

# Blood Tests and DNA - Part 2

Rabbi Chaim Jachter



Date: Feb 10, 2006

<https://www.yutorah.org/lectures/lecture.cfm/735917/rabbi-chaim-jachter/blood-tests-and-dna-part-2/>

## Introduction

In our previous issue, we presented the consensus opinion of twentieth century Dayanim not to admit blood tests as evidence that a husband is not the father of his wife's children. We noted that they cite the Gemara (Niddah 30a) that states that the mother provides the genetic material from which the child's blood is produced. They argue that this Gemara rejects the modern scientific assertion that both maternal and paternal influences produce a child's blood. We suggested that the motivation for this approach lies in the Dayanim's desire not to open up a proverbial "can of worms", as blood tests can unnecessarily (from a Halachic perspective) reveal the identity of a Mamzeir.

This week, we shall begin to discuss whether DNA evidence is admissible in Beit Din. We shall present the rulings of Rav Ovadia Yosef, Rav Shlomo Dichovsky, Rav Eliashiv and Rav Shlomo Zalman Auerbach concerning DNA evidence that were issued prior to the vicious World Trade Center terrorist act. Next week, we shall discuss the debate regarding admitting DNA evidence to identify the remains of missing husbands who worked in the World Trade Center.

## Rav Ovadia Yosef and the Israeli Rabbinic Court of Appeals

In 1986, Rav Ovadia Yosef sat in the Israeli Rabbinat's Rabbinic Court of appeals (we discuss this fascinating institution in an essay that is available at [www.koltorah.org](http://www.koltorah.org)) together with two other Rabbanim of eminent stature, Rav Yosef Kapach and Rav Yitzchak Kullitz. They were presented with an appeal of a ruling of a district Israeli Rabbinat Beit Din regarding an interesting case.

A young man and woman lived together without the benefit of marriage. Some time after the couple separated, the woman was discovered to be pregnant, and she subsequently gave birth to a child. The young man claimed to be the father, while the young woman vigorously denied this claim. The young man demanded that a DNA test be administered to prove the validity of his claim, and the wife refused to do consent. The district Beit Din ruled that if the woman persisted in her refusal to permit taking a DNA sample from her child for the DNA test, it would interpret this refusal as an admission that the young man is indeed the father.

Rav Yosef (Teshuvot Yabia Omer 10: Even HaEzer 13) presents the reason why the Rabbinic Court of Appeals rejected the ruling of the district Beit Din. Rav Yosef argues that just as the consensus view among Dayanim is to

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consider blood tests inadmissible evidence in Beit Din, so too DNA tests should not be permissible evidence in Beit Din. He bases his ruling on a number of passages in the Gemara that speak of a child whose father is known to be one of two possible men. The Gemara treats this doubt as irresolvable. Rav Ovadia argues that the fact that the Gemara does not mention blood tests or DNA tests as a possible means to resolve the doubt indicates that these two methods are not acceptable means of determining paternal identity.

Although this approach seems a bit far-fetched, the Gemara sometimes presents theoretical possibilities, such as transportation on a "flying camel" (see Makkot 5a), in order to bring out certain principles. In our case, the Gemara does not present a theoretical means of resolving the doubt, giving no precedent for resolving questions of paternal identity by means of DNA testing.

## **Rav Shlomo Dichovsky and the Ashdod Beit Din**

In 1982, Rav Shlomo Dichovsky sat as a member of the Ashdod district Israeli Rabbinate Beit Din. After the Beit Din had presided over a couple's divorce agreement and Get, the husband opened a file challenging his heretofore presumed fatherhood of his wife's two children. After ordering the couple to perform a blood test, the Beit Din was informed that DNA tests (accurate up to 99.6% at that time) were now administered to determine paternal identity. The DNA test revealed that the husband was the father of only one of his wife's two children. When the results were read in Beit Din in the presence of the parties, the wife still insisted that her husband was the father of both of their children, denying she ever having had an affair during the marriage. The question was whether the Beit Din should regard the results of the DNA test as evidence that the husband was not the father.

Dichovsky writes that this presents a conflict between two mechanisms of resolving doubt regarding paternal identity when a wife is suspected of adultery. On one hand, the Gemara (Sotah 27a) states that in such a case we assume that the husband is the father since "Rov Be'ilot Achar HaBaal," which may be translated as "a wife will have most of her relations with her husband." On the other hand, the overwhelming majority of DNA tests are accurate. Rav Dichovsky ruled that since we are faced in this case with a conflict of two "Rovs" (presumptions created by what is expected to happen in a majority of situations) the doubt remains unresolved. Therefore, Rav Dichovsky opined that the Beit Din cannot obligate the husband to pay child support since a Beit Din cannot coerce someone to pay in case of doubt (see Bava Kava 46a).

On the other hand, Rav Dichovsky stated that the child is not a Mamzeir, because the level of certainty necessary to presume that the child is a Mamzeir against the assumption of Rov Be'ilot Achar HaBaal is extremely high. In

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fact, the Gemara (Yevamot 80b codified in Shulchan Aruch E.H. 4:14) states that if a husband travels overseas and his wife gives birth to a child twelve months after his departure, we assume that the husband is the father and that the wife was pregnant for twelve months (!). Similarly, reasons Rav Dichovsky, since (in 1982) the DNA test was only 99.6% accurate, there is insufficient evidence to pronounce the child as Mamzeir against the presumption of Rov Be'ilot Achar HaBaal.

The other two Dayanim on the court disagreed with Rav Dichovsky and ruled that the DNA evidence was not admissible in this case (the order to undergo the DNA was apparently a "bluff" intended to elicit a confession from either of the parties; see Sefer Melachim 1:3:24-27 for a similar strategy employed by Shelomo HaMelech). They ruled that the husband must pay child support despite the DNA evidence. They argued that the DNA test does not prove an assertion that contradicts the principle of Rov Be'ilot Achar HaBaal and the Chazakah (presumption) that had existed from the child's birth until after the administration of the Get that the husband was the father of the child. The husband appealed the ruling to the Rabbinic Court of Appeals, which subsequently sustained the ruling of the Ashdod Beit Din. Rav Avraham Shapira (the Rosh Yeshiva of Yeshivat Merkaz HaRav and Ashkenazic Chief Rabbi of Israel during the 1980's) was among the prominent Rabbanim who composed the panel of the appeals Beit Din in this case.

## **Rav Yosef Shalom Eliashiv**

Rav Eliashiv was asked to adjudicate a case related to DNA testing. A wife had claimed when she was pregnant that her husband was not the father of the unborn child. Years later, the father wished to know whether he should conduct genetic tests to determine if he is the father of the child. Rav Eliashiv ruled unequivocally, "Since many years have passed, and a Chazakah has been established that he is the father of the child, one has no right to cast aspersions on the legitimacy on the child by engaging in testing."

As a precedent, Rav Eliashiv cited the Rashash that we presented last week, who explains that the rabbis of the Gemara did not engage in testing to determine paternal identity at the risk of revealing that someone who was heretofore presumed to be legitimate (BeChezkat Kashrut) was a Mamzeir. Rav Mendel Senderovic (Teshuvot Atzei Besamim 16) observes that Rav Eliashiv does not rule that DNA evidence is inadmissible evidence in Beit Din per se. One could add that it seems he does deem it admissible evidence, since he wanted to avoid having such evidence revealed in this particular case.

## **Rav Shlomo Zalman Auerbach**

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The strongest advocate for the admissibility of DNA evidence prior to the World Trade Center attack was Rav Shlomo Zalman Auerbach. His ruling regarding a case that occurred in an Israeli hospital in 1977 appears in Nishmat Avraham E.H. 4:6 (authored by Dr. Abraham S. Abraham). Two babies were confused after birth, and all investigations could not conclusively determine the identity of the respective parents of each baby. The hospital administration suggested undergoing DNA testing to reach a final conclusion. Dr. Abraham consulted Rav Shlomo Zalman and Rav Waldenberg, and both ruled that utilizing the results as a consideration in the final determination of the identity of the parents of each child was permissible.

This is quite a significant ruling, since Rav Waldenberg (as we noted last week) is a staunch opponent of admitting a blood test as evidence in a Beit Din hearing. In addition, Dr. Abraham writes that Rav Auerbach "now" (in preparation for the publication of the third volume of Nishmat Avraham in 1993) wrote to him, "If this [DNA] test is well-known and accepted throughout the world as reliable as a result of a numerous and unambiguous tests, it is reasonable to say that the results of this testing constitutes admissible evidence by Halachic standards."

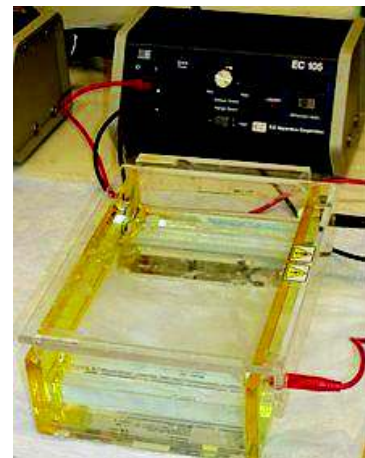
## **Conclusion**

Whereas Rav Ovadia Yosef regards DNA evidence as inadmissible proof of parentage in Beit Din, Rav Shlomo Zalman Auebach ruled in the early 1990's that it is admissible. Rav Waldenberg (in 1977) and Rav Shlomo Dichovsky (in 1982) were willing to consider its admissibility. More recently, Rav Eliashiv seemed to accept DNA evidence as admissible evidence in a Teshuva that he authored in 1999. Next week, we shall (IY"H and B"N) discuss the rulings of Poskim regarding identifying remains of a missing husband by means of DNA evidence, particularly in relation to those victims of the terrorist attack on the World Trade Center.



# Jerusalem Science Contest החידון המדע הירושלמי

## DNA based Paternity Identification as applied within Judaism



## DNA as a tool in the Halacha decision process

Based upon this essay

[Blood Tests and DNA - Part 2](#)

by Rabbi Chaim Jachter

22 Shvat 5767 February 10, 2006



Rabbi Haim Jachter has been affiliated with the Sephardic Congregation of Teaneck since 2000. He serves as a Dayan on the Beth Din of Elizabeth, since 1993, and has acquired an international reputation of excellence in the area of Get administration. He is also a teacher at Torah Academy of Bergen County.

Rabbi Jachter's Yadin Yadin ordination is from Yeshiva University where he also earned his Master's degree in Jewish Philosophy.

Rabbi Jachter has authored four volumes of Gray Matter which discuss contemporary Halachic issues of major importance. He has also authored dozens of scholarly articles that have appeared in prestigious Torah journals both in Israel and the United States.

Taken from: <https://www.sephardicteaneck.org/our-rabbi.html>

## Four rulings regarding the admissibility of DNA testing into the halacha decision process

### ➤ Rav Ovadia Yosef

Non-recognition of the evidence value of DNA testing



### ➤ Rav Shlomo Dichovsky

Quantifying the evidence value of DNA testing



### ➤ Rav Yosef Shalom Eliashiv

Performing DNA testing to solve a personal doubt



### ➤ Rav Shlomo Zalman Auerbach

DNA paternity ID as a hospital's administrative tool.



## Halacha Ruling #1 – Non-recognition of the evidence value of DNA testing

Rav Ovadia Yosef and the Israeli Rabbinic Court of Appeals, 1986



Rav Yosef Kapach



Rabbi Ovadia Yosef



Rav Yitzchak Kulitz

### **The Case – Israel Rabbinic Court of Appeals, 1986**

1. Unmarried couple separated.
2. After separation woman gives birth.
3. Male ex-partner claims paternity; mother denies paternity of male ex-partner.
4. Male ex-partner demands DNA testing to prove his paternity; mother refuses to be tested.  
District Bet Din rules male ex-partner to be father. **Rationale: Mother's refusal to be tested proves male ex-partner's paternity.**
5. Rabbinic Court of Appeals overturns decision of District Bet Din – paternity of male ex-partner is not established.
6. **Rabbinic Court of Appeals rationale: Results of DNA testing are not acceptable evidence in paternity court decisions.**



## Halacha Ruling #1 – Non-recognition of the evidence value of DNA testing

### Rav Ovadia Yosef and the Israeli Rabbinic Court of Appeals, 1986



Rav Yosef Kapach



Rabbi Ovadia Yosef



Rav Yitzchak Kulitz

#### **Dayanim reasoning for the Rabbinic Court of Appeals rationale:**

**DNA test are not acceptable as legal evidence for a court paternity decision.**

IRCA rationale: Inferred from Talmud NOT offering DNA evidence as possible evidence option.

**Rabbi Jachter comment:** If the Talmud decided to allow any other theoretical evidence of paternity, it would have constructed an absurd theoretical possibility (such as the 'flying camel' of Makot 5a).

**Rabbi Weiner's response to Rabbi Jachter:** "Flying Camel" was NOT theoretical. Per Rashi on Makkot 5a, "Flying Camel" was nothing more than colloquial for a very speedy (and probably expensive) transportation service similar to flying the supersonic Concorde as opposed to a regular commercial airliner. The Talmud is saying that we don't consider unconventional techniques, even if they exist. But conventional methods are considered. Is DNA ID conventional? In 1986? Now?

## Halacha Ruling #2 – Quantifying the evidence value of DNA testing



Rav Shlomo Dichovsky, Ashdod District Rabbinic Bet Din, 1982

### **The Case**

1. Couple divorced; a “Get” properly executed for halachik divorce.
2. Subsequent to divorce, ex-husband sues for exemption from child support. Claim: he is not father of their two children.
3. Bet Din orders DNA testing (99.6% accuracy in 1982) to evidence paternity.
4. DNA results: Positive DNA of ex-husband’s paternity of only one of the children.
5. **The issues:**
  1. **Must the ex-husband pay child support for the child with negative DNA identification?**
  2. **Is the children with negative DNA identification a “mamzer”?**

### **Rav Dichovsky’s decisions and rationales**

**Decision #1: The ex-husband is exempt from paying child support for the child with negative DNA ID.**

Rationale: Although there is a legal assumption (using “Rov”- majority) that the ex-husband is the child’s father, the high accuracy of the DNA testing is sufficient to contradict the “Rov” and produce a doubt. Payment of child support cannot be enforced in a case of doubtful liability.

**Decision #2: The child with negative DNA ID is NOT a “mamzer” (or a “doubtful mamzer”).**

Rationale: The accuracy of DNA testing is not sufficiently high enough to contradict the child’s legitimacy based upon the “Rov”. The child also does NOT have the status of “doubtful mamzer”.

## Halacha Ruling #2 – Quantifying the evidence value of DNA testing



Rav Shlomo Dichovsky, Ashdod District Rabbinic Bet Din, 1982

### **The Case**

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  1. **Must the ex-husband pay child support for the child with negative DNA identification?**
  2. **Is the children with negative DNA identification a “mamzer”?**

### **The accompanying Dayanim decisions and rationales**

**Decision #1: The ex-husband is liable to pay child support for the child with negative DNA ID.**

Rationale: The DNA ID testing is not admissible as evidence as it does not positively prove that the child is not of the ex-husband.

**Decision #2: The child with negative DNA ID is NOT a “mamzer” (or a “doubtful mamzer”).**

Rationale: Same as rationale to decision #1

## Halacha Ruling #3 – DNA testing to solve a personal doubt, date unknown



### Rav Yosef Shalom Elyashiv

#### **The Inquiry**

1. During pregnancy, a married woman claims (to friends) that her husband is not the father of her unborn child.
2. Years after the child's birth, the woman's husband asked Rav Elyashiv whether DNA testing should be performed to establish paternity.

**The issue: Should DNA testing be performed to settle a personal held paternity doubt in the absence of any legal challenge, civil or religious?**

#### **Rav Elyashiv's decision (Rabbical psak halacha) and rationale**

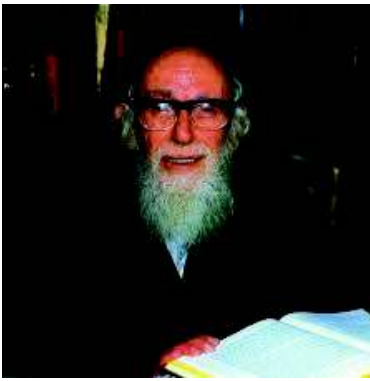
**Decision #1: No. Do not perform DNA testing for the purpose of settling a personal doubt unrelated to a legal challenge.**

Rationale: Years of the child's acceptance as the legitimate offspring of the husband produces an assumption "Chazaka" of legitimacy. In this case, Jewish law would deem it inappropriate to collect information whose results could upset the assumption of legitimacy and wreak havoc on the child's life.

#### **Inference from Rav Elyashiv's decision:**

**DNA evidence is admissible in court. It was for this reason that Rav Elyashiv directed not to collect this evidence**

## Halacha Ruling #4 – DNA ID as a Hospital’s administrative tool



### Rav Shlomo Zalman Auerbach

#### **The Inquiry**

1. Two babies confused at birth.
2. The hospital administration asked Rav Auerbach and Rav Eliezer Waldenberg whether they could perform DNA testing to ID the children to the parents.

#### **Rav Auerbach’s (and Rav Waldenberg’s) decision (psak halacha) and rationale**

**Decision #1: Yes. Perform the DNA ID.**

Rationale: DNA paternity identification used administratively by hospitals is permitted.

#### **Additional from Rav Auerbach’s decision:**

Rav Waldenberg previously disallowed DNA ID for use as evidence in court. It appears that, as functional court evidence, DNA is not admissible. However, as an administrative tool to solve a technical uncertainty, DNA ID results are acceptable.

Dr. Abraham S. Abraham quotes Rav Auerbach as saying that DNA testing has gained enough popular worldwide acceptance so as to give it legitimate evidential reliability in a Bet Din

Rav Eliezer Waldenberg, the “Tzitz Eliezer”



## Summary

- 1) What can we in fact prove from DNA testing? When markers match, one can argue a positive identification. But if the markers don't match, can we say with complete confidence that the relationship does not exist?
- 2) What is the reliability and accuracy of the DNA testing results?
- 3) How does information from DNA testing relate to the application of legal mechanisms such as Rov and Chazaka?
- 4) Are there societal reasons that may affect our decision to pursue or not pursue DNA testing in certain cases such as mamzerut?
- 5) Is the acceptability of DNA evidence in a Bet Din related to or affected by its acceptance in courtrooms belonging to the surrounding secular world?
- 6) Are the DNA testing results being submitted as evidence in a Bet Din in response to a legal challenge or are they being used to solve a personal dilemma unrelated to a court case?
- 7) Differentiate between an inquiry of a Rav for a "psak halacha" versus a claim in Bet Din defending or opposing a claim.