Clarifications in the Laws of Choshen Mishpat and Ribbis | #31 Shvat 5785



Shaalos Recently Asked in the Heichal Horaah

Question: A wealthy man had an assistant who helped him in his final years and took care of all his needs. When the wealthy man fell ill, he told his assistant [in front of witnesses] that he will give him one of his apartments, and a few weeks later the wealthy man passed away. Are the heirs obligated to honor this wish?

Answer: Had the wealthy man made a kinyan, it is clear that the assistant is koneh, and the heirs would be obligated to honor the kinyan made by the deceased. In the case of a kinyan, the gift was given legally to the assistant, and since the father didn't say that the gift will become legal only after he died (because if the father said he is giving the gift only after his death, the kinyan wouldn't have helped, since a person cannot give a gift after his death).

However, in this specific case, no kinjun was made, and therefore we must discuss the different ways to approach this balachab:

1) First of all, one must examine the exact wording of the giver.

If he said he is giving the apartment "as an inheritance" to the assistant, his words are ineffective and the true heirs are not obligated to give him the apartment. The assistant is not a halachic heir and he cannot inherit the dead man, and therefore what he said is null and void.

This is ruled in Shulchan Aruch (253:2), that a dying person can only give to others if he expressed it as a "gift" or other such terminology listed there, while the term "inherit" only applies to the legal heirs as stated in the Torah, and not to anybody else.

2) If the giver said he is giving the apartment to the assistant as a "gift,"

the ruling is that whatever an ill person says, is legally binding. This is termed a matnas shechiv mera.

will that he will be able to give gifts simply not binding, he might suffer such psychological stress that will exacerbate requirement of a kinyan. of by speaking. his situation. Therefore, they instituted concerned for this institution is that Chazal were shechiv mera is able to transfer ownership bedridden. sheebiv mera is an ill person who is dridden. Chazal instituted that a gifts that think that that if he his instructions gives, without the the shechiv The reason

If so, the assistant should be koneh the apartment, since he received the apartment as a mathas shedhir mera.

However this is not so, since the din of a shechin mera's gift attaining this special status of being koneh even without a kinyan only applies when the shechin mera gives away everything he owns [even more so, he must specifically state that he is giving "these assets," or we know that he has no more assets. Otherwise, we say that perhaps the shechin mera has other assets, in which case his gift is ineffective]. If he gives away everything he owns, there is an umdana (clear grounds) that he gave the gift due to his imminent death and he realized that his death is near, and therefore his words are legally binding.

But if he left assets, as in our case, there is no *umdana* that he gave the gift because he knew he was going to die, and therefore it requires a *kinyan* as in every transfer of ownership. Since, in our case there was no *kinyan*, the assistant was not *koneh* the apartment with the claim of *matnas shechin mera*.

3) There is another type of gift, that of a metzaveb mechania misab (one who

Editorial

With thanks and praise to Hashem, we present before you some of the *dirrei Torah* and *balachos* that were studied and clarified in our *beis medrash*, and we are certain that the Torah world will enjoy these *chidushim*.

We have added to our beithal bord'ab Devar Hamishpat a panel to assist anybody who has a query in Choshen Mishpat or ribit, and we print here some of the issues discussed.

are the many משפטים צדיקים referred to in the passuk. and from every mishpat is created an angel, which mishpatim, a holy power, from Hashem's power. This is why the Torah writes אוקים ומשפטים צדיקים, righteous acts in accordance with Hashem's mishpatim brings a holv nower, from Hashem's power. This is why mitzvah creates an advocate angel, similarly one who mashpia much Light. Just as one who performs a mishpatim brings much kedushah in its root, laws are also spiritual. Whoever obeys the Torah's correct physically, but these laws don't have any holy dimension, while אמשפטי ה' אמה, Hashem's monetary Mishpalim, the non-Jews' monetary laws are only also have monetary laws. As we wrote in parashas are equal, rebutting the non-Jews' claim that they the passuk גוי גדול אשר לו חוקים ומשפטים צדיקים because the Torah's monetary laws connect us to Hashem just like the mitgro. This is the meaning of also have monetary laws. But they are mistaken, logical monetary laws, are the mitzvos are unique to the Jews, the משפטים, "These non-Jews mistakenly think that although which great nation has righteous mitzvos and because they are the power of Hashem, and not חוקים ומשפטים צודקים, laws,' the mitzvos not, since the and monetary laws non-Jews correct , and ರ್ಷ

We must note that although all the halachic rulings and *chidushim* presented here are based on the writings and rules set down by the leading *paskim*, since the *balachab* can differ when even just a small detail changes, therefore every *shaalab* must be brought to a Rabbi.

are created from the משפטי צדק."

These angels,

gels, created by following the Torah's are termed צדיקים צדיקים because they

Shevat 5785

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בראשות הגאון ראדיר רבי נפתלי נוסבוים שליט"א ובהכוונת הגר"ש סג"ל שליט"א

gives away because his death is imminent), where it is clear from the ill person's words that he realizes his death is imminent, and is therefore giving away his possessions.

giving away his possessions. In the case of a metzaveh mechamat misah, even if he gave away only some of his assets, it has the status of a matnas shedhir mera and the receiver is kaneh even without making a kinyan.

The Rema (250:4) writes, that every ill person, after being bedridden for more than three days, has the *din* of *metzaveb mechamat misab*, and consequently, even if he doesn't give away all his assets, the gift is legal.

If so, if in our case the ill person was bedridden more than three days before he told the assistant that he is giving him the gift, the father has the status of *metzaneh mechamat misah*, in which case his word is binding and the assistant is *komeh*, and the heirs are obliged to give him the apartment.

4) But even if he wasn't ill for three days beforehand and there are no grounds to give the assistant the apartment because the father was metzaveh mechaniat misah, there is another perspective to our case: Since the assistant worked for the wealthy man for many years, it is possible that the gift of the apartment was given to him as a laborer's wage, and since the issue is an apartment, which has the din of karka (land), it is possible that the laborer is koneh.

Let us explain: The Rema rules (Choshen Mishpat 332:4), if a person hires a worker, and he said he will give him a certain object for his wage, the hirer can later give him the money's worth of the object and is not obliged to give him the actual object, since the worker didn't make a kinyan on the object and therefore he wasn't koneb it.

The reasoning is, that the money the hirer owes the worker cannot be *koneh* the object, since the rule is that *maos einan konos*, money does not generate a *kinyan*, and therefore the hirer is not obliged to give the worker the object.

Accordingly, writes the Aruch Hashulchan (ibid 13), if the hirer promised to give the worker a house, the worker is *koneb* the house and the hirer is not able to give him the money's worth, since the rule regarding *karka* is that *maos konos*, money generates a *kinyan* in *karka*, and his wage is considered money, and therefore the worker is *koneb* the apartment.

If so, if we regard the ill person's gift of an apartment as the assistant's wage, the assistant was *koneh* the apartment with the money the ill person owed him, and he is therefore *koneh* the apartment.

[However, the Aruch Hashulchan is doubtful if this halachab is correct, because we could say that the money that the hirer owes the worker is not considered money to even be kunch karka.]

But who says our case is the same as that of the Aruch Hashulchan? We could argue that the Aruch Hashulchan is discussing a case where the hirer had made up with the worker **beforehand** that he will pay with a certain object, and the Aruch Hashulchan suggests that if they had agreed on *karka* it would be *koneh*.

That has nothing to do with our case, where the wealthy man didn't stipulate in advance with the assistant that he would pay for the help, and if so the assistant agreed to work for free. If so, there is no money here to be *koneh* the *karka*, and we cannot oblige the heirs to give the assistant the apartment on such grounds.

did intend to ask for a wage and that he only helped the elderly man because he knew that he

will be paid at the end, he can claim his wage from the wealthy man. If so, it is regarded as a salary [and he is paid the minimum wage, since it wasn't stipulated from the beginning].

This rule is clarified in Teshuvos Mahari ben Lev, that if sons are working for their father, and one of the sons works more than the others, he deserves to be paid.

Teshuvos Shevet Halevi cites the Mahari ben Lev, and explains that the Mahari ben Lev was discussing a case where all the sons worked for the father and receive a wage, and one of them worked harder than the others, and therefore anan sahadi (we can attest) that this son intended to be paid. But if there is only one son helping his father, one could say that he didn't intend to be paid. If so, the assistant doesn't deserve a wage, and the apartment is not his wage that we could argue that the assistant is kuneb the apartment.

The Pischei Choshen brings the explanation of the Shevet Halevi, and concludes that it is up to the *dayan* to decide in each case separately, if there was intention to pay a wage or not.

Also, the acharmim write that these paskim are discussing a case where it is possible that he intended to be paid with cash or objects, but if the person helped the rich man in order to merely receive torus hamath, to receive a favor from him and the suchlike, it is not considered as intent to receive a wage.

Therefore, this *baladadah* is left for a knowledgeable and expert judge who can read a person's intentions and feelings (Mishpatei Choshen).

5) The next issue to be discussed is mitzuah lekapum dinrei hamus, one is obligated to fulfill the words of the deceased. If so, there is a mizzvah for the heirs to fulfill their father's words and give the apartment to the assistant.

The din is that mitzyah lekayem divrei hames doesn't have the power of a matnas shechiv mera, in that if the heirs already sold the asset, mitzyah lekayem divrei hames cannot annul that sale, while a matnas shechiv mera can.

However, in our case the heirs haven't yet sold the asset, and if so, they should be required to give the asset to the assistant because of mizqub lekapem divrei hames:

But the Shulchan Aruch rules that mitzpub lekayem dirrei bames only holds strong if the object the deceased wanted to give to him was given to a shalish (a third party).

This is based on the Gemara (Gittin 13) that doesn't oblige a person to abide to the words of the deceased, and the Gemara doesn't oblige him because of mitzuah lekayem dirrei hames. The reason is, say the risbonim, is that the mitzuah lekayem dirrei hames only holds ground if it was delivered to a shalish.

This was not so in our case, and even more so, since our case relates to *karka*, the Ketzos Hachoshen writes that *karka* cannot be deposited to a *shalish* (although the Cheshev Ha'efod elaborates on this point and he writes that according to the Shulchan Aruch, *karka* **can** be deposited to a *shalish*).

And although the Shach and Sema write that if the deceased ordered the heirs to give something to somebody, they have a mitzvah to fulfill his words even if it wasn't deposited to a *shalish*, Rav Akiva Eiger questions this ruling, since the Ritva is of the view that even if the deceased commanded the heirs, there is only a mitzvah to fulfill his words if he gave the object over to a *shalish*.

Although there are views that a shalish is only

necessary in the case of a healthy person who said he wants to give something to somebody, and then he died. But if he was a shethin mera when he said to give the gift, there is a mitzvah to fulfill his words even if the object was not given to a shalish. And the Minchas Elazar rules, that even if it wasn't given to a shalish, there is a mitzvah lekayem dinrei hames, and a person can't claim that he holds according to those who require a shalish. If so, in our case, the heirs are required to give the appartment to the assistant.

But in our case this not so: First of all, according to those who require a *shalksh*, in our case there wasn't a *shalksh* and therefore there is no *mitzyah lekayem divrei hames*.

But even those who are of the opinion that there is no requirement for a *shalish*, they explain the Genara that brings a case where there is no *mizyuh lekapen dirrei hames*, because in that case the deceased didn't command, saying "I command to give," and he he merely said "I give," in which case there is no *mizyuh lekapen dirrei hames*.

Accordingly, since in our case the deceased didn't command to give, but merely said "I give," there is no mitzuah lekayem divrei hames.

6) The next issue is that of kibud av

Even if we say that he can't be koneh because of matnas shechin mera and there is no mitzuah lekayem dinrei hames, why aren't the heirs responsible to give the apartment to the assistant because their father so said, and they have a mitzvah of kibud an?

Rav Akiva Eiger discusses this point, if there is a mitzvah of *kibud av* in money that the heirs have already inherited, because one could argue that the rule is, if the mitzvah of *kibud av* requires expenses, the father is the one who should cover the expense. Otherwise, the children are not obliged to comply with their father's wishes. Here, following their father's wish would mean giving from their own inheritance, which is theirs and not their father's, and if so they are not obliged to comply with their father's will.

Rav Akiva Eiger doesn't have a clear ruling in this matter.

However, in his case, the father told the children his wish, and therefore one could discuss the obligation of kibud av. מצוית בישר אב, אבל סתם בלשון תנו אי"ב מצוה להיורשים לקיים דבריו) מצוית כיבור אב, אבל סתם בלשון תנו אי"ב מצוה להיורשים לקיים דבריו) But in our case, the father didn't tell the children his wishes, he only told the assistant. If so, we could say there is no mitzvah of kibud av.

7) After bringing all the sides of the question, there is still one point to clarify: When there is a doubt in a balabab, we must know who is muchzak, in which case the other person is bamatzi mechavera alav baraaya (the burden of proof is on the one who wants to take from another). In our case, who is the muchzak?

Regarding the doubt if our case has the power of matnus shechir mera or if mitzuah lekayem divrei hames is appropriate, it is clear that the heirs are the muchzuk, as ruled by the Shulchan Aruch (250:3). In most present-day wills, the will works on the basis of a gift from life, which requires a kinyan, and in such cases the one who receives the gift is the muchzuk since it was his before the heirs inherited.

But in our case, there was no *kinyan* and therefore it was a gift after his death, in which case the heirs are the *muchzak*. [However, if the assistant would have been *koneh* because of his wage, as in (4), he would be the *muchzak* since it was his before it reached the heirs.]

ע"י הרה"ג ר. ברוך אברהם עסטרייכער שליט"א ראה"כ וטרבני היכל הוראה זדבר המשפט