Wills

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Introduction

1. Vignettes

- David, an observant Jew, prepared a will in accordance with local law, distributing his property among his children equally and ignoring any considerations of Jewish law. His daughter, Sarah, declares that she will refuse to accept any property bequeathed to her under the terms of this will. Under Jewish law, is Sarah correct?
- David wishes to appease Sarah; how might he prepare a legal will which conformed to Jewish law?
- David's son Sam has stopped observing Judaism, and David is concerned that his grandchildren will not be raised as Jews at all. David wishes to structure his will to exclude Sam, unless Sam would send his children to Jewish schools. Would Jewish law approve of this? Would this be legal in Ontario?

2. The order of inheritance – Numbers 27:8-11

3. Rabbi Yosef Karo (16th century Israel), Code of Jewish Law, Even haEzer 112:11

מי שמת והניח בנים ובנות, יירשו הבנים כל הנכסים והם זנים אחיותיהם עד שיבגרו או עד שיתארסו. בד"א? כשהניח נכסים שאיפשר שיזונו מהם הבנים והבנות כאחד עד שיבגרו הבנות... אבל אם אין בנכסים שהניח אלא פחות מזה, מוציאים מהם מזונות לבנות עד שיבגרו, ונותנים השאר לבנים. ואם אין שם אלא כדי מזון הבנות בלבד, נזונות מהם עד שיבגרו או עד שיתארסו, והבנים ישאלו על הפתחים.

When a person dies, leaving sons and daughters, the sons inherit all of the property, and they feed their sisters until they mature or are betrothed. When is this true? Where the deceased left property which could feed both the sons and the daughters until the daughters mature… But where the bequeathed assets are only less than this, they feed the daughters from this until they mature, and the rest is given to the sons. If it is only sufficient to feed the daughters, they are fed until they mature or are betrothed, and the sons ask at doors.

4. The Jewish imperative to write a will Age 50; Arrangements; Causing others to stumble; Non-financial issues

Vignette 1: A secular will

5. Talmud, Gittin 13a

משנה: תנו מנה לאיש פלוני ומת יתנו לאחר מיתה

גמ' אמר רב יצחק בר שמואל בר מרתא משמיה דרב: והוא שצבורין ומונחין בקרן זוית. במאי עסקינן? אילימא בבריא, כי צבורין מאי הוי, הא לא משך! ואלא בשכיב מרע, מאי איריא צבורין? כי אין צבורין נמי, דהא קיי"ל דדברי שכיב מרע ככתובים וכמסורין דמו! א"ר זביד לעולם בבריא, וכדרב הונא אמר רב, דאמר רב הונא אמר רב מנה לי בידך תנהו לו לפלוני במעמד שלשתן קנה...

Mishnah: If someone says, "Give a *maneh* to so-and-so" and he dies, they give it posthumously.

Gemara: Rav Yitzchak bar Shemuel bar Marta cited Rav: This is only if the money is gathered together in a corner.

What are we talking about? If the giver is healthy, why does their being gathered matter? The recipient has not moved them [in an act of acquisition]! If the giver is on his deathbed, why specify that the money is gathered? Even if the money is not gathered, don't we rule that the speech of a person on his deathbed has the legal force of written and transmitted wishes!

Rav Zvid said: This is a case of a healthy person, as Rav Huna cited Rav to say: If a giver says, "Please take the *maneh* you owe to me and give it to so-and-so", in front of the three parties, that effects the transaction.

6. Rabbi Yosef Karo (16th century Israel), Code of Jewish Law, Choshen Mishpat 250:24

בריא שאמר: כתבו ותנו שדה זו לפלוני, אם מחיים, כותבים ונותנים אי לא הדר ביה קמי דמטא שטרא לידיה, אבל לאחר מיתה אין כותבים ונותנים אא"כ קנו מידו.

If a healthy person says, 'Record a deed and give this field to X', then while he is alive they record and give, and it is valid so long as he does not recant before the deed reaches X's hand. However, after his death they do not record a deed and transfer the field, unless he enacted a *kinyan* with them [while he was alive].

7. Rabbi Moshe Feinstein (20th century USA), Igrot Moshe Even haEzer 1:104

בעצם מסתבר לע"ד שצואה כזו שודאי יתקיים כדברי המצוה בדינא דמלכותא א"צ קנין שאין לך קנין גדול מזה.

Logically, in my humble opinion, a will like this, which certainly would be upheld in accordance with the words of the person who issued it under the law of the land, should not require an act of *kinyan*. There could be no greater *kinyan*!

Vignette 2: How might we make everyone happy?

A gift with a retained life interest

8. Rabbi Yosef Karo (16th century Israel), Code of Jewish Law, Choshen Mishpat 257:1

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

If one writes his property to his children 'after his death', the body belongs to the child from the date on the document, and the produce belongs to the father until his death. Therefore, the father cannot sell it, for it is given to the son, and the son cannot sell it for it is in the father's domain.

9. Donna Litman, Steven Resnicoff, Jewish and American Inheritance Law pg. 175

The transfer of a future interest also requires that the kinyan be accompanied by appropriate language. Thus, a transferor who wants to retain beneficial ownership until just before death could state (or include in any deed): "This transfer is from now and until one moment before I die." By this language, the transferor will retain the right to possession of the property until the moment before death, when that right will vest in the transferee. Because at the transferor's death, the property belongs completely to the transferee, the transferor's Torah heirs receive nothing.

10. Rachel Blumenfeld, The Jewish Laws of Inheritance and Estate Planning in Canada, pg. 7

There are a number of practical and legal drawbacks to this solution — not the least of which is the loss of control by the donor over his or her property. As well, there would be tax consequences to the transfer if there is an accrued gain realized on the disposition (unless the property is a principal residence). If the donor does wish to proceed with a transfer of this nature, it is important to document what is to occur if, for example, the donor is unable to continue living in the property.

Artificial Debt

11. Rabbi Yosef Karo (16th century Israel), Code of Jewish Law, Choshen Mishpat 40:1

המחייב עצמו בממון לאחר בלא תנאי, אף על פי שלא היה חייב לו כלום, ה"ז חייב. כיצד, האומר לעדים: הוו עלי עדים שאני חייב לפלוני מנה, או שכתב לו בשטר: הריני חייב לך מנה, אף על פי שאין שם עדים, או שאמר לו בפני עדים: הריני חייב לך מנה בשטר, אף על פי שלא אמר: אתם עידי... שהרי חייב עצמו כמו שישתעבד הערב.

One who obligates himself to pay another unconditionally is obligated, even if there was no debt. One who says to witnesses, 'Witness that I owe X a *maneh*' or one who writes in a deed, 'I owe X a *maneh*' even without witnesses, or one who says to X before witnesses, 'A deed says that I owe you a *maneh*', is obligated even without saying to the witnesses, 'You are my witnesses.'… He has obligated himself, as one who obligates himself to be a guarantor.

12. Rambam (12th century Egypt), Mishneh Torah, Laws of Sales 11:1

המקנה בין קרקע בין מטלטלין והתנה תנאין שאפשר לקיימן, בין שהתנה המקנה בין שהתנה הקונה, אם נתקיימו התנאין נקנה הדבר שהוקנה, ואם לא נתקיים התנאי לא קנה,

If one makes a *kinyan* assigning land or movable items to another, with conditions which can be fulfilled, the property is transferred if the conditions are fulfilled, whether the conditions came from the transferor or the recipient. If the conditions are not fulfilled, the transaction is void.

13. Rambam (12th century Egypt), Mishneh Torah, Laws of Sales 11:16

חייב עצמו בדבר שאינו קצוב, כגון שאמר הריני חייב לזון אותך או לכסות חמש שנים, אע"פ שקנו מידו לא נשתעבד, שזו כמו מתנה היא ואין כאן דבר ידוע ומצוי שנתנו במתנה, וכן הורו רבותי.

One who obligates himself to pay an unspecified sum, as in, 'I am obligated to feed/clothe you for five years', is not obligated even if a *kinyan* was made. This is like a gift without a known object. So my mentors have ruled.

14. Rabbi Yosef Karo (12th century Egypt), Code of Jewish Law, Choshen Mishpat 60:2

המחייב עצמו בדבר שאינו קצוב, כגון שנתחייב לזון את חבירו או לכסותו חמש שנים, (או שלא נתן קצבה לשנים) (ב"י בשם הרשב"א), אף על פי שקנו מידו, לא נשתעבד להרמב"ם; וחלקו עליו כל הבאים אחריו לומר שהוא משתעבד, והכי נקטינן

One who obligates himself to pay an unspecified sum, such as to feed or clothe someone for five years (or without a specific number of years), is not bound according to the Rambam, even with a *kinyan*. All who came after Rambam disagreed with him, though, saying he is bound, and this is the law.

15. Donna Litman, Steven Resnicoff, Jewish and American Inheritance Law pg. 175
[A] husband is first in line to inherit from his wife. In addition, however, a husband's rights are deemed to have vested at the outset of the marriage. Consequently, even if, during the marriage, the woman were to admit a great debt to a third party, this would not affect the husband's rights. Given that his rights preceded the indebtedness to the third party, the husband would have prior rights to the wife's estate.
Consequently, for a married woman to use this device, she needs her husband's cooperation. The husband should sign a separate admission of indebtedness that falls due on his wife's death. This document, however, should provide that this indebtedness is deemed fully paid and discharged if he fulfills the gifts set forth in his wife's "will".

16. Donna Litman, Steven Resnicoff, Jewish and American Inheritance Law pg. 181
As a general rule, American law does not enforce an obligation or deem it legally binding when a person voluntarily undertakes an obligation to another without consideration or a consideration substitute.

17. Rabbi Moshe Isserles (16th century Poland), Code of Jewish Law, Even haEzer 108:3
ומה שנוהגין בשטר חצי זכר שכותבים עכשיו לבנות שנוטלין בכל אשר ימצא לו כמו הזכרים, משום דכותב להם דרך הודאה שחייב סך מה, ולא יפטר אלא כשנותן להם כמו הזכרים, ובדרך זה יכול להקנות אף מה שלא ברשותו, הן ראוי הן מוחזק...
The practice of *shtar chatzi zachar*, writing for daughters that they should have a share like the males, writing in the form of an admission that he owes a certain sum to her and he will not be exempt other than by giving them a share like the males, and so he can even give her that which he does not currently own, whether that which is his due or that which he currently has…

Joint tenancy
18. Rachel Blumenfeld, The Jewish Laws of Inheritance and Estate Planning in Canada, pg. 6
Transferring and holding assets in joint tenancy with children during lifetime may be a solution to the *halakhic* issue of distributing assets to daughters on death. However, in Canada, one must proceed cautiously. There may be tax implications to a transfer to joint tenancy (where a "true" joint tenancy is created), as the parent may be considered to be disposing of one-half of the property. And, in light of the *Pecore* and *Saylor* decisions, if the property is transferred to one of several children with the intention that the child is to distribute the property among several siblings, the property may be considered to fall back into the estate to be divided according to the will. That said, if, as discussed above, there had been a proper *kinyan* at the time of the transfer into joint tenancy, the child holding the property at the death of the parent should be able to distribute it in accordance with the will without offending the *halakha.*

Inter vivos trust
19. Rabbi Chaim Jachter, http://koltorah.org/ravj/Yerushah.html
A new suggestion may provide a Halachically viable solution to the Yerushah issues in a manner that is consistent with common secular legal and estate planning for many people. This involves establishing a revocable living trust, a contractual arrangement between a person as the grantor forming the trust, preferably that person and another person as co-trustees managing the trust, and he and his family members as beneficiaries to receive the economic benefits of the trust. This approach to a living trust is fundamentally different from the more simplistic approach of most living trusts in which one would be the sole grantor, trustee and beneficiary until death. The latter approach is less likely to be respected as a valid entity under Halacha. If the former kind of trust can be regarded as a legal entity (a third party) by Halacha, and the subsequent transfers of one's assets to such a trust characterized as lifetime gifts, this commonly used secular planning technique may afford a new method of complying with the Torah requirements concerning Yerushah…

Jewish Estate Planning

20. Charles Wagner, *When is a disappointed heir a defrauded creditor?*, Jewish Tribune, May 7 '13

A seminal case in this area is Stone v. Stone. In 1995, multimillionaire Harry Stone hatched a plan to ensure that his wife of 24 years Sarah Stone would get very little upon his death. In particular, Harry wanted to make sure that his commercial wealth would go to his children from a prior marriage. The problem for Harry, of course, was the Family Law Act, which lets the surviving spouse seek equalization against the estate in the same way that a spouse might on a divorce. Harry tried to thwart his wife's rights under the Family Law Act by transferring his assets to his children before he died. The result was that, when Harry passed away on July 21, 1995, there was virtually nothing left in his estate. Essentially, Harry was preventing his wife from exercising her claim under the Family Law Act for an equalization of net family property. In this case, Ontario Court of Appeal recognized the possibility of using the Fraudulent Conveyances Act to set aside transfers "made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures." In Stone v. Stone, the court held that, as a spouse who held rights under the Family Law Act at the time of the fraudulent conveyances, i.e., the right to seek equalization, Sarah was a "creditor or other" within the meaning of the Fraudulent Conveyances Act. Accordingly, Harry's transfers to his kids were declared void and Sarah received an equalization payment of $851,937.

21. Rachel Blumenfeld, The Jewish Laws of Inheritance and Estate Planning in Canada, pg. 3

[I]t is unlikely for observant Jews in Western societies to want to execute wills that are strictly in keeping with the Biblical laws of inheritance. Not only would such a will be viewed as unfair and likely to cause discord in a family, in many jurisdictions, secular laws may be applied to overturn such distributions

22. Talmud, Bava Batra 133b

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

Mishnah: One can write away his property to others, leaving his children, but the sages are displeased with him. Rabban Shimon ben Gamliel said: He is remembered for the good if his children were not behaving properly.

23. Talmud Yerushalmi, Bava Batra 8:6

א"ר בא בר ממל הכות' נכסיו לאחרי' והניח את בניו עליו הו' אומ' ותהי עוונותם על עצמותם

Rabbi Abba bar Mamal said: Regarding one who writes his property to others, leaving his sons, it is written, 'And their sins were upon their bones.'

24. Rabbi Yehoshua Falk (16th century Poland), Sefer Meirat Einayim 282:4

והטעם, דהרי זכתה להן התורה בפרשת נחלות דיקומו היורשים תחת מורישיהן בנחלתן וירושתן:

This is because the Torah's portion of inheritance assigns to the heirs the right to stand in the place of those who bequeath to them, in their lot and inheritance.

25. Rambam, Mishneh Torah, Hilchot Nachalot 6:11

כל הנותן נכסיו לאחרים והניח היורשין, אע"פ שאין היורשין נוהגין (בו) כשורה אין רוח חכמים נוחה הימנו, וזכו האחרים בכל מה שנתן להן, מדת חסידות היא שלא יעיד אדם חסיד בצוואה שמעבירין בו הירושה מן היורש אפילו מבן שאינו נוהג כשורה לאחיו חכם ונוהג כשורה.

One who gives his property to others, leaving the heirs, displeases the sages even if the heirs do not act properly [to him]. The others do acquire whatever he gives them. It is pious to refrain from testifying to a will that transfers inheritance from the heir, even from a son who does not act properly to a brother who is wise and acts properly.

26. Rabbi Moshe Isserles (16th century Poland), Code of Jewish Law Choshen Mishpat 257:7

בריא שרוצה לחלוק נכסיו אחרי מותו שלא יריבו יורשיו אחריו, ורוצה לעשות סדר צוואה בעודו בריא, צריך להקנות בקנין.

If a healthy person wishes to distribute his assets after his death, to prevent fighting among his heirs, and he wishes to arrange the instructions while he is healthy, he must assign it with an act of *kinyan*.

27. Talmud, Gittin 47a

כי נח נפשיה שבק קבא דמוריקא, קרא אנפשיה: ועזבו לאחרים חילם.

When [Reish Lakish] died, he left behind a measure of saffron. He applied to himself Psalms 49:11, "And they left their strength to others."

28. Talmud, Eruvin 54a

אמר לי' רב לרב המנונא: בני, אם יש לך - היטב לך, שאין בשאול תענוג ואין למות התמהמה. ואם תאמר אניח לבני - חוק בשאול מי יגיד לך.

Rav said to Rav Hemnuna: My son, if you possess something then it is good for you, for in *she'ol* there is no pleasure and death does not delay. And should you say, 'I will leave a portion for my son,' who will tell you [what happens to it] in *she'ol*?

29. Talmud, Ketuvot 67b

כי קא ניחא נפשיה, אמר: אייתו לי חושבנאי דצדקה, אשכח דהוה כתיב ביה שבעת אלפי דינרי סיאנקי, אמר: זוודאי קלילי ואורחא רחיקתא, קם בזבזיה לפלגיה ממוניה. היכי עביד הכי? והאמר ר' אילעאי: באושא התקינו, המבזבז - אל יבזבז יותר מחומש! הני מילי מחיים, שמא ירד מנכסיו, אבל לאחר מיתה לית לן בה

When [Mar Ukva] was dying, he instructed, "Bring me my *tzedakah* account." He found 7000 *dinari siyanki* recorded therein. He said, "My provisions are light and my path is long!" He stood and gave away half of his money.

How could he do this? Didn't Rabbi Ila'i say, "In Usha the sages enacted that one who gives to *tzedakah* may not give more than twenty percent!" That is only when one is alive, lest he become impoverished, but after death there is no such concern.

30. Talmud, Ketuvot 53a

אמר ליה שמואל לרב יהודה: שיננא, לא תיהוי בעבורי אחסנתא אפילו מברא בישא לברא טבא, דלא ידיעא מאי זרעא נפיק מיניה...

Shemuel said to Rav Yehudah: Sharp one, do not be among those who divert inheritance, even from a bad son to a good son; you don't know what sort of child may emerge from him.

31. Rabbi Moshe Feinstein (20th century USA), Igrot Moshe Choshen Mishpat 2:50:1

והנה אף שלדינא איפסק כשמואל... אבל איתא בקצוה"ח סק"ב מהתשב"ץ דבטופסי שטרות ראשונים יש שיור ד' זוזי, וכתב גאון דמשום כדי שתהא רוח חכמים נוחה הימנו. ועיין בחת"ס חו"מ סימן קנ"א שהביא מתשב"ץ ח"ג סס"י קמ"ז שמה שהניח להיורש רביע זהוב אינו כלום לעשות שיהיה רוח חכמים נוחה הימנו אבל ד' זוזי הוא שיור

Although we rule with Shemuel's view… we find that the Tashbetz wrote that in early template documents they noted that the deceased left four *zuz* to his heirs, and one *gaon* explained that this was to satisfy the sages.

See also the Chatam Sofer, who cited the Tashbetz as saying that leaving a quarter-*Zahuv* coin to an heir is not significant enough to satisfy the sages, but four *zuz* is sufficient…

<u>Bibliography</u>

- Rachel Blumenfeld, *The Jewish Laws of Inheritance and Estate Planning in Canada* http://www.millerthomson.com/assets/files/news_attachments/blumenfeld.pdf
- Rabbi Chaim Jachter, Various articles http://koltorah.org/ravj/ravj.htm "Modern Issues: Wills"
- Donna Litman, Steven Resnicoff, *Jewish and American Inheritance Law* http://ssrn.com/abstract=2252912
- Charles Wagner, *Rabbi Moshe Feinstein and Halachic Wills* http://www.estatelawcanada.ca/rabbi-moshe-feinstein-and-halachic-wills/
- Charles Wagner, *When is a disappointed heir a defrauded creditor?*, Jewish Tribune http://www.jewishtribune.ca/features/2013/05/07/when-is-disappointed-heir-a-defrauded-creditor
- Rabbi A. Yehuda Warburg, *Drafting a Halakhic Will* http://www.yutorah.org/lectures/lecture.cfm/759377/Rabbi_Dr_Ronnie_[A_Yehuda]_Warburg/Drafting_a_Halakhic_Will
- Rabbi Mordechai Willig, *Inheritance Without a Fight* http://www.torahweb.org/torah/special/2007/rwil_will.html
- JLaw, Several articles http://www.jlaw.com/Articles/ "Wills, Trusts & Estates"