Making a Will the Jewish Way

A clear and consice explanation of how to plan your Will according to Halacha and Legal Law.



The Institute for Rabbinical Jurisprudence

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Blessed is the Omnipresent, Blessed is he, Blessed is He Who gave the Torah to his people Yisroel. Without knowledge of Torah, human understanding is unable to reach beyond self-oriented notions of fairness and equity. Only by striving to understand and apply the divinely ordained Mishpatim to all situations is it possible for human understanding to develop and expand, and we are thus forbidden to substitute any other legal systems for that of the Torah.

The institute for Rabbinical Jurisprudence/Mechon L'Hoyroa was created in order to train a new generation of Jewish leaders. Not just rabbis, but Dayanim- Rabbonim who are sufficiently learned in the letter, the spirit, and the practical application of Jewish law to guide us and render authoritative decisions in all the complex questions of our business, personal, and religious affairs.

Founded in 1976 by Rabbi Ezriel Tauber, the Institute has become widely acclaimed as one of the most innovative and important Torah projects of the century. Mechon L'Hoyroa Is truly creating Dayanim for our time.

The Institute's forty full-time scholars are carefully selected from among the most gifted graduates of rabbinical ordination programs. They devote themselves to intensive rigorous study - day in, day out - from 5:00 in the morning till late at night. Most importantly, they focus not on abstract theory, but on the myriad, complex questions of Halacha (Jewish Law) that arise in everyday life. Their knowledge is specific, practical, concrete.

Fourteen of our scholars are already full fledged Dayanim, presiding over the Institute's two Rabbinical Courts, in Boro Park, Brooklyn, and Monsey, New York, where they adjudicate cases without recompense, and without bias. the Institute's twenty six Dayanim in training receive "shimush" (practical apprenticeship) and will one day soon be qualified to preside over courts of their own.

Mechon L'Hoyroa is now internationally renowned and respected as a primary source of Halachic authority and expertise, providing a vast range of vital services to communities and individuals throughout the world.

In addition to the Rabbinical Courts, the Institute also provides invaluable consultation services to the community at large. Whenever a problem arises - whether in business ethics, in personal matters, or in any other aspect of Jewish law - a call to Mechon L'Hoyroa can resolve the issue. The scholars of the Institute are available to research and resolve even the subtlest, most complex questions, and their reputation has spread far and wide. Inquiries come in from throughout the U.S. and Canada and around the globe. The institute has even dispatched its representatives on missions to as far away as Australia and the former Soviet Union, to assist those communities in their quest for justice, as embodied in the Rabbinic tradition.

In this publication we explain the procedures and its halachic implications of how to make a will the Jewish way.

Making A Will The Jewish Way

- Introduction -

Our holy Torah's laws of inheritance differ significantly from state laws governing inheritance. If there is a conflict between Halacha (Jewish law) and civil law, we are obligated to follow Halacha. Although we often apply the rule *dina demalchusa dina*, "the law of the land is the law", this in not true for the laws of inheritance. [1] Since many Halachic authorities take the position that a will drawn up by lawyers is invalid according to Torah law, other steps must be taken in order for a will to be effective according to Halacha. Indeed, if a person dies without leaving a will, the relatives inheriting his property are obligated to divide it according to Halacha. Of course people receiving property based on Halacha can relinquish their rights so that others may receive the property.

Therefore, a person who wishes to distribute his property differently than the Torah's laws of inheritance must take several steps to insure that the division of the estate will be according to Halacha. This article will briefly answer the following questions.

1) What differences exist between the Torah laws of inheritance and *lehavdil* the laws of the state? Readers should understand that these differences can effect virtually every family.

2) Can a person take steps during his lifetime in order to disburse his estate in a manner different than the Torah laws of inheritance?

3) Is a legal will valid in Halacha?

4) How can a person insure that his wishes will be respected after his death?

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[1] In fact, anyone accepting money allotted through the secular laws of inheritance,that is not entitled to according to Halacha is guilty of an act of theft, unless

The Laws of Inheritance in Brief - Torah and Civil

➤ **1) "Inheritance of daughters"** - Civil law maintains complete equality between men and women. Daughters inherit in the same fashion as sons. In Halacha, only sons inherit in a family with both sons and daughters. [2] In addition, a son and all of the son's descendants take precedence over a daughter. For example, a person's grand daughter born to his son takes precedence in inheritance over his own daughter.

Daughters do inherit when there are no sons or descendants of sons, and the daughters take precedence in the line of inheritance over the decedent's own father or brother. There is no difference in these laws whether the estate owner was male or female. If a person has no children or father, brothers inherit the estate. They and their descendants take precedence over sisters and sister's descendants. Sisters of a person inherit only if the deceased had no brothers or brothers' descendants.

➤ **2) "Family through the mother's side"** - In civil law there is no difference between relatives who are related through the mother (maternally) and relatives who are related through the father (Paternally). In Halacha, family relatives who are only related maternally are not considered family for the purposes of inheritance. [3] For example, a mother can never inherit her son. Similarly, anyone who is only related maternally does not have a status of an inheritor. Therefore, half-brothers related maternally do not inherit a deceased even if they are the only surviving brothers. On the other hand, a paternal half brother inherits just like a brother related through both parents. The same principle extends to uncles who inherit when the deceased had no live children, brothers, of fathers. Paternal uncles inherit, but maternal uncles do not inherit even if there are no other relatives.

➤ **3) " The rights of the first born "** - In civil law a first born has no extra rights and inherits equally with all other brothers and sisters.

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[2] The Rabbis did institute an enactment known as "child support for daughters" (Even HaEzer section 112) that gives minor daughters the right to be supported by the father's estate until they reach maturity or are married. Another enactment known as *eesur nechasim* (Even HaEzer section 113) provides daughters with a special allotment from their father's estate for the purpose of marriage.

[3] Regarding other laws, maternally related family is equivalent to paternally related family. In laws of forbidden relationship, for example, it is forbidden to marry a step sister who is related maternally just as a sister through the father's side,etc

In Halacha, the first born son (the father's first son) receives a double portion when inheriting the deceased father's property. For example, if the deceased had two sons, all of the father's property is divided into three equal parts with the first born receiving two thirds. If in addition to the first born there are two other brothers, the property is divided into four equal portions with the first born receiving two parts and each of the other brothers receiving one part.

This principle that the first born receives a double portion in property is restricted to property which is defined in the Halacha as tangible (*muchzik*). Property defined in halacha as "receivable", "*raui*", is divided equally among the sons. "*Muchzik*", "tangible", means that the property was available to the inheritors at the time of the deceased's passing, whether real property (real estate) or chattel (moveable property). *Raui* receivable, includes items such as property which were left to the deceased by inheritance after his own death and debts that were owed to the deceased but not collected. [4]

➤ **4) " Inheritance of a spouse "** - In civil law a husband and wife have equal rights of inheritance. The spouse of the deceased receives a certain percentage of the estate and the rest goes to the children. In Torah law, a husband inherits his wife but a wife does not inherit her husband. [5] Therefore, a surviving husband inherits his wife's property and none of it belongs to the children. It makes no difference whether the children are his own or they are children from a previous marriage. Again, the right of inheritance is limited to the property which is considered *muchzik* "tangible". Property that is considered *raui*, "receivable", goes directly to the other relatives to inherit (even if she had no sons or daughters). As previously stated, a wife does not inherit her husband even if he does not have children or other relatives in a position to inherit.

➤ **5) " Conversion and adoption of children "** - In civil law a conversion plays no role in the laws of inheritance. Adopted children are in most States considered to be equivalent to the natural children of the adoptive parents and will inherit with the other children equally. The laws regarding inheritance of biological parents by adopted children differ from state to state.

In Torah law, the convert is considered "reborn". If an entire family converts,

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[4] Most halachic authorities regard debts even if they are secure as receivables. Therefore, even secured debts such as U.S. Saving Bonds, and even money held in the bank are in the category of receivable, since the person does not have actual possession of the funds.

[5] Although a wife does not inherit her deceased husband, she does have a claim on the estate for support until such time as she remarries. Alternatively, she may receive the sum allotted by her *ketuba* (marriage contract).

the children do not inherit their parents because at the time of conversion they each assumed a new identity. Adoption has no status in the laws of inheritance. An adopted child is not considered related to the adoptive family and has no rights of inheritance to their property. On the other hand, an adopted child is still considered to be the true inheritor of his biological parents and does inherit their estate.

We see from the above that there are significant differences between rights of inheritance according to our holy Torah and the laws of inheritance in the civil code. We have already pointed out that where contradictions exist, Torah law takes precedence and supersedes civil law.

The Right to Distribute Personal Estate

Our second area of concern is whether a person can institute procedures to change the Torah laws of inheritance? and whether a person is permitted to institute procedures to change the Torah laws of inheritance? Generally one can arrange to distribute his property in a way that differs from the way it would have been distributed by the Torah law, but he has to do it properly in order to be halachically effective. An exception to this rule is that a married woman cannot supersede her husband's ability to inherit without his consent (unless she had taken these steps prior to her marriage). Otherwise, people may take steps canceling out an inheritors' right to the estate.

It is the general consensus of Halachic authorities that our sages pronounced that a person should not side step the Torah's laws of inheritance. For example, like taking property from one son to transfer it to another son. This only applies where a person overturns the Torah's laws of inheritance entirely. A testator is permitted to distribute his estate according to his personal wishes as long as he leaves a portion of the estate to be distributed strictly according to Torah laws. This is also a generally accepted practice. Even if a person acted contrary to our sages pronouncement and totally disinherited his Halachic heirs, his actions remain valid and binding.

The Status of a Legal Will

Our third question is whether a will drawn up by a lawyer is effective according to Torah law as well. We preface our remarks by stating that the wishes of the

deceased should be honored even if the will cannot be enforced. This is proper conduct for religious Jews. The question remains whether a will is enforceable because, realistically, if the will is not enforceable we must rely on the good will of those inheriting the estate. Unfortunately, experience shows all too often that people who generally conduct themselves in an upright manner do not always extend their pious conduct to matters effecting their own pocket books.

The majority of Halachic authorities consider a civil will unenforceable according to Torah law, while a minority take the view that it is effective. Since it is a matter of disagreement amongst the Halachic authorities, the parties are obligated to go to a Rabbinical Court acceptable to both sides for a binding decision. Obviously, anyone who wants to insure that his wishes for distribution of the estate be followed will not rely on the civil will for there is no telling whether the Rabbinical Court will in fact enforce it or not. Note that a litigant does not have the power to say that "I follow the opinion of a specific Rabbi or Halachic decider and do not wish to go to Beis Din". Furthermore, it is absolutely forbidden to go to a civil court to enforce such a will, even though the will is binding according to certain Rabbinic authorities.

Making the Will Effective According to Torah Law

How does a testator insure that his family will uphold his will? The easiest method is for the person to divide his estate and to distribute it as gifts while still alive. Technically, he could give away property but retain the rights to use and benefit from it until death. He can also make a condition that he gives out the estate with the stipulation that the gifts are effective immediately prior to death. These solutions are problematic for a number of reasons:

1) Many items cannot halachically be transferred using these methods. Examples include debts that are not recorded in contracts, or cash that cannot be transferred by the standard *kinyan suder* for people without real estate.

2) These methods of transfer are valid only for items that are owned at the time of transfer, but are not effective for property acquired later.

Therefore, we recommend a different solution; the testator should create "conditional notes of obligations", as we will explain. The basic idea is that when the person goes to his lawyer to draw up a will, he should also create financial obligations in writing, on himself. This financial obligation should be in the form of notes (contracts) creating personal indebtedness to all the

individuals receiving portions of the estate that are greater than the sum allotted by the Torah laws of inheritance. A sum of money greater than the amount of the sum allotted in the will becomes an "obligation" to that individual named in the will. The conditional part of this obligation is that it will **only occur if the inheritors of the estate do not fulfill the conditions of the will.**

What this accomplishes is that the inheritors must uphold the will because failure to execute the will means that they will have to give the individuals named in the will even greater sums of money, due to the contract that we have described. An advantage of this procedure is that all of the deceased's property becomes responsible for the payment of the debt, even property purchased after creation of the debt. Thus, we avoid the problems mentioned earlier with contracts that merely transfer property.

Note that if a person later changes his will, he need not execute new notes of obligation unless he added additional recipients to the estate that were not mentioned in the previous notes, or unless the money mentioned in the notes of obligation is insufficient to cover the distribution according to the new will. This could also occur if his assets significantly increase.

It is best to write a sum in the note that is considerably greater than the sum that the inheritor receives in the will. This obviates the need to update the notes of obligation.

If the testator doesn't know whether those inheriting from the will receive more than they would have been allotted by Torah law, he can make a separate contractual obligation for each one of the beneficiaries of the will without clarifying the extent of the person's right to receive by virtue of Torah law. All he has to do is write notes of obligation to each of the recipients named in the will which are worth more than the value of the sum allotted according to the will.

A person who plans to distribute his property through a trust instead of a will should also prepare notes of obligation, because many of the trusts are halachically problematic. While the details are beyond the scope of this article, suffice it to say that everyone should be very careful and avoid problems by using notes of obligation.

It is important to note that the method we described is not valid if the will or trust includes a distribution to people who had not yet been born when the contract of obligation was written. In this case other types of contracts are required. Interested parties may contact the Mechon HaHoyroa to receive the relevant documents.

Steps for Making a Will Effective According to Torah Law

Step 1: Have a lawyer draw up a legally binding will or trust.

Step 2: Determine which beneficiaries of the will or trust are receiving more than allotted to them according to Halacha.

Step 3: Determine how much those beneficiaries of the will or trust are receiving above and beyond what Torah law allots. Estimate the maximum value that it may be worth at the time of his death. If a person does not know whether the beneficiaries of the trust or will receive more than the Torah allots to them, he should create a note of obligation for each beneficiary of the trust or will. He should determine how much each beneficiary of the will or trust are receiving, and then estimate the maximum value that it may have at the time of his death.

Step 4: Fill out a note creating an obligation for each one of the beneficiaries mentioned in step 2 or 3, and enter a sum which is greater than the sum mentioned in step 3.

Step 5: Prior to signing the note of obligation, the testator shall take a handkerchief or pen from a third person who is Jewish, Orthodox and religiously observant, in order to perform a kinyan (legal transfer) for the obligation in the note.

Step 6: It is advisable to give an original of the note to a third party who is Orthodox and religiously observant. If the lawyer meets these criteria, give the contracts to the lawyer to be kept together with the will or trust.

Step 7: It is advisable to show the will or trust as well as the completed note of obligation to a competent Rav, in order to examine if they have been filled out correctly and to check if there are details which require special contracts.

Conditional Note

To Accompany Legal Will

I, _____ the undersigned, do hereby state that I am indebted to _____ in the amount of _____ payable one hour before my death. To secure the aforesaid debt, I hereby pledge all my property - both real and personal - by virtue of the Talmudic Act of Acquisition known as "Agav" [Moveable Property Gained Together with Real Property,] whereby moveable property can be pledged as a consequence of pledging real property. The above mentioned indebtedness and pledge were made with Kinyan Sudder.

Notwithstanding the foregoing, this obligation shall be rendered null and void if the wishes expressed in my Last Will and/or trust, will be carried out in regard to any benefit that said Will and/or Trust benefits the obligee(s) above named,and none of my heirs contest the disposition of my property set forth therein in regard to any benefit that said Will and/or Trust benefits the obligee(s) above named.

In the event that an obligee(s) will use this obligation to receive an amount that is greater than the share he is entitled to receive according to said Will and/or Trust, at the expense of another beneficiary (who is not a "Contesting Heir") named in said Will and/or Trust, this obligation shall be rendered null and void with respect to any such obligee(s).

In the event that all my heirs contest or make objection to the disposition of my property made in my Last Will and/or Trust, in regard to any benefit that said Will and/or Trust benefits the obligee(s) above named, before a Jewish Court, then the aforesaid obligation to the obligee(s) above named shall be deemed to vest absolutely.

If one or more of my heirs contest the disposition of my property made in my Will and/or Trust in regard to any benefit that said Will and/or Trust benefits the obligee(s) above named ("Contesting Heirs") and some of my heirs are willing to abide by my last wishes in regard to any benefits that said Will and/or Trust benefits the obligee(s) above named ("None contesting Heirs"), then:

(a) with respect to my Non-Contesting Heirs, all of the above named obligee(s) shall release such Non-Contesting Heirs from honoring his (their) share of this obligation. In the event any of the above named obligee(s) fail or refuse to release a Non-Contesting Heir(s), then this obligation shall be null and void with respect to any such obligee(s);

(b) With respect to a Contesting Heir(s), any Contesting Heir will be required to honor his (their) share of his obligation to the extent of his (their) share of the inheritance.

The foregoing has been done in a Halachic manner, in accord with Talmudic Jurisprudence, with effective conditions and stipulations set forth in the manner of the children of Gad and the children of Reuven, and with effective acts of property transfer, and not in the manner of speculation. This instrument is not an impractical document, but a bona fide Halachic document, and even if it be in my possession at the time of my death, shall not be deemed invalid by reason of either proof of payment or failure of delivery.

This document shall be considered a valid document, only if presented to a Jewish Court; in case this document is presented to any secular court (Federal or State, Civil or Criminal) it shall be deemed null and void.

Dated:_____ Signed _____

ם מטה מודה בתודאה גמורה דלא כהשטאה ולא כהשבעה רק הודאה גמורה
כ"ד חשוב וראוי, שאם לא יקיימו יורשי מה שכתוב בה"ווילי" ו/או טראסט
זה, ואם הזוכים בשטר חיוב זה לא ישתמשו בשטר חיוב זה כדי לקבל יותר
תוב בה"ווילי" ו/או טראסט ו/או צוואה, ע"ח אחרים [שאינם יורשים
ז למה שכתוב בה"ווילי" ו/או טראסט ו/או צוואה] שראוי להם לקבל על פי
זוב בה"ווילי" ו/או טראסט ו/או צוואה, אז התחייבתי עצמי ל-

סך

להם כל נכסי אגב קרקע דקנאי ודעתיד אני למקני, וחזמן פרעון יהא שעה
ך למיתתי ואין אני או באי כחי נאמנים לטעון שום טענה המגרע את חוב
טענת מחילה או חזרה או טענת פרעון בין לפני זמנו ובין לאחר זמנו ובין
רעון, רק הזוכים הנ"ל יהיו נאמנים בדיבור קל בלי שבועה ובלי קבלת חרם
ד יתומים קטנים כל זמן שלא יהיו עדים שנפרע החוב. אבל אם יקיימו יורשי
ב בה"ווילי" ו/או טראסט ו/או צוואה אז החוב בטל ומבוטל כי לא התחייבתי
בתנאי שאם לא יקיימו מה שכתוב בה"ווילי" ו/או טראסט ו/או צוואה. וכן
ים בשטר חיוב זה ישתמשו בשטר חיוב זה כדי לקבל יותר ממה שכתוב
ו/או טראסט ו/או צוואה, ע"ח אחרים [שאינם יורשים המתנגדים למה שכתוב
ו/או טראסט ו/או צוואה] שראוי להם לקבל על פי מה שכתוב בה"ווילי" ו/או
ו/או צוואה, שאז שטר חיוב זה בטל ומבוטל בנוגע אותו זוכה שרוצה
ו בזה כדי לקבל יותר ממה שכתוב בה"ווילי" ו/או טראסט ו/או צוואה. ותנאים
שה כדינא כתנאי בני גד ובני ראובן. ואם מקצת יורשי לא ירצו לקיים מה
ה"ווילי" ו/או טראסט ו/או צוואה אז התניתי עם הזוכים שלאחר שיקבלו את
חזירו ויתנו להיורשים שרצו לקיים מה שכתוב בה"ווילי" ו/או טראסט ו/או
ת חלק הממון שקיבלו מהם, וכל הנ"ל התניתי בתנאי המועיל בתנאי כפול
ם ללאו ובתנאי קודם למעשה כתנאי ב"ג וב"ר, וכל זה נעשה בקנין המועיל
שוב, ולעולם על כל ספק יהא יד בעל השטר על העליונה ויד המערער על
ז. ואפילו אם ימצא שטר זה תחת ידי יהא ראוי על כל הנ"ל. כל זה אני מודה
סמכתא ודלא כטופסי דשטרי ולא כמתנה טמירתא הכל שריר וקים:

ל החתום ביום____ לחודש_____ שנת _____