversion, regardless of the fact that he or she was born to a Jewish mother. However, the second passage seems to imply the opposite, and despite the fact that these two brothers were conceived while their mother was not Jewish, they remain brothers once they are born, contrary to what would normally occur in the process of conversion.¹ This would imply that the gestation and delivery are more critical for creating a Jewish child.

There are numerous ways to resolve this contradiction and because there is no clear resolution as to whether conception or gestation is the ultimate determinant, many poskim suggest that the *beis din* should be stringent and require conversion if either the egg donor or the surrogate are not Jewish. One of these resolutions provides for us an important insight into what makes us Jewish. Rav Naftali Trop, in his *Chiddushim* to *Kesuvos* 11a, resolves the contradiction by explaining that both conception and delivery are contributing factors to one's Judaism. There are two fundamental elements that give an individual the status of a Jew. There is *shem Yisrael*, Jewish nationality, which is attained by being born to a Jewish mother. The second dimension is *kedushas Yisrael*, Jewish Sanctity, which is attained when one is conceived by a Jewish

mother. We take for granted that every child born Jewish has both of these components, but as Rav Trop suggests, these two elements don't always go hand in hand. Perhaps, he suggests, the child born to a woman who converted during pregnancy is considered a member of the Jewish nation for the purpose of determining his relatives, and therefore maintains his relationship with his twin brother for halachic purposes. Since at the time of his birth he was born to a Jewish mother, he has the status of a brother to his twin. Nevertheless, at conception he was the child of a non-Jewish mother and therefore is missing the second element of being Jewish, *kedushas Yisrael*. For that, according to Tosfos, he requires a conversion in-utero and for the Ramban, he still must undergo the conversion process after birth. Thus, the two passages in the Gemara are not necessarily contradictory. They are merely discussing different components of becoming a Jew.

Perhaps one could suggest that these two elements, Jewish nationality and Jewish spirituality, stem from the experience of the Jewish people at matan Torah. The Gemara, *Kerisus* 9a, states that bnei Yisrael underwent a conversion at Har Sinai. In fact, we use that process as the source for how we conduct our conversions. If this is true, then am Yisrael should have lost all of their familial relationships after undergoing the conversion process at Har Sinai. Are we to assume that after matan Torah, the Jewish people had no relatives because they were all converts? Furthermore, don't we all recite three times daily that we are the children of our ancestors Avraham, Yitzchak and Yaakov? How can the Gemara consider am Yisrael converts, yet still maintain their connection to

their ancestors as well? Why didn't the *ger shenigayer* principle apply after matan Torah?

Based on the analysis of the two elements of our Judaism, I believe we can resolve these questions. Our relationship with our ancestors and the fathers of our nation is a result of being born to Jewish parents. The descendants of Avraham, Yitzchak and Yaakov had a *shem Yisrael*. Nevertheless, we were still missing a critical component of being Jewish. We had not yet achieved the element of *kedushas Yisrael*. This second element was only realized at Har Sinai when we received the Torah and its commandments. When we perform a mitzvah, we recite a beracha that states "*asher kideshanu b'mitzvosav vitzivanu*" — Who sanctified us with His mitzvos and commanded us. We were endowed with holiness and sanctity when we received the Torah and mitzvos. In order to attain that additional component of Judaism, we required a conversion process at Har Sinai. It remains true that our family relationships remained the same, since we already had Jewish nationality from our ancestors. Nevertheless, Shavuot imbued within us that *kedushas Yisrael* and completed the process of becoming a Jew. In essence, every single one of us standing at Har Sinai was similar to the status of a baby born from a Jewish mother but conceived by a non-Jewish mother. The same way — according to this analysis — the child would require a conversion, the Jews at Har Sinai all required conversion as well.²

It is remarkable how a modern dilemma encountered in a beis din for geirus helps to illuminate our perspective on the chag of Shavuot. Many of us were born to Jewish parents and live in Jewish

communities. As we approach this chag — which takes us back to our national conversion — we realize it is insufficient to simply identify ourselves as part of the Jewish nation. We must realize the other component of becoming a Jew, and renew our commitment to achieving *kedushas Yisrael*. This component of Judaism requires constant reaffirming and commitment. We relive this transformation every Shavuot and reaffirm our commitment to Torah and mitzvos, thereby completing the process of our own "conversion" to Judaism. The world is changing and constantly confronts us with new challenges. We must therefore undergo an annual kabbalas Hatorah, a symbolic conversion, through which we maintain our *kedushas Yisrael*.

Endnotes

1 This question could theoretically be applied equally to both the opinion of the Baalei Hatosfos and Ramban. However, as we alluded to earlier, if a conversion takes place in-utero and then the Jewish baby is born to a Jewish mother, he retains the relationship with his mother. See *Achiezer* 2:29. The relationship to the mother in such a situation is more of a technicality and as such, the first passage in the Gemara implies that conception is the determinant even according to the Baalei Hatosfos.

2 These two dimensions of Judaism are not only apparent to us. Our enemies have recognized it as well. We have suffered from anti-Semitism in many different generations. Yet the persecution and animosity was triggered in different generations for various reasons. We have often faced enemies that would like to destroy the Jewish nation, the descendants of Avraham, Yitzchak and Yaakov. Mitzrayim serves as the paradigm of this type of antisemitism. They persecuted us before we even attained *kedushas Yisrael*. However there are other enemies, such as Yavan and Amalek, who focused on Jewish sanctity and our observance of mitzvos.