Paternity Testing and the Adulterous Wife in Halacha

***“If a man’s wife will go astray and commit a treachery against him.”* (*Bamidbar* 5:12)**

In this week’s Parsha, the Torah outlines the laws of the *Sotah* – the woman whose husband suspects her of being unfaithful. During the times of the Beis Hamikdash, if a woman’s husband warned her not to seclude herself with a certain man and witnesses testify that she subsequently did, he would bring her to the Beis Hamikdash and make her drink the ‘bitter waters’ that would test whether or not she had been faithful to him.

The result of the test had important ramifications for the marriage. A married woman who has sexual relations with another man becomes forbidden to her husband, though this generally requires eyewitness testimony in Beis Din. In a case of *Sotah,* the wife is forbidden to her husband unless the bitter waters reveal that she had not been unfaithful. In fact, if she is found to be innocent, the Torah promises great blessings in return.

In recent years, scientific advances have led to the possibility of empirically determining whether a woman has been unfaithful to her husband in some circumstances. Specifically, if a woman gives birth to a child and the husband claims that he is not the father, paternity testing that confirms the lack of genetic relationship between him and the child substantiates his claim. Would such test results forbid a woman to her husband?

We should point out that in Israel it is against the law to perform any genetic tests that may result in identifying the subject as a *Mamzer*. Therefore, a husband would have no lawful way of determining whether a child born to his wife is in fact from another man. However, the reality is that a determined person could have these tests performed independently.

Moreover, if genetic testifying only reveals that the child was from another man, but does not determine the identity of the father, the child is not perforce a *Mamzer*. His father could have been a non-Jew, and a child born to a non-Jew from a Jewish mother is not a *Mamzer*. However, the woman is still forbidden to her husband if she has relations with a non-Jew.

There are several forms of paternity tests:

1. The earliest testing method was a comparison of the blood types of the child and the father. If the child’s blood type (A, B, AB, or O) is not a possible combination of the mother and her husband’s blood types, there is a 93% chance that he isn’t in fact the father.
2. A more reliable method is comparing proteins and enzymes or HLA antigens. If there is no match between the child and the husband, it is highly unlikely that he is the father.
3. The most reliable method is to compare the husband and child’s DNA. This test is almost 100% reliable; in scientific terms it is considered a “certainty”[[1]](#footnote-1). DNA paternity testing has become the gold standard and is the predominant method used today.

The Poskim discuss a range of questions regarding paternity testing and its impact on a wide range of Halachos, among them, questions of *Mamzerus*, the permissibility of husband and wife remaining together, inheritance, and mourning. Regarding the tests that examine blood and HLA antigens, there is debate among the *Poskim* as to their reliability in respect to Halacha but many agree that DNA paternity testing is a definitive confirmation or exclusion of paternity[[2]](#footnote-2).

My dear friend, Rav Ze’ev Litke *Shlit*”*a*, an expert in genetics and DNA in Halacha, discusses this topic in his Sefer, *Piskei Din*. He records how the Poskim in previous generations considered DNA testing as either only “somewhat reliable” (“*Siman Beinoni*”), “extremely reliable” (“*Siman Muvhak*”), or akin to a Halachic “*Rov*” (majority). Some, in fact, discounted it completely as a method of determining facts for questions of Halacha, arguing that science often changes its position at a later point in time. However, in our time, it is clear that the reliability of DNA testing is incontrovertible and will not be disputed at any later date. If a child does not possess any of the DNA of his supposed father, it is a certainty that that person is not his father at all.

Rav Moshe Feinstein *zt”l* (*Igros Moshe* E.H. 4:17) has a truly novel ruling on this topic that is well-known by Dayanim and *Poskei Halacha*.

The Gemara (*Yevamos* 80b) discusses a case of a husband who traveled overseas (and therefore had definitely not had sexual relations with his wife during that time). Twelve months after his departure, his wife gave birth to a child. The Gemara avers that the child ought not be considered a *Mamzer* even though the vast majority of women give birth after a nine-month pregnancy (in which case she would have had to have conceived from another man), since it is theoretically possible for a woman to experience a twelve-month pregnancy. Therefore, any child born within twelve months of her husband’s trip could still have been conceived with him.

There are other opinions recorded in the Gemara who dispute this ruling and a number of *Rishonim* rule accordingly. However, the *Shulchan Aruch* (*E.H*. 4:14) rules that the Halacha follows the former opinion and the child is not be considered a *Mamzer*. The *Rema[[3]](#footnote-3)* (ibid.) qualifies that this only true where no suspicious or sordid behavior was witnessed between the woman and another man.

Why do we not base our ruling on the majority of pregnancies that last only nine months? Usually we would expect to follow the “*Rov*” (majority), particularly when it is based on the natural trends of the world (“*Ruba d’Leisa Kaman*”).

Rav Moshe explains that the imperative to follow the *Rov* only applies when we have some sort of doubt. We do not use a *Rov* to create *Sfeykos* (doubts). Therefore, regarding a woman who is not suspected of any wrongdoing, though she has experienced an apparently extraordinary pregnancy lasting twelve months, we have no right to utilize a *Rov* (of pregnancies which last nine months) to determine that she has conceived from another man. Rather, we conclude that she has had an extremely uncommon or perhaps unheard of experience.

In fact, so long as we have no evidence that such an experience is impossible, we deduce from this episode that such a thing is a possibility![[4]](#footnote-4) We do not conclude that she conceived from another man unless we have a tradition or scientific knowledge that a pregnancy of that length is an impossibility.

However, in a case where there is some sort of doubt, we would then invoke the rule of *Rov*. Rav Moshe explains that this was the intention of the *Rema* who argued that if the woman has been acting suspiciously with another man, we would then consider her child as a *Mamzer*. Since she has acted in a way that aroused suspicion, we have a doubt as to from whom she conceived. Once there is a doubt we may then invoke the *Rov* which states that the majority of pregnancies are nine months in duration and her child is therefore considered a *Mamzer*.

Could Rav Moshe’s reasoning be applied in a case of paternity testing? Since, as mentioned, there is a slight chance of error when performing or interpreting these tests, perhaps one could argue that a child should not be considered a *Mamzer* (and the wife should not become prohibited to her husband) even if the tests show that the child is from another man. However, in the majority of cases, paternity testing is only sought when a husband has some suspicion that his wife has been unfaithful. Therefore, in many such cases, there would be considered to be a “doubt” as to the father of the child and therefore a *Rov* should be invoked and the child would be considered a *Mamzer* in line with the ruling of the *Rema* above.

1. Prof. Avraham Steinberg explained that fundamentally, science cannot credibly claim that a method is 100% accurate. There is always the possibility of laboratory error or mistakes in assessing and understanding of results. However, in proper conditions, these possibilities are negligible and the results of these tests are near absolutely certain. [↑](#footnote-ref-1)
2. See אנציקלופדיה הלכתית ערך "אבהות" [↑](#footnote-ref-2)
3. The source of the *Rema’s* ruling is the *Teshuvas Meimonis*. [↑](#footnote-ref-3)
4. Rav Moshe contends that the Gemara implies that there had not been another case like this to their knowledge. Nevertheless, *Chazal* concluded that there must have been a possibility of a twelve-month pregnancy. [↑](#footnote-ref-4)