**Introduction**

Thank G-d, we live in an age where women without a womb can have children using a surrogate mother and those with no ovulation can receive egg donation. Clearly, it is impossible to say that in both cases the one raising the children is the natural mother.

Contemporary *poskim* are split over this question and there are major halachic ramifications. If only one of the two potential mothers is Jewish, the child may require conversion. Worse still, if one of them is related to the father or married to another man, the child may be a *mamzer* with all that this entails.[[1]](#footnote-2) Here I will try to analyse some of the proofs that have been brought for each side.

**Foetal converts**

Chazal did not have to deal with either the question of surrogacy or egg donation. In order to attempt to prove anything from their words, we need to look for a case that is similar. Some believe that this case is when a non-Jewish woman conceives and converts to Judaism before the baby is born. Here the egg came from a non-Jew, but the woman who gave birth (despite being the same woman physically) is Jewish.

This case is discussed explicitly by the *gemara*. A *b’raisa* says that twin brothers born to such a mother are not considered brothers concerning *yibum* and *chalitza*, but each is liable to *kareis* if he marries the wife of the other (after death or divorce).[[2]](#footnote-3) Rashi explains that *yibum* is dependent on paternal brotherhood and these children are the product of non-Jewish seed.[[3]](#footnote-4) However, due to the common birth mother they are considered brothers when it comes to forbidden relations.

Many use the above as the main halachic proof that the one who gives birth is considered to be the halachic mother and not the one who provides the egg.[[4]](#footnote-5) However, upon further examination, this proof is far from straightforward. In general, the status of a convert is a complicated issue. To what extent we say that a convert is ‘like a new-born child’ is much debated in the *gemara* and by later authorities.

With a pregnant woman who converts together with her foetus, the question is even more complex. The foetus has not had a literal birth yet, so it clearly cannot be ‘like a new-born child’ when it converts. The most it can be described as is akin to a newly conceived foetus.

Elsewhere in the *gemara*, it is explicit that the nature of a foetal convert is dependent on the general question of how we view foetuses. If a foetus is considered ‘a limb of its mother,’ the mother’s conversion covers the foetus as well. If the foetus is halachically an independent entity, it requires its own immersion. However, this is achieved in the *mikveh* together with the mother.[[5]](#footnote-6)

Here we see that at least according to the view that the foetus is independent, having a Jewish birth mother is not sufficient to make the child Jewish. Only the foetus’s own immersion converts it into a Jew. Furthermore, some *rishonim* rule that a boy born like this requires circumcision to complete the conversion or that the *gemara* is talking about females alone.[[6]](#footnote-7)

Due to the above *gemara*, some of those who maintain that the foetus carrier is the real mother base this ruling on the majority view that the halacha is in accordance with the view that a foetus is considered a limb of the mother.[[7]](#footnote-8) However, I believe that even according to this view there is no proof.[[8]](#footnote-9)

I prefer to explain that the case of foetal conversion is unique and no conclusion about modern day egg donation or surrogacy can be drawn from it. Whether a foetus is a limb of its mother or not, a child’s maternal relatives are dependent on birth and are in accordance with the state of the ‘mother’ then, whoever the ‘mother’ may be. However, this does not necessarily imply that the woman who carried the child is considered the mother. Even if motherhood is dependent on the egg, in this case the egg ‘went through conversion’ prior to birth and so the child has maternal relatives.[[9]](#footnote-10)

I also believe that there is support for the rebuttal of this proof from some *rishonim*. The halachic status of one who converted himself is different to that of the child of a convert. For example, while a *kohen* may not marry a convert, he may marry the daughter of a female convert.[[10]](#footnote-11) If the foetus being a limb of the mother automatically implied that motherhood was dependent on birth alone, presumably we could conclude that when the mother converts the child would have the status of the child of a convert.[[11]](#footnote-12) However, Tosfos state explicitly that he is a convert in his own right.[[12]](#footnote-13) This is also clear from the words of the Rambam.[[13]](#footnote-14)

**How did Chazal understand motherhood?**

Other attempts to find cases similar to egg donation or surrogacy in the words of Chazal are tenuous at best. Some attempt to bring a proof from an obscure *midrash* about the birth of Dina, but it is clear that ‘proofs’ like this cannot hold water.[[14]](#footnote-15) An alternative avenue to solve this conundrum may be to try to prove which part of motherhood Chazal saw as being critical.

A *b’raisa* tells us that there are three partners in (the formation of) a man; Hashem, the father and the mother. The father sows the ‘white,’ from which the bones, sinews, nails, brain and whites of the eyes are formed. The mother sows the ‘red,’ from which the skin, flesh and hair are formed. Hashem places the spirit, soul, facial features, sight, hearing, speech, ability to walk, understanding and intelligence.[[15]](#footnote-16)

R’ Shlomo Goren zt”l saw this as evidence that Chazal defined motherhood by the female ‘seed’ corresponding to the male seed, which we now know is the egg.[[16]](#footnote-17) The problem with this is that the egg has no connection to the ‘red’ parts more than the sperm does. The ‘red’ referred to by Chazal presumably refers either to menstrual blood (in which case, the statement is scientifically inaccurate) or to the blood of the mother through which the foetus is sustained (in which case, if anything, we have a proof that the one who holds the baby is the mother).

If we were to take all the expressions of Chazal literally, we could bring a counterproof of the same nature. R’ Tarfon says that if a *mamzer* marries a non-Jewish maidservant, the child is purified from *mamzerus*. The *gemara* concludes that this is because “offspring in the womb of a maidservant is similar to offspring in the womb of an animal.”[[17]](#footnote-18) The reference to the womb, as opposed to the egg, seemingly implies that the important factor is the one carrying the child.

It is clear to me that this question cannot be decided by finding proofs from Chazal. Chazal did not have this question to answer, as in their time the provider of the female seed was inseparable from the carrier. That being the case, inferences from their language seem irrelevant here.

**Reductio ad absurdum**

R’ Avigdor Neventzahl is quoted as claiming that we can answer the question decisively based on logic alone. He argues that a pregnant woman acts merely as an incubator and theoretically could also support an animal foetus.[[18]](#footnote-19) In this case, clearly the animal would not have the same status as a human being! The only option remaining is that the real mother must be the one who provides the egg.[[19]](#footnote-20)

R’ Tzvi Reisman argues further that eventually the whole foetal process will be able to take place in an artificial womb, with no birth mother![[20]](#footnote-21) Assuming that there cannot be a child without an halachic mother, this proves that the mother must be the egg provider.

The problem is that the same assumption also can be used to disprove the possibility of the real mother being the egg provider. Scientists are already working on cloning humans from cells in the ear, something that has already been done successfully with animals. Here the baby is not produced from an egg at all, meaning that if there is a mother it must be the one who gives birth. It seems that the correct approach is to accept the possibility of motherless children.[[21]](#footnote-22)

**When there is no proof**

All we have left to answer questions like this is instinct. My instinct says that the mother can only be the genetic mother, who the child will often resemble physically. Others will argue that the role of the woman who carries a child for nine months is far superior to that of the one who merely had minor surgery to produce the child.

Ideally, an issue like this would be brought to the Sanhedrin and all would have to accept their ruling. Until the Sanhedrin is re-established, the issue will certainly remain unresolved and we have to deal with this in the best way possible. To help determine what this way is, we can draw on Chazal.

If we are looking for a dispute over an equally severe issue as a precedent, one existed in the times of the Mishna. Beis Shamai and Beis Hillel disagreed over the complicated case of ‘*Tzaras* *Erva’*, an issue which requires a brief introduction.

If a married man dies leaving a brother but no children, his wife and brother must either marry (*yibum*), or perform *chalitza*. However, if the wife is one of the close relatives forbidden to her brother-in-law (e.g. if she is also his daughter as would be the case if the deceased originally married his niece), no *chalitza* is required.

The dispute occurred in a case where the deceased brother had more than one wife, and one of the wives is forbidden to her brother-in-law. Beis Shamai required one of the other wives to perform either *yibum* or *chalitza*, whereas Beis Hillel maintained that the exemption of one wife is enough to exempt all the wives.

The Mishna tells us that despite this dispute, Beis Shamai and Beis Hillel did not refrain from intermarrying.[[22]](#footnote-23) The *gemara* explains that although the performance of *yibum* created *mamzerim* according to Beis Hillel,[[23]](#footnote-24) Beis Shamai informed Beis Hillel of such cases so that they would not marry those forbidden to them according to their view. Beis Hillel would also inform Beis Shamai about any cases of ‘*Tzaras* *Erva*’ so that Beis Shamai would not marry women who required *chalitza* according to their view.[[24]](#footnote-25)

In our case, if it is necessary to use a married or non-Jewish surrogate mother, it is generally well known and therefore relatively easy for those who believe that the surrogate is the real mother to act accordingly. However, the use of egg donation is not usually publicised.

A married donor should certainly not be used secretly as it could create an irreversible problem of *mamzerus*. I imagine even those who believe that the birth mother is the real one would not want their children to be viewed as mamzerim by others, so this should rule out any egg donation (or surrogacy) by a married woman.

The problem caused by non-Jewish egg donation is a smaller one, as the child can go through conversion relatively easily.[[25]](#footnote-26) However, here also parents may not like the idea of having a child who is a convert.[[26]](#footnote-27) If they believe that the birth mother is the real one, they may choose not to convert the child. If they make this decision, it is incumbent on them to publicise the fact that their child is not Jewish according to those who disagree. It would be more prudent to convert him just to be sure.

1. See Minchas Shlomo 3:98, where R’ Shlomo Zalman Orbach makes a compelling argument that *mamzerus* can exist even when no forbidden sexual relations have occurred. [↑](#footnote-ref-2)
2. Yevamos 97b [↑](#footnote-ref-3)
3. Even if the father was always Jewish, as the mother was not, this seed loses its ‘Jewishness’ at the time of conception. Given that the seed has lost its ‘Jewishness’ and the fact that non-Jews who convert are not considered to be related to one another, the paternal brotherhood ceases to exist. [↑](#footnote-ref-4)
4. See, for example, R’ Zalman Nechemia Goldberg in T’chumin vol. 5, from page 248. [↑](#footnote-ref-5)
5. Yevamos 78a-b [↑](#footnote-ref-6)
6. See Rashba Yevamos 47b, Nimukei Yosef ibid. 16a. However, the Mishna in B’choros 46a says explicitly that in the case of a firstborn son, *pidyon haben* is required. This seems to be an absolute refutation of these views as *pidyon haben* is only required for a baby that is born Jewish. [↑](#footnote-ref-7)
7. See Siach Nachum (R’ Nachum Eliezer Rabinovitz shlita) siman 101. According to this, the author of the *b’raisa* on 97b must also hold that a foetus is a limb of its mother. [↑](#footnote-ref-8)
8. Presumably in the cases of surrogacy and egg donation, the foetus is considered a limb of the woman holding it whether or not she is the halachic mother. In the same way, the father will certainly not be obligated in the mitzvah of *pidyon haben* unless this is the first child to which the surrogate mother has given birth. However, presumably this mitzvah could only apply if the child is also the firstborn of the egg provider (if she is considered the real mother). See Bechoros 47b. [↑](#footnote-ref-9)
9. This is not a difficult explanation, as Chazal did not have to deal with cases where the genetic mother was distinct from the birth mother. [↑](#footnote-ref-10)
10. See Kiddushin 77a, Shulchan Aruch Even Ha’ezer 7:21 [↑](#footnote-ref-11)
11. If anything prior to birth is insignificant, there is no reason to distinguish between this child and any other child of a convert. [↑](#footnote-ref-12)
12. Kesubos 11a s.v. matbilin [↑](#footnote-ref-13)
13. As he quotes the law of a foetal convert together with the case of a child who converts (Isurei Biah 13:7). The implication is that the foetal convert could also object and undo his conversion prior to coming of age, although there is some debate over this issue. See Techumin, vol. 20 from page 251. [↑](#footnote-ref-14)
14. The *gemara* in Berachos 60a says that Leah davened that her seventh child should be a girl, in order to allow Rachel to have two of the tribes. The foetus immediately changed into a female. The Targum Yonasan (Bereishis 30:21) says a similar but different idea. He says that Yosef was in Leah’s womb and was swapped for Dinah who was at the time in Rachel’s womb. [↑](#footnote-ref-15)
15. Niddah 31a [↑](#footnote-ref-16)
16. Toras Har’fuah, pages 176-7 [↑](#footnote-ref-17)
17. Kiddushin 69a [↑](#footnote-ref-18)
18. I went to some effort trying to find out whether this is physically possible, but to no avail. I doubt it has been tried. [↑](#footnote-ref-19)
19. Quoted in Kuntres Ratz Katzvi (Reisman) [↑](#footnote-ref-20)
20. Incubators can already hold foetuses at the beginning and end of development. R’ Reisman has extrapolated, although I am unaware of any proof as to whether or not this is possible. [↑](#footnote-ref-21)
21. We already know that halachically there are fatherless children, the prime example being when only one of the parents is Jewish. This will also almost certainly be the case when it comes to cloning. [↑](#footnote-ref-22)
22. Yevamos 14a [↑](#footnote-ref-23)
23. As when there is no mitzvah of *yibum*, the dead brother’s wife is a forbidden relative. [↑](#footnote-ref-24)
24. Yevamos 14b [↑](#footnote-ref-25)
25. The parents or beis din can convert their child without any need for him to accept, as per Kesubos 11a. Although he can reject this conversion when he reaches adulthood, this will be rare provided that he has any kind of relationship with his parents and a good Jewish education. [↑](#footnote-ref-26)
26. There are also halachic ramifications to having the status of a convert as a female convert and daughters of two converts cannot marry Kohanim. [↑](#footnote-ref-27)