

Dying Wishes

Submitted by the Bais Hora'ah

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 because 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 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 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 wanted the *kinyanim* to be finalized only 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*).

MONEY MATTERS

Apotropus (Financial Guardian) #8

Appointment by Civil Court

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*).

The Business Halacha Institute serves the community in all areas of monetary law according to halachah. Please contact our confidential hotline with your comments or halachic questions at 877-845-8455 or ask@businesshalacha.com.