

Surrogate Motherhood

RABBI DAVID H. LINCOLN

This paper was adopted unanimously in 1984.

שאלה

The following questions about surrogate motherhood have arisen: The wife has had a hysterectomy; the husband's sperm is fertile; and a gentile, divorced woman has agreed to be artificially inseminated with this husband's sperm. Should the procedure prove successful, the surrogate mother would hand over the child at birth. Is this arrangement permissible? Does it matter whether the surrogate mother is gentile or Jewish, married or single?

תשובה

Although we should mainly confine ourselves to answering the questions as posed, there are certain ancillary matters which need to be mentioned, matters such as: Is the father the father? Has he fulfilled the mitzvah of פרייה ורבייה ("Be fruitful and multiply)? What is the status of the child? If a boy, would he need פדיון הבן (redemption of the first born)?¹

We need to note as well the uncertainties in civil law regarding surrogate mothers and their offspring. A recent paper by Carolea Goldfarb of New York Law School outlines some of our problems.²

Some Halakhic Responses

In 1970, the office of the Chief Rabbi in London raised objections to AID artificial insemination when the donor is not the husband re-implanting a fertilized egg into a host mother.³ This idea of a host mother is also discussed by Rabbi J. David Bleich.⁴ Attention should also be paid to Rabbi Seymour Seigel's personal statement on the Brown baby which ends with, "We hail the brilliant achievement of science which has made possible the fulfillment of the profound desire for a child . . . We should continue to use our God-given intelligence to wrest

The Committee on Jewish Law and Standards of the Rabbinical Assembly provides guidance in matters of halakhah for the Conservative movement. The individual rabbi, however, is the authority for the interpretation and application of all matters of halakhah.

from nature her secrets. We can improve man's lot. We must be vigilant so that our achievements do not become our tribulations. We have reason to believe that an informed public, an intelligent government, and a dedicated scientific community will achieve even more wonders in the future.”

To tackle the dilemma more directly however, it would be true to say that much has been written in rabbinic responsa on both AID (artificial insemination donor) and AIH (artificial insemination husband). Rabbi Isaac Klein in *A Guide to Jewish Religious Practice* has a short note on pages 417-418. American Reform Responsa has two responsa by Rabbi Solomon Freehof and one by the Law Committee.⁵ Rabbi Morris Shapiro's aforementioned paper quotes many authorities. Rabbi Moshe Feinstein's responsa have achieved world-wide acclaim, and even notoriety in some quarters.⁶

Status of the Child

All of these writings yield the same conclusion: the child born of a non-Jewish mother is not Jewish. Of course, it is possible to convert the child, but do we really want to encourage a Jewish father to have a non-Jewish child so that we can convert it? What impact would this have on Jews who are married to gentiles for whom we do not make it so easy? Should the couple not, rather, look for a baby to adopt?

Status of the Surrogate Mother

Once we have established the permissibility, even if not desirability, of surrogate motherhood, we need to discuss who would make an acceptable surrogate mother. According to Rabbi Moshe Feinstein, the marital status of the mother is non-consequential.⁷

Rabbi Feinstein argues that artificial insemination is not considered **ביאה** (sexual intercourse) and is permissible. However, there are authorities, including the Satmar Rebbe, who state that it is forbidden for the recipient to be a Jewish married woman, for offspring from such a pregnancy would be **מזורים** (illegitimate). For Rabbi Feinstein, however, adultery and illegitimacy apply only in cases where there is lust, broken faith and physical intercourse.

A problem of which Rabbi Feinstein is constantly aware, and which should be noted in cases of artificial insemination, is the possibility of incest. Rabbi Aaron Soloveitchik of the Brisk Yeshivah in Chicago relates a case where he was invited to officiate at a wedding on the West Coast. One of the bridal couple had been conceived through artificial

insemination. A doctor had kept track and found that they were brother and sister! The Talmud warns of this:

לא ישא אדם אשה במדינה זו וילך וישא אשה במדינה אחרת, שמא יזווגו זה לזה ונמצא אח נושא את אחותו.⁸

One should not marry a woman in this country and go marry a woman in another country, lest [the child of] one have relations with [the child of] the other, and only then discover that he is marrying his sister.

That is why it is better to know to whom the sperm is given, and be certain that some record is kept.

There is a problem that I did not see mentioned in other authorities but was raised by Rabbi Aaron Soloveitchik based on the talmudic discussion in Yevamot 76a where it says, 'ונשים המסוללות זו בזו וכו',⁹

All this is described as *מעשה מצרים* (immorality of Egypt). I would, with respect, tend to believe that the *מעשה מצרים* is not the transfer of semen, but rather the lesbian behavior, although the Maggid Mishneh could be interpreted as Rabbi Soloveitchik suggests.

Nevertheless, might there not be an element of *מעשה מצרים*, something unsavory, about the whole process? Is it desirable for Jews to father gentiles, even if the children's birth may be quickly followed by conversion? If the surrogate mother is unmarried, are we not degrading her, however noble her intentions? Can we really allow a single woman to become pregnant? If married, is there not something distasteful in carrying another man's baby even if the woman has not committed adultery?

CONCLUSION

In spite of these reservations, however, artificial insemination is permitted in Jewish law and we recognize that. The mitzvah of having children is so great that we should not deny couples this opportunity. If, however, the surrogate mother is not Jewish, the child requires conversion.

Colleagues who recommend such procedures and who counsel couples in such a predicament must be aware, however, of both psychological and legal difficulties which may arise. In the latter especially, each state and country has different laws. The legal ramifications have not as yet been fully discussed or formulated by the courts and legislatures. Great caution must therefore be exercised.

NOTES

1. See, for example, Rabbi Morris Shapiro, "Artificial Insemination in Jewish Law" (Lugo 1978).
2. Carolea Goldfarb, *Two Mothers, One Baby, No Law* (11 *Human Rights* 26:7 Summer 1983).
3. *Jewish Medical Ethics*, Rabbi Immanuel Jakobovits, pp. 264-6.
4. *Contemporary Halakhic Problems*, volume I, pp. 106-109, and volume II, pp. 91-93.
5. #159 Surrogate Mother, p. 505-7.
6. *Iggerot Moshe Even Haezer* Part I: 10, 71; Part 2:11.
7. A more complicated case would be if the fertilized ovum of a Jewish woman would be transferred to a non-Jew. The status of the child would depend on whether halakhah defines maternal identity as established by conception, by parturition or perhaps by genotype. Rabbi Moshe Hershler in "א" הלכה ורפואה 31b (Jerusalem 5740) quotes: יבמות צ"ז which discusses a pregnant woman who became a convert to Judaism and then gave birth to twins. Since conception happened before her conversion, there is no halakhic paternity, and hence no levirate obligations devolve upon the twins since they are not deemed to be paternal siblings, etc. (There are, however, restrictions as they are "related.") This all would need a separate paper, and we are not asked that here.
8. B. *Yevamot* 37b.
9. See also: רמב"ם
משנה תורה הכות איסורי ביאה פרק כ"א הלכה ח:
עיינן מגיד משנה: ופי' ריב"ן ורש"י ז"ל מסוללות שדיין שכבת זרע להדדי".