



## Are You My Mother? Maternity and Surrogacy in Halacha

*And the sons of Shimon: Yemuel, Yamin, Ohad, Yachin, Zohar, and Shaul, son of the Canaanite woman. (Bereishis 46:10)*

Who was “Shaul, son of the Canaanite woman”? *Chaza”l* reveal that he was the son born to Shimon and his sister Dina. When Shimon and Levi rescued Dina from *Shechem* she was too embarrassed to leave the city and made Shimon promise to marry her. Later she bore him a son called Shaul.<sup>1</sup>

Many of the *Mefarshim* ask how it was permissible for Shimon to marry his sister. Although the sons of Yaakov had the status of “*Bnei Noach*” who are permitted to marry their paternal sisters, Dina was Shimon’s maternal sister which is forbidden even to a *Ben Noach* (*Sanhedrin* 58a)!

One answer is based upon a famous *Ma’amar Chaza”l* (cited by *Rashi, Bereishis* 30:21). *Chaza”l* relate that Leah knew through *Ruach haKodesh* that Yaakov Avinu would only have 12 sons. When she became pregnant for a seventh time, she realized that if she were to give birth to another son, Rachel would have the chance to bear only one of the *Shevatim*, fewer than even Bilha or Zilpa. She therefore Davened that Rachel be spared this shame and her fetus, which was male, was switched to a female.

*Chaza”l* also relate (see *Targum Yonasan ibid.*) that at the same time that Leah conceived a boy, Rachel conceived a girl. In response to Leah’s *Tefila* that Rachel not be humiliated, the two fetuses were exchanged – Rachel’s female fetus was transferred to Leah and born Dina, and the male fetus conceived in Leah’s womb was transferred to Rachel and born Yosef.

The *Maharsha* uses this latter *Chaza”l* to explain a Gemara in *Maseches Nidah* (31a). The Gemara asserts that if a woman is “*Mazra’as*” (emits seed) first during intercourse, a male child will be born from the union, but if a man is “*Mazria*” first, a female child will be born<sup>2</sup>. The source for this is a Pasuk in this week’s Parsha which states: “*There are the sons of Leah whom she bore to Yaakov in Padan Aram, and Dina*

<sup>1</sup> There are other sources in *Chaza”l* which assert that Shaul was actually *Zimri ben Salu*.

<sup>2</sup> A man being “*Mazria*” refers to ejaculation. It is unclear what physiologic event *Chaza”l* were referring to in the female.



*his daughter*" (46:15). The male children are dubbed "*the sons of Leah*" (as they were brought into existence by their mother being *Mazria* first) but Dina is called "*his (Yaakov's) daughter*" (as she came about due to her father being *Mazria* first).

The *Maharsha* asks that according to the aforementioned *Chaza"l*, Dina was originally conceived as a male, not a female. If so, her conception would have been a result of Leah being *Mazria* first, like all of her brothers. Why then does the Torah refer to her as "his" (*Yaakov's*) daughter?

In light of the second *Ma'amar Chaza"l* we cited, the *Maharsha* answers his question simply. Leah's fetus was not transformed from male to female – it was swapped with the female fetus of Rachel. This female fetus would have been the result of Yaakov being *Mazria* first, thus it is correct to call her "*Yaakov's daughter*".

Several of the *Rishonim*<sup>3</sup> use the *Ma'amar Chaza"l* quoted by the *Targum Yonasan* to explain why Shimon was allowed to marry Dina. If Dina was conceived by Rachel, Rachel was considered to be her mother in a sense (i.e., not Leah). Therefore, she was only a paternal sister to Shimon and permitted to him.

This extraordinary *Chaza"l* has been studied for thousands of years without any practical application. However, it has become extremely relevant to a modern Halachic dilemma, namely, **who is considered to be the mother of a child that was born from a surrogate?** [This question, like others that have arisen due to medical and technological advances, could never have been envisioned by the Poskim of previous generations. Contemporary Poskim must grapple with Halachic and ethical questions about which there is little in the way of Halachic literature to guide them.]

Women who are unable to carry a fetus to term (for example, due to uterine anomalies or underlying medical conditions), are sometimes able to have children by means of a surrogate. The process of surrogacy consists of extracting one of her eggs, fertilizing it with her husband's sperm, and inserting it into the uterus of another woman who will carry the fetus during pregnancy until birth. The genetic material obviously comes from the woman who donates the egg, not the surrogate.

Poskim have sought to determine which woman should be considered the child's mother – the genetic mother whose egg was fertilized and who provided half

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<sup>3</sup> The *Moshav Zekeinim miBa'alei haTosfos* and *Tosfos haShalem Al haTorah, Bereishis 46*, in the name of the *Riva*.



of the child's genetic material, or the pregnancy host who carried the fetus through pregnancy and birth of the child.

Clearly, this question holds significant practical importance. For instance, whom is the child expected to honor for *Kibud Em*? Who are his maternal relatives (whom he is forbidden to marry)? If the surrogate isn't Jewish, need he undergo conversion? The questions span the entire breadth of all four sections of the *Shulchan Aruch*.

There are two arguments lying at the heart of this question. On the one hand, the genetic makeup of the child is extremely significant, as it is the only biological connection between a child and its mother (just as it is the only biological connection between a child and its father – as there is certainly no other biological basis for paternity<sup>4</sup>). Therefore, there is a strong reason to think that the egg donor should be considered the Halachic mother.

Additionally, the embryo was created in a laboratory (by fertilizing the egg) before the surrogate was involved at all. At this stage the woman who provided the egg was the only partner with the biological father. Therefore, the surrogate could be perceived as merely hosting the embryo of another woman in her uterus as though she were an incubator, and has no maternal relationship to it at all.

On the other hand, one could consider the fetus' development that occurs in the surrogate's uterus to be more significant. The fetus receives its nourishment via the surrogate, and she is the one who will ultimately deliver it. Therefore, perhaps she shouldn't be considered merely an incubator, but, on the contrary, from the moment that the embryo was implanted it became a part of her body, and its relationship to the egg donor is severed. Since *Chaza"l* did not clearly attribute greater significance to a hereditary link than a link borne out of development and birth, one could argue that Halacha would consider the surrogate to be the child's mother.

In the absence of sources that discuss this question explicitly, the Poskim attempt to adduce proofs from other cases discussed by *Chaza"l* and earlier Halachic authorities. The majority of Poskim agree that there are no clear proofs from which one may rule conclusively on this matter, and the ultimate decision rests with each individual Posek according to his judgment. Therefore, there are those who refrain

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<sup>4</sup> The majority of the Poskim maintain that the act of intercourse is not the basis for considering somebody to be the father.



from ruling on this question at all, maintaining that we are no longer of the caliber to rule on such weighty matters as these, particularly as we can only rely on our own judgment.

We will now briefly cite some of the sources that are discussed by the Poskim in this regard:

*Geirus While Pregnant with Twins (Yevamos 97b)*

If a non-Jewish woman is pregnant with twins and undergoes *Geirus* (conversion) during her pregnancy, her *Geirus* is also effective for the fetuses. Usually, following *Geirus* a person is considered like “a newborn child”, and is no longer Halachically related to his biological relatives (thus, if his sister also converts he would technically be permitted to marry her). Nevertheless, when a mother pregnant with twins converts (and, as stated, her *Geirus* is effective for them too), the twins retain their status as siblings, in spite of the conversion (*Yevamos 97b*).

Some say that this proves that the maternal relationship must be established at the moment of birth (or perhaps during pregnancy). For this reason, although the twins undergo conversion during pregnancy, since their gestation occurs in the same woman and she gives birth to them, they are considered to share a mother and thus are siblings. Were the maternal relationship to be only established by the source of the egg or at the moment of conception, the fetus’s subsequent conversion would have disrupted it and the twins would be considered unrelated.

This conclusion can be challenged in two ways. Firstly, *Rashi’s* opinion (in *Yevamos 98a*) is that the law that a convert is considered to be like a newborn child does not apply to fetuses. Therefore, twin fetuses who undergo conversion are certainly still considered to be siblings. Secondly, even if the maternal relationship is generally established through heredity, that doesn’t necessarily mean that it is solely based upon the donation of genetic material. In a normal pregnancy, the same mother provides the genetic material and is the gestational host. Therefore, even if conversion disrupts the original relationship of the fetuses to the mother (and each other), perhaps it is reestablished by gestation and/or delivery.<sup>5</sup>

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<sup>5</sup> [Editor’s note: Perhaps maternity is established through both egg donation **and/or** gestation. The Gemara’s ruling that twins are considered siblings even after *in utero* conversion does not conclusively prove that maternity is determined exclusively by gestation.]



### The First Forty Days – *Maya b'Alma* (Yevamos 69b)

The Gemara (Yevamos 69b) asserts that an embryo is deemed to be "*Maya b'Alma*" (mere "water") during the first forty days following conception and is not considered to have independent status as a "*Nefesh*". Some *Acharonim* contend that even those who hold that a fetus usually requires its own *Geirus*<sup>6</sup> would agree that it is not required if the conversion occurred during this period.

Implantation of the egg in the surrogate takes place within forty days of fertilization. Therefore, it could be argued that the surrogate should certainly be considered the true mother as the fetus is only established as a *Nefesh* after implantation in her uterus.

However, this argument can also be refuted. Although during the stage of "*Maya b'Alma*" the embryo may not have the status as an independent being or *Nefesh*, it has the potential to develop into a fetus and then child. This potential and its genetic traits were bestowed by the woman whose egg was fertilized; therefore, she can be regarded as its true mother.

### The Three *Shutfim* (Nidah 31a)

*The Rabbis taught: There are three partners in [the creation of] man - Hashem, his father, and his mother. The father provides the "white" from which the bones, sinews, nails, brain, and whites of the eyes develop. The mother provides the "red" from which the skin, flesh, hair, and pupils arise. Hashem imparts the spirit and soul, luster of the face, sight, hearing, power of speech, ability to walk, intuition, and understanding.*

This Gemara clearly states that a person's fundamental connection with his parents ("*the partners who created him*") is the biological and genetic properties they bestowed upon him. A surrogate mother, by contrast, contributes none of these properties. The fact that gestation occurs in her uterus is immaterial. The properties bestowed by a father always develop inside the body of the mother and are nevertheless attributed by the Gemara to him. The same applies to the properties

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<sup>6</sup> The Gemara in Yevamos (78a) explains that according to those who hold "*Ubar Lav Yerech Imo*" – a fetus is not considered to be a "limb" of its mother (i.e. it is an independent being) – it would require its own independent *Geirus* after birth. (However, the mother's *Tevila* would be considered effective for the fetus as her body is not considered to be a *Chatzitza*.)



bestowed by the genetic mother, though they develop within the surrogate, they are still attributed to her.

Nevertheless, it is generally difficult to draw Halachic conclusions from *Divrei Agada*, so this cannot be considered definitive proof.

### Shimon and Dina, Rachel and Leah

Returning to the *Ma'amarei Chaza"l* with which we began, we saw that Shimon may have been permitted to marry Dina because she was conceived by Rachel, even though she was born to Leah. This seems to clearly demonstrate that the maternal relationship is determined by heredity and not gestation!

However, there are a number of points to consider:

- The Torah consistently describes Yosef as being the son of Rachel and Dina as being the daughter of Leah.
- The exchange of the fetuses may well have taken place at the end of each of their respective pregnancies. If so, Rachel would have carried Dina throughout almost the entire pregnancy, and this could be why she was considered to be her mother. We cannot prove that a mother who merely provides the genetic material should be considered the mother over another woman who carries the fetus through pregnancy.
- Finally, we can never draw Halachic conclusions from *Ma'asei Nisim*.

It is difficult to come to a conclusion in this matter – it is a matter of great dispute among the Poskim. See the footnote for additional sources that discuss the topic<sup>7</sup>.

In conclusion, there are three opinions:

1. Maternity is determined by heredity, and the egg donor is the Halachic mother.

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<sup>7</sup> *Tzitz Eliezer* (15:45, 19:40, 20:49 & 22:55), *Nishmas Avraham* (4, E.H. 2 in the name of Rav Shlomo Zalman Auerbach *zt"l* and Rav Elyashiv *zt"l*). See also *Yeshurun* 21, p535, R' Avraham Sherman, also quoting Rav Elyashiv *zt"l* as well as Rav Avigdor Nebenzahl *Shlit"a*. Rav Zalman Nechemia Goldberg *Shlit"a* has two essays on this topic; the first published in *Techumin*, 5, p248, the second in *Asya* 65-66, p45.



2. Maternity is determined by gestation, and the surrogate is the Halachic mother.
3. It is impossible to determine which one is the mother. Therefore, both women must be considered mothers.

It is important to note, that we have only discussed the question of maternity in surrogacy, but there are a number of other important questions to consider as well:

- Is it permissible to serve as a surrogate mother?
- May a single or divorced (i.e. unmarried) woman serve as a surrogate?
- May a married woman do so?
- May one use a non-Jewish surrogate? Is it preferred to use a Jewish or non-Jewish surrogate?

These questions have important Halachic ramifications, and practical guidance in actual scenarios should be sought from *Gedolei haPoskim*.