



Why can't a minor engage in a contract? Two theories

1. Nathan Oman, *Unity and Pluralism in Contract Law*, Michigan Law Review 103:1488

Contract theory suffers from an embarrassment of riches. Roughly speaking there are two main camps, one of which contains two significant subcamps. On one side sit the economic theories, which not surprisingly argue that contract law should be guided by notions of efficiency and welfare maximization. On the other side sit what [Stephen] Smith labels "rights-based" theories...

2. Charles Fried, *Contract as Promise*, pg. 2

The regime of contract law, which respects the dispositions individuals make of their rights, carries to its natural conclusion the liberal premise that individuals have rights. And the will theory of contract, which sees contractual obligations as essentially self-imposed, is a fair implication of liberal individualism.

3. Rabbi Elchanan Wasserman, Kovetz He'arot 66:6

ב' דינים ישנם בקטן: א) קטן שלא הגיע לכלל דעת הרי הוא שוטה [כתובות מח.]. ב) קטן פיקח שאנו רואין שיש לו דעת כגדול, ומ"מ אין מעשה קטן כלום, והוא גזה"כ, מדכתיב איש ולא קטן, שאין כח במעשה קטן לפעול חלות קנין או קידושין [ב"ק קו.; ירושל' מע"ש ד:ג].
There are two issues regarding a minor: 1) A minor who has not achieved capacity is mentally incompetent; 2) A bright minor whom we perceive to have the mind of an adult – but the deeds of a minor are nothing, by scriptural fiat, for it says, "When a man gives," not "a minor". A minor's deed lacks the force to effectuate transaction or marriage.

At what age can a minor give or sell to others?

4. David L. Trueman, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*, pg. 6

Donative Capacity Capacity to make a gift has been defined by courts to require an understanding of the nature and purpose of the gift, an understanding of the nature and extent of property to be given, a knowledge of the natural objects of the donor's bounty, and an understanding of the nature and effect of the gift. Some states... [require] that the donor knows the gift to be irrevocable and that it would result in a reduction in the donor's assets or estate.

Contractual Capacity In determining an individual's capacity to execute a contract, courts generally assess the party's ability to understand the nature and effect of the act and the business being transacted. Accordingly, if the act or business being transacted is highly complicated, a higher level of understanding may be needed...

5. Talmud, Gittin 59a

משנה: הפעוטות - מקחן מקח וממכרן ממכרן במטלטלין.
גמרא: ועד כמה? מחוי רב יהודה לרב יצחק בריה: כבר שית, כבר שב. רב כהנא אמר: כבר שב, כבר תמני. במתניתא תנא: כבר תשע, כבר עשר. ולא פליגי, כל חד וחד לפי חורפיה. וטעמא מאי? א"ר אבא בר יעקב א"ר יוחנן: משום כדי חייו.

Mishnah: The purchase and sale of movable items by *pe'utot* are binding.

Gemara: How young? Rav Yehudah pointed to his son, Rav Yitzchak, saying, "Like six or seven." Rav Kahana said, "Like seven or eight." In a *braita* we learned, "Like nine or ten." There is no debate – each depends on his sharpness. Why [is this valid]? For the sake of his life.

6. Sefer Meirat Einayim, Choshen Mishpat 235:1

דאל"כ אין שום אדם יהיה לו שום עסק עמו, שהרי יכול לחזור בו כשירצה, גם קרוביו יכולין לבטל מעשיו
Otherwise, no one would have any involvement with him; he could recant at will, or his family could cancel his deeds.

7. Rambam, Mishneh Torah, Hilchot Mechirah 29:6

קטן עד שש שנים אין הקנייתו לאחרים כלום, ומשש שנים עד שיגדיל אם יודע בטיב משא ומתן מקחו וממכרו ממכרו...
Until the age of six, his assignment of property to others is nothing. From six until maturity, if he comprehends commerce then his purchases and sales are binding.

8. Talmud, Bava Metzia 16a-b

מה שאירש מאבא היום - משום כבוד אביו, מה שתעלה מצודתי היום - משום כדי חייו.

Saying, "[I am selling] that which I will inherit from my father today" [is valid] to enable his father's honour. Saying, "[I am selling] that which will enter my trap today" [is valid] for the sake of his life.

9. Talmud, Bava Metzia 112b

שכיר אמאי תקינו ליה רבנן למשתבע ושקיל?... אמר רב נחמן אמר שמואל: תקנות קבועות שנו כאן. שבועה דבעל הבית היא ועקרוה רבנן לשבועה דבעל הבית ושדויה אשכיר, משום כדי חייו דשכיר.

Why did the sages rule that an employee may swear [that he has not been paid] and collect?... Rav Nachman cited Shemuel: We have learned fixed decrees here. The oath is of the employer, but the sages uprooted it and transferred it to the employee, for the sake of his life.

10. Rashi to Bava Metzia 112b

תקנות קבועות - ראוי לעשותן קבע לעקור עליהם דבר מן התורה

"Fixed decrees" - It would be appropriate to make them fixed, uprooting the Torah's law for them.

11. Sefer Meirat Einayim, Choshen Mishpat 235:5

גם במתנה תיקנו שתהא קיימת, דאי לא עביד ליה נייח נפשיה לא היה נותן לו המתנה ובכלל כדי חייו הוא...

They enacted that gifts, too, should be binding, for had someone not appeased him then he would not have given the gift, so this also for the sake of his life.

12. Sefer Meirat Einayim, Choshen Mishpat 235:1

אם מכר ביותר מכדי חייו, כתב הטור [סעיף א'] דפליגי ביה... והמרדכי פרק הניזקין [שצ"ז] כתב כדעת הרמב"ן דכיון דתיקנו תו לא חילקו דאף יותר מכדי חייו יכול למכור

If one sells more than is needed for the sake of his life, the Tur wrote that this is debated... Mordechai sided with Ramban that once this was enacted, the did not distinguish, and one may sell more than is needed for his life.

At what age does a minor acquire that which is given to him?

13. Rudolf Sohm, The Institutes of Roman Law, pg. 141

The following persons are incapacitated from all juristic acts: the *infans*, or child who has not yet completed its seventh year... The following persons are incapacitated from some juristic acts, but are capable of others: the *impubes*, or child who has completed its seventh, but not yet completed (if a boy) his fourteenth, (if a girl) her twelfth year;... The legal position of persons of the second class is as follows. They are capable of such juristic acts as result in an improvement of their proprietary position, but they are incapable of juristic acts which operate to alienate property or impose a liability...

14. Talmud Yerushalmi, Maaser Sheni 4:3 - Capacity is King

אמרין בשם רב נחמן בר יעקב כל שנותנין לו אגוז ומשליכו צרור והוא נוטלו המוציא בידו כמוציא באשפה. אגוז והוא נוטלו צרור והוא משליכו גזילו גזל מפני דרכי שלום. אגוז וצרור והוא נוטלן ומצניען ומביאן לאחר זמן גזילו גזל גמור.

They cited Rav Nachman bar Yitzchak saying:

- When he rejects nuts and accepts stones, one who takes from him is like one taking from the trash.
- When he accepts nuts and rejects stones, stealing from him is theft, to keep the peace.
- When he keeps nuts and stones and stores them for use later, stealing from him is complete theft.

15. Talmud, Gittin 65a - Capacity is King

אמר רבא, ג' מדות בקטן: צרור וזורקו, אגוז ונוטלו - זוכה לעצמו...; הפעוטות - מקחן מקח וממכרן ממכר במטלטלין...

Rava said: There are three types of minor. If he rejects stones and keeps nuts, he can acquire... At *pe'utot*, his purchases and sales of movable items are binding...

16. Mishnah Gittin 5:8 - Age Matters

מציאת [קטן] יש בהן משום גזל מפני דרכי שלום ר' יוסי אומר גזל גמור

Taking that which a minor finds is theft, to keep the peace. Rabbi Yosi said: It is complete theft.

17. Rama Choshen Mishpat 243:15

קטן שנותנים לו צרור וזורקו, אגוז ונוטלו, זוכה לעצמו. (ודוקא כשיש דעת אחרת מקנה לו, אבל במציאה, לא).

A minor who rejects stones and keeps nuts can acquire, but specifically where another assigns it to him, not where he finds an object.

18. Rabbi Shabbtai haKohen, Shach Choshen Mishpat 243:6

ולפע"ד דוחק להמציא חילוק שלא נזכר בש"ס דאע"ג דמצינו לקמן דדעת אחרת מקנה עדיף מ"מ בזה דקטן דזוכה לעצמו לא מצינו בש"ס לחלק בכך וגם אין סברא לחלק בכך... אלא נ"ל דהא דאמרי' מציאת חש"ו אין בו רק מפני ד"ש היינו בקטן שהוא פחות מזה...

In my humble opinion, it is difficult to present a distinction which is not mentioned in the Talmud. True, transactions are stronger when someone assigns the item, but we have not found any talmudic distinction regarding minors acquiring for themselves, and there is no logic in such a distinction... Rather, it appears to me that the statement that taking a minor's found object is prohibited in order to keep the peace is regarding the youngest class of minor.

19. Rabbi Moshe Sofer, Chatam Sofer Yoreh Deah 316

והי' נ"ל לפשוט דתרי הקנינים בין כסף ובין משיכה הם קנינים מחודשים כי משיכה הוא שמושך ד' אמות או מגביה ג' טפחים... ושוב מניח המטלטלים במקומם וכבר הם שלו ממש וזה מחודש מן התורה אבל לולי התורה לא הי' קנין נגמר במשיכה כל דהו אלא אחר שנגמר הקנין והלוקח סילק המוכר במעותיו וחזר ולקחו המקח לביתו ממש כאדם העושה בשלו ובקנינו אז נגמר ובקונה הפקר או מתנה דליכא כסף אינו שלו אלא יוליך הדבר לביתו וחצרו כשלו ממש...

To me, it appears correct to answer that these two transactions, silver and moving the item, are novel forms of acquisition. Moving the item means moving it four cubits or lifting it three handbreadths... and then putting the object down, and then it is actually his. This is the Torah's novelty; without Torah, a transaction could not be completed via any moving of the object until after the rest of the transaction was complete and the buyer had paid off the seller and brought the object to his actual home, as one handled his own property. Then it would be complete. When acquiring an ownerless item or a gift, so that there is no payment, it would not be his until he brought the item to his home or yard, like his own property...

Minimum Requirements for Acquisition by a Minor				
	Modern	Roman	Rama	Shach
Gift	No age, No capacity	7 years, No capacity	No age, Capacity	Biblical: 6 yrs, Capacity Rabbinic: No age, No capacity
Hefker			Biblical: 6 yrs, Capacity Rabbinic: No age, No capacity	