



Taking a Kidney from a Child

By Israeli law, at age 17 a person may consent to donate his organs in the event of his death. He may similarly consent to donate organs during his lifetime such as one of his kidneys. HaGaon Rav Asher Weiss *Shlit"a* discusses whether this act of consent has any Halachic validity, and at which age a person is Halachically capable of making this momentous decision.

If a donor is in good health, donating his kidney fulfills the Mitzva of saving a life. However, as we have discussed elsewhere¹, this Mitzva is not obligatory, as the surgery carries some risk. The *Radvaz* (1:52) contends that since "*Deracheha Darchei Noam*" (the Torah's ways are pleasant), there can certainly be no obligation for a person to relinquish one of his limbs on behalf of another. (See also the *Pischei Teshuva*, Y.D. 157:15.) Our discussion will therefore focus on those who wish to voluntarily donate organs, and, specifically, on the age that Halacha would consider them capable of consent.

Certainly, one may not harvest a person's organs without consent. Doing so is an act of theft, for although according to most Poskim, a person is not the "owner" of his body² (the proof being that one is obligated to rescue somebody who is attempting suicide *because his body is not his to dispose of*), his body is still no worse than one of his possessions. It is therefore forbidden to help oneself to any of it without his permission³. In addition, it is forbidden to forcibly wound a person due to the prohibition of "*Lo Yosif l'Hakoso*" (*Devarim* 25:3).

At what age may a person give their consent? Generally we consider the age of "*Da'as*" (intellect) to be 12 for girls and 13 for boys. For this reason, when a person reaches this age he is obligated in Mitzvos, and is also capable of performing *Kinyanim* (acts of acquisition) (*Shulchan Aruch C.M.* 96:4). Simply put, at this stage, a person's acts are considered those of a "*Bar Da'as*" (person of intellect).

¹ We discussed the topic of organ donation at length in our essay for *Parshas Shoftim* 5779.

² The proof being that one is obligated to rescue somebody who is attempting suicide because his body is not his to dispose of.

³ The *Maharam Chaviv* (*Tosfos Yom haKipurim*, Yoma 82b) famously permits a person whose life is in danger to forcibly sever another person's limb in order to save his own life. However, all other Poskim disagree with the *Maharam Chaviv*. In addition, the ruling of the *Maharam Chaviv* only applies to the person whose life is in danger, not to a third party.



The *Aruch haShulchan* (C.M. 95:5), citing the *Sema* and *Tumim* summarizes this Halacha:

The Kinyan of a minor is not effective, as the Pasuk states, "The man shall remove his shoe" etc. (Rus 4:7). [This implies that only a man can effect a Kinyan] not a minor. Therefore, if witnesses see him [a minor] performing a Kinyan they shall not sign any documents pertaining to it. Even if [the minor is at an age when] his gifts and sales are valid, such as [the gift or sale of] moveable objects after the age of "Peutos" [6 or 7 years old depending upon the aptitude of the child], his acts of Kinyan are nevertheless invalid – for he has no Da'as to understand the nature of the Kinyan.

For this reason, Rav Yitzchak Zilberstein *Shlit"a* (*Halacha u'Refua* 4, p157) ruled that an 11-year-old boy was not permitted to donate his kidney to his 12-year-old brother who needed it.

However, according to Rav Zilberstein, a boy at the age of 13 and girl at the age of 12 are of sufficient *Da'as* to consent to donate an organ to another person! This would seem to be a surprising ruling – do people of this age truly understand the repercussions of this decision such that they may give their consent?

Rav Asher Weiss *Shlit"a* (1:119), in response to a question posed by Professor Nachum Rakover, discusses this matter. Professor Rakover began cited the *Shulchan Aruch* (C.M. 235) regarding the sale of real estate:

A minor below the age of 6 is unable to give or sell items to others. From the age of 6 until he become an adult – if he is familiar with simple business transactions (in other words, he is questioned and is found to be familiar with them – or if he is over the age of 10, as long as he isn't known to be a Shoteh – an imbecile) (Tur), his acquisition is valid, his sale is valid, and he can grant a gift to others, be it a large amount or a small amount, be it the gift of a healthy person or the gift of a person on his death bed. This matter is an enactment of the Chachamim, and only applies to movable objects...

However, regarding real estate – a child of this age is unable to sell it or give it away, until he becomes an adult (in other words, if male, he turns 13, and if female, she turns 12, and they developed physical signs of maturity). (Rambam)



A minor who becomes an adult and develops physical signs of maturity – in other words, a male older than 13 or a female older than 1 – though he has no familiarity with simple business dealings: his act of acquisition is valid, his sale is valid, and his gift is valid, if they are of movable objects. But if they are of real estate, his actions have no validity unless he is familiar with simple business dealings having already become an adult...

When does this apply? To real estate that he acquired or that was given to him by a living person. But real estate that he inherited from his father or other relatives, or that was given to him by somebody on his death bed [and which has the status of an inheritance], his sale of it has no validity until he reaches the age of 20 and has physically matured. But before the age of 20, though he may have been physically mature and familiar with simple business dealings, he may not sell it, lest he sell it cheaply because he is enticed by the money, and he hasn't matured in the ways of the world.

But when he turns 20 and has physically matured, he may sell both movable objects and real estate, whether he acquired them, or whether they were previously his father's [and which he inherited], even if he isn't familiar with simple business transactions.

In summary: A minor below the age of 13 can sell movable objects if we are certain that he understands the nature of a sale. At age 13, he is able to sell real estate that he acquired. However, he may not sell real estate that he inherited until he reaches the age of 20 because we are concerned that he does not have the maturity to appreciate the ramifications of the sale.

Professor Rakover claimed that the same guidelines should apply to organ donation. Since it is such a weighty decision, a 12- or 13-year-old would surely not appreciate the ramifications of the decision and his or her consent should not be deemed to be valid.

Rav Weiss agreed and asserted that had organ donation existed during the time of *Chaza"l*, they would certainly have instituted that a person may not give consent at the tender age of 12 or 13. Although *Chaza"l* made no such enactment, we know of several instances in which the later Poskim widened the accepted age restrictions to include contemporary cases in which they were certain that *Chaza"l* would act similarly:



1. The *Shach* (C.M. 235:2) cites the *Be'er Sheva* (39:4) who rules that if a person inherits the rights to a store from his father, he may not sell it until he reaches the age of 20. Though the rights to a store do not have the status of real estate, since they were extremely significant at that time, the *Be'er Sheva* contended that *Chaza"l* would not have allowed a person of age 12 or 13 to sell them.

2. The "*Pinkas Medinas Lita*" (of the year 5383), records an enactment of the time that a boy younger than 18 could not get married without his father's consent (or a relative's if his father wasn't alive). If he did so, his marriage was not binding. (Rav Asher explained that this likely meant that the *Shiduch* arrangement was nullified, rather than the actual nullification of a bona fide *Kidushin*.)

3. The same *Pinkas Medinas Lita* and the records of *Medinas Mehrin* (of the year 5410) also record that a *Shtar Chov* (a lien) written by an unmarried person was not binding unless it had the consent of his father.

We see that a number of later enactments were based on the original enactment of *Chaza"l* that forbade the sale of real estate by a person younger than 20. Though from age 12 or 13 a person is a *Bar Da'as*, *Chaza"l* did not believe that to be equivalent to the maturity to make certain momentous decisions. Therefore, in any case where the Poskim are doubtful that a person has sufficient maturity to make certain decisions, they may forbid him from doing so and consider his decision invalid.

Therefore, Rav Weiss concluded that this should certainly apply in the case of organ donation which is one of the most momentous decisions a person can make. Unless a person is 20 years old (or at least 18), he cannot grant consent without the agreement of his father or guardian.

Rav Zilberstein (*ibid.*) cites his father-in-law (Rav Elyashiv *zt"l*) who argued that there is a distinction between *Chaza"l*'s original enactment and the case of organ donation. Regarding the sale of real estate, *Chaza"l* were concerned that a young person's immaturity may lead him to be enticed by the prospect of the proceeds of the sale (as clearly stated by the *Shulchan Aruch* cited above) and therefore did not permit him to make the sale. But in cases where no money is at stake (such as in the case of organ donation where the person is acting altruistically), though the decisions



in question may be momentous, we cannot say that *Chaza"l* would have enacted that their decisions have no validity.

Rav Weiss, however, did not agree. It is true that *Chaza"l* made their enactment regarding real estate due to the fact that the person may be enticed by the money. However, this still reflects upon the lack of maturity of a person of this age. Therefore, in all instances where we suspect that their lack of maturity may impact upon their decision, we can assume that *Chaza"l* would similarly say that their decisions have no validity.