

## ***Conditional Marriage to Prevent Suffering: Rav Yehudah Amital's Approach***

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During the summer of 2007, a young I.D.F. officer serving in a combat position in the Second Lebanon War was soon to be married. Leading his men in battle put his life at risk on a daily basis. As he had only one brother who was six years old at the time, he appealed to us for help. He was concerned that if he were to be killed, his wife would be left as an *agunah* (i.e., a “*shomeret yavam*” in this case) for the next seven years, unable to remarry until his six-year-old brother reached the age of thirteen—old enough to perform *chalitzah* (*Shulchan Aruch, Even HaEzer* 167:3).

A number of prominent rabbis were consulted. Their reaction was that there was no halakhic solution to the problem; if the *chatan* were to die, the young kallah “would, unfortunately, have to wait.” It was then recommended to us to call R. Yehuda Amital ר"צ, one of the two *Roshei Yeshiva* of Yeshivat Har Etzion. R. Amital responded in a very positive manner, immediately inviting us to his Jerusalem apartment to explain his solution to the problem.

In his apartment, R. Amital related to us how he himself had solved a similar problem in the past by conducting conditional marriages on two occasions. The purpose of this article is to present R. Amital ר"צ's solution to this problem of potential *iggum*, by describing the two conditional marriages (i.e., both *kiddushin* and *nisuin al t'nai*)<sup>1</sup> that he himself

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<sup>1</sup> As is well known, the terms *kiddushin* and *eirusin* are halachically interchangeable. Neither denote *nisuin* (*Yad Habaẓakah, Hilbot Isbut* 1:3, 12:1–3). For the sake of brevity, the term “conditional marriage” will be used in this article to include both *kiddushin* (= *erusin*) *al t'nai* and *nisuin al t'nai*. It should be noted that the general topic of *nisuin al t'nai*—as opposed to *kiddushin al t'nai*—is worthy of a far more expansive discussion than entailed by this article. This article will

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had performed in prior years as well as the conditional marriage that was performed for this young couple in 2007 under his direction. The conversations we had with R. Amital in 2007 regarding the issue were written down at the time and are now being presented in English.<sup>2</sup>

### Halachic Background

The conversion of Jewish men (male apostasy) in the Middle Ages to Islam or Christianity led to the tragic phenomenon of the wives of these men being left as *agunot*. The apostates would often disappear or simply refuse to give their wives a *get*. When a married Jewish man died childless, leaving behind him an apostate brother, the halachic requirement of *yibum*/*chalitzah* created additional difficulties.

As is well known, a childless widowed sister-in-law has the halachic status of a *shomeret yabam*, i.e., she cannot re-marry until she either undergoes *yibum* with her deceased husband's brother, or the deceased brother performs *chalitzah*. In the case of the deceased brother being an apostate, the option of *yibum* (which effectively meant marrying a non-Jew), needless to say, was undesirable. Alternately, the apostate would likely disappear from the Jewish community with his whereabouts being unknown—thereby making *chalitzah* impossible.<sup>3</sup> In other cases, even though his whereabouts were known, he may have refused (perhaps out of resentment to his former family and/or religion) to perform the *chalitzah*.<sup>4</sup>

Two positions are quoted by the Tur and Shulchan Aruch with regard to the problem of a married Jewish man dying childless while having a surviving apostate brother. The first, that of R. Yehudai Gaon, is that the halachic problem actually vanishes as long as the brother's apostasy occurred prior to his Jewish brother's wedding (*Tur. Even Haezer* 157). In such a case, R. Yehudai simply exempts the widow from the need for *yibum* or *chalitzah*. His *psak* is based on the principle that the

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deal with “conditional marriage” to prevent *iggun* caused exclusively by a potential need for *yibum*/*chalitzah*.

<sup>2</sup> This article is based on the Hebrew article published by these authors in *Tebumin* 37 (2017), pp. 248–255. It appeared as one of a series of articles devoted to solving problems of *iggun* and *get* refusal (Broyde and Levmore, pp. 228–239, Reiss pp. 240–247, and Bin-Nun, pp. 256–267).

<sup>3</sup> See for example *Teshuvot haGeonim Sha'arei Zedek* part 3, *sh'ar* 1: 50, *Otzar HaGeonim, Yevamot bateshuvot* 22a 77-78 p. 34, *Shut Chayim She'al* part 1: 74, 26.

<sup>4</sup> *Otzar HaGeonim, Yevamot* 22a pp. 34–37, *Teshuvot HaGeonim Sha'arei Zedek* 3 *sha'ar* 1: 28, 53, *Or Zarua* 1:655, Yitzchak Dov Gilat, *Perakim Behishtalshelut Halachah*, Ramat Gan: Bar-Ilan, 1992, pp. 187-188, 210–212.

obligation of *yibum* falls only on someone who is defined as a brother— "כִּי יֵשְׁבוּ אֲחֵימָם יְהוָה וּמַת אֶחָד מֵהֶם וּבֵן אֵין לוֹ... וַיִּבְמָה יְבֵא עָלֶיהָ וּלְקַחָהּ לוֹ לְאִשָּׁה" (Deut. 25:5). A brother who was already an apostate before the wedding is no longer halachically defined as a brother; his "brotherhood" status was lost when he converted and began to live as a non-Jew. There was, therefore, no need (*zikuk*) for *yibum* or *chalitzah*.<sup>5</sup>

The second position, that of R. Sherira Goan, is that the need for *yibum* or *chalitzah* remains standing, even when the brother had converted prior to the wedding. For according to the principle that "A Jew, even if he had sinned, is still considered a Jew" (*Sanbedrin* 44a), the act of apostasy is halachically meaningless. The apostate brother always remains a Jew. Consequently, "קִידוּשֵׁי קִידוּשֵׁין" (*his kiddushin are considered binding*) (*Yevamot* 47b, *Yad HaChazakah*, *Hilchot Ishut* 4:15, *Tur*, *Shulchan Aruch* 44:9), and the woman needs to undergo either *chalitzah* or actual *yibum*. If the apostate brother-in-law refuses to perform *yibum/chalitzah*, then the woman remains an *agunah*, i.e., a "shomeret yabam" to her apostate brother-in-law. Similarly, she will remain an *agunah* if he should simply disappear or move to a distant country.

In addition to the concern of *igum*, R. Sherira's position requiring *yibum/chalitzah* from the apostate brother created additional halachic concerns. For should the brother in law actually agree to perform *yibum* (i.e., marry her), the assumption was that he would then have relations with her when she was a *niddah* and would ultimately draw her into his new religion as well (*Mordechai*, *Yevamot Perek Hacholetz* 29, *Mayim Amukim* 1:33, *Igrot Mosheb*, *Even HaEzer* 4:121). Furthermore, it was felt that if the apostate brother had either refused to or was not available to perform *yibum/chalitzah*, the suffering and frustration that the widowed wife would endure as an *agunah* could lead her to having sexual relationships and children with non-Jewish men.

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<sup>5</sup> There is a third (more lenient) halachic position that is not mentioned by *Tur* or *Shulchan Aruch*. This is the position of R. Hananel. R. Hananel maintained that as long as the brother was living as an apostate at the time of his Jewish brother's death, even if the apostasy occurred only after the marriage of his Jewish brother, the apostate was, nevertheless, no longer considered a brother. Consequently, neither *chalitzah* nor *yibum* was necessary and the widow was free to remarry even though at the time of the original wedding her husband's brother had not yet converted to Islam or Christianity (*Otzar HaGeonim*, *Yevamot* 22a, p. 37). For further sources regarding this controversy, see also the *Tshuvot Maimoniyot Ishut* 29, *Mordechai Yevamot Perek HaCholetz* 28-29, *Meiri*, *Beit HaBechirah Yevamot* 22a, *Or Zarua part 1: 505*, *Terumat HaDesheh* 223, *Beit Yosef Even HaEzer* 157: 4-5, *Bach ibid: 3-4*, *Yabia Omer* vol. 9, *Even HaEzer* 36.

The Maharam of Rothenburg, in fact, describes just such a case in which a woman was a *shomeret yabam* to her deceased husband's only brother. This brother, a *meshumad lebachis* and an extremely "devout" idol worshipper, refused to perform *chalitzah* and the widow remained an *agunah* for "days and years." Eventually, she became a "ruined" woman ("*levasof kikelah sheniv'alab legoyim veyaldah liznunim*") (*D'fus* Prague:1032). Finally, the Shevut Ya'akov expressed the concern lest a young *agunah*, eager to remarry... *tetz'ei letarbut ra'ab* (presumably, marry a non-Jew) (3: 110).

While these concerns related to women left as widows with apostate brothers in law, R. Sherira's position created spiritual difficulties for the brothers of these apostates as well. The Bach thus writes that a Jewish man whose only brother was an apostate "was likely to marry a non-Jewish woman, since Jewish women refused to marry such a man, lest he die and they be left in need of *yibum* or *chalitzah* from his apostate brother (*Even HaEzer* 157:3).

R. Yosef Karo mentions R. Yehudai Gaon's position (that exempts the woman from the need to undergo *yibum/chalitzah* if the brother had already been an apostate at the time of the wedding) but, nonetheless, rules according to R. Sherira Gaon: "A woman needs *yibum* from an apostate. There is a position which permits her to remarry if the brother was already an apostate at the time of her marriage; this position should not be relied upon (*Even HaEzer* 157:4)."

The Rema, nonetheless, does suggest a solution to this problem that applies when the brother was already an apostate at the time of marriage: "When a man who has an apostate brother is *mekadesh* a woman, he can perform a conditional *kiddushin* using a double conditional clause (תנאי כפול) (כפול) stating that if she should ever need *yibum* from the apostate brother, then she was never married to begin with" (ibid, in the name of R. Yisrael of Brin). The Rema thus permits conditional marriage in order to prevent *igun* in the case of a man who has only one brother who is already an apostate at the time of the marriage.<sup>6</sup>

This *psak* of the Rema in the case of an apostate brother was broadened and applied to cases of brothers who were unable to perform *yibum/chalitzah* for other reasons as well. Amongst them are a deaf-mute brother (*Baer Heitev* in the name of the *Nabalat Shivah* ibid, 6), a brother who is unable to speak (*Nodab Bi-Yehudah* 54) and a brother who had

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<sup>6</sup> The *Beit Shmuel* here writes, "although we generally say that there are no conditional marriages (נישואין על תנאי), in this type of situation, it is, nevertheless, permitted" (*Even HaEzer* 157:6).

disappeared (without it being known whether he was alive or dead) (*Even HaEzer* 157:4, *Taz* ibid 1, *Pitchei Teshuvah* ibid, 8-9). Following this approach, the Chatam Sofer performed a conditional marriage for a man whose only brother had disappeared for a number of years, and noted: “This is the lenient tradition that was passed on to me by my Rabbis” (*vegam kibalti lehakeel merabotai*) (*Even HaEzer* 1: 110).

Before describing how R. Amital himself extended this ruling of the Rema and the Chatam Sofer to the halachic dilemma of the I.D.F. officer in this article, we would like to first briefly note that conditional divorce (*get al t'nai*) could, conceivably, be used as an alternative solution to *yibum* problems in general and, consequently, to the case in this article as well.<sup>7</sup> The conditional *get* would stipulate that should the husband die childless, then the wife would be divorced from a moment before he dies, thereby releasing her at that moment from any *yibum* obligation.

R. Amital rejected this solution to our case, as he held that such a conditional *get* would be invalidated as soon as the couple had marital relations. The husband would, consequently, be required to return to the Rabbinic office to draw up a new conditional *get* every time he would go back to the army. Needless to say, such a solution would be pragmatically unfeasible, as the only way for the conditional *get* to remain valid would thus be if the couple were never to be together alone again (*Shulchan Aruch, Hilchot Gittin* 148: 2, *Iggerot Moshe Even HaEzer* 1:147).<sup>8</sup>

## Two Conditional Marriage Ceremonies performed by R. Amital himself

As mentioned above, R. Amital had performed conditional marriages for two different couples. Both involved grooms who had only one brother

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<sup>7</sup> See, for example, the discussion of גט שכיב מרע על תנאי and גט מותנה משעה in R. Yoel Bin-Nun, *Tehumin* 37 (2017), pp. 256–267, and R. Eliezer Igra's reaction (ibid pp. 268–270).

<sup>8</sup> Consistent with this approach, the Ben Ish Chai ruled that a married man who had an apostate brother and wanted to prevent the possible *zikuk leyibum* of his wife to his apostate brother should **not** give his wife a conditional divorce. Instead, he instructed the husband to give his wife an actual standard divorce and then immediately remarry her conditionally, following the *kiddushin al t'nai* stipulations described in this article (*Shut Rav Pe'alim 2 Even HaEzer*, 6). As we did not discuss this situation with R. Amital, we do not know what he held to be the best solution for couples who are already married and are worried about potential *yibum* problems.

and that brother was “autistic.”<sup>9</sup> R. Amital explained that the *beter* to perform conditional marriage in such a case was based on the Chatam Sofer described above, as well as on the Rema, Beit Meir, Nodah BiYehudah and Aruch HaShulchan.

R. Amital added that there were *poskim* who disagreed, such as the Beit Yosef. The Beit Yosef writes that the solution of marriage performed on condition that the wife be exempt from *yibum* constitutes a condition that undoes an explicit Torah law (“מתנה על מה שכתוב בתורה”) and is consequently halachically meaningless.<sup>10</sup> This, in fact, might be why R. Yosef Karo in his *Shulchan Aruch* did not mention the solution of conditional marriage suggested by Rema.<sup>11</sup>

After mentioning the *poskim* who disagreed,<sup>12</sup> R. Amital stated that there were, nevertheless, enough *gedolim* to rely on in order to perform a

<sup>9</sup> We did not ask R. Amital to define the parameters of his usage of the term “autistic.” Current psychiatric DSMV criteria for Autistic Spectrum Disorder is probably different from the term “autism” as used by R. Amital. In any event, R. Amital meant a brother who was unable to perform *yibum/chalitzab* as a result of his mental condition.

<sup>10</sup> The Beit Yosef thus writes: מאחר שאין ההיתר מבואר בתלמודא דידן ובתלמוד ירושלמי: מבואר לאיסור היאך אפשר להקל בדבר וע"כ נשתקע הדבר ולא ראינו ולא שמענו מי שהתנה (כן (טור אה"ע קנ"ז סוף ד"ה ומ"ש רבינו).

<sup>11</sup> The Ben Ish Chai (*Shut Rav Pe'alim 2 Even HaEzer 6*), however, writes that R. Yosef Karo actually opposed only a conditional marital stipulation stating that should the husband die with no children, the wife would not need *yibum/chalitzab*. Since the Torah clearly demands that marriage culminating with no children requires the wife to undergo *yibum/chalitzab*, any such conditional clause to simply annul this obligation does indeed constitute *מתנה על מה שכתוב* and hence is null and void. Rema's conditional clause, however, avoids this problem by simply retroactively annulling the marriage if the husband dies without children. Since (retroactively) there was no marriage, then there was likewise no Biblical requirement of *yibum/chalitzab*, and the problem of *מתנה על מה שכתוב* is avoided. Ben Ish Chai thus notes that Beit Yosef would actually agree with Rema's formulation: "התנאי שכתב הרמ"א שלא תהיה מקודשת: מעיקרא, בזה יודה מר"ן". Unfortunately, we did not discuss this alternate way of interpreting Beit Yosef with R. Amital.

<sup>12</sup> While not mentioned by R. Amital, the *Riaz* (quoted by the *Shiltei Giborim, Ketubot 34a* in the *Rif*) might reflect another such dissenting opinion. He states that when one is “mekadesb on condition” and then explicitly repeats that same verbal condition before marital relations (... קידש על תנאי ובעל על תנאי ואמר...) the very marital relations render any such explicit verbal condition as null and void: אי אפשר לבטל בעילת אישות. This could, thus, be interpreted as a rejection of the halachic legitimacy of the conditional clause regarding *yibum* as well.

conditional marriage in this case, especially since the Chatam Sofer testified that he himself had followed this *heter* and was continuing the halachic tradition he had received from his rabbis.<sup>13</sup>

The first case of conditional marriage that R. Amital performed involved a man who wanted to marry in the midst of a war (his only brother, as just mentioned, was “autistic”). R. Amital performed the conditional marriage with the approval of a Dayan in Jerusalem whose name he did not mention. The *kiddushin* ceremony was performed in R. Amital's house the evening before the *chuppah*/wedding in the presence of two witnesses.<sup>14</sup> The *kiddushin* ceremony consisted of the *chatan* reading the Chatam Sofer's *shtar*, followed by his declaring *הרי את מקודשת לי*... as per the conditions of the *shtar*, and then transferring the ring to the *kallah*.

*Birkat ha'irusin* was not recited. On the next day (the day of the *chuppah-nisuin-wedding*) the *chatan* read the *shtar* (with its conditional clauses) an additional three times in the presence of the two witnesses and R. Amital: before the *chuppah*, before the *yibud* room and after the wedding celebration before the couple went into their home/hotel room together.

As mentioned above, since the *kiddushin* had already actually taken place the night before (in R. Amital's home), saying "*הרי את מקודשת לי*..." and transferring the ring to the *kallah* under the *chuppah* was merely for "*מראית עין*".<sup>15</sup> The ring used did not actually even belong to the *chatan*.<sup>16</sup>

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It should be noted that this *Riaẓ* is centrally important to the broad topic of conditional *nisuin* (as opposed to conditional *kiddushin*). For some further discussion of this *Riaẓ*, see the *S'ridei Eish* in his introduction to R. Eliezer Berkowitz, *T'nai Benisuin UveGet*, Mossad HaRav Kook, 1967, and R. Eliezer Berkowitz who writes: "*לולי מסתפינא הייתי אומר ש(הריא"ז) אינו חולק וכו'*" *ibid* pp. 26-27).

<sup>13</sup> Ccf. the extensive list of *poskim* cited by Ben Ish Chai mentioned above (*Shut Rav Pe'alim 2, Even HaEzer 6*).

<sup>14</sup> This follows the precedent of Chatam Sofer who writes that he arranged the *kiddushin* in his house in Mattersdorf, Hungary the night before the *chuppah*/wedding (*Even HaEzer 1:111*).

<sup>15</sup> R. Amital explained that in order “to preserve the privacy of the couple” he did not publicize that the *kiddushin* had actually already taken place the night before.

<sup>16</sup> R. Amital told us that R. Sholmo Zalman Auerbach had labelled the common practice of asking the *chatan* whether the ring was his as “*shtik*,” i.e., halachically frivolous and therefore unnecessary. R. Amital smilingly had also shared

Despite the fact that the *kiddushin* had actually taken place the night before, R. Amital said *birchat baeirusin* the next day under the *chuppah*. He explained this as following the position of the *Magid Mishnah* (*Hilchot Ishut* 3:23) who writes that in his country the prevalent custom was to recite *birchat baeirusin* after the *kiddushin* had already taken place and that it did not have to be said עובר לעשייתן.<sup>17</sup>

After the *birchat baeirusin* under the *chuppah*, and the “pretend” transferring of the ring to the *kallah*, the *ketubah* was read and the rest of the *sheva berachot* were recited just as in a regular wedding. As stated above, after the *chuppah* the groom read the *shtar* and repeated the *tnai* two additional times: before the *chatan* and *kallah* entered the *yibud* room and later in the evening before the couple entered their home/hotel room. The *tnai* was thus read a sum total of four times: before the *kiddushin* the night before the wedding; before the *chuppah*; before the *yibud*; and before the couple entered their home/hotel room.

The second time that R. Amital performed a conditional marriage for a similar case: The Dayan who had approved the first conditional marriage refused to approve this second one, explaining only that he had since been appointed as a judge in a *beit din*. R. Amital, consequently, asked R. Shabtai Rappaport to raise the issue with his father-in-law, R. Moshe Feinstein. R. Amital told us that R. Moshe agreed to the conditional marriage, but objected to saying *birchat baeirusin* during the *kiddushin* "למראית העין" under the *chuppah* the next day. Because of R. Moshe's objection, R. Amital mumbled words that sounded like *birchat baeirusin* under the *chuppah*, without using the microphone, so that the guests at the wedding would not realize that *birchat baeirusin* was not actually being said.<sup>18</sup>

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with us that the ring used under the *chuppah* “*lemarit ayin*” was, in fact, the ring of his wife Rebbetzin Amital.

<sup>17</sup> R. Amital added that the *brachah* did not have to be recited on the same day as the *kiddushin*; it was permissible to recite the *birchat baeirusin* after שקיעה of the day following the *kiddushin*. Rivash writes that as long as the bride has the status of an ארוסה, then the *brachah* can still be recited even after a great deal of time has passed (*Rivash* 82, *Rema Shulchan Aruch Even HaEzer* 34:3). This position is against the Rambam (*Hilchot Ishut* 3:23) and R. Yoseph Karo (*Shulchan Aruch, Even HaEzer* 34:3), who hold that if one did not say *birchat baeirusin* before the *kiddushin* took place, then one is no longer permitted to say this *brachah*. (See *Mishneh laMelech, Hilchot Ishut* 3:23 and *Otzar HaPoskim* 34:3 for a more comprehensive discussion of this *machloket*).

<sup>18</sup> R. Amital did not mention this, but *birchat baeirusin*, in all likelihood, was recited the night beforehand, before the “true” *kiddushin*.

R. Shabtai Rappaport, when asked about this, claimed that R. Moshe Feinstein had in actuality not given his halachic approval to the conditional marriage, but instead had maintained only that one should not protest against those who were lenient, since they had (*poskim*) on whom to rely<sup>19</sup> ("שאין למחות נגד המקילים כי יש להם על מי לסמוך").

When we later confronted R. Amital with R. Shabtai Rappaport's report of R. Moshe's involvement, R. Amital's reaction was: "Interesting." We then asked him: "Interesting—but does this change the Rabbi's mind?" R. Amital immediately answered: "Me? (change my mind?) My conscience is clear. I did what I was supposed to do."

R. Amital said that the *beit din* in Jerusalem at the time did not want to give its approval to the conditional marriage, and rejected his request for approval for a long period of time. In any event, the woman ultimately had a child and the conditional marriage retroactively became a non-conditional, standard *kiddushin* and *nisu'im*.

### **The conditional marriage ceremony of 2007 (performed under the direction of R. Amital)**

The third case that R. Amital allowed for a conditional marriage was the case of the soldier in 2007, described in the beginning of this article. When R. Amital informed us that the halachic problem of our case could be solved using the same conditional clause to the *kiddushin* and *nissuim* as he had used in the case of the "autistic" brother, we challenged him. We noted that the two prior cases in which he had performed the conditional marriages were cases wherein the woman would have otherwise remained an *agunah* her whole life, whereas our case was a matter of the woman needing to wait (in the worst case scenario) "only" seven years. To this question, R. Amital immediately responded: "What! Do seven years (of waiting) not constitute enough suffering for a *yiddishe maidele*?"

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<sup>19</sup> See however R. Moshe Feinstein's ruling (in 1981) regarding the case of a Bucharian *shomeret yabam* in need of *chalitzah* from her apostate, antagonistic, Communist brother-in-law who had already been an apostate at the time of her wedding. Although no explicit *t'nai* had been made at the time of the marriage, R. Moshe ruled that in that particular circumstance it was an *והוא צריך* *מהדברים שאפילו גילו מלתא לא צריך* *אומדנא ברורה*... that neither the wife nor the husband would ever have married had they known that she would need to undergo *chalitzah* from his apostate brother-in-law and would thus remain an *agunah* forever (*Iggerot Mosheh, Even HaEzer* 4:121). R. Moshe consequently allowed her to remarry without *yibum*/*chalitzah*.

After R. Amital gave us the *shtar* of the Chatam Sofer (with his additions to suit our specific case) and explained the details of how the wedding was to be conducted, we asked him if he would be willing to be the *mesader kiddushin*. He replied that he did not want to do so, explaining that he was already old and did not want to become involved in any more arguments.

R. Amital then elaborated. He told us that he had fought (he used the word *nilchamti*) the Rabbinat on this issue “his entire life.” R. Amital’s position was that in the midst of a war, the Rabbinat should—at their own initiative—always ask if the groom has an only brother. Tragically (according to R. Amital) the Rabbinat does not do so. R. Amital further held that the Rabbinat should perform conditional marriages for all men whose only brothers could never perform *chalitzah*. In the case of men who have only one brother who is still a minor, then each case should be given separate consideration.

Despite marriages in Israel being legally regulated by the Rabbinat, R. Amital claimed that the conditional marriage could be performed without the approval of the *dayanim*. For once the woman had a child, the conditional marriage would, retroactively, become a standard marriage. On the other hand, if the husband were to die before having children, R. Amital told us that ex post facto it would be possible to find a *dayan* who would be willing to affirm that the *t’nai* had cancelled the marriage retroactively and then allow the widow to remarry.<sup>20</sup>

### **The actual proceedings of the conditional marriage ceremony in 2007 as per the Chatam Sofer’s *shtar*.**

As explained above, on the night before the *chuppah*, the conditional *kiddushin* was performed (in the presence of two witnesses but without a minyan being present) using the *shtar* given to us by R. Amital. R. Amital’s *shtar* was his Hebrew translation of the Chatam Sofer’s original Yiddish *shtar* (*Chatam Sofer, Even HaEzer* 1: 111). The additions added to the *shtar* by R. Amital for this specific wedding are marked by square parentheses; the blank lines indicate where the names are to be inserted. We will now present our English translation of the sections recited by the *chatan*. Our translation of the entire *shtar* (along with explanatory footnotes) will follow as a separate section.

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<sup>20</sup> Unbeknownst to us, the *chatan* at the time had discussed this issue with R. Aharon Lichtenstein אהרן ליכטנשטיין. The *chatan* afterwards told us that R. Lichtenstein told him that he was not a *posek*, but that everything that R. Amital said could be relied upon *halachah lema’aseh*.

## 1. Conditional Kiddushin (קידושין על תנאי)

You, R. \_\_\_\_\_ witnesses, hear my words: Since I intend to marry my *kallah* \_\_\_\_\_, and be *mekadesh* her and be *koneh* her conditionally, I therefore wish to state the conditions in your presence, so that you will be witnesses to the conditions with which I am being *mekadesh* her and how I will be *koneh* her with *chuppah* and *kinyanei ishut*, and this is my intent:<sup>21</sup>

- 1) If I do not die without bearing children who live;<sup>22</sup>
- 2) And if I *chas veshalom* die without bearing children who live but my death occurs after the death of my *kallah* \_\_\_\_\_;
- 3) And if I die *chas veshalom* when my *kallah* \_\_\_\_\_ is still alive but my death occurs after the death of my brother, meaning that my brother \_\_\_\_\_ dies before I die;
- 4) And even if I die *chas veshalom* without children who live while my *kallah* \_\_\_\_\_ remains alive and my brother \_\_\_\_\_ remains alive or if the *kallah* \_\_\_\_\_ does not know for sure if my brother \_\_\_\_\_ is alive or dead but I will have wanted to divorce my *kallah* by giving her a *get keritut* at some point in time;
- 5) [Or if my brother \_\_\_\_\_ reaches the age of thirteen],

In these cases, then the *kiddushin* that I am currently being *mekadesh* her will be a complete *kiddushin* and will be fully activated immediately at the time of the *kiddushin*, and the *chuppah* will be a full *kinyan* and the marriage (נישואין) a full marriage.

However,

(1–5): if I die *chas veshalom* without children who live during the life of my *kallah* \_\_\_\_\_ and the life of my [young] brother \_\_\_\_\_ [who has not yet reached thirteen years of age], and during all the years of my life I will not divorce my *kallah* \_\_\_\_\_ a *get keritut*, in that case:

Then the *kiddushin* with which I am *mekadesh* her as well as the *chuppah* and all the *kinyanei ishut* will be retroactively null and void, because this

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<sup>21</sup> We have added the numbers 1-5 here and below in order to indicate the parallel clauses which generate the *תנאי כפול*. The first five clauses are thus each enumerated separately and describe the conditions that will create the *kiddushin*. The clause below labelled “(1-5)” describes the conditions that will result in *no kiddushin* taking place.

<sup>22</sup> I.e., if I do not die childless, which is to say: If I have a child any time before my death.

is my intent—if this should be the case, then I have no desire whatsoever to be *mekadesh* her, and instead, the wedding ring that I will give her will be merely a simple present, and regarding the *chuppah* and all of the *kinyanei ishut* that are *konim* a woman—it is not my intent to be *koneh* with them. And, in this same manner, all of the marital relations which I will have with her all the days of my life—will be exclusively with the intent of the *kiddushin* that I performed now with the above-mentioned condition that I stated in the presence of you my witnesses, and will not be considered a new *kinyan*.

I swear a *shevuah chamurah* with the knowledge of *rabim* that I will not cancel any words that I said or any conditions that I made before you, my witnesses—so that there be no other *kiddushin* and *kinyanim* other than the conditional *kiddushin* and conditional *chuppah* that I have stated here before you, my witnesses.

It is for this purpose, if it will come to pass as I have stated here and as is written before us in the document, – הרי אני מקדש אותך –  
אם יהיה כך הרי את מקודשת לי מעכשיו בטבעת זו כדת משה וישראל

If, however, *chas veshalom* the opposite will occur, meaning the other scenarios delineated in this document will come to be, then these *kiddushin* will be null and void from this moment on and the ring will be merely a present.

At this point, the *chatan* transferred the ring to the *kallah*.

## 2. Conditional *Chuppah* (חופה על תנאי)

The next day, at the public wedding ceremony, before the *chatan* was led to the *chuppah*, he again read from the *shtar* and declared in the presence of the two witnesses and the *mesader kiddushin*:

This *chuppah* will be *koneh* only according to the condition stated before you (i.e., before the witnesses) at the time of the *kiddushin* and written down in this *shtar*, but if the opposite will occur, then I do not wish this *chuppah* to be *koneh*.

The *chatan* was then led to the *chuppah*. As instructed by R. Amital, the *mesader kiddushin* recited the *birkeat eirusin* under the *chuppah*. The *chatan* then handed over a ring that did **not** belong to him, and stated, *lemarit ayin*, "הרי את מקודשת לי בטבעת זו כדת משה וישראל". The *ketubah* was then read and the remaining *sheva berachot* were recited in the usual manner.

### 3. Conditional *Yihud* (יהוד על תנאי):

After the *chuppah* and before the couple entered the *yihud* room, the *chatan* in the presence of the *kallab*, the witnesses and the *mesader kiddushin* read from the *shtar* for the third time.

You, my witnesses R. \_\_\_\_\_ R. \_\_\_\_\_,  
are my witnesses that this *yihud* will be *koneh* only according to the  
condition stated before you at the time of the *kiddushin* and written  
down in this *shtar*, but without this condition, I do not wish this *yi-*  
*hud* to be *koneh*.

After the couple left the *yihud* room, the wedding celebration continued in the usual manner.

### 4. Conditional Marital Relations (ביאה על תנאי):

After the wedding celebration was over, the witnesses and the *mesader kiddushin* met the *chatan* near the room in which he and the *kallab* were to spend the night.<sup>23</sup> For the fourth and final time, the *chatan* read from the *shtar* and declared in the presence of the witnesses (and the *mesader kiddushin*) that the ensuing marital relations would be conditional,<sup>24</sup> as would all future marital relations (ביאות):

You are hereby appointed as my kosher witnesses, that according to the conditions that I stated before you at the time of the *kiddushin*, namely:

- 1) If I do not die without bearing children who live;
- 2) And if I *chas veshalom* die without bearing children who live but my death occurs after the death of my *kallab* \_\_\_\_\_;
- 3) And if I die *chas veshalom* when my *kallab* \_\_\_\_\_ is still alive but my death occurs after the death of my brother, meaning that my brother \_\_\_\_\_ dies before I die;
- 4) even if I die without children who live while my *kallab* \_\_\_\_\_ remains alive and my brother \_\_\_\_\_ remains alive or if my *kallab* does not know

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<sup>23</sup> R. Amital stated that if the bride understood the details of the *shtar* (all of which were for her benefit) and on that basis had agreed to the conditional nature of the *kiddushin*, *chuppah*, *yihud* and the ensuing marital relations, then for reasons of *tzniut*, she had no obligation to be present when the *chatan* read this final section of the *t'nai*.

<sup>24</sup> R. Amital said that whether or not the marriage was actually consummated on the wedding night was not halachically significant.

for sure if my brother is alive or dead but I will have wanted to divorce my *kallah* by giving her a *get keritut* at some point in time;

- 5) Or if my brother \_\_\_\_\_ reaches the age of thirteen]:

In these cases, the *yibud* that I am currently entering into with my *kallah* \_\_\_\_\_ will be with the intent of *kinyanei ishut*.

(1–5) However, if I die *chas veshalom* without children who live during the life of my *kallah* and my [young] brother [who has not yet reached thirteen years of age], and I do not divorce my *kallah* with a *get keritut*,

In that case, then for the rest of my days, I do not want any *yibud* or marital relations or any other *kinyanei ishut* whatsoever to be *koneh* this woman \_\_\_\_\_ to me for the purposes of *ishut*.

After the chatan read this section regarding the conditional marital relations, the entire *shtar* was read aloud, reviewing all that had happened halachically starting from the conditional *kiddushin* the night before. The two witnesses then signed the *shtar* in the presence of the chatan and the *mesader kiddushin*. The conditional marriage ceremony was thus concluded.

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The conditional marriage described above had a "happy ending": The young soldier and his wife had a child before the younger brother reached the age of 13. At that point, the conditional marriage retroactively became a standard marriage.

### Concluding Note

At the end of our discussion with R. Amital in 2007, we asked him if we could publicize his *psak*. R. Amital seemed surprised by the question. He immediately stated explicitly: "I have never tried to hide my halachic positions."

יהי זכרו ברוך

### The Complete *Shtar*: (*Chatam Sofer, Even HaEzer 1:111*)

We the witnesses who have signed below hereby testify how \_\_\_\_\_ came to Rabbi \_\_\_\_\_ before his wedding and asked for instruction as to what to do (כדת מה לעשות) and how to act, as he (the *chatan*) wished to be *mekadesh* and to marry (לקדש) (וליישא) his *kallah* Marat \_\_\_\_\_, but he wanted to perform the *kiddushin davka* conditionally (על תנאי) for the correct and upstanding reason which he explained to Rabbi \_\_\_\_\_. He implored the Rabbi נ"י to instruct him in the path which he was to follow and instruct him as to the actions that he was to undertake so that the *t'nai* would be effective. And Rabbi \_\_\_\_\_ was agreeable to the request and told \_\_\_\_\_ how to create this *t'nai* before the *kiddushin*, before the *chuppah*, before the *yibud* and before the marital relations. For this reason the *chatan* consequently appointed us \_\_\_\_\_ as witnesses to testify that everything would be done according to the conditions stated, that we will hear and see all these conditions—as per the forthcoming explanation in this *shtar* of what we indeed will have heard and seen.

For various reasons, the times are not appropriate for allowing \_\_\_\_\_ to state his condition under the *chuppah* and be *mekadesh* her there as is generally practiced. Consequently, he was *mekadesh* the *kallah* \_\_\_\_\_ before he entered under the *chuppah*, under the direction of the *mesader kiddushin* at \_\_\_\_\_ (i.e., such and such address) before they entered under the *chuppah*.<sup>25</sup>

And this is what R. \_\_\_\_\_ told us before the *kiddushin* and these were his words:

You, R. \_\_\_\_\_ witnesses, hear my words: Since I intend בעזרת ה' to marry my *kallah* \_\_\_\_\_, and be *mekadesh* her and be *koneh* her conditionally, I therefore wish to state the conditions in your presence, so that you will be witnesses to the conditions with which I am being *mekadesh* her and how I will be *koneh* her with *chuppah* and *kinyanei ishut*, and this is my intent:

- 1) If I do not die without bearing children who live;
- 2) And<sup>26</sup> if I *chas veshalom* die without bearing children who live but my death occurs after the death of my *kallah* \_\_\_\_\_;<sup>27</sup>

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<sup>25</sup> I.e. the *kiddushin* took place the night before the *chuppah*.

<sup>26</sup> In this *shtar*, the word “and” at the beginning of the separate clauses actually means “or.”

- 3) And if I die *chas veshalom* when my *kallah* \_\_\_\_\_ is still alive but my death occurs after the death of my brother, meaning that my brother \_\_\_\_\_ dies before I die;
- 4) And even if I die *chas veshalom* without children who live while my *kallah* \_\_\_\_\_ remains alive and my brother \_\_\_\_\_ remains alive or if the *kallah* \_\_\_\_\_ does not know for sure if my brother \_\_\_\_\_ is alive or dead but I will have wanted to divorce my *kallah* by giving her a *get keritut* at some point in time;<sup>28</sup>
- 5) [Or if my brother \_\_\_\_\_ reaches the age of thirteen]:<sup>29</sup>

In these cases, then the *kiddushin* that I am currently being *mekadesh* her will be a complete *kiddushin* and will be fully activated immediately at the time of the *kiddushin*, and the *chuppah* will be a full *kinyan* and the marriage (נישואין) a full marriage.

However,

(1–5): if I die *chas veshalom* without children who live during the life of my *kallah*<sup>30</sup> \_\_\_\_\_ and the life of my [young brother]<sup>31</sup> \_\_\_\_\_ [who has not yet reached thirteen years of age],<sup>32</sup> and during all the years of my life I will not divorce my *kallah* \_\_\_\_\_ with a *get keritut*,<sup>33</sup> in that case:

<sup>27</sup> Throughout the continuation of the *shtar*, the Hebrew has the word הנה"ל ("heretofore mentioned") added whenever the bride or brother are referred to without mentioning their names. For the sake of clarity, we chose to simply replace the term הנה"ל with a blank line.

<sup>28</sup> This clause (#4) is linguistically complicated. The meaning of the clause seems to be as follows:

If at some point in time before I die, I wish to give the *kallah* a *get* while I am childless and my brother is alive or if at some point in time I wish to give the *kallah* a *get* while I am childless but it is **not known** to my *kallah* whether he is alive or dead.

<sup>29</sup> Meaning: "my brother reaches the age of 13 before I die."

<sup>30</sup> This clause is the converse of conditions #1 and #2 above and in simpler terms states: "If I die childless while my *kallah* is still alive." The first part of the clause—"If I die childless"—is the converse of condition #1 which stated that I had a child before my death. The second part of the clause—"while my *kallah* is still alive"—is the converse of condition #2 which referred to my *kallah* dying before me.

<sup>31</sup> This clause is the converse of condition #3 above.

<sup>32</sup> This clause is the converse of condition #5 above.

<sup>33</sup> This clause is the converse of condition #4 above.

Then the kiddushin with which I am *mekadesh* her as well as the *chuppah* and all the *kinyanei ishut* will be retroactively null and void, because this is my intent—if this should be the case, then I have no desire whatsoever to be *mekadesh* her, and instead, the wedding ring that I will give her will be merely a simple present, and regarding the *chuppah* and all of the *kinyanei ishut* that are *konim* a woman—it is not my intent to be *koneh* with them. And in this same manner, all of the marital relations which I will have with her all the days of my life will be exclusively with the intent of the *kiddushin* that I performed now with the above-mentioned condition that I stated in the presence of you my witnesses, and will not be considered a new *kinyan*.

And I swear a *shevuah chamurah* with the knowledge of *rabim*<sup>34</sup> that I will not cancel any words that I said or any conditions that I made before you, my witnesses—so that there be no other *kiddushin* and *kinyanim* other than the conditional *kiddushin* and conditional *chuppah* that I have stated here before you, my witnesses.

At the moment of the transferring of the ring of the *kiddushin* to the kallah, the *chatan* \_\_\_\_\_ said to the kallah \_\_\_\_\_ in our presence all the conditions noted above and added:

It is for this purpose, if it will come to pass as I have stated here and as is written before us in the document, – הרי אני מקדש אותך –  
אם יהיה כך הרי את מקודשת לי מעכשיו בטבעת זו כדת משה וישראל

If, however, *chas veshalom* the opposite will occur, meaning the other scenarios delineated in this document will come to be, then these *kiddushin* will be null and void from this moment on and the ring will be merely a present.

Once again, before the *kallah* entered under the *chuppah*, the *chatan* \_\_\_\_\_ declared in our presence:<sup>35</sup>

This *chuppah* will be *koneh* only according to the condition<sup>36</sup> stated before you<sup>37</sup> at the time of the *kiddushin* and written down in this *shtar*, but if the opposite will occur, then I do not wish this *chuppah* to be *koneh*.

We the witnesses whose names are signed below, wish to add that before the *yibud*, following the way of the world to have the *chatan* and *kallah* go into a room alone after the *chuppah*, the *chatan* stated before us:

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<sup>34</sup> I.e., with a publicly declared oath.

<sup>35</sup> I.e., the witnesses who have signed below.

<sup>36</sup> I.e., the five conditions enumerated above.

<sup>37</sup> I.e., before the witnesses.

You, my witnesses R. \_\_\_\_\_, are my witnesses that this *yibud* will be *koneh* only according to the condition stated before you at the time of the *kiddushin* and written down in this *shtar*, but without this condition, I do not wish this *yibud* to be *koneh*.

We the witnesses whose names are signed below, also wish to add that at night, after the wedding meal, we went with the *chatan* and *kallah* to the house in which they went to sleep, and the *chatan* stated the following before us:

You are hereby appointed as my kosher witnesses, that according to the conditions that I stated before you at the time of the *kiddushin*, namely:

- 1) If I do not die without bearing children who live;
- 2) And if I *chas veshalom* die without bearing children who live but my death occurs after the death of my *kallah* \_\_\_\_\_;
- 3) And if I die *chas veshalom* when my *kallah* \_\_\_\_\_ is still alive but my death occurs after the death of my brother, meaning that my brother \_\_\_\_\_ dies before I die;
- 4) And even if I die without children who live while my *kallah* \_\_\_\_\_ remains alive and my brother \_\_\_\_\_ remains alive or if my *kallah* does not know for sure if my brother is alive or dead but I will have wanted to divorce my *kallah* by giving her a *get keritut* at some point in time;
- 5) [Or if my brother \_\_\_\_\_ reaches the age of thirteen]:

In these cases, the *yibud* that I am currently entering into with my *kallah* \_\_\_\_\_ will be with the intent of *kinyanei ishut*.

However,

(1–5): if I die *chas veshalom* without children who live during the life of my *kallah* and my [young] brother [who has not yet reached thirteen years of age], and I do not divorce my *kallah* with a *get keritut*,

In that case, then for the rest of my days,<sup>38</sup> I do not want any *yibud* or marital relations or any other *kinyanei ishut* whatsoever to be *koneh* this woman \_\_\_\_\_ to me for the purposes of *ishut*.

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<sup>38</sup> In our case, “the rest of my days” actually refers only to the time before the brother reaches age thirteen. From that point on, the younger brother would be able to perform *chalitzah* and the conditional marriage would no longer be necessary.

In addition to the above, we the witnesses whose names are signed below, attest that when each of the above *t'naim* were made by the *chatan* \_\_\_\_\_, the exact wording of each of the *t'naim* was explicitly in front of us in writing and he read all these *t'naim* aloud and did not make any mistakes at all in his speech.

And as proof, we sign this document today, the night of \_\_\_\_\_ here in \_\_\_\_\_ (name of place).

עד \_\_\_\_\_ נאם

עד \_\_\_\_\_ נאם