Equitable Distribution and the Enforceability of Choice of Law Clauses in Beit Din

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I. Choice of Law Clauses

A choice of law clause is a provision in a contract specifying that any dispute arising under the contract shall be resolved in accordance with the law of a particular jurisdiction. Section 3(d) of the Beth Din of America's Rules and Procedures provides for the Beth Din to recognize a choice of law clause:

> *In situations where the parties to a dispute explicitly adopt a "choice of law" clause, either in the initial contract or in the arbitration agreement, the Beth Din will accept such a choice of law clause as providing the rules of decision governing the decision of the panel to the fullest extent permitted by Jewish Law.*[2]

To what extent is a choice of law clause, where Jewish parties elect to have their dispute governed by the legal principles of a particular jurisdiction, "permitted by Jewish law"?

II. Rashba's Responsum

The *locus classicus* of this complex question is a responsum of Rashba (6:254), which the Beit Yosef excerpts in Choshen Mishpat 26.

The query in the responsum reads as follows:

מעשה היה בפירפיניאן בראובן שהשיא את בתו לאה לשמעון והכניס לו עמה סך ממון בנידוניא וילדה לו בת ואח"כ מתה לאה ואחר זמן מתה ג"כ הבת שילדה לו. ועכשיו עמד ראובן ותבע בדיני הגויים שיחזיר לו אותו ממון הנדוניא שהכניס לו עם לאה בתו. ואעפ"י שהבעל יורש את אשתו והאב את בתו בדיני ישראל טוען ואומר: שאין לחוש לירושת הבעל כיון שהכל יודעי' שהם הולכים בדיני הגויים והרי כל

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[2] Beth Din of America, *Rules and Procedures*, available at https://bethdin.org/rules.

הנושא אשה שם כאילו התנה כן... ועל ירושת האב בנכסי הבת, טוען שהמלך חקק בנימוסיו שכל שימות הולד תוך זמן ידוע שיהא מה שיש לו מצד האם ליורשי האם, ודינא דמלכותא דינא

> It happened in Perpignan that Reuven married off his daughter Leah to Shimon and provided her with a sum of money as a dowry. [Sometime thereafter] Leah gave birth to a daughter, after which Leah died. After that, the daughter also died. Reuven now claims, under the rules of the local non-Jewish law, that he is entitled to recover the dowry that he provided his daughter Leah.
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> [Reuven argues that] even though under Jewish law a husband inherits the assets of his deceased wife (according to which Shimon would inherit Leah's assets) and a father inherits his daughter (according to which Shimon would inherit the assets of the daughter born to him and Leah), the [halakhic] right of a husband to inherit his spouse is not applicable here because it is well known that [the Jewish community of Perpignan] follows the laws of the gentiles [on this matter] and therefore anyone who gets married in Perpignan, it is as if they stipulated so (i.e., that the husband does not receive the dowry of his deceased wife)...
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> And regarding [the halakhic rule] that a father inherits the assets of his deceased daughter (such that Shimon would inherit any assets belonging to the daughter he had with Leah), [Reuven] claims that the king enacted a law that if the child dies within a certain period, the assets that came into the marriage from the mother's side of the family (the dowry) revert to the mother's relatives. And the law of the kingdom is [halakhically] binding (*dina de-malkhuta dina*).

Note that Reuven advances two separate claims. First, he claims that the halakhah of spousal inheritance is inapplicable because the custom in the Jewish community of Perpignan was to follow the non-Jewish law, which did not recognize a husband's right to inherit his wife's assets. Reuven argues that anyone who gets married in Perpignan implicitly adopts this practice as a condition (*tenai*) at the time of the marriage. According to this claim, Shimon would not be entitled to inherit Leah's dowry at the time of her death.

Second, Reuven claims that, supposing Shimon and Leah's daughter inherited the dowry upon Leah's death, now that the daughter died, the dowry should revert to him (Reuven), the maternal grandfather, and not to the father (Shimon). Although this contradicts the rules of Jewish inheritance, according to which a father (and not the maternal grandfather) inherits the assets of a deceased daughter, Reuven argues that the non-Jewish law of the jurisdiction provides that if a child dies soon after the marriage, the assets the child inherited from the mother (such as the dowry) will revert back to the mother's family. Reuven claims that the law of the jurisdiction (*dina demalkhuta*) should be followed over the Jewish law of inheritance.

The First Claim

Rashba responds to each of these claims separately. He accepts Reuven's first claim that the custom in Perpignan overrides a husband's halakhic right of spousal inheritance. Rashba writes:

כל דבר שבממון תנאו קיים ובאמת אמרו שמתנין בכענין זה וכדאמרי' בירושלמי הני דכתבין אין מיתת בלא בנים תהדיר מוהרא לבי נשא תנאי ממון וקיים. ומוסיף אני על זה שבכ"מ שנהגו להתנות ולעשות כזה תנאי אפי' הנושאים שם סתם גובין מהם אם מתה בלא בנים שכל הנושא סתם ע"ד הנוהג שם בישראל נושא וזהו שקראוה בפ' המקבל דרישת הדיוט

> In any monetary matter, one's conditions and stipulations are halakhically binding. And in fact, the Rabbis maintain that one can stipulate in this type of matter (that a husband will not inherit his wife's dowry). As the Yerushalmi states: "those who stipulate [before the marriage] 'if the wife dies without children the dowry shall revert to the wife's family'—that is a valid monetary stipulation and is binding."
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> And I go further: anywhere where the regnant custom and practice is to stipulate and to make such a condition, even those who get married without making such a stipulation explicit, the dowry should revert [to the wife's family] if the wife died without children. This is because anyone who gets married, without specifying otherwise, intends to do so in accordance with the prevailing custom in the Jewish community. And this [legal principle] (recognizing the normative force of communal practice) is called "derishat hedyot" (i.e. giving legal force to popular practice).

To summarize Rashba's position: He opens by stating that parties have broad discretion to make stipulations in monetary matters (*kol davar she-bemamon tena'o kayam*). He acknowledges that the parties could stipulate for the dowry to return to the wife's family upon her death. Further, where there is a common practice to make such a stipulation, the parties are considered bound by it, even if they did not stipulate so explicitly. The underlying rationale is that when people enter into agreements they do so with the intent of being bound by the prevailing custom and practice in the community. The responsum concludes as it began, by stating that in monetary matters all conditions are valid. Rashba therefore concludes that the parties are bound by the Perpignan custom, and Shimon is not entitled to inherit his wife's assets.

Having established that the custom in the Jewish community of Perpignan to override the Jewish law of spousal inheritance is halakhically binding, Rashba proceeds to criticize the origins of the communal practice. He admonishes the Perpignan community: if the Jewish community adopted the practice *because it was the gentile law*, then it was wrong (*asur*) for them to adopt the practice. It is against the Torah to adopt a gentile law if the reason for adopting it is to copy the gentiles. While Rashba does not call the legal bindingness or efficacy of the practice into question—Reuven still inherits Leah over Shimon—he suggests that Reuven will not benefit from money inherited via a custom of illicit origins. Rashba writes:

ומ"מ לנהוג כן מפני שהוא משפט גויים באמת נ"ל שאסור לפי שהוא מחקה את הגויים וזהו שהזהירה תורה לפניהם ולא לפני גויים ואף על פי ששניהם רוצים בכך והוא דבר שבממון. שלא הניחה תורה את העם שהוא לנחלה לו על רצונם שייקרו את חקות הגויים ודיניהם ולא עוד אלא אפי' לעמוד לפניהם לדין אפי' בדבר שדיניהם כדין ישראל. ע"כ אנו פה תמהים מקום המשפט בעירכם מקום תורה ויתרון דעת איך נתנו יד לכלל דברים אלו שאסרתן תורה שלמה שלנו. ומה ממון יתהנה לירש שלא כתורתנו

> However, to enact such a practice [solely] because it is the gentile law, indeed it appears to me that this is prohibited. For this imitates the gentiles, and the Torah warns against this [when it prohibits adjudication before gentiles] even when both parties agree and even when it is a monetary matter. For the Torah did not leave it to the choice of the nation to which it (i.e. the Torah) was bequeathed [to choose] to elevate the statutes of the gentiles and their laws....

> We are therefore astounded: how can your city, which is a place of Torah and great learning, allow such things [i.e. adopting the gentile law] that the Torah prohibits?... And what financial gain will there be from inheriting property inconsistent with our Torah?

The Second Claim

Rashba then addresses Reuven's second claim: as between Leah's husband, Shimon, and Leah's father, Reuven, who inherits the assets of Leah's daughter? While Jewish law clearly designates Shimon, the deceased-daughter's parent as the rightful heir (not the maternal grandfather), Reuven argued that he is entitled to inherit his granddaughter under the *dina de-malkhuta* (law of the gentile jurisdiction).

Here, Rashba summarily rejects Reuven's claim and declares that any inheritance taken by Reuven under a claim of *dina de-malkhuta* would be theft. A polemical diatribe follows, rejecting *dina de-malkhuta dina* when it clashes with the halakhic inheritance of blood relatives. Further, Rashba notes, universal application of *dina de-malkhuta dina* would render Torah law irrelevant. After all, Rashba states, if the law of the jurisdiction prevailed over Torah law, then we should send our children to law school rather than to Yeshiva. Rashba writes:

ואומר אני שכל הסומך בזה לומר שמותר משום דינא דמלכותא טועה וגזלן הוא וגזלה ישיב... ואם נאמר כן בטלה ירושת בנו הבכור דכל הנחלות ותירש הבת עם הבנים. ובכלל עוקר כל דיני התורה השלמה ומה לנו לספרי הקודש המקודשים שחברו לנו רבי ואחריו רבינא ורב אשי ילמדו את בניהם דיני הגויים ויבנו להם במות טלואות בבית מדרסי הגויים חלילה לא תהיה כזאת בישראל ח"ו שמא תחגור התורה עליה שק

> And I maintain that anyone who relies on *dina de-malkhuta* to permit [overriding the Torah's rules of inheritance] is mistaken and is a thief and must return the stolen goods... If we were to hold this way (that *dina de-malkhuta* can override Jewish inheritance of blood relatives), then the [Jewish law] of a first born's inheritance will be obliterated, and a daughter would receive an equal share with the sons. And in general it would uproot all the laws of the Torah. And [if it were so] why would we need our sacred works [of Jewish law] that were composed by R. Yehudah Ha-Nasi (i.e. the Mishna) and by Ravina and Rav Ashi (i.e. the Gemara), they should teach their children gentile law and send them to study in the gentile academies! Perish the thought of this being true, and God forbid it.

Why does Rashba embrace the "all monetary conditions are valid" (*kol davar she-be-mamon tena'o kayam)* rule in his response to Reuven's first claim but not entertain it at all in his response to the second claim? The answer is quite simple: The first claim pertains to spousal inheritance while the second claim pertains to the inheritance of blood relatives. The Torah rules of inheritance for blood relatives cannot be modified by agreement of the parties or altered through stipulated conditions.[3] In this sense, the inheritance of blood relatives constitutes an exception within *dinei mamon*.[4] By contrast, the halakhic rules of spousal inheritance *are* modifiable by agreement and by stipulation prior to the marriage.[5] An implied condition based on a common practice is no stronger than an explicit condition stipulated by the parties. Since an explicit stipulation to override Shimon's Torah right to inherit his daughter would be invalid, it follows a fortiori that an implied condition based on a communal practice is also invalid. Therefore, Shimon inherits his daughter, and Reuven does not inherit his maternal granddaughter.

III. Some General Conclusions from Rashba's Responsum

In matters other than inheritance of blood relatives, is it permissible for two individuals to agree to a "choice of law clause" that will produce a legal outcome different from what Torah law would have yielded? Rashba began by citing the Yerushalmi that it is acceptable to stipulate to override the Jewish law of spousal inheritance. Rashba himself added that wherever it is customary to make such a stipulation, that stipulation becomes an assumed, implicit condition even when it is not stated by the parties.

At the conclusion of the responsum, Rashba states that two parties can accept upon themselves the non-Jewish law in order to effectuate a transaction that would

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3 See *Rambam*, *Nachalot* 6:1:
אין אדם יכול להוריש למי שאינו ראוי ליורשו ולא לעקור הירושה מן היורש אף על פי שזה ממון הוא, לפי שנאמר בפרשת נחלות והיתה לבני ישראל לחוקת משפט לומר שחוקה זו לא תשתנה ואין התנאי מועיל בה.

4 See *Rambam*, *supra* note 3.

5 See *Rambam*, *Ishut* 23:5–6:
התנה עמה שלא יירשנה הרי זה לא יירשנה... וכן אם התנה עמה שיירש מקצת נכסיה וכן אם התנה עמה שאם מתה בלא בנים יחזרו נכסין לבית אביה הכל קיים.

See also *Rambam*, *Nachalot* 6:8.
Although the Jewish law of inheritance is not modifiable by agreement of the parties, a device called a *shetar chatzi zachar* can be used to distribute one's assets differently from how they would be distributed under the Jewish law of inheritance. See Beth Din of America, *Halachic Will Materials*, available at http://bethdin.org/wp-content/uploads/2015/07/HalachicWill.pdf.

otherwise not be efficacious in Jewish law. Rashba compares this to the Talmud's ruling that allows an unpaid watchman (*shomer chinum*) to modify his Torah status and stipulate to have the liability rules of a borrower (*sho'el*). According to Rashba, these cases reflect the general rule that parties have wide discretion in monetary matters to obligate themselves and generate liability to produce results different from *din Torah.* Moreover, the fact that Rashba compares the "choice of law" stipulation to the Talmud's case of a watchman (*shomer*) suggests that it is *fully permissible* to adopt a "choice of law" provision (just as it is fully permissible for the watchman to stipulate to modify his liability rules).

Rashba writes:

ואי נמי [אמרינן דינא דמלכותא דינא] במה שישראל עושה עם ישראל חבירו מדעת עצמו, כאותה שאמרו בפרק קמא דגיטין מתניתין דכל השטרות העולות בערכאות שלהן כשרים חוץ מגיטי נשים, דאקשינן קא פסיק ותני כל השטרות ואפילו שטרי מתנה, במאי קני בהאי שטרא, חספא בעלמא הוא, ופרקינן... ואיכא דאמרי משום דינא דמלכותא דינא, כלומר אף על פי שמצד דיני המלך אינו מועיל כיון שבמתנה אין בו תועלת למלך, כיון שזה מדעתו עשה מתנתו בערכאות הרי קבל עליו לילך בזה בדיני המלכות שאמר שכל שטר שיעלה בערכאות שיועיל ויקנה, ובדבר שבממון יכול לשעבד עצמו וליתן משלו שלא מן הדין כמו שאמרו מתנה שומר חנם להיות כשואל

> Further, [the gentile law of the jurisdiction will be binding] when two Jewish parties voluntarily do business [in accordance with the gentile law]. Such is the principle in the Mishna that rules "any document that was validated by the gentile court is halakhically valid except for a bill of divorce (*get)*." And the Talmud asks, "any document" implies even a document gifting property—but how can property be gifted via a document that lacks the features to effect a proper halakhic *kinyan*? The Talmud answers that the document is valid because *dina de-malkhuta dina*. This means that even though the gentile law is not automatically binding, nevertheless, because these parties voluntarily effectuated their transaction through the gentile legal system, they have accepted upon themselves to be bound by the gentile law that recognizes such a document as valid and effective. And in monetary matters a party can obligate himself and make himself liable in ways that diverge from the [Torah] rules. As the Talmud says: an unpaid bailee can stipulate to have the liability of a borrower.

How does Rashba's ruling on the permissibility of two parties agreeing to execute their transaction according to the gentile law cohere with his criticism,

earlier in the responsum, of Perpignan's custom to follow the gentile law on spousal inheritance? The difference is that Rashba's earlier criticism is directed at the common custom of the community of Perpignan, which, if practiced *in order to copy the gentiles and their laws*, is prohibited by the Torah. (But even so, the transactions entered into under the prohibited custom are still halakhically binding.) By contrast, if two parties accept the validity of a document executed according to the non-Jewish law or organize their business deal around the non-Jewish law *out of considerations of expediency or efficiency*, then it is permitted. Parties may adopt the law of the jurisdiction in their business dealings for expediency and efficiency, but not so as to copy the gentiles and their practices.

Thus, it is certainly "permitted by Torah law," and even required, for the Beth Din of America to honor a choice of law clause in a contract. Based on Rashba's conclusion, it is also permissible for the parties themselves to enter into a choice of law clause if their intention is expediency or efficiency.

IV. Later Developments: Beit Yosef, Rema, and Sema

The Beit Yosef's Version of Rashba's Responsum

Rashba concluded that a couple married in Perpignan is considered to have implicitly adopted the custom overriding spousal inheritance. The Beit Yosef (Choshen Mishpat 26) excerpts components of Rashba's responsum but omits some sections (e.g., the entire discussion of Reuven's second claim, Rashba's conclusion, and parts of Rashba's response to the first claim).[6] The effect of this

[6] See *Beit Yosef*, *Choshen Mishpat* 26:
על פי שבדיני ישראל הבעל יורש את אשתו (ב"ב קח.) כיון שהכל יודעים שהם הולכים בדיני הגוים הרי כל הנושא אשה שם כאלו התנה כן וכמו שאמרו (כתובות סז.) גמלי דערביא אשה גובה פורנא מהן לפי שסומכת עליהם והשיב כל דבר שבממון תנאו קיים (כתובות נו.) ובאמת אמרו (ירושלמי כתובות פ"ט ה"א) שמתנין בכענין זה אבל לנהוג כן מפני שהוא משפט הגוים באמת נראה לי דאסור לפי שהוא מחקה את הגוים וזהו שהזהירה התורה לפניהם ולא לפני גוים ואף על פי ששניהם רוצים בכך והוא דבר שבממון שלא הניחה תורה את העם שהוא לנחלה לו על רצונם שייקרו חוקות הגוים ודיניהם ולא אפילו לעמוד לפניהם לדין אפילו בדבר שדיניהם כדיני ישראל והמביא ראיה לזה מגמלי דערביא טועה דכתובה מן הדין היה לגבות ממטלטלי דמיניה ואפילו מגלימא דאכתפיה אלא ששמו רבנן שאין סמיכת האשה עליהם משום שגבייתה לזמן מרובה ובערביא שכל עסקיהם בגמלים סמיכתה עליהם אבל ללמוד מזה לילך בדרכי הגוים ומשפטיהם חס ושלום לעם קדוש לנהוג ככה וכל שכן אם עתה יוסיפו לחטוא לעקור נחלה הסומך על משענת קנה הרצוץ הזה ועושה אלה מפיל חומות התורה ועוקר שרש וענף והתורה מידו תבקש ואומר אני שכל הסומך בזה לומר שמותר משום דינא דמלכותא טועה וגזלן הוא ואפילו גזלה ישיב רשע מקרי כדאיתא בפרק הכונס (ב"ק ס:) ובכלל עוקר כל דיני התורה השלימה ומה לנו לספרי הקודש המקודשים שחברו לנו רבי ואחריו רבינא ורב אשי ילמדו את בניהם דיני הגוים ויבנו להם במות טלואות בבית מדרסי הגוים חלילה לא תהא כזאת בישראל חס ושלום שמא תחגור התורה שק עליהם עכ"ל

abridgment is that it appears to conflate Rashba's rejection of *dina de-malkhuta* regarding blood inheritance with his affirmation of the legal validity of the implied stipulation to override spousal inheritance. Reading the Beit Yosef's version, one might be left with the impression that Rashba would *invalidate* an implied stipulation to override spousal inheritance—the opposite of Rashba's actual conclusion in the responsum.

Rema's Two (Contradictory) Rulings

Rema's First Ruling

Led by the Beit Yosef's version of the responsum, Rema writes (Choshen Mishpat 369:11) that if a couple gets married in a city where the custom is to follow the non-Jewish law (and override the Jewish law of spousal inheritance), the wife's family cannot claim that the couple implicitly adopted the local custom.[7] Rema's formulation suggests that a general custom to follow the gentile law does not create a presumption that any particular transaction was done with the implicit stipulation to follow the custom—contrary to the conclusion of Rashba's responsum.

Rema's Second Ruling

The Sema (Choshen Mishpat 369:20) notes that Rema's above ruling appears to contradict a different ruling of Rema in Choshen Mishpat 248. The discussion in Choshen Mishpat 248 pertains to a testator on his deathbed who wills his estate to his son Levi with the stipulation that upon Levi's death the estate should pass to a third party, Binyamin. The halakhah holds that because Levi is the testator's proper heir (*yoresh*) and therefore receives the estate qua inheritance (and not as a gift), the testator cannot exercise control over the estate after Levi's death: Once Levi receives the estate through the rules of inheritance, it is now his inheritance, and it passes, upon Levi's death, to Levi's rightful descendants—notwithstanding the will of the testator.[8]

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7 *Rema*, *Choshen Mishpat* 369:11:
הנושא אשה במקום שדנין בדיני עובדי כוכבים, ומתה אשתו, לא יוכל אבי אשתו או שאר יורשיה לומר: כל הנושא אשה על דעת המנהג הוא נושא ונדון הדבר בדיני עובדי כוכבים דאם מתה לא יורשה בעלה או כדומה לזה.

8 *Shulchan Arukh*, *Choshen Mishpat* 248:1:
שכיב מרע שאמר: נכסי לפלוני ואחריו לפלוני... אם היה הראשון ראוי ליורשו, כגון שהיה בן מכלל הבנים, אין לשני כלום... שכל לשון מתנה ליורש הרי הוא כלשון ירושה, וירושה אין לה הפסק ואף על פי שיאמר: ואחריו לפלוני.

Suppose the same fact pattern but this time the testator lives in a community where the custom is to follow the non-Jewish law of the jurisdiction, which happens to allow a testator to do what the halakhah does not: to will his property to his son Levi with the stipulation that it pass to Binyamin upon Levi's death. Here Rema adopts Rivash's ruling (Responsum 52) holding that the parties are bound by the custom and, therefore, the non-Jewish law, and the estate passes to Binyamin upon Levi's death.[9] This ruling suggests that a communal custom to follow the gentile law *does* create a presumption of an implied stipulation by the party to follow the custom. Under the principles of Jewish law, the estate would not pass to Binyamin. It is because we interpret the intent of the testator to execute the will *pursuant to the terms of the law of the jurisdiction* that Rivash and Rema hold that the estate should pass to Binyamin.

Sema's Reconciliation of Rema's Rulings

The Sema (Choshen Mishpat 369:20) notes that these two rulings of Rema appear to contradict each other. The ruling in Choshen Mishpat 369 suggests that we *do not* take a communal custom to follow the gentile law as grounds for interpreting the intent of the husband to forgo spousal inheritance. By contrast, the ruling in Choshen Mishpat 248 suggests that we *do* take a communal custom to follow gentile law as grounds for interpreting the testator's intent to structure the will in accordance with the gentile law.

The Sema reconciles the two rulings with the following distinction. In the spousal inheritance case (Choshen Mishpat 369), there was no explicit stipulation at the time of marriage regarding spousal inheritance, and further there was no evidence that, at the time of the marriage, the parties *even contemplated* what would occur in the future to the wife's assets if she predeceased the husband. Therefore, if the husband now claims that he never renounced and never intended to renounce his Jewish law right to spousal inheritance, a *beit din* should award him his wife's assets pursuant to din Torah.[10]

This principle is known as *yerushah ein lah hefsek*.

9 *Rivash*, Responsum 52:

היה להם לדון בדיני עובדי כוכבים כי כן נהגו מעולם קהל מיורקה מרצונם.

10 Note that Sema's conclusion contradicts Rashba's position in the responsum. According to Rashba, if the husband failed to specify to the contrary, we presume that his intent at the time of the marriage was to conform to the communal custom, and he is considered to have renounced his spousal inheritance by default. Rashba attributes this to the halakhic principle of *darshinan lashon hedyot*. See the discussion above.

By contrast, the testator on his deathbed (Choshen Mishpat 248) explicitly stated that his assets shall pass to Binyamin after Shimon's death. Given the custom in that society to abide by the non-Jewish law in such transfers, the testator undoubtedly intended to create the legal effect that is usually created by similar statements in that society.[11]

In other words, the difference between the cases, according to the Sema, is primarily evidentiary. In the case of spousal inheritance there was no clear evidence at the time of marriage to suggest that the parties accepted the communal custom. In the case of the testator on his deathbed, the plain meaning of the testator's stipulation evidences his intent for the will to be effective in accordance with the communal custom.[12]

V. Recent Rulings

Equitable Distribution in a Prenuptial Agreement

In a recent letter, Rav Zalman Nechemia Goldberg zt"l allows couples to enter into a prenuptial arbitration agreement that provides for a *beit din*, in the event of

[11] *Sema*, *Choshen Mishpat* 369:20:

וי"ל דשאני התם כיון דהמצוה מת באותו מקום שדנין בדיני גוים ועשה צואה סתם ואחריו לפלוני, אמרינן דודאי דעתו היה כמו שמורגל בפי הבריות דמפרשים ואחריו לפלוני כפשוטו ואפילו אם הראשון ראוי לירש, ומשו"ה פסק שדנין בדיני גוים, משא"כ כאן בהנושא אשה דבשעה שנשאו זה את זו לא היה שעת הירושה ולא היה אז שום גילוי דעת שנשאה אדעתא דמנהגא, והבעל עומד עתה לפנינו ואומר שלא היתה דעתו אז לישא על דעת שאם תמות שלא יירשנה, דבזה ודאי לא עקרי דין תורה.

[12] Rivash and Rema's ruling in the testator case looks, *prima facie,* like an example where a communal custom to follow the law of the jurisdiction can override the Jewish law of inheritance for blood relatives. How else can the custom allow the estate that now belongs to Levi pass to Binyamin over Levi's descendants? Chatam Sofer (responsa *Choshen Mishpat* no. 142, cited in *Pitchei Teshuvah*, *Choshen Mishpat* 248:2), however, explains that the halakhic principle of *yerushah ein lah hefsek*, which is what keeps the estate with Levi's heirs over Binyamin, is a rule of inheritance and not gifts. Thus, in principle, the testator could have structured the transfer as a *gift* to Levi with the provision that it pass to Binyamin at Levi's death. The Talmud (*Bava Batra* 133a) states that a testator's gift to a rightful heir is halakhically characterized as inheritance, which cannot be interrupted. Chatam Sofer argues that the Talmudic principle that characterizes a testator's "gift to an heir" as inheritance is limited to those familiar with the Torah's language. In a society that adjudicates exclusively in secular court and that is unfamiliar with the Torah's rules, the clear intention of such a testator is to structure the transaction as a gift transfer, not through inheritance. As such, Rivash's ruling does not in fact uproot the Jewish law of inheritance for blood relatives. Chatam Sofer writes:

ויותר נ"ל דריב"ש נמי לא אמרו אלא בעובדא דילי' דהרי משמעות לשון מתנה איננו ירושה אלא בלשון התורה במי שראוי ליורשו הוי מתנה ג"כ ירושה אבל אי הוי ברי לנו שאין כוונת השכ"מ ללשון התורה הרי גם דין תורה הוא שמתנה הוא ולא ירושה ויש לה הפסק וכיון שבכוונה ובלשון תלי' מילתא ואלו האנשים לא הכירו לשון תורה כי כל התנהגותיהם בערכאות הי' אם כן גם דין תורה הוא שמתנה הוא ולא ירושה.

a divorce, to divide the couple's assets in accordance with any set of principles the couple chooses—including the principles of equitable distribution typically used under secular law if that is what the couple desires.[13] Rav Goldberg permits this even though equitable distribution may differ from the halakhic rules for dividing marital property.[14]

Rav Goldberg writes that, in principle, it is permissible for the couple to explicitly adopt the non-Jewish law of the jurisdiction as the basis for dividing marital property upon divorce. Nevertheless, Rav Goldberg suggests that it is preferable for the couple to adopt the substantive principles of distribution (e.g., equitable distribution, equal distribution, etc.) which form the basis of the New York law, rather than refer specifically to "the laws of the State of New York." Rav Goldberg's position constitutes the basis of the current version of the Beth Din of America's prenuptial agreement, which allows a couple to select "principles of equitable distribution in accordance with customary practice" as the basis for a *beit din* decision regarding the division of their marital property.[15]

Acceptance of an Entire System of Secular Law

Acceptance of an entire system of secular law is problematic, especially if it accepts the secular law as it may be *in the future* when the dispute arises.[16] This may be prohibited according to Rashba.[17] Still, in matters other than inheritance of blood relatives, the agreement between the parties to adopt the law of the jurisdiction remains halakhically binding, and a *beit din* must rule in accordance with the parties' agreement.[18]

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13 See the exchange in Yeshurun 11 (2002), 698–703.

14 For an overview of the halakhic rules for dividing marital property, see *Pitchei Choshen Hilkhot Yerushah ve-Ishut*, Chapters 6–8.

15 Beth Din of America, *Standard Prenuptial Agreement*, Section II:A, available at https://res.cloudinary.com/orthodox-union/image/upload/v1574874396/prenup/Standard-Prenup-Rev-Nov-2018.pdf.

16 The idea here is that if the parties accept the secular law of the jurisdiction even as it may be amended in the future, then they are accepting the authority of the law *because it is the secular law,* which is prohibited by the Torah. But if they are accepting the law as it is on the day of their agreement because its substantive terms are expedient for organizing their business relationship, then it constitutes a valid *minhag ha-sochrim* and is permissible. See Rabbi Yona Reiss, *Kanfei Yonah*, 41.

17 Although here, too, it may be permissible for the parties to accept 'the law of the jurisdiction even as that law is later amended' if their reason for doing so is grounded in considerations of expediency and efficiency and not to submit to the *authority* of the law.

18 See Rabbi Yaacov Feit, *The Prohibition Against Going to Secular Courts*, Journal of the Beth

Choice of Law in a Post Dispute Arbitration Agreement

Similarly, a choice of law clause adopted in a post-dispute arbitration agreement that does not accurately reflect the intent of the parties during their business dealings might be problematic.[19] To be sure, the choice of law provision is binding, as Rashba rules, and should be enforced by the *beit din*, even though it was wrong for the parties to adopt it.

Dinei Mamonot (Monetary Matters) vs. Issur ve-Heter (Ritual Prohibitions)

The enforceability of a choice of law clause is limited to *dinei mamonot* (monetary law). A choice of law clause would be invalid in areas of Jewish law that pertain to *issur ve-heter* (ritual prohibitions). For example, a stipulation against the cancellation of debts on *shemitah* (*shemitat kesafim*) is invalid.[20] Similarly, as we saw earlier, the inheritance of blood relatives is not characterized as normal *dinei mamonot,* and therefore stipulations to override it are invalid.[21] In cases of *dinei mamonot*, it is permitted, and required, by Torah law for a *beit din* to enforce a choice of law provision—even in cases where it may have been prohibited for the parties to adopt the clause in the first place.

VI. Implicit Conditions and Equitable Distribution

Section 3(e) of the Beth Din of America's Rules and Procedures provides:

> *In situations where the parties to a dispute explicitly or implicitly accept the common commercial practices of any particular trade, profession, or community—whether it be by explicit incorporation of such standards into the initial contract or arbitration agreement or through the implicit adoption of such common commercial practices in*

Din of America 1 (2012), 41, available at https://bethdin.org/wp-content/uploads/2019/07/The-Prohibition-Against-Going-to-Secular-Courts-by-Rabbi-Yaacov-Feit.pdf.

19 See *Tumim* 26:4; Rabbi Yona Reiss, *Kanfei Yona,* 41–42. *Tumim* distinguishes between a pre-dispute choice of forum clause binding the parties to litigate in secular court and a post-dispute one. However, *Tumim*'s discussion of a choice of forum clause can be distinguished from the above discussion regarding a choice of law clause, in which case a post-dispute choice of law clause would also be permitted by Jewish law.

20 See *Taz*, *Choshen Mishpat* 26:3; *Talmud Bavli*, *Makkot* 3b; *Netivot Hamishpat* 61:9; Rabbi Mordechai Willig, *Am Mordechai IV,* 266. Whether a stipulation against the cancellation of debts on *shemitah* is valid depends on how the stipulation is formulated. See *Shulchan Arukh*, *Choshen Mishpat* 67:9. A *pruzbul* relies on a different mechanism to allow for the collection of debts after *shemitah*.

21 See *Rambam*, *Nachalot* 6:1.

> *this transaction — the Beth Din will accept such common commercial practices as providing the rules of decision governing the decision of the panel to the fullest extent permitted by Jewish Law.*[22]

How should this provision be interpreted? What constitutes an implicit adoption of common commercial practices?

It is often instructive to look at the manner in which the parties did business. If the contracts and business deals between the parties were drafted and reviewed by attorneys trained in secular law, then a dispute arising from these agreements should most likely be resolved according to secular law. Had the parties intended for their dealings to be resolved according to *din torah*, they would have been better served to have their contracts drafted and reviewed by Torah scholars with expertise in Jewish law.

Equitable Distribution in End-of-Marriage Disputes

It can also be instructive to look at the practice in the parties' community. Many years ago, an astute and distinguished, veteran *dayan*, Rabbi Leib Landesman, said to me that it is arguable, though he was not certain enough to rule that way, that for parties belonging to a modern orthodox community, a *beit din* should resolve end-of-marriage financial disputes by applying basic principles of equitable distribution. After all, the majority of such disputes in that community are resolved based on the principles of equitable distribution, whether by court decision, settlement in the shadow of court decision, or through mediation. Attorneys in the field have attested to me that at least 95% of divorce cases in the modern orthodox community are resolved in this way.[23]

At the time, I disagreed, based on the Sema, discussed above in Section IV, who held that because there is no indication at the time of marriage that the parties were contemplating how their assets should be divided upon its dissolution, there is no basis to assume they accepted the common custom over Torah law.[24] Whereas commercial contracts are reviewed by attorneys, weddings are officiated and presided over by rabbis. Thus, it appeared to me at the time, based on the

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[22] Beth Din of America, *Rules and Procedures*, available at https://bethdin.org/rules.

[23] Recently, Rabbi Landesman added that this argument may possibly be extended to a basic minimal award of maintenance as well.

[24] At least, that is, when the husband denies that he ever intended to waive his right to spousal inheritance at the time of the marriage. See Sema's formulation, *Choshen Mishpat* 269:20:
והבעל עומד עתה לפנינו ואומר שלא היתה דעתו אז לישא על דעת שאם תמות שלא יירשנה.

Sema's analysis, that the division of marital assets should be conducted according to Torah law.

However, based on the above presentation of Rashba's responsum, it seems that Sema's analysis is inconsistent with Rashba's position. As such, Rabbi Landesman's suggestion seems correct. Even if the genealogy of the practice in the modern orthodox community is grounded in a prohibition—litigating divorces in secular court and being subject to the non-Jewish law—the common custom is still binding on parties who implicitly adopt it, and a *beit din* must honor the common custom by dividing the couple's marital property in accordance with the principles of equitable distribution.

In supporting the Beth Din of America prenuptial agreement, Rav Zalman Nechemia Goldberg wrote that by allowing the parties to adopt a choice of law provision or, better, to specify that their assets should be divided according to equitable distribution, the prenup will make couples more amenable to resolving their end of marriage issues in *beit din* rather than secular court. Similarly, if the Beth Din of America were to publicize that, for any couple to whom this communal practice is relevant, it will resolve end-of-marriage financial disputes by utilizing principles of equitable distribution, couples will become more inclined to resolve their dispute in *beit din*.

There is a further benefit to adopting such a policy. Lawyers and mediators frequently complain that, whereas the contours of a secular court decision in marital disputes are generally foreseeable, a *beit din's* approach to resolving end of marriage disputes is totally unpredictable. For this reason, these lawyers and mediators are hesitant to recommend clients to go to *beit din*. Even Orthodox practitioners have expressed this hesitation.

Based on a careful reading of Rashba's classical responsum and the common practice within large segments of the Orthodox community, the Beth Din of America generally resolves end-of-marriage disputes for such couples by utilizing principles of equitable distribution and limited spousal maintenance, as the *dayanim* deem appropriate, according to principles of Jewish law, equity and local custom.[25] Publicizing the Beth Din's policy will allow parties to avoid the prohibition

[25] See Beth Din of America, *Rules and Procedures*, available at https://bethdin.org/rules See also Beth Din of America, *Standard Prenuptial Agreement*, Section II:A, available at https://res.cloudinary.com/orthodox-union/image/upload/v1574874396/prenup/Standard-Prenup-Rev-Nov-2018.pdf.

of secular court and the possible prohibition of *gezeilah* in enforcing the secular court's decisions.[26] It will also create a sense of predictability in the *Beth Din's* decisions, allowing couples to resolve their end-of-marriage disputes in *beit din* with greater confidence.

[26] See *R. Akiva Eger*, *Choshen Mishpat* 26:1.