

# *Ovum donation, homograft of an ovary and gestational surrogacy: Who is the legal mother in Jewish law?*

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## Background

Ovum donation, ovarian transplantation and gestational surrogacy are part of **Assisted Reproductive Technology** (ART), as well as part of the process of third party reproduction.

1. **Ovum donation**<sup>1</sup> is the process by which a woman provides one or several eggs for purposes of assisted reproduction to another woman. It involves the process of in-vitro fertilization (IVF) as the eggs are fertilized in the laboratory. Ovum donation and embryo transfer has given many infertile women a mechanism to become pregnant and give birth to a child that will be their biological child, but not their genetic child. Some of the medical indications for ovum donation are:

- **Congenital absence of eggs:** Turner syndrome; Swyer syndrome; gonadal dysgenesis.
- **Acquired reduced egg quantity or quality:** S/P oophorectomy; premature menopause; S/P chemotherapy or radiation therapy; advanced maternal age; and compromised ovarian reserve.

The first ovum-donation-produced human birth was reported on February 1984.<sup>2</sup>

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<sup>1</sup> See: [http://en.wikipedia.org/wiki/Egg\\_donation](http://en.wikipedia.org/wiki/Egg_donation)

<sup>2</sup> Blakeslee, Sandra, "Infertile Woman Has Baby through Embryo Transfer". *The New York Times* online, Feb. 4, 1984: <http://query.nytimes.com/gst/fullpage.html?sec=health&res=9404EE DC143BF937A35751C0A962948260>

2. **Homograft**<sup>3</sup> of an ovary is a transplant of an ovary between two women.<sup>4</sup>

Birth after ovary transplants between monozygotic twin siblings was reported several times in the last decade.<sup>5</sup>

A birth after complete surgical removal of both ovaries and a subsequent ovary transplants between women with **different genotype**, was reported in the medical literature once, a century ago, in the beginning of the 20<sup>th</sup> century.<sup>6</sup> Nevertheless, most physicians doubted the veracity of that case.<sup>7</sup>

3. **Gestational surrogacy** is an arrangement in which a woman carries and delivers a child for another couple, where she has no genetic relationship to the embryo transferred to her uterus. Treatment follows routine IVF procedures for the commissioning mother, with the transfer of fresh or frozen (thawed) embryos to the surrogate host.

<sup>3</sup> Homograft: a tissue graft obtained from an organism of the same species as the recipient. *Collins English Dictionary – Complete and Unabridged*. HarperCollins Publishers, 2003.

<sup>4</sup> See: Randerson, James. Woman to give birth after first ovary transplant pregnancy. *The Guardian*, November 9, 2008. <http://www.guardian.co.uk/science/2008/nov/09/health>

<sup>5</sup> See: Silber S, Kagawa N, Kuwayama M, Gosden R, Duration of fertility after fresh and frozen ovary transplantation. *Fertil Steril*. (Nov 2010) 94(6):2191-6.

<sup>6</sup> Morris, RT, A Case of Heteroplastic Ovarian Grafting Followed by Pregnancy and the Birth of a Living Child, *Medical Record* 69:18 (May 5, 1906), 697. See also: Reichman, E, The Halakhic Chapter of Ovarian Transplantation, *Tradition*, 1998; 31(1):31-70.

<sup>7</sup> See: Reichman, E. *ibid*.

The indications for treatment include absent or defected uterus, recurrent miscarriage, repeated failure of IVF and medical conditions where pregnancy is contraindicated.

The first gestational surrogate pregnancy took place in 1985.<sup>8</sup>

## General considerations

### Familial relationships, legal vs. biological<sup>9</sup>

The view of the ancient Roman law is that familial relationships are legal relationships. Being a biological parent does not necessarily legally endow the rights usually associated with parenthood, and conversely, one may not necessarily be biologically related to a child and still be considered in the law as the parent of this child.

The view of the Jewish Law is that familial relationships are biological relationships. Every child has biological parents. Therefore an entity of “illegal child” does not exist. In general, being a biological parent does endow the rights usually associated with parenthood, and conversely, only biologically related to a child will be considered by the Jewish law as the legal parent of this child.

### Fundamental distinction between paternity and maternity

There is a fundamental distinction between biologic paternity and biologic maternity. While paternity is based on the genetic and only on the genetic function, maternity normally includes **two** functions:

- I. A **genetic** function – production of oocytes and ovulation.
- II. A **physiologic** function – nine months of pregnancy and parturition.

The technology of IVF with ovum donation or surrogacy, made it possible to break up and divide these two functions between two women. If the 1906 Morris report is reliable, such a break occurred a century ago.

The donation of an oocyte raises two *halachic* questions: the legal determination of motherhood, and the religious attitude towards the procedure. The discussion here will be limited to the first.

### Maternity determination – four alternatives

The fundamental question is who, according to *halacha*, is the mother when the two biological functions had been broken up and divided between two women. Four alternatives should be considered:

- The *halachic* mother is only the genetic mother.
- The *halachic* mother is only the physiological (surrogate) mother.
- No one is the legal mother.
- Both are legal mothers.

[The possibility of two legal mothers for one child need not be related only to the *halachic* rules of ovum donation, surrogacy or ovary transplant. There can be two genetic mothers where two fertilized oocytes from two different women were joined, and the resulting chimera combines *genetic* components of both genetic mothers.]

### Ovarian Transplantation<sup>10</sup>

In 1908, R. Binyamin Arye Weiss wrote a very interesting responsum regarding ovary transplantation.<sup>11</sup> He described the case as “a cluster of eggs” (“*shalal shel beitzim*”) removed from a fertile woman that had been grafted into the body of an infertile woman. Even though R. Weiss doubts if this procedure has really occurred, nevertheless he deals with the *halachic* status of such offspring. He

<sup>10</sup> See: Reichman, E. *ibid*; Ryzman, Zvi, Ovary transplantation (Heb.) *Yeshurun* 21. pp. 565-582 (New York, 2009); M. Halperin, “*Trumat Chomer Geneti biTipulay Poriyut*,” in the *2nd International Colloquium: Refuah, Etika v’Halacha* (Schlesinger Institute, Jerusalem, 1996), 321-327, (Heb.)

<sup>11</sup> *Vayelaket Yosef*, (Editor: Yosef Schwartz). Year 10, vol. 9, no. 77 (1908); *Responsa Even Yekara*, vol. III (1913), n. 29. See also Reichman, E. *ibid*.

<sup>8</sup> <http://www.information-on-surrogacy.com/history-of-surrogacy.html>

<sup>9</sup> See also: Steiner, Eva, The Tensions between Legal, Biological and Social Conceptions of Parenthood in English Law, *Report to the XVIIth International Congress of Comparative Law, July 2006, Electronic Journal of Comparative Law*, vol. 10.3 (December 2006), <http://www.ejcl.org>

concluded that the *halachic* mother of that offspring would be the organ recipient. R. Weiss brings proof for his position from the Babylonian Talmud, *Sotah* 43b: A branch of an *orlah* tree, which is less than three years old and its fruit are forbidden to use, was grafted onto an older tree, whose fruits are permitted. The Talmud concludes that according to the *halacha*, the branch becomes an integral part of the receiving tree and loses its original identity. R. Weiss concluded that in the Morris case too, the transplanted ovary would lose its identity and become an integral part of the recipient's body. The recipient would therefore be considered the sole *halachic* mother.

The genetic similarity between the Morris case of ovary transplant and the Talmudic case of *orlah* graft is amazing. In both cases, even though the fruits are genetically related to the donor, legally they are related to the recipient. The only difference is that the Morris case deals with human creatures while the Talmudic *orlah* case deals with plants.

R. Waldenberg<sup>12</sup> accepted R. Weiss proof that the *halachic* maternal identity is the physiologic one in all three cases of third party reproduction. On the other hand, R. Sh. Z. Auerbach<sup>13</sup> did not agree with the comparison of human to plants.

### Ovum donation and surrogacy

Among present day *halachists*, there is a long debate. Twenty years ago, most Jewish scholars tended to accept the physiologic-birth-mother as the only legal mother,<sup>14</sup> and only the minority did not reach a definite conclusion<sup>15</sup> or tended to regard the genetic mother as the only legal mother for all intents and purposes.<sup>16</sup>

Nevertheless, nowadays the *halachic* trend was changed, as most great *halachists* accept or tend to accept the **genetic** mother as the legal mother.<sup>17</sup>

Rabbi Avigdor Nebentzhal expressed himself as follows:

My opinion is that the egg donor is the only legal mother, and the surrogate is not more than incubator. Just imagine: if a dog's embryo will be born after being implanted into a Jewish female, should we circumcise him on the 8<sup>th</sup> day and pray: "... and his mother should rejoice her fruit of the womb"?!<sup>18</sup>

The late Rabbi Meir Bransdorfer<sup>19</sup> brings, as a proof, the known paragraph from *Niddah*, 31a, where it is clear that *halachic* maternity includes a genetic function:<sup>20</sup>

Our Rabbis taught: There are three partners in man, the Holy One, blessed be He, his father and his mother.

His father supplies the semen of the white substance out of which are formed the child's bones, sinews, nails, the brain in his head and the white in his eye;

**His mother supplies the semen of the red substance out of which is formed his skin, flesh, hair, (blood) and the black of his eye;**

And the Holy One, blessed be He, gives him the spirit and the breath, beauty of features, eyesight, the power of hearing and the ability to speak and to walk, understanding and discernment.

When his time to depart from the world approaches the Holy One, blessed be He, takes away his share and leaves the shares of his father and his mother with them.

<sup>12</sup> R. E.Y. Waldenberg, *Tzitz Eliezer*, v. 20, sect. 49.

<sup>13</sup> Lev, Z., *Emek Halacha* (Ed. Steinberg, A. Jerusalem, 1989) vol. II, pp. 163ff. (Heb.); Steinberg, A., *Encyclopedia of Jewish Medical Ethics* (Feldheim Pubs., Jerusalem – New York, 2003), Vol. II p. 579, see footnote 70.

<sup>14</sup> R. E.Y. Waldenberg, *Tzitz Eliezer*, *ibid.*; R. Y.Sh. Elyashiv, in *Nishmat Avraham* 4, (*Even Haezer*), 2, 2; R. Z.N. Goldberg, "Fetal Implant", *Techumim* 5 (1984), pp. 248-259; 269-274 (Heb.); R. A. Kilav, "Test-tube Babies", *ibid.* pp. 260-267 (Heb.); R. Y.M. Ben-Meir, "In-Vitro Fertilization: the Legal Relationships of the Embryo and the Surrogate Mother", *Assia* 41 (1986), pp. 25-40 (Heb.).

<sup>15</sup> R. Sh.Z. Auerbach, in *Nishmat Avraham*, *ibid.*

<sup>16</sup> R. S. Goren, *Hatsofe*, Adar A 14, 1984.

<sup>17</sup> R. M. Bransdorfer. *Yeshurun ibid.* pp. 557-564; R O. Yosef, see *Assia* 87-88 p. 101 ; R. A. Nebenzahl, *Yeshurun ibid.* p. 585; R. M.Sh. Amar, *Assia ibid.* p. 100-102; and even R. Y.Sh. Elyashiv, tend to accept the **genetic** mother as the legal mother. See: R. A. Serman, *Yeshurun ibid.* pp. 535-545; Halperin M. *Medicine, reality and halachah*, Jerusalem 2011, pp. 23, 28; 289-295 (Heb.).

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> This conception may be concluded also from R. Yaakov Baal ha'turim, on Genesis 46:10 (extended edition).

## Concluding remarks

- I. The possibility for two women to share the mother's functions, caused a real controversy among present *halachists*, as discussed above.
- II. The practical advice therefore is to follow the ruling of the late R. Sh. Z. Auerbach and of R. Y. Sh. Elyashiv. They both agreed that there is no certain proof in the matter, so we must act strictly as in cases of doubt. The offspring therefore is prohibited from marrying close relatives of either woman.
- III. If one of these 'mothers' is a gentile, a procedure of child conversion has to be followed because of the doubt.<sup>21</sup>

## *International Responsa Project*

### *Treating an end-stage liver patient with possibly life shortening procedure*

Dear Team at Schlesinger Institute

Just wanted your views and possibly to point us towards some literature about the following case:

Lady is 70s end stage idiopathic cirrhosis of liver. Patient had pedal oedema and pulmonary oedema from poor liver function.

What is the consensus about giving such a patient sub cut fluids in the end stage of life.

I would think that it may actually shorten life as the intra vascular oncotic pressure is so low that the fluid will be deposited in the extra vascular space making breathing and moving more difficult.

Please try give us some sources to look at

Thank you

### *Answer:*

In principle, one should not administer a treatment that endangers the patient. This is true for any patient, and is true also for a patient at end stage. On the other hand, it is prohibited to stop fluids because of "ideological" reasons. I.e., when there is no danger to the patient from the feeding or hydration, it is prohibited to stop this because of low-quality life.

Addition of Rav Halperin: On the practical level, each case needs to be evaluated individually. In some cases, indeed, fluids should not be given in large quantities, on account of danger to the patient. There is still an obligation to give fluids in a smaller quantity, which will prevent dehydration, but will not endanger the patient. The details in each case are complicated and require a formal medical recommendation from an expert who is treating and familiar with the patient.

See entry "Terminally III" in Encyclopedia of Jewish Medical Ethics, vol. III, pp. 1046-1088.

Answered by: prof. A. Steinberg at 20/6/2014

<sup>21</sup> Nevertheless, only one *berachah* – "*Al ha'milah*" – has to be said before the circumcision act. The *berachah* "*Le'hachniso*" should be omitted.