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THE CONVERSION OF CHILDREN BORN TO GENTILE MOTHERS AND JEWISH FATHERS

No rationale need be spelled out for a consideration of our topic. Current estimates are that one third of all marriages among American Jews involve a gentile partner, and few of them undergo a halakhically valid conversion. All halakhic authorities reject the notion of patrilineal descent, and the question naturally arises as to what our attitude should be toward Jewish men married to gentile women who want their children raised as Jews fully accepted by the halakhic community.

The key Talmudic text that deals with this issue is *Ketubot* 11a:

> R. Huna said: A minor proselyte is immersed by the knowledge of *(al da-at) beit din.* What does this teach us? That it is an advantage for him [to be a Jew] and one may act for a person in his absence for his advantage. We have learned [this already]: One may act for a person in his absence for his advantage but one cannot act for a person in his absence for his disadvantage! [Here, though,] you might have supposed that an idolator prefers a life without restraint [unbridled by Jewish law] because it is established for us that a slave certainly prefers a dissolute life; therefore he (R. Huna) tells us that this is said [only in the case] of a grown up person who has already tasted sin, but [in the case] of a minor it is an advantage for him [to become a Jew].
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> It seems that [the preceding Mishna] supports him (R. Huna). [It speaks of] "a woman proselyte, a woman captive and a woman slave who have been redeemed, converted or freed (when they were less than three years and one day old)." Must they not have been immersed by the direction of *beit din?* No; here [the Mishna] treats the case of a proselyte whose sons and daughters were converted with him, so they are satisfied with what their father does.
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> R. Yosef said: "When they come of age they can protest [against their conversion].

Rabbi Cohen's forthcoming *Intermarriage and Conversion: Halakhic Solutions* (KTAV Publishing) will include an expanded version of this article.

A simple reading of the text is that a *beit din* may convert an infant gentile. The rationale is that being Jewish is considered a privilege, a *zekhut,* and one may confer an advantage upon a person even without his knowledge. This principle is recorded in the *Shulhan Arukh* (*Yoreh De'ah* 268:7) as the authoritative halakhah.

Yet straightforward as the Talmudic text appears, this basic halakhic principle was not accepted universally at face value.

In 1864, Rabbi Bernard Illowy of New Orleans, a former student of the Hatam Sofer, ruled that sons born to Jewish fathers and gentile mothers could not be circumcised by a *mohel.* His rationale was that since such sons were not Jewish, the circumcision might cause people to mistakenly identify them as Jews. To solicit support for his halakhic position, R. Illowy presented his case publicly in *Der Israelit* (an Orthodox Journal published in Germany), requesting the European Rabbinate to respond. Of major pertinence to us is the public exchange of views between Rabbi Zvi Hirsch Kalischer (1795–1894) and Rabbi Ezriel Hildesheimer (1820–1899). R. Kalischer permitted such a circumcision as well as the conversion of children born to gentile mothers, while R. Hildesheimer disputed his ruling and prohibited such conversions.[1]

R. Kalischer made the following comments regarding the Talmudic discussion in *Ketubot:* Rashi contended that R. Huna's dictum that the *beit din* may convert a minor relates to a case where the mother alone brought the child to *beit din* for conversion. The Talmudic text further contends that when the parents convert together with the child, R. Huna's dictum is not applicable. This seems to suggest that in the original instance the mother did not herself convert when she brought her child to *beit din* for a conversion. Even though the child would be reared subsequently by a gentile mother, R. Huna permitted the *beit din* to conduct the conversion. As such, concludes R. Kalischer, if a *beit din* may convert one who will be reared by a gentile mother, considering it a privilege (*zekhut)* for the child, so much more so when the child's father (a Jew) brings his son for conversion: the child wishes to emulate his father and we have good reason to expect the child to grow up Jewishly.

R. Hildesheimer retorted that we have no way of being certain that the gentile mother posited by Rashi intended to raise the child herself; perhaps either the child would be reared by observant Jews or it is known definitely that the gentile mother would rear the child according to the dictates of Torah and not *avodah zarah.* In the modern case of a gentile mother and Jewish father bringing their child to be converted, however, we cannot automatically apply R. Huna's principle.

In 1949, when Rabbi Yechiel Yaakov Weinberg (the last Rosh Yeshiva of the Hildesheimer Berlin Rabbinical Seminary) was asked his opinion in a case wherein a Jewish father and gentile mother brought their child to *beit din* for conversion, he did not focus on the argument as outlined here, but instead quoted the basic guideline which to this day serves as the pivotal negation of most child conversions:[2] The Talmud in *Ketubot* rules that a *beit din* has the authority to convert a child; this is because being a Jew is a privilege *(zekhut)* and one may confer a *zekhut* without another's knowledge. But to have a Jewish child grow up in a home that transgresses basic Jewish beliefs and observances is not deemed a *zekhut,* he said; it is rather a disadvantage and liability. Accordingly, a *beit din* has no authority to implement such a conversion. This guideline basically invalidates the legitimacy of the conversion of any child raised in a non-observant milieu. (Indeed, this principle has a far-reaching effect in another social issue: adoption. Jewish families seeking to adopt children are faced with a number of obstacles. Should they attempt to adopt a Jewish child, rabbinic authorities require exact data about the parents of the child to mitigate concerns about illegitimacy;[3] frequently, the exact information is difficult to acquire. Accordingly, many people prefer to adopt a gentile child and convert the child during infancy. Yet, if the adopted parents of such a child are not themselves observant, a *beit din* may not convert the child.[4])

Though the argument mandating an observant familial milieu in order to validate a conversion may appear straightforward and logical, with all due respect and reverence, it seems that a fine reading of our text in *Ketubot* does not force such a conclusion. Consider the following questions:

1. Rashi notes that R. Huna's ruling relates to a situation in which the mother brought her child to a *beit din* for conversion, suggesting that had the father been present the legal process of conversion might have differed. But, what is the pragmatic halakhic distinction between a mother and a father in this matter?

2. R. Huna states "*Ger katan matbilin oto al da'at beit din*—through the knowledge of *beit din.*" The phrase "*al da'at beit din*" connotes a special role for the court in the conversion of a child separate and distinct from its function during the conversion of an adult. What is this additional role?

3. Rashi states that "*beit din* becomes a surrogate father during the conversion of a child." Why is such a status necessary and what purpose does it serve?

4. The Talmud states that R. Huna's dictum may not be derived from the Mishna, as the Mishna refers to a case wherein the parents converted with the child. In that situation, the child is assumed to

approve of the actions of his parents. Yet, the pragmatic distinction between the two cases is unclear. The implication is that R. Huna's case is an innovative role for *beit din*. What is that role?

5. A valid halakhic conversion requires four integral elements: *Kabbalat Mitsvot* (the awareness of and commitment to observe the commandments[5]); *Milah* (circumcision for a male convert); *Tevilah* (immersion in a *mikveh*); and *Beit Din* (the presence of a Rabbinical Court). Should any one of these factors not be present, the conversion is not proper. A child certainly cannot (and does not) comprehend the meaning of *mitsvot* or the need for their observance; nor can he or she possess the ability to make a commitment to observe *mitsvot* in the future. As such, the entire conversion should be deemed invalid for it lacks the essential element of *kabbalat mitsvot*.

To resolve these difficulties it is necessary to posit a new frame of reference which sets guidelines for the discussion.

Shita Mekubbetset on our text poses the latter question regarding the lack of *kabbalat mitsvot* at the conversion of a child. He cites Ritva and *Shita Yeshana* who contend that *kabbalat mitsvot* is a vital element of the conversion process only in those cases where such commitment is physically possible to ascertain. In cases where the potential convert has the physical and intellectual capacity to be aware of *mitsvot* and make a commitment to observance, then and only then is this essential for a legal conversion. In such instances, the lack of *kabbalat mitsvot* would invalidate the conversion. For an infant or child, however, where *kabbalat mitsvot* is beyond the child's physical capability of comprehension, this element is deemed non-essential to the conversion process. In other words, any consideration of *mitsvot* is not germane to the validity of such a conversion. Consequently, R. Huna's rule and the Talmudic discussion do not make any reference to observance. Indeed, to infuse the concept of *kabbalat mitsvot* into our text is contrary to Ritva's position and a misreading of the discussion. The issue, it seems, concerns a completely different concept.

We suggest that the Talmud is concerned with the issue of *consent* and not observance. A *beit din* is not permitted to coerce anyone, adult or child, to involuntarily accept conversion. The process must be a voluntary one, accepted willingly by the potential convert. Should the conversion be coerced, then it is deemed invalid.[6]

The Talmud contends that R. Huna's principle is not applicable to a case in which parents convert together with their child. For in such a case, "the child consents to [join] the action of his parents." In other words, an act which emulates the action of parents—the role models—is deemed implied consent to the conversion process. The conversion has legal standing even should one dispute R. Huna's

principle, that *beit din* may convert a minor. R. Huna's case is different; he deals with a situation in which parents are not converting together with their child. In such a case, the problem of consent looms as a major issue. What authority does *beit din* have to convert a child without any concern as to whether there is consent to such a process? To this R. Huna innovates the concept that the conversion process is conferred "*al da'at beit din.*" It is not the authority or power of *beit din* which is invoked, but rather *da'at*—knowledge, consent. That is, *beit din* affirms consent for the child, for being a Jew is a privilege, and one may confer a privilege upon another even without his or her knowledge. With *beit din* thus affirming consent for the child, the conversion is thereby presumed to be a voluntary process. This is the meaning behind Rashi's comment that the *beit din* becomes a surrogate father for the child; it becomes a surrogate parent for purposes of consent. Of interest is that this commentary of Rashi is cited by the *Beit Yosef* [*Yoreh De'ah* 268] who notes that the *beit din* "becomes the father of the child who is converted through their hands." In other words, the court has a unique role to play in the conversion of a child distinct from that performed at the conversion of an adult. In the former case, they guarantee consent to legitimize the conversion.

Of concern are the particulars of the case in which R. Huna presents his principle. It is clear that R. Huna is not dealing with a situation where parents converted with the child. The *Tosefot Rid* [*Ketubot* 11a] suggests that R. Huna deals with a case of either an orphaned, destitute gentile youth or a child who was captured; the *Shita Mekubbetset* presents other options. Yet Rashi maintains that R. Huna is dealing with a case of a mother who brings the child to *beit din.* Indeed, it is Rashi's view that must be seriously considered above and beyond that of other authorities, for it is Rashi's position which is officially recorded in the Codes (see *Yoreh De'ah* 268:7).

The implication of Rashi's interpretation is that had the father brought the child to the *beit din,* R. Huna's principle would not be operational. Indeed, the Bah specifically notes that when the father brings the child for conversion, *da'at beit din* is not necessary.[7]

Rashi apparently is of the opinion that no proper conversion can occur without the precondition of consent. Just as a child who converts with his parents consents to performing a similar act, a father has the authority to grant consent to a *beit din* for the conversion of his child. The determination of the religion of the child is the father's prerogative. Consequently, when the father grants consent to convert his son, the *beit din* is not needed to utilize its good offices for consent.

There are two options for interpreting Rashi's position on the role of the mother:

1. Rashi believes that *beit din* has no authority to convert orphan children. *Beit din* cannot presume that the concept of *zekhut* is sufficient to imply consent. Consequently, only the wishes of a mother together with the concept of *zekhut* can enact a legitimate conversion.

2. Rashi feels that only a father and not a mother has the authority to grant consent; a mother's views are immaterial (see glosses of R. Yaakov Emden).

Regardless of which interpretation we accept, the specific language of the *Shulhan Arukh* supports our general position: If a gentile child has a father, the father may convert him; and if he does not have a father and (himself) seeks to be converted or his mother brings him to be converted, then *beit din* converts him, "for it is [deemed] an advantage to him (the child) and one may confer an advantage even without the beneficiary's presence" [*Yoreh De'ah* 268:7]. In the opening section, "the father may convert him." In the latter section (where the father is not present), "*beit din* converts him for it is a *zekhut.*" The concept of *zekhut* is applicable only in the absence of a father bringing the child for conversion.

The text of the *Shulhan Arukh* forces us to understand that the entire aspect of *zekhut* is a material issue only when *beit din* must utilize the principle of *da'at beit din.* In such an instance, the consent of *beit din* is granted only when there is an assurance of observance of *mitsvot.* Otherwise, *beit din* does not authorize consent for the conversion. In an instance of a parent bringing his child to *beit din, da'at beit din* is not necessary for the conversion. Parental consent is sufficient and it may even be deemed a complete *zekhut* without any consideration of *kabbalat mitsvot.* Fathers have personal rights over their children, and children consider it important to emulate their fathers. Observance of *mitsvot* in no way affects this principle. The *Shulhan Arukh* clearly notes a distinction between the cases and rules that the concepts of *zakhin* and *da'at beit din* are not applicable when a father brings his son for conversion.

The above analysis argues against R. Weinberg's halakhic challenge to the legitimacy of the conversion of children born to an irreligious Jewish father and a gentile mother, for in such an instance, the concept of *zekhut* is not germane. Indeed, since the conversion is valid without the principle of *zakhin* or *da'at beit din,* any question as to whether it is in fact a *zekhut* or a liability is immaterial to the conversion process.

This suggests that the debate between R. Kalischer and R. Hildesheimer may have been more subtle than we thought.

R. Hildesheimer contended that R. Huna dealt with a case where either the mother gave the child to *beit din* to rear according to Torah values or it was certain that the gentile mother would insure that the child observed *mitsvot*. In other words, since according to Rashi and the *Shulhan Arukh* approval of the mother is not sufficient to provide consent for a conversion, and *beit din* must therefore use the principle of *zekhut,* then the mother's commitment for the child's observance is necessary for *beit din* to assume that the process is indeed a *zekhut* and not a liability. But if the father brings the child to *beit din,* no commitment for observance is necessary. Parents cannot assume the commitment of *kabbalat mitsvot* for their children. The only reason parental consent may be necessary is to insure that the conversion was not coerced. To assume that the Talmud discusses a case where *beit din* assumes total responsibility for the child is simply far-fetched. Or, one may conjecture that since a gentile mother's commitment for observance is meaningless, *beit din* would not provide consent *al da'at beit din* unless it also assumed responsibility to rear the child. Again, such extra precautions would only apply when the conversion was *al da'at beit din.*

R. Kalischer contended that if the *beit din* could convert a child and return that child to the gentile mother's home, it certainly should permit a child of a gentile mother to be reared by a Jewish father. When a gentile mother alone brings her child to a *beit din,* the principle of *zakhin* is applicable. *Beit din* must then manifest concern that religious observance transpires so that no future disadvantage results. But when the father brings the child to *beit din,* the principle of *zakhin* is immaterial and, therefore, concern for observance is totally extraneous to the issue.

Now, what difference is there whether a gentile father or a Jewish father presents his child to *beit din* for conversion? To the extent that "consent" of a parent is all that is necessary in such a case, there should be no difference in law. The original proposal to have Jewish fathers present their non-Jewish children to *beit din* for conversion appears to be based upon solid halakhic grounds. Since, moreover, *kabbalat mitsvot* is not necessary in this instance, the procedure would be readily acceptable to even the most non-observant Jew.

One possible criticism must be noted. According to Halakhah, gentiles follow patrilineal descent while Jews observe matrilineal descent. This means that from a halakhic view, the Jewish father of a child born to a non-Jewish woman is not the halakhic father of the son. The Jewish father may not have the right to express "consent" for a child that is not his halakhic son.

This criticism suggests that a gentile father but not a Jewish father may grant consent. But consent is simply a *gilui da'at,* an expression of approval which must be elicited from the father of a child. Indeed, a child knows that a certain person is his father. To the child, there is no difference between a halakhic father or a biological father. The concern is basically who has responsibility to make decisions for the child. If the child is sick, for example, a parent has the authority to sign "consent" for an operation. In ancient times, perhaps only the father could exercise comparable authority. In our society, the biological father has legal jurisdiction over a child; he may make a decision for the child relating to life and death. He, therefore, should have the authority to assume consent on actions for purposes of conversion for his child. Indeed, many *aharonim* have accepted this line of reasoning.

Rabbi Moshe Schik also discussed the propriety of converting a child born to a Jewish father and a gentile mother. He cited *Tosefot Yom Tov* [Mishna *Ketubot,* 4:3, and *Kiddushin* 3:13] who rules that *beit din* should not convert gentile children. R. Schik suggested that *Tosefot Yom Tov* relates to a case of a Jewish father and gentile mother; since the male is not the halakhic parent of the child he has no authority to submit such a child to *beit din* for conversion. R. Schik disagreed with this position. He suggested, rather, that a court, *lekhat'hila (ab initio),* has no authority to convert gentile children, for the conversion process is a form of robbery from a gentile. To the extent that gentile children inherit their fathers, the conversion takes the child away from the family. As such, he reasons, the conversion is prohibited without parental permission. Yet, where parents consent, one may definitely convert the child.[8] At no time does he discuss any need for observance of *mitsvot.*

Rabbi David Hoffman briefly cited this responsum and added the comment that "since according to the law of the government this father has authority over his son, even though he is not a son according to *Din Torah,* it is not a form of theft. As such, perhaps even *lekhat'hila* one may convert the child, but certainly *bedi'avad* it is valid."[9]

Rabbi Avraham Yitshak HaKohen Kook also discussed this issue.[10] He too maintained that even though a Jewish father is not the halakhic father of a son born to a gentile mother, he still has the authority to submit the child to *beit din* for conversion. He utilized *Ketubot* 11a as substantiation for this principle. There the Talmud implies, according to Rashi, that when parents convert with their children, such children consent to the process. The Talmud makes no distinction as to whether the father converted prior to the conversion

of the children or whether the father and children simultaneously converted. If the former is correct, then once the father converted he is no longer a gentile, but a Jew, and is no longer the halakhic father of his son. However, he still has authority over his children to submit them to *beit din* for conversion. This proves, contends R. Kook, that even a Jewish father has authority over his non-halakhic son. R. Kook notes that such authority may not depend on biology but may relate to anyone who is responsible for the rearing of a child.

(In terms of *pesak,* however, R. Kook required that the gentile mother should not protest the conversion. In addition, he refused to sanction such a conversion where *kabbalat mitsvot* is lacking. Though he suggested that Tosafot, *Sanhedrin* 68b, imply that *kabbalat mitsvot* is not required for the conversion of a child, he still felt that it is wrong to convert a child in a milieu where there is no probable opportunity for *kabbalat mitsvot.* Of interest is that R. Kook does not discuss the text of the *Shulhan Arukh* (*Yoreh De'ah* 268:7) which grants the father authority to submit his child to *beit din* for conversion without utilizing the principle of *zekhut* or any consideration of observance. As the *Shulhan Arukh* is the standard code, its conclusions should be granted halakhic priority over those of other scholars.)

It is clear that the requirement of "consent" is simply a means of preventing an involuntary conversion. It has nothing to do with a commitment to observe *mitsvot.* For this reason R. Yosef rules in our Talmudic text that upon maturity, such children converted during youth or infancy have an opportunity to renounce the conversion. Since such forms of conversion lack *kabbalat mitsvot,* the children are yet granted an opportunity to engage in this essential factor. This means that *kabbalat mitsvot* becomes necessary only when children have the capacity for such a commitment. Prior to maturity, a renunciation is not halakhically acceptable and upon the age of maturity the child is assumed to be automatically Jewish. When does the child have the opportunity to manifest either rejection or acceptance of his religious status?

Three options to express renunciation are presented by *Shita Mekubbetset* to our text in *Ketubot.*

1. Tosafot contend that upon the age of maturity the child is informed about the need to observe *mitsvot.* Should the child reject commitment, then he loses his Jewishness.

2. Ritva contends that R. Yosef speaks of a youngster who as a minor renounced his Jewishness, protesting his or her status as a Jew. Should this rejection persist until after the age of maturity, the child's conversion is invalidated.

3. Rosh notes that the child is observed at age of maturity. Should he observe Jewish customs, then he is deemed Jewish. Should he not be observant, his status is invalidated.[11]

Kabbalat mitsvot may not be essential or even germane to the conversion of a child, but it is vital to the ultimate status of such a convert. *Beit din* is not absolved from its obligations upon the formal conclusion of the rituals performed in youth. It must convene at the child's age of maturity to assess the status of the convert. For this reason Tosafot note that the child must be informed of the need to observe *mitsvot*. That is, *beit din* must convene and formally request *kabbalat mitsvot*. This procedure is a formal "act of *beit din*."

It is apparent that Ritva does not require a formal act of *beit din* to extract a commitment of *kabbalat mitsvot*. According to Ritva, the child retains his Jewishness as long as he does not reject it as a youth and persist in his rejection till maturity. This suggests that the concern has nothing to do with *kabbalat mitsvot*. Ritva does not require any assessment of observance. This may be due to his theory that once *kabbalat mitsvot* is not feasible (e.g., at the conversion of an infant), the entire concern for *kabbalat mitsvot* is never material to that particular conversion. The concern is, rather, one of "consent." For this reason as long as the child does not reject his Jewish status, the "consent" factor is implied and the child retains his Jewishness till maturity.

The position of Rosh is that *kabbalat mitsvot* is immaterial to the conversion of a child only because the child is unable to make such a commitment. This merely temporarily withholds such a requirement till a date when the commitment is physically and legally able to be assessed. Yet, no formal convening of *beit din* or *kabbalat mitsvot* is necessary. As long as the child is observed to follow Jewish customs, it is deemed sufficient to legitimize the conversion.

Hatam Sofer cites numerous opinions, including that of Bahag, who contend that if parents bring their child to *beit din* for conversion, even though the parents themselves do not convert, the child may not subsequently renounce the conversion, for the parents "accept the condition of the conversion for him."[12] The subsequent need of *kabbalat mitsvot* is nonessential. Once consent is provided for the conversion, it remains valid even without a subsequent *kabbalat mitsvot*.

In 1934, Rabbi Hayyim Ozer Grodzinski modified the above *pesak* of Hatam Sofer by contending that only children who are reared as observant Jews may not subsequently renounce their Jewish status. However, if during minority they violated Jewish law, then they retain the option of renunciation. But violation of Halakhah alone is not tantamount to renunciation; a formal renunciation