HALACHIC AND HASHKAFIC ISSUES IN CONTEMPORARY SOCIETY

171 - HALACHIC WILLS & INHERITANCE FOR DAUGHTERS PART 2 - PRACTICAL SOLUTIONS

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• In Part 1 we examined the halachic background to the law of inheritance. We saw that the Torah itself (through the parshiot of the daughters of Tzelafchad[1] and of the bechor - firstborn[2]) lays down a very clear hierarchy for who inherits after death. This is:
- double to the eldest son
- the remainder to the other sons in equal shares
- no assets for the daughters.

• We saw that Chazal defended this Torah mitzva against the Sadducees, the non-Jewish Roman scholars and also the early Christians, all of whom insisted that daughters should inherit equally with sons.

• Nevertheless, we also saw that Chazal recognized the need to provided appropriately after death for the welfare of daughters, and instituted a number of rabbinic decrees to address this, including:

(i) ***Mezonot***: maintenance for unmarried minor daughters. This is in effect a prior debt on the estate, which is binding on the assets inherited by the sons. In the event of a shortage of assets, the maintenance of the daughters takes priority, even if the sons must beg for tzedaka.

(ii) ***Nedunya***: a dowry given to daughters on marriage. Depending on the financial arrangements agreed between the daughter and her new husband, the daughter could ensure that she retained ownerships of those assets and passed them to her own children. The dowry for daughters (comprising 10% of the estate) was also a prior lien on the assets inherited by sons.

(iii) ***Ketubat Banin Dichrin***: a structure whereby the husband promises his wife that, in the event of her pre-deceasing him and leaving sons, her ketuba would be inherited solely by those sons, and not shared with other sons from a later marriage.

• Even though these Rabbinic structures did not all survive into the post-Talmudic period, we saw that the poskim developed others - such as the *Shtar Chatzi Zachar*, which enabled daughters to effectively share in the assets.

• In the modern period, although there were poskim (such as Rav Kook) who strongly defended the Torah allocation of assets through inheritance, most poskim have strongly advised against this, due to the dispute and resentment it can cause, and the potential for major halachic prohibition if some of the family challenge the halachic apportionment in a secular court.

• In this shiur we will iy'H examine different[3] options for re-allocating inherited assets in such a way as satisfies the wishes of the testator at the same time as complying with the halacha.

• In all cases, halachically valid Estate Planning must be undertaken in consultation with all necessary advisors, including: (i) a Rav who is qualified in this area; (ii) a lawyer qualified in the relevant civil jurisdiction who can ensure that the documentation is valid and binding in the secular courts; (iii) an accountant/tax planner who can ensure that the arrangements are as tax efficient as possible.

A] THE TORAH MITZVA OF INHERITANCE

A1] AVUREI ACHSANTA

1. ת"ש, דאמר ליה שמואל לרב יהודה: שיננא! לא תיהוי בי **עבורי אחסנתא**, ואפילו מברא בישא לברא טבא, וכ"ש מברא לברתא. ת"ר: מעשה באדם אחד שלא היו בניו נוהגין כשורה, עמד וכתב נכסיו ליונתן בן עוזיאל. מה עשה יונתן בן עוזיאל? מכר שליש, והקדיש שליש, והחזיר לבניו שליש. בא עליו שמאי במקלו ותרמילו. **(רשב"ם** – כלומר להתווכח עמו על **שעבר דברי המת)** א"ל: שמאי, אם אתה יכול להוציא את מה שמכרתי ומה שהקדשתי - אתה יכול להוציא מה שהחזרתי. אם לאו - אי אתה יכול להוציא מה שהחזרתי. אמר: הטיח עלי בן עוזיאל! הטיח עלי בן עוזיאל!

בבא בתרא קלג:

Chazal insisted that assets should not be taken away from the Torah heirs. This is the prohibition of 'avurei achsanta'.

• However, the commentators differ as to what constitutes 'disinheriting'. Must ALL the assets go to the Torah heirs? Or the majority? Or (as in the case of the Gemara above) is it enough that a significant minority go to the heirs? Or perhaps it is sufficient that a nominal amount be given to the Torah heirs and the rest can be diverted elsewhere.

1. Bamidbar Chapter 27.
2. Devarim 21:16-17
3. These options are not necessarily mutually exclusive and, in some cases, a combination of them will be recommended. An excellent article on these issues is *Halacha and the Conventional Last Will and Testament*, Judah Dick, and can be found at https://www.jlaw.com/Articles/last_will_and_testament1.html. See also https://rabbikaganoff.com/is-a-will-the-halachic-way/

A2] IS IT EVEN POSSIBLE TO GIVE ASSETS TO OTHERS?

2. אין אדם יכול להוריש למי שאינו ראוי ליורשו, ולא לעקור הירושה מן היורש אף על פי שזה ממון הוא. לפי שנאמר בפרשת נחלות *וְהָיְתָה לִבְנֵי יִשְׂרָאֵל לְחֻקַּת מִשְׁפָּט* - לומר שחוקה זו לא תשתנה ואין התנאי מועיל בה. בין שצוה והוא בריא, בין שהיה שכיב מרע, בין על פה, בין בכתב - אינו מועיל.

רמב"ם הלכות נחלות פרק ו הלכה א

In principal, the Torah laws of inheritance are fixed and NOT subject to change by the testator. This stems from the wording, 'chukat mishpat' - a permanent law. Even though it is a monetary matter, which in halacha would normally be subject to the choice of the individual - tenai bemamon - this is a special case, over which the testator has no power.

3. ... אמרו זכרונם לברכה (ב"ב קכו:) שאם ציוה ואמר המוריש אל יירשני בני, או בני פלוני לא יירש עם אחיו, או בתי תירשני במקום שיש בן וכיוצא בדברים האלה, אין בידו לעקור דבר האל שאמר שיירש היורש מורישו. ואף על פי שאמרנו שנכסיו בידו לכל חפציו, הענין הוא לומר שיכול האדם ליתנם לכל מי שירצה ולעשות בהם כל חפצת נפשו, ואפילו לאבדם, בכל לשון, חוץ מזה של ירושה. לפי שזה הדיבור הוא כנגד דברו של מקום וגזרתו כי הוא אמר יירש היורש. .... וכן האומר ... בתי תירשני במקום שיש בן, לא אמר כלום שהתנה על מה שכתוב בתורה ....
ועובר על זה וציוה בין בריא בין שכיב מרע שלא יירשנו הראוי ליורשו ביטל עשה זה, והוא שציוה כן בלשון ירושה כמו שאמרנו. ואף על פי שאין בדבריו ממש כמו שכתבנו למעלה בתחלת הענין.

ספר החינוך פרשת פינחס מצוה ת

In fact, it is difficult to formulate a structure which will circumvent the apportionment required by the Torah. If a person declares - orally or in writing - that they do not wish their children to inherit in accordance with halacha, they have breached a Torah mitzva AND their declaration is invalid. The children will always inherit according to the Torah!

A3] THE CENTRAL HALACHIC ISSUE - 'EIN KINYNA LEACHAR MITA'

4. [ו]אין שטר לאחר מיתה

בבא בתרא קלה:

5. **ואין שטר לאחר מיתה** - פי' ואין קנין לאחר מיתה

תוספות כתובות נה:

Chazal state in a number of places throughout Shas that it is NOT halachically possible to transfer property after death. The mefarshim explains that no kinyan may be made after a person dies. Any required kinyan must be before!

- As such, halacha does not recognized a secular will, since a person may not gift their assets after death[4]. Irrespective of the provisions of a will, or the laws of intestacy in the relevant jurisdiction, the halacha will vest the deceased's assets in the halachic heirs.

- Writing a civil will which seeks to apportion assets in a manner other than halachic inheritance could be a breach of the Torah prohibition of attempting to circumvent the mitzva of yerusha[5]. In order to vest assets in other ways, a Halachic Will must be drafted.

- Nevertheless, we also saw that Chazal created structures to alleviate inequities caused by a strict application of the Torah law!

B] OPTION 1 - IS A CIVIL WILL VALID UNDER 'DINA DEMALCHUTA DINA'?

- In financial matters, the halacha invokes the principle - *dina demalchuta dina* - the secular law of the country has halachic validity.

6. י"ח דלא אמרינן דינא דמלכותא דינא אלא במסים ומכסים התלויים בקרקע ... אבל בשאר דברים לא. ויש חולקין וסבירא להו דאמרינן בכל דבר דינא דמלכותא דינא .... וכן הוא עיקר.

שולחן ערוך חושן משפט הלכות גזילה סימן שסט סעיף ח

The Rema brings different views on the ambit of 'Dina Demalchuta Dina'. According to the first view, it has limited application - to property taxation in the country. However, he rules like a more expanded view which applies the secular law of the land to a much broader area of halachic life. But what are the limits of its application?

4. According to halacha, upon death, all assets belong immediately to the halachic heirs. Since a secular will gifts assets after death, this has no effect in halacha. A person would have to gift the assets when still alive.
5. According to some authorities, anyone advising a person on how to avoid the Torah allocation of inheritance is involved in this prohibition. This is not the position of most poskim.

7. .... ולפי"ז קרקע לאו דוקא אלא בכל מילי הוי דינא דמלכותא. ..... וכתב ב"י .... בשם הרשב"א דלא אמרינן דינא דמלכותא דינא אלא מה שהוא מדיני המלוכה. אבל דיניס שבין בערכאות אין אלו ממשפטי המלוכה, אלא בערכאות דנין בעלמן ..... שאם אי אתה אומר כן בטלת חס ושלום דיני ישראל .... ובמרדכי ... מדיני דמלכותא וכתב שם עוד דאפילו בין ישראל לחבירו יש בו משום דינא דמלכותא דינא ....

דרכי משה הקצר חושן משפט סימן שסט

In his Darchei Moshe, however, the R. Moshe Iserlis also quotes the position of the Beit Yosef (see below) - that if Dina Demalchuta were applied across the board to all dealings between Jews, there would be no room left for the Torah at all!

8. .... דלא אמרינן דינא דמלכותא דינא אלא בדבר שיש בו הנאה למלך או שהוא לתקנת בני המדינה, מה שאין הדין מפורש אצלינו. אבל לא שידונו בדיני גויים נגד תורתינו כו'. .... לא אמרינן דינא דמלכותא אלא בדבר שיש לו הנאה למלך או שהוא לתיקון בני מדינתו בעניני משא ומתן שביניהם. אבל שאר דיניס דיני תורה המפורסמים בינינו, כגון שהם מכשיריס עד אחד ואפילו הוא קרוב או פסול, וכיוצא בדברים אלו – דיניס פרטיים שבין ישראל לחבירו – פשיטא שלא נדין בהם כמותם. דאל"כ בטלו ח"ו כל דיני תורה מישראל!

ש"ך חושן משפט סימן עג

The position of the Shach is very firm. Dina Demalchuta has no application where there is any form of Torah prohibition involved. It relates to financial and regulatory issues needed for the smooth running of the state, but not to private interactions between Jews.

9. כתב הרשב"א (ח"ו סי' רנד) שנשאל על אחד שמתה בתו, ותבע את חתנו בערכאות הגויס שיחזיר לו כל הנדוניא בטענה שאף על פי שבדיני ישראל הבעל יורש את אשתו (ב"ב קח), כיון שהכל יודעים שהם הולכים בדיני הגויס הרי כל הנושא אשה אם כאלו התנה כן ..... והשיב כל דבר שבממון תנאו קייס (כתובות נו). ובחמת אמרו (ירושלמי כתובות פ"ט ה"ח) שמתנין בכעניין זה, אבל לגבוג כן מפני שהוא משפט הגויס בחמת נראה לי לאסור, לפי שהוא מחקה את הגויס. וזהו שהזהיר התורה 'לפניהם ולא לפני גויס', ואף על פי שבניהם רוליס בכך והוא דבר שבממון. שלא הניחה תורה את העס שהוא לנחלה לו על רלונס שייקרו חוקות הגויס ודיניהם. ולא אפילו לעמוד לפניהם לדין – אפילו בדבר שדיניהם כדיני ישראל.

בית יוסף חושן משפט סימן כו

The Beit Yosef quotes a teshuva of the Rashba, which discusses the case of father whose daughter died, and he tried to claim back the dowry using the local non-Jewish courts. The Rashba rules that, although in monetary matters one can normally make any condition one wants, matters of inheritance may not be brought to the secular courts (even where their ruling would be in accordance with halacha). To do so would be a breach of 'lifneihem velo lifnei goyim'.

10. (שמות כא:א) וְאֵלֶּה֙ הַמִּשְׁפָּטִ֔ים אֲשֶׁ֥ר תָּשִׂ֖ים לִפְנֵיהֶֽם - לפניהם ולא לפני עובדי כוכבים

גיטין פח:

Chazal learned from the Torah that two Jews may not bring their dispute to a non-Jewish court.

11. *ואלה המשפטים אשר תשים לפניהם.* לפניהם ולא לפני גוים. וכל הקובל בערכאות של גוים אין לו חלק לעולם הבא, וכפר באלהי ישראל:

מדרש אגדה (בובר) שמות פרשת משפטים פרק כא

This was stressed to the point that some sources state that a Jew who does this has no place in the World to Come!

12. אסור לדון בפני דייני עובדי כוכבים ובערכאות שלהם. .... אפילו בדין שדנים בדיני ישראל, ואפילו נתרצו ב' בעלי דינים לדון בפניהם, אסור. וכל הבא לידון בפניהם, הרי זה רשע, וכאילו חרף והרים יד בתורת מרע"ה

שולחן ערוך חושן משפט הלכות דיינים סימן כו סעיף א

The Shulchan Aruch[6] also rules this in very strong terms. Two Jews must go to a Beit Din.

- Many poskim throughout the generations have understand this to be a Torah prohibition[7].

6. Based on the wording on the Rambam in Hilchot Sanhedrin 26:7.
7. There are many details to this issue which are beyond the scope of this shiur. For instance, If one of the litigants refuses (repeatedly) to to to Beit Din, the Beit Din may give the other permission to use the secular law. The secular status of the courts in Israel - where Jewish judges adjudicate non-Jewish laws - is a major discussion. Is this better or worse than going to a non-Jewish court? See for instance https://www.yeshiva.co/midrash/7079 and http://halachayomit.co.il/en/default.aspx?HalachaID=2648. For some contrasting perspectives see https://www.zomet.org.il/?CategoryID=265&ArticleID=381

B1] THE MINORITY POSITION OF RAV MOSHE FEINSTEIN

• Rav Moshe Feinstein agreed that Dina Demalchuta Dina could not be used to validate in principle all civil wills. However, on one specific, but critical issue - that of the kinyan - he issued a ruling that gives validity to a civil will in halacha.

13. .... דהא דבעינן קנין הוא רק להעיד על רצונו ומחשבתו שגמר בלבו ליתן לזה בכל נפשו וכל שיש חזקת אומדנא דמוכח שנותן מרצונו הטוב כל הקנין הוא למותר ....

שו"ת מהרש"ם חלק ב סימן רכד

R. Shalom Schwadron (19C Poland) understands that the requirement for a kinyan in these situations is really to establish 'gemirat da'at' - a firm intention on the past of the testator. Where that is clear, a kinyan may be superfluous.[8]

14. ועצם הצואה - כיון שנמסרה לדינא דמלכותא, שודאי יעשו כדבריה אף שהיא מתנה לאחר מיתה. ואין קנין לאח"מ שכבר אינו שלה שמסתבר שלא יועיל בכגון זה. הא דדינא דמלכותא דינא שתוכל ליתן דבר שאינו שלה .... מסתבר לע"ד שצואה כזו שודאי יתקיים כדברי המצוה בדינא דמלכותא, א"צ קנין שאין לך קנין גדול מזה. וממילא כיון שא"צ קנין מועיל מדינא אף נגד היורשין אף שהוא מתנה לאחר מיתה

שו"ת אגרות משה אבן העזר חלק א סימן קד

R. Moshe Feinstein allows the application of 'dina demalchuta' in one key area. A civil will is ineffective in halacha since it purports to make a kinyan after death, whilst halacha states that a kinyan is impossible (since the assets already belong to the inheritors). Following in the footsteps of R. Schwadron, R. Moshe rules that the requirement of a kinyan is simply to show the 'gemirat da'at' - clear intention - of the testator. The validity of a civil will in secular law is a clear indicator of this da'at. Thus, the civil will could be valid in halacha, even in the absence of the requisite kinyan.

• Most poskim have rejected this position and consider a civil will invalid on the basis that it purports to transfer assets after death.

15. According to Rabbi Aharon Lichtenstein, Rav Joseph Soloveitchik prepared a civil will. It is Rabbi Dr. Dov Frimer's understanding, who was the drafter of Rav Soloveitchik's testamentary disposition, that Rav Soloveitchik endorsed Rabbi Feinstein's view that gemirat da'at could be obtained based upon the testator's awareness that the provisions of a secular will would be enforced by civil law and therefore no kinyan was necessary.

The Propriety of a Civil Will, R. Yehuda Warburg[9], Hakira Journal Vol 15 p 171 n21

C] OPTION 2 - SHECHIV MERA: THE DEATH-BED BEQUEST

16. שכיב מרע שכתב 'כל נכסיו לאחרים' ושייר קרקע כל שהוא - מתנתו קיימת. לא שייר קרקע כל שהוא - אין מתנתו קיימת. לא כתב בה שכיב מרע, הוא אומר 'שכיב מרע היה' והן אומרים 'בריא היה' - צריך להביא ראיה שהיה שכיב מרע, דברי רבי מאיר. וחכמים אומרים - המוציא מחבירו עליו הראיה.

משנה מסכת בבא בתרא פרק ט משנה ו

The Mishna rules on the special case of a 'shechiv mera' - someone who believes themselves to be on their deathbed and wishes to gift their property away to others. If they retained a little property[10] for themselves, it is clear that they contemplated a recovery. In such a case, if they do indeed recover, the gift is valid[11]. If they did not retain anything for themselves it is clear that they had no expectation that they would survive. As such, the gift is impliedly conditional upon their death and, if they DO survive, it is <u>not</u> binding. If it is not clear whether he was indeed a shechiv mera, and the family then dispute this[12], the halacha is that burden of proof is upon the children, who are trying to extract the money.

• As such, a person on their deathbed can halachically give[13] away property to whomever they wish. Since they are still alive at that stage, their money belongs fully to them to gift to whomever they wish.
• The downsides of this option are clear:
(i) Many people do not have the luxury of a death-bed conference with their family. They may c'v die suddenly or alone.
(ii) Many people are mentally incapacitated for some time before they die and unable to make such a gift.
(iii) If the person then recovers, there may be halachic uncertainty as to whether the property did in fact pass in the gift.

8. This concept is found in Tosafot Ketubot 102a s.v. aliba.
9. Rabbi Dr Warburg is a prominent Dayan in the NY area and is also on the Hebrew University Faculty of Law. Two important articles by him on Halacha and Inheritance can be found at: http://www.hakirah.org/Vol15Warburg.pdf and http://www.hakirah.org/Vol%2010%20Warburg.pdf
10. Although the Mishna refers to land, the same applies to other property too.
11. In order to be fully valid, such a gift also requires a kinyan - a formal halachic transfer of ownerships/rights.
12. The children may claim that he was healthy and the gift was unconditional. He may claim that he was deathly ill and the gift was conditional, and is ineffective now that he has recovered.
13. It is critical that they use the language of 'gift' and not 'bequest'. The latter would be a death-bed will, which has no effect in halacha, since it purports to bequeath the property AFTER death, which is halachically impossible.

D] OPTION 3 - GIVE AWAY MONEY WHILE STILL HEALTHY

17. **מתני'**. הכותב את נכסיו לאחרים והניח את בניו - מה שעשה עשוי, **אלא אין רוח חכמים נוחה הימנו**. רשב"ג אומר: אם לא היו בניו נוהגים כשורה - זכור לטוב.

משנה בבא בתרא פרק ח משנה ה'

A person is entitled to gift their property during their life to anyone they please. Nevertheless, if they do so in a manner that effectively disinherits the halachic heirs, the halacha looks negatively at this (although it IS legally valid). Although there is a view that this could be fitting for a child who is behaving badly, this is not the halacha.

18. **א** כל הנותן נכסיו לאחרים והניח היורשים, אף על פי שאין היורשים נוהגים בו כשורה, אין רוח חכמים נוחה הימנו. וזכו האחרים בכל מה שנתן להם. ומדת חסידות שלא להעיד בצואה שמעבירין בה הירושה מהיורש, אפילו מבן שאינו נוהג כשורה, לאחיו חכם ונוהג כשורה. הגה: **מי שלוה לעשות בנכסיו הטוב שמפסד לעשות, יתנהו ליורשיו כי יש יין טוב מזה!**

שולחן ערוך חושן משפט הלכות נחלות סימן רפב סעיף א'

The Shulchan Aruch rules this position. The best people (at least in principle) to inherit are the halachic heirs, irrespective of their conduct[14]. One should not try to circumvent that, even in ways which are halachically effective.

D1] 'RUACH CHACHAMIM'

- What is the implication of the psak that an action is valid, but אין רוח חכמים נוחה הימנו?
- Clearly, some behavior is, strictly speaking, within the letter of the law but not within its spirit. Halacha[15] requires a person not only to be 'yotzei' and 'get away with' something which is technically permitted, but also to respect underlying halachic values[16].

19. תנו רבנן: הגזלנין ומלוי ברבית שהחזירו - אין מקבלין מהן. והמקבל מהן - **אין רוח חכמים נוחה הימנו**. אמר רבי יוחנן: בימי רבי נשנית משנה זו; דתניא: מעשה באדם אחד שבקש לעשות תשובה. א"ל אשתו: ריקה! אם אתה עושה תשובה, אפילו אבנט אינו שלך! ונמנע ולא עשה תשובה. באותה שעה אמרו: הגזלנין ומלוי רביות שהחזירו - אין מקבלין מהם, והמקבל מהם - אין רוח חכמים נוחה הימנו.

בבא קמא צד:

Another example of this the case of the repentant thief. Although they may want to do teshuva and return stolen items, this may in practical terms be very hard for them and discourage their teshuva process. As such, whilst a victim of theft is halachically entitled to take back the stolen item, such an action is not sanctioned and is against 'Ruach Chachamim'.

- In this case, the Rabbis are concerned at the use of such gifts to undermine the Torah laws of inheritance.
- There may also an implicit warning that giving away one's inheritance while alive may cause more problems than it solves[17]!
- Another major downside of this system is that the donor loses all control over these assets!

D2] THE REVOCABLE INTER-VIVOS TRUST

- The halachic objective is to give away the property before death, but to keep control of the assets during life.

20. **א** הכותב נכסיו לבנו לאחר מותו, הרי הגוף של בן מזמן השטר, והפירות לאב עד שימות, לפיכך האב אינו יכול למכור מפני שהם נתונים לבן, והבן אינו יכול למכור מפני שהם ברשות האב. ....

ו מתנת בריא שכתוב בה: 'מהיום ולאחר מיתה' - הרי היא כמתנת שכיב מרע שאינה קונה אלא לאחר מיתה. שמשמע דברים אלו שאע"פ שקנה הגוף מהיום ואינו יכול לחזור בו, אינו זוכה בו ואוכל פירות אלא לאחר מיתה. ....

ז כתב לו: 'מהיום אם לא אחזור בו עד לאחר מיתה' - היא לגמרי כמתנת שכיב מרע ויכול לחזור בו כל ימי חייו אף מהגוף. הגה: ומ"מ לריך קנין במתנת בריא ...

שולחן ערוך חושן משפט הלכות מתנת שכיב מרע סימן רנז

A healthy person may give away their property in the form of a trust, where the beneficiary takes immediate title to the property, but the donor retains the right to all income during their lifetime. If worded properly, this can also be fully revokable by the donor at any time before they die. However, such a transaction requires a halachically binding kinyan.

14. A wayward child may themselves do teshuva and/or have righteous children who should not be excluded from the yerusha.
15. Through mitzvot such as *Kedoshim Tihiyu* and *VeAsita HaYashar VehaTov.*
16. We will see iy'H in later shiurim how the halachic system balances the letter and spirit of the law, in a short series dealing with meta-halachic values vs loopholes.
17. As Shakespear explore through King Lear in Lear's opening speech:

Meantime we shall express our darker purpose. *Give me the map there. Know that we have divided*
In three our kingdom: and 'tis our fast intent *To shake all cares and business from our age;*
Conferring them on younger strengths, while we *Unburthen'd crawl toward death.*

Although it may seem like the release of a burden to relieve oneself of financial responsibilities during life, one could destroy a family in so doing!

21. ... ולכן בריא שרוצה לחלוק נכסיו מחרי מותו שלא יריבו יורשיו מחריו, ורוצה לעשות סדר צוואה בעודו בריא, צריך להקנות בקנין. ואפילו קנין אינו מהני אם רוצה ליתן להן דבר שאינו בידו דאין אדם מקנה דבר שלא בראשותו ....

רמ"א שולחן ערוך חושן משפט הלכות מתנת שכיב מרע סימן רנז סעיף ז

The Rema notes that this could be a potentially useful structure for a testator who wishes to leave their property to heirs in a manner different to the Torah apportionment. However, the Rema also notes the significant limitation of this kinyan.

- The major downside in this case is that a kinyan can only transfer property which is owned by the donor at the time of the kinyan. It cannot include property that they acquire later (*davar she'eino bereshuto)*, and certainly not property which is not as yet in existence at all (*davar shelo ba le'olam)*.
- This will significantly limit its usefulness. If a person makes such a gift, it will not include anything that they acquire between the gift and their death.[18]

E] OPTION 4 - THE HEALTHY BEQUEST IN CONTEMPLATION OF DEATH

22. נשאל לרבינו מאיר – אם ים לו לאדם בן אני ורוצה לתת לו עתה כדי לסלקו לאחר זמן מירושתו .... והשיב ז"ל דיש תקנה לאדיו עכשיו אף על פי שהוא בריא לחלק נכסיו לאחר מותו לכל יורשיו במתנת שכיב מרע חוץ מזה. וכן יאמר עכשיו אף על פי שהוא בריא יפלוני בני יטול לאחר מותי שלים נכסי', ויפלוני בני שלים' ויפלוני כך וכך'. ולא ישאר לזה כלום ולא יזכירהו במתנה. וממילא לא ישאר לו כלום דאפילו בריא וחי אחר כך ימים רבים, כיון שמלוה ואומר פלוני בני יטול לאחר מותי, אין לך מלוה מחמת מיתה גדולה מזו....

מרדכי מסכת בבא בתרא פרק יש נוחלין [המתחיל ברמז תקעג]

There is a minority position of the Maharam of Rotenberg, quoted in the Mordechai (13C Germany). He rules that a person may gift ALL of their property in the manner of a shechiv mera, but when they are still healthy! As long as the gift is made in contemplation of death by a person in sound mind, in front of witnesses, it will have the effect of vesting the assets in the designated beneficiaries after death.

- According to the Maharam of Rotenberg, this would work even without the need for a kinyan. Can this then be used as a precedent for upholding a civil will?
- In principle, the answer must be NO, since it is a minority view and the majority of Rishonim, the Shulchan Aruch and the majority of Acharonim do not follow it[19]. So is it useless?
- In fact, since this is an area of monetary (and not ritual) law, a minority view of this type could be helpful in a couple of ways:
  - (i) It will often be essential to establish in a monetary dispute who is the *muchzak* - presumed to be in halachic ownership. Once someone can establish themselves as a *muchzak*, this will shift the burden of proof onto the other side to justify taking the assets away from them - *hamotzi mechavero alav haraya.* In a normal situation, the Torah inheritors will be the *muchzakim* after death. However, the position of the Maharam may validate a civil will sufficient to place the beneficiaries on the same footing, with a counter-claim to be *muchzakim.* This would level the playing field when it comes to the burden of proof.
  - (ii) In a monetary matter, a litigant who is a *muchzak* can always make a claim of *kim li* - literally 'I hold ...'. This means that they can argue to the Beit Din that, since there are multiple halachic views on a particular issue, they chose to hold like view *x* which supports their claim. This could be done even with a minority position. As such, the position of the Maharam could be helpful to beneficiaries under a civil will.

F] OPTION 5 - THE MITZVA TO FULFIL THE WISHES OF THE DECEASED

23. אתא ההוא סבא תנא ליה: האומר 'תנו שקל לבני בשבת', וראוין ליתן להם סלע - נותנין להם סלע. ואם אמר 'אל תתנו להם אלא שקל' - אין נותנין להם אלא שקל. ואם אמר 'אם מתו יירשו אחרים תחתיהם', בין שאמר 'תנו' בין שאמר 'אל תתנו' - אין נותנים להם אלא שקל. אמר ליה: הא מני? רבי מאיר היא - דאמר: **מצוה לקיים דברי המת**. ... קיימא לן הלכה כרבי מאיר - דאמר: מצוה לקיים דברי המת ...

כתובות סט:

The Gemara rules that there is a special mitzva to fulfil the wishes of a dying person with regards to the manner in which they wish their heirs to be supported.

- This principal will be especially relevant where the testator is a parent, due to the impact of kibud av ve'em
- Although this is ruled in Shulchan Aruch (CM 252:2), the application of this principle is very limited.

18. Furthermore, the burden of proof will rest on the heirs to prove that the property in dispute was indeed in existence and owned by the testator at the time of the gift (Shulchan Aruch CM 211:6).
19. In general, it is an important principle in halachic process that rejected minority opinions cannot be brought 'into play' simply because they present a helpful precedent. For instance, one cannot reach out to minority views in Hilchot Shabbat and permit activities which are clearly prohibited according to the mesora of halachic process - Shulchan Aruch, nosei kelim and contemporary poskim.

• First, it will NOT prevent the allocation of assets to the Torah heirs. It simply, makes them liable to fulfil the wishes of the deceased in allocating funds.
• It will apply only when the donor has addressed his wishes directly to his heirs[20]. It is not sufficient for them to be in writing.
• It only applies to property in existence at the time of the declaration.
• According to some poskim, it will only apply in the case of a *shechiv mera* - a deathbed gift - and not with a healthy person.

G] OPTION 6 - CREATING AN INDEBTEDNESS

• We saw in Part 1 that one of the common mechanisms for ensuring that daughters and other non-halachic heirs could inherit was the Takanat Chatzi Zachar.

24. הגה: שטר חלי זכר שנוהגין בו בהידנא – שכותב האב לבתו ליטול בירושתו כחלק חלי זכר ....

שולחן ערוך אבן העזר הלכות כתובות סימן צ סעיף א

The Takanat Chatzi Zachar is mentioned by Rema (16C Poland)[21] and became popular[22]. The father would write to his daughter upon her marriage (in addition to her dowry) a promissory note entitling her[23], one minute before his death, to an enormous sum of money which would wipe out the entire inheritance. Built into this debt was a condition that it could be removed if the sons paid her an amount equal to half their individual inheritance[24]. They would naturally choose to give her the inheritance, rather than lose the whole estate! Since this was a loan binding on his estate from before his death, it took priority over the laws of inheritance.

• The advantage of this approach is that a personal indebtedness can be created in halacha without any legal consideration[25], without the existence of an actual monetary loan, and without the need for a kinyan! All that is required is a valid document to that effect.
• This mechanism could be used to give a bequest of any amount to any third party beneficiary, eg a charity.
• One of the risks of this approach is that it may be struck down as fictional by the secular court. Even if upheld, it may have unintended tax consequences.

H] OPTION 7 - THE CHARITY BEQUEST

• Normally speaking, the pledge of a gift is a personal obligation and will not create a lien on the assets. As such, a pledge by the testator will not be binding on the heirs after their death.
• However, the status of a pledge to charity[26] may be different.

25. .... אמירתו לגבוה כמסירתו להדיוט (רי עובדיה מברטנורא: – כלומר שור זה עולה, בית זה הקדש, אפילו בסוף העולם, קנה. ובהדיוט לא קנה עד שימשוך בבהמה, ויחזיק בבית)

משנה מסכת קידושין פרק א משנה ו

The Mishna rules that a pledge to 'hekdesh' - as a sacrifice or donation to the Temple - does not require a kinyan. Whilst a regular transaction requires a kinyan to transfer ownership, simply stating a pledge to the Temple immediately transfers to the ownership.

26. האומר: חפץ פלוני אני נותן לצדקה בכך וכך, והוא שוה יותר, אינו יכול לחזור בו (דכל אמירה שיש בה רווחא לגבוה, אמירתו כמסירתו להדיוט). .... אם חשב בלבו ליתן אינו חייב לקיים מחשבתו ואין צריך אמירה, אלא דאם אמר מחייבין אותו לקיים.

שולחן ערוך יורה דעה הלכות צדקה סימן רנח סעיף יג

The Rema applies this to contemporary gifts to tzedaka.

• As such, a pledge to a tzedaka in a will may be binding on the estate since it is deemed in halacha to already belong to the tzedaka.
• Nevertheless, since this is not agreed on by all poskim, it is preferable to structure the gift as an indebtedness - see above.

20. This may also be difficult in practice where the donor wishes to avoid pressure and hostility from his family.
21. We also see this mechanism in use in Toledo and Morocco in the time of the Rishonim.
22. Glückel of Hameln writes in the early 1700s that her father had written such notes to her husband and her sister's husband.
23. The loan would also benefit his son-in-law who would effectively inherit together with his sons. This could be very useful since the father could chose the quality of his sons-in-law, but not of his sons!
24. There is no reason why the father could not use this mechanism to give his daughter a FULL portion equal to her brothers, and there were recorded cases where this was done - see https://www.biu.ac.il/JH/Parasha/eng/pinchas/shi.html#_ftn14 note 14.
25. A technical legal term for any benefit received in return.
26. Note that, whilst most people are not permitted to give away to charity during their lives more than 20% of their assets, the position is different after death. See Rema YD 249:1 who rules that a person may give away to charity as much as they wish after death. Clearly, they should give due consideration to the needs of their surviving family.

I] OPTION 8 - MINHAG - SITUMTA

27. וכן כל דבר שנהגו התגרים לקנות בו, כגון על ידי שנותן הלוקח פרוטה למוכר, או על ידי שתוקע לו כפו, (או במקום שנוהגים בסוחרים שמוסרים לקונה המפתח) וכן כל כיוצא בזה.

שולחן ערוך חושן משפט הלכות מקח וממכר סימן רא סעיף ב

One of the halachic principles of monetary law is that any acceptable trade or professional practice or custom for transferring ownership - known as situmta[27] - will be binding in halacha. This could be a handshake, handing over a key or the fall of a gavel at an auction.

- Some authorities have suggested that this could be applied to civil wills. Since the minhag in society is to make a civil will to bequeath property after death, this could be imported into halacha, obviating the need for a formal kinyan.
- Most poskim have rejected this on the basis that *situmta* is simply a way of identifying alternative commercial forms of property transfer which can replace a formal halachic kinyan, where this would otherwise be needed (and effective). It cannot transform the nature of a civil will and render effective a kinyan after death, when halacha states that this will not work.

J] OPTION 9 - KIBUD AV VE'EM

- Some poskim have invoked the Torah mitzva of Kibud Horim - respecting parents - to argue that the provisions of a parent's civil will should be respected, even when they go against halacha.
- Others reject this on the basis that (i) a child cannot be forced by the court to comply with their parents' wishes; (ii) kibud horim applies to personal service to parents but may not include taking a major personal financial loss; (iii) the mitzva may be more limited in scope after the death of the parent.

K] PRACTICAL APPROACHES[28]

- In practice[29], many lawyers[30] will recommend a combination of the indebtedness approach and the inter-vivos trust.
- This will often require two separate documents[31] - a regular will and also a 'halachic shtar' to ensure compliance with the halacha.
- It is recommended to include a provision leaving a small amount of money to the halachic heirs[32].
- Further recommended reading is listed below.[33]

27. See Bava Metzia 74a. The word situmta refers to a stamp placed on a wine barrel. If placing the stamp on a wine barrel in a particular society is considered to signify that a deal is finalized, the halacha considers this action to be a kinyan.
28. As explained above, full consultation with all relevant halachic and professional advisers is always required. The halachic positions are more complex than we have been able to outlined in this shiur, and even a small change in circumstances can have significant halachic implications.
29. For forms and practical guidance see also http://bethdin.org/wp-content/uploads/2015/07/HalachicWill.pdf
30. See https://torahmitzion.org/learn/wills-halacha-no-need-compromise-either/where the writer - Simon Jackson, a prominent Israeli lawyer - writes that his approach is to draw up two documents. The first is a standard, secular will, drafted in Hebrew or English, according to the laws of the State of Israel, which usually involve distributing property to the surviving spouse and then to each of his/her children (whether male or female) in equal shares (whether firstborn or otherwise). The second document constitutes a "Halachic Wills Appendix," based on a Hebrew document drafted by Rav Zvi Yehuda ben Ya'akov, a Dayan on the Tel-Aviv Regional Rabbinical Court. This document effectively enables the secular will to comply with the requirements of Halacha, combining as it does the elements of the gift approach (for property on which a kinyan can work) and the penalty payment mechanism (in the sum of double the share that each beneficiary would be entitled to receive under the secular will, in the event that the sons do not pay their full monetary obligations to the daughters under the 'note' of indebtedness). The "Halachic Wills Appendix" is drafted in a separate document – which has the added advantage that it need not be brought to the attention of a non-religious judge (who may otherwise be confused at best, particularly by its unusual "indebtedness" provisions) at the time the ordinary, secular will is probated.
31. In order to avoid legal confusion concerning the documents, the Beit Din of America (see above) recommend: (i) that 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 shtar chov under civil law. (ii) Since there is no delivery requirement under Jewish law to validate the shtar chov, only a single executed copy of the shtar chov should be prepared. This copy should be held in safekeeping by ones Rabbi.
32. Such as the following clause: "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.
33. http://teamshabbos.org/wp-content/uploads/2015/12/Halachic-Wills-by-Marburger.pdf - a 51 page analysis of the relevant issues
Halacha and the Conventional Last Will and Testament, Judah Dick - at https://www.jlaw.com/Articles/last_will_and_testament1.html
https://rabbikaganoff.com/is-a-will-the-halachic-way/
http://www.hakirah.org/Vol15Warburg.pdf
http://www.hakirah.org/Vol%2010%20Warburg.pdf
http://bethdin.org/wp-content/uploads/2015/07/HalachicWill.pdf
http://teamshabbos.org/halachic-wills/
A detailed academic analysis is: *Jewish and American Inheritance Law: Commonalities, Clashes, and Estate Planning Consequences*, Donna Litman and Steven H. Resnicoff, at https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2252912_code625213.pdf?abstractid=2252912&mirid=1
Professor Resnicoff's collection of articles on Jewish law are generally recommended, and can be found at https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=625213