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UNDER THE AUSPICES OF HARAV CHAIM KOHN, SHLITA

STORY LINE

By Rabbi Meir Orlian

ENTRUSTED WITH INSTRUCTIONS

Mr. Alter did not own much and led a simple life, living off his pension and social security. His wife had passed away years before; he had one married son and one unmarried daughter, who lived with him in his apartment.

Mr. Alter's life's savings consisted of several gems, valued at about $18,000. "My savings are set aside for good things," he would say.

Some years after his wife's passing, Mr. Alter handed the gems to his brother, who had a safe. "Please keep these gems in your safe," Mr. Alter had instructed his brother. "If I pass away before my daughter is married, please give them to her."

Mr. Alter passed away 10 years later. He left no will and negligible property, other than some furniture and the gems that he had entrusted to his brother. After the shivah, Mr. Alter's son asked his uncle for the gems that had been entrusted to him.

"Your father gave me instructions," replied the brother. "If he should pass away before your sister is married I should give the gems to her!"

"But my father left no legal will," said the son. "I'm the halachic heir. I'm willing to share the gems with my sister, but am certainly entitled to at least half of them."

"I can't go against your father's explicit instructions!" insisted the brother.

"Once a person passes away, his property no longer belongs to him," argued Mr. Alter's son. "It belongs to his heirs, i.e., me. You have no right to give the gems to someone who is not the halachic heir."

"I understand your point of view," said the brother, "but it seems wrong to me. I'd like to consult Rabbi Dayan on this."

The two came to Rabbi Dayan. "What should I do with the gems?" asked Mr. Alter's brother.

"You should give them to the daughter," answered Rabbi Dayan. "There is a concept, 'mitzvah l'kayem divrei hameis' — it is an obligation to fulfill the words of the deceased. The heirs are required to honor his instructions regarding his property" (C.M. 250:23; Ketzos 252:3).

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BHI HOTLINE

BORROWING AND LENDING OF A MINOR

Yossi (12 years old) was in the hall and saw a younger boy playing with a Diablo (Chinese yoyo consisting of two sticks connected with a string, and two plastic cups attached with a silver bolt). He asked for permission to use it, and the younger boy agreed. Yossi attempted to do a certain trick (which is normal to do) and one of the sticks cracked.

Q: They asked me, their rebbi, to decide whether Yossi is obligated to pay for the damaged Diablo. Is there any reason to obligate Yossi for chinuch purposes?

A: There are two issues here. One is the halachah pertaining to a minor who lends his object to another (assuming that it in fact belongs to the child; see C.M. 270:2). The second issue is the responsibility of a child who borrows an object.

Regarding the first matter, Poskim debate whether an adult is liable as a custodian for a child's object. Some contend that an adult has no liability since the Torah uses the term ish and a child is not an ish. Others maintain that a custodian for a child's object is liable (C.M. 96:1, 302:2). This debate is limited to acting as a custodian for a child's object, but all agree that since a child cannot convey ownership he cannot halachically lend his object.

Therefore, one who "borrows" a child's object is borrowing that object without permission (sho'el shelo midaas) and is categorized as a thief (C.M. 292:1, 359:5). As a thief he is liable even if the "borrowed" object becomes damaged in the normal course of use (meisah machmas melachah), in contrast to a borrower who is exempt in such a circumstance (C.M. 340:1; Minchas Chinuch 60:10; Imrei Binah, To'en v'nitan 38; Chazon Ish, E.H. 74:18, d.h.

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"This would seem to negate the need for a halachic will!" exclaimed Mr. Alter's son.

"According to most authorities, Chazal limited the legal application of this concept to a case where the deceased initially entrusted property to a third party with explicit instructions," explained Rabbi Dayan. "However, if the property remained in the deceased's hands, or was already entrusted to the third party before he made his statement, the concept does not apply, so there is a need for a halachic will" (C.M. 252:2).

"What is the rationale for this limitation?" asked the brother.

"Maharit (II:95) indicates that if the property was entrusted with instructions, it is almost as if he gave the property to the third party to acquire on behalf of the recipient," answered Rabbi Dayan. "Thus, that property never entered the possession of the inheritors. Maharsham (2:224) suggests that the reason is that since transactions normally require an act of kinyan, we assume that the benefactor was insincere in his statement, unless he entrusted it originally with this instruction.

"There is an opinion, mentioned by some Acharonim, that when there is a legally valid will, since the will is enforceable in the civil court, the concept of mitzvah l'kayem divrei hameis can be applied, even if the property was not entrusted with this explicit instruction," concluded Rabbi Dayan. "In this case, as well, we can consider the recipient as in possession and we consider his intent sincere. However, some Acharonim do not accept this ruling" (Pischei Choshen, Yerushah 4:36-38[85]).

MONEY MATTERS

PARTNERSHIP # 17

Loan Taken by a Business Partner

Q: I took out a loan in my own name for a small, joint business venture. If the venture falters and the loan has to be repaid from personal assets, does my partner have to repay half the loan?

A: If one partner borrows for the purpose of a joint business, the other partner is also obligated, even though he did not participate in procuring the loan, because the first partner is viewed as an agent of the second partner. This is true provided that the loan was explicitly taken on behalf of the partnership, or the first partner borrowed the money at the instruction (or with the consent) of the second partner, or if the money was invested directly in the partnership (C.M. 77:2; Shach 77:9; Nesivos 77:4).

If the second partner questions whether the loan was taken for the purpose of the joint business or for personal use of the first partner, the burden of proof is on the first partner.

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b'ketzos). Even if we were to assume that one who "borrows" from a child is not a thief since the daas the child possesses prevents the "borrower" from being classified as a thief (Igros Moshe, O.C. 2:107; Nachal Yitzchak 96; and see Oneg Yom Tov 111), nevertheless, it is not sufficient daas for the child to indemnify a borrower who damages the object in the normal course of use.

Poskim do write, however, that when a child reaches the age of pe'utos (one who understands the nature of business; generally above the age of six), since he can execute transactions (C.M. 235:1), one who borrows an object from him is not a thief and is not liable if the object becomes ruined in the normal course of usage (Minchas Chinuch and Imrei Binah op. cit.; cf. Gidulei Shmuel, B.M. 96b to the effect that in this case the borrower is liable). [However, some contend that if a child's father is alive, Chazal's enactment to recognize the child's kinyanim does not apply (Darkei Moshe 2, cited by Nesivos 10) and thus a child who has a father cannot lend his objects.]

When the "borrower" is also a child, it is clear that he does not have the liability of a custodian. Furthermore, even the halachah that a person should pay for damage that he inflicted when he was a child (O.C. 343; Pischei Teshuvah, C.M. 349:2) is limited to where his act was intentionally destructive. If his act was not intentionally destructive, he is not expected to pay the damaged party once he is an adult (see Pischei Choshen, she'eilah 1:[34]) and he is certainly not liable if the object becomes damaged in the normal course of usage. Since an adult in that circumstance is not liable, there is no reason, even for chinuch purposes, for a child who damaged in that manner to be liable.

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