

BUSINESS WEEKLY

RESTORING THE PRIMACY OF CHOSHEN MISHPAT UNDER THE AUSPICES OF HARAV CHAIM KOHN, SHLITA



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האה"ח מרת מאטיל לאה (Marta) בת הר"ר יוסף אלימלך הלוי שראן ע"ה



CASE FILE

Rabbi Meir Orlian
Writer for the Business Halacha Institute

לע"נ הרב אהרן בן הרב גדליהו ע"ה

LATE-PAYMENT PENALTY, PART 2

Mr. Braun paid his rent late a number of times during the year. His landlord, Mr. Joshua, sent him a bill for the late-payment fees for each month, totaling \$1,000.

Mr. Braun objected that perhaps this represents *ribbis*, since he was charged extra for delaying payment. Rabbi Dayan explained that a one-time penalty for each month is not considered *ribbis* (as explained in last week's article). However, there is an additional factor, *asmachta* (insincere commitment), which could affect the practical ruling in this case.

"Could you illustrate the concept of *asmachta*?" asked Mr. Joshua. "I'm not familiar with this term."

"There are a number of examples in the *Gemara*," replied Rabbi Dayan. "Imagine a landowner who leases out his land to sharecroppers for a percentage of the yield. Obviously, the financial gain of the landowner depends on the reliable work of the sharecropper" (B.M. 104b; C.M. 328:2).

"I'm afraid that you might not work the land properly and find some other job," says the landowner.

"You don't trust me?" replies the sharecropper, with a hurt tone.

"I do," says the landowner, "but still, I want some sort of assurance."

"I'll tell you what," says the sharecropper. "If I don't work the land, I'll pay you a million dollars! I don't expect this to happen, but does that make you feel better?"

"OK," says the landowner. "I guess so."

"Similarly, you expect the tenant to pay his rent on time," continued Rabbi Dayan.

"The tenant also does, but to reassure you, he commits to paying a penalty if he does not. This is a kind of *asmachta*."

Mr Joshua asked:

"What is the *halachah* of *asmachta* and what impact does it have on *ribbis*?"

"There is a dispute in the *Gemara* whether conditional penalties (*asmachta*), are considered sincere obligations that are binding," replied Rabbi Dayan. "Most authorities maintain that without additional strengthening, they are not binding; they are meant primarily to give reliance to the other party, without a sincere commitment to paying the penalty" (C.M. 207:12-13).

"If the late-payment penalty was made without strengthening so that it is not binding, the

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agreements can
be halachically
non-binding if not
set up properly.

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לע"נ ר' שלמה ב"ר ברוך וזוג' מרת רייכלה בת החבר יעקב הלוי ע"ה ווייל

DYING WISHES

Q: A heartrending *she'eilah* was submitted to the Business Halachah Institute during this frightening pandemic.

A man was hospitalized with coronavirus, and none of his family members were allowed to stay with him due to fear of contagion. Realizing that his condition was deteriorating, he decided that since he had never written a *tzavaah* (halachic will) or even a legal will, he would video himself detailing how he would like his possessions to be distributed after his death. He began the recording by bemoaning his fate and the loneliness of dying with no loved ones around him. He then instructed his sons that after he passes away, his wife should keep his home until she remarries, after which his children – including his daughters – should split the value of the home equally.

He emailed the video to his family, who rushed it off to us to ascertain whether this is a valid *tzavaah*.

A: There are two questions we must examine: (1) Is this recorded set of instructions valid without any form of *kinyan*, and (2) If it is valid, does the fact that the man stipulated that his heirs follow his instructions a while after his death, and not immediately, invalidate it in any way?

Generally speaking, in order to transfer ownership of a belonging, one must make a proper *kinyan* to seal the transaction. *Chazal* stipulated, however, that if a *sh'chiv meira* – a person who is incapacitated by a severe illness – issues instructions as to how he would like his possessions distributed after his passing, his instructions are binding even without a *kinyan*. (See *Shulchan Aruch*, C.M. 250:5 for the exact parameters of a *sh'chiv meira*, but the case of a person severely ill from coronavirus definitely falls under that category.)

In the words of *Chazal*: "*Divrei sh'chiv meira kikesuvim uchimesurim damya* – The instructions of a *sh'chiv meira* are as though they were written and transferred" (see *Tur* and *Shulchan Aruch* 250:1). This means that if the ill person gave instructions



CASE FILE

tenant is not required to pay it. Therefore, even if he would to pay, it would be an additional, unrequired payment on account of the delay, and would be considered rabbinic interest (*ribbis me'ucheres*)" (*Bris Yehuda* 4:[5]; *Chelkas Binyamin* 177:[141]).

"There are various ways of strengthening the obligation. Among them: indenting the penalty amount from now on condition (*mei'achshav*), ; making a *kinyan sudar* before a formal *beis din*; writing in the contract that the obligation was made with a *kinyan sudar* before a formal *beis din* (even if in actuality it wasn't, based on *hodaas baal din*); writing in the contract that the penalty clause is made in a manner that is not *asmachta* (C.M. 207:14-15; *Taz* 207:18; *Avnei Yashfeh* #159(b)).

"Moreover, some maintain that if the contract can be legally upheld in court as binding, it is also halachically valid as *kinyan situmta* (common commercial practice), and it is not considered *asmachta*; hence, there is also no concern of *ribbis*. This opinion can be relied upon for commercial rental contracts. For private rentals between individuals, one of the aforementioned ways of strengthening should be used. If this wasn't done, the landlord can still rely on this opinion and ask for the late-payment fee. However, if the tenant refuses to pay, and claims that the penalty clause is *asmachta* and not binding, it is questionable whether *beis din* would be able to make him pay" (*Toras Ribbis* 6:1[ftnt. 2]).

"Furthermore," concluded Rabbi Dayan, "if the renter was prevented from paying on account of circumstances clearly beyond his control (*oness*), he would not be halachically liable for the late-payment fee, if not stipulated that it applies even in cases of *oness*."

Verdict: A (one-time) late-payment penalty clause does not pose an inherent *ribbis* problem, but unless it's in a commercial setting or strengthened, there may be concern of *asmachta* (insincere commitment).



MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

APOTROPUS #8

FIDUCIARY GUARDIAN

Appointment by Civil Court

לע"נ ר' יחיאל מיכל ב"ר חיים דו"ג ח' בת ר' שמואל חיים ע"ה

Q: What is the status of an *apotropus* appointed by civil court?

A: An *apotropus* appointed by civil court for the orphans is recognized by *Halachah* based on *dina d'malchusa dina*. He has the authority of an *apotropus* appointed by *beis din* on account of the judge's appointment. Although we generally do not apply *dina d'malchusa dina* to rulings of civil courts, here the *apotropus* needs civil legal authority to function on behalf of the orphans toward non-Jews and other agencies, and for the courts to legally uphold his actions (*Tashbetz* 2:188; C.M. 290:17).

Although an *apotropus* appointed by *beis din* is not required to give a financial accounting, only to swear at the end, *beis din* would require an *apotropus* appointed by civil court to provide an accounting, as required by civil law.

Even if the court appointed someone whom *beis din* would not normally appoint, *beis din* would not act to have him/her replaced unless the *apotropus* acts irresponsibly (*Responsa Maharsham* 5:25).



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regarding his real estate, it's as though he wrote a contract (*kikesuvim*) to transfer ownership; if he gave instructions regarding an object, it's as though it was physically handed it over (*kimesurim*) to the recipient (*Sma* 3).

Chazal instituted this policy because a *sh'chiv meira* may not have the wherewithal to make proper *kinyanim* for each item he wants to distribute, and they were concerned that if he feels that his wishes are not going to be fulfilled, he might suffer a breakdown, further endangering his life (*Sma*, ad loc. 1).

The *halachah* of *sh'chiv meira* applies only in cases in which a person is distributing his possessions out of fear of imminent death. Therefore, only if the *sh'chiv meira* distributed *all* of his possessions to others, leaving nothing for himself, do we consider his instructions binding without a *kinyan*, because the fact that he left nothing for himself proves that he believes he is about to die. If he left some possessions for himself, his instructions are not binding unless a *kinyan* is made to finalize the transfer of ownership (*Shulchan Aruch* 250:4 with *Nesivos* 11).

If he expresses clearly that he is distributing his possessions out of fear of death, or even if he didn't express that this is the reason, but he is bemoaning his imminent death, then even if he did leave some items out of his list of instructions, his verbal distribution is binding without a *kinyan* (ibid. 250:7 with *Sma* 21). Furthermore, if he states that he is distributing his possessions in keeping with the *halachah* of *sh'chiv meira*, his instructions are binding even if he distributed only some of his possessions (ibid. 250:9).

Interestingly, if a *sh'chiv meira* did make a *kinyan* to go along with his instructions, he actually made matters worse – even if he wrote his instructions into a will and handed it over while he was still alive. That additional step gives us reason to believe that he only wanted the *kinyanim* to be finalized after his death, and a dead person cannot execute *kinyanim*.

There are three ways to avoid this issue: (1) by expressing clearly that the *kinyan* made at this point is only to bolster the instructions of the *sh'chiv meira*, not to transfer the item; (2) by writing in the contract (or will) that it should work by whatever halachic mechanism is valid; (3) by stipulating that the *kinyan* is valid from this point, not only after the *sh'chiv meira's* death (ibid. 250:17).

Returning to our case, since a *sh'chiv meira's* instructions are binding even if he issues them only verbally or in writing, without any *kinyanim*, then certainly if he issued his instructions via a video recording, which cannot be forged, those instructions are binding.

It makes no difference whether the *sh'chiv meira* instructed that his wishes be carried out immediately upon his death, or whether he instructed his heirs or an executor to carry them out a certain amount of time after his death; either way, we follow his instructions as they were issued, and each recipient receives whatever the deceased allotted to him (*Rema* 250:1; *Nesivos* 248:1 & 5).

For questions on monetary matters, arbitrations, legal documents, wills, ribbis, & Shabbos, Please contact our confidential hotline at 877.845.8455 or ask@businesshalacha.com

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