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בית דין דאמריקא

Halachic Will Materials

THE HALACHAH OF WILLS

By Rabbi Mordechai Willig

The monetary laws of the Torah, as recorded in Choshen Mishpat, have unfortunately been largely disregarded even within the Orthodox community. Litigation between two Jews before a secular court is prohibited,[1] and one who extracts money to which he or she is not entitled under Torah law is guilty of gezel (theft).

The principle of dina d'malchusa dina does not apply when two Jews are involved, for if it would, then – as the Ramo says[2] – all the (monetary laws) of the Torah would be botel (null and void). While in many circles Choshen Mishpat is de facto botel, the observant individual resolves monetary disputed only by compromise or in a din torah before a beis din.

However, there is one area of monetary law which affects everyone, even the majority who succeed in avoiding disputes and litigations. This is the area of Yerusha. According to the Torah's laws of inheritance, a man's sons – if he has any – are his sole heirs,[3] each getting an equal share, except for the b'chor who gets a double share.[4] In addition, the halacha provides for the widow, who can exercise one of two options. She can receive food, clothing, and shelter from her late husband's estate indefinitely, losing these rights only if and when she remarries,[5] or she can receive a lump sum payment of the kesuba, which currently totals over $33,000.[6] The halacha also provides for single daughters, entitling them to food, clothing, and shelter until they mature,[7] and a substantial dowry as well.[8]

It is a common practice to leave a will by which a person's estate is divided according to his own wishes, and not in accordance with the halacha. However, a secular will has no halachic validity, since it takes effect after death, at which time a person has no halachic power to transfer his possessions.[9] Therefore, a person (or charity) designated in a will has no halachic right to the property bequeathed to him, and may take it only if the rightful halachic heirs agree to give it to him. Obviously, leaving such a will could easily lead to gezel, and, therefore, it is a violation of lo yuchal l'vaker – even though this attempt has no halachic validity.[10]

In fact, the only will recognized by the Torah is one made by a very sick man (sh'chiv mera), in which he divides his property among his sons in unequal or specified shares.[11] Of course, a man can give a gift to whomever he pleases, and can even make it conditional upon a lack of retraction until his death, which would effectively give him full control in his lifetimes.

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[1] שו"ע חו"מ כו:א
[2] שם שסט:יא
[3] רמב"ם הלכות נחלות א:ה.
[4] שם ב:א
[5] שו"ע אה"ע צג:ג אך ע"ש בפ"ת סק"ה ויל"ע בזה"ז
[6] חזון איש אה"ע סו:כא
[7] שו"ע אה"ע קב:א
[8] שם קג:א
[9] שו"ע חו"מ רנח ורמ"א שם ס"ב
[10] הוספות לספהמ"צ ל"ת יב
[11] שו"ע חו"מ רפא:א

However, a halachic kinyan is required, the simples of which is sudar, which is effective for both real and movable properties. It is not effective, however, for property acquired after the gift is made or for a person's outstanding loans.[12] While written loans (e.g. bonds and bank accounts) can be transferred, there are logistical difficulties involved. In addition, a division by percentage, which includes future acquisitions, cannot be achieved by means of a gift. Hence, dividing one's estate by means of gifts is effective only in limited cases.[13]

Our rabbis, therefore, devised a different method to enable a man to arrange that a person who is not a halachic heir will receive a part of his estate. This method was widely used when it was customary to leave one's daughter half a share (chelek chatzi zochor) in one's estate.[14] The procedure is as follows: the man writes a note of indemnity, obligating himself to pay an enormous sum of money to his daughter. It is stipulated, however, that if his son(s) will give his daughter a certain percentage of the estate, then the obligation is null and void. Upon his death, the son(s) will perforce give her entire estate as a creditor.[15] This arrangement can be implemented to bequeath, in effect, a share of one's estate to as many people – and/or charities, as one desires, and can also be made conditional upon a lack of retraction during one's lifetime.[16] Since secular law probably does not recognize such an obligation, and since often it cannot be assumed that the heirs will abide by Torah law, it is suggested that a regular will be drawn up together with an accompanying document containing an halachically valid "will" with the same net results. This would avoid the halachic problems which would otherwise face the person who writes the will, the ultimate heirs and the lawyers involved in the estate.

[12] רמ"א שם רנז:ז
[13] פ"ת שם סק"ו
[14] רמ"א שם רפא:ז
[15] שם ועיין פ"ת שם
[16] ואף דבנוסח שבנחלת שבעה (סי' כא) איתא "דלא למהדר בי"", נראה שבזה"ז רוב בני אדם לא יסכימו לכתוב כן, ובפרט שיכול לחזור בו מהצואה שנעשה בערכאות.

Form of Halachic Will

Introduction

Jewish religious law does not recognize the validity of a will. Except for unusual circumstances, one cannot arrange for his estate to be divided in a manner different from Torah law. However, by creating a conditional obligation, one can achieve the same net result as that of a will and other government laws, in a way which conforms to Torah law.

A person who writes a will should obligate himself to pay a sum of money greater than his total assets. It is stipulated that the obligation is retractable, and is not payable until one moment before death. Therefore, the obligation has absolutely no effect during one's lifetime.

If one wills his entire estate to one person, e.g. his wife, he should obligate himself to pay her a sum of money greater than his total assets. In such a case, paragraph two in the obligation form below should be omitted.

If the will includes many persons, the obligation is made to the prime beneficiary, or several beneficiaries. In this case it is further stipulated that if the Torah heir(s) carry out the terms of the will and other government laws, then the obligation is null and void.

The obligation becomes effective when the form below is executed and delivered to the beneficiary or any other party (e.g. a rabbi or a Jewish attorney) who receives it on the beneficiary's behalf, even without the beneficiary's knowledge.

THE OBLIGATION

I, the undersigned, hereby obligate myself to _____ the sum of _____ effective immediately, but not payable until one minute before my death, on the condition that I do not retract this obligation at any time prior to my death. All the property which is mine at that time, both real and personal, should serve as security for the payment of said obligation.

I hereby stipulate that my heirs, as defined by the Torah, shall be given the option of paying the above obligation, or, in lieu thereof, of carrying out the terms as specified in my last Will and Testament and, in addition, carrying out all transfers of property upon my death which are considered "non-testamentary transfers" in accordance with the laws of the State of _____. If my Torah heirs abide by the terms of my will and aforementioned state laws, then the above obligation is null and void.

The above obligation is undertaken by a kinyan sudar in a beis din chashuv (a proper means of transaction in an important Jewish court). The above condition(s) is (are) made in accordance with the laws of the Torah, as derived from Numbers Chapter 32.

Signed this _____ ,2_____ at _____

_____

Wills: Halakhah And Inheritance

By: Rabbi Aryeh Weil and Martin Shenkman

Although many parents prefer to leave their estates to their children in equal shares, there are many different ways in which you can decide to leave your assets. Biblical love, however, prescribes certain specific distributions of assets following death. This raises the issue as to what you can do where you will provides for the distribution you believe best for your family, but you would also prefer to show allegiance to the requirements of traditional Jewish law. There is a practical approach to achieving both objectives with little difficulty.

Under Biblical law, a widow is entitled to support and maintenance for life, or until remarriage. A widow could also elect to forego, at any time, this support and instead claim a lump sum settlement provided for in her marriage contract (ketubah). Sons are generally the exclusive heirs, with the first born son being entitled to a double portion. Single daughters are to receive support and maintenance and a dowry upon marriage (Numbers 27:5-11). This presents an obvious difficulty if you wish to distribute your estate according to your own design, but would prefer not to violate the precepts of Jewish law. The solution is generally found through a combination of two documents: a will reflecting your intended distributions of your estate, drafted in accordance with current civil law; and a document creating a means of circumventing the Biblical inheritance requirements (yerushah) without technically violating them, drafted in accordance with Jewish law. The ease of compliance should serve as an encouragement to those concerned to comply with the religious precepts.

To understand the suggested approach, some of the basic principles and issues should be noted. Jewish law makes an important distinction between inter-vivas (lifetime) gift and a testamentary (effective on death) bequest. Generally, a person can gift any property while alive, and in any manner. This is because the Biblical laws of inheritance only apply to assets owned at death.

The obvious solution, then, would be to make an inter-vivas gift to the desired heir (such as a daughter). If you gave a deed to your daughter for property which was only to become effective on your death, this would not be effective under Jewish law. This is because at the instant of your death the Jewish laws of inheritance would apply and the assets would have to be distributed accordingly. Alternatively, if you attempted to make a gift which was to become effective at a later date, a number of additional problems are raised. One problem with this approach is that the transfer of most property requires a formal act (kinyan). A kinyan cannot be effective for property which is not owned at the time of the gift transaction. Also, for a transfer to be effective under Jewish law, a kinyan must generally be completed at the time of the transfer.

The solution to this situation is the creation of a debt in favor of the persons you wish to inherit property in excess of what they would be entitled to under Jewish law. This technique creates a technical compliance with Biblcical law through a separate contractual document (shetar) which creates a fictional debt (a chov). There is no prohibition in Jewish law concerning the creation of such a debt. The debt is stated to mature one minute prior to your death. The amount of the debt is set at some amount greater than the intended inheritance. The heirs, under Biblical law, are given the option of paying this substantial debt, or as an alternative, agreeing to the distribution provided for under your secular will. The intent is that they would obviously comply with this alternative in order to preserve a greater inheritance for themselves.

Example: Father leaves an estate worth $3 million. His will provides that Son-1, Son-2 and Daughter each receive $1 million. Biblical law would require the following distribution: Son-1 $2 million, Son-2 $1 million and Daughter support and a dowry. Father executes a conditional shetar chov creating a debt of $2 million in favor of Daughter. Son-1 can agree to the equal one-third allocations provided for in Father's will, or in the alternative attempt to secure his $2 million inheritance provided under Jewish law, and then make a payment of $2 million to Daughter. The choice will be obvious, each child will receive an equal $1 million inheritance as Father intended, and Father's estate will have technically been distributed in accordance with the precepts of Jewish law. The fictitious debt will lapse by its own terms.

This approach is not without both religious and secular doubts. All authorities are not in full agreement concerning the effectiveness of this approach under Jewish law. From a civil perspective the creation of this fictional debt could conceivably raise a number of issues. Although the contractual form of debt (shetar chov) does not have to contain a fixed maturity date or stated interest rate (two factors used to identify a debt for tax and civil purposes) there is no guarantee that the debt will not be regarded as a true indebtedness for all purposes. If the debt is in fact a valid indebtedness could the payee enforce the payment of the amount due and hold your estate liable? What if one of the heirs wished to create problems for the other family members by using the documents as part of a will challenge? If the debt is recognized under civil law will the imputed interest rates provided under the Internal Revenue Code apply to create income and expense for family members? Would the eventual relief of the debt without payment (which is obviously not intended) create relief of indebtedness income? Does the creation of the debt itself trigger a gift tax? It is hoped, although no assurance can be given, that should such a situation ever arise, the civil, legal, and tax authorities would recognize the intent and purpose of the transaction and not permit such unwarranted and harsh results to occur.

Two steps can be taken to minimize this risk. First, some of the language used in the contractual arrangements creating the debt should be the appropriate Hebrew terms, so as to distinguish the document from what may be considered a shetar chov under civil law. Secondly, there does not seem to be any delivery requirements under Jewish law to make the shetar chov valid under religious law. As a result, only a single executed copy of the shetar chov should be prepared. This copy should be held in safekeeping by your Rabbi. This alone should serve as a substantial safeguard to avoid unintended problems.

As a final step in addressing the compliance with the Biblical laws of inheritance, it is suggested that an additional paragraph be added to your secular will. This additional provision has two purposes. The first is to provide for some amount of money which should be distributed in accordance with Jewish law. This will serve to remind your heirs of the rules and customs involved and thus encourage them to take similar steps to make their estate plans conform to Jewish law. The second objective of this additional provision is to provide language which would make the distributions called for under even your secular will come closer to compliance with the Biblical requirements of inheritance. As discussed above, everyone is free to complete inter-vivos gifts. Thus, all transfers under the will could be stated to have been effected by gift transfers, effective one minute prior to your death, and in accordance with the completion of a proper kinyan as required under Jewish law. This language should provide some basis for a Rabbinic Court (Beit Din) to sanction the distributions under your secular will on the basis of your conformity with local custom and certain minority Rabbinic opinions concerning inheritance.

Proposed Language to Add to Secular Will

Conformity with Jewish Law

It is my intent that all transfers of property made under this will shall be in conformity with Orthodox Jewish law (halakhah). Therefore, for the sole purpose of meeting this objective, I provide as follows:

1. I hereby devise and bequeath the sum of One Thousand Dollars ($1,000.00) to my heirs, as defined in accordance with halakhah, to be divided among them in strict accordance with halakhah.

2. Each and every distribution or other transfer of any property under this Will, except for the bequest set forth in Subsection 1., above, shall be deemed to be made by way of gift, effective the instant prior to my death. Each such transfer by gift shall be deemed to have been completed through a proper kinyan, as appropriate for each type of property, and as defined by halakhah.

Conditional Shetar Chov

WHEREAS, the undersigned testator ("Testator")

I, the Testator, hereby accept upon myself this Chov to [NAME OF PERSON TO RECEIVE DISTRIBUTION UNDER YOUR SECULAR WILL WHO IS NOT AN HEIR UNDER BIBLICAL LAW] the sum of [AN AMOUNT IN EXCESS OF THE BEQUESTS TO SUCH PERSON] Dollars, effective immediately, but not payable until one minute before my death, on the condition that I do not retract this obligation at any time prior to my death. All the property which is mine at that time, both real and personal, shall serve as security for the payment of the said obligation.

I hereby stipulate that my heirs, as defined by Biblical law (Torah) as interpreted in accordance with Orthodox Jewish law (halakhah) (the "heirs") shall be given the option of paying the above obligation, or, in lieu thereof, of carrying out the terms as specified in my Last Will and Testament executed on DATE OF YOUR WILL and, in addition, carrying out all transfers of property upon my death which are considered "non-testamentary transfers" in accordance with the laws of the State of NAME OF YOUR STATE. Should my Heirs choose and comply with this option, then this Conditional Shetar Chov shall become void.

The above condition(s) is (are) made in accordance with the laws of the Torah, as derived from Numbers 27:5-11.

Any dispute arising out of this document, or the transactions contemplated hereunder, shall be brought before, and settled in, a court of Jewish Law, a Beit Din.

Signed this MONTH, DAY, YEAR, at ADDRESS WHERE EXECUTED.

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(Signature)