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בס"ד

The Halachic Will

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There is a familiar saying that states, "where there is a will, there is a way." Along these lines, it is common for people to prepare for the end of their respective lifetimes by preparing a secular last will and testament so that there can be a smooth disposition of their assets at the end of their lives. However, from a *halachic* perspective, where there is such a will, there is often no way to enforce it, unless a "*halachic* will" has been prepared. Accordingly, a more apt saying might be, "where there is a *halachic* will, there is a way." What is a *halachic* will? It is not actually a will per se, but it does indeed provide a way. Let's start with a little background.[1]

According to the Torah,[2] when a man dies, the inheritance goes only to sons. If there are no sons, the inheritance goes to daughters. If there are no sons or daughters, the inheritance goes to the person's father, or if there is no father, the inheritance passes to the brothers. If there are no brothers, the inheritance passes to the sisters. If there were no brothers or sisters, the inheritance passes to the previous generation, namely the father's father, and if he is deceased, then to the uncles, and if there are none, then to the aunts. This continues throughout all previous generations until heirs are located. In each case, if an heir died, but left children, the children would inherit (either the sons, or if there weren't any, then the daughters, as above).[3]

When there are multiple heirs, they split the inheritance, except in the case of sons inheriting from their father,[4] in which case a *bechor* – a first-born eldest son who satisfies all the relevant criteria according to Jewish law - receives a double portion.[5] For example, if there were two sons, the estate would be split three ways; the eldest son would receive two portions while the younger son would receive one portion. If there are multiple heirs and one of the heirs died and left children, the children would split equally the parent's single portion, an arrangement which is described in legal parlance as "per stirpes." Although daughters do not inherit, they receive an allowance and a dowry from the estate.[6]

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[1] There are several excellent articles that have already been written on this subject. See the series on Estate Planning by Rabbi Chaim Jachter in his *Gray Matter*, volume III, Rav Mordechai Willig's articles, "The Halachah of Wills," posted on the Beth Din of America website, and "Inheritance Without a Fight: Writing a Will in Modern Times," posted at TorahWeb.org, and the annotated notes that were penned by Rabbi Aaron Kraft of the Chicago Rabbinical Council on the *halachic* will form of the Beth Din of America and the Chicago Rabbinical Council. See also the seminal essay by Rav Hershel Schachter, "*Dina Demalchusa Dina*: Secular Law as a Religious Obligation," in the *Journal of Halacha and Contemporary Society*, Vol. I, pages 128-132. I also want to thank Rabbi Kraft for his helpful comments to this article.

[2] *Bemidbar* 27:8-11.

[3] See *Choshen Mishpat* 276:1.

[4] See *Choshen Mishpat* 278:1.

[5] *Devorim* 21:15-17.

[6] See *Even Haezer* 112-113.

Husbands inherit their wives, either as a matter of Torah law or rabbinic law (it is a debate)[7], but wives do not inherit their husbands. Rather, widows receive payment based on the ketubah between the husband and wife which obligates the husband's estate to pay a certain sum upon death or divorce. Until the widow chooses to collect the ketubah, she is entitled to be supported by the estate, but not to inherit any of the husband's assets.[8]

In both the case of the husband's inheritance of his wife and the first-born son's double portion from his father, the inheritance is only with respect to available assets in the testator's possession at the time of death (*muchzak*) as opposed to non-available assets that are owing *(ra'ui*) such as outstanding loan amounts. [9]

What if a man desires that his wife inherit his assets, or if a couple desires that after they pass away, both their sons and daughters should inherit equally, or that the first-born son should receive an inheritance equal to the other brothers? In all these instances, the Talmudic sources[10] indicate that although a person is usually permitted to make conditions that are not necessarily consistent with the default rules of the Torah when it comes to monetary transactions,[11] inheritance is an exception to this rule. The Rambam explains[12] that this exception is because inheritance is not simply a monetary ordinance but is rather in the realm of ritual law which is not subject to adjustment. Thus, if a person devises a will that bequeaths his or her assets in a manner which is contrary to the Torah scheme of inheritance, the will would be null and void as a matter of Jewish law. Accordingly, secular wills that are not in accordance with Torah law would be unenforceable.[13]

Is there then no way to distribute one's assets upon death in a manner which is different from Torah law? There is a special rule that a person on his deathbed may reapportion his inheritance in unequal shares amongst his heirs, but this only pertains to reapportionment amongst those who would inherit anyway, and only applies to a person who is on his deathbed.[14]

However, a person can also donate gifts during his or her lifetime to individuals who would not otherwise be heirs (although a gift given after death would be void). The downside to this option is that once the gifts are given, the grantor no longer has access to these assets. If the assets are specifically identified, a gift can be given to take effect "one minute prior to death." However, if the asset is a percentage interest in the monetary value of the estate (as is often the case in wills), then most rabbinic authorities conclude that the uncertainty of the amount coupled with the uncertainty of the exact moment in which the gift

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[7] See Rambam, *Hilchos Nachlos* 1:8 (assuming that the husband's inheritance of his wife is only rabbinic), and *Maggid Mishneh* ad locum (citing the Ra'avad's opinion that the husband inherits his wife according to Torah law). Unlike most other cases of inheritance that are not subject to condition or waiver (see text *infra*), the husband is able to waive his right to inherit his wife, so long as the waiver is made between betrothal and marriage. As to why a waiver can be performed in this case, see my essay in *Kanfei Yona*, pages 51-67.

[8] See *Even Haezer* 69:2; 93:3.

[9] See *Even Haezer* 90:1 with respect to a husband's inheritance; Choshen *Mishpat* 278:3 with respect to a *bechor*.

[10] *Bava Basra* 126b; see *Hagahos Eretz Zvi* ad locum; *Rashba*, s.v. *hasam*. See also *Bava Basra* 130a.

[11] See, e.g., *Bava Metzia* 94a.

[12] *Hilchos Nachlos* 6:1.

[13] Although there is a suggestion made by Rav Moshe Feinstein that even a secular will could be an enforceable transaction based on the principle of *Dina Demalchusa* (see *Igros Moshe* 1:104), this opinion has not generally been accepted. Some understand this opinion to mean that the testator's intention is really to convey the inheritance one moment prior to death (however, this implicates the issue of *breirah*, as noted *infra* in the text).

[14] See *Choshen Mishpat* 281:1 (technically, this rule would even allow a testator on his deathbed to bequeath all his assets to one heir to the exclusion of the other heirs).

would be vested (since nobody can predict when "one minute before death" will happen) creates a problem of "*breirah*" (retroactive designation) that is not a valid form of conveyance according to Torah law.[15]

Accordingly, earlier rabbinic authorities devised a solution to these obstacles by creating the forerunner to what is currently described as the "*halachic* will" in the form of a "*shtar chatzi zachar*" which literally means a "half male contract."[16] The mechanism of this document is that the testator obligates himself during his lifetime to grant a huge monetary gift in a quantifiable sum greater than his anticipated total assets (such as a gift of ten million dollars for somebody who does not expect to have an estate worth more than five million dollars) to his daughter or daughters which shall take effect one minute before death, and pledges all of his assets as security for this debt. However, the testator stipulates that if his sons (who are his Torah heirs; the same would be true of brothers or nephews if they are the heirs) will give half-portions of the estate to each of their sisters upon the testator's death, then the gift will become null and void. This device avoids *breirah* problems because the huge sum of money is quantifiable in nature (and the only uncertainty is the time that the obligation will vest, which is a minor component of the transaction)[17] and a person has the right according to Jewish law to obligate himself to pay a vast sum that is greater than his current or foreseeable assets even without receiving any consideration in return.[18]

Later authorities expanded this idea to allow a "*shtar zachar shalem*"[19] pursuant to which the sons (or other heirs) are required to grant equal portions of the testator's estate to their sisters if they wish to nullify the debt obligation. This *shtar* or document of indebtedness is typically called a *halachic* will because it enables the secular last will and testament to become enforceable as a matter of Jewish law through the volitional compliance of the heirs with the terms of this otherwise unenforceable document since they would otherwise lose their inheritance entirely. The same mechanism can be utilized by a husband who seeks to have his wife receive all his assets, except in this case there is no need for a trigger mechanism to incentivize the heirs to comply with the terms of the last will and testament, since the husband can simply stipulate that he is granting his wife a gift of ten million dollars (assuming the estate is worth less) to be effective one minute prior to death and that all of his assets shall be pledged towards satisfaction of this debt.[20]

However, there is one important caveat to this solution, namely that while a person could technically give away all his or her assets as a gift prior to death and thus circumvent the Torah laws of inheritance, the Talmud rules that it is improper to do so.[21] To avoid this impropriety, it is necessary to exclude a certain amount of the estate that will in fact be distributed to the Torah heirs solely in accordance with Jewish law. According to some authorities, this can be accomplished by designating one's *seforim* solely for the Torah heirs, so that only the sons and not the daughters would receive all the *seforim* of the estate, and

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[15] See *Beitza* 38a.

[16] Rema, *Choshen Mishpat* 181:7.

[17] See *Ran, Nedarim* 45b, s.v. "ve'ika".

[18] Rambam, *Hilchos Mechira* 11:15. The fact that this may be viewed as an unenforceable contingent obligation (*asmachta*) can be resolved by the grantor taking on the obligation "*me-achshav*" (immediately) and in front of an esteemed Beth Din (even if only stated to be such). See the opinions cited in the *Shulchan Aruch* and *Rema*, *Choshen Mishpat* 207:14-15.

[19] *See Ktzos Hachoshen* 33:3; *Igros Moshe*, EH 1:110.

[20] Arguably, the willingness of rabbinical authorities to allow this type of device, which involves gift-giving in one's lifetime, is based upon the precedent found in *Bereishis* 25:6 with respect to Avrohom and his children. See Rashi ad locum.

[21] *Bava Basra* 133b.

the first-born eldest son would receive a double portion.[22] Alternatively, a significant sum of money (usually assessed to be $1,000 or more) can be set aside for this purpose.[23] This carve-out amount should ideally be reflected both in the actual last will and testament document and in the "*halachic* will" document.[24] Even in the case of a husband granting all his assets to his wife, such a carve out clause would be necessary.

With respect to a wife who executes a will, two special considerations need to be addressed as well. First, to the degree that she wishes to gift her assets to anyone other than her husband, her husband needs to sign a form that he agrees to any such disposition because otherwise he is considered a "first purchaser" who takes precedence over anyone else.[25] Secondly, even if the wife wishes to bequeath all of her assets to her husband, her other heirs (e.g., sons) would take precedence with respect to non-available assets (such as loan monies owed to her), and therefore she would still need a *halachic* will to gift those assets to her husband instead because the husband would not otherwise be entitled to that portion of her estate (and in such a case, she should also set aside a meaningful amount to be inherited by her heirs from those non-available assets).

Although it is discouraged to steer assets away from the rightful heirs altogether, the halacha does endorse bequeathing a certain amount of money upon death to charity. Based on a Talmudic passage,[26] some authorities recommend that the amount be as much as 50% of a person's estate,[27] while others write that even more can be given so long as a meaningful amount is left over for the heirs.[28] Since even money for charity cannot technically be gifted after death, the money can instead be placed into a "trust" during the testator's lifetime based on the principle of "*mitzvah le'kayem divrei hames*" (i.e., it is a mitzvah to fulfill the wishes of the deceased). This principle permits one to set aside assets in any trust account (which according to many authorities can even be a revocable trust)[29] so long as there is a third party trustee of the account.[30] While this generally necessitates at least the establishment of a stand-alone trust, in the case of charity, any kind of written (or even oral) declaration suffices for the donation to be deemed enforceable since "an oral commitment to sanctify funds is equivalent to handing over the funds to another party."[31]

While in many cases, the desire of children to fulfill "*kibbud av v'em*" will cause heirs to agree to share assets of their parents' estate with non-Torah heirs, such as brothers sharing their inheritance with their sisters to satisfy the wishes of their parents, this is by no means a sure thing, and it is unfortunately the reality that many families experience much strife over inheritance disputes. In my years of experience in the Beth Din, I have been involved in the adjudication and resolution of numerous such cases. One major advantage of a *halachic* will is that it enables individuals to see to it that the bulk of their estate is given to

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[22] See *Nachlas Shiva, siman* 21, note 6.
[23] See *Igros Moshe* CM 2:50.
[24] The reasoning to include this carve-out amount in the *Halachic* Will document is to clarify that this amount is being conveyed as part of the enforceable inheritance rather than as merely part of the voluntary compliance by the heirs with the otherwise unenforceable last will and testament.
[25] See *Bava Basra* 139b.
[26] *Kesuvos* 67b.
[27] See *Aruch Hashulchan* 249:1.
[28] See *Igros Moshe* CM 2:49-50.
[29] This was the opinion of Rav Gedalia Dov Schwartz zt"l, and is also the opinion of *yblc"t* Rav Hershel Schachter shlit"a.
[30] See *Tosafos, Gittin* 13a (citing Rabbeinu Tam). It would also not be necessary to have a separate *halachic* will with respect to any such assets placed in a trust during one's lifetime so long as the beneficiary is clearly identified.
[31] *Nedarim* 29b, *Kiddushin* 28b, *et passim*.

children in equal shares, thus preventing acrimony. It is therefore very prudent to work with an experienced Beth Din[32] or rabbinic advisor who can help one navigate the execution of a "*halachic* will" to ensure that his or her wishes be respected. This process should also be coordinated with one's estate attorney to ensure that it does not trigger any adverse secular law consequences. May our punctiliousness with respect to devising a proper "*halachic* will" also serve as a *z'chus* for a long and rewarding life.

[32] See the links posted on the The Chicago Rabbinical Council website for the revised *halachic* will form with instructions and annotations (see note 1).