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THE JEWISH LAWS OF INHERITANCE AND ESTATE PLANNING IN CANADA

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THE JEWISH LAWS OF INHERITANCE AND ESTATE PLANNING IN CANADA

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ABSTRACT

Combining the inheritance laws of the secular and religious worlds can be a challenge. Ms. Blumenfeld's article analyzes the various facets of this challenge, first by outlining the Jewish sources — the Torah and rabbinic law — and legal concepts that support them. She then tackles the relevant concepts and sources in Canadian law, pointing out commonalities and differences between the two systems. The article discusses various planning techniques for those seeking a will that is in accordance with Jewish law, such as the use of a trust, and closes by discussing an innovative planning technique.

INTRODUCTION

Jewish laws relating to inheritance¹ stem from a portion in chapter 27 of the Book of Numbers, where the daughters of Zelophehad question Moses about their right to inherit land following their father's death. Moses "brought their cause before the Lord", and verses 8 to 11 record God's response to Moses:

Speak to the Children of Israel, saying 'If a man dies and leaves no son, turn his inheritance over to his daughter. And if he has no daughter, give his inheritance to his brothers. And if he has no brothers, give his inheritance to his father's brothers. And if his father had no brothers, give his inheritance to the nearest relative in his family, and he shall possess it. This shall be the law of procedure [*hukat mishpat*]² for the Israelites, as the Lord commanded Moses.'

In addition to setting out the order of succession, the Torah also accords special status to the firstborn. Deuteronomy 21:16-17 provides that the firstborn male receives a double portion of his father's estate.³ Whether one leaves a will or not, *halakha* (Jewish law⁴) dictates the order of

¹ See, generally, Dayan I. Grunfeld, *The Jewish Law of Inheritance: Problems and Solutions in Making a Jewish Will* (1987, Targum Press, Oak Park Michigan).

² The term *hukat mishpat* is interpreted as a "Divine law" or statute that is imposed for all generations, not just during the division of the land. (See Nachmanides on this verse.)

³ This may appear surprising in light of the accounts in the Book of Genesis. Indeed, the Talmud teaches that one should learn from the mistakes of Jacob, who favoured Joseph, causing jealousy among the siblings, which in turn caused the exile to Egypt (Tr. *Shabbat* 10b).

succession — first sons, then daughters, then brothers, then uncles, and lastly next of kin. Rabbinic law developed the order of inheritance further, such that male lineal descendants have priority. Thus, a grandson of a predeceased son inherits over a daughter of the deceased. A husband inherits from his wife, but not vice versa. However, Talmudic and later rabbinic laws developed to ensure that widows were to be provided with maintenance out of the estate,⁵ while unmarried daughters had a right to one-tenth of the father's estate as a dowry.⁶

Western laws of inheritance and property ownership have developed over the last few centuries to permit women to own property and, therefore, inherit. Indeed, under Canadian law today, spouses are treated favourably under intestacy⁷ and tax laws.⁸ While parents sometimes do wish to provide more for one child (in the case of a disabled child, for example) or disinherit another, and a spouse may restrict the inheritance of the other spouse (often in the case of a second marriage), it is unlikely for observant Jews in Western societies to want to execute wills that are strictly in keeping with the Biblical laws of inheritance.⁹ 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.¹⁰ Rabbinic law has developed certain methods for accommodating observant Jews who wish to leave wills that provide bequests to a wife and daughters, or legacies to other relatives and charitable organizations.

The following discusses a number of methods for accomplishing an estate plan that provides for beneficiaries who fall outside the Biblical or “*halakhic* heirs” (which is the term I will use hereafter for those entitled to inherit under Jewish law) while remaining within a *halakhic* framework. Implementing one or more of these methods should be done in consultation with a rabbinic authority.

⁴ For purposes of this paper, I have only considered Orthodox Jewish sources.

⁵ A widow was automatically entitled to remain in the marital home and receive support. She would also be entitled to the obligations provided in the *ketubbah* (Jewish marriage contract). See discussion in Menahem Elon (trans. by Bernard Auerbach and Melvin J. Sykes), *Jewish Law: History, Sources, Principles*, v. II, 573-74 (1994, JPS, Philadelphia).

⁶ The *Mishna* in *Bava Batra* (9:1) states, "When one dies leaving a large estate and surviving sons and daughters, the sons will inherit and the daughters will be supported." See Elon, 574-80. Elon, a former Justice of the Supreme Court of Israel, views the Talmudic enactment that provided daughters with a right to 1/10th of the father's estate as reflecting "the beginning of a recognition that a daughter has some right in her father's estate" (578).

⁷ In Ontario, under the *Succession Law Reform Act*, a surviving spouse receives a "preferential share" of \$200,000 and then divides the remainder of the estate with his or her children.

⁸ Under the *Income Tax Act* (Canada), the deemed disposition of capital assets on death is deferred when assets are left to a surviving spouse, such that capital gains taxes are deferred until the death of the spouse or actual disposition of the assets.

⁹ For an interesting discussion of female inheritance issues among the Yemenite Jewish community in Mandatory Palestine, see "Women resisting men: inheritance and disinheritance in the Yemenite Jewish community in Mandatory Palestine," *Nashim: A Journal of Jewish Women's Studies and Gender Issues*" (22 March 2006).

¹⁰ In Ontario, a surviving spouse who did not receive a sufficient percentage of her deceased husband's estate may choose to elect under the *Family Law Act* to take her equalization payment. In British Columbia, children who have been cut out of a will may successfully challenge it under that province's *Wills Variation Act*. Some European civil law jurisdictions have forced heirship laws that could be relied on to redistribute an estate. Further, the *halakhic* scheme of distribution may lead to significant tax in Canada where the spouse is not the beneficiary of assets with an accrued gain or, in the United States, to significant estate taxes.

1. GENERAL TITLE

1a. Deathbed gifts

The rabbinic concept of *matanat sh'chiv mera* has elements of the common law concept of *donatio mortis causa*, a gift made in contemplation of death. Rabbinic authorities permitted a dying person to distribute property (including real property) by way of an "oral will" which would become effective on death, even if the distributions contradicted the *halakhic* scheme of inheritance. The oral will stands only if the person dies from the illness. The rabbis explain that the reasoning behind this rule is the concern that a person's condition might worsen if he was not able to distribute his estate in the manner he wishes, hastening his demise.¹¹

In Canadian law, a gift made in contemplation of death is an effective gift (and therefore does not fall into the person's estate) where:

1. the gift is made in contemplation of the impending death of the donor;
2. the subject matter of the gift has been delivered to the recipient of the gift (e.g., keys to a safety deposit box were delivered, a cheque was written or other paperwork completed; and
3. the gift is to take effect only on the impending death of the donor; that is, it is conditional until the donor dies.¹²

In both Jewish and Canadian law, the gift is effective only upon death — and only if the person dies from the illness or condition that he or she was suffering from the gift or “oral will” was made. However, the requirement of delivery of the object appears to be only a common law requirement. While a *donatio mortis causa* would appear to fulfill the halakhic requirements of *matanat sh'chiv mera*, it is not a prudent method of estate planning, to say the least.

1b. Mitzvah LeKayeim Divrei HaMeit

A related concept in Jewish law is that it is a "mitzvah" (literally, a commandment, but also often translated as a "good deed") to fulfill the wishes of the deceased. Some rabbinic authorities have concluded on this basis that the charitable bequest of a testator expressed in a will would be valid in Jewish law. Dayan Grunfeld,¹³ an eminent judge of the London *beit din* (Jewish court) whose work, *The Jewish Law of Inheritance*, is one of the few comprehensive texts on the subject, discusses several *responso* (written responses to questions of Jewish law by a rabbinic authority) that accept this approach, although he appears to be critical of it.

¹¹Rabbi Joseph Perelman, "Halachic Aspects of Estate Planning" *Omka De-dina* (<http://www.jlaw.com/Articles/perelman.pdf>). See also, Grunfeld, ch. 3.

¹² *Widdifield on Executors and Trustees*, 6th ed. ch. 2, para. 2.5.7(a).

¹³ At 65–71.

The core of the issue is whether there has been, or needs to be, a "*kinyan*",¹⁴ or acquisition, of the gift by the beneficiary during the testator's lifetime. To be valid, some authorities find, the assets would have to have been deposited with a third party prior to death, as after death, the testator cannot perform the *kinyan*.¹⁵ Accordingly, modern authorities consider funds deposited in retirement savings plans and life insurance policies to be "deposited in the hands of a third party, and *Mitzvah LeKayeim Divrei HaMeit* would apply to such assets ..."¹⁶ Presumably, when the owner (who is the annuitant or life insured) dies, the payment to the named beneficiary would be fulfilling the wishes of the deceased.

2. *Dina d'Malkhuta Dina: The law of the land is law*

The ancient¹⁷ Jewish legal doctrine of "*dina d'malkhuta dina*" (literally, the "law of the kingdom is law") is invoked in respect of laws relating to documents, taxes, and punishments.¹⁸ Throughout the centuries, rabbinic authorities sought to limit the application of the doctrine as much as possible — to matters that are "for the benefit of the king".¹⁹ (Today, it is most often imposed in the context of taxation.)

In a *responsum* dealing with the question of the validity of a will made in accordance with American law, one of the most important Jewish legal decisors of the twentieth century, Rabbi Moshe Feinstein, appears to maintain that a will made in accordance with the law of the land is valid even where the Biblical rules of succession are ignored and where there has been no "*kinyan*" of the person's assets prior to death.²⁰ In discussing a situation where a woman left a bequest to charity in her will, he determined that the *kinyan* was unnecessary, because the provisions of the will would be put into effect by the secular courts, and "there is no more effective *kinyan* than this."²¹ Indeed, R. Feinstein observed that this is the basis for the practice of many in the observant Jewish community in the United States to rely on secular wills and not be concerned that their heirs will be guilty of theft from the *halakhic* heirs.²²

Surprisingly, many contemporary authorities disagree with R. Feinstein.²³ Dayan Grunfeld cites (with apparent approval) a *responsum* of R. Moses Sofer (the *Hatam Sofer*, 1762-1839) in which

¹⁴ Jewish law sets out certain rules whereby objects are to be acquired. A *kinyan* is performed by a purchaser of property (real or personal) giving an object such as a handkerchief or pen to the seller. When the seller takes hold of the pen, handkerchief, or other object, title to the property passes to the purchaser, who now owns the object being transferred (http://www.ou.org/torah/tt/5760/pinchas60/specialfeatures_jewishlaw.htm).

¹⁵ R. Chaim Jachter, "Yerushah – Mizvah LeKayeim Divrei HaMeit," *Rabbi Jachter's Halacha Files*, Nov. 11, 2006, 1–5 (<http://koltorah.org/ravj/Yerushah.html>).

¹⁶ Jachter, Nov. 11, 2006, p. 2. R. Jachter refers to correspondence he had with R. Feivel Cohen with respect to U.S. Individual Retirement Accounts (IRAs), which are equivalent to RRSPs and RRIFs.

¹⁷ *Elon*, v. IV, at 1821, indicates that this concept developed in the third century C.E. in Babylon.

¹⁸ *Elon*, v. I, at 64–74, discusses the development of this concept.

¹⁹ *Elon*, v.I, 71, citing a ruling of R. Moses Isserles (the *Rema*).

²⁰ R. Moshe Feinstein, *Iggrot Moshe, Even Ha'Ezer*, v.1, siman 104.

²¹ Feinstein, 256.

²² Feinstein, 257. R. Feinstein's opinion appears to be based in part on earlier responsa of Rabbis Jacob Ettlinger (1798-1871) and Chaim Ozer Grodzensky (1863-1940), as discussed in Grunfeld, 67-70.

²³ See Grunfeld, p.73, and R. Chaim Jachter, "Yerushah and Dina DeMalchuta Dina", *Rabbi Jachter's Halacha Files*, Nov. 3, 2006, 1–5 (http://koltorah.org/ravj/Yerushah_and_Dina_DeMalchuta_Dina_1.html).

he rejected outright the notion that *dina d'malkhuta dina* could apply to matters of inheritance. He explained that because, under Jewish law, the *halakhic* heirs automatically inherit, it is not possible for the civil authorities to distribute the estate differently, either in accordance with a will or on an intestacy where there is no will.²⁴

That said, the context of the discussions of *dina d'malkhuta dina* are situations in which the deceased had prepared a will that was valid under the law of the land but deviated from the *halakhic* order of inheritance, either by leaving a bequest to a wife, daughter(s), or charities. While not discussed in the texts I consulted, it would appear that property owned during lifetime by two or more individuals as joint tenants that passes under the (secular) common law to a non-*halakhic* heir by right of survivorship would be valid under Jewish law.²⁵ Indeed, in Canada, the norm is for spouses to hold real property, and bank and investment accounts, during lifetime as joint tenants with right of survivorship, unless the spouses are in a second marriage, have concerns about creditors, or have themselves inherited assets from others that they wish to keep separate. In many situations, on the death of the first spouse, most, if not all, property accordingly passes to the surviving spouse. The will (whether valid according to *halakha* or not) is not probated and is in effect all but disregarded. The use of joint tenancy between spouses, then, may avoid *halakhic* concerns.²⁶

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,²⁷ 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.²⁸ 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*.

Provincial laws²⁹ permit the designation of a beneficiary for certain types of assets – specifically, RRSPs, RRIFs, life insurance and annuities. As noted above, R. Jachter has briefly discussed the fact that the distribution of these assets on death would not be problematic under the rubric of *Mitzvah LeKayeim Divrei HaMeit*, because there had been a *kinyan* between the owner during lifetime and a third party (the financial institution) that will distribute the funds following the

²⁴ R. Jachter, in his Nov. 3, 2006, article indicates that not leaving a will is problematic in Jewish law, as the laws of intestacy contradict the *halakha*, despite the dictum of *dina d'malkhuta dina*.

²⁵ While I have discussed this with a number of rabbis, who have agreed that the surviving joint tenant would be entitled to the property by right of survivorship, under the concept of *dina d'malkhuta dina*, I have not encountered this idea in any articles or *responso*.

²⁶ Please note that I am not dealing in this article with the issue of ownership by wives and daughters in Jewish law — which is a topic in itself.

²⁷ *Pecore v. Pecore*, [2007] 1 S.C.R. 795, and *Madsen Estate v. Saylor*, [2007] 1 S.C.R. 838.

²⁸ Where the property is transferred into joint tenancy with only one child, with the intention that the child is to distribute the asset among him or herself and the siblings after the death of the parent, it is prudent to document that intention in a declaration of trust.

²⁹ In Ontario, the *Succession Law Reform Act*, R.S.O. 1990, c. S.26, and the *Insurance Act*, R.S.O. 1990, c. I.8.

death of the owner in accordance with the beneficiary designation. Moreover, the financial institution would be bound by the law of the land to do so.

3. *Inter Vivos Gifts and Trusts*

The solutions to the "problem" of the *halakhic* rules of succession presented in this section succeed for purposes of the *halakha*, as they are premised on transfers occurring during lifetime,³⁰ while ensuring that the testator maintains the use and control of the assets during lifetime. However, they may raise legal and tax issues in Canada and must be considered carefully in that context.

3a. *Gift of residual interest in real property*

At common law, an individual can transfer the residual interest in real property to another while retaining a life interest in the property. The transfer is registered on title and is effective during the lifetime of the donor. The Canada Revenue Agency discusses these types of transfers in the context of a donation to charity³¹ and posits that the gift has been made as long as:

1. the property has vested in the donee/beneficiary, which occurs where:
 - (a) the person or persons entitled to the gift are in existence and are ascertained,
 - (b) the size of the beneficiaries' interests is ascertained, and
 - (c) any conditions attached to the gift are satisfied;
2. the transfer is irrevocable;³² and
3. it is evident that the recipient will eventually receive full ownership and possession of the property transferred.

For the purposes of the Jewish laws of inheritance, a gift of the remainder interest to someone other than a *halakhic* heir would be considered to have been made during lifetime and, consequently, would not offend the *halakhic* order of succession.³³

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

³⁰ See, e.g., Judah Dick, "Halacha and the Conventional Last Will and Testament", *Journal of Halacha and Contemporary Society*, v. II, no.1, Spring 1982, 5–18.

³¹ In Interpretation Bulletin IT-226R, "Gift to a Charity of a Residual Interest in Real Property or an Equitable Interest in a Trust".

³² This requirement is limited to a gift in the charitable context.

³³ At common law, it is generally not possible to sever property other than real property into separate life interests and remainder interests (referred to in texts on property law as "the strict and ancient law of the indivisibility of a chattel". In order to achieve a similar result with chattels, including, for example, investment accounts, artwork or collections, the property is transferred to a trust and the trust indenture sets out the life interest and remainder interest.

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.

3b. Inter vivos trusts

Trusts are used in Canada for income splitting and asset protection purposes. Where, for example, a family owns a business, certain shares of the business may be held by a trustee in trust for the spouse or children, such that dividend income can flow out to the beneficiaries while the founder maintains control of the corporation (through a separate class of shares and/or as a trustee of the trust). A person (the settlor) may also transfer investment assets to a trustee for the benefit of minor, spendthrift, or disabled children to maintain some control of the assets; alternatively, a trust may offer creditor protection for the settlor. In addition, *inter vivos* trusts — that is, trusts established during lifetime, as opposed to on death or in a will — are useful estate planning tools where one wishes to remain within a *halakhic* framework for inheritances. Assets can be transferred to a trustee to hold in trust with the transferor maintaining the control over and benefit of the assets during lifetime and dictating how the assets are distributed on death. Trusts can last for several generations, thereby avoiding the *halakhic* problem for the next generation (at least in relation to the assets held in the trust).

In Canada, the primary drawback of using an *inter vivos* trust to replace a will is that, depending on the type of assets one is contributing to the trust, the disposition of the assets to the trust may attract capital gains tax. This can be avoided in certain circumstances. If the settlor is 65 years of age or older, he or she can settle an "alter ego" or "joint partner" trust. Under the *Income Tax Act* (Canada), where the 65-year-old settlor contributes assets to a trustee (who may be the settlor or a third party) to be held in a trust under which the settlor is the sole beneficiary of all of the net income of the trust during lifetime and encroachments on capital can be only for the settlor's benefit, the assets can roll into the trust on a tax-deferred basis.³⁴ The terms of the trust can set out the distribution at the time of the death of the settlor. However, as the assets no longer belonged to the settlor at the time of death (as they had been transferred to the trustee), the distribution can deviate from the *halakhic* order.

Where the settlor is under 65, a "self-benefit" trust may be considered.³⁵ Like with the alter ego trust, the settlor must be the sole beneficiary of the income and capital of the trust. However, if the trust provides for residual beneficiaries on the death of the settlor, there would be tax at the time of the disposition of the assets to the trustee. To avoid the tax, the trust would have to provide that on death, the assets fall back into the estate of the settlor and are dealt with under the will or on an intestacy. This structure may work for the purposes of Jewish law if there had been a *kinyan* at the time the trust is established, even though the terms of the will ultimately govern on death. A rabbinic authority should be consulted.

³⁴ See subclause 104(4)(a)(iv) of the *Income Tax Act*. Similar types of trusts may be established for a spouse or for both the settlor and spouse.

³⁵ Similar to the "revocable living trust" in the United States. Dick, "Halacha and the Conventional Last Will and Testament", 9, and Jonath Porat, "Kosher Revocable Trusts: The Jerusalem Trust Form", *Jewish Law Articles: Examining Halacha, Jewish Issues and Secular Law*, 1998 (<http://jlaw.com/Articles/revocable.html>).

A number of Jewish authorities have pointed out that, under Jewish law, it appears that a trust will only be effective for assets that the settlor owns and transfers to the trust at the time it is established.³⁶ Property acquired after the settlement of the trust will not necessarily be included, making this otherwise helpful solution rather cumbersome.

4. Promissory Note

The final planning technique that I will discuss provides a traditional but innovative and fairly simple solution to the issue of leaving assets to non-*halakhic* heirs by will. Under this method, the testator executes a “secular” will that includes distributions to non-*halakhic* heirs and a note of indebtedness (referred to in the rabbinic literature as a *shtar hatzi zakhar*, literally, “an instrument of half-equality with a male heir”) in favour of the non-*halakhic* heirs. In the note, the testator conditionally undertakes a large debt payable just prior to death (usually more than the value of the estate) to the heirs, which is enforceable (under Jewish law) against the estate. Provided that the *halakhic* heirs agree to the distribution under the will, the debt is cancelled. If the *halakhic* heirs refuse to agree to the distribution in the will, then the debt would be enforced against the estate.

Traditionally, the *shtar hatzi zakhar* was presented to a daughter at her wedding and would stipulate that the daughter was entitled to half of a son’s share of the father’s estate. This has developed to become the more general document that is used today in conjunction with the secular will. Rabbi Feivel Cohen, in his book *Kuntreis Me-Dor Le-Dor*, provides a text of a note of indebtedness that may be used by a testator. Note that the debt is to be undertaken in a Jewish court by way of a *kinyan*. This requires the convening of a *bet din* consisting of three Jewish men, two of whom act as witnesses to the *kinyan*. It is strongly recommended that this be undertaken under the guidance of a rabbi. I have included a precedent text of the Note of Indebtedness, which I have adapted from a number of sources.³⁷ Again, a rabbinic authority should be involved in undertaking this method. While Jewish laws of inheritance restrict the manner in which a testator can dispose of their assets on death, it is possible, through careful planning, to ensure that the testator is able to benefit those that he (or she) wishes to benefit while remaining faithful to the *halakha*.

³⁶ Dick, “Halacha and the Conventional Last Will and Testament”, 11 and Rabbi Feivel Cohen, *Kuntreis Me-Dor Le-Dor*, Shevat, 5747.

³⁷ Cohen, *Kuntreis Me-Dor Le-Dor*, ch. 2, Rabbi Mordechai Willig, “Inheritance Without a Fight: Writing a Will in Modern Times”, http://torahweb.org/torah/special/2007/rwil_will.html.

NOTE OF INDEBTEDNESS

I, _____, hereby obligate myself to my wife, _____, in the amount of _____ MILLION CANADIAN DOLLARS (CAN\$____,000,000.00) (hereinafter called the "Obligation") effective immediately, but not payable until one minute before my death, on the condition that I do not retract the Obligation in writing at any time prior to my death. All the property which I own at that time, both real and personal, shall serve as security for the payment of the Obligation. If my said wife predeceases me, at the time of my wife's death, the Obligation shall devolve and be owed to my daughters, _____ and _____, or the survivor of them.

I HEREBY STIPULATE that my heirs, as defined by the Torah (hereinafter called "my Torah Heirs") shall be given the option of paying the Obligation to my wife or to my daughters, as the case may be, or, in lieu thereof, of carrying out the terms as specified in my Last Will and Testament and, in addition, carrying out all transfers of property upon my death pursuant to the laws of the Province of Ontario, Canada and any other applicable jurisdiction. If my Torah Heirs abide by the terms of my Last Will and Testament and the laws of the Province of Ontario and Canada and such other applicable jurisdiction, then the Obligation is null and void.

THE OBLIGATION is undertaken in a Jewish Court ("*Bet Din*") through an instrument legally fit to establish a transaction ("*kinyan suddar*"). The above conditions are made in accordance with Rabbinic law.

SIGNED this _____ day of _____, 57____, being the _____ day of _____, 20____, at the City of _____, Province of Ontario

The *kinyan suddar* was undertaken in the presence
of

Witness

Hebrew Name

English Name

Witness

Hebrew Name

English Name