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UNDER THE AUSPICES OF HARAV CHAIM KOHN, SHLITA

STORY LINE

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CHILD GUARDIAN

Eli, who was 11, had a basketball hoop set up in his backyard. His friends often came over to play ball. One afternoon a cousin from a few blocks away, 14-year old Yitzi, joined them. He brought his basketball, which was brand new, but Eli preferred to use his own ball.

At one point, Yitzi had to take care of some errands. "How long will you be playing?" he asked Eli.

"It's a nice day," replied Eli. "I'll be here with my friends at least another hour."

"I have some errands to take care of," Yitzi said. "Can you watch my ball while I'm gone?"

"Sure," replied Eli. He took Yitzi's ball and tossed it into the corner of the backyard. The boys continued playing.

"I got a new game for Chanukah," one of Eli's friends said about 20 minutes later. "How about coming over to my house to play?"

"OK," the friends replied. "We've played enough ball for today."

Eli brought his ball inside and locked the house. He went off with his friends, forgetting about Yitzi's ball.

When Yitzi returned, the yard was empty and the house was locked. He looked in the yard, but didn't find his ball.

"What happened to my ball?" Yitzi asked Eli that evening.

"We went over to a friend's and I forgot your ball in the backyard," replied Eli. "Did you take it?"

"When I returned from my errands, it wasn't there!" said Yitzi.

"You're kidding!" exclaimed Eli. "I'm really sorry."

"It was a brand-new ball," said Yitzi. "It cost almost $50!"

Eli's father overheard them. "What's going on?" he asked.

Yitzi related what happened. "Our backyard is not a secure place," the father said. "It was negligent of Eli to leave your ball in the yard. I'm surprised that you relied on him, though; he's only 11. Makes an interesting question for Rabbi Dayan!"

The three went over to Rabbi Dayan. "Is Eli liable for the ball?" Yitzi asked.

"A minor, under the age of bar mitzvah, is not considered of legal mind (*bar daas*) to be obligated in the responsibilities of guardianship," replied Rabbi Dayan. "The *Gemara* (*B.B.* 87b) teaches that a person

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MISTAKEN DELIVERY

Q: A few minutes before Shabbos, I realized that my grocery had delivered as part of my delivery a few bottles of soda that I had not ordered. Was I allowed to use them and pay for them after Shabbos, or was I not allowed to use them, since they would not become mine until after I paid?

A: Generally, you may not use someone else's belongings without permission, even if you plan to reimburse him for them (Shulchan Aruch, C.M. 359:2). Even if there is reason to assume that the other person would be willing to allow you to use an item, you may still not take it. We rule that yei'ush — an owner forfeiting his rights to a lost object — happens only when the owner knows it is lost. A case of yei'ush shelo midaas — i.e., when the owner is not aware that the object is lost — is not considered yei'ush, even if we are certain that the owner would forfeit his rights if he knew the object was lost (Ibid. 262:3). Indeed, Tosafos (Bava Metzia 22a, s.v. "Mar") rules that one may not eat another person's produce unless he received express permission, even if he knows that the owner would gladly allow him to eat it.

The Shach (C.M. 358:1) rules differently and permits the use of that produce. He differentiates between this case and cases of yei'ush because in an instance of yei'ush, the owner is unaware of his loss, and until he knows that the item is lost we have no right to assume that he would agree to the finder using it. Since, in the case of the produce, we are certain that the owner would gladly agree to the use, the person may eat it (see Agudas Eizov on Yei'ush and Oneg Yom Tov, Orach Chaim 31).

There is a dispute among the Poskim whether we rule according to the Shach (Nesivos 68:28; 195:1), or according to Tosafos (Ketzos 209:5; 262:1 and Shulchan Aruch HaRav, B.M. 64, who adds that we should warn the public about this issur, because many err out of ignorance).

In our case, although the store owner wants to sell the drinks and would be happy if the customer used them, according to Tosafos' ruling, the customer would still be prohibited from using them, since the owner does not know about the "sale" taking place.

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who entrusts an item to a minor's care is considered *aveidah midaas* — willful loss" (*C.M.* 291:21; 188:2).

"Therefore, if the ball was entrusted to a minor, he is not liable for it, even if it was lost through the child's negligence (*peshia*)," continued Rabbi Dayan. "Yitzi, when entrusting his ball to Eli, took a known risk upon himself. Therefore, Eli is not liable. Even when he becomes bar mitzvah, he has no moral obligation to pay, unlike a child who damages" (*Pischei Choshen*, *Pikadon* 1:17).

"A child has no need to look after another's property?" asked Eli's father.

"Indeed, there is a broad *chinuch* goal to train children in financial responsibility and accountability," replied Rabbi Dayan. "However, it does not generate legal or moral liability in this case, where Yitzi jeopardized his ball by entrusting it to a minor."

"What about the opposite case, if I entrusted my ball to someone who is already bar mitzvah?" asked Eli.

"*Shulchan Aruch* rules that a guardian carries full responsibility toward a minor, including the Torah-imposed oath," answered Rabbi Dayan. "Although the *Gemara* (*Shavuos* 42a; *Kesubos* 18a) derives that one does not swear on account of a minor's claim, the oath of a guardian is not due to the owner's claim *per se* but emanates from the inherent doubtful circumstances. Rema, however, rules that a Torah oath does not apply to property entrusted by a minor" (*C.M*. 302:2; 96:1).

"Some maintain that even according to the Rema there is a rabbinic responsibility of guardianship toward a minor," concluded Rabbi Dayan. "Furthermore, Shach maintains that if the guardian was negligent with the minor's property, he is liable even according to the Rema" (Gr"a 96:8, but see *Pischei Choshen, Pikadon* 1:[35], citing *Imrei Yosher; Shach* 96:2).

MONEY MATTERS

(Based on writings of Harav Chaim Kohn)

DINA D'MALCHUSA DINA #16

Public Roads

Q: Can the government grant permits to block off streets, or allow construction that hinders the public?

A: One is not allowed to ruin a public thoroughfare, but the government can grant permission to block off streets, since the roads belong to the government. It is questionable, though, whether one may initially place a request for a permanent permit (*C.M.* 162:1; *Pischei Teshuvah* 162:3).

Similarly, one is not allowed to dig a hollow under public roads lest the cover fall in and people get injured. Nonetheless, Rema writes that this is permitted nowadays, since this is the common practice. Furthermore, the streets belong to the municipality, and we do whatever they grant permission for (*C.M.* 417:1).

Aruch Hashulchan (*C.M.* 417:5) bases this on *dina d'malchusa*. However, this is permissible only upon receiving a permit from the governing body, but otherwise it is not allowed, even if one could receive a permit. With a permit, even construction that is not commonly done is allowed (*Pischei Choshen*, *Nezikin* 8:[67]).

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There is an additional factor to consider, however. Tosafos' ruling might apply only to cases in which the owner of the item does not stand to benefit from its use, and the basis for the assumption that he would allow it to be used without his knowledge relies entirely on his affinity for the person using it. In a case in which the owner stands to benefit — i.e., in a case in which he will be paid for something he wants to sell, such as the drinks delivered to your home — we consider it as though he actually knows about your use of the items and agrees to it (see Erech Shai 308:7 and Pischei Choshen, Geneivah 1, fn 19).

Nevertheless, the Poskim write that generally you may rely on the owner's unstated agreement only if you transfer payment (or a bartered item of greater value) to a third party who takes ownership of it on behalf of the owner (zechiyah). Taking the item without zechiyah would be considered theft even if you plan to pay afterward, just as taking any object with the intention of paying afterward is considered theft (see Shulchan Aruch, C.M. 359:2 with Shach 3 and 4 and Chiddushei Rav Akiva Eiger).

It would seem, then, that without zechiyah, you would not be able to use the drinks. In reality, however, zechiyah is necessary only because without it, the act of taking the item is considered theft, and zechiyah nullifies that issue (Be'er Yaakov, Y.D. 72b). In your case, however, since the drinks were delivered to you, you did not engage in theft. This is akin to the type of aveidah (lost object) in which we are confident that the owner would accept payment for the item in lieu of the actual item, and we therefore allow the finder to use the item and pay for it if he later locates the owner (see C.M. 267:21). Since the grocery owner would be happier to receive money than to receive the drinks back, you do not need zechiyah, as long as you will make sure to pay for the drinks. If there is a chance you will forget to pay for them after Shabbos, then we cannot assume that the store owner agrees to your using his products. In that case, unless you inform the store that you will use the drinks and they should add them to your bill, or set some other reminder to pay, you should not use the drinks (Shu"t Kol Eliyahu, Even Ha'ezer 3).

For questions on monetary matters, Arbitrations, Legal documents, Wills, Ribbis, & Shabbos, Please contact our confidential hotline at 877.845.8455 ask@businesshalacha.com