

## Surrogate Motherhood in Judaism

In this week's Torah portion, *Lech Lecha*, we learn that Abraham and Sarah are unable to have children. So Sarah asks Abraham to sleep with her maid, Hagar:

I beg you, go into my maid [Hagar]. Perhaps I can obtain children through her. And Abram listened to the voice of Sarai.  
[Genesis 16:2]

So Hagar gets pregnant and quickly becomes very contemptuous and impertinent towards her mistress, Sarah. So a very angry Sarah runs to her husband Abraham and says to him:

This is all YOUR fault! [Genesis 16:5]

Exactly why this was Abraham's fault is left as an exercise for the congregation. What I would like to focus on today is the notion of surrogate motherhood, which is the role Hagar was asked to play. Modern advances in medicine have given us new ways to help infertile couples.

Abraham had to physically sleep with the maid to use her as a surrogate mother. Today, the sperm of the father can be used to artificially inseminate the surrogate mother, so she doesn't even have to meet him, which reduces the possibility of unwanted entanglements later. (After all, the Torah tells us that after Sarah died, Abraham married a woman named Keturah and had six sons by her, but the Midrash says that Keturah was none other than... Hagar herself! So he *had* formed an attachment to her and went back to her!) [Ber. R. 61:4]

There is now in-vitro fertilization, where the wife's egg and her husband's sperm are used in the laboratory to create an embryo, which is then implanted in the womb of the surrogate mother. The parents are then the biological parents of the child. The surrogate mother is only the carrier. If the wife cannot produce eggs, the egg of another woman can be used, perhaps the wife's sister to ensure a genetic link. The embryo might also have been produced by another

couple, unrelated to the one trying to have children. Sperm can also be collected and stored for later use.

There are many ethical and legal issues involved. Should the surrogate mother be paid a fee in addition to being reimbursed for her expenses? Is this an acceptable profession, or is she being exploited? Is it just a job, or a dark hybrid of prostitution and slavery? Should we allow the rich to hire the poor to have their children, so they don't have to endure pregnancies? What if the surrogate mother wants to abort the fetus? What if she refuses to abort a defective fetus? What if she refuses to follow the diet and behavior requested by the parents? What if she decides to keep the child? Who is the "real" mother? Who is responsible if she develops complications in pregnancy or even dies in childbirth? What if the parents refuse to take the child? Does the child have a right to know the identity of all the people involved in his conception and delivery? What does the law say about all this?

Both Jewish and civil law are in the process of being formulated on the subject. Let's discuss the matter from a Jewish point of view.

In Jewish law, the father of the child is the man who gives sperm. But whether the mother is the producer of the egg or the one who gives birth is still being debated in halachic circles. So far, the majority of rabbinical authorities rules that the one giving birth is the mother. The question is important, not least to determine Jewishness. If the mother is the woman who gives birth, then even if the egg donor is not Jewish, but the woman who gives birth is, the child is born Jewish. The fact that his genetic mother is not Jewish does not matter. Even if the egg comes from the wife, the surrogate mother would be considered the legal mother.

What are the arguments for the legal mother being the birth mother? The most direct proof is based on a midrash quoted by Targum Yonatan, which dates from Talmudic times. It says that Dinah, Jacob's daughter, was conceived in Rachel's womb, and Joseph in Leah's womb, but that God switched the embryos so Rachel could give birth to a son, Joseph. [Targum Yonatan on Genesis 30:21]

What is the basis for this midrash? In the Torah, all six times Leah has a son, it says: “Leah *conceived* and bore a son”. But when it comes to Dinah, it just says: “Leah bore a daughter”:

And Leah conceived, and bore a son, and called [him] Reuben...  
And she conceived again, and bore a son... and called [him] Simeon.  
And she conceived again, and bore a son; and... called [him] Levi.  
And she conceived again, and bore a son; and... called [him] Judah.  
And... Leah... conceived, and bore Jacob a fifth son..., Issachar.  
And Leah conceived again, and bore Jacob a sixth son... Zebulun.  
And afterwards [Leah] bore a daughter, and called her... Dinah.  
[Gen. 29:32-35; 30:17-21]

So Leah did not “conceive” Dinah! Yet, the Torah clearly refers to Leah as Dinah's mother [Gen. 34:1]. So we learn that she who gives birth is the mother, not she who produced the egg. But this is only a midrash, a homiletic story told by the rabbis to illustrate their teachings. A midrash is not supposed to be the basis of Jewish law.

But other ancient sources support this view. The Talmud, definitely concerned primarily with law and not parable, says:

Rava [said]: If a pregnant gentile woman converts [to Judaism], her child does not need to convert [to be considered Jewish].  
[Yevamot 78a, Bechorot 46a]

Some interpret this to imply that she who gives birth is the legal mother. But it's not so simple! The Ramban (Nachmanides) says that the child is Jewish only because he went to the mikvah along with the mother, in her womb, not because she gave birth to him! He is a Jew by birth, but a pre-birth convert. Others, including the Vilna Gaon, disagree. [Beurei Ha'Gra]

The Talmud also says:

R. Acha said: When [Esther's] mother became pregnant with her, her father died; when she was born, her mother died. [Meg. 13a]

Some interpret this as saying: Esther's mother did not become her mother until Esther was born.

Also, in Judaism, the first-born is called “*peter rehem*” – “the one who opens the womb”. Thus, “opening the womb” for birth is significant to determine status – at least first-born status.

More generally, the Midrash says that:

R. Levi said in the name of Hama b. Hanina: If someone begins to perform a commandment and does not complete it, and someone else comes and completes it, the one who has completed it gets the credit. [Deut. R. 8:4]

Here, the one who completes the task is the birth mother, so she is the mother. But again, it's a midrash. Also, women are not commanded to have children. Only men are. [Kidd. 35a, Gen. R. 8:12] So it's not clear this teaching solves the problem.

One can also argue that, from a practical standpoint, you always know who the birth mother is, but the identity of the conception mother may be uncertain.

But the Talmud can also be used to say that conception, not birth, determines the mother. It asks: If one takes a fetus from the womb of one animal, and places it in the womb of another animal, who is the mother? (Apparently they could do that with animals back then.) They discussed this because there are special laws for first-born animals. The Sages' answer is "*Teku*", which is equivalent to "We do not know". [Chullin 70a]. But the Rambam (Maimonides) rules that the first animal is the mother if the transfer occurs after forty days from conception, implying that conception, not birth, defines the mother, at least after the first forty days. [Maimonides, Mishneh Torah, Sefer Korbanot, Hilchot Bechorot 4:18]

As far as ethics is concerned, Judaism allows surrogate motherhood in principle, but on a case-by-case basis. The mitzvah of assisting people in need – in this case a childless couple – and the mitzvah for the husband to "be fruitful and multiply", must loom large in the decision. The Israeli Rabbinate allows it, provided the process is overseen by a committee, which must include a rabbi; provided the surrogate mother is unmarried, to avoid possible charges of adultery and bastardy; provided there is demonstrated need; provided the child is formally adopted, to avoid legal challenges later; provided records are kept to ensure the child does not marry a prohibited relative later in life; and provided all involved are Israeli citizens, to prevent abuse of women from Third-World countries.

One issue of concern is certifying paternity. If a baby is conceived naturally, the husband is automatically assumed to be the father. But

for a test-tube baby, this assumption cannot be made. Therefore, some rabbis require a supervisor to the process, to make sure the sperm comes from the father, a requirement not unlike kashrut supervision. Laboratory staff cannot fill that role because of possible conflicts of interest. This may create issues of modesty. Also, some rabbis have concerns about masturbation, which they regard as wasting seed, even though in this case the seed is definitely not wasted.

The discussions continue. In the absence of a Sanhedrin to decide Jewish law, we'll have to wait until enough halachic heavyweights agree on the details. But Judaism has always adapted to changing times and emerging technologies, and continued to thrive.

Shabbat shalom.