



# BUSINESS WEEKLY

Restoring the primacy of choshen mishpat

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UNDER THE AUSPICES OF HARAV CHAIM KOHN, SHLITA



## STORY LINE

By Rabbi Meir Orlian

### NIGHTTIME APPOINTMENT

Mr. Fine was embroiled in a monetary dispute with Mr. Kahn; he filed a suit in Rabbi Dayan's beis din.

"The regular hours of the beis din are Monday through Thursday, 9 to 5," said the secretary. "When are you available?"

"I know Mr. Kahn from business and it's unlikely that we'll be able to find a mutually convenient time during the day," said Mr. Fine. "Is there any way of arranging an appointment at night?"

"The beis din also convenes, when necessary, on Monday and Thursday nights, from 8 to 10," replied the secretary. "Would that work?"

"Thursday night would work for me," said Mr. Fine. "Please check with Mr. Kahn."

The secretary called Mr. Kahn. "We would like to schedule a hearing for your din Torah against Mr. Fine on Thursday night at 8:00 p.m.," he said. "Are you available then?"

"I can make it then," replied Mr. Kahn, "but I'm surprised that you schedule appointments to begin adjudication at night!"

"Why? Not everyone can attend the beis din during daytime hours," replied the secretary. "It's a logistical issue that we try to accommodate."

"The issue is not just logistical," replied Mr. Kahn. "I thought that Halachah requires that the beginning of adjudication and acceptance of testimony be during the daytime" (C.M. 5:2; 28:24).

"We do convene primarily in the daytime, but we also schedule adjudication at night when necessary," said the secretary. "I'm not sure of the halachic basis, though. If you want, I can transfer you to Rabbi Dayan and you can ask him directly."

"The secretary offered to schedule an appointment for a din Torah at night," Mr. Kahn told Rabbi Dayan. "We just learned in Daf Yomi (Yevamos 104a) that the beginning of adjudication and acceptance of testimony must be in the daytime!"

"There are three possible reasons to allow convening for adjudication at night," answered Rabbi Dayan. "First, the Mishnah (Sanhedrin 24a) teaches that a person can agree to accept disqualified judges and witnesses as valid. Thus, although most authorities consider adjudication and testimony at night as invalid even b'dieved (post facto), the Rashba (Responsa, 6:200; 7:467) and other Poskim write that both parties can willingly accept litigation at night, just as they can willingly accept disqualified judges and witnesses.

"The Rema (C.M. 28:24) writes that on this basis it is possible to convene a session at night, if both parties are



## BHI HOTLINE

### FROG. PART II

Last week we read about a child who

found a frog in a public park. As he was about to scoop it up, another child ran over and lifted it first. They asked their rebbi to decide who owned the frog. We discussed the parameters of kinyan dalet amos and its application in our case.

**Q: Is this kinyan effective for minors? Is intent necessary for the kinyan to be effective?**

**A:** Biblically, minors cannot buy or sell, even when lifting an object. However, Chazal enacted that minors who have reached the age of pe'utos, the age at which they understand how business works, can purchase and sell movable objects (C.M. 235:1). Most Poskim assert that the enactment does not allow minors to acquire found objects. The Rabbinic enactment was formulated to apply when there is another person involved in transferring ownership (daas acheres) but not in circumstances where we rely entirely on the comprehension of the minor (C.M. 243:15; cf. Shach 243:6).

Additionally, the enactment is limited to orphans that do not have guardians and are not financially supported by others (C.M. 235:2). However, out of consideration for peace (darkei shalom), it is prohibited to steal lost objects found by minors (C.M. 270:1).

The above are the parameters for the kinyan hagbahah (by picking up). Regarding kinyan dalet amos, Shulchan Aruch rules that female minors do have kinyan dalet amos (C.M. 268:4), although Rema adds (C.M. 243:23) that a female minor's kinyan dalet amos is granted only when she does not have a father (cf. Shach 11, Nesivos 14). Male minors do not have kinyan dalet amos (C.M. 268:4) even for the sake of darkei shalom (Shulchan Aruch HaRav, Hefker 8; cf. Pischei Choshen Aveidah 9:[65]). Since

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## STORY LINE

willing," continued Rabbi Dayan. "Even if they don't explicitly state that they accept the adjudication at night, the fact that they willingly come suffices as an indication of their acceptance. Some batei din prefer to state explicitly in the summons that the litigants are accepting adjudication agreement at night as valid" (Sma 5:7; Pischei Teshuvah 5:6; Seder Hadin 1:77).

"Second, although most Rishonim invalidate adjudication and testimony at night that was not willingly accepted, the Rashbam (B.B. 114a) validates testimony that was given at night," continued Rabbi Dayan. "The Rosh (B.B. 8:6) further cites a Yerushalmi that, post facto, adjudication at night is valid, but concludes in the name of the Ramban that the Bavli disagrees. The Shulchan Aruch and most later authorities similarly rule that the adjudication and testimony are invalid, but the Rema mentions also the opinion that validates, de facto, adjudication that was done at night" (C.M. 5:2; Shach 5:5).

"Third, the Sma (5:8) suggests that when lights are lit and it is possible to clearly identify the parties, it should be considered like daytime," said Rabbi Dayan. "However, this suggestion is rejected by almost all other authorities (Shach 5:4). Regardless, the first reason — willing acceptance — is sufficient basis to convene at night when both parties agree."



## MONEY MATTERS

### COPYRIGHTS AND PATENTS # 29

#### Q: Why is the application of shiur b'mecher on copyrights questionable?

**A:** We mentioned last week that, according to some authorities, if the author explicitly excludes from the sale agreement the right to copy (shiur b'mecher), one who copies a book or disc (even just for personal use) would be considered a thief, even according to the opinion that Halachah does not recognize ownership of intangible intellectual property (IP).

Other authorities question this application of shiur b'mecher for three main reasons.

Shiur b'mecher classically applies when the seller intends to maintain a certain usage for himself, thereby restricting the customer. However, here the author has no intention to maintain use of the book or disc for copying; his sole intention is to restrict the customer.

Often, copying does not entail any extra usage of the item itself, but of external equipment over which the author has no rights; e.g., saving an existing file to another disk or printing something already displayed on a screen.

Shiur b'mecher would apply only to the original book or disc, not to a copy or a file on the hard drive.

Nonetheless, according to the opinion that Halachah recognizes ownership of IP, only one copy of the IP was sold, not two, even without shiur b'mecher. Similarly, issues of hasagas ge'ul, minhag hamedinah and dina d'malchusa remain (see Pischei Choshen, Kinyanim 20:[46]; Emek Hamishpat, Zechuyos Yotzrim, intro. 33:3-7; ch. 38).



## BHI HOTLINE

your student is a minor, he does not have kinyan dalet amos even for the sake of darkei shalom.

The last issue requiring consideration is whether intent is necessary to utilize kinyan dalet amos. For example, if someone was ignorant of kinyan dalet amos and intended to acquire an object by lifting it, will kinyan dalet amos serve as a proprietary act even before he lifts that object? Many Poskim (Pischei Teshuvah 198:9, 268:1) differentiate between one who falls on a lost object to acquire that object with kinyan dalet amos (268:1) and one who was running toward a lost object stating his intent to acquire it by falling on it, in which case kinyan dalet amos is not effective.

The difference between these cases is that in the first case he intended to acquire the object at that moment. Even though he did not have a full understanding of kinyanim, since we know his intent was to acquire the object at that moment, kinyan dalet amos is effective even without specific intent for that kinyan. In the second case his intent was to acquire the object when he falls on it rather than as he approaches. Since he did not intend to acquire it at that moment kinyan dalet amos is not activated.

Furthermore, even if a person's kinyan dalet amos could acquire objects for him without specific intent (Taz 268, cf. Rivash 345), when one knows the object is there and doesn't intend to acquire it, kinyan dalet amos will not acquire it (see Tosafos, B.B. 54a; Shem Aryeh, C.M. 22; Imrei Yosher 2:72).

Therefore in your case, the halachah allows the second child to keep the frog. However, the prohibition of ani hamehachapach (discussed last week) might still be taken into consideration for the child's chinuch.

For questions on monetary matters,  
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