

Eirand-Herskowitz v Mt. Carmel Cemetery Assn.

JEWISH CEMETERIES

RABBI MOSHE DAVIS

SUPREME COURT, QUEENS COUNTY

IN THE MATTER OF DEBRA EIRAND-HERSKOWITZ,
PETITIONER,

AGAINST

MT. CARMEL CEMETERY ASSOCIATION, ET AL.,
RESPONDENTS.

12952/09

For Petitioner:

Francis X. Moroney, Esq.
497 Westbury Avenue
Carle Place, New York 11590

For Respondents Jean Herskowitz and Nanci Gordon:

Moritt, Hock, Hamroff & Horowitz LLP
400 Garden City Plaza, Suite 202
Garden City, New York 11530

by: Charles R. Kleinhardt, Esq.
Henry Klosowski, Esq.

For Respondent Mt. Carmel Cemetery Association:

Martin A. Fischer, Esq.
254 East 68th Street
New York, New York 10021

Howard G. Lane, J.

This is a proceeding pursuant to Not-For-Profit Corporation Law ("N-PCL") § 1510(e) to disinter the remains of the petitioner's husband, Jamie Herskowitz, from the Herskowitz family plot in the Mount Carmel Cemetery (hereinafter "Mt. Carmel"), Queens County, New York in which he is now buried and to permit the removal of such remains from such plot to the petitioner's family plot in the Saint [*2]Elizabeth Memorial Chapel (hereinafter "St. Elizabeth Cemetery"), Eagle Valley, Sloatsburg, New York. The respondents, Jean Herskowitz and Nanci Gordon, are the mother and sister of the decedent and have an ownership interest in the Herskowitz family plot. They oppose the petition. The respondent Mt. Carmel Cemetery Association does not oppose the petition.

An application under N-PCL 1510(e) is analogous to a special proceeding and an evidentiary hearing is required where the papers and pleadings raise a material issue of fact concerning the burial wishes of the decedent (*Matter of Lichtman v. Highland View Cemetery Corp.*, 289 AD2d 244 [2d Dept 2001]; *Matter of Briggs v. Hemstreet-Briggs*, 256 AD2d 894 [3d Dept 1998]). In a decision and order dated September 11, 2009, this court determined that upon review of the papers and pleadings herein, they raise material issues of fact concerning, inter alia, the decedent's expressed wishes regarding his final resting place in his deceased father's family plot in Mt. Carmel Cemetery and being buried together with his spouse, and accordingly ordered that an evidentiary hearing be held. A hearing was held on December 8, 2009, and at the conclusion of the hearing, the parties were directed to submit to the court, post hearing memorandums by February 10, 2010, which date was extended at the request of counsel for the parties. Based upon papers and pleadings herein, and upon the credible evidence adduced at the hearing and the admissible exhibits, the following constitutes the court's findings of fact and conclusions of law:

FINDINGS OF FACTS

Based on an evaluation of the credibility of the witnesses and the exhibits, the court finds the testimony of all of the witnesses credible, and the essential facts are not in dispute.

After being together and dating since 1988, and being engaged to be married in 1998, petitioner Debra Eirand-Herskowitz and Jamie Herskowitz were married on March 6, 1999.

✓ From when they were married and up to the time of Jamie Herskowitz's death on November 6, 2007, they lived together, residing in Tuxedo, New York.

During the course of their marriage, they celebrated holidays together including Christmas, Thanksgiving and Easter. With respect to Christmas, they developed a tradition of putting up a Christmas tree. Although Mr. Herskowitz was Jewish, he did not actively practice his faith during the nearly 20 years of their marriage. Petitioner is Catholic, however she concedes that ✓ she is not a practicing Catholic. With regard to the couple's relationship with her late husband's mother and sister, she testified that they lived in California and that she and Jamie "had very little to do with them" and that Jamie "did not spend much time with them."

Mrs. [*3]Herskowitz and Ms. Gordon visited New York infrequently, and except for one or two special occasions, Mrs. Herskowitz did not visit Jamie and Debra in Tuxedo, New York.

✓ On May 7, 2006, Mr. Herskowitz was diagnosed with "pulmonary arterial hypertension" and thereafter had to be placed on oxygen. In or about September 2007, they began discussing future burial and funeral arrangements including the fact that they wanted to be buried together and that her husband did not want to be separated from his wife in death. At that

time petitioner also believed that her husband owned two deeds for cemetery plots at the Mt. Carmel Cemetery, one plot which contained the remains of his late father and a second plot of which contained the remains of his paternal grandparents. Although before they were married, they had discussed his grandfather's family burial plots in Mt. Carmel Cemetery as a potential burial place for them both, after her husband became ill, they later discussed these plots again, and decided that they did not want to be buried in Queens County because they did not live there nor did they have family or friends who lived there. As a consequence, they began investigating purchasing burial plots in a cemetery closer to their home in Tuxedo, New York.

✓ They considered and ruled out one cemetery because it was restricted to Catholics, and as her husband was Jewish, they could not be buried together. Just days prior to her husband's final days of life, they visited St. Elizabeth Memorial Chapel, in Eagle Valley, New York, near Tuxedo and they agreed that was where they would purchase their burial plot. Indeed, after the visit, Mr. Herskowitz designed a headstone that he wanted to have placed on the grave he would share with his wife with the inscription to read: "Number one husband. Loving you always and forever until we meet again." Since her husband had a hospital visit scheduled for November 2, 2007 for a medical procedure, they had agreed that on the Monday after his hospital visit they would follow-up and make arrangements to purchase the plots at St. Elizabeth's Cemetery. Unexpectedly and sadly, Mr. Herskowitz was never able to make arrangements to purchase the plots, as he never left the hospital, having succumbed to the effects of his illness. Jamie Herskowitz died on November 6, 2007.

After her husband's death, petitioner was extremely distraught so much so that she was unable to make burial and funeral arrangements. As a result, the burial and funeral arrangements were made by her husband's mother and sister. Although, she was not present and had no active participation in the funeral and burial arrangements, she admits that on November 8, 2007, she signed an authorization requested by Mt. Carmel Cemetery which authorized the burial of his remains in the Mt. Carmel Cemetery. The authorization states that:

✓ "I hereby authorize the interment of and future monument work for Jamie Herskowitz whom I know to be a member of the Jewish faith" in the plot owned by Calvin Herskowitz, Jamie's father. However, she testified that at that time she was emotionally distraught and grieving over the sudden, unexpected death of her husband, and did not know that the plot could not accommodate her remains so that she could be buried with her husband. It was on the day of burial on November 8, 2007 she realized for the first time that her husband was to be buried at Mt. Carmel Cemetery. Even at that time she believed, although erroneously, that the plot in which he was to be buried had a second adjoining plot for her to be buried with him in the future.

Shirley Pinkney testified as a close personal friend of the couple for nearly 17 years and corroborated the fact that although Mr. Herskowitz was Jewish he did not actively practice his religion, and did not attend nor was he a member of any synagogues. Patricia Flanagan ✓ also [*4] testified as a close personal friend of Mr. Herskowitz for nearly 18 years and of petitioner for nearly 30 years and corroborated the fact of the couple's longtime loving relationship and their wish to be buried together.

✓ Respondent Jean Herskowitz is the mother of Mr. Herskowitz and resides in Laguna Hills, California. She had conversations with him when he expressed that he wanted to be buried in the Herskowitz family plot with his family in Mt. Carmel Cemetery. At their last visit to Mt.

✓ Carmel Cemetery they went together "into the office [of Mt. Carmel Cemetery] ... [to] see if there are any available plots", and a "man gave him a card, and said I'll be in touch." She conceded that when she did have conversations with her son concerning being buried with his family, she did not treat such statements as serious expressions of his intentions. She testified specifically as follows:

Q. Did you ever have a conversation with your son as to you taking care of his burial arrangements?

A. No, I did not.

Q. Did he ever have a discussion with you with respect to him being buried with your husband, your late husband?

✓ A. He indicated that he would wind up near his family, Daddy, Nanny Ann, he would say and the rest of them and we would laugh.

Q. He indicated to you that's where he wanted to be buried?

A. Excuse me? Only those conversations.

...

A. That were very casual and life -- I never really took seriously because what mother wants to have a child go before she does.

✓ Whenever she visited Mt. Carmel Cemetery with her son he would take out a prayer book, put on a yarmulke, and say a prayer at his father's grave.

✓ Respondent Nanci Gordon is the sister of Mr. Herskowitz and resides in Laguna Hills, California. She testified that in or about October 20, 2007 he told her he wanted to be buried next to his father. Steven Smith, a close friend of Mr. Herskowitz for nearly 30 years, testified that during the period of May or June 2007 until in or about October 2007, the month prior to his death, he had conversations with him when he expressed to him that he wanted to be buried with his father. Dennis Kuccia, the attorney who participated in preparation, drafting and supervision of the execution of the Last Will and Testament of Jamie Herskowitz, testified that the decedent never indicated to him where he wanted to be buried or what funeral arrangements he wanted. The Will does not contain any provision concerning a specific place of burial.

Additional facts appear in the Conclusions of Law.

CONCLUSIONS OF LAW

A petition to disinter a body is governed by New York

Not-For-Profit Corporation Law (N-PLC) § 1510(e), which provides, in relevant part: [*5]

✓ A body interred in a lot in a cemetery owned or operated by a corporation incorporated by or under a general or special law may be removed therefrom, with the consent of the corporation, and the written consent of the owners of the lot, and of the surviving wife, husband, children, if of full age, and parents of the deceased. If the consent of any such person or of the corporation can not be obtained, permission by the county court of the county, or by the supreme court in the district, where the cemetery is situated, shall be sufficient.

(See, *Matter of Lichtman v. Highland View Cemetery Corp.*, *supra*; *Matter of Pring v. Kensico Cemetery*, 54 AD3d 766, 767 [2d Dept 2008]). "In the absence of consent, a court may grant permission to disinter upon a showing of good and substantial reasons" (*Matter of Pring v. Kensico Cemetery*, *supra* at 767; citing N-PCL 1510[e]; *Matter of Kelly v. Kelly*, 16 AD3d 587 [2d Dept 2005]).

While a decedent's spouse has "a superior right over the decedent's parents in selecting [the] final place of burial" (*Matter of Kelly v. Kelly*, *supra* at 588); a decedent's own wishes "concerning his or her final resting place are of significant concern to courts in determining whether disinterment should occur" (*Matter of Briggs v. Hemstreet-Briggs*, *supra* at 894; see, *Matter of Conroy v. Hynes*, 138 AD2d 212 [3d Dept 1988]; *Matter of Coraggio v. Coraggio*, 21 Misc 3d 1111A, [Sup Ct, Richmond Cty 2008, McMahan, J.] [wishes of decedent are "significant concern" to court and may even prevail over wishes of surviving spouse]).

A decedent's wish that he or she be buried with his or her spouse constitutes "good and substantial" reason for disinterment (see, e.g., *Matter of Pring v. Kensico Cemetery*, *supra* [good and substantial reasons for disinterment existed where petitioner husband showed paramount concern of deceased wife was to be buried with husband and owners of plot where deceased was buried could not assure petitioner that he would be buried in a grave adjoining wife]). Where the decedent's wishes were unclear or vague, the desire of the surviving spouse to be buried with his or her deceased husband or wife has been found to constitute "good and substantial" reason for disinterment (see, e.g. *Yome v. Gorman*, 242 NY 395 [1926] [holding that disinterment "to satisfy a longing that those united during life shall not be divided after

death ..[is].. praiseworthy and decorous"]; *Matter of Kelly v. Kelly*, 16 AD3d 587 *supra* at 588 [holding that wife's showing that she and children would not be able to be buried with deceased husband because he had not been buried in a Catholic cemetery constituted "good and substantial" reason to disinter husband's remains]; *Viscomi v. McGuire*, 169 Misc 2d 713 [Sup Ct, Westchester County 1996, Donovan, J.] [trial court finding that notwithstanding wife's expression at one point in her lifetime to be buried with her mother, granted surviving husband permission to move wife's remains from wife's family grave site to new plot he purchased which would provide sufficient space for them to be buried together]; cf., *Matter of Chait v. Chait*, 270 AD2d 259 [2d Dept 2000] [Court denied wife's petition to disinter deceased husband's body *but only* on the condition that respondents convey to wife title to the burial plot immediately adjacent to that of her husband so that they could be buried together]).

DISCUSSION

The quiet of the grave, the repose of the dead, are not lightly to be disturbed. Good and [*6]substantial reasons must be shown before disinterment is to be sanctioned. (see, *Yome v. Gorman*, 242 NY 395, 403; *Matter of Ackermann*, 124 App Div 684, 685). While the disposition of each case is dependent upon its own peculiar facts and circumstances and while no all-inclusive rule is possible, the courts, exercising a 'benevolent discretion', will be sensitive 'to all those promptings and emotions that men and women hold for sacred in the disposition of their dead' (*Yome v. Gorman*, *supra*, 242 NY, at 402; *Matter of Currier v. Woodlawn Cemetery*, 300 NY 162, 164 [1949]). And looming large among the factors to be weighed are the wishes of the decedent himself [and] then only compelling considerations would

justify disinterment and removal. (*Id. Matter of Conroy v. Hynes, supra* at 215 [holding that the wishes of decedent is a significant factor to be considered whenever a court is asked to sanction disinterment]).

"The person having charge of the remains holds them as a

sacred trust for the benefit of all who may, from family ties or friendship, have an interest in them; in case of a contention the court should assume an equitable jurisdiction over the subject, somewhat in analogy to the care and custody of infants, and make such a disposition as should seem to be best and right under all the circumstances'." (*Matter of Bauer*, 36 Misc 33, *affd* 68 App Div 212 [2d Dept 1902]).

In this case the issue for this court to decide is whether there exist good and substantial reasons for a court to exercise its benevolent discretion to permit petitioner to disturb the quiet of decedent's grave, and inasmuch as it is supported by the admissible evidence, decedent's wishes as expressed in his lifetime.

Petitioner argues that the wishes of decedent's spouse must take precedence over the wishes of his family. Petitioner also argues that the proof offered by respondents concerning alleged statements made by decedent with respect to his desire to be buried with his family are not inconsistent with petitioner's assertion that decedent also expressed a desire to be buried with his wife because those statements were made either before decedent learned that his death was imminent or without knowledge that the Herskowitz family plot did not have sufficient space so that decedent and his spouse could be buried together.

Respondents argue that the funeral and burial arrangements made by decedent's mother and sister following decedent's death were those requested by decedent before and after he learned that he had a serious illness, and that he wanted to be buried with his father for both family and religious reasons. Respondents contend that decedent made his request in statements to them and that decedent also expressed these wishes to decedent's friends. Respondents further contend that as the decedent was Jewish, he would never want to be buried in a cemetery of any other religious affiliation.

Where judicial sanction is sought for disinterment and removal of remains, the court must consider the following factors:

- (1) the deceased's wishes expressed during his lifetime;
- (2) the religious convictions of the deceased;
- (3) by whose direction the choice of burial site was made; [*7]
- (4) the desires and motives of close family, especially a spouse in promoting a change of location;
- (5) the sanctity of sepulture.

(*See, Viscomi v. McGuire, supra*, citing *Matter of Frost v. St. Paul's Cemetery Assn.*, 44 Misc 2d 589, 591 [County Ct, Oneida County, 1964, Walsh, J.]).

Initially, the court is unpersuaded by respondents' argument that the decedent's expressions during his lifetime of his wish or desire to be buried together with his father were a clear and unambiguous manifestation of decedent's intentions concerning the final resting place of his remains. Indeed, decedent's mother conceded that she treated such declarations

by decedent casually or lightly (*see, Yome v. Gorman, supra*). While decedent may have expressed these thoughts to his family and friends during his life, the court finds that decedent did not seriously focus on and finalize his wishes concerning his last resting place until the time in early November 2007 that his wife and he agreed they wanted to be buried together and to purchase the adjoining plots at St. Elizabeth Cemetery, just days before his death on November 6, 2007. Moreover, even were the court to credit the testimony of respondents' witnesses, such evidence is insufficient to overcome the proof that decedent's paramount wish and desire was to be buried with his wife.

Both respondents, mother and sister, testified to the fact that the decedent followed many Jewish traditions, and that his Jewish faith was an important part of his daily life. Although it is not the function of this court to sit in judgment of anyone's choice in the manner in which he/she chooses to practice or observe his/her faith, the court finds that these occasional, isolated acts of religious observance do not unequivocally constitute and support the fact that Jamie actively practiced his Jewish faith. Moreover, the court finds that whatever the nature of decedent's bond of religion, it was insufficient to overcome his paramount wish that his wife and he be together in death as they were in life (*see, Yome v. Gorman, supra* at 404 [dicta]). Additionally, as the proposed final resting place for his remains, St. Elizabeth Cemetery is nondenominational, there is no evidence to show that his burial there will offend his Jewish faith (*see, Matter of Currier v. Woodlawn Cemetery, supra* at 164 [1949] [where court held that factors to be considered in a disinterment proceeding were "[i]f the deceased had been a member of a faith which forbade disinterment, . . . [and] if he had elected to be laid in hallowed earth and the request was for reburial in unconsecrated ground....."]. There was no evidence presented by respondents to show decedent's paramount concern was that his remains be laid to rest in a Jewish cemetery.

Petitioner established a prima facie showing of good and substantial reasons to disinter and remove the remains of the decedent, which respondents failed to rebut. Here, virtually all of the factors weight heavily in support of the petitioner's application. It was the decedent's desire to be buried in a location (a) that is geographically near where his wife and closest surviving family member resides, as his sister and mother reside in California, (b) that both petitioner and decedent chose for their final resting place and (c) that would allow decedent's wishes to be buried together with his wife to be fulfilled and not offend his Jewish faith. While it appears that it was also decedent's wish to be buried in the Herskowitz family plot, if possible, his paramount concern was to be buried with petitioner, his wife. Notwithstanding that petitioner had initially authorized burial of her husband in the present location at Mt. Carmel Cemetery, the court finds [*8] that petitioner established that such decision was due to extreme emotional distress at the time of burial, and did not result in her waiving her rights of burial nor having consented at that time to a permanent resting place (*Matter of Inzero v. Inzero*, 278 App Div 945 [2d Dept 1951]). Furthermore, petitioner demonstrated that as the surviving spouse she has a superior right over the decedent's mother and sister in selecting his final place of burial (*see, Matter of Kelly v. Kelly*, 16 AD3d 587, *supra*). While the wish of a surviving spouse is not always supreme and final, particularly where the body has been laid at rest, (*Yome v. Gorman, supra* at 402 [1926]), it is well settled that a surviving spouse has high priority in selecting the place and mode of burial of the deceased spouse (*Matter of Fromm v. Fromm*, 280 App Div 1022, 1023 [3d Dept 1952]). Furthermore, as petitioner is not of the Jewish

faith, and Mt. Carmel Cemetery will not accept her remains for burial because she is not a member of the Jewish faith, decedent's paramount desire to be buried with his wife could not be fulfilled if petitioner is not permitted to remove her husband's remains to the proposed family plot in the nondenominational St. Elizabeth's Cemetery.

CONCLUSION

Accordingly, the application is granted provided (a) that petitioner purchase a suitable plot at Saint Elizabeth's Memorial Chapel; (b) that petitioner complies with all rules and regulations of law and the cemetery, including payment without any expense to the respondents, all necessary fees for removal and restoration of the present site at Mt. Carmel Cemetery to its original condition before interment; and (c) that petitioner, upon repayment to respondents of any headstone cost actually incurred, shall have the remains of her deceased husband, Jamie Herskowitz, presently interred in Mount Carmel Cemetery located at 85-45 Cypress Hill Street, Glendale, New York 11385 in the County of Queens, City and State of New York, Section 1-E path 48-6-12 removed to such other plot in Saint Elizabeth's Memorial Chapel cemetery.

This constitutes the decision and order of the Court.

Counsel are directed to contact the clerk of IAS Part 6 at (718) 298-1210 for retrieval of petitioner's and respondents' exhibits.

A courtesy copy of this order is being mailed to counsel for the respective parties.

Dated: April 23, 2010.....

Howard G. Lane, J.S.C.

Moshe Yeres

Dr. Moshe J. Yeres is rabbi of Congregation Or Torah in Skokie, Illinois.

BURIAL OF NON-HALAKHIC CONVERTS

I

The significance of a Jewish cemetery as sacred ground reserved solely for the burial of Jews is well documented in Jewish tradition and history. So important was this requirement, and so universal was its acceptance, that the first purchase of property by Jewish communities of the Diaspora was usually for a tract of cemetery land. This often preceded even the acquisition of a building or land for a permanent synagogue structure.¹ The sanctity of the Jewish cemetery was formalized by the erection of a wall or fence which quite rigidly conferred the boundaries of the *beit ha-kevarot*.² Its special sanctity—*kedushat beit ha-kevarot*—extended to the entire tract of land within those boundaries.³

This law—that Jews, and only Jews, are to be buried in a specifically Jewish cemetery—is often taken for granted. The Rabbis understood it to be operable even as early as the First Temple period. The Targum to Ruth 1:17 interprets the statement *ba-asher tamuti amut ve-sham ekaver*—“where thou diest will I die, and there will I be buried”—as a recognition by Ruth that her conversion to Judaism will allow her the privilege of being buried in a Jewish cemetery, a privilege clearly understood to be reserved solely for members of the Jewish faith.⁴

The Talmud makes no direct reference to this halakhah. In fact, the Talmud in *Gittin* 61a seems to imply the opposite when it quotes a *baraita* which states *ve-koverin metei nokhrim im metei Yisra'el mipenei darkhei shalom*, “we bury the dead of the heathen along with the dead of Israel in the interests of peace.” However, Rashi very clearly explains that this does not mean that they are to be buried together in the same cemetery:

Along with the dead of Israel: [This does] not [mean that the non-Jewish dead are buried] in a Jewish cemetery, but rather that we take care of their [funeral

Moshe Yeres

arrangements] if the non-Jewish dead are found slain together with the Jewish dead.⁵

This explanation is repeated by a number of Rishonim, all of whom assume that it is unthinkable under any circumstance to inter non-Jews in the same cemetery as Jews.⁶ *Bah*, however, does interpret the *baraita*'s statement to allow for the actual burial of non-Jewish deceased alongside the Jewish deceased:

However . . . [the Talmud's statement in *Gittin* 61a] comes to teach us that they can bury the [non-Jewish] dead in a Jewish cemetery if the bodies were found slain together with Jewish bodies. And even though we never bury a non-Jew next to a Jew . . . however [in this case] since the bodies were discovered slain together, he can bury the non-Jewish deceased in the same courtyard as the Jewish deceased, because of *darkhei shalom*.⁷

Yet *Bah* makes it quite clear that the Talmud's case is the sole exception to what is otherwise an unbending prohibition to inter non-Jews in a Jewish cemetery. Furthermore, it has been argued that even *Bah* did not intend to allow the positioning of non-Jewish graves immediately adjoining Jewish graves; rather his permission was limited to *hatser ehad*—burial within “the same courtyard.”⁸

In short, it has always been an accepted fact within Jewish tradition that Jews and only Jews have the privilege of burial within the sacred confines of the Jewish cemetery.⁹

II

The exclusiveness of Jewish cemetery ground, reserved solely for Jews, generally continued unquestioned even into the Modern era. However, together with the twin inroads of emancipation and assimilation, there now arose the very real issue of intermarried (mixed marriage) couples, and their desire to be buried together after death, just as they had lived together in life. The Jewish partner of such mixed marriages, despite his or her having married outside the faith, still coveted the privilege of burial in the Jewish cemetery. That he or she remained eligible for such burial privileges never seems to have been contested in the responsa; the only proviso discussed is that the Jewish partner of such a marriage not be buried next to the graves of righteous and religious Jews, but rather somewhat removed from them. This is similar to the Halakhah's approach to the burial of apostates and others who have rebelled against basic Jewish tenets.¹⁰

The issue appears to have been first dealt with by R. Hayyim Palache who refers to an actual case where the Jewish partner of a

TRADITION: A Journal of Orthodox Thought

mixed marriage was buried in the Jewish cemetery, in an area somewhat removed from the other graves.¹¹ R. Jekutiel Judah Greenwald best summarizes the halakhic stance when he writes in *Kol Bo al Avelut*:

Regarding the [Jewish] man married to a non-Jewish woman . . . or the [Jewish] woman married to a non-Jewish man . . . who died . . . since [the law is that] we are obligated to bury even complete sinners in a Jewish cemetery, surely we are obligated to bury these. However, they ought not to be buried among [the graves of] religious Jews, rather among [the graves of] those of similar [Jewish religious character].¹²

III

On the other hand, the non-Jewish partner of a mixed marriage or the children of a non-Jewish wife¹³ could not be eligible for burial rights in the Jewish cemetery because they were not Jewish. Or so it should have been obvious. However, in the Modern era, this question has been raised a number of times, as Jews who have married outside the faith have requested and at times demanded that their non-Jewish spouses be buried alongside them,¹⁴ and that their children from a non-Jewish wife be buried in the Jewish cemetery because of their Jewish paternity.¹⁵

One such incident is well recorded. In 1903, the Jewish cemetery in Temesvar (Timisoara), Hungary allowed the burial of a five-year-old boy from a non-Jewish mother. Immediately Rabbi Bernat Schück of Temesvar took up the cudgels against this unconscionable anti-halakhic act. Rabbi Schück wrote to the leading Orthodox rabbis and scholars of his day asking for their support in his opposition to the cemetery's action, and for their advice on his proposed secession from that cemetery and his formation of an independent Orthodox *hevra kaddisha* and cemetery grounds. Many rabbis responded to his letter, and the wealth of polemic writings was collected and published by Rabbi Schück in a booklet entitled *Dat ve-Din, Hit es Allam*.¹⁶ Among those who responded was Rabbi David Tzvi Hoffmann. He concurred with Rabbi Schück, that this wanton act—the burial in a Jewish cemetery of the offspring of a non-Jewish mother—should not be condoned by the local Orthodox community, and that Rabbi Schück ought to secede and form his own cemetery.¹⁷

Another who dealt with this type of question was R. Hayyim Eleazar Shapira, the author of *Minhat Elazar*, who prohibited a Jewish cemetery from accepting for burial the son of a Jewish father

Moshe Yeres

and a non-Jewish mother. In this case, though the child had been circumcised, the circumcision was not done *le-shem gerut*, and the child was therefore not considered Jewish.¹⁸ In the last century, the question of Jewish burial rights for non-Jewish marriage partners and the children of non-Jewish wives has been posed numerous times to halakhic authorities;¹⁹ though interestingly enough, even those who posed the questions never argued with the fact that these people were clearly not considered Jewish according to Halakhah.

R. Moshe Feinstein was asked how to deal with this situation in a case where the accepted procedure within a Jewish cemetery had been to bury non-Jews next to their Jewish spouses. Rabbi Feinstein responded that the area where all other Jews are buried²⁰ must be separated from the "mixed" area where these Jewish and non-Jewish marriage partners are buried, by a space of eight *amot* (cubits) plus a fence no less than ten *tefahim* (handbreadths) high.²¹ Rabbi Feinstein makes it clear that these requirements of separation apply not only for the burial of religiously observant Jews ("*shomerei Torah*") in that cemetery, but for any Jew who wishes to be buried there in accordance with "*dinei Yisra'el*"; the criterion for separation is the "*kedushat Yisra'el*" of the deceased.²² Other *posekim* have prohibited the burial of a non-Jewish spouse in a Jewish cemetery even if there is the separation of a fence from the other Jewish graves.²³

IV

The above rulings appear clear-cut and simple. However, we now discuss applying this to a non-halakhic convert to Judaism, that is to say, a conversion performed *she-lo ka-halakhah*, by a non-Orthodox rabbi.²⁴ We obviously work with the premise that such a non-halakhic conversion does not effect any change in the religious status of the individual; he or she is still considered not Jewish.²⁵ But with regard to burial in a Jewish cemetery, do the same strictures apply as with a complete non-Jew, as indeed this non-halakhic convert does not possess *kedushat Yisra'el*;²⁶ or may limited privileges of burial in a Jewish cemetery be extended at times to one who does not meet the strict requirements of *kedushat Yisra'el*?

This is a very significant issue, for today's Orthodox rabbi is often called on to officiate at funerals where the interment takes place at cemeteries controlled by independent lodges and "benefit" organizations. As such, the religious status of those accepted for burial in these cemeteries is not under the control of the local Orthodox rabbinate. And while many of these lodges and "benefit" cemeteries do not permit the burial of blatant non-Jews (even where the other

TRADITION: A Journal of Orthodox Thought

marriage partner is Jewish), they will accept for burial privileges any convert to Judaism regardless of whether the conversion was performed by an Orthodox rabbi *ka-halakhah* or by a Conservative or Reform rabbi *she-lo ka-halakhah*.²⁷ In such cemeteries it is therefore more than likely to find non-halakhic converts buried. The questions then become: how would this impinge upon the burial of other Jews in such a cemetery, both religiously observant Jews and the non-observant; how ought an Orthodox rabbi respond to a request to officiate at an interment in this type of cemetery; and how careful does a cemetery actually need to be in ascertaining that those Jews (and specifically converts to Judaism) accepted for burial privileges have the status of halakhic *kedushat Yisra'el*?

Historically, this issue was discussed long before Reform and Conservative conversion practices arose which deviated from the Halakhah. In a case reported by R. Abraham I. Gatigno in *Tseror ha-Kesef*, a gentile maid-servant (*shifhah*) who became ill requested of her Jewish master to be converted to Judaism. She did not recover; and though she passed away after undergoing *kabbalat ha-mitsvot* in the presence of a *beit din*, she had not yet undergone immersion in a *mikveh*. As a result, her conversion remained incomplete. Nonetheless, her body was allowed to be buried in the Jewish cemetery ("*tokh kivrei Yisra'el*"). Though she had obviously not acquired *kedushat Yisra'el*, not having undergone *tevillah*, she was still accorded Jewish burial privileges.²⁸ In a similar case where the maid-servant of a Jew had begun to carry out certain *mitsvot*, but had not formally undergone *kabbalat ha-mitsvot* or *tevillah* in the presence of a *beit din* (though she had undergone *tevillah le-shem gerut* in the presence of her owner's mother), R. Elijah b. Benjamin Halevi did not require that her body once buried be disinterred from the Jewish cemetery; however, it is possible that had he been consulted prior to the actual burial, he might have decided differently.²⁹

R. Hayyim Eleazar Shapira, discussing in Responsa *Minhat Elazar* the prohibition of accepting for Jewish burial the child of a non-Jewish mother,³⁰ raises *inter alia* the question of a non-Jew who underwent circumcision *le-shem gerut* but died prior to the *tevillah*. R. Shapira felt that in this case it would only be logical to allow burial in a Jewish cemetery.³¹ As to whether a distance of eight *amot* is needed to separate such a grave from other Jewish graves, R. Shapira does not reach a definite conclusion.³²

In all of these cases there was no completed *gerut*; yet the deceased was accepted for burial in the Jewish cemetery. It appears, then, that the criterion of personal status for burial may not always be the same as for other issues of Jewish personal status, such as

Moshe Yeres

marriage. For surely we would not permit an incomplete *ger* or even a questionable *ger* to marry a Jew simply because he or she had strong intentions to identify with Judaism. However, in the cases discussed above, though the deceased had not been formally admitted to the Jewish community, his or her will to identify with the Jewish community and with Judaism is considered sufficient to allow for Jewish burial privileges. Though the deceased had not undergone a full and complete conversion to Judaism and obviously did not meet the strict halakhic requirements for *kedushat Yisra'el*, his or her decision to identify with Halakhic Judaism is sufficient to permit burial in a Jewish cemetery.

A related question is discussed by a nineteenth-century Orthodox rabbi and scholar in the United States, Rabbi Bernard Illowy. The case concerned a convert to Judaism who died in 1856 in Nashville, Tennessee, and was buried in the Jewish cemetery. Her husband, however, was unable to produce a certificate attesting to the halakhic validity of the conversion, and, as a result, questions and doubts were raised. R. Illowy allowed the woman's body to remain buried based on the *hazakah* that until now she was considered Jewish, and especially since, in this case, she had clearly observed the *mitsvot* of the Torah.³³

אמה צוקטא קדושת יסראל?

① קדושת יסראל

② כז' שמו יהיה זלזול טע'ם זל צ' עכום
זמ אין ג' קדושת מיוחדת יתח' השתת
ויסראל

③ רעז/צצ'ק

נ' - ① יסראל שאינו שומר מצוות ומצוות
② עכום שאקלו ז' מצוות