

# THE CASE OF THE UNCONVERTED SPOUSE

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*This paper was approved by the CJLS on February 17, 1993, by a vote of eight in favor, eleven opposed, and four abstaining (8-11-4). Voting in favor: Rabbis Kassel Abelson, Ben Zion Bergman, Elliot N. Dorff, Ezra Finkelstein, Arnold M. Goodman, Howard Handler, Joel E. Rembaum, and Gordon Tucker. Voting against: Rabbis Stanley Bramnick, Jerome M. Epstein, David Feldman, Samuel Frint, Judah Kogen, Herbert Mandl, Lionel E. Moses, Avram Israel Reisner, Chaim Rogoff, Joel Roth, and Gerald Skolnik. Abstaining: Rabbis Jan Caryl Kaufman, Reuven Kimelman, Aaron L. Mackler, and Mayer Rabinowitz.*

*The Committee on Jewish Law and Standards of the Rabbinical Assembly provides guidance in matters of halakhah for the Conservative movement. The individual rabbi, however, is the authority for the interpretation and application of all matters of halakhah.*

## שאלה

May one convert a married gentile who intends to remain married to the unconverted gentile spouse even after completion of the conversion?

## תשובה

This is not a case of first impression for the CJLS. The CJLS minutes of March 13, 1956, record that this question was posed and the Committee's decision was in the affirmative. Subsequent correspondence of the CJLS similarly reflects that the question was asked a number of times by individual rabbis and in each case the Secretary of the CJLS answered that the position of the CJLS was to approve such a conversion. In 1985, Rabbi Joel Roth presented a paper to the CJLS in which he proposed that such a conversion should not be undertaken. His paper failed to garner the six votes required to make it an acceptable option for members of the Rabbinical Assembly. The present status of the issue, therefore, is that it is permitted to convert a married gentile who will continue to live with the unconverted gentile spouse. I see no reason to change the status quo.

## Introduction

The 1956 decision recorded in the CJLS minutes is not accompanied by a rationale or even a record of any discussion pro and con. We therefore do not know the basis of their decision.

Rabbi Roth, in his paper, argued that to convert a married gentile who will continue a marital relationship with an unconverted gentile spouse is tantamount to creating an intermarriage and therefore should be forbidden.

Rabbi Roth, in his paper, is correct that the classical sources are silent on the question. The silence is not surprising since the question would never arise in a social context where Jewish and gentile communities were strictly separated and the situation would represent an anomaly. Indeed, what we consider an intermarriage was anomalous in previous times since any union between a Jew and a non-Jew would have required the conversion of one to the faith of the other. It is precisely in our open society, where intermarriage is possible with both spouses adhering to their individual religious affiliation, that the question becomes actual.

One therefore has to consider this question in the total context of our position on intermarriage, the reasons for our refusal to perform intermarriages, and the decisions we have made vis-à-vis intermarried couples within our congregations. The issue, therefore, has to be considered both from the aspect of halakhah and public policy.

### ***The Halakhic Issue***

The contention that such a conversion by a Conservative rabbi results in the rabbi virtually creating an intermarriage may not necessarily render the conversion forbidden.

One can argue that to transgress the Biblical injunction: **וְלֹא תִתְחַתֵּן בָּם**, “You shall not intermarry with them” (Deut. 7:3), requires a positive act of marriage, as the verse itself continues: **לֹא תִתֵּן לְבָנוֹ וּבָתוּרָא לֹא תִקַּח לְבָנוֹךָ**, “Do not give your daughters to their sons or take their daughters for your sons.” In the present situation, there is no *act* of intermarriage. If the conversion results in an intermarried status, the intermarried status **ממילא קאתי** has come about indirectly.

The issue as to whether a permitted act is forbidden if it will result in an undesired consequence, which consequence itself would be forbidden if undertaken purposely, is a classic dispute between R. Simeon and R. Judah found in various places in the Talmud. The primary source is the following baraita:

תניא ר' שמעון אומר גורר אדם כסא מטה וספסל ובלבד שלא יתכוון לעשות חריץ. ר' יהודה אומר אין הכל נגררין בשבת חוץ מן העגלה שהיא כובשת.

Rabbi Simeon says: One may drag a chair, bed, or bench [on the Sabbath] as long as there is no intention to make a rut. Rabbi Judah says: Nothing may be dragged on the Sabbath except a wagon because it presses (i.e. merely presses the earth down and does not dig it out) (Betzah 23b, also Shabbat 22a, Menahot 41b).

In the discussion, *ad locum*, the Talmud extrapolates the jurisprudential principles held by the disputants as R. Simeon holding that **דבר שאין מתכוון מותר**, when the forbidden consequence is unintentional, the act which creates it is permitted, and R. Judah holding that **דבר שאין מתכוון אסור**, the act is forbidden *ab initio* when a prohibited consequence might result.<sup>1</sup>

<sup>1</sup> See also Shabbat 29b where it appears that R. Judah would go so far as to forbid dragging in circumstances where a rut was impossible, such as on a stone floor, since in most other circumstances the surface would not be a hard one. See also Shabbat 41b and Ketubot 5b with its attendant Tosafot s.v. **חיבורי מחבר** דם. מפקד פקיד או דם חיבורי מחבר.

In the Amoraic discussion of this issue, there is a dispute between Rav and Samuel, with Rav maintaining that *אין הלכה כר' שמעון בגרירה*, regarding “dragging” the law does not follow R. Simeon, and Samuel holding *הלכה כר' שמעון בגרירה*, the law follows R. Simeon in dragging. However, the later Amoraic consensus clearly comes down that *הלכה כר' שמעון*, the law follows R. Simeon, since Abaye reported that his teacher, Rabbah, would always follow the view of Rav over that of Samuel, except in three issues in which he followed the view of Samuel. One of the three is the case of dragging on the Sabbath (Shabbat 22a, also Pesahim 101a).

The issue is not confined to Sabbath violations. In Nazir 42a the Mishnah which reads *נזיר חופף ומפספס אבל לא סורק*, a Nazirite may rub or scratch his hair but may not comb it – is explained in the Gemara as being the view of R. Simeon, that it is permitted because any removal of hair by rubbing or scratching is unintentional, while the combing referred to is explained as combing with the intention of removing knotted clumps. Similarly, in Kilaim 9:5:

מוכרי כסות מוכרין כדרך ובלבד שלא יתכוונו בחמה מפני החמה  
ובגשמים מפני הגשמים.

Clothing merchants may sell [garments made from forbidden mixtures and may hang them for display] in the usual manner, provided they do not intend them on sunny days as protection from the sun or as protection from the rain when it is raining.

Therefore, since *דבר שאין מתכון מותר*, the act is permissible despite its leading to an unintended consequence which would be forbidden were it intentional, in our case, the conversion would be permitted, since the intermarried status is an unintended consequence.

One might counter that R. Simeon's position would not hold where the unintended consequence is a certainty to occur:

אביי ורבא דאמרי תרווייהו מודה ר"ש בפסיק רישא ולא ימות.

Abaye and Rava both maintain that R. Simeon would agree that the act is forbidden when the consequence is an inevitability (Shabbat 75a, 111b, Ketubot 6a et al.).

Nevertheless, as long as it is not an *absolute* inevitability, it is permitted, as is indicated in Ketubot 6b where the issue is whether the first marital intercourse with the virgin bride may be consummated on the Sabbath, since in the process a wound is created. And even though this could be an unintentional consequence, Abaye questions the identification of those who would permit it as being the view of R. Simeon, since even R. Simeon would not permit an act whose forbidden consequence is inevitable. Rava counters this by saying, “Not like those Babylonians who are not expert in turning aside (i.e. able to engage in intercourse without causing bleeding) but some are expert at this.” Thus as long as it is not an absolute inevitability, it is permitted even for the one who is not expert in the maneuver.

One can argue that in the case of the converting spouse the intermarried status is not an *absolute* inevitability, since (A) there may be instances where divorce would ensue, or (B) in the process, the other spouse may be inspired by the example and decide to convert as well. Therefore, even when the stated intention is to remain married to an unconverted spouse, since it is not always an absolute inevitability, the dictum would hold that *דבר שאין מתכון מותר*, the unintended consequence does not prohibit the act that might cause it.

Thus, there is ample room to argue that converting someone who intends to remain married to the unconverted gentile spouse is not violative of the halakhah.

### ***Policy Issues***

Over and above the halakhic argument, I feel even more strongly that forbidding such a conversion would be detrimental to the interests of the Jewish people, inconsistent with other CJLS decisions, and would reflect failure to respond reasonably to the sociological reality.

The inconsistency with our position vis-à-vis intermarried couples within the synagogue organization would be patent. We have taken the position that, while the non-Jewish spouse may not be a member, the Jewish partner in the intermarriage may be a member of the congregation.<sup>2</sup> Now between the Jew who actively, consciously, and purposely violated the law by intermarrying, and the convert who becomes a partner to an intermarriage by indirection, clearly the former is the more egregious. Yet to forbid the latter from entering into and participating in the Jewish religious community, while permitting the former, is to treat the innocent more severely than the sinner. Even if our position on the intermarried Jew were to deny him/her membership in the congregation, one could make a case that such denial should not extend to a convert. If congregational membership is open to the intermarried Jew, קל וחומר, *a fortiori*, it must be extended to the convert whatever his/her marital status.

To phrase it in the converse – if conversion is denied because it would indirectly result in an intermarriage, then we are saying that an intermarried person, even if the intermarried status was not the result of a positive act in violation of Jewish law and standards, may not be a member of the Jewish community. Then קל וחומר, *a fortiori*, the person who consciously and directly violated Jewish law by contracting a marriage with a non-Jew should not be allowed membership in the Jewish community.

Since we are anxious to hold on to the allegiance of all Jews – even the sinners among us – and to retain their sense of identity with the Jewish people, we try not to alienate the intermarried Jew. Logical consistency then requires that we permit all to convert, with the resultant indirect intermarried status not a deterrent.

The same consideration also prompts us to maintain that denial of conversion in these circumstances is detrimental to the best interests of the Jewish people. In light of our decreasing numbers, we have consciously embraced a policy of קירוב – of encouraging conversion to Judaism. To deny this conversion sends a contrary signal. In addition, it is expressly counter-productive.

In our desire to encourage conversion, we have permitted conversion in cases where the major – sometimes the sole – motivation is to enable the non-Jew to marry a Jew. As some have said: “Out of a desire to embrace a Jew rather than to embrace Judaism.” Traditionally, where the sole purpose of the conversion was to facilitate a marriage, conversion would be denied because of the ulterior motive. Nevertheless, we do accept converts whose motivation is marriage to a Jew. In our case, it is clear that the conversion is not motivated by any such ulterior motive. There can possibly be no clearer indication of a conversion that is out of sincere conviction. To deny it is counter-productive to the best interests of the Jewish people since we would possibly be refusing the best and most sincere convert who could be the greatest asset and a source of strength to the Jewish community.

<sup>2</sup> See *PCJLS 27-70*, 3:1027-1037; *PCJLS 80-85*, pp. 129-173 [– EDS.].

The same considerations lead to the conclusion that permitting this conversion is the proper response to the sociological reality. We oppose intermarriage because, in addition to the halakhic reasons, historically – and in most instances today as well --- intermarriage resulted in a loss to the Jewish people. Not only the loss of those who intermarry, but also of *עַד סוֹךְ הָעוֹלָם זרעיותי עד סוף העולם*, their descendants until the end of time. In the present circumstance, however, despite the ancillary intermarriage, the conversion results in a gain – of the convert and possible numerous descendants. One could characterize this as a “reverse intermarriage” which results in benefit to the Jewish people.

Under the present conditions, the only proper response to the sociological pressures that militate against Jewish identity and Jewish survival is to welcome all sources of additional Jewish strength and vitality.

### ***Caveat***

This is not to deny the fact that conversion under the stated conditions presents its own inherent problems. This convert, though sincerity and motivation are beyond question, does have a greater difficulty in fulfilling Jewish responsibility and achieving a Jewish lifestyle.

The rabbi and bet din who supervise and carry out the conversion have the responsibility to make sure that the non-converting spouse (and other non-Jewish members of the household) are supportive of the convert and will cooperate with the convert in maintaining standards of kashrut, Shabbat and holiday observance, etc. This will require extensive consultation and counseling with the convert and the convert’s family. Only when the bet din is convinced that this support and cooperation are forthcoming should the conversion be completed.

### ***Conclusion***

A married gentile may convert to Judaism even though the convert intends to remain married to the unconverted gentile spouse. Such conversion should take place, however, only after proper counseling and consultation assuring that the convert will be able to practice the Jewish religion without interference by the non-Jewish members of the family. Under those conditions, those who seek *לחסות תחת כנפי השכינה* – to shelter under the wings of the Shekhinah – *ירבו כמותם בישראל* – may their numbers increase in Israel – *ותבוא עליהם ברכה* – and may blessings be bestowed upon them.