



Vignettes

- 1> Wired Comics and Collectibles held a special sale to clear out inventory. Sally, age 14, withdrew \$4,000 (cash) of her Bat Mitzvah money from her bank account in order to purchase discounted vintage comic books. When Sally's parents found out, they brought the comic books back to Wired Comics and Collectibles, arguing that their daughter's agreement was voidable. Are Sally's parents correct, under civil law and Jewish law?
- 2> William, an accountant specializing in cross-border tax filings, is appointed as guardian for the property of five-year-old Samantha. The property includes a trust of \$10,000 from Samantha's deceased grandmother. When the guardianship began, the trust was invested in municipal bonds, but William has been reading a lot about cryptocurrency, and believes it would be worthwhile to diversify the portfolio by putting \$3,000 in Ethereum. May William do this?
- 3> Tragically, Julie and David die in an automobile accident, leaving behind their twelve-year-old son Raymond. Two people step forward to apply to serve as guardians for property: Rhonda, the family accountant, and Julie's brother James, a librarian. Whom should the court choose as guardian, under civil law and Jewish law?
- 4> If there is time: Susan and Chaim divorced in 2016; Susan is raising their twelve-year-old son Harry, with joint decision making. Susan is skeptical of the COVID-19 vaccine, and does not want Harry to receive it; Chaim argues that the medical evidence supports vaccination, and insists that Harry be vaccinated. Harry wanted to be vaccinated, until Susan took him to a physician who described vaccines as dangerous. What should happen, according to civil law and Jewish law?

Vignette 1: The Power of a Minor

1. Nathan Oman, *Unity and Pluralism in Contract Law*, Michigan Law Review 103:1488

Contract theory suffers from an embarrassment of riches. Roughly speaking there are two main camps, one of which contains two significant subcamps. On one side sit the economic theories, which not surprisingly argue that contract law should be guided by notions of efficiency and welfare maximization. On the other side sit what [Stephen] Smith labels "rights-based" theories...

2. Charles Fried, *Contract as Promise*, pg. 2

The regime of contract law, which respects the dispositions individuals make of their rights, carries to its natural conclusion the liberal premise that individuals have rights. And the will theory of contract, which sees contractual obligations as essentially self-imposed, is a fair implication of liberal individualism.

3. Rabbi Elchanan Wasserman (20th century Poland), Kovetz He'arot 66:6

ב' דינים ישנם בקטן: א) קטן שלא הגיע לכלל דעת הרי הוא שוטה [כתובות מח.]. ב) קטן פיקח שאנו רואין שיש לו דעת כגדול, ומ"מ אין מעשה קטן כלום, והוא גזה"כ, מדכתיב איש ולא קטן, שאין כח במעשה קטן לפעול חלות קנין או קידושין [ב"ק קו.]; ירושל' מע"ש ד:ג].
 There are two issues regarding a minor: 1) A minor who has not achieved capacity is mentally incompetent; 2) A bright minor whom we perceive to have the mind of an adult – but the deeds of a minor are nothing, by scriptural fiat, for it says, "When a man gives," not "a minor". A minor's deed lacks the force to effectuate transaction or marriage.

4. David L. Trueman, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*, pg. 6

Donative Capacity Capacity to make a gift has been defined by courts to require an understanding of the nature and purpose of the gift, an understanding of the nature and extent of property to be given, a knowledge of the natural objects of the donor's bounty, and an understanding of the nature and effect of the gift. Some states... [require] that the donor knows the gift to be irrevocable and that it would result in a reduction in the donor's assets or estate.

Contractual Capacity In determining an individual's capacity to execute a contract, courts generally assess the party's ability to understand the nature and effect of the act and the business being transacted. Accordingly, if the act or business being transacted is highly complicated, a higher level of understanding may be needed...

5. Talmud, Gittin 59a

משנה: הפעוטות - מקהן מקה וממכרן ממכרן במטלטלין.

גמרא: ועד כמה? מחוי רב יהודה לרב יצחק בריה: כבר שית, כבר שב. רב כהנא אמר: כבר שב, כבר תמני. במתניתא תנא: כבר תשע, כבר עשר. ולא פליגי, כל חד וחד לפי חורפיה. וטעמא מאי? א"ר אבא בר יעקב א"ר יוחנן: משום כדי חייו.

Mishnah: The purchase and sale of movable items by *pe'utot* are binding.

Gemara: How young? Rav Yehudah pointed to his son, Rav Yitzchak, saying, "Like six or seven." Rav Kahana said, "Like seven or eight." In a *braita* we learned, "Like nine or ten." There is no debate – each depends on his sharpness. Why [is this valid]? For the sake of his life.

6. Sale of Goods Act, R.S.O. 1990, c S.1 <https://www.ontario.ca/laws/statute/90s01>

3 (1) Capacity to buy and sell is regulated by the general law concerning capacity to contract and to transfer and acquire property, but where necessaries are sold and delivered to a minor or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he or she shall pay a reasonable price therefor. R.S.O. 1990, c. S.1, s. 3 (1).

(2) In this section, "necessaries" means goods suitable to the conditions in life of the minor or other person and to his or her actual requirements at the time of the sale and delivery. R.S.O. 1990, c. S.1, s. 3 (2); 1993, c. 27, Sched.

7. Rabbi Yehoshua Falk (16th century Poland), *Sefer Meirat Einayim*, Choshen Mishpat 235:1

דאל"כ אין שום אדם יהיה לו שום עסק עמו, שהרי יכול לחזור בו כשירצה, גם קרוביו יכולין לבטל מעשיו... אם מכר ביותר מכדי חייו, כתב הטור [סעיף א'] דפליגי ביה... והמרדכי פרק הניזקין [שצ"ז] כתב כדעת הרמב"ן דכיון דתיקנו תו לא חילקו דאף יותר מכדי חייו יכול למכור

Otherwise, no one would have any involvement with him; he could recant at will, or his family could cancel his deeds...

If one sells more than is needed for the sake of his life, the Tur wrote that this is debated... Mordechai sided with Ramban that once this was enacted, they did not distinguish, and one may sell more than is needed for his life.

8. Rabbi Yehoshua Falk (16th century Poland), *Sefer Meirat Einayim*, Choshen Mishpat 235:9

אבל בקרקע כו'. דבקרקע צריך חריפות ובקיאיות במשא ומתן טפי מבמטלטלים:
"But with land" – For land requires greater sharpness and expertise in commerce than movables do.

9. Rudolf Sohm, *The Institutes of Roman Law*, pg. 141

The following persons are incapacitated from all juristic acts: the *infans*, or child who has not yet completed its seventh year... The following persons are incapacitated from some juristic acts, but are capable of others: the *impubes*, or child who has completed its seventh, but not yet completed (if a boy) his fourteenth, (if a girl) her twelfth year;... The legal position of persons of the second class is as follows. They are capable of such juristic acts as result in an improvement of their proprietary position, but they are incapable of juristic acts which operate to alienate property or impose a liability...

10. Talmud, Gittin 65a

אמר רבא, ג' מדות בקטן: צרור וזורקו, אגוז ונוטלו - זוכה לעצמו...; הפעוטות - מקחן מקח וממכרן ממכר במטלטלין...
Rava said: There are three types of minor. If he rejects stones and keeps nuts, he can acquire... At *pe'utot*, his purchases and sales of movable items are binding...

11. Mishnah Gittin 5:8

מציאת [קטן] יש בהן משום גזל מפני דרכי שלום ר' יוסי אומר גזל גמור
Taking that which a minor finds is theft, to keep the peace. Rabbi Yosi said: It is complete theft.

12. Rabbi Moshe Isserles (16th century Poland), *Rama Choshen Mishpat* 243:15

קטן שנותנים לו צרור וזורקו, אגוז ונוטלו, זוכה לעצמו. (ודוקא כשיש דעת אחרת מקנה לו, אבל במציאה, לא).
A minor who rejects stones and keeps nuts can acquire, but specifically where another assigns it to him, not where he finds an object.

13. Staples (Next friend of) v. Varga, 1995 CanLII 17970 (AB PC), <<https://canlii.ca/t/gc671>>, retr. 2021-11-01
 1. February 15, 1995. SCOTT Asst. C.J. Prov. Ct.:— The plaintiff, who sues by his next friend, during the period September 1 to October 21, 1993, purchased vintage comic books for the sum of \$4,233.75 from the defendant who at the time carried on business of buying and selling sports cards and comic books in the town of Cochrane, Alberta under firm name of True Legends Sport Cards and Comics: The plaintiff, who was 14 years of age at the time of the acquisition (15 years of age at the time of trial), now sues for recovery of \$4,000, being the limit of the monetary jurisdiction of this Court...
6. The defendant concedes that comic books are not necessities within the meaning of subs. (3) above. [*goods suitable to the condition in life of the minor or other person and to his actual requirements*]
14. Here the infant received what he bargained for. There is no suggestion that the comic books were purchased at an exorbitant price. On the contrary, they were purchased at various discounts and evidence was given by the plaintiff's next friend that many of the comic books had gone up in value according to certain trade magazines which were never filed in evidence. I have no doubt, however, that over time this will likely occur. These statements were made to support the plaintiff's position that despite the sale of several of the comic books, the defendant could be restored to his original position. If that is the case, then it can also be said the plaintiff has in fact received a real benefit from those comic books which were sold and for which the plaintiff received compensation...
15. In the present instance, we do not know the exact number of comic books that have been sold and at what price, nor has any other evidence been provided as to value upon which this Court could make a finding of what was "practically just". Further, one of the comic books in question was used to complete a series of comic books purchased elsewhere by the infant which was sold for what, as a result, may have been an enhanced value, thereby bestowing a benefit on the infant plaintiff.
16. As a result, I find that, overall, the plaintiff did receive some real benefit from the contract and is not in a position to restore the defendant to his former position.
17. In so finding, this does not mean that I condone the actions of the defendant. It is true, that on being informed by his employee early on in the transactions of the plaintiff's expenditures (the defendant on the whole being an absentee owner), he made inquiries as to the financial responsibility of the plaintiff's parents, but never attempted to contact either parent direct in respect of what had to be unusually sizeable transactions over a short period of time by a 14-year-old boy, despite the fact he and they resided in a rather small community...

Vignette 2: How is the guardianship executed?

14. Talmud, Ketuvot 48a

מי שנשתטה בית דין יורדין לנכסיו וזנין ומפרנסין את אשתו ובניו ובנותיו ודבר אחר... מאי "דבר אחר"? רב חסדא אמר זה תכשיט, רב יוסף אמר צדקה. מ"ד תכשיט כ"ש צדקה, מ"ד צדקה אבל תכשיט יהבינן לה דלא ניהא ליה דתינוול.

When a man becomes a *shoteh*, the court descends into his assets to feed and support his wife and children, and for another matter... What is "another matter"? Rav Chisda said: Jewelry. Rav Yosef said: Tzedakah. The one who approves jewelry will certainly approve tzedakah, but the one who approves jewelry will say that we give it to her because he would not want her to be without beauty.

15. Talmud, Kiddushin 42a

אמר רבא בר רב הונא אמר רב גידל א"ר: מנין ליתומים שבאו לחלוק בנכסי אביהן שבית דין מעמידין להם אפוטרופוס לחוב ולזכות? "לחוב" אמאי?! אלא לחוב ע"מ לזכות? ת"ל, "ונשיא אחד נשיא אחד ממטה תקחו. (במדבר לד: יח)"

Rava bar Rav Huna cited Rav Gidel citing Rav: How do we know that the court establishes a guardian for orphans who come to split their father's estate, for liability or benefit? "For liability"?! Rather: For liability in order to benefit? Bamidbar 34:18 says, "And you shall take a leader from each tribe."

16. Rule 212, CPA Code of Professional Conduct (2016 ed.)

212.1 Handling of trust funds and other property

(a) A member or a firm that, receiving, handling or holding money or other property in any capacity as a trustee, or as a receiver or receiver/manager, guardian, administrator/manager or liquidator, shall do so in accordance with the terms of the engagement, including the terms of any applicable trust, and the law relating thereto and shall maintain

such records as are necessary to account properly for the money or other property; unless otherwise provided for by the terms of the trust, money held in trust shall be kept in a separate trust bank account or accounts...

212.2 Handling property of others A member or firm, in the course of providing professional services, shall handle with due care any entrusted property.

GUIDANCE – Rule 212

2 While it may be prudent to obtain legal advice with respect to complying with the law relating to trusts, the following should assist in understanding the Rule:

- each trust relationship should be documented in writing

17. Rabbi Yosef Karo (16th century Israel), Code of Jewish Law, Choshen Mishpat 290:7, 290:15

ז: כשמעמידים בית דין אפוטרופוס ליתומים מוסרים לו כל נכסי הקטן, הקרקע והמטלטלים שלא נמכרו, והוא מוציא ומכניס ובונה וסותר ושוכר ונוטע וזורע ועושה כפי מה שיראה שזה טוב ליתומים, ומאכילן ומשקן ונותן להם כל ההוצאה כפי הממון וכפי הראוי להם. ולא ירויח להם יותר מדאי ולא יצמצם עליהם יותר מדאי.

טו: אין פוסקים עליהם צדקה, אפילו לפדיון שבויים, מפני שמצות אלו אין להם קצבה. מיהו אם פסק עליהם צדקה לאחשוביניהו כדי שיצא עליהם שם טוב, והם אמודים לכך, שפיר דמי.

7: When the court appoints a guardian for orphans, they give him all of the assets of the minor – the land and the movables which have not been sold – and he takes out and brings in and bulds and demolishes and hires and plants and acts as he sees to be good for the orphans. And he feeds them and gives them all expenditures, based on the assets and on what is suitable for them. And he shall not give them too much, and he shall not stint too much.

15: We do not assess [minor orphans] for *tzedakah*, even to redeem captives, because these mitzvot have no limit. But if he assesses them for *tzedakah* to give them status, so that they will develop a good reputation, and they can afford it, this is fine.

18. Substitute Decisions Act, 1992, S.O. 1992, c. 30 s. 37 <https://www.ontario.ca/laws/statute/92s30>

Optional expenditures

(3) The guardian may make the following expenditures from the incapable person's property:

1. Gifts or loans to the person's friends and relatives.
2. Charitable gifts. 1992, c. 30, s. 37 (3); 2016, c. 23, s. 70 (3).

Guiding principles

(4) The following rules apply to expenditures under subsection (3):

1. They may be made only if the property is and will remain sufficient to satisfy the requirements of subsection (1).
2. Gifts or loans to the incapable person's friends or relatives may be made only if there is reason to believe, based on intentions the person expressed before becoming incapable, that he or she would make them if capable.
3. Charitable gifts may be made only if,
 - i. the incapable person authorized the making of charitable gifts in a power of attorney executed before becoming incapable, or
 - ii. there is evidence that the person made similar expenditures when capable.

19. Rabbi Yeshayah Blau (20th21st century Israel), Pitchei Choshen IX 5:12 footnote 26

וכתב בכנה"ג שזה פשוט שאם אינו מוצא להרויח אלא בחשש הפסד, מוטב שלא להתעסק.

The Keneset haGedolah wrote that it is obvious that if [the guardian] does not find an opportunity to profit without fear of loss, it would be better that he not invest.

Vignette 3: Who should be the guardian?

20. Children's Law Reform Act, R.S.O. 1990, c. C.12 <https://www.ontario.ca/laws/statute/90c12> s. 49

49 In deciding an application for the appointment of a guardian of the property of a child, the court shall consider all the circumstances, including,

- (a) the ability of the applicant to manage the property of the child;
 - (b) the merits of the plan proposed by the applicant for the care and management of the property of the child; and
 - (c) the views and preferences of the child, where such views and preferences can reasonably be ascertained.
- R.S.O. 1990, c. C.12, s. 49; 2001, c. 9, Sched. B, s. 4 (2).

21. Rabbi Yosef Karo (16th century Israel), Code of Jewish Law, Choshen Mishpat 290:2

... בודקין אדם נאמן ואיש חיל ויודע להפך בזכות היתומים וטוען טענתם ויש לו כח בעסקי העולם כדי לשמור הנכסים ולהרויח בהם...
 We examine a trustworthy person of substance, who knows how to lobby for the benefit of the orphans, and makes their claims, and has a strong business position, so that he will protect and increase their assets...

22. Rabbi Yehoshua Falk (16th century Poland), Sefer Meirat Einayim, Choshen Mishpat 290:12

שהוא מפסיד נכסי יתומים [מסלקין אותו]. דקדק וכתב נכסי יתומים, לאפוקי מפסיד נכסי עצמו ומבזבז דאין מסלקין אותו, די"ל דנזהר בשל יתומים דבעי בר נש מיתן כמה ומיתקרי מהימן...

If he squanders the assets of the orphans [we remove him] – It specifically wrote “assets of the orphans,” as opposed to where he squanders his own assets and wastes them; then we do not remove him. We may assume that he is careful with the property of the orphans, for people are willing to spend a little and be called “trustworthy”...

Vignette 4: Vaccination

23. Saint-Phard v. Saint-Phard, 2021 ONSC 6910 (CanLII), <<https://canlii.ca/t/jjr26>>, retrieved on 2021-10-31 [6] Elyon’s father relied on statements made by Dr. Tam, Chief Officer of Health for Canada on the Canadian Government website recommending COVID-19 vaccinations for those between the ages of 12 and 17, stating that thorough testing has determined the vaccines to be safe and effective at preventing severe illness, hospitalization, and death from COVID-19. Dr. Kieran Moore is the Chief Medical Officer for Ontario. The father tendered his recommendation to vaccinate all youth ages 12 to 17 against COVID-19 as set out in a publication by the Ontario COVID-19 Science Advisory Table. Elyon’s school is administered under the Ottawa Catholic School Board. That Board released a notice advising that all students over age 12 are eligible to be vaccinated for COVID-19 and stating that the vaccine is key in protecting schools from the virus.

[7] Relying on these public documents and the authority of the court in *A.C. v. L.L.*, I find that the applicable government authorities have concluded that the COVID-19 vaccination is safe and effective for children ages 12-17 to prevent severe illness from COVID-19 and have encouraged eligible children to be vaccinated.

24. Minors and Medicine <https://www.yutorah.org/lectures/lecture.cfm/843635/>

25. Talmud, Kiddushin 29a

ת"ר: האב חייב בבנו למולו, ולפדותו, וללמדו תורה, ולהשיאו אשה, וללמדו אומנות. וי"א אף להשיטו במים.
 Our sages taught: A father’s obligations to his son are: To circumcise, redeem, teach Torah to, marry off, and train in a trade. And some say to train him to swim.

26. Talmud, Shabbat 108a

שמואל וקרנא הוו יתבי אגודא דנהר מלכא, חזינהו למיא דקא דלו ועכירי, אמר ליה שמואל לקרנא: גברא רבה קאתי ממערבא, וחייש במעיה, וקא דלו מיא לאקבולי אפיה קמיה... עייליה שמואל לביתיה, אוכליה נהמא דשערי וכסא דהרסנא ואשקיה שיכרא ולא אחוי ליה בית הכסא כי היכי דלישתלשל...

Shemuel and Karna were sitting by the shore of *Nehar Malka*, when they saw that the water was elevated and murky. Shemuel told Karna: A great man is coming from the west, and he has intestinal pain; the water is elevated before him... Shemuel brought him to his home, fed him barley bread and cups of fish, and gave him beer to drink, and did not show him the washroom, so that he would develop *shilshul*...

27. R’ M. Halperin (21st c. Israel), *Parental Opposition to Surgery for a Dangerously Ill Infant*, Assia VIII pg. 29

ברור שהשיקול שצריך להילקח בחשבון הוא אך ורק בטובתו של הקטין ולא שיקולים זרים הכוללים, בין השאר, את טובת ההורים או החברה.

It is clear that the decision must consider only the minor's benefit, and no foreign, general concerns, such as the good of the parents or society.

28. Rabbi Yitzchak Zylbershtein (21st century Israel), Shiurei Torah l'Rofim 3 #168

ובפרט שגם האם מתנגדת לכך, שהיא הרי האפוטרופוס הטבעי של הילדים... ואע"פ שהאפוטרופוס של האבא רוצה להשתיל, דעת האם במקרה זה מכרעת יותר, ופרט שהיא המטפלת בילדים.

Especially since the mother objects, for she is the children's natural guardian... And even though the paternal guardian wants the transplant, in this case the mother's view is stronger, especially as she cares for the children.

29. Rabbi Yitzchak Zylbershtein (21st century Israel), Shiurei Torah l'Rofim 3 #179

יפה עשו הרופאים... ובפרט שחכמתם עולה על חכמתה, כיון שהם רופאים והיא רק אחות...

The doctors did well... especially as their wisdom is greater than hers, for they are doctors and she is a nurse...