

Who's Your Mommy? Surrogacy and Establishing Maternity In Halachah

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A STUDY OF LEGAL PARENTAGE AND THE ISSUES ARISING FROM INTERNATIONAL SURROGACY ARRANGEMENTS

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However, several States provided general comments to the effect that, based on the experience of the competent authorities, the prevalence of ISA cases has increased over the past five years, in some cases significantly. Moreover, a small minority of receiving States did provide specific figures concerning the number of incoming cases of ISAs. In particular, the data from Israel was striking: from 12 cases pre 2009, the authorities dealt with 128 cases in 2012 (a percentage increase of 967%). In Australia, the Department of Immigration and Citizenship was aware of approximately 430 "incoming ISA cases" in the period 2009 to 2012. Sweden reported approximately 100 cases from 2007 to 2012...

Establishing Halachic Parenthood

- Who is the father?
 - A father's only biological involvement is at conception. Seemingly, paternity would be established at this stage.
- Who is the mother?
 - Unlike the father, the mother has multiple different stages of involvement with the child. Which stage halachically establishes maternity?
 - Conception
 - Gestation
 - Parturition

1. Gem. Megillah 13a [Modified Koren/Sefaria translation]

כי אין לה אב ואם - ובמות אביה ואמה, למה לי? אמר רב אחא: עיברתה - מת אביה, ילדתה - מתה אמה. ובמות אביה ואמה לקחה מרדכי לו לבת

The verse initially states with regard to Esther: "For she had neither father nor mother" (Esther 2:7). Why do I need to be told in the continuation of the verse: "And when her father and mother were dead, Mordecai took her for his own daughter"? Rav Aha said: This repetition indicates that when her mother became pregnant with her, her father died, and when she gave birth to her, her mother died, so that she did not have a mother or a father for even a single day.

2. Rashi [1040 - 1105, France], *ibid*.

ובמות אביה ואמה תו למה לי - מאחר דכתיב כי אין לה אב ואם, אלא ללמדנו שאפילו יום אחד לא היה לה אב ואם.
בשעה שנתעברה אמה מת אביה - נמצא שלא היה לה אב משעה שנראה להקרות אב.
וכשילדתה אמה מתה - ולא נראית לקרות אם.

And when her father and mother were dead - Since it had already stated that she had no father or mother. Rather it comes to tell us that she didn't have a father or mother for even one day.

When her mother became pregnant, her father died - as such, she didn't have a father from the time that paternity could begin.

And when she was born, her mother died - and wasn't considered her mother.

- a) **R' Zalman Nechemiah Goldberg, Techumin 5** - "As such, there is a difference between the father and the mother. The rationale for this distinction is that the father isn't involved with parturition and, therefore, only conception [can] establish paternity. However, maternity is established at birth, not conception since the mother gives birth [to the child]..."
- Does this actually prove that conception is *not* an important stage for establishing maternity? Perhaps parturition only establishes maternity in a case where the child is her biological child and not in a case of surrogacy.

It is important to be aware of the concept that a גר שנתגייר כקטן שנולד דמי, a convert who has completed the conversion process is akin to a newborn child. This has implications on halachic lineage.

3. Gem. Yevamot 97b [Modified Koren/Sefaria translation]

ת"ש: שני אחים תאומים גרים, וכן משוחררים - לא חולצין ולא מייבמין, ואין חייבין משום אשת אח; היתה הורתן שלא בקדושה ולידתן בקדושה - לא חולצין ולא מייבמין, אבל חייבין משום אשת אח

Come and hear: Two twin brothers who are converts, and similarly twin brothers who are freed slaves, do not perform halitza for each other's wives, and they do not perform levirate marriage with them, and if they engage in intercourse with them they are not liable to receive karet for engaging in intercourse with a brother's wife. If they were not conceived in sanctity and only their birth was in sanctity, they do not perform halitza or levirate marriage, but they are liable for engaging in intercourse with a brother's wife. If they were conceived and born in sanctity, they are like Jews from birth in all of their matters. In any event, the baraita is teaching that regular converts are not liable for engaging in intercourse with a brother's wife. It can be inferred that while there is no liability by Torah law,

- a) **R' Zalman Nechemiah Goldberg, Techumin 5** - "From this it appears certain that parturition is sufficient to establish maternity, for their conception took place before conversion and the mother's lineage was nullified at the time of conversion. They are viewed as "newborns" and she is made their mother through parturition, demonstrating that parturition establishes maternity."
- b) **R' Avraham Yitzchak Kalav, Techumin 5** - Reaches the same conclusion, but limits this to a when the ovum source and surrogate are both Jewish.
- c) **R' Yaakov Ariel, Techumin 16** - We can't deny the reality before us; the genetic mother has an inviolable tie to the child. As such, this case cannot serve as a proof since the twins are being birthed by their biological/genetic mother.

4. **Gem. Niddah 31a**

תנו רבנן: שלשה שותפין יש באדם, הקב"ה ואביו ואמו. אביו מזריע הלובן, שממנו עצמות וגידים וצפרנים, ומוח שבראשו, ולובן שבעין. אמו מזרעת אודם, שממנו עור ובשר ושערות, ושחור שבעין. והקב"ה נותן בו רוח ונשמה וקלסתר פנים, וראיית העין, ושמיעת האוזן, ודבור פה, והלוח רגלים, ובינה והשכל.

The rabbis taught: There are three partners in [the creation] of a person - The Holy One blessed is He, the father, and the mother. Father [white] - bones, sinews, nails, brain, and white of the eye. Mother [red] - skin, flesh, hair, and black of the eye. The Holy One blessed is He - spirit of life, soul, the face, sight, hearing, speech, ability to walk, *binah*, and rationale thought.

5. **Dr. John D. Loike and R' Dr. Moshe D. Tendler, Gestational Surrogacy, Hakirah 16, pg. 119-120 - <https://goo.gl/BX2Yds>**

While maternal-fetal cell exchange has been well documented in women who conceive and carry their own child, there are now several studies of animal and human surrogacy indicating that this process occurs in surrogacy as well. Recognizing that these biological processes occur in gestational surrogates might have profound implications on the medical and psychological state of the surrogate, the genetic parents, and fetus, as well as the halakhic status of the child.

6. **Dr. Bob Weinhold, Epigenetics: The Science of Change <https://goo.gl/5SrPTF>**

The word "epigenetic" literally means "in addition to changes in genetic sequence." The term has evolved to include any process that alters gene activity without changing the DNA sequence, and leads to modifications that can be transmitted to daughter cells (although experiments show that some epigenetic changes can be reversed). There likely will continue to be debate over exactly what the term means and what it covers.

7. **R' Tzvi Ryzman [Current, USA], Techumin 37 – רחם מלאכותית כמכריעת ספק היוחסין בפונדקאות**

From here we can seemingly conclude the following: given the fact that there is [the scientific possibility of] an artificial substitute for a woman's womb, even if the child is gestated in a natural womb, this should not establish lineage at all since it is possible to use an artificial womb. As such, in cases of gestational surrogacy or ovum donation, when there are two women, the surrogate has no portion in the lineage of the child – she has no more involvement than the artificial substitute which certainly doesn't establish anything with regards to lineage.

8. **R' Yuval Sherlow [1957 - , Israel] Tweet from April 26, 2015 - <https://news.walla.co.il/item/2849034>**



The humane treatment of female surrogates in Nepal and their rescue as a justified humanitarian act does not overshadow the scandal of this type of surrogacy, which is unethical and illegal, and is akin to enslavement.