



## Donating a Uterus for Transplant

Due to tremendous breakthroughs in reproductive endocrinology and fertility treatment in the last several decades, many new diagnostic tools and therapeutic options are now available to make pregnancy and birth possible for couples who would previously have remained childless. However, for women with uterine factor infertility<sup>1</sup>, the only real chance of motherhood has been through either adoption or a gestational host<sup>2</sup>.

Today, there may be another possibility: uterine transplantation. Though this is not a new surgery – the first uterine transplant took place almost a hundred years ago – until recently, there have not been any successful pregnancies. During the last century many attempts were made, some of which resulted in miscarriages, others in emergency hysterectomy due to infections, and even death due to infections or rejection. However, in the last decade, women have successfully conceived and carried pregnancies to delivery after uterine transplants. The first report of live birth following human uterus transplantation was published in 2014, and, while not yet widely performed, an increasing number of deliveries are occurring each year.

Before discussing the Halachic permissibility of uterine transplants, we must establish two principles:

1. Even if uterine transplants become widespread, eligible women will not be obligated to undergo them, even if they have no other way of procreating. This is because the process requires at least three surgeries (transplant, implantation of the fertilized embryos, and removal of the transplanted uterus after one or two pregnancies to avoid complications associated with long-term use of immunosuppressant medications), and other possible complications. Since women are not obligated in *Pru u'Revu*, they certainly have the right to refrain from the complicated and stressful process and its attendant risks.
2. A child born to a woman who had a uterine transplant is certainly considered her child. Though there is a discussion among the Poskim as to the *Yichus* of

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<sup>1</sup> [Editor's note: This can be either congenital absence of the uterus, a condition known as Mayer-Rokitansky-Küster-Hauser (MRKH) syndrome, or acquired uterine factor infertility due to hysterectomy or scar tissue, fibroids, radiation damage, or other injuries to the uterus that prevent pregnancy.]

<sup>2</sup> [Editor's note: Colloquially referred to as surrogate pregnancy, although gestational host is the preferred term.]

a child born to a gestational carrier that hinges upon whether genetic material defines motherhood or gestation, in the case of uterine transplant, the recipient provides both the genetic material and the gestational environment. That the uterus came from another woman is irrelevant since the second woman carried and nourished the fetus throughout the pregnancy. Even from a scientific standpoint, the uterus is no more than an incubator – a protective environment where fetal development occurs. Therefore, there is no reason to consider the uterine donor to be the mother.

Moreover, the consensus of contemporary Poskim is that a transplanted organ is fully accepted by the body of the recipient, so it is *Bateil* and becomes an inseparable part of his body. If so, there is no basis for any connection between a child born from a transplanted uterus and the donor.

Granted, there is a dispute among the Poskim as to the *Yichus* of a child born to a woman who underwent an ovarian transplant. However, this bears little resemblance to a uterine transplant. The ovaries contain eggs with the donor's DNA, and those obviously do not assume the "identity" of the transplant recipient. This is not the case with a uterine transplant, as stated above. Moreover, even regarding ovarian transplants, most Poskim hold that the recipient is considered the mother.<sup>3</sup>

### ***Sirus***

A more complex issue is that of *Sirus* – sterilization, in this case of the uterine donor. Below is a summary of the basic principles of the *Isur* of *Sirus*, with emphasis on the *Isur* as it applies to a woman.

The Gemara in Shabbos (110b) discusses drinking "*Kos Shel Ikrin*" (that can sometimes lead to *Sirus*) as a cure for different ailments. The Gemara implies that, according to the *Chachamim*, a woman may undergo *Sirus* since she has no obligation of *Pru u'Revu*.<sup>4</sup> Interestingly, the *Rambam* rules that a person who performs *Sirus* on a woman is "exempt", which implies that it is *Asur mi'd'Rabbanan* (*Hilchos Isurei Biah* 16:11). This is also the conclusion of the *Shulchan Aruch* (*E.H.* 5:11):

*It is forbidden to cause the loss of the procreative organs, whether those of a person, animal, wild animal, or bird... anybody who performs Sirus receives lashes*

<sup>3</sup> There is a great deal of discussion on this subject, however, citing sources is beyond the scope of this essay. See *Tzitz Eliezer* 7:48 (*Orchos Mishpatim* 5), which lists the Poskim that discuss this.

<sup>4</sup> This essay will not examine the connection between the *Isur* of *Sirus* and the obligation of *Pru u'Revu*, though it is necessary to understand the *Sugya* and the *Rishonim* in Shabbos.

*Min haTorah in every case...[except for] one who performs Sirus of a female, whether human or [any] other species, who is exempt, though it is forbidden.*

Nevertheless, in the following *Se'if* he rules:

*Someone who gives a person or any living being Kos Shel Ikrin to drink in order to cause Sirus – [although] doing so is forbidden, he does not receive lashes for it. But a woman is permitted to drink the Ikrin so that she will become infertile and will not [be able to] give birth.*

This *Se'if* seems to reflect the Gemara in Shabbos more closely. However, it is difficult to understand the distinction between *Se'if* 11 which rules that it is *Asur mi'd'Rabbanan* to perform *Sirus* of a female and *Se'if* 12 which permits a female to drink a *Kos Shel Ikrin*.

The *Beis Shmuel* (*ibid.* 14) and *Taz* (*ibid.* 7) answer that there is a difference between active *Sirus* which is forbidden even for women (as the *Shulchan Aruch* rules in *Se'if* 11), and *Sirus* that does not involve a direct act (e.g., drinking a *Kos Shel Ikrin*) which is permissible for a woman (as in *Se'if* 12). The *Bach* answers that *Se'if* 12 refers to *Sirus* performed for the purposes of *Refua*, such as to prevent a woman from suffering painful labor, which is permissible, but *Se'if* 11 refers to *Sirus* performed for other reasons which is forbidden.

As an interesting aside, many challenge the *Beis Shmuel's* distinction between “active *Sirus*” and “*Sirus* that does not involve an act”, arguing that there is no direct act of *Sirus* possible for a woman. One cannot therefore distinguish between *Se'if* 11 and 12 on that basis. However, the *Taz* and *Chasam Sofer* (*Siman* 20) and other *Acharonim* agree with the *Beis Shmuel*, and, in fact, there are multiple forms of “active *Sirus*” of women, such as hysterectomy, oophorectomy, or tubal ligation.

The *Bach* adduces support for his position from *Tosfos* in *Shabbos* (*ibid.*) who state that “*Sirus* does not apply to a woman”. However, the *Acharonim* counter that *Tosfos* merely mean to contend that *Sirus* is not forbidden for a woman, not that *Sirus* is impossible. In fact, reading *Tosfos* this way (i.e., that they were referring to the *Isur* and not to the possibility of *Sirus*) would lead to the conclusion that there is no *Isur* of *Sirus* for a woman, however it is performed (since *Tosfos* are not discussing *Kos Shel Ikrin*), as noted by the *Chida* (*Yair Ozen, Ein Zocher, Ma'areches* 1:18).

We quoted the *Shulchan Aruch* and *Rambam* who appear to hold that “active *Sirus*” for a woman is an *Isur d'Rabbanan*. This, position appears to be contradicted by the following *Beraisa* in *Toras Kohanim* (*Emor*, 7):

*How do we know that Sirus applies to females? The Torah states, “Ki Mashchasam Bahem, Mum Bam” – “for their corruption is in them, their blemish is in them”*

(Vayikra 22:25). R' Yehuda says, it says "Bahem", implying that *Sirus* does not apply to females.<sup>5</sup>

In other words, according to the *Chachamim*, *Sirus* for females is *Asur mi'd'Oraisa* but according to R' Yehuda it is permissible. How then may the *Rambam* and *Shulchan Aruch* assume the intermediate position, considering it *Asur d'Rabbanan*?

The *Magid Mishna* explains that the *Rambam* must hold like R' Yehuda, however, he holds that R' Yehuda did not mean to permit *Sirus* on a female *Lechatchila*, just to say that it is not *Asur mi'd'Oraisa*. This is supported by the *Tosefta* (*Yevamos* 8:3) that does not state, "*Sirus does not apply to females*" like the *Toras Kohanim*, but that one is "*exempt*" for performing *Sirus* on females. However, the *Taz* (*ibid.* 6) maintains that the *Magid Mishna's* explanation is difficult, given the wording of R' Yehuda in *Toras Kohanim*.

The *Smag* (*Lavin* 120) suggests that the *Machlokes* between R' Yehuda and the *Chachamim* was not about whether it is permissible to perform *Sirus* on females but whether an animal that underwent *Sirus* may be offered as a *Korban*. Thus, even if the Halacha follows the *Chachamim*, it may still be *Asur d'Rabbanan* to perform *Sirus* on a female.

The *Gra*, by contrast, holds that the *Machlokes* is about the permissibility of *Sirus*. He maintains that the *Rambam* rules like the *Chachamim* and that *Sirus* of females is *Asur mi'd'Oraisa*. Though the *Rambam* states that one is "*exempt*", he does not mean that it is only *Asur mi'd'Rabbanan*. Rather, since it is only an "*Isur Asei*" – a prohibition derived by implication from a positive precept ("*Mashchasam Bahem*"), he uses the expression "*one is exempt*" rather than "*it is forbidden*". (By contrast, the *Isur* to perform *Sirus* on a male is an explicit *Lo Sa'asei* – prohibition – "*u'b'Artzechem Lo Sa'asu*".)

We have delineated three approaches to explaining the *Rambam's* view of *Sirus* of a female:

1. *Magid Mishna*: The Halacha follows R' Yehuda that it is *Asur mi'd'Rabbanan*.
2. *Smag*: Both the *Chachamim* and R' Yehuda hold it is *Asur mi'd'Rabbanan*.
3. *Gra*: The Halacha follows the *Chachamim* that it is *Asur mi'd'Oraisa*.

All three of these approaches assume that the *Chachamim* and R' Yehuda are arguing about *Sirus*. However, there are two other approaches that suggest that the *Machlokes* revolves around a different issue.

1. The *Prisha* (*ibid.* 30) notes that although women are exempt from *Pru u'Revu* they are obligated in the Mitzva of "*Sheves*" (the general obligation to

<sup>5</sup> [Editor's note: "*Bahem*" is masculine, and R' Yehuda interprets the use of "*Bahem*" instead of the feminine "*Bahen*" as indicating that the *Isur* does not apply to women.]

contribute to populating the world). Therefore, the *Rabbanan* forbade them to undergo *Sirus*.

2. The *Taz* and other *Acharonim* hold that a woman should not undergo *Sirus* because it is forbidden to wound oneself.<sup>6</sup>

Returning to the question of performing a uterine transplant. Would the removal of the uterus from the donor be considered *Sirus*?

The *Sefer Even Yekara*<sup>7</sup> (3:29) holds that removal of the uterus (or ovaries) is considered *Sirus* and is at least *Asur mi'd'Rabbanan*, if not *Asur mi'd'Oraisa*.

If the donor is already at the age of menopause there would not appear to be any issue of *Sirus* as she is considered an "*Akara*". This appears to be the position of the *Chasam Sofer* (*ibid.*). This is particularly true according to the *Prisha* who holds that the *Issur* of *Sirus* of a female is that it prevents her from performing the Mitzva of *Sheves*. If she can no longer bear children, she cannot perform this Mitzva in any case. However, it is likely true even according to the *Gra* who holds that *Sirus* of a woman is *Asur mi'd'Oraisa*. (We should point out that a woman has the status of "*Akara*" even if she could theoretically become pregnant as a gestational carrier.)

[In addition, it is likely that even according to the *Gra* there is a distinction between the *Sirus* of a male and that of a female. The underlying reason for the *Isur Sirus* of a female is that of destroying the potential to give birth. If so, where the purpose of removing her uterus is to allow another woman to give birth, it cannot be defined as a destructive act. See the *Shu"t Cheshev haEfod*<sup>8</sup> (2:61) who makes a similar argument in another context. However, this argument can definitely not be used to allow an act that may be *Asur mi'd'Oraisa*.]

Therefore, it would seem to be preferable to choose a donor who has reached menopause. [In fact, it would be even better to accept a uterus of a *Nachris* as the majority of Poskim hold that there is no *Issur* of *Sirus* for a *Nachris*.] It would also be better that the procedure be performed by a *Nachri*.

According to the Poskim that there is an *Isur* of *Sirus* of a female, one cannot clearly permit taking a uterus from a woman still capable of childbearing. We should also point out that although the majority of Poskim hold that *Sirus* is only *Asur*

<sup>6</sup> The problem with the *Prisha* is that it does not explain why a woman may drink a *Kos Shel Ikrin*. The problem with the *Taz* is that this would not explain why there is also an *Isur* to perform *Sirus* of an animal. Further discussion is beyond the scope of this essay – see the *Taz*, *ibid.* 5 and *Minchas Chinuch* 291:9.

<sup>7</sup> R' Binyamin Aryeh haKohen Weiss zt"l (1842-1912), *Av Beis Din* of Chernovitz.

<sup>8</sup> R' Chanoch Dov Padwa zt"l (1908-2000), *Av Beis Din* of *Hisachdus Kehilos haCharedim* (UOHC) of London, 1955-2000.

*mi'd'Rabbanan*, many hold that one should be concerned for the position of the *Gra*, as his position is implied by *Chazal*. (See, for example, the *Igros Moshe*, E.H. 3:12.)

However, according to those who hold that the *Isur* is only due to *Sheves* or to the *Isur* of wounding oneself, there may be more room for leniency in allowing a young woman to donate her uterus.

### **Chavala**

Regarding the *Isur* of wounding oneself (*Chavala*), it seems obvious that this would not apply in a case of a uterine donation. The recipient is certainly permitted to undergo the procedure as it is a matter of *Refua*, like any other surgery. It is certainly better than cosmetic surgery.

The donor also likely does not transgress the *Isur*. The *Rambam* rules that one is only liable for making a wound when it is "*Derech Nitzayon*", in a manner of fighting (*Hilchos Chovel u'Mazik* 5:1). The *Acharonim* rely on this condition *l'Halacha* (see *Igros Moshe*, C.M. 2:66 who uses this condition to permit cosmetic surgery, and *Yabia Omer* 8, C.M. 12). The basic premise is that if a wound is not made for the purpose of causing pain or injury it is permissible (*Kovetz Hearos* 70. It is also known that Rav Chaim Brisker held this view.) Clearly, in our case the donor is not wounding herself "*Derech Nitzayon*".

### **Sheves**

First, we should point out that although the *Prisha* clearly assumed that *Sirus* of a female would be an abrogation of the Mitzva of *Sheves* (his source appears to be *Tosfos* in *Gitin* 41b), this is not agreed to by many *Acharonim*. The *Pnei Yehoshua* (*Gitin* *ibid.*) asks how *Tosfos* knew that a woman has a Mitzva of *Sheves*, see also the *Beis Shmuel* at the beginning of *Even haEzer*, who says that it is subject to a *Machlokes Rishonim*.

In addition, even if a woman does have a Mitzva of *Sheves*, it does not seem obvious that giving her uterus to another woman so that she can give birth can be considered to be abrogating the Mitzva. However, this argument doesn't have any precedent or support in the *Poskim*.

Therefore, the simplest approach would be to take a uterus from a woman who has already given birth. (In any case, this is dictated by ethical practice.) The donor has thus already fulfilled the Mitzva of *Sheves* and there would be no *Isur* of *Sirus*. On this basis, the *Atzei Arazim*<sup>9</sup> answers how a woman is permitted to drink a *Kos Shel Ikrin* even though she is obligated in *Sheves*. She may only do so if she has given birth previously (see *Tosfos* *ibid.* 110b, s.v. "*v'haTanya*" in this regard, relating to a man).

<sup>9</sup> R' Noach Chaim Tzvi Berlin (1733-1801), Rav and Av Beis Din of Altona-Hamburg-Wandsbek.

[In any case, there are some women who are exempt from the Mitzva of Sheves, such as those who experience severe postpartum depression or other pregnancy-related complications. A Rav should be consulted in all such cases.]

To summarize, the ideal approach is to choose a donor who is a *Nachris* or at least a woman who has already reached menopause. There are some who hold that it is even permissible for a young woman, as explained above. Questions in this regard should be addressed to the *Poskei haDor*. To the best of our knowledge, no *Teshuva* has yet been penned about this subject.