

BUSINESS WEEKLY



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

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לע"נ הרב יחיאל מיכל בן ר' משה אהרן אורליאן



CASE FILE

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לע"נ הרב אהרן בן הרב גדליהו ע"ה

DELAYED REPAIR

Mrs. Horowitz was known throughout her neighborhood for her culinary talents. Her home-baked challah was acclaimed by all who tasted it!

Every week, on Thursday, Mrs. Horowitz would bake about 50 challoos, which she sold to her friends as an additional source

of income.

One Thursday afternoon as Mrs. Horowitz prepared the last batch, her Bosch mixer stopped working.

"I'm glad it lasted the day!" Mrs. Horowitz exclaimed to her husband. "At least I have the challoos for this week. I'll have to have it fixed before next week."

On Friday, Mrs. Horowitz brought the mixer in to the appliance repair store.

"How long will it take to fix?" Mrs. Horowitz inquired.

"Two to three days," replied the repairman, "but, of course, we're closed tomorrow and Sunday. I'll check it today, and have it repaired by Wednesday."

"That's OK," said Mrs. Horowitz, "but I *must* have it back by Thursday morning. I have orders for 50 challoos to bake then."

"I don't foresee a problem with that," said the repairman.

On Wednesday afternoon, Mrs. Horowitz called the appliance repair store. "I brought my Bosch mixer in for repair last Friday," she said. "Is it ready?"

"I'm sorry," replied the repairman. "It needs a replacement part, but I didn't order it yet. I can get the piece tomorrow evening, and have the mixer ready by Friday afternoon."

"What?!" exclaimed Mrs. Horowitz. "Friday afternoon won't do!"

"At this point there's nothing I can do," replied the repairman. "I can't get the piece until tomorrow evening, even with express delivery."

"I'll have to cancel the challah orders, then," said Mrs. Horowitz. "That's a few hundred dollars of loss for me! I think that should be deducted from the repair charge."

"Ask your Rov," said the repairman.

Mrs. Horowitz called Rabbi Dayan, and asked:

"Is the appliance repairman liable for the lost revenue due to his negligent delay?"

"A person who was hired for a time-sensitive job, such as to bring flowers for a wedding, but arrived too late, is not entitled to his wages, since the employer did not benefit at all," replied Rabbi Dayan. "The time factor is an integral part of such an employment



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

A WAY TO A WILL

Q. Reuven fell deathly ill, but eventually recovered. His illness gave him enough of a scare that he decided to write a *tzavaah* (halachic will). His father, Yaakov, was a wealthy, elderly man, and when Reuven wrote his will he distributed not only his own assets, but also the assets he assumed he would inherit from his father, dividing everything evenly between his sons and daughters.

When Reuven passed away, his sons-in-law were uncertain whether their wives had a right to assets Reuven had inherited from Yaakov between the time he wrote his will and his passing. Were those assets considered to be in his possession, in which case he was able to distribute them to his daughters, or does the fact that those assets were not in his possession render his distribution of them invalid?

A. There are two ways to write a *tzavaah*.

The first approach is to make a *kinyan* (act of acquisition) on whatever he wants each child to inherit "*meihayom ul'achar misah*" (lit. starting today and commencing after death). This means that immediately upon writing the will, the actual assets are transferred to the recipients, but the giver retains the rights to use them until he dies.

There is a rule, however, that a person cannot make a *kinyan* on something that hasn't yet come into existence (*davar shelo ba l'olam*). Similarly, one cannot transfer ownership of something that he does not yet own. Therefore, if someone says, "I am selling you whatever I will inherit from my father," that declaration is worthless, because he didn't own the inheritance when he made that statement (*Shulchan Aruch, C.M. 211:1*).

Some say, however, that if a person declares, "When I inherit such-and-such possession from my father, it is sold to you," that sale is valid (*Rema, ibid.*), because the inheritance will become his without any further action on his part, and he specified the possession he was selling (*Sma, ibid. 2*). But some *poskim* limit this *halachah* to a sole heir, who is guaranteed to inherit

DID YOU KNOW?

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CASE FILE

agreement" (see C.M. 333:5; *Pischei Choshen, Sechirus* 10:[5], 13:4[4]).

"In our case, though, the mixer needs to be fixed, regardless, for subsequent weeks. Even if we were to consider the contractual arrangement as void, Mrs. Horowitz would still have to pay the going rate for the repair, as anyone would whose property was in need of repair." (C.M. and *Kesef Kodashim* 375:1).

"Nonetheless, the technician might be liable for this week's loss of earning.

"The Yerushalmi (B.M. 5:3) teaches that a person who restrains another from earning profit (*mevatel kiso shel chaveiro*) is not liable for the lost profit, since this is considered only as *grama* (indirect damage)" (*Shach* 292:15).

"However, many authorities maintain that an employee – whom the employer relied upon – is liable also for losses, or even irrecoverable lost profit, caused by his inaction.

"The *Gemara* (B.M. 73b) teaches that a person who was handed money to buy wine when prices were low, but neglected to do so, would have been required to pay the lost profit, were it completely in his hand to buy wine at that price. *Nesivos* (176:31, 183:1, 306:6), based on the *Ritva*, explains that this is due to the extra responsibility of an employee. However, others disagree, and provide alternate explanations of this *gemara*" (*Pischei Teshuvah, C.M.* 328:1; *Nachalas Zvi* 292:7).

"On account of this dispute," concluded Rabbi Dayan, "the repairman can refuse to repair or return the mixer unless paid fully. However, if he already returned it, Mrs. Horowitz can refuse to pay the full amount, and deduct her lost profit. It is proper to compromise."

Verdict: There is a dispute whether an employee is liable for lost revenue due to his negligence, so that the *muchzak* (one in possession) has the upper hand; however it is proper to compromise.



MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

MONEY MATTERS Mechilah (Forgoing) #26 Tzedakah

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

Q: I lent \$500 to a needy person. He bashfully asked if I would consider forgoing the loan. If I do, can I count it toward maaser kesafim?

A: In principle, forgoing a loan to a needy person is considered like giving him *tzedakah*, and can be counted toward *maaser kesafim*. This is because forgoing a loan is tantamount to giving a gift (*Tzedakah U'mishpat* 1:7[8], 5:13; *Sma* 65:76).

Moreover, some write that since forgoing a loan to a poor person is a *mitzvah*, it is possible to do so even on Shabbos (*Mishneh Halachos* 6:69).

Nonetheless, contemporary *poskim* qualify that only a loan that is possible to collect can be considered *maaser kesafim*, since by forgoing, you are effectively giving him that amount.

However, if there is no reasonable chance of collecting the loan from the borrower, such as if he is penniless or has declared bankruptcy, the loan is as if lost, so that you can no longer consider forgoing it as having given *tzedakah* (*Hilchos Maaser Kesafim* 9:8-9).



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what he sold, so if there are other heirs the sale is invalid (*Nesivos* 2).

In our case, if Reuven didn't specify which items he was giving to each of his children, or if he wasn't Yaakov's only heir, his distribution of those assets is invalid.

If, however, Reuven wrote his will *after* Yaakov had written his will, and Yaakov had written his will in the fashion of "*meihayom ul'acher misah*," since the actual possessions were already transferred to Reuven before Yaakov died and before Reuven wrote his will, he is able to transfer those possessions to another person. His children were therefore able take possession of whatever he had given them (*Shulchan Aruch* 211:5).

The fact that those possessions were still held by Yaakov does not prevent Reuven from transferring them, because the only reason they are still on Yaakov's property is that he is entitled to use them until his passing. This is akin to someone who borrows or rents something; his use of that object or property does not prevent the owner from selling or transferring it to another person, because the person who has possession of it now is merely holding it for its owner (*Shulchan Aruch* 211:7).

But if Reuven wrote his will before Yaakov's was written, since the possessions he would eventually inherit from Yaakov did not belong to him when he wrote his will, he could not transfer them to his children.

There is another halachic approach to writing a will, however, and even those who write the will according to the first approach also use this approach.

Since there are halachic problems associated with the first approach — such as the inability to transfer a *davar shelo ba l'olam* — the person writing the will adds a clause stating that he obligates himself to give specific possessions to each recipient, or the specific amount of money he wants to give them. Since the person obligated *himself* to those instructions, it works even for a *davar shelo ba l'olam* (C.M. 60:6).

Another approach is for the person drafting the will to obligate himself to pay a large sum of money to one of the beneficiaries or to a third party, with a condition that this clause becomes void if the rest of the instructions in his will are followed (this is called a *shtar chatzi zachar*; see *Even Ha'ezer* 90:1 and C.M. 281:7).

If Reuven's will specified this obligation and that all of his possessions are in lien to it, and he also specified that this includes anything that comes into his possession until the time of his death, and his father predeceased him, then anything he inherited from Yaakov that he had distributed to specific children belongs to those children, even though they hadn't been in his possession when he wrote the will.

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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