

A MATTER OF GRAVE CONCERN: A QUESTION OF MIXED BURIAL

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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

In an area of Southern California with a growing Jewish population and no local Jewish cemetery, a Christian (or non-denominational) cemetery has offered to set aside a designated section of ground as an exclusively Jewish cemetery.

While proper means of distinct separation from the non-Jewish part of the cemetery will be instituted and maintained, the questioner is concerned that the Jewish section will not really be an exclusively Jewish cemetery, since his Reform colleagues will allow the non-Jewish spouses of their members to be buried there.

His question seeks determination of whether this would vitiate the Jewish character of the cemetery, with the consequence of rendering it halakhically unfit.

תשובה

There is one issue of which the questioner is either unaware or with which he is unconcerned – namely, the legal ownership of the property itself. The issue is twofold: There is the individual's ownership of his or her burial place; and secondly, there is the issue of whether this communal cemetery is **קרקע ישראל**.

The question of individual ownership arises since in California (and it may also be true in other jurisdictions) the individual purchaser of a cemetery plot does not acquire title to the property. Title remains vested in the non-profit corporation. (Otherwise, the property would become taxable to the purchaser and heirs.) The “purchaser” of a cemetery plot only acquires a license – a right of interment.

While it may not be an absolute halakhic certainty that every Jew must own his or her

own burial plot, it was considered improper for a צדיק to be buried in a plot belonging to others. Bava Batra 111b quotes Josh. 24:33 which states: ואלעזר בן אהרן מת ויקברו אותו בגבעת פינחס בנו. The Gemara infers that Elazar apparently had no burial place of his own. This raises the question of how Phineas could have had property other than through inheritance from his father. After hypothesizing that this could have been possible only if Phineas had married a woman of property whose property he inherited upon her death, R. Papa says to Abaye (ibid. 112a), “Perhaps Phineas bought the property.” Abaye’s response was: פינחס דזבין מיוזבן לא מצית אמרת דאם כן נמצאת שדה חוזרת ביובל ונמצא צדיק קבור בקבר שאינו שלו.

While the Talmud specifies צדיק later authorities extended this to all Jews. In *Eyin Yitzhak* (סי’ ל”ד), Rabbi Isaac Elchanan Spector, dealing with the issue of whether a community may purchase property that would be available as a cemetery only for a limited time, cites this passage and adds:

ואף דאמרו בגמ’ בלשון צדיק קבור כו’ עכ”ז הא עלינו החיוב להחזיק לחבירו צדיק כמו דמצינו באו”ח סי’ תקפ”ב סעי’ ט’ בהג”ה וט”ז ומג”א שם. ובפרט בעדה שלימה דהם עדת קדושים אין לנו לעשות מעשה ח”ו דיהי’ נגד מעלת כבודם ויהי גנאי להם ח”ו.

Thus, all Jews are to be considered presumptively צדיקים and, as such, should be buried in graves which belong to them.

Nevertheless, while in our case, title to the property does not become vested in the decedent, the right of interment conferred by contract with the cemetery owners is designated as irrevocable. Indeed, the “purchaser” may sell the right of interment to others, which indicates that to all intents and purposes, even without title in fee simple, he or she exercises dominion over the property. We may therefore maintain that קבר, *qua* the property is קבר שלו/ה.

Since the title to the entire cemetery, including the Jewish section, is vested in the corporation that operates both the Jewish and non-Jewish sections, the Jewish cemetery is not אה לצרה. Jewish ownership has been a requirement, and in as late a work as קרקע ישראל by Rabbi Yehuda Yekutiel Greenwald it is stated:

חוב קדוש הטילן רבותינו על בני ישראל להיות להם בית הקברות מיוחד להם ושיהיה הקרקע שלהם (פרק ג’ סי’ י”א).

The issue arose in the early nineteenth century when several municipalities in the Austro-Hungarian Empire established communal cemeteries with sections set aside for the various faiths. At that time, rabbinical authorities insisted that the community attempt to get outright possession of the Jewish section. In the event that that was impossible, then at least control of the Jewish section and the rules governing it were to be in the hands of Jews and proper separation erected between the Jewish and non-Jewish sections.

פתחי תשובה to Yoreh De’ah 363 cites a responsum by R. Moses Sofer in which he declared that it is permitted to disinter bodies from a cemetery owned by non-Jews to be reburied in a cemetery owned by Jews. While exhumation was considered a serious prohibition, evidently the fact that the body was in non-Jewish ground overrode that prohibition. On the other hand, the same passage in פתחי תשובה cites a responsum by R. Ezekiel Landau to a similar question in which he forbade disinterment. Evidently, to the נודע ביהודה, a cemetery not owned outright by Jews was nevertheless considered a proper cemetery.

In the responsum of R. Isaac Elchanan (cited *supra*), in which he attempts to explain the position of the נודע ביהודה, it is clear that the essential issue is not the matter of title,

but rather the assurance that the cemetery will be a Jewish cemetery in perpetuity and that those buried there will not be disturbed. He therefore forbade the purchase (really a lease) of temporary cemetery property since after the fixed period, the bodies will have to be removed. This would be violative of the halakhah for two reasons: *חרדת הדין וניווול המת*.

In 1959, the issue became a *cause celebre* in the Los Angeles community. Forest Lawn Memorial Park (a non-denominational commercial cemetery operation) established a separate Jewish cemetery called Mt. Sinai Memorial Park. A number of congregations and individuals purchased cemetery property there and the Jewishly-owned cemeteries raised the issue that Mt. Sinai Memorial Park was not *קרקע ישראל*. The issue was vituperatively debated in the Anglo-Jewish press, leaking over into the general press, with the result that the Jewish Community Relations Committee, seeking to bring the matter to a conclusion, approached the various rabbinic groups and organizations for a statement. Included was the Southern California Board of Rabbis of which I happened to be President at the time. I wrote to the CJLS of the Rabbinical Assembly for guidance. Approximately a year later, I received a response, indicating in essence:

- a. Halakhically, there is no *איסור* to be issued for a cemetery which is owned by non-Jews.
- b. However, it would be against the best interests of the Jewish community for control of a Jewish cemetery to be in the hands of non-Jews. Therefore, if possible, congregations, organizations and individuals seeking to acquire cemetery property should ascertain that the ownership is Jewish.
- c. Where families or congregations already own plots in cemeteries owned by non-Jews, no aspersion should be cast upon burials there nor should disinterment and reburial in a Jewishly-owned cemetery ever be suggested.

Approximately one year later, Rabbi Joseph Wagner, then President of the local RA Region, wrote to Rabbi Max Routtenberg, then Chairman of the Law Committee, for clarification of the statement. Rabbi Routtenberg's response essentially emphasized the need to safeguard "Jewish legal rules and sensitivities."

בנ"ד – in the present instance – while it is permissible to bury in the Jewish section of the non-Jewish cemetery, the questioner should be alerted to the need to establish that (1) administrative control over the Jewish section should be in the hands of a proper Jewish committee to see that only Jewish rites are performed there, and (2) that the contractual agreements between the cemetery and the purchasers are unconditional, with the non-Jewish cemetery warranting that the Jewish section will remain a Jewish section and never revert to a non-denominational status.

Burial of Non-Jewish Spouses

The questioner's essential concern is that his Reform colleagues will bury the non-Jewish spouses of their members in the Jewish section of the cemetery. Initially, this seems to pose no problem since a baraita cited in Gittin 61a would seem to permit it:

ת"ר מפרנסים עניי נכרים עם עניי ישראל ומבקרין חולי נכרים עם חולי
ישראל וקוברין מתו נכרים עם מתו ישראל מפני דרכי שלום.

Nevertheless, however one may be personally convinced that *פשוטו כמשמעו*, beginning with Rashi, this was understood by the poskim as not conferring permission to bury Jews and non-Jews together. While the Rif quotes the baraita *ad verbatim*, Rashi comments *ad locum*: לא בקברי ישראל אלא מתעסקין בהם אם מצאום הרוגים עם ישראל.

The Ran quotes Rashi's limitation but differs from him only in that he extends Jewish involvement in non-Jewish burial to isolated instances and not only in the case of a common disaster, which seems to be a possible inference from Rashi. He says: ולישנא לאו דווקא דה"ה כשנמצאו מתי עובדי כוכבים לכד שמתעסקים בהם מפני דרכי שלום.

He substantiates his understanding of the halakhah on the fact that in the Yerushalmi, the parallel baraita appears without the word *עם*, as follows: ומתו ישראל וקוברין מתי גויים ואבילי ישראל ומכבסין כלי גויים וכלי ישראל מפני דרכי שלום (ירושלמי גטין ומנחמין אבילי גויים ואבילי ישראל ומכבסין כלי גויים וכלי ישראל מפני דרכי שלום (ירושלמי גטין ופרק ה' ה"ט). The Ran further bases the rationale for not burying Jews and non-Jews together on the principle that: אין קוברין רשע אצל צדיק (סנה' מז, א').

Maimonides refers to this halakhah in two places. In הלכות מלכים פ"י סעי' י"ב he states:

וזהו שאמרו חכמים אין כופלין להן שלום בעכו"ם ולא בגר תושב. אפילו העכו"ם צוו חכמים לבקר חוליהם ולקבור מתייהם עם מתי ישראל ולפרנס ענייהם בכלל עניי ישראל מפני דרכי שלום הרי נאמר טוב ה' לכל ורחמי על כל מעשיו ונאמר דרכיה דרכי נועם וכל נתיבותיה שלום.

Lest you be misled to believe that non-Jews and Jews may be buried together by the words *עם מתי ישראל*, parallel to *בכלל עניי ישראל*, the Kesef Mishnah is quick to cite Rashi and the Ran, making sure to point out: אין קוברין... אצל ישראל... רשע אצל צדיק.

In קוברין מתי עכו"ם... מפני דרכי שלום, Maimonides merely states *הלכות אבל פ"ד סעיף י"ב*. The Radbaz cites the baraita in Gittin, adding: והא דקתני עם מתי ישראל לאו דוקא אלא: שמתעסקין עמהם דהא אין קוברין אותם בקברי ישראל וזהו שהשמיט רבינו מלת עם.

The Meiri, explicating the Mishnah which begins at the bottom of Gittin 59a, incorporates the baraita quoted later in the Gemara, adding: ולא לקברם בבית הקברות של ישראל. אלא שאם מצאו ישראלים וגויים מתים משתדלים בקבורתם כדרך שמתדלים במיתי ישראל.

When the Tur (Yoreh De'ah 367) expressly codifies Rashi's limitation, even citing Rashi explicitly, the Bet Yosef, in commenting on it, adds the statement of the Ran in its entirety. However, when Yosef Karo codified the Shulhan Arukh, he did not include this limitation, saying only: קוברים מתי עכו"ם ומנחמים אבליהם מפני דרכי שלום. By leaving out any reference to *עם מתי ישראל* or *עם אבלי ישראל*, the codified halakhah has thus incorporated both Rashi and the Ran.

It is therefore abundantly clear that non-Jews are not to be buried together with Jews. This was so obviously that R. Shlomo Kluger, in שו"ת טוב טעם ודעת סי' רנ"ג, becomes incensed that someone would even address a question to him that implies that he might permit having a Jewish cemetery about a non-Jewish cemetery without a solid מחיצה. He says:

ע"ד שאלתו אם מותר לערב בית הקברות של ישראל לבית קברות של עכו"ם דהיינו שדופן אחד מן בית הקברות ישראל יהי פרוצה לקברות עכו"ם הנה כועס אני עליו על שאלתו זו כי בודאי עלה על דעתו שאולי אני אהי' המתיר בזה וחדשני בכך ואם הי' יודע בדעתו דבודאי לא אתיר לא היה שואל ממני וגם מה שעלה בלבו ספק כלל בזה אני כועס עליו ולא רציתי להשיב לו כלל: רק מיודעי אמרו לי כי אם לא אשיב כלל אולי יאמר מדשתק אודי אודי לך נחמתי להשיבו.

He then cites Rashi's comment on the baraita in Gittin and the principle that אין קוברין to show that there must be a physical separation between places of different degrees of sanctity. *A fortiori* there must be a physical separation between the *הקודש* and *הטומאה* אשר מעמידין. על קבריהם צלמים. After further Biblical expositions from Abraham and Ruth, he analogizes from the *הלכות עירובין* wherein, if there is a breach in the wall of the abutting *המקום האסור*, then it is forbidden to carry there, which shows that without a solid barrier:

נחשב האויר מעורב יחד כן ה"נ מכ"ש דאסור להיות אויר קברות ישראל ואויר קברות עכו"ם מעורבין יחד בלי הפסק מחיצה ממש לכך. ח"ו להיות כן.

Despite his previous annoyance, he nevertheless signs דברי ידידו.

While it is clear that *לכתחילה* one must create a physical separation between a Jewish graveyard and a non-Jewish graveyard, our questioner is asking if the interment of some non-Jews in the Jewish section invalidates the section for Jewish burial.

R. Moshe Feinstein (*Iggrot Moshe Yoreh De'ah*, vol. 1, siman 160) responds to this question in a different context. The question addressed to him revolves around the fact that in the Jewish cemetery in Canton, Ohio there are buried converts who were converted by a Conservative rabbi.

After indicating that there might be some grounds for considering the fact that the convert did not observe Shabbat and other mitzvot as not necessarily vitiating the conversion, he nevertheless declares it is invalid *ab initio* merely on the basis that it was done by a Conservative rabbi.

אבל עכ"פ צריכה לקבל המצות בפני ב"ד, והראבי"ט הקאנסערוואטיוו מסתמא אין עושין כן דהא אין יודעין דיני גרות. וגם אינם זהירין לקיים כדין אף אם היו יודעין וממילא חסר קבלת מצות אף הקבלה הגרועה שזוה ודאי הוא עיכוב בגרות. וגם הא ב"ד של הקאנסערוואטיוו הם פסולים לב"ד דהם כופרין בהרבה עיקרי הדת ועוברין על כמה לאוין... וגם הוא כודאי שעוברין על כמה איסורין דאורייתא ואף שלא נתקבל עדות עלייהו הוא כאנן סהדי שכל מי ששם הבזוי קאנסערוואטיוו עליו הוא בחזקת מופקר להרבה איסורין ולכפירה בהרבה עיקרים... ולכן פשוט שאין הגרו שעשה הראבי"ט של הקאנסערוואטיוו כלום.

While we would certainly take issue with Rabbi Feinstein's characterization of Conservative rabbis and of conversions done under Conservative auspices, nevertheless for him the conversion was a nullity and therefore the convert is, for him, still a non-Jew.

Nevertheless, he responds to the question:

אם מחוייב כתר"ה לצאת במחלוקה גדולה... אני אומר שכיון שמה שאין קוברין מתי עכו"ם בקברות של ישראל כדאיתא ברש"י גטין דף ס"א הוא מטעם דאין קוברין רשע אצל צדיק כדמפרש שם בר"ן עיי"ש והובא בב"י סי' שס"ז ביו"ד עיי"ש לכן החיוב על כתר"ה רק להזהיר את שומרי תורה שיצוו שלא יקברום סמוך לגרים כאלו.

Thus, even Rabbi Feinstein does not consider the burial of these converts (who in his estimation are גמורים) as preventing observant Orthodox Jews from being buried in the same cemetery.

This is not a case of first impression for the CJLS, although it is difficult to ascertain with certainty that there is a definitive ruling. In a summary of the decisions of the CJLS on Mourning and Funerals, one finds, *inter alia*, the following statements:

- A. A non-Jew married by a rabbi without conversion may not be buried in a Jewish cemetery (H235).
- B. If non-Jewish spouse had attended services and considered themselves (sic) part of the Jewish people, and raised their children as Jews, then they may be buried in a Jewish cemetery. The space of one grave must be left on either side of the non-Jewish grave (K559, W75). (My comment: Must an empty space also be left at head and foot of the interment space?)
- C. Non-Jewish wives and children cannot be buried in a Jewish cemetery, although in cases of need certain specific arrangements can be made to have them buried in a Jewish cemetery (N75). (My comment: This is egregiously ambiguous. [A] What about non-Jewish husbands? [B] What could constitute need? [C] What specific arrangements?)
- D. A non-Jewish wife may be buried in a Jewish cemetery in the following manner: Her grave is to be partitioned from the Jewish graves by shrubbery or railing or a groove ten טפחים high or deep, or by the space of one empty grave on each side (N287, W75). (My comment: Again the gender distinction exists. Must partition by barrier or empty grave be at both head and foot?)
- E. The synagogue constitution, as well as the literature describing cemetery plots, should state clearly that a non-Jewish spouse cannot be buried there (U448). (My comment: This seemingly negates the previous statements allowing burial with empty space on each side.)
- F. Some ground contiguous to the cemetery can be set aside for burial of non-Jews who do not object to being buried in such a section of the cemetery (U448). (My comment: The decedent is in no position to voice objection or acceptance. Also, “can be set aside” and “do not object” leaves open the interpretation that if objection is voiced, then they may be buried in the cemetery proper. Is this a correct inference?)
- G. It is not advisable to have a non-Jewish spouse buried in a separate section (W6). (My comments: If it were not an oxymoron, one would have to say that this, together with F. above, is clearly ambiguous.)

The confusion rampant in the above only illustrates the difficulty of dealing with the realities of the situation. The reality is that it is inevitable that some non-Jews will be buried in the Jewish section under the mistaken assumption that they are Jewish, or through deception. The reality is that this occurs even in Jewish cemeteries not connected to non-Jewish cemeteries and owned and operated by Jews.

Mt. Sinai Memorial Park referred to above, subsequent to the community furor, was sold to Sinai Temple, a prominent Conservative congregation. Their contract specifically permits burial of non-Jewish spouses. Operators of other Jewish cemeteries in the Los Angeles area who do not make such a specific provision nevertheless maintain, quite correctly, that they are not in a position to be בודק צצינות, nor are they the ones to determine who is or who is not Jewish. Their position is that if a rabbi will officiate, they must assume that a Jewish burial is taking place.

It should be pointed out that the problem will not be restricted to non-Jewish spouses. With the adoption of patrilineal descent by the Reform movement, children will also be buried who are halakhically non-Jewish. As time goes on, this will become even more prevalent, as today's "patrilineally Jewish" children become "patrilineally Jewish" adults. There is, therefore, no way to prevent burial of non-Jews in this Jewish cemetery.

There is, of course, one option available to our questioner that affords the maximum assurance that his congregation will not be buried in proximity to the non-Jewish spouses or children of Reform congregants. If the congregation is able to purchase a substantial number of contiguous plots in the cemetery – i.e. an entirely distinct section for the exclusive use of the congregation – the gravesites on the perimeter of the section could be sacrificed and left empty in accordance with CJLS suggestion B. above. (To prevent the empty graves from inadvertently being used, caution would dictate that those gravesites be covered with a hedge or other type of *מחיצה*. Indeed, I am unaware of the halakhic basis for considering a mere empty grave, without a tangible separation of appropriate size, as constituting a proper *מחיצה*. In that way, the congregation could control the burials within that section, restricting interment there to Jews who were born of Jewish mother or were converted to Judaism.

However, I would hazard a guess that despite all such precautions, in the course of time, some non-Jewish spouses or children of Jewish fathers only will be interred there. This will occur as a result of ignorance, deception, or negligence. But even if this option were assumed to be fail-safe, I would argue against its necessity and/or its advisability.

The creation of such a distinctly separated section makes a statement about the remainder of the cemetery. If only that section is considered halakhically proper, then, by implication, the rest of the cemetery is *פסול*. This is then *מוציא לעז* on the Jews buried there. Furthermore, let us hypothesize the following scenario: The rabbi of this congregation has a member who is married to a non-Jew. Since the non-Jewish spouse cannot be interred in the congregational section, the family purchases plots in the undifferentiated part of the Jewish cemetery because the spouses want to be buried side by side. When the Jewish spouse dies, will the rabbi refuse to officiate at the interment? The questioner's own logic would seem to militate against his participation. In his inquiry to the CJLS he expressed his problem as, "I don't see how this can be considered a Jewish cemetery." Yet can he, both from an ethical and practical standpoint, refuse to officiate? The creation of the distinctly separated section, by virtue of its reflection on the Jewish cemetery of which it is a part, may be counter-productive both for the rabbi and for the congregation.

One can also argue against the necessity from a halakhic standpoint. In the question, there is, as we have noted, the implicit presumption that the interment of some non-Jews, even with Jewish rites, vitiates the Jewish character of the cemetery. But nothing in the sources we have cited indicate this. While it is true that the Jewish section must be separated by a physical barrier from the non-Jewish section, as far as individual graves are concerned, even Rabbi Moshe Feinstein would only caution that *שומרי תורה* not be buried in adjacent proximity to the non-Jew. But even he does not declare the entire cemetery *פסול*. If R. Shlomo Kluger can analogize from *הלכות עירובין*, I can analogize from *הלכות מקוואות*. As long as there is the requisite amount of *מים חיים*, the addition of some *מים שאובים* does not render the *מקוה* unfit. Similarly, since the vast majority of interments is of halakhically defined Jews, the addition of some non-Jewish bodies does not make the cemetery *פסול*.

But over and above these arguments, I am motivated by an ethical consideration. As R. Moses Feinstein has indicated in his *תשובה* (following the Ran), the reason why non-Jews are not to be buried together with Jews is because *אינן קוברין רשע אצל צדיק*. This

rationale is presumptively characterizing all non-Jews as רשעים. Whatever may have been the justification for such a presumption in times past, I find such a presumption today ethically offensive. This is particularly so, since the statement in its original context (Sanhedrin 47a) is used to explain why הרוגי ב"ד were buried separately. In other words, in the original context the רשע is an executed criminal. Furthermore, the tradition in saying חסידי אומות העולם יש להם חלק לעולם הבא (תוספתא סנהדרין פי"ג) recognizes that not all non-Jews are רשעים. Certainly this non-Jewish spouse, who may have contributed service to the synagogue, provided the children with a Jewish education and is not being buried with Christian burial rites or sacraments, should not be presumptively characterized as a רשע.

Conclusion

(A) Although the decedent possesses only a right of interment, and does not own the gravesite, it is still to be considered קבר שלו/ה and we need not be concerned that נמצא צדיק קבור בקבר שאינו שלו.

(B) The agreement with the non-Jewish cemetery operators must vest the Jewish community and its designated representatives with absolute control over the religious administration of the Jewish section. No religious rites other than Jewish may be conducted there, nor may any clergy other than rabbinical be allowed to officiate. The cemetery owners must contractually warranty that the Jewish section will remain an exclusively Jewish cemetery in perpetuity and never revert to Christian or non-denominational status.

(C) While a congregation may, for a variety of reasons, seek to have its own section in the cemetery, it need not establish a barrier separating the section from the rest of the Jewish cemetery. Clearly, the congregation may, in its own wisdom, establish rules of eligibility for interment in the congregational section. Nevertheless, it should not do anything which by inference casts aspersion on the Jewish character of the total Jewish section. The interment of non-Jewish spouses and children by Reform rabbis does not vitiate the Jewish character of the cemetery or its sanctity.