The Fertility Dilemma

View PDF



Richard V. Grazi, M.D. is the Director of Reproductive Endocrinology at Maimonides Medical Center and the founder of GENESIS Fertility & Reproductive Medicine. This article appears in issue 6 of Conversations, the journal of the Institute for Jewish Ideas and Ideals.

When the first baby was born after conception in vitro, the news was extraordinary in ways that bear recalling some thirty years later. Few before then had imagined that human conception had been so distilled to its scientific essence that it could be captured in a test tube. When Steptoe and Edwards announced their stunning accomplishment to a captivated global audience, those listening could only wonder where the new science of in vitro fertilization would take humanity.

That life began in a laboratory was the first breach of a barrier no one thought was up for breaking. Still, they could see with their own eyes the stirring footage, taken in time-lapse through the lens of Edwards's microscope, which captured the conception of an embryo they already knew as baby Louise Brown. Would babies soon grow entirely outside the womb? Was the human race standing at the precipice of a *Brave New World*? Our collective wonder gradually was peppered with fears about safety, about the ethics of beginning human life in this way and, not unexpectedly, about the challenges the new technology posed to religious beliefs. For Torah-observant Jews, IVF would soon be tested through a halakhic lens.

The original techniques of in vitro conception have since morphed into what we know today under the broad rubric of ART: the Assisted Reproductive Technologies. ART currently refers to any number of treatments that involve the surgical removal of eggs and their fertilization outside of the body, with later transfer to the womb. In some ART procedures, embryos are tested for their genetic health prior to transfer. In others sperm, too, must be surgically retrieved. A number of ART procedures involve the use of third parties, be they sperm donors, egg donors or gestational carriers. It is not the purpose of this article to review the halakhic discussions about these various forms of ART. Those discussions have appeared in a variety of venues, including responsa literature and academic publications. (For a more detailed overview see my *Overcoming Infertility: A Guide for Jewish Couples*. Toby Press, 2005). Here I will focus, rather, on a fundamental problem that faces Torah-observant physicians and others who care for couples requiring ART to build their families.

There is a dilemma that occurs with some regularity in the field of reproductive medicine which has some implications for how fertility services are delivered to Torah-observant couples. It is a problem that calls into question the personal code of conduct chosen by the health care provider. It arises not from discrepant halakhic decisions that face doctors, but rather from those that confront their patients.

Below are four situations followed by some questions that will highlight this particularly Jewish fertility dilemma.

* * *

Case #1. A twenty year old woman and her mother consult with a nurse practitioner regarding the young woman's future family building options. They have come to her because, as a *frum* nurse, they expect her to be in a position to deal sensitively with their predicament. The patient was diagnosed at birth with Turner Syndrome and, as a result, she has no ovarian function. (Turner Syndrome is caused by the absence of an X chromosome. Affected girls have a range of phenotypic features but all have "streak ovaries," which are rudimentary structures that lack eggs. Because there are no eggs, the ovaries do not produce estrogen and, in the absence of hormonal treatment, there is no menstruation.)

The patient has been maintained on hormones to promote normal development and cyclic menses, but she is aware that, with no eggs, she will never be able to have a biological child. She and her mother worry if she will ever be able to find a *shidduch.* The nurse practitioner is aware that many Torah-observant couples will avail themselves of egg donation in order to have children. However, as a *haredi* woman she has chosen to abide by the *Kol Koreh,* recently issued by *gedolim* revered in her community, in which egg donation is described as a breach against the holiness of the Jewish people.

Is this nurse practitioner obligated to discuss the option of egg donation with the patient and her mother? Does she explain how it works? Does she need to disclose to them that other *haredi* women have pursued this path? Need she recommend them to a *posek* who allows the procedure? Or should she advise them of the official ban on egg donation and refer them to a "special needs" *shadchan*.

Case #2. A Torah-observant coordinator of a donor program is called upon to recruit a gestational carrier for a woman with Mayer-Rokitansky syndrome, a congenital anomaly that results in failure of the uterus to develop. Her ovaries are normal. She is married and her husband has no reproductive issues. Their only hope for a biological child is for another woman, a gestational carrier, to carry their embryo. The couple's rabbi has conferred with his own *posek* and they are allowing the procedure. The donor program coordinator is aware of the halakhic controversies surrounding surrogacy. She is aware that many *poskim* do not allow gestational surrogacy under any circumstances but that, among those who do, many prefer the carrier to be Jewish. She has discussed this with her own rabbi and believes this is the proper halakhic route. However, this couple's *posek* has no preference for a Jewish carrier because he holds the biological parents to be the halakhic parents in all cases. Consistent with this opinion, the couple and their rabbi see no need for future conversion of the child.

Should the program coordinator recommend that the couple use a Jewish gestational carrier? May she refer them for what she believes would be more appropriate halakhic advice? And what if a suitable Jewish carrier is not available? Should she go ahead and arrange the match or must she recuse herself from the care of the couple?

Case #3. A Torah observant-physician is consulted by a young hasidic couple who failed an attempt at in vitro fertilization. Surgical exploration failed to reveal any sperm. The couple's *posek* has told them that there is no halakhic authority who permits donor insemination. However, the physician knows of *gedolei Torah* who have permitted it. Does he or she have an obligation to inform the patients that important relevant information has been withheld from them?

Case #4: In a different scenario regarding donor insemination, the *posek* has suggested that the donor be the husband's brother. The physician is familiar with the great halakhic controversy surrounding sperm donation but he has performed the procedure many times at the behest of *poskim* who have

referred specific couples. These *poskim*, however, have always insisted that the donor be a gentile so that the child have no halakhic relationship to his or her biological father and therefore need not fear marrying a halakhic half-sibling. Does the physician refuse to perform the procedure? Does he refer the couple for a second halakhic opinion? Must he consult with his own rabbi regarding the permissibility of acceding to the couple's wishes?

* * *

With the growing success and utilization of ART, it is not at all surprising that halakhic discussions abound concerning their appropriateness, how and when they should be carried out and under what circumstances couples should avail themselves of ART. Also not surprising is the increasing inclination on the part of some rabbis to become expert in so-called reproductive halakha. It should come as no news to anyone, therefore, that the field has also become the focus of intense interest on the part of Torah-observant physicians, nurses, scientists and other health professionals. Scenarios such as those depicted above, all of which are real, are therefore expected to grow in numbers and complexity as the relatively young field of ART unfolds.

Of course, the discipline of ART is not unique among medical fields in posing to practitioners diverse ethical and halakhic challenges. However, reproductive technologies seem to differ in one respect: the consequences of decisions that patients make impact not only themselves but their children as well. Children who are the successful results of ART eventually will become adults and want to marry within the Torah-observant community. Because halakhic standards within that community differ, however, the halakhic status of many of those adults may also differ. An individual might be considered a kosher Jew, a possible Jew, a *mamzer* or a gentile depending on how one understands the halakha. This unresolved (and perhaps irresolvable) issue can weigh heavily on both physicians and patients who are committed to a halakhic life.

Yet the distinction is not as solid as one might think. Parents often have to make controversial decisions that will affect their children's lives. They decide on one medical therapy or another, whether to use cochlear implants or to inoculate with a certain vaccine, for example, or – to use a halakhic example – whether to marry given a controversial decision that a previous marriage had been annulled. However, that is part of the burden that parents assume when they bring their children into this world. It is not the physician's job to make these sorts of decisions for them. Physicians who are aware of therapies with which they disagree have an obligation to make their patients aware of all available options. Indeed, this is the way all *poskim* operate. Even when one has a definite view on a subject, the questioner is made aware of other positions (and often referred to others who take a more lenient view).

Torah-observant physicians who are entrusted to provide health care must not confuse their own commitment to a specific halakhic position with their professional obligation to provide appropriate care for their patients. Were this not so, one could envision a scenario where reproductive specialists would offer ART services only for couples whose circumstances qualify for halakhic sanction as interpreted by their providers' individual beliefs. Non-Jews would presumably be exempt from halakhic scrutiny and therefore eligible for the full range of ART services. Aside from being morally tenuous, this would open up ART providers to complaints of discrimination. Clearly, this cannot work.

* * *

Fundamental to the physician's role is the ethical responsibility to heal the sick. While it might be argued that individuals with infertility are not sick, as one would traditionally understand the word, every learned Jew understands from the stories of barrenness threaded within *Tanakh* that infertility is an affliction no less serious than any other physical ailment. The Talmud goes as far as to say that *akar hashuv kemeit*: one who has no children is as good as dead. Accordingly, the obligation of physicians and other health care workers who treat infertile couples is to heal them, not to be their religious counselors.

One need look no further than the Oath of Maimonides, which many Jewish physicians take upon graduating from medical training, to answer this dilemma. It itself is not a halakhic text, but it succinctly captures the ethos of the halakhic approach to healing. In it we ask our Supreme God to allow us the "merit to see any who suffers and seeks my counsel as a person, without a difference if he is rich or poor, friend or foe, good or bad – in his suffering let me see only the person." It is interesting that the Oath does not invoke love of God or Torah as the inspiration for the physician's work. That would be understood if not uttered. Instead, it invokes a different allegiance. "May my love for the medical canon [*torat harefuah*] strengthen my spirit and may truth alone be my guide."

The obligation of the caregiver is to use the tools of medicine to heal. To the extent that faith and halakhic observance are tools to cure infertility, they belong more in the province of the rabbi than the doctor. The separation is clear. The halakhist or *posek* seeks to protect the spiritual integrity of those who seek his counsel, a charge that involves judgments about people. The Oath erects a high barrier between judgments of this type and the practice of medicine. Thus, "in his suffering let me see only the person."

This does not, of course, preclude physicians from holding strong to their faith and Torah-observance. In their personal lives, many health care workers strictly follow the rules of halakha. But it is not their prerogative to impose those rules on others with the same degree of halakhic commitment who may see the rules differently. Nor can they worry about those who may disapprove of their means of healing. Here, the opening line of the Oath rings especially clear. "Exalted God, before I begin my holy task of healing your creations, I beseech you to give me strength to do my job with truth, and that worrying about the public sphere will not blind me from doing right."

An example of this occurred recently at the Genesis ART program where, in order to facilitate access to ART by the widest swath of Torah-observant couples, a program of permanent rabbinical supervision, or *hashgacha*, has been ongoing for nearly two decades. (This is described *in Overcoming Infertility*.) When an edict banning the use of third parties in ART was distributed in the *charedi* community, providing *hashgacha* to Torah-observant couples who were undergoing such procedures emerged as potentially problematic. The concern was to keep the trust of that community despite involvement by the *mashgichot* in procedures that some considered forbidden. Disaffection of an entire community could impact *hashgacha* for the vast majority of couples who were undergoing traditional ART and who continued to require *hashgacha*.

In this regard, it is worth bringing the Talmudic teaching from Berachot 28b.

When Rabbi Yochanan ben Zaccai took ill, his students came to visit… They told him, Rabbi, please bless us. He told them, May it be His will that you fear Heaven to the same degree that you fear man. His students asked him, This and no more? He answered them, You should know that when a person is about to transgress he says [to himself] 'I hope no one sees me!'

The sages are very clear about what they consider the proper approach to such dilemmas. The fear of God trumps the fear of man. If we are enjoined from permitting what is impermissible, just as certainly we must avoid prohibiting what is permissible. Disagreements among *poskim* who interpret the same halakhic precedents in different ways are not for the physician to judge. Nor is it the role of others involved in the care of infertile couples to permit one camp to prevail over another. Halakhic tyranny cannot rule in the setting of health care. What rules instead can only be what is right and fair for the patient, i.e. whatever alleviates her suffering.

* * *

It is clear that there are disagreements among *poskim* about the use of certain types of ART and that, even when permitted, there are varying thresholds for their use. Such disagreements should not deter Torah-observant reproductive specialists from their obligation to provide appropriate medical care. Nor should the desire to solve such disagreements become a distraction. *Shivim panim laTorah*: The Torah has seventy faces. Our Talmud is a tribute to the role of disagreement in Judaism. The houses of Beit

Hillel and Beit Shammai are only the most well-known examples. Who can explain what the sages had in mind when they ruled that the halakha almost always follows Beit Hillel but left open the idea that in the days of *mashiach* the opinions of Beit Shammai will reign supreme?[*] There is no school of thought among us that has cornered the market on truth, or on piety or on what constitutes legitimately Jewish approaches to life. The glory of our tradition is not that Torah-observant Jews are monolithic but rather that disagreement is accepted as basic to the fabric of a Torah-observant life.

Torah-observant men and women who choose as their calling to heal couples with infertility must respect the dignity and choices of each individual couple, including those whose Torah-observance will not square with their own. In this way they remain true to the Oath that binds them to their calling.