

# Organ Transplants from Living Donors

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## SURVEY OF TRANSPLANTATION TECHNIQUES

The kidney is one of the few organs which can successfully be transplanted from a living donor with current technics. Since a healthy donor can function satisfactorily with a single kidney, the removal of one of them for transplantation does not significantly endanger live.<sup>1,2,3</sup> Removal, or substantial partial removal, of other organs, such as the heart, lungs, or pancreas, entail serious health risks or death of the donor.

Besides organs, other parts of the body can be transplanted from living donors either to save the life of a recipient or to improve his quality of life.<sup>4</sup> Among these are skin, bone marrow, and blood.

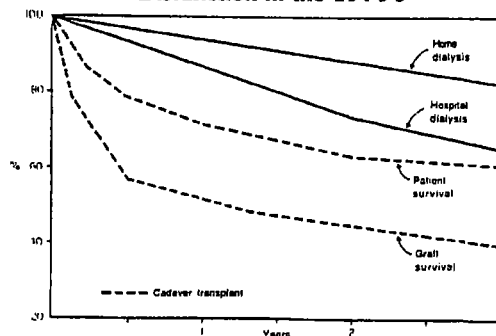
### I. KIDNEY TRANSPLANTS

The kidneys regulate the body's electrolyte and water balance and eliminate various wastes. Severe kidney dysfunction endangers the life of the patient, and requires treatment by dialysis or kidney transplant. Prior to the last decade the life expectancy of patients on dialysis exceeded that of patients who have undergone kidney transplantation.<sup>5</sup>

In the last few years the life expectancy of patients who have undergone kidney transplantation from deceased donors has increased, and is now comparable with the life expectancy of patients on dialysis.<sup>6</sup> The life expectancy of patients receiving kidney transplants from living donors has

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Survival Rates for Patients with Terminal Kidney Dysfunction in the 1970's



Patients undergoing home dialysis compared with patients treated with artificial kidneys in hospital and patients who have undergone kidney transplantation from deceased donors

increased to the extent that it now exceeds the life expectancy of patients on dialysis.<sup>7</sup>

Transplanting a kidney from a dead body often improves a patient's quality of life more than does dialysis. On the other hand, patients who reject such a transplanted kidney suffer for months and ultimately have to be returned to dialysis.

The success rate of kidney transplants from unrelated living donors equals or exceeds the success rate of transplants from deceased donors.<sup>8,9</sup> The threat to the life of a living donor is not significantly greater than the threat to

life which accompanies any anesthesia and simple surgery. This is particularly significant in view of the inadequate number of kidneys available for transplant from deceased donors.

## II. SKIN GRAFTING

Grafting of human skin may save the life of burn victims. Extensive burns need a covering with the characteristics of human skin in order to prevent infection, loss of body heat, fluids and electrolytes. Although biological and artificial substitutes exist,<sup>11</sup> the best "bandage" is human skin.

Unless the donor is an identical twin, grafted skin is usually rejected by the recipient's body within several days. The purpose of such a graft from others is to provide a temporary "bandage" over the burn until the patient's own skin can grow.<sup>11</sup> In emergency cases the superficial layers of the skin can be removed from a covered part of the donor's body and used to "bandage" the patient's burn. In this procedure there is no significant threat to the donor's life, although it may cause substantial discomfort.

## III. BONE MARROW TRANSPLANTS

The following life-threatening conditions are usually treated by bone marrow transplant:

1. **Malignancies:** In many cases of blood cancer, such as various forms of leukaemia, the treatment of choice is transplantation of bone marrow. This procedure produces impressive results, and a high percentage of patients can be successfully treated. A restrictive factor in the treatment of malignant tumors by radiation therapy or chemotherapy is the damage occasionally done to the patient's bone marrow. Bone marrow transplantation after treatment of the tumor may solve this problem. In these cases it is sometimes possible to remove some of the patient's own bone marrow before radiation therapy or chemotherapy for the malignant tumor, and later to re-implant the patient's own bone marrow.<sup>12</sup>

2. **Deficiencies of bone marrow products:** In aplastic anemia the bone marrow ceases to function and no longer produces white blood cells, red blood cells, or platelets. There are other diseases which result from complete or partial insufficiency of bone marrow products. In many cases patients suffering from these life-threatening conditions can be successfully treated by bone marrow transplant if a suitable donor can be found.<sup>12</sup>

3. **Combined Severe Immune Deficiency:** In this condition a congenital defect in the newborn's

immunologic system leads to death as a result of recurring infections. In the past these infants were kept in complete isolation within a plastic bubble, in an attempt to prevent infection. The only lifesaving treatment available today is bone marrow transplantation.<sup>12</sup>

4. **Other diseases:** Other life-threatening diseases can be treated by bone marrow transplant. Among them are those in which bone marrow products are defective, and genetic diseases of enzymatic deficiency.<sup>12</sup>

In all these cases the patient's immunologic system has to be suppressed before executing the bone marrow transplantation. This is done by heavy irradiation. Occasionally cytotoxic drugs are also administered. The actual technique for transplanting bone marrow into the patient is the simplest part of the procedure, but it can succeed only after the patient's immunologic system has been suppressed.

A small quantity of expertly prepared bone marrow is injected intravenously into the patient. The bone marrow cells spread throughout the patient's body, and some of them settle in locations where they are able to produce blood cells.

After the transplantation the patient undergoes a long and exhausting period in which the immune system is non-functional, and the patient is very susceptible to infection. During this period the immune system slowly returns to normal on the basis of the donated cells.

Although there are variations between the conditions listed above, about 50% of the patients undergoing bone marrow transplantation survive, while only few of them would survive without this procedure.<sup>13</sup>

There is no significant threat to the life of the donor of bone marrow other than the dangers associated with anesthesia, but significant discomfort is likely.

## IV. BLOOD TRANSFUSION

Blood transfusion is the oldest form of "transplantation".<sup>11</sup> Modern medicine depends heavily on transfusion of whole blood and blood products. Blood transfusion is essential in case of injury or surgery accompanied by massive loss of blood. Transfusion of coagulating factors is vital for patients suffering from hemophilia. Administration of blood serum containing immune agents creates passive immunity, which may save the life of a patient with immune system dysfunction.

There is only minimal danger in donating blood and only relatively minor inconvenience.

## HALACHIC ASPECTS

There are four fundamental problems concerning the halachic aspects of transplantation from living donors.

- A. The danger to the donor
- B. Donation under coercion.
- C. Sale of organs and tissues.
- D. The legally incompetent donor

Here we shall only deal with transplants intended to save the life of the recipient. In halachic terms these are cases of *נפיש נפיש* (saving of life) All halachic authorities agree that where a procedure is not a life saving measure, one may not significantly endanger the life of a donor, nor may one coerce a potential donor to donate.

### A. DANGER TO THE DONOR

#### I. THE COMMANDMENT OF LIFE PRESERVATION

Everyone is obligated to try to save the life of another who is in danger. There are two aspects to this commandment: the preservation of life and the restoration of "lost property." The commandment of the preservation of life is derived from the verse: You shall therefore keep my statutes and my judgments; which if a man do, he shall live by them (Leviticus 18:5). From this the Sages deduced: You shall live by them, but not die by them.<sup>15</sup> This implies that preservation of human life is the essential purpose of the commandment. Since the Torah clearly conveys this idea, there is no doubt that one must make every effort to save life.<sup>16</sup>

The preservation of life overrides all but three prohibitions of the Torah: idolatry, illicit sexual intercourse, and the shedding of blood.<sup>17</sup> Thus if it is necessary to set aside the Sabbath laws, to eat on the Day of Atonement, or to suspend other commandments in order to save human life, the Torah obligates us to save that life since this takes precedence over all the commandments of the Torah, except for the three mentioned. Thus, if one is confronted with the choice of killing one's fellow man or being killed oneself, the Torah calls for sacrificing one's own life rather than killing another. The reason for setting aside most commandments is the prevention of death. If a life will be lost in any case, the justification for violating the commandment prohibiting killing is nullified.<sup>18</sup>

Suicide is forbidden as part of the prohibition of killing.<sup>19</sup> Thus, suicide is prohibited, even when it is intended to save the life of another. It follows that one may not permit removal of a vital organ, even if the donor were to consent.<sup>20</sup>

*Halachah* is clear in two cases. If A's life is in danger and B can save A without endangering his own life, he must do so. If B can only save A by sacrificing his own life, he may not do so.

What would the ruling be in a case where B can save A's life by endangering, but not necessarily sacrificing, his own life? It would seem that the possibility of saving A's life

should outweigh other considerations and require B to risk his own life. Indeed there is support for such a ruling in the Palestinian Talmud.<sup>21</sup>

However, this opinion finds no acceptance by the halachic authorities of generally accepted codes. This led Rabbi Joseph Karo to conclude that the acknowledged authorities disagreed with the view of the Palestinian Talmud on this point.<sup>22</sup> These authorities held that just as one may not sacrifice one's life to save that of another, so one may not risk one's own life to save that of another.<sup>23</sup> This opinion prohibiting the risk of life is derived from the Babylonian Talmud, and is definitive.<sup>24</sup>

#### II. THE INFINITE VALUE OF HUMAN LIFE

The concept of the infinite value of human life is the basis of a law formulated in the Tosefta.<sup>25</sup> Maimonides<sup>26</sup> accepted the opinion of the Tosefta and the Palestinian Talmud<sup>27</sup> according to which it is prohibited to kill an individual human, even to save the lives of several others.

The basis of this law is clear.<sup>28</sup> It is rooted in the infinite value of each human life. This value cannot be measured in any ordinary scale. Thus one has no right to say that the value of a individual life is less than of a group.<sup>29</sup>

Although the principle which prohibits risking of one life to save that of another could be taken to absurd lengths, the halachic authorities emphasize that one may, and indeed one must, undertake a "reasonable" risk to save the life of another.<sup>30</sup> Unfortunately, the definition of the acceptable level of risk has not been formulated. One guideline, however, is clear. A risk such as one might normally take in everyday activity or in the course of earning a living is considered acceptable. Such an acceptable risk offers no justification for refraining from saving a life.<sup>31</sup> This guideline calls for a clarification of the level of risk in donating blood, skin, bone marrow, or a kidney.

At one end of the spectrum we have blood donations which are associated with a minimal level of danger and discomfort. The conclusion is clear: a donor is halachically obligated to give blood to save another's life. At the other end of the spectrum is the procedure of kidney transplantation. Although this does not immediately endanger the life of the donor, there is an ongoing controversy among physicians regarding the long term damage resulting from removal of a kidney to the health of the donor.<sup>32</sup> If there is a high probability of shortening the life of the donor, the removal of a kidney would have to be considered dangerous to life; this would then be prohibited even for the purpose of saving life.<sup>33</sup> An act which shortens life is as much an act of killing as one which leads to immediate death.<sup>34</sup> Thus shortening life is clearly prohibited.

Even if the probability of death or shortening life is not high, the pain resulting from the surgery and during recovery may be substantial.<sup>35</sup> It follows that even when donating a kidney for lifesaving purposes is not prohibited, it is not obligatory.

#### III. MAY ONE SACRIFICE A LIMB TO SAVE A LIFE?

The situation in which A can save B's life by A's sacrificing one of his limbs was discussed by Radbaz who

ruled that A is under no obligation to do so,<sup>41</sup> based on a verse in Proverbs.<sup>42</sup>

Although A is not obligated to sacrifice a limb to save B's life, he may choose to do so. Further, the rabbis encouraged saving the life of another even at the cost of sacrificing one's own limb. A's choice to sacrifice a limb and thereby save B is clearly a mitzvah.

There is some similarity between the case discussed by Radbaz and our subject. In donating a kidney one sacrifices an organ in order to save the life of another.<sup>43, 44</sup>

#### IV. SUMMARY

1. It is prohibited to shorten the life of the donor by removing an organ.<sup>45</sup>
2. Even when the donor's life is not thereby shortened, there is no halachic obligation to donate a kidney.
3. A donor who gives a kidney in order to save the life of another life or to improve his quality of life fulfills a mitzvah of great merit.<sup>46</sup>

In the cases of skin grafts and bone marrow transplants there is minimal risk to the life of the donor. Therefore, there is no doubt that these procedures are permissible. It is not clear whether there is an obligation to donate skin or bone marrow; although there is no permanent loss of an organ or limb, the discomfort suffered by the donor is not negligible. Halachah clearly encourages these donations.

## B. DONATION UNDER COERCION

### I. THEFT AND PERSONAL INJURY

May a patient attempt to save his own life by compelling another to donate an organ? Consider, for example, a patient with a rare blood type who is injured and whose life depends on an immediate blood transfusion. The blood bank does not have the critical blood type available, but knows of a suitable donor. That potential donor refuses to donate blood, even though this means that the patient will die. May the potential donor be compelled to give blood?

Related questions arise when the potential donor is legally incompetent to give consent to the procedure. A retarded or autistic donor, or a donor who has not yet reached the age of majority, is legally incompetent to consent to any procedure.<sup>47</sup> May such an incompetent person be accepted as a donor of blood in order to save the life of the injured patient?

There are two halachic prohibitions in drawing blood from a donor without his consent:

1. The prohibition of "theft."<sup>48</sup>
2. The prohibition of injuring a person.<sup>49</sup>

The prohibition of "theft" is derived from the verse: Thou shalt not steal (Leviticus 19:13), and includes doing any damage to another person or his property.<sup>45</sup> Drawing blood without legal permission is accordingly an act of theft. Similarly it is forbidden to injure another without justification.<sup>44, 46</sup> Although these procedures are in general prohibited, they may be permissible if intended for lifesaving purposes.

## II. THE PRESERVATION OF LIFE AND "THEFT" OR INJURY

The preservation of life overrides all but three prohibitions of the Torah. These are: idolatry, illicit sexual intercourse, and the shedding of blood. One might thus conclude that prohibition of theft and injury to others are suspended in lifesaving situations.<sup>17</sup> Accordingly it might appear that one may save one's life by compelling a suitable donor to give blood, just as one may save one's life by eating on the Day of Atonement, by setting aside the Sabbath laws, or by eating otherwise prohibited food.<sup>18</sup> But in cases of theft or injury to another, a second party is involved and the circumstances are therefore not comparable. Discussions of this point appear in the Talmud,<sup>19</sup> the works of early and more recent authorities.<sup>50, 51</sup>

## III. KILLING AND ACTS RELATED TO KILLING<sup>52</sup>

Personal injury to another might be considered as an act related to killing (אביווריהו דשפיכות דמים). Since many authorities hold that the saving of life does not supersede any act related to killing,<sup>53</sup> the coercion of potential blood donors might still be held to be prohibited even in lifesaving situations.

## IV. PATIENT'S REFUSAL OF TREATMENT<sup>54</sup>

Even those who hold that preservation of life does not supersede the prohibition of personal injury<sup>55</sup> must deal with the question of the patient who refuses treatment. Everyone is obligated to maintain his own health and to try to save himself in case of danger.<sup>56</sup> Therefore, refusal to be treated does not necessarily exempt others<sup>57</sup> from forcing the patient to comply with his duty to maintain his own health. In such a case coercion would be a mitzvah rather than an act of injury.<sup>58</sup> This is the approach adopted by the Israeli Supreme Court, as indicated by Justice Beiski in his opinion.<sup>59</sup> A similar argument justifies coercion of a potential donor to save life where he is Halachically committed to do so. Rabbi Shlomo Zalman Auerbach approves a stressful demand to a potential donor only where there is no risk to the donor.<sup>60</sup> Aside from this opinion, I have found no other authorities who deal with this issue.

It must be made clear that we are speaking only about coercing a person who is legally competent. Someone who is legally incompetent (a psychotic or autistic person, for example) is not bound by the commandments, and may not be compelled to fulfill them.

## V. SUMMARY

The question of coercing a donor to donate an organ or body tissue in order to save the life of another is not simple. Its solution depends on a number of fundamental factors:

1. Does the preservation of life supersede all but three prohibitions?
2. Is personal injury an act "related to killing?"
3. If so, does the preservation of life supersede acts related to killing?
4. May one, or when must one, compel another to fulfill the duty of saving the life of another?

These four questions are the subject of ongoing controversy among halachic authorities. The final answers are still open.

### C. SALE OF ORGANS AND TISSUES

The issue of sale of organs and tissues is a sensitive one; the emotional aspects of the issue can not be neglected in the discussion. Nevertheless, the halachic aspects of the issue must be discussed dispassionately in the light of authoritative sources. Here we shall deal with the halachah pertaining to the sale of human hair, blood, and kidneys.

#### I. SALE OF HAIR AND KIDNEYS

The Mishnah mentions the sale of hair as a legitimate way of raising money:

Rabbi Akiva said: You must fulfil your financial obligations even if you have to sell the hair upon you head to do so!<sup>11</sup>

The Babylonian Talmud states that sale of hair is a legitimate method of raising money.<sup>12</sup> The Palestinian Talmud relates that Rabbi Akiva's wife sold her braids to support her husband who was studying Torah.<sup>13</sup> This indicates that the human origin of biologic tissue does not necessarily disqualify it from sale.

One might say that there is no essential difference between the sale of hair intended for a wig and skin intended for grafting on to the head of another. But, one might distinguish between the procedure of cutting the hair, which is permitted, and the procedure of removal of a donor's skin, which might be considered to be injury and thus prohibited. Moreover, hair regrows as contrasted with organ or tissues.

This brings us to the basic question of a person's right to injure himself.

#### II. INJURING ONESELF

All authorities agree that it is prohibited to injure oneself irreversibly.<sup>14</sup> This is derived from the principle that wanton destruction is not permissible.<sup>15</sup> There are differences of opinion among the sages in cases where one "injures" oneself for beneficial effects.

According to one source<sup>16</sup> a person may injure himself for a beneficial purpose, just as one may destroy one's own tree or any other property for beneficial purposes.<sup>17</sup> In another source<sup>18</sup> we find a rather different opinion according to which one may not injure oneself for "minor" benefit,<sup>19</sup> while this would be permissible in order to achieve "great" benefit.<sup>20</sup> According to this opinion financial profit would be considered "minor",<sup>21</sup> while avoidance of pain and suffering, on the other hand, would be viewed as a "great" benefit.<sup>22</sup> The codifiers are also divided on this matter. Rabbi Meir Abulafia held that under such circumstances one may injure oneself,<sup>23</sup> while Maimonides held that one may not injure oneself,<sup>24</sup> a ruling codified by Rabbi Joseph Karo.<sup>25</sup>

In view of this, the utilization of organs and body tissues for purely commercial purposes is not permissible. Similarly, it is prohibited to donate a kidney for research or industrial purposes if the benefit to the donor is purely financial. On the other hand, cutting the hair involves no injury, and it is therefore permissible to use hair for purely commercial reasons.

Blood donations fall somewhere between the examples discussed above. In drawing blood there is only minor

discomfort. Is this similar to cutting hair, which is not considered an injury, and therefore permitted? Or is drawing blood more like kidney donations? Rabbi M. Feinstein tended to permit drawing blood for purely commercial reasons.<sup>26</sup> Although one may not remove a kidney for mere financial benefit, one may surely remove it to transplant it for the prolongation of life. Even relief from suffering or improvement of the quality of life is considered to be of great enough benefit to justify the injury involved in removing a kidney.<sup>27</sup>

When there is no prohibition of injury to the donor of an organ or tissue, does the donor have a right to demand payment? In principle, it would seem that the donor should have the same right to sell a kidney or blood as he has to sell his hair. But three points might restrict this right:

1. As a rule, one should not accept payment to fulfill a commandment of the Torah.
2. Society may legislate to prevent the exploitation of its poorer members.
3. Informed consent and a firm decision to sell are necessary prerequisites for removal of an organ or tissue, and for transfer of ownership to the purchaser.

#### III. PAYMENT FOR THE FULFILLMENT OF DIVINE COMMANDMENTS

In principle one may not insist on monetary compensation for teaching Torah.<sup>28</sup> This is deduced from the well known Midrash which compares the Almighty's instruction of the Israelites in the days of Moses with the instruction of students by their teachers.<sup>29</sup> Just as the Israelites were instructed without payment, so should students in every generation be instructed without charge. This principle is not limited to instruction in Torah. It encompasses the fulfillment of all commandments.<sup>30</sup> Since healing is a commandment of the Torah,<sup>31</sup> the healer may not demand payment for healing.<sup>32</sup> It would apparently follow that one may not be reimbursed for donating an organ for lifesaving purposes.

Although a healer may not demand compensation for his efforts in healing, he may request compensation for his expenses, his time, and any medications or devices which he gives the patient.<sup>33</sup> In other words the fulfillment of a commandment does not require that the healer spend his own money for the patient.

It is obvious that the loss of organ can, to some extent, be evaluated in terms of money terms.<sup>34</sup> The suffering involved in the removal of an organ is also measurable in financial terms.<sup>35</sup> Therefore, a donor has every right to demand compensation for a donated organ and for the suffering incurred by its removal, even when such an act is considered as a great Mitzvah.

A reason presented for permitting midwives to receive compensation for the performance of their occupation on the Sabbath is: "because if they knew that they would not be paid, they might not come."<sup>36</sup> The same principle can be applied to any medical procedure of a lifesaving nature.

Even if a physician were not allowed to receive compensation, there is a fundamental difference between the donor of an organ and a physician. A physician is

charged with the commandment of healing. He cannot exempt himself from this obligation,<sup>86</sup> and it may be argued that one who has no right to refuse rendering medical service ought have no claim to compensation.<sup>87</sup> A donor, on the other hand, who is under no obligation to donate an organ,<sup>88</sup> and may accordingly choose not to donate, has the right to claim compensation.

In summary, the general prohibition of compensation for fulfilling a commandment<sup>89</sup> does not conflict with the right of a donor to demand and receive payment for organs or tissues donated.

#### IV. EXPLOITATION OF THE POOR

It would seem that in a cruel world, there is real danger of an organ-market, in which the affluent might purchase an organ from the poor. This is an example of exploitation of the poor by the rich. In order to prevent such legalized exploitation, it would be appropriate to introduce legislation prohibiting the sale of human organs and tissues.<sup>90 91 92</sup>

Today, as we have no central halachic authority to legislate universally binding laws,<sup>93</sup> rabbinic bodies have jurisdiction only in those locations which have accepted their authority.<sup>94</sup>

In summary, unless such a prohibition is legislated, we cannot prohibit the sale of organs for purely exploitative reasons, whether the donation of an organ may lengthen human life, or where it may improve the quality of life.

#### V. INFORMED CONSENT AND VALID SALE

Secular Israeli law requires the patient's signature on a consent form prior to surgery.<sup>95</sup> The law stipulates the formula to be used.<sup>96</sup> A physician is also required to sign a form certifying that he has explained to the patient everything contained in the form, that the patient fully understood, and that the patient signed the form in his presence.<sup>97</sup>

The requirement that the patient fully understand the need for and the possible results of the surgery is impracticable in many cases. In fact, this requirement is fulfilled in only a minority of cases. Generally speaking, the patient has neither the medical knowledge nor the ability to weigh the matter seriously. The physician's signature does not change these facts.

From the halachic point of view a surgical procedure which may save the patient's life does not require his consent.<sup>98</sup> But the removal of an organ to save another patient is different. In such a case consent of the donor is of great significance. Without explicit prior consent the donor might subsequently claim that consent was given in error, and that he had never intended to allow removal of an organ or tissue from him.

It is doubtful if the profit seeking donor always properly understands the medical issues involved in the donation. The donor's need for money may lead him to ignore the medical consequences of his donation. As a result, the donor may be considered as not fully informed, and his consent might thus not be valid.

#### VI. COERCED SALE OF AN ORGAN

If *human organ* is sold under coercion, the sale seems to be invalid since it fails to comply with one of the basic conditions of "meeting of the minds" (גמירת דעת). A donor who sells an organ because of urgent financial need is in a state of coercion. Payment for the coerced sale does not create a situation of consent unless the seller receives full value and loses nothing on the transaction.<sup>99</sup> Since financial payment cannot reflect the absolute value of an organ, the donor must be losing something on the transaction, thereby invalidating the sale. The giving of a gift also requires full consent of the donor. Just as a gift given without full consent is invalid,<sup>100</sup> so the gift of an organ on account of financial stress or without full consent would be invalid.

#### VII. SUMMARY

1. There is no halachic prohibition against receiving compensation for donated organs.
2. Sale of an organ as a result of desperate financial distress is likely to create a situation of coercion without full value being paid. Such a situation lacks "complete consent" and the sale is therefore void.
3. A donor's incomplete understanding of the medical consequences of the removal of an organ is likely to invalidate the sale.
4. In light of the differences in various cases the donation of organs for payment should be regulated, and requires fully informed prior consent. This should eliminate exploitation on account of uninformed consent.

#### D. LEGALLY INCOMPETENT PERSONS

##### I. THE PRACTICAL QUESTION

"A patient requiring a kidney transplant had a mentally retarded son whose kidney would be suitable for transplantation. Under what circumstances is it permissible to perform the transplantation procedure? In this case there arise difficult questions both in halachah and in the realm of general morality."<sup>101</sup>

This was the actual case brought before the Israeli Supreme Court, and which led to a decision prohibiting the removal of a kidney from a retarded son for transplantation into his father. The court's decision was based on an evaluation of benefit to the father as weighed against injury to the son.

"After evaluating and balancing these considerations we have come to the conclusion that in the case before us we cannot authorize the removal of the son's kidney for transplant into the father."<sup>102</sup>

The Supreme Court purposely declined to formulate a generally applicable rule. The Court preferred to deal with the single case at hand without establishing obligatory principles in cases of donation by legally incompetent persons.<sup>103</sup>

However, in the world of halachah the ruling having been made would be applicable to other similar cases, and would therefore have wider effect than the decision of the Israeli Supreme Court.

## II. AUTHORITY OF A LEGAL GUARDIAN

A legal guardian (אפוטרופוס) is appointed by the court to manage the financial affairs of a minor or a mentally retarded person.<sup>111</sup> The need to appoint a guardian is derived from the Torah<sup>112</sup> as well as from general logical reasoning<sup>113</sup>. The authority of the guardian to manage the property of a minor is derived from the principle that one may act on behalf of another to his benefit even in his absence (זכין לאדם שלא בפניו)<sup>114</sup>. This principle in turn is derived from the scriptural verses dealing with the distribution of the Holy Land<sup>115</sup> and from the power of the court to dispose of private property by the process of law (הפקדן בית-דין הפקר)<sup>116</sup>.

According to the Talmud<sup>117</sup> and codes<sup>118</sup> the authority of a guardian is limited to financial areas. He has no rights over the body of his ward.<sup>119</sup> Therefore, a guardian has no rights as to removal of an organ from his ward.

It is true that under certain circumstances a father or teacher is permitted to strike a child,<sup>120</sup> but this is related to halachic principles of education and is not derived from the relationship between guardian and ward.

## III. PRESERVING THE LIFE OF A WARD

The power of a guardian in relation to a ward does not relate to removal of an organ or limb from a ward. His being faced with the possibility of saving a ward's life by removal of an organ or limb from the ward is just the same as that of any other person who can save the life of another by removal of an organ of his, and is bound by the same principles<sup>121</sup>.

The same principle which obligates us to save legally competent persons (even without their consent) obligates us to save the life of a minor who is legally incompetent. This principle has nothing to do with the fiduciary relationship between a guardian and his ward.

## IV. SELLING THE KIDNEY OF A WARD FOR THE PURPOSE OF IMPROVING THE QUALITY OF HIS LIFE OR HIS LIFE EXPECTANCY

May we permit the poor among us to sell an organ in order to improve life expectancy of the donor? As long as society has not reached such moral standards that selling an organ would be out of question, this could be halachically permissible. But one could hardly call this meritorious! It is preferable that every individual, and society as an organized body, come to the aid of the desperately poor donor, rather than leave him no recourse other than selling a kidney. With this in mind society should all the more be required to help those who are legally incompetent who may have no other means of support.

Those who hold that the preservation of life supersedes all but three prohibitions might agree that it is permissible<sup>124</sup> to buy non-vital organ from the desperately poor person who has no other means of supporting himself<sup>125</sup>.

## V. SAVING THE GUARDIAN'S LIFE

If transplanting the kidney of a ward into the body of the guardian is the only available means of saving the guardian's life, and if the guardian is the only one who is able to care for the ward and thereby prevent his institutionalization, and if institutionalization would likely shorten the ward's life expectancy, the procedure is comparable to the case of the sale of a kidney in which the donor of the kidney receives consideration from the recipient and could be permissible.

This situation is almost identical with that of selling a kidney of a ward in order to improve the quality of the ward's own life. The absence of any other means of lengthening the life of the ward indicates a major failing on the part of society. It is the duty of society to offer other solutions in such cases, as a result of which there would be no reason for permitting the removal of the kidney of the ward, unless the procedure is undertaken medically to save the life of the ward himself.

תושלביע

## NOTES

1. Tapson, J.S., "The Risk of Donor Nephrectomy," *Int. J. Artif Organs* 8(1), 13-16 (1985).

2. Weiland D. et al., "Information of 628 Living-related Kidney Donors at a Single Institution with Long Term Follow-up in 472 Cases," *Transp Proc.* 16, 5 (1984).

3. Vincenti F. et al., "Long-term Renal Function in Kidney Donors: Sustained Compensatory Hyperfiltration with No Adverse Effects," *Transplantation* 36, 626 (1983).

4. Skin is an example of a tissue which is vital for preserving life.

5. Black, D. and Jones N.F. (eds.), *Renal Disease* Blackwell: 4th ed (1979), p 528.

6. Vollmer, W.M. et al., "Survival with Dialysis and Transplantation in Patients with End-Stage Renal Disease," *NEJ Med* 308(26) 1553-1558 (1983). The main factors in improvement are selection of donor candidates by tissue typing (MHC), use of blood transfusion, and new methods for suppression of the recipients' immune system.

7. Combined Report on Regular Dialysis and Transplantation in Europe XVI (1985) offered by Hospal Ltd. Basel, pp.58-61.

8. Levey, A.S. et al., "Kidney Transplantation from unrelated Living Donors," *NEJ Med.* 314: 914 (1986).

9. Weinstein, T. et al., "Kidney Transplantation from Related Donors (in Hebrew)," *HaRefuah* 115 (12): 403-404 (1988).

10. Schwartz, A.I. et al., (eds.), *Principles of Surgery*, McGraw Hill: 4th ed. (1984), pp.278-279.

11. Shuck, J.M. "Biologic Dressing," in Burns, *A Team Approach* edited by C.P. Artz et al., Saunders: 1979, pp.211-223.

12. Or, R. and Salvin, Sh., "Bone Marrow Transplant (in Hebrew)," *Madda* 30 (2-3): 96-101, 117 (1987).

13. An example would be certain severe leukemias (ANLL). See Harrison's *Principles of Internal Medicine* (10th ed., 1983), p 807. In aplastic anemia, on the other hand, 50% of all patients die within four months of diagnosis. Only 10-20% recover without bone marrow transplant (*ibid.*, pp 1886-1894).

- 14 See R. Arnon, "Karl Landsteiner, Discoverer of Blood Groups (in Hebrew)," *Madda* 14(3), p 177 (1969)
- 15 Yoma 85b.
- 16 This principle was adopted by the Israeli Supreme Court and emphasized by Justice Beiski in a decision dated 16 June 1986 (480/85 and 527/85)
- 17 Yoma 82b., *Pessachim* 25a-b. and *Sanhedrin* 74a
- 18 *ibid.*, according to Rashi (*Yoma* 82b. s.v. mai chazit).
- 19 *Mishneh Torah, Rotseach* 2:2
- 20 *Issur ve-Hetter*, 59:38; *Sefer Chassidim* 674
- 21 *Haggahot Maimoniot* quoting the Palestinian Talmud in *Kesef Mishneh, Rotseach* 1:14; *Bet Yosef, Choshen Mishpat* 426 Cf R. N T J Berlin, *Ha'amek She'elah* 147:2 and A S Sofer, "Lifesaving (in Hebrew)," *HaMa'yan* 22:3 (Nissan 5742), pp.31- 40
- 22 *Sefer Me'irat Einayim* 426:2.
23. In war one is obligated to endanger oneself to save others. Therefore it is halachically prohibited to abandon a battle field. See *Mishnah Sotah* 8:6 and *Tsits Eliezer* 12:57.
24. Resp. R. Hai Gaon in *Sefer Ha-Eshkol, Hilchot Sefer Torah* (ed Auerbach) II:49; *Piskei ha-Rif, Eiruvim: Eretz Yisrael beSifrut ha-Teshuvot* I:18-26.
- 25 *Tosefta Terumat* (ed. Lieberman), VII:20.
26. *Mishneh Torah, Yesodei ha-Torah* 5:5
27. *Palestinian Talmud, Terumat* 8:4.
28. S Atlas quoted in a footnote in J.J. Weinberg, *Resp. Seridei Eish* 2:78; *Gesher ha-Chayyim* 2:2 (note 3); I Jakobovits, *Jewish Medical Ethics* (in Hebrew), p.152; See also R. Weinberg's response, *ibid.*, Sect. 4, p 199.
29. According to the well known principle of set theory there are no fewer points in a line of length a than in a line of length 2a
30. Radbaz, *Leshonot ha-Rambam*, 1582 (218); *Pitchei Teshuvah, Choshen Mishpat* 426:2, I 426:2; *Mishnah Berurah* 329:19; *Tsits Eliezer* 8:15, ch. 10(13); 9:17, ch. 5.
31. Radbaz, *ibid.*, Cf. R. I. Zilberstein, "Endangering Physicians' Lives," *Assia* 41(11:10), pp.5-11 (1986); *Minchat Chinnuch* 296:
32. See: Tapson, (note 1 above).
33. See: note 23 above.
34. See: Z. Nebenzahl, "Shortening Life," in *Sefer Assia* 5, pp.259-260.
35. See: Tapson, (note 1 above).
- 36 *Resp Radbaz* 1052 (627).
- 37 *Proverbs* 3:17. Cf. *Sotah* 32a, *Yevamot* 15a, 67b.
- 38 Only a kidney donated from a living relative lengthens life expectancy. Cf. notes 6-7 above.
39. In contrast to removal of a kidney which does not cause disability (See Tapson, note 1 above), removal of a limb does cause a substantial disability
40. Radbaz, *ibid.*; *Tsits Eliezer* 9:45; *Minchat Yitschak* 6:103
- 41 *Tsits Eliezer* 10:25, ch. 7: See R. O Yosef, "Kidney Transplants," in *Dine Israel* 7 (1936); R. C D. ha-Levi, "Organ Transplants," *Sefer Assia* 4, pp.255-257; *Nishmat Avraham*, Y.D. 349:3(31).
42. The guardians consent is valid only when it is in the interests of the ward.
- 43 *Leviticus* 19:13; see *Bava Metsi'ah* 61b.
44. *Deut.* 25:3.
45. Rabbenu Yonah, Comm. on *Pirkei Avot*, 1:1.
- 46 *Talmud Bavli, K'tuboth* 33a (cf. Rashi on *Deut.* 25:3).
- 47 According to Rabbenu Yonah, *Sha'arei Teshuvah* 3:139, personal injury may be considered part of the prohibition of killing, therefore it would not be suspended even in life saving situations.
- 48 According to the unique opinion of R Moshe ibn Chabib (*Tosafot, Yom ha-Kippurim* 82b, quoted in I Jakobovits, *Jewish Medical Ethics* (in Hebrew), p 120) one may save one's own life by injuring another when there is no alternative
- 49 See *Ketubbot* 19a and Ramban in *Shittah Mekubbetset, ibid.: Palestinian Talmud, Shabbat*, at the end of ch 14; *ibid.* *Avodah Zarah* 2:2; *Babylonian Talmud, Bava Kama* 60b.
50. Rashi, *Tosafot*, and Rosh, *Bava Kama, ibid.*: *Shittah Mekubbetset Bava Kama* 117b; *Resp Rashba* 1:17; *Resp Binyan Tsion* 167, 168; *Sho'el u-Meishiv* I:2 (174); *Iggerot Moshe* Y D I:214; *Sedei Chemed, Ma'arechet Alef*, sect 16; *Resp Chatam Sofer* Y D 319; *Nishmat Avraham* Y D 349:3(2)2.
51. cf. *Yalkut Shim'oni*, II Samuel 168; cf *Bava Kama* 60b
- 52 cf. Rabbenu Yonah, *ibid.*; *Ran Pesachim* 25a; *Rema, Y D* 157:1
- 53 Rabbenu Yonah, *Ran*, and *Rashba, ibid.*, Cf. *Palestinian Talmud, Avodah Zarah* 2:2 But according to Maimonides in *Mishneh Torah, Yesode ha-Torah* 5:2 only the actual violation of the three prohibitions calls for sacrificing one's life. Unlike *Ran*, Maimonides does not extend the obligation to sacrifice one's life to include acts related to the three prohibitions Cf *Tosafot, Pesachim* 25a. s.v. *Chuts m'atsei asheira*
- 54 cf. *Assia*, vol 3 (Rubin Mass Pub., Jerusalem 1982) pp.295-325.
55. See notes 47, 52 and 53 above. Cf *Nishmat Avraham, Y.D* 157:4(1).
56. *Deut.* 4:9 Cf. M. Halperin, "Smoking," *Assia*, vol. 5 (1986), p. 238, note 7.
57. The power to enforce compliance might be limited to the court. Cf. *Netivot ha-Mishpat* 3:1 and *Meshovev Netivot, ibid*
- 58 Jewish law places certain limitations on the rights of a person. For example, suicide is prohibited See *Bava Batra*, ch 2 regarding the damager's obligation to remove the source of damage In essence the rights of the individual are limited in accordance with the law.
59. Decision dated 16 June 1986 (480/85 and 527/85).
60. See *Nishmat Avraham*, Addenda (in print), E.H. 80:12 (quoting R. Shlomo Zalman Auerbach; *Nishmat Avraham, E.H* 80:1 (quoting *Resp She'eilat David*)
- 61 *Mishnah, Nedarim* 9:5.
- 62 *Nedarim* 65b
63. *Palestinian Talmud, Shabbat* 6:1.
64. *Bava Kama* 91b. There is a difference of opinion among contemporary authorities regarding the question whether a person is considered to own his body. According to Rabbi Shlomo Yosef Zevin a person does not own his body (see "Mishpat Shylock" in his *Le-Or ha-Halachah*). Rabbi Saul Israeli, on the other hand, is of the opinion that a person does own his body (see the addenda to Rabbi Zevin's article).
- 65 *Deut.* 20:19 According to Rabbenu Yonah the Torah prohibits waste of money (see his *Sha'arei Teshuvah* 3:82 and compare Maimonides, *Sefer ha-Mitsvot* Neg 57). But in *Hilchot Melachim* 6:10 Maimonides wrote that the prohibition is of rabbinic origin. This would seem to indicate that the Torah does not prohibit it. There is also a difference of opinion regarding the prohibition of injuring one's self. According to Meiri (*Bava Kama* 91b) the Rabbis prohibited injuring one's self But *Rashba* (*Resp.* 616) wrote that the Torah prohibits this See *Resp. Yabbia' Omer* I Y.D 8:6
66. *Bava Kama* 91b.
- 67 See *Tiferet Yisrael, Mikva'ot* 2:7, Bo'az 7

68. *Mishnah Bava Kama* 8:6  
 69. *Bava Kama* 91b. *Tosafot* s.v. "Ella hai tanna."  
 70. *Penei Yehoshua*, *ibid.*  
 71. cf. *Mishnah*, *ibid.*  
 72. *Penei Yehoshua*.  
 73. *Shittah Mekubbetset*, *Bava Kama*, *ibid.* : Tur Ch.M 420.  
 74. *Mishneh Torah* Chovel u-Mazzik 5:1.  
 75. *Choshen Mishpat* 420:31.  
 76. *Iggerot Moshe* Ch.M 1:103.  
 77. *Nedarim* 37a; *Mishneh Torah*, *Talmud Torah* 1:7. According to Tur YD 221, nowadays it is permissible to accept payment for teaching Torah.  
 78. *Mishneh Torah* *ibid.*, cf. *Rosh*, *Nedarim*, *ibid.*  
 79. Rabbi David Chazan, *Ma'archei Lev* 29d (quoted in *Dine Israel* 7, p.87).  
 80. *Y.D.* 336:  
 81. Ramban, *Torat ha-Adam* Sha'ar ha-Sakkanah. Cf. S Kottek, "Payment for Medical Services," in *Sefer Assia* 5, pp. 34-39.  
 82. Ramban *ibid.*, Cf. *Y.D.* 336:2.  
 83. According to *Mishnah Bava Kama* 8:1 and the *Talmud Bava Kama* 4b.  
 84. "Tsa'ar" according to *Bava Kama* *ibid.*  
 85. *Resp. Mahari mi-Barona* 114  
 86. *Y D. ibid.*  
 87. *Machaneh Efraim*, *Sechirut* 17; *Resp. Rivash* 476.  
 88. Cf. *supra*.  
 89. Regarding the amount which the donor may demand see Ramban *ibid.*; Ch M. 264. *Y D.* 336. and *Bi'ur ha-Gra* *ibid.*, sect. 11  
 90. Cf.: *Ta'amei Massoret ha-Mikra* le-Rab Judah ha-Chasid, end Ki Teitsei.  
 91. Cf. *Malbim* on the *Sifrei* 134.  
 92. Cf.: Ramban, *Comm.* on the *Torah* *ibid.*; *Sefer ha-Chinnuch* 580.  
 93. *Mishne Torah*, Introduction.  
 94. Ch.M. 2; *Sedei Chemed*, *Kelalim*. Tav 26.  
 95. Quoted in A. Karmi and E. Saggiv, *Roshlanut refu'it be-yahadut ube-Yisrael*, 150  
 96. Quoted in Karmi, *ibid.*  
 97. Karmi *ibid.* . 153-154  
 98. See M. Halperin. "Haskamah le-nittuach," *Assia* 44, 31-32  
 99. Rashbam, *Bava Batra* 48a. c.v. *Modeh Shemu'el* Cf *Ch.M* 205:4.  
 100. Rashbam, *ibid.*, s.v  
 101. Justice Menachem Elon in an Israeli Supreme Court decision dated 3 July 1988 (698/86: 151/87; 184/87)  
 102. Justice Elon, *ibid.*  
 103. *Mishneh Torah* *Nahalot* 10:5: *Ch M.* 290:27.  
 104. Ramban *Gittin* 52b: *She'eltot* 139  
 105. *Netsiv*, *Ha'amek She'eilah* 139:2  
 106. *Eiruvin* 81b: *Kiddushin* 42a.  
 107. Ramban *ibid.*; *She'eltot* *ibid.*  
 108. *Ritva Gittin* 52a.  
 109. *Gittin* 52a.  
 110. *Mishneh Torah* *Nahalot*, ch 11: *Ch M.* 290.  
 111. *Resp. R Moshe Alsheich* end 38  
 112. *Mishnah Makkot* 2:2.  
 113. Rabbi J Emden *Mor u-Ketsi'ah* 328. Cf. M Halperin "Consent for Surgery on Shabbat," *Assia* 33 (1988), pp 31-33; *Assia* vol. 3 pp.295-325  
 114. But one could hardly call this meritorious, as stated above  
 115. See notes 49-53 above