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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

"I'M NOT ASKING FOR THE MONEY!"

David and a group of nine other friends wanted to get together for Shabbos. After some discussion, they decided to buy the food and eat at someone's house.

"Who's willing to host?" they asked.

"I can host," David said. "There's a catering place nearby where I can buy the food."

"Great," said his friends. "Find out how much it will cost, and we'll split it!"

David priced the food, adding in challah and cake, drinks and nice disposable dishes and utensils. "All together, I expect it will cost about $80 a person," David wrote to his friends. "Please get the money to me by Wednesday evening."

Each of the friends Zelled David $80.

David bought the food and other items necessary for Shabbos, keeping all the receipts. The total cost came out significantly less than projected — only $600.

After Shabbos, while David was outside, his friends discussed what to do with the extra money. "Each of us should be getting $20 back," said Reuven.

"I'm not asking for the money!" exclaimed Shimon. "It was nice of David to host the Shabbos, so he can keep my $20."

"I don't agree," insisted Reuven. "We agreed to split the cost. It's true that David was gracious to host us, but he shouldn't get $200 because he initially overestimated the cost."

After some discussion, the group decided that they would each ask for $10 to be returned.

"You should also ask for $10 back," Reuven said to Shimon. "It will make us look bad if you let David keep all your extra money."

"But I already said that he could keep it," replied Shimon. "Once I decided to forgo the money – *mechilah* — I can't demand it back."

"You never told David, though, that you're forgoing the money," argued Reuven.

Shimon called Rabbi Dayan and asked:

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

HIDDEN WILL

Q: I read the information packet for the BHI initiative in which you help people formalize their wills according to halachah, in an effort to prevent uncertainty and strife upon a person's passing. I noticed that it stated that I do not have to deposit the document with anyone else, even with one of my heirs; I can just leave it in a drawer.

I have heard, however, about a din Torah that occurred after a will was discovered in the house of a deceased person, and beis din invalidated it because it had not been deposited with any of the beneficiaries — even though there were proper witnesses and kinyanim made during the draft of that will.

Can you explain why this would happen and how you circumvent this possibility?

A: First let's address the case you mentioned. The *beis din* ruled according to the *halachah,* codified in *Shulchan Aruch* (*Choshen Mishpat* 250:25), that if a *shechiv meira* (deathly ill person), or even a healthy person, who writes a will stipulating that he may renege and change his instructions (*Tur* ibid. 250:42, and *Taz* ibid. 25) and does not give it to one of the beneficiaries or someone else who can acquire it on their behalf and safeguard it for them, that will is null and void — even if it is signed by valid witnesses and *kinyanim* were made to formalize it. The reason is that we are concerned that perhaps at some point, the person regretted his distribution of his assets and decided not to follow through on that will. We wouldn't worry about his regret if he deposited it with someone else, because he would have informed that person.

Now, the *Shulchan Aruch* (*Orach Chaim* 153:19) cites *Maharik* (161), who states that if a handwritten note was found among a person's possessions stating that he is consecrating some objects to a shul, we must fulfill that pledge, and we are not concerned that perhaps he did not fully commit until he actually gave them to the shul. He explains that because this was a handwritten note, it differs from a contract written by a *sofer* or by witnesses. In the latter case, it is possible that the person did not fully commit to the transaction, and the only reason he wrote the contract was because he happened to have

CASE FILE

"Am I allowed to demand the $10 back?"

"When the lender has full intent to forgo the loan but does not express so verbally — *mechilah balev* — the *Acharonim* dispute whether the *mechilah* is valid," replied Rabbi Dayan. "Most *Acharonim* maintain that *mechilah balev* is not valid, so the lender can retract and demand the loan" (see *Ketzos* 12:1; *Nesivos* 12:5).

"There is a further question regarding *mechilah* expressed verbally, but not in the presence of the borrower, or against his will — whether it is valid, or can the lender still retract?" (*Kiryas Melech Rav*, Vol. II, Question 11; *Pischei Choshen*, *Halva'ah* 12:8[13]).

Some *Acharonim* link this to a dispute between the *Rishonim* whether *mechilah* is merely a withdrawal of the lender's rights — *siluk* — in which case there is no need for the awareness or agreement of the borrower. Alternatively, is *mechilah* a form transfer to the borrower — *hakna'ah*, in which case it requires his awareness and agreement (see *Machaneh Ephraim, Zechiya MeiHefker #11; Erech Hashulchan 12:5)*?

However, some conclude that such *mechilah* is valid even if *mechilah* is *hakna'ah*, because the transfer requires no further action and is automatic so that the loan is cancelled, and the lender may not retract (ibid.)

Aruch Hashulchan (*C.M.* 241:4) maintains that *mechilah balev* is not binding but rules that *mechilah* not in the borrower's presence is binding. Nonetheless, he qualifies that this is only if the lender became aware of the *mechilah* before the lender retracted so that he possessed the money; otherwise, the *mechilah* did not take force yet, although expressed verbally, and the lender may retract.

The other *Acharonim*, though, do not make this distinction. Moreover, some reject this distinction explicitly and maintain that the lender's *mechilah* is valid even before the borrower becomes aware of it, because the borrower holds the money and a person can acquire what is in his possession even without his awareness (*Teshuras Shai* 1:406, 408).

"Thus," concluded Rabbi Dayan, "according to most *Acharonim* (other than *Aruch Hashulchan*) your *mechilah* is already binding, even though stated not in David's presence, so you may not demand the $10 without alerting him that he no longer owes you. Otherwise, he is paying only because he thinks that he still owes you, so there is concern of dishonesty on your part."

Verdict: Almost all *Acharonim* maintain that even *mechilah* stated not in the presence of the borrower is valid, so the lender may not retract. *Aruch Hashulchan* requires that the borrower be aware of the *mechilah*, but other *Acharonim* do not distinguish.

MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

MONEY MATTERS

Yei'ush – Abandonment

#21

Slow-Moving River

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

Q: While hiking in a small Golan stream, I spotted an item that fell in the water. May I keep it?

A: When an item falls into a slow-moving river with impediments so that the owner can rescue the item easily, if it has *simanim* and those likely to find it are Jewish, we presume that the owner does not have *yei'ush.* Even if he does not chase after the item, he knows that it has *simanim* and that the finder is required to return it (*C.M. 259:7).*

[Nonetheless, others are not required to toil to rescue the item if the owner makes no effort and relies on them. However, if it is difficult for the owner and easy for others, they are required to make the effort.]

However, if there aren't *simanim* so that once the item distances the owner has no way to claim it, if he chases after it (or if not present) the finder is required to return it, because the owner does not have *yei'ush* and thinks that whoever sees him chasing the item will return it to him (*Rema*, ibid.; *Sma* 259:19; *Nesivos* 259:3).

However, if the owner does not chase after the item, we presume his *yei'ush*, because he knows that later he will have no basis to claim the item.

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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had access to a *sofer* or witnesses who could prepare or validate the contract. But if the note is handwritten, we assume that its author would not write something morbid about his demise unless he is certain about what he wants to do, so we are not concerned about him later regretting his gift (see also *R' Akiva Eiger* 146, cited in *Pis'chei Teshuvah* 250:11; *Shu"t Chasam Sofer, Choshen Mishpat* 137).

In regard to BHI's initiative, there are two options available. One option is for the person to set up the will on his own, without witnesses. If a person chooses this option, he obviously did not do so solely because he had access to a *sofer* or witnesses. Even if we might be concerned that perhaps he wasn't computer literate and he had to process the document when he had help, he still had no reason to sign it until he fully committed himself to whatever is contained in his will. We can therefore safely assume that the document is valid.

The other option involves having the document signed by witnesses. This option does raise the possibility that the person might have the document signed because he has witnesses that he was comfortable asking to sign it. However, he hasn't yet fully committed to the contents of his will, and perhaps he might regret his distribution of his assets.

The *poskim* have written, however, that if we know that the person who wrote the will deliberately avoided giving it to the beneficiaries, choosing to hide it so as not to cause pain to any of his heirs, then the document *is* valid (*Shu"t Maharsham* 2:224[19], based on *Sma* 250:60).

Even without that assumption, however, if a person writes in a contract that his intention is to fully commit to it and that even if the contract is found among his possessions, it should still serve as valid proof of his intentions, then there is no longer any concern that he would have reneged (as explained by the Urim v'Tumim, 65, Urim 54). This phraseology has therefore been adopted in many wills, and our BHI contract contains the following clause: "This document shall constitute full evidence even if it be found in my possession and not yet released from my hand."

Our document is therefore valid, even if you deposit it in your drawer.