

# BUSINESS WEEKLY



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

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## CASE FILE

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לע"נ הרב אהרן בן הרב גדליהו ע"ה

### CASSETTE COLLECTION

Mr. Zemer had a large collection of Jewish music cassettes. He passed away 15 years ago, leaving a young son, Yuval.

Five years afterward, Mrs. Zemer moved. The new apartment was smaller, so she didn't want to take unnecessary items.

The family had a close friend, Mr. Nigun, who was a music hobbyist. Mrs. Zemer turned to him and asked: "Would you like my husband's collection of cassettes? The world is switching to CDs."

"Very much so!" replied Mr. Nigun.

"Then please come within the next hour," Mrs. Zemer said. "We're moving now and don't have room for the cassettes. Otherwise, we'll have to dump them."

Mr. Nigun quickly drove over. "The cassettes are sitting on those shelves," Mrs. Zemer said. "My husband collected them, but we barely listened to them during the past few years."

"I still have a cassette player," said Mr. Nigun. "I'll enjoy Mr. Zemer's collection." He loaded all the cassettes into his car and drove off.

Years passed and Yuval reached adulthood. He approached Mr. Nigun. "I heard that you have my father's cassette collection," Yuval said.

"Correct," replied Mr. Nigun. "Your mother was going to discard the cassettes when she moved and offered them to me."

"I would like the cassettes back!" said Yuval. "There are some collector's items in the collection, and I still use a cassette player."

"But your mother gave them to me!" exclaimed Mr. Nigun.

"I am the halachic heir, though," argued Yuval. "My dear mother dedicated herself fully to raising us, but is not authorized to give away my property!"

"Why not?" asked Mr. Nigun. "Just as she made any other financial decision regarding you, why can't she decide to give away your father's cassette collection, which she considered unnecessary?"

Yuval and Mr. Nigun approached Rabbi Dayan and asked:

**"Must Mr. Nigun return the cassette collection to Yuval?"**

"A mother who tends to the needs of her orphan children, and they rely on her for their financial matters, is *de facto* considered as their *apotropus* (financial guardian)," replied Rabbi Dayan (C.M. 290:24).

"Although a minor below bar mitzvah is not halachically considered legally competent, the

### DID YOU KNOW?

Allowing your employees buy non-kosher lunch on your company's credit card can entail business (benefit) from Ma'achalos Asuros.

Ask your Rav or email  
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## BHI HOTLINE

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

### INVESTMENT GUARANTEE

**Q:** I'm a kollel *yungerman*, and I managed to save up a sum of money over several years. Someone asked me if I would consider investing the money in a certain endeavor. I told him that I shy away from investments that involve serious risk, out of fear that I might lose my capital. To allay my concerns, he promised that if I lose my money, he will reimburse me.

Will this pledge alone obligate him to repay me if I lose my investment?

**A:**

At first glance, we might think that your investment partner would be obligated to fulfill this pledge as an *areiv* (guarantor): Just as an *areiv* on a loan is required to fulfill his pledge to reimburse the lender if the borrower defaults, so too your guarantor would be required to reimburse you if you invested because of his pledge to guarantee your capital.

In truth, even in the case of a typical *areiv*, we might actually wonder why his guarantee of the loan is not considered an *asmachta* (a commitment made under the assumption that the conditions requiring the person to fulfill his commitment might not be met) — in which case the guarantor would not be obligated to fulfill his commitment (as per the principle of *asmachta lo kanya*). The *Gemara* explains that the reason he is obligated to pay is that we say that the prestige of having the lender extend the loan based on his guarantee makes it worthwhile for him to truly obligate himself to guarantee the loan despite the *asmachta* involved (*Bava Basra* 173b).

Similarly, since your guarantor gains prestige from your being willing to invest because of his guarantee, it is worthwhile for him to obligate himself to keep his word despite the inherent *asmachta*.

There are nevertheless several reasons your guarantor would not be obligated to repay you if your capital is lost.

The *Shulchan Aruch* (C.M. 131:9, following the opinion of the *Rambam*, *Hilchos Malveh V'loveh* 25:7) discusses a case



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*Mishnah (Gittin 59a)* teaches that *Chazal* empowered a minor to buy and sell movable items so that he could procure his needs. Similarly, *Chazal* upheld gifts that he gave" (C.M. 235:1).

"Nonetheless, the *Gemara (Kesubos 70a)* qualifies that when the minor has a guardian, his transactions require the guardian's approval. Rivash applies this also to a *de facto* guardian" (C.M. 235:2).

"Even so, the *Rishonim* rule clearly that a guardian is not authorized to grant of his own accord a gift from the orphan's property, since it is not his and the gift does serve the orphan's financial interests" (*Responsa Rosh* 85:10; *Rivash* #20,268; C.M. 235:26).

"Similarly, the guardian should not give of the orphan's property as charity, unless to uphold the orphan's good name (C.M. 290:15). Furthermore, the guardian is considered a *shomer* on the property with which he is entrusted; if he is negligent, he is liable" (C.M. 290:20).

"Thus, if the mother discarded the heir's cassette collection or gave it away, her unilateral gift should not be valid. If the collection cannot be returned, she should be liable. She should have sold it for whatever it was worth (see C.M. 290:9). Even so, it is possible that if she gave the collection away, since there was no room for it and seemingly had no value, her decision could be valid if there was justification for it.

"Furthermore, if her husband's will awarded her all his property, even if only a secular will, some authorities uphold it" (see *Achiezer* 3:34; *Igros Moshe*, E.H. 1:104).

"Thus," concluded Rabbi Dayan, "since Mr. Nigun is in possession of the collection, it is not clear that Yuval can force him to return it."

**Verdict: A parent or guardian is not authorized to give away the heir's property without justified reason, but can sell it when not needed.**



## MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

**BAR METZRA #41  
(Bordering Property)  
Improvements/Damage  
to the Property**

לע"נ ר' יחיאל מיכל ב"ר חיים וזוג' ח"י בת ר' שמואל חיים ע"ה

**Q: If the buyer improved the property or damaged it before the bar-metzra took it, how much must the bar-metzra pay when compensating him for the property?**

A: We previously explained that the buyer is considered as the agent of the *bar-metzra* to acquire the property. Therefore, if the buyer improved the property, he is entitled to compensation not only for the purchase price, but also for the property improvements.

For improvements made before the *bar-metzra* claimed his rights, the buyer is entitled to the going rate for making such improvements, like an agent who acted with permission. However, for improvements made after the *bar-metzra* claimed his rights, the buyer is entitled only to his expenses, since now he is considered as acting without permission (C.M. 175:6; *Pischei Choshen*, *Shutafim* 11:74).

If the buyer damaged the property, even before the *bar-metzra* claimed it, he is entitled to compensation only for the current value of the property, since he is not considered an agent to the *bar-metzra's* detriment.



## BHI HOTLINE

in which Reuven sold a property to Shimon, and Levi agreed to guarantee the sale so that if Reuven's lien holder repossesses the property, he will recompense the buyer for the cost of the property. The *Shulchan Aruch* rules that Levi is not obligated to make that payment if that circumstance materializes (the *Rema* rules, in accordance with the Raavad, that Levi is obligated to follow through on his commitment).

The reasoning behind the *Shulchan Aruch's* ruling is that guaranteeing the sale of a property does not carry the same prestige associated with being trusted as a guarantor on a loan. The *Gemara (B.M. 14a)* states that a person is willing to buy a property temporarily, which means that the buyer is willing to take a chance on buying the property because a lien might never be executed on the property, and even if it is, he might have owned it long enough at that point to have made the purchase worthwhile (*Sma* 131:18, citing *Tur*). This means that the buyer of the property is relying on the business sense of making the purchase, not on the *areiv's* guarantee alone. Since Levi is not gaining prestige by acting as a guarantor, because the buyer would make the purchase even without his guarantee, Levi doesn't truly obligate himself to guarantee the sale.

Some *poskim* suggest that an investment might be similar to the purchase of a property in this regard. Since many people invest without having their capital guaranteed, the guarantor doesn't truly obligate himself to repay the capital if it is lost. (*Minchas Pittim* 131:9 suggests this comparison but doesn't rule definitively on the matter; see *Maharil Diskin*, *Psakim* 332; *Ketzos* 183:4 and *Nesivos* *ibid.* 2; and *Igros Moshe*, C.M. 1:48.) An *areiv* of a loan obligates himself only when he benefits from the prestige of having someone take a financial risk on his word alone, whereas an investor likely makes the decision to take on the risk based on his own research of the potential growth of the investment, so the *areiv* of an investment doesn't fully obligate himself.

Another reason to differentiate between a guarantor on a loan and a guarantor on a purchase is that when a lender says that he will lend the money only with an *areiv*, the *areiv's* obligation is activated, *along with* the borrower's obligation to repay the loan, at the time of the loan. In the case of a sale of a property, however, there is no way for the obligation to be activated, because at the time of the sale no party is obligating himself to another — they are merely transferring the ownership of property from one party to another, and if a lien holder repossesses the property later on, there is no way for the guarantor's obligation to be activated at that time (*Shu"t Beis Ephraim*, C.M. 34).

The same would hold true for an investment (see *Maharil Diskin*, *Psakim* 77 and *Eimek Hamishpat* 2:33).

Given all these issues with the guarantee, if you want to be certain that your investment partner will be required to follow through on his guarantee, you must draw up a proper *shtar* (contract) worded in a way that obligates him fully.

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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