הא בשכיב מרע – This is by a שכיב מרע

Overview

One ברייתא states that if someone stated הולך מנה לפלוני and that פלוני passed on, the rule is that it should be given to the heirs (of this פלוני).[1] רב אבא בר ממל explained that (even) this ברייתא can maintain הולך לאו כזכי and nevertheless it is given ליורשיו, because the grantor was a שכיב מרע,[2] and דברי שכיב מרע ככתובים וכמסורים דמי (as long as he does not retract), therefore it is like the שכ"מ said זכי and the פלוני was זוכה, so his יורשין inherit it.[3] It would seem that this is true if the שכ"מ died before the intended recipient died (since the recipient acquired it at the death of the שכ"מ), but not if the מקבל predeceased the שכ"מ, for then he never acquired it that it should be transferred to his heirs. תוספות maintains that this is not so.

אומר רבינו יצחק אף על גב דמת מקבל בחיי נותן[4] ולא קני אלא אחר מיתת נותן –

The ר"י stated that this ruling of יתנו ליורשיו applies **even though the recipient** (פלוני) **died during the lifetime of the grantor** (the שכ"מ), **and** the rule is that **one does not acquire** a מתנת שכ"מ, **only after the death of the grantor,** so seemingly if the מקבל died בחיי נותן, there is no one to receive these monies and it should be returned to the שכ"מ -

אפילו הכי קנו יורשין דדעת נותן הוא –

Nevertheless the יורשין acquire it (after the death of the נותן) **for** it is presumed that **the intent of the grantor is -**

דכיון שישנו למקבל בשעת מתן מעות שיזכה המקבל אחר מיתתו או הוא או יורשיו[5] –

That since the recipient existed when the money was given to the שליח, the grantor intends **that the recipient or his heirs should acquire these** monies **after his (the grantor's) death.**

תוספות adds an additional חידוש:

ואפילו לא נולדו יורשי מקבל עד אחר מיתת נותן קנו –

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[1] The other ברייתא ruled that it should be returned to the sender (because it is discussing a מתנת בריא).

[2] A שכ"מ is a person who is deathly ill; the חכמים instituted that all his instructions are to be adhered to as if they were written and delivered to the intended party (even though nothing was written and no קנין was made). The wishes of the שכ"מ are to be fulfilled after the שכ"מ dies. However if the שכ"מ recovers then all that he said is void.

[3] See רש"י ד"ה בשכיב.

[4] תוספות may derive this from the fact that one ברייתא states ולא מצאו (meaning that the מקבל died) we give it ליורשי מי שנשתלחו לו and the other ברייתא (seemingly in the same case) states יחזרו למשלח indicating that the שכ"מ is still alive while the מקבל already passed away.

[5] See footnote # 9.

And even if the heirs of the recipient were not born until after the death of the grantor,[6] nevertheless **they are** still **קונה.** This is valid **-**

אפילו למאן דאמר המזכה לעובר לא קנה[7] **–**

Even according to the one who maintains that one who is מזכה for a fetus, the fetus **does not acquire it,** nevertheless here the יורשין are קונה -

דדברי שכיב מרע כשמת כמסורים למקבל[8] **משעת נתינת שכיב מרע או אמירתו:**[9]

Because the words of a שכ"מ once he dies are considered as if they were already delivered to the recipient from the time the שכ"מ either **gave** the item **or he said**[10] to give the item.

Summary

The מתנת שכ"מ is given to the heirs of the מקבל even if at the time the שכ"מ died the מקבל was already dead and the יורשין were not born, because it is the intent of the שכ"מ to give it to the heirs, and the מתנת שכ"מ becomes effective retroactively from the time the gift was given or ordered.

Thinking it over

תוספות anticipated how can יורשין who were not yet born acquire the gift.[11] It would seem that if they were already born there would be no difficulty as to how they are קונה. However at this point (before תוספות explained that it belonged to the מקבל retroactively), how can the יורשין who are alive בשעת מיתת שכ"מ acquire the gift, since they were not alive at the time it was given?[12]

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[6] The מקבל died childless בחיי נותן and after the נותן died, [closer] יורשין [to the deceased מקבל] were born.

[7] The difficulty is; granted that the שכ"מ intends to give it to the יורשין, but how is that קנין effective since the יורשין were not in existence until after מיתת שכ"מ (when the קנין takes effect). See 'Thinking it over'.

[8] After the שכ"מ passes on we consider as if the gift belonged to the מקבל (retroactively) from the moment the שכ"מ gave or said to give this gift. Therefore since it belonged to the מקבל (retroactively) therefore his heirs may inherit it.

[9] It is still necessary to assume what תוספות previously said (see footnote # 5) that דעת נותן הוא שיזכה המקבל אחר מיתתו או הוא או יורשיו; for otherwise (even if we assume that the מקבל owns it retroactively, nevertheless) we can say that if the שכ"מ would know that the מקבל is not living he would retract the gift (for a שכ"מ may retract as long as he is alive), therefore we must say that the דעת נותן includes the יורשין as well. [We may then interpret the phrase דעת נותן הוא שיזכה המקבל אחר מיתתו או הוא או יורשיו to mean that the דעת נותן is that the מקבל (after מיתת שכ"מ) should be זוכה retroactively, and then it should revert either to the מקבל (if he is alive) or to his יורשין (whenever they are born).]

[10] See אמ"ה # 152 onwards (and נח"מ) for a more detailed discussion of this issue.

[11] See footnote # 7.

[12] See בל"י אות שלט.