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Estate Planning, Wills, and Halachah:
A Practical guide to Hilchos Yerusha

By: Rabbi Ari Marburger

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This work is not intended to provide any conclusive halachic, legal, or tax advice. Its purpose is to inform the public of the halachic issues involved in Estate Planning, and to provide general suggestions about how to address such issues. Readers are encouraged to seek the assistance of qualified halachic, legal, and tax professionals regarding their specific situation.

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The Business Halacha Awareness Initiative is a joint project of the North Miami Beach Kollel and the Law Offices of Stok, Kon & Braverman, with the mission to promote better awareness and expert handling of business-related financial issues in both the halachic and legal realms.

To this end, we have created a chabura of local Talmidei Chachomim to learn the halachos of Choshen Mishpat, as well as a schedule of seminars and programs to better educate the community in business halacha topics. We thank Beis Din Maysharim of Lakewood, NJ for overseeing the project.

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Robert A. Stok, Esq. *the managing principal of the firm, became an attorney after a successful career on Wall Street working as an investment banker and a trader for prominent financial institutions. In addition to his law practice as a commercial litigator and transactional lawyer, Mr. Stok has developed real estate projects and has established a variety of successful businesses ventures. Therefore, Mr. Stok brings a unique perspective to the practice of law due to the combination of his in-depth real-world experience together with his highly homed legal skills.*

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Foreword

The purpose of this work is to provide readers with an outline and framework to better understand the Jewish laws of inheritance and its practical application. I have sought to present a comprehensive perspective of the subject, one that incorporates various halachic opinions rather than advancing one particular viewpoint. I have drawn heavily from several excellent works on Hilchos Yerusha, including Mishpatey Hatzavah, Kuntris Midor L'dor, and Pischey Choshen. Special thanks is due to Saul Elnadav, Esq for reviewing large parts of this work. Please consult a qualified Rabbi for any specific questions.

Introduction

Planning for one's death is never a pleasant task. Yet, most people recognize its importance. Without proper planning, a large share of one's wealth may be lost to taxation. What is left over may be distributed in a manner that does not reflect one's values or expectations. Furthermore, poor planning can cause tremendous tension between family members. Family members may feel that they did not get their fair share of the assets, and may find themselves locked into unworkable partnerships.

For a frum Jew, there is another important reason to prepare appropriately. Halachah's view of inheritance is drastically different from the rules of secular law which apply to the disposition of an individual's assets after death. If a person does not prepare a will, his estate will be distributed in accordance with applicable local law, most likely in a manner completely inconsistent with halachah. This creates a very sensitive situation. The individual's Yorshim, the rightful Torah heirs, have a halachic claim against the estate. Yet, the assets will be distributed in accordance with local secular law, which may result in the legal heirs being in possession of assets that are not halachically theirs. If the legal heirs retain these assets, as far as halachah is concerned, they are stealing from the true halachic heirs. Nevertheless, once in possession of the "inherited" assets, the legal heirs often find it difficult to relinquish them. They may invent various justifications for keeping their legal inheritance, without realizing that they are guilty of halachic theft. This can all be avoided with proper foresight and planning.

There are also important Halachic principles that govern how and to whom a person should distribute his assets. Halachic estate planning is not simply to ensure that one's instructions will be followed. Rather, the goal is to create an estate plan that will provide for one's family in a manner consistent with halachah.

It should be noted that according to some opinions, a secular Will is not enforceable in halachah. While the vast majority of wills are honored by the Halachic heirs without challenge, it is not unheard of for beneficiaries to challenge a will in Bais Din. This may happen either because there were tensions between the beneficiary and the testator, or between the halachic heirs and the legal beneficiaries. It can also be simple desperation. A halachic heir who was relying on a larger share of the estate may feel compelled to fight for his halachic rights to maintain a certain lifestyle. Regardless of the motivation, it is prudent to address these issues, and to structure one's estate plan in a manner that will avoid any Halachic questions.

This work is divided into the following chapters:

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The Halachic Order of Inheritance

The *Seder Hayerusha*, or Halachic Order of Inheritance, dictates how an estate is distributed. Under the *Seder Hayerusha*, a person's estate is distributed among his closest relatives. The *Seder Hayerusha* is divided into tiers; the closest tier of relatives receives the entire estate. Members of the subordinate tiers do not inherit anything if a closer relative exists. The tiers, in order of their priority, are as follows:

1. Husband[1]
2. Sons (if deceased, their children [the deceased's grandchildren] receive their share[2])
3. Daughters (if deceased, their children [the deceased's grandchildren] receive their share)
4. Father[3]
5. Father's *yorshim* (paternal brothers of the deceased, or their offspring. If there are no brothers, then the paternal sisters inherit.)
6. Father's father (paternal grandfather)
7. Paternal grandfather's *yorshim*.
8. Paternal great-grandfather
9. Paternal great-grandfather's *yorshim*
   Etc.

For example, if a married woman dies, her husband inherits her estate[4]. Her children receive nothing if her husband survives her. If her husband predeceased her, her sons receive the entire estate. Daughters do not receive any inheritance[5] if there are sons[6]. If there are no sons (or their issue), the estate is passed to the daughters. If there are no daughters (or their issue), the estate is passed to the deceased's father. If her father predeceased her, the estate passes to the father's children; i.e. his sons (or their issue) or daughters (or their issue)(the deceased's brothers or sisters). If her father was not survived by any issue, the estate rises up a generation to her grandfather. If her grandfather is not alive, the estate passes down to his children, grandchildren or great-grandchildren. If there are still no heirs, the estate will continue to rise a generation through the male line, and then fall to the offspring

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[1] A husband inherits most of his wife's estate. (Excluding certain loans owed to his wife. Such assets are distributed to the woman's *halachic* heirs.) See Bais Shmuel Even Haezer 90:1 for a discussion as to whether or not this is a Rabbinic decree.

[2] For example, if the deceased had three sons, each receives 1/3 of the estate (assuming there is no Firstborn Bechor). If one of the sons died, then that son's children receive his share. For example, if that deceased son had four children, each receives ¼ of their father's inheritance, which equals 1/12 of the entire estate (1/4 of their fathers 1/3 share). If that deceased son only had daughters, the daughters receive their father's share.

[3] Yerusha passes through the father's family. A mother does not inherit her children.

[4] Subject to the exclusions discussed in footnote 1.

[5] Daughters are entitled to support until they reach the age of 12 ½, and are given a share of the estate as a dowry. See Even Haezer 112, 114.

[6] See, however, Chapter Two that there is a custom to give daughters a share in the estate.

until a *halachic* heir is found. Ultimately, as all Jews are related through Yaakov Avinu, a *halachic* heir will eventually be found.

Grandchildren

As explained before, the closest class of relatives inherits one's entire estate. However, if a member of this highest tier of relatives predeceased him, then that member's share in the inheritance passes to his own *yorshim*. Based on this, grandchildren would not receive any share in an estate if their parent (the deceased's son or daughter) is still alive. However, if the parent predeceased the grandparent, their sons (the deceased's grandchildren) receive the share that the parent would have received. For example, if one of the deceased's four sons predeceased him, the estate would be distributed as follows: One fourth of the estate would be given to each of the three surviving sons. The remaining portion would be divided among the predeceased son's sons. If all of the sons predeceased the testator, the estate would be divided among the grandchildren in a *per stirpes*[7] fashion.

Adopted Children

An adopted child does not inherit his adoptive parents[8]. If one wishes to give a share to his adopted child, it should preferably be done via an *inter vivos* gift (a gift that takes effect while the donor is living). See Chapter Two for further discussion.

Wife

As mentioned before, a wife does not inherit her husband's estate. However, that does not mean that she is left penniless. She is entitled to significant support from the estate[9] until she remarries or claims her *kesubah*.[10] Accordingly, the widow is often entitled to the bulk of the estate, but without any of the responsibilities of ownership. The children or other *halachic* heirs will control and manage the estate, while the widow will retain a priority claim against its assets to ensure her standard of living.

While this arrangement provides for the widow's support in a dignified manner, it creates certain restrictions. The widow may not gift away any of the assets, or raise her standard of living above what she enjoyed while her husband was alive. The

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[7] Each son would inherit an equal share, and pass that inheritance to his sons. Thus, each branch of the family would receive an equal amount. However, if one son had more children, they would each receive a smaller share of the inheritance.

[8] Minchas Yitzchok 3:135 (16)

[9] Including limited medical care (the estate pays for all medical care that does not have a fixed cost. In contrast, if a doctor agrees to accept a flat fee to treat a sickness or condition, the fee would not be reimbursable. In practice, virtually all medical bills would be covered. See also Even Haezer 79), and food, shelter, clothing, and domestic help as per her standard of living while her husband was alive. Even Haezer 94:1.

[10] Even Haezer 93

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widow is ensured of her comfort, but the remainder of the estate ultimately passes to the deceased's children.

Life Insurance, Joint Accounts, and Houses

There are significant asset classes that may not be subject to the laws of inheritance. A term life insurance policy would be paid out to the designated beneficiary of the policy, regardless of who the insured's *halachic* heirs may be[11]. This would likely apply to jointly-held assets with rights-of-survivorship as well, such as joint bank accounts[12]. Furthermore, a house or other asset that is titled under both spouse's names may be considered to be owned by each of the spouses. As such they may each be considered partners in such assets even prior to any issues of inheritance (see footnote[13]).

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[11] Cheshev Haephod 3:50, Pischey Choshen Yerusha 1 (65). The Order of Inheritance applies to assets that the deceased owned, and are passed to his heirs through the process of *yerusha*. In contrast, the benefits of a life insurance policy never belonged to the testator. Rather, the insurance company obligates itself to pay the 'death benefit' directly to the beneficiaries named by the policyholder. This obligation is owed directly to the beneficiaries, and does not go through the *yerusha* process. A whole life policy, which has a cash value that is owned by the testator, presents a more difficult question. See the following footnote.

[12] Jointly-held assets, such as joint bank accounts, typically have rights of survivorship. Upon either spouse's death, the surviving spouse succeeds to the ownership of the entire asset by operation of secular law. In other words, the actual ownership interest in the asset is such that the first to die's ownership interest dissipates upon his or her death. The entire asset thus belongs to the surviving spouse. Because this right is a characteristic of the ownership interest, as opposed to transfer via probate or inheritance, *halachah* would likely recognize this right. It would not conflict with the laws of *yerusha* since it simply defines the parties' ownership interest. Shuras Hadin volume 2 pg 342 quoting Rav Feivel Cohen and Rav Zalmen Nechemia Goldberg. (See also footnote 13)

Even if one were to argue that the depositor did not intend to actually transfer ownership of the funds to his spouse at the time of deposit, the bank is obligated under secular law to pay the funds to the beneficiary or survivor on the account. Accepting such funds from the bank would be permissible regardless of whether the asset was *halachically* jointly owned during the testator's lifetime. (See Chidushay Rav Shlomo Teshuva 8).

[13] If the parties' intent at the time the asset was purchased was that each spouse should be a true partner in the asset, the wife would immediately own a share in the asset. As such, upon her husband's death, his heirs could not claim the portion of the asset that already belonged to her. Depending on the type of ownership, this would mean either a fifty percent share (as is typical in a Tenancy in Common), or the entire asset (in the case of joint tenancy where each spouse has an undivided interest in the entire asset.) See previous footnote for a discussion of survival rights.

Notwithstanding this analysis, the fact that both spouses are on the deed does not always prove that the intent was to form a true partnership. (Mechaber Choshen Mishpat 60:12 rules that if the wife is named on the deed, she is presumed to be a partner. Teshuvos Harosh 96:4 explains that it was unusual for a woman to be listed on the deed. As such, if her name appears, we will presume it is because she was in fact a partner. Arguably, this norm has changed today. In addition, Rosh refers to a case where the woman claimed that she had paid half of the cost of the house. In the absence of such claims, the implication from the Rosh is that we would not assume the husband intended to gift it to her.) See also Aruch Hashulchan 60:21, 62:6, and Igros Moshe Choshen Mishpat 17.

To avoid any confusion, it is advisable for the couple to execute a document stating that their intent was to be true partners in the asset.

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As a result of these exclusions, a widow is often left with the bulk of the deceased's estate despite the fact that she is not a *halachic yoresh*.
It should be noted that there is no clear halachic precedent for these asset classes, and it is therefore not advisable to rely on the above conclusions. In order to avoid any doubts or disputes, one should include these assets in any *Halachic* will that one executes.

Firstboorn Son- *Bechor*

A firstborn[14] son, known as a *bechor*, receives a double share of certain assets. For example, if there are four sons, the estate is divided into five equal parts. The firstborn receives two of those shares, or forty percent of the estate, while the other brothers each receive one share, or twenty percent each. This applies only when children inherit their father's estate. When children inherit their mother's estate, the firstborn does not receive a double share.

Exclusion: Debt

A *bechor* only receives a double share of the assets that were in his father's possession at the time of his death[15] . By contrast, debts[16] that were owed to the father but not collected until after his death would be distributed to all of the sons equally. This applies regardless how secure the debt is. According to many *poskim*, a *bechor* does not receive a double share of any money that the deceased deposited in any bank[17] (even if the bank is owned by Jews[18]), or invested in government bonds[19] . The status of stocks is questionable.[20]

See also footnote 12

[14] If the firstborn son was delivered via cesarean section, neither he nor any subsequent child will have the status of a *bechor*. Bechoros 47b

[15] Bava Basra 125b .

[16] See Choshen Mishpat 278:6 that discusses a *bechor's* right to income earned by the estate after the father's death.

[17] Ginas Veradim Even Haezer 4:19, Igros Moshe Even Haezer 1:104, Pischay Choshen Nachlus 2:35, Yabia Omer 8:8.
Funds that are deposited into a bank account are considered loaned to the bank. Although the account is payable upon demand, the bank does not actually hold on to the funds deposited for the depositor. Rather, it uses the funds until they are withdrawn. Therefore, the money in a bank account is considered debt, and is not subject to the double portion. In contrast, if a person keeps cash in a safe deposit box, those funds are directly owned by the deceased, and the *bechor* would receive his double share regardless of where the safe deposit box was located.
See however Tevuas Shemesh Choshen Mishpat 1, Torah Temima Devorim 21:17, Shearim Metzuyanim B'halachah 193 Kuntris Achron 5, Emek Hateshuva 117, Teshuvos Vhanhagos 1:852, that demand deposits may be subject to the double portion.

[18] A Jewish-owned bank typically has a *heter iska* for all deposits in order to avoid the prohibition against *ribbis*. This changes the relationship between the depositor and the bank; a deposit is not a loan, it is an *iska* partnership. In a classic *iska* arrangement, fifty percent of the funds advanced are considered an investment (*pikadon*). The remaining portion is considered a loan. As explained before, a *bechor* does not receive a double share in debt owed to his father. He would, however, receive a double

share of any investments owned by his father. Therefore, Radvaz 3:564 and Pnay Yehoshua 2:104 conclude that the half of the funds that are considered a *pikadon* investment would be subject to the double share, while the loan portion would not be subject to the double share. Accordingly, a *bechor* would receive a double share of half of the funds in the account, and a regular share in the rest.
In contrast, Chut Hashanee 1 considers the entire *iska* as a loan for inheritance purposes, and the firstborn is not entitled to a double share at all. Pischay Choshen 8:2:36 suggests that all opinions accept this analysis in regards to a modern day bank. (His reasoning is that even the investment portion is re-lent to other customers. Thus, even the portion of the deposit that is treated as a *pikadon* investment becomes converted into debt once the funds are re-lent to another customer [Arguably, this logic would dictate that ¼ of the deposit should still be classified as a *pikadon* investment. Half of the deposit is a loan. The remaining half is an investment, which is 'lent' to another customer in accordance with a *heter iska*. Since that customer is receiving the money as part loan and part investment, ¼ of the original amount (½ of ½) should still be subject to the double portion. This analysis applies only in Israel, where substantially all of the deposits are re-lent to other Jews as an *iska*. In the United States, where much of the money is re-lent to non-Jews as standard loans, the entire deposit would be classified as a loan]).
A third opinion (Pischay Teshuva 278(4) quoting Shar Mishpat 278, Shvus Yaakov 1:172) is that the entire amount of an *iska* is subject to the double portion. These *poskim* maintain that since the entire *iska* is collateral for the *pikadon* investment, it would all be subject to the double share.
See also Shevet Halevy 4:216.
[19] Nodeh Beyehuda Kama Choshen Mishpat 34 writes that government bonds are considered loans regardless of how secure they are, and the *bechor* is not entitled to a double share.
See also Aruch Hashulchan 278:13 who argues that government notes are subject to the double portion. However, Aruch Hashulchan takes this position only regarding notes that are already due, and that are sometimes accepted as cash in the marketplace. (See also Aruch Hashulchan 66:9 for a discussion of the *halachic* status of different financial instruments) . See also Yeshurin volume 20 page 565 quoting Imrey Emes that the custom is not to follow the ruling of the Nodeh Beyehuda.
Today, government bonds are not used as currency in the general marketplace. Furthermore, bonds that are traded are generally not mature. Therefore, all would agree that bonds would not be subject to the double portion.
A private debt, even from a very wealthy and secure debtor, is treated as a regular loan according to all opinions.
See Pischay Choshen Yerusha 2:57 that a *bechor* receives a double portion of the estate's cash. Although paper money has no real intrinsic value and can be compared to government debt, it is fundamentally different. People do not use cash to 'collect' from the government. Rather, people accept paper currency as intrinsically valuable, and accordingly the *bechor* will receive his double share.
[20] From a technical standpoint, every shareholder is a partner in the company. Since the *bechor* is entitled to a double-share of assets that the deceased was a partner in, he should receive an extra share in all stocks owned by the deceased. However, this would depend on the underlying assets owned by the company. Only tangible assets would be subject to the double share. Other assets, such as loans that the company extended, would be no different than if the deceased had directly extended a loan, and would not be subject to the double portion. (Rav Suriel Rosenberg, Yeshurun 20 page 579). In practice, determining what percentage of the shares' value consists of tangible assets is virtually impossible.
Furthermore, Igros Moshe Even Haezer 7 writes that shareholders are not considered true partners in a company unless they own a significant stake. Small shareholders are viewed as having rights to distributions and future profits, but not to the underlying business. Based on this approach, shares of stocks would be similar to debt, and the *bechor* would not get a double share regardless of the type of assets owned by the company.
See also Emek Hateshuva 3:117 that suggests that a Firstborn *Bechor* receives a double portion of shares even though the company may own debt or other intangible assets. He explains that only direct

Modifying the Halachic Order of Inheritance

The previous chapter discussed the Halachic Order of Inheritance. This defines how one's estate is distributed by default in the absence of any halachically valid will/trust. For various reasons, people may wish to modify how their estate will be divided. This chapter will discuss the halachic parameters governing modifications, and the circumstances under which such modifications are permissible.

Disinheriting a *Halachic* heir

It is forbidden to circumvent the *Seder Hayerusha* by disinheriting[21] a *halachic* heir[22]. When the Torah defines the order of inheritance, it is teaching us the proper distribution of an estate. The *Seder Hayerusha* is not just a default for those who neglect to execute a will; rather, it reflects the Torah's view of how an estate should be divided. Therefore, executing a will that overrides this Order by disinheriting a *halachic* heir is prohibited. Nevertheless, the will would be valid even though it violates *halachah*[23].

This concept is expressed in a fascinating *p'sak* quoted by Rama[24]: A woman gave an executor a bag of gold and instructed her executor to distribute it 'in the best manner'. The Mordechai rules that we do not distribute the money to charity, even though this could be construed as a "best manner." Rather, we distribute the assets to the *halachic* heirs in accordance with the Halachic Order of Inheritance. Thus, following the Torah's instructions on how to distribute an estate is considered the ideal allocation of the estate.

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loans, which must be collected before they have any use, are excluded from the *Bechor's* double share. In contrast, stocks are never 'collected'; rather the shares themselves are traded. As such, the shares were considered in the deceased's possession at the time of his death, and the *Bechor* will receive a double-share.
Regardless, it should be noted that shares held in a margin account can be lent out to investors who will short the stock. If the shares were lent out at the time of the father's death, all would agree that the *Bechor* does not receive his double-share.
See also Pischey Choshen Yerusha Chapter 2 note 72.

[21] See Levush Haorah Parshas Chayey Sarah that limits this proscription to Karka. See also Sdey Chemed mareches *'lamed' klal* 3 (11)

[22] Mishna Bava Basra 133b *"If one transfers his assets to an 'outsider' and disinherits his children, the transfer is effective, but Chazal are displeased with his behavior."* Kitzur Piskey Harosh Bava Basra 8:37, Teshuvas Harosh 85:2, Knesses Hagedola (Choshen Mishpat Tur 282:2, quoting Ranach 1:118 and Rashdam 311) interprets this to mean that it is prohibited to do so. Bais Din has an obligation to try to prevent this from occurring.

[23] Choshen Mishpat 282

[24] 282 quoting Mordechai Bava Basra 625.

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Partial redistributions

Many *poskim* differentiate between completely disinheriting a *halachic* heir, which is virtually always prohibited, and a partial redistribution. This distinction is of vital importance to estate planning. Typically, a testator will modify the Order of Inheritance, but will not completely disinherit any of his *halachic* heirs. If partial redistributions are permissible, this would allow for the majority of common estate planning choices. There are three opinions among the commentators:

1. One may not make any changes to the Halachic Order of Inheritance[25].

2. One may distribute his assets as he wishes, provided that four zuz (gold coins) are distributed in accordance with *halachah*[26]. While the exact value of four *zuz* is unclear, Igros Moshe[27] rules that the requirement is to leave a meaningful portion of his estate to be divided in accordance with the *Seder Hayerusha*. One may then distribute the remainder of the estate as he pleases. See footnote[28] for a discussion of how large this exclusion must be.

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[25] Rashbam Bava Basra 133b, Meiri Kesubos 53.
See also Chasam Sofer Choshen Mishpat 151 maintains that while there is no actual prohibition against a partial redistribution, it is not condoned by Chazal, and *ayn ruach chachamim noche hemenu*. He explains that if a person distributed his entire estate in a manner inconsistent with the Order of Inheritance, he is subject to the severe curse quoted by the Yerushalmi Bava Basra 8:6 of ותהי עונותם על עצמותם "*and the sin will be in your bones [forever]*". A partial redistribution would not be subject to the severe curse but is nevertheless condemned by Chazal.
See also Zerah Emes 2:110 that a partial redistribution is prohibited if only a token amount is left to the *halachic* heirs. However, if at least half of the estate will be left to the *halachic* heirs, one may distribute the rest as they please.
[26] Itur Chelek 2 "Schiv Mera" page 59b, Tashbetz 3:147, Avkas Rochel 92 , Maharshal 49, Taz Even haezer 113 (1), Ketzos 282(2), Birkey Yosef Yoreh Deah 249:15. Bais David Choshen Mishpat 137 states that the custom is to rely on this opinion.
[27] Igros Moshe Choshen Mishpat 2:50. See also Kuntris Mdor Ldor who reaches a similar conclusion.
[28] Tashbetz 147 writes that if one leaves only ¼ of a *zahuv* for his *halachic* heirs, he will not avoid the prohibition. However, Tashbetz permits leaving over four *zuz*. To translate this into today's currency, Harav Ulman (in a letter of approbation to Mishpitey Hatzavoah) points out that two hundred *zuz* is described as the amount that a pauper needs to support himself for one year. It follow that four *zuz* is approximately one week's living expenses for a single pauper. Based on this, Rav Ulman concludes that $100 would suffice in Eretz Yisroel.
Igros Moshe has three *teshuvos* on the matter, which seem to reflect a higher threshold. In Choshen Mishpat 2:49, Igros Moshe suggests setting aside 1/5 of the estate to be divided in accordance with the *Halachic* Order of Inheritance. In Choshen Mishpat 2:50, Igros Moshe implies that $1,000 is sufficient. In Even Haezer 1:110, Igros Moshe recommends leaving the house to the *halachic* heirs. While it is unclear what formula Igros Moshe used in these *teshuvos*, it does seem that a more meaningful amount is recommended.
There does not seem to be any basis to require a larger exclusion for a larger estate: In discussions with Rav Yisroel Burger and Rav Chaim Kohn concerning an estate valued in excess of $500 million, both maintained that leaving ten thousand dollars to the *halachic* heirs would suffice.

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3. Completely disinheriting a child is always forbidden. A partial redistribution is permitted only for a *mitzvah* purpose.[29]

Practical Application

The predominant custom for many years[30] has been to rely on the lenient opinions that permit partial redistributions, and this remains true today[31]. Nevertheless, it is preferable only to rely on this leniency where there are other mitigating factors present. The following are examples of such mitigating factors:

Spouse

Contemporary *poskim* permit a testator to allocate a portion of his estate to his spouse. As discussed earlier, Chazal took deliberate measures to ensure the spouse's welfare, entitling her to significant support from the estate. However, if one feels that such support would be insufficient to ensure her comfort, one may bolster it with a direct allocation[32]. However, one may not leave his entire estate to his wife. Doing so would necessarily disinherit the *halachic* heirs, which is forbidden. To avoid this, one should leave a portion of the estate to be divided according to the *Seder Hayerusha*, and then may leave the rest to his spouse.[33]

Daughters

There was a widespread custom among Ashkenazi Jews[34] to give each daughter a significant share of the estate[35]. Historically, a daughter received one-half of the

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[29] Pischay Teshuva 282, Shulchan Aruch Harav Mechira 8, Igros Moshe Choshen Mishpat 2:50.
Shevet Halevy 4:216 suggests that perhaps a partial redistribution is merely against a *middas chasidus*. As such, when sufficient justification exists (such as for charity or other mitzvah purposes) one may make a partial redistribution. In contrast, if it were a true prohibition, we would not take the liberty of making such calculations.
See also Igros Moshe Choshen Mishpat 2:50 (2) that permits only when the grantor's motivation is to fulfill the mitzvah. However, donating one's estate to charity in order to disinherit the *halachic* heirs would be prohibited.

[30] See Itur and Bais David quoted in footnote 26

[31] Kovetz Maishiv Bhalachah volume 23, Darkey Choshen 282.

[32] Minchas Yitzchok 3:135 (15), Kuntris Medor Ldor.
It would seem most appropriate to create a trust to provide support for the spouse, with the remainder of the assets transferring to the *halachic* heirs after her death.

[33] In the event the estate is not large enough to provide for the widow's *kesuba,* she would be entitled to the assets regardless of the provisions of the will.

[34] See Pischey Choshen Yerusha 4 (98) that this custom was not prevalent among Sefardik communities.

[35] This custom needs explanation. According to some opinions, one may not modify the Halachic Order of Inheritance at all. If so, how and why did the custom evolve to give a significant share to the daughters?
Some *poskim* (Maharam Mintz 47, Nachlas Sheva 21:2, Minchas Yitzchok 3: 135) maintain that the monies were given as a form of a dowry to help the daughters get married; the mitzvah of marrying off one's children overrides the mitzvah of distributing the assets in accordance with the *seder hayerusha*. (See Kuntris Mdor Ldor that suggests that a mother, who does not have this mitzvah , would not be

amount that each son received, excluding real estate[36] and Jewish books[37]. One may follow this custom today[38]. However, people frequently wish to give their daughters a larger share of the estate. Some *poskim* maintain that from a technical *halachic* point of view, there is no difference between leaving a daughter a half share or a complete share[39]. Therefore, one may rely on the lenient *poskim* –especially if one suspects that leaving a daughter only a half-share may lead to arguments and strife[40].
However, there is a *hashkafic* aspect to consider: The traditional custom as recorded by the *poskim* was to give each daughter a half-share. In the absence of any

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able to rely on this justification. However, if there is a compelling need, Kuntris Mdor Ldor permits one to rely on the opinions that allow partial redistributions.)
Others explain that the prohibition applies only when giving away assets as an inheritance. In contrast, the method used to grant the daughters a share in the estate (known as a *Shtar Chatzi Zacher*, which will be explained in Chapter Four) is not subject to the injunction (Nachlas Shiva 21:6, Kesef Hakadashim 282)

[36] Kneses Yechezkel 93 maintains this exclusion applies only to the house that the deceased lived in. Commercial holdings and investments were not excluded from the daughter's share. Rav Akiva Eiger 130 further differentiates between investments that were intended to be sold, which the daughters may be given a share in, and properties that were intended to be held for their rental income, which would be excluded.
Shvus Yaakov 2:121 writes that this exclusion is capped at 1/3 of the estate: the daughters would receive a share in all real estate above that value.
See Minchas Yitzchok 3:135 (14), Kesef Hakadashim 282 that one should not override this exclusion. However, today the custom seems to be that people give their daughters a share in their home. The reason is twofold. First, for many people, the equity in their house is a large part of their estate, and excluding their daughters from it would often leave them with little else. Second, people today are less attached to their houses. It is unusual for a house to stay in the family for more than one generation, and therefore some of the reasons for the exclusion do not apply.
See also Igros Moshe Even Haezer 1:110 that if a person insists on overriding this limitation, they must explicitly state that the daughter should receive a share in the real estate that the testator lived in. Otherwise, the default assumption is that the gift is intended to be consistent with the traditional exclusions.

[37] See Minchas Yitzchok 3:135 (14), Kesef Hakadashim 282 that one should not override this exclusion. Chasam Sofer Even Haezer 2:168, Likutim Choshen Mishpat 63 writes that although the reason for this exclusion does not apply today, one should maintain the original custom and not should give his daughter a share in his seforim.

[38] See Maharsham 7:12 who permits such gifts only when they are given at the time the daughter gets married (as per Maharam Mintz in footnote 35). Harav Zalmen Nechemia Goldberg (printed in Mishpitay Hatzavaah pg 203) rejects this limitation.
See Emes Lyaakov Choshen Mishpat 282 footnote 20 that writes that it is appropriate for a person to leave his daughters a respectable share of his estate.

[39] HaRav Zalmen Nechemia Goldberg.
If the method of transfer (by creating a debt) is not subject to the prohibition against redistributing an estate, then it does not matter how large of a share is given. If the justification is that the *halachic* heirs are still receiving a significant share, that applies regardless of whether the daughter receives a half or whole share. If the justification is that the imperative to marry off a daughter outweighs the concept of the *Seder Hayerusha*, there is no reason to limit it specifically to a half-share.

[40] See Gesher Hachaim 1 pg 41 that justifies giving a daughter a share in the estate to avoid disputes and to prevent a disenfranchised daughter from litigating in secular court. Gesher Hachaim adds that even if the deceased did not execute a will, the sons should give a share to the daughters.

legitimate need, it is preferable to maintain this original custom. Chasam Sofer[41] and Chazon Ish[42] took strong issue with those who wanted their sons and daughters to inherit equally. They write that this was the philosophy of the *Tzedukim,* and reflects a desire to adopt the norms of the gentile culture, and is a rejection of Torah Hashkafa.

It would therefore seem appropriate to do some introspection before modifying the *Seder Yerusha*. If one's motivation is that they believe in equality and are troubled by the *Seder Yerusha*, it would be highly inappropriate to modify the *Seder Yerusha*. Such behavior would be a rejection of *halachah*. However, if the motivation is to avoid creating strife within the family or a similarly legitimate purpose, then there is ample basis to make such modifications—provided that the *halachic* heirs receive a meaningful share of the estate[43].

Based on the above, it would be appropriate to differentiate in some manner between the sons and daughters[44]. Even a minimal difference[45] demonstrates that one accepts the *halachah* of how the estate should be divided, and demonstrates that the modification is being done simply to avoid disputes.

In any event, one should not give his daughters a larger share in the estate than his sons[46].

Other relatives

The above discussions are specific to a wife or daughter. If a person wishes to leave a portion of his estate to grandchildren[47], friends, or other relatives, the only *halachic* justification would be the opinions that permit partial redistributions. As mentioned

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[41] Chasam Sofer Choshen Mishpat 153 responds to a question that "it appears his goal is to equalize the sons and daughters, and if so I want nothing to do with him, and will not draft the will ".

[42] Kovetz Igros Chazon Ish 1:96.

It should be noted that Chazon Ish was rejecting the idea of creating laws that gave daughters an equal share in the estate. Such laws would be a rejection of *halachah*. A private person transferring a share of his assets to his daughters may not be as problematic.

[43] Rav Henken Ksavim 2:100. See also Cheshev Haephod 3:50 for a similar approach.

[44] See also footnote 37.

[45] If even a minimal difference would create resentment, one may distribute the estate equally between the children.

[46] Maharam Mintz Segel 31, Chasam Sofer Even Haezer 2:168, Maharsham 7:12.

[47] The restriction against 'depriving' a relative of his *yerusha* applies when it is done against the heir's will. If the heir agrees, some *poskim* maintain that the prohibition does not apply. Mishpatey Hatzavah (2:11) quoting Shut Rama 78. See also Kesef Hakadshim 282 who seems unsure about the matter.

However, it should be noted that Rama refers to a case where the *halachic* heirs voluntarily made an internal agreement among themselves how to divide the estate. The testator did not disinherit them. Since it was simply an agreement between the recipients about how they would divide the estate between themselves, there is no prohibition. In contrast, when the testator creates a will that disinherits a *halachic* heir, perhaps it would be prohibited even with their consent.

This should depend on the nature of the prohibition. If it is based on the children's 'right' to inherit a share, such rights can be waived. If, however, the prohibition is to displace the *Halachic* Order of Inheritance, than it may be prohibited even with the children's consent. See also Darkey Choshen 282, וצ"ע לדינא

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above, many *poskim* accept this leniency. Nevertheless, it is preferable to structure the estate in a manner that has other mitigating factors as well.
When relying on these leniencies, it is important that the *halachic* heirs not be completely disinherited. If a person wishes to leave his entire estate to his spouse or a particular relative, friend, or charity, he would be completely depriving his *Halachic* heirs of their inheritance. This would be prohibited according to all opinions.

Lifetime Gifts

Some *poskim* maintain that the restriction against redistributing one's estate applies only to testamentary transfers. However, a lifetime - or an *inter vivos* gift – would not be subject to such restrictions[48]. Others reject this distinction.[49]
As a matter of *halachah*, all opinions agree that a person is free to spend money and give normal[50] gifts during his lifetime. Although every gift reduces the value of one's estate, he is entitled to spend his wealth as he chooses without restrictions.
At the other extreme, if a person engages in estate planning but uses a mechanism that is technically an *inter vivos* gift, according to many *poskim* the rules concerning redistributions would apply.[51]
The *halachah* is less clear concerning an unusually large gift that will have a meaningful impact on the estate. Although it may be *inter vivos*, such gifts materially alter how the testator's wealth will be distributed. Therefore, such gifts would be subject to the dispute among the *poskim* mentioned above.

Practically, it is highly unusual for one to make a gift of all of his assets, leaving himself with nothing. Therefore, the *halachic* heirs would typically end up with a share of the estate regardless. As such, the opinions mentioned above that permit partial redistributions would apply here as well. Accordingly, virtually every case of *inter vivos* gifts will have two separate reasons to be permissible: 1) some opinions always permit partial redistributions, and, 2) *inter vivos* gifts may not be subject to

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[48] Bris Avraham Choshen Mishpat 20, Lvush (Sefer Haorah Parshas Chayeh Sarah 24:10), Prisha Choshen Mishpat 99:20, Kneses Hagedolah 282:10, Erech Shay Even Haezer 50:6, Machaneh Yehuda Choshen Mishpat 282, Sdei Chemed 2 page 667, Kinyan Torah 2:77. ((see also Teshuvas Harosh 85:3))

[49] Rashdam 311, Ranach 118, Zerah Emes 2:110, Tzemach Tzedek 42, Chasam Sofer 151, Maharsham 7:12. See also Sday Chemed volume 2 page 667 for further discussion.

[50] See Minchas Yitzchok 3:135 (5) that gifting heirlooms or other assets that are normally passed from one generation to the next would be subject to the restrictions of *Havaras Nachla*. Other gifts are permitted, provided one leaves a meaningful part of the estate for the *halachic* heirs, as per Tashbetz.

[51] To create a halachically valid will, the transfer must take effect a moment before the testator's death. Such transfers are clearly testamentary and would be prohibited. (Minchas Yitzchok 3:135 quoting Bris Avraham Choshen Mishpat 20, Machaneh Yehuda Choshen Mishpat 282, Sdei Chemed 2 page 667, Tashbetz 147.), Darkey Choshen 282. See, however, Chasam Sofer 151.
Pischey Choshen Yerusha 4 (2) maintains that if the intent of the transfer is to circumvent the Halachic Order of Inheritance, it would be prohibited regardless of its form and timing.

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the rules of disinheritance. As such, one may follow the lenient position in such cases.

Based on this, if a person intends to distribute his estate in a manner that is *halachically* questionable, it is preferable to do so as an *inter vivos* gift.[52] However, there is an important caveat: one should always retain enough assets to provide for one's future needs. Presuming that one's children will happily return the assets if one needs them in the future is imprudent, and can lead to serious problems.[53]

Caution, however, that inter vivos gifts may be subject to taxation under applicable secular tax laws, and one should consult with an attorney who is qualified in estate and gift taxation and planning before making such gifts.

Favoring a particular child

Notwithstanding the *halachic* concerns about modifying the *Seder Hayerusha*, Chazal teach us that a person should never show any preference to a particular child[54]. The preferential[55] treatment Yosef received from Yaakov Aveinu caused resentment by the other *shevatim*, which had terrible ramifications. Even if one feels that there are legitimate reasons to give a particular child a larger share of the estate[56], one should hesitate greatly before ignoring Chazal's instructions[57].

Charity

Normally, a person should not donate more than one-fifth of his assets to charity[58]. A person's first obligation is to provide for himself and his family; if he is overly generous, he may find himself unable to fulfill these obligations. Rama rules that this limit does not apply to a testamentary gift[59]. Because the gift is made at the time of death, there is no fear that it will be needed by the donor. There is a debate among the *poskim* whether there are any limits to such charity. Some *poskim* allow a person to donate up to one-third of his estate to charity[60]. Other *poskim* permit one to

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[52] Chasam Sofer 151, Minchas Yitzchok 3:135 (regarding an adopted child).

[53] See Bava Metzia 75b.

Shela Os daled '*derech eretz'* 42 adds that "A parent can support ten children, but ten children cannot support one parent"

[54] Shabbos 10b

[55] See Chasam Sofer Shabbos 10b that in reality, Yosef was greater than his brothers and deserved the special treatment. Nevertheless, the brothers did not appreciate his greatness, and the perceived unfairness created the problems.

[56] See however, Bach, Minchas Pitim (Shirey Mincha) 282 quoting Rambam Nachlos Chapter 6 that this applies only to gifts during one's lifetime; it is permitted, however, to give a larger portion of one's estate to a particular child. Tur 282, quoted by Cheshev Haephod 3:50, does not differentiate.

[57] See Kisvay Rav Henken that implies that it is permitted where there is a legitimate need.

[58] Yoreh Deah 249:1

[59] Yoreh Deah 249:1

[60] Rav Akiva Eiger Yoreh Deah 249:1 quoting Shieltos, ChaChoshen Mishpatas Adam 155.12.

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donate up to one half of his estate.[61] A third opinion is that one may donate any amount, provided that a significant sum is left to the *halachic* heirs[62].
It should be noted that a person's priority when giving charity should be his own family. If he has relatives that are struggling, it would be more appropriate to leave the estate to them then to support a charity[63].

If a *halachic* heir is a *rasha*

Even if a *halachic* heir is a *rasha*, the prohibition against disinheriting him still applies[64]. Though his behavior seems completely beyond hope, his descendants may yet prove to be worthy[65]. Therefore, the inheritance should be left intact. Tashbetz adds that even if a child was disrespectful toward his parents and treated them in a highly inappropriate manner, the child should not be disinherited[66].

Assisting Redistributions

As mentioned before, there is a prohibition against redistributing one's estate against the *Seder Hayerusha*. In addition, one may not be a witness[67] to a will that redistributes an estate. Some *poskim* add that even advising a testator how to change the *Seder Hayerusha* would be prohibited[68].
This law can be challenging for an attorney. If a Jewish client insists on disinheriting a *halachic* heir, assisting him would violate this *halachah*. However, refusing to draft the will may jeopardize the attorney's career.
Under most circumstances, there is sufficient basis to permit an attorney to draft such wills. As long as there is a legitimate *halachic* opinion that justifies the redistribution, the attorney need not be concerned about his role regardless of whether he personally would follow the leniency for himself[69]. As previously

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[61] Birkey Yosef Yoreh Deah 249:15, Aruch Hashulchan 249.1.
See Zerah Emes 2:110 that even an extremely wealthy person should not exceed this limit.
[62] Shulchan Aruch Harav Mechira 8, Igros Moshe Choshen Mishpat 2:50 (2).
[63] Yoreh Deah 251:3
[64] Kesubos 53
[65] Mahram Shick Choshen Mishpat 43, Igros Moshe Choshen Mishpat 2:50 write that if the son is completely non-observant, this restriction does not apply. See also Dovev Maysharim 97.
[66] Tashbetz 2:177, 3:192. Even if a child curses his parents, they should not disinherit him.
[67] The Gemara discusses being present at the time the transfer takes place. Presumably, this applies only when one's presence adds gravitas to the will (See Tur that this applies only to an *adam chashuv*). Pischey Choshen Yerusha 4 (6).
Rambam and Tur (282) add that being a witness on the document is included in this restriction.
[68] Chasam Sofer 151, Shulchan Aruch Harav Mechira 8.
See however Kneses Hagedolah Tur 11 that simply advising a testator would not be prohibited. However, this applies only when advising the testator to give one son a larger share. Advising how to disinherit a child would seem to be prohibited even according to Knesses hagedolah.
[69] Assisting a person to violate a prohibition typically is considered *Mesayeah Ldvar Avaira*. However, this applies only when the testator is actually violating an Aveira. If, however, the testator has a legitimate halachic opinion to rely on, he is not violating any prohibition and assisting him would be

explained, there are numerous leniencies and exceptions to the prohibition[70]. Many situations will qualify for at least one of these leniencies, providing sufficient basis for an attorney to rely on.

In addition, disinheriting a *halachic* heir is a Rabbinic prohibition according to most Poskim. Assisting a person in an action that violates a Rabbinic prohibition is permitted under certain conditions, which are outlined in the footnote below[71]. Furthermore, according to some Poskim, although disinheriting a *halachic* heir is prohibited, assisting in such transfers is not a strict prohibition but rather a *Middas Chassidus*.[72] Because there is no actual prohibition involved, if one would suffer a significant financial loss by refusing to help draft such a document, one would not be obligated to do so[73].

Regardless, if an attorney is in a position to influence the client's decision, he certainly should try to encourage him to comply with *halachah*.

However, if one proactively recommends that a client disinherit a *halachic* heir, he would be considered *mesayeah ldavar aveira*.[74]

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permitted. Although the attorney may be personally uncomfortable with some of these leniencies, there is nothing wrong with helping a client who relies on a legitimate *halachic* opinion.

[70] Some examples include: if the *halachic* heir is not completely disinherited, or if the assets are given as an inter vivos gift. Furthermore, there are different opinions as to what methods of transfer violate this rule. *Mitzvah Lkayem Divrey Hameis* would not violate according to Teshuras Shay 447. A *Shtar Chatzi Zacher* would not violate according to Nachlas Shiva.

[71] *Shach,* Dagul Mervavah Yoreh Deah 151:6 limit Mesayeah to instances where the sinner is unwittingly violating a prohibition. If, however, a person deliberately violates a prohibition, one is not forbidden to assist him. See also Pri Megadim Aishel Avraham, Orach Chaim 163:2 that maintains that Mesayeah does not apply to Rabbinic prohibitions. While we are not quick to rely on either of these leniencies, they certainly can be taken into consideration along with the factors mentioned above.

[72] Tur and Rambam write that a witness that signs a will that disinherits a *halachic* heir would only violate a *Middas Chassidus*, and not a true prohibition. (Os Hee Leolam pg 106b, quoted by Sdey Chemed Mareches Lamed Klal 3). Rav Shaffran, in a conversation with the author, adopted this approach.

See however, Chasam Sofer Choshen Mishpat 151 that requires the recipient to return the assets to the rightful *halachic* heir so as not to violate *Mesayeah*. This implies that drafting a will is not merely against a *Middas Chassidus*, but rather is considered *Mesayeah*. See also *Baiy Chayey* 1:188 that does not differentiate between testifying and being *Mavir Nachla* with respect to the severity of the prohibition. Furthermore, Sdey Chemed and Os Hee Leolam base their position on Ranach 118 who differentiates between the testator who violates a prohibition, and one who was present at the time, who violates only a *Middas Chassidus*. However, Ranach may be limited to cases where the person did not actually play a role drafting the will, and consequently does not violate *Mesayeah*. In contrast, one who plays an active role drafting such wills may violate *Mesayeah* וצ"ע.

[73] See Erech Shay that a recipient of an estate that was inappropriately given to him need not return it, since one is not obligated to suffer a loss to prevent the testator from violating *Haavaras Nachla*. This argument is certainly true if one's career is in jeopardy. See, however, Chasam Sofer 151.

[74] See Baey Chayey 1:188 that uses especially harsh language to describe such behavior.

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Firstborn *Bechor*

There is a specific prohibition against depriving a firstborn of his double share by explicitly stating in the will that the firstborn should inherit only a regular share. Such attempts would be both ineffective and prohibited[75]. However, a testator is permitted to gift assets to others, even though the result will be that there is little remaining for the firstborn's extra share[76].

[75] Although a *shciv merah* (explained in Chapter Three), may redistribute his estate by ordering that a particular son inherit a larger share, this would not apply when it deprives the *bechor* of his double share.

[76] See Kerem Shlomo Choshen Mishpat 282 quoting Hilchos Ktanos 2:30 that suggests that there is no prohibition of *havaras nachla* on the firstborn's double-share. וצ"ע

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Secular Wills and Trusts

Once a person determines how they want their estate to be distributed, the next step is to execute the appropriate legal instruments to ensure those wishes will be followed. Modern estate planning typically involves executing a will and creating a trust. This chapter will explore the halachic effect of such instruments. To properly understand the halachic effect of such instruments, we will introduce the concepts of:

1. *Deathbed Bequests- Matnas Shchiv Mera*
2. *Gifts made in contemplation of death- Mitzaveh Machmas Missa*
3. *Minhag and Customs*
4. *Dina d'malchusa dina*
5. *Kibbud av V'eim*
6. *Mitzvah Lkayem Divrey Hames*
7. *Practical Application- Secular Wills*
8. *Practical Application- Trusts*

Transferring Assets - *Kinyan*

Under normal circumstances, *halachah* requires a *kinyan*, a formal act, for any sale or transfer of assets. Unless and until a *kinyan* is executed, either party may back out of a deal[77]. A notable exception to this rule is inheritance. When a person dies, his estate is immediately transferred to his heirs without any action or *kinyan*. However, this applies only when an estate is distributed as per the *Seder Hayerusha*. If one wishes to modify how his estate will be distributed, it typically needs to be done in accordance with the classical requirements of *kinyan*. This greatly complicates any *halachic* estate planning.

Secular Wills

Most estate planning is done in the form of secular law Wills. The execution of a secular will does not conform to the classic requirements of a *kinyan*. Nevertheless, there is significant discussion among the *poskim* about the *halachic* effect of secular wills. Numerous approaches are suggested to justify relying on secular wills. Although these approaches are novel and subject to debate, the de facto practice has been to rely on such wills. The following is a summary of the different concepts that can be applied to secular wills, and some of the objections raised by *poskim*.

[77] There are significant exceptions to this rule, which are beyond the scope of this work. In addition, there is often a prohibition against breaching one's word even in the absence of a formal enforceable agreement.

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1. Deathbed Bequests- *Matnas Shchiv Mera*

Chazal waived the requirements of a formal *kinyan* for a person distributing his estate on his deathbed[78]. As a practical matter, it is difficult for a person who is about to expire to execute the appropriate and necessary *kinyan* to effectively distribute his estate. Chazal were concerned that a person who was trying to make such a distribution would become frustrated, and the frustration would have an adverse effect on his declining health. Therefore, a dying person's instructions regarding his estate are binding even in the absence of a formal *kinyan*.

A will contains the instructions of a testator about how his estate should be distributed. If the will was executed while the testator was on his deathbed[79], it may be enforceable based on this concept. That being said, estate planning is generally arranged well before the testator is in terminal decline, and this concept is of limited use. Furthermore, there are numerous other limitations to this concept which greatly reduces its practical application[80].

2. Gifts Made in Contemplation of Death- *Mitzaveh Machmas Missa- mortis causa*

There is a minority view among the *poskim* that gifts that are given specifically because the individual making the gift was contemplating death do not require a *kinyan* regardless of the individual's health condition[81]. According to these opinions, all wills would be *halachically* recognized since they are, by their very definition, written to prepare for one's death. However, this approach is rejected by the majority of *poskim*.[82]

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[78] Choshen Mishpat 281:5

[79] See Choshen Mishpat 250:5 for a precise definition.

[80] This concept applies only when the testator intended to take advantage of it. However, if a person on his deathbed attempts to execute a standard *kinyan* or will, but does so in an ineffective manner, the concept of Schiv Mera will not apply.
Furthermore, this method may only be used either when the testator is distributing his entire estate, or if it qualifies as "Gift made in Contemplation of Death" (see next section).
Furthermore, if a language of inheritance (I hereby bequeath) is used, the testator may only modify the distributions between his *halachic* heirs. He may not, however, distribute assets to people who are not *halachic* heirs. Therefore, this method cannot be used to give a wife or daughters a share in the estate. This limitation can easily be avoided by using language of a gift or transfer, as opposed to words such as 'inherit'.

[81] Maharam, quoted by Mordechai Bava Metzia 254 and Bava Basra 591. Most *poskim* reject this opinion and limit the exclusion to gifts given on one's deathbed (Shchiv Merah).

[82] Rama 257:7. See also Rashdam 304, Har Hamor 40.
See however, Maharsham 2:224 that states that the matter is undecided in *halachah*, and that the *muchzik* would prevail.
Regardless, most of the limitations mentioned in footnote 80 would apply here as well.

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3. Customs and *Minhag*

In monetary matters, local norms or customs play an important role. Any act that is accepted as finalizing a deal will act as a *kinyan*. The fact that society has accepted a particular act as a 'deal clincher' gives it *halachic* significance regardless of whether it meets the technical requirements of a *kinyan*. Such acts are known as *situmta*[83].

The reality is that most Jews do not write independent *halachic* wills. Instead, they rely upon the legal documents drafted by their attorney. Would such documents qualify as a *Situmta*, and can they be effective simply because they are used to affect a transfer?

This idea has *halachic* precedent. Radvaz[84] writes that secular wills are enforceable in *halachah* because there was a custom to honor them. Radvaz explains[85] that the government insisted that Jews enforce wills that were drafted in civil court. Were Jews to reject such wills, it would have jeopardized the safety of the entire community. As such, the Rabbis accepted these wills and treated them as a valid *kinyan*.

After Death

There is a fundamental flaw with using the concept of *minhag* to legitimize secular wills. The concept of *situmta* creates a *kinyan*. However, according to many *poskim*, it cannot be better than a classic *kinyan*[86]. As far as *halachah* is concerned, a person's estate immediately transfers to his *halachic* heirs the moment he dies. Any attempt to gift or transfer the estate after one's death must fail, since the assets are no longer his to give away. Therefore, no *kinyan* could be effective if it purports to transfer the assets after the testator's death. Thus, even if we were to accept a secular will as a valid *kinyan*, since a will attempts to transfer the assets after the testator's death, it would be ineffective.[87] (Chapter Four will discuss how *halachic* will Addendums address this issue)

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[83] Choshen Mishpat 201

[84] 1:67, Maharchash 2:13.
See however Radvaz 1:544 that rejects the existence of such a *Minhag*.

[85] See also Rivash 52 where the governor sent a letter to the Rivash on behalf of the King to ensure the will was honored in accordance with the government's laws.

[86] There is a discussion in Choshen Mishpat 201whether *situmta* can work for a *Lo Ba Leolam*, an item that does not exist yet. However, even the opinions that maintain that *situmta* is effective for such goods concede that the asset must enter the seller's possession before the *kinyan* takes effect. Here, there is an attempt to transfer assets at a time they will no longer belong to the testator.

[87] Achiezer 3:34.
Radvaz agrees to this principle. However, Radvaz maintains that the legal wills in those times were intended to be effective immediately. In contrast, if the will states that it is effective only upon death, Radvaz would concede that even a *minhag* could not validate such wills. Today, all wills are effective only after death.

The Opinion of Igros Moshe

There is a notable opinion that accepts secular wills as *halachically* enforceable: Igros Moshe[88] rules that because a testator relies completely on a secular will and fully expects that his instructions will be followed, there is no need for any *kinyan*. The entire need for a *kinyan* is to establish *gemiras da'as*—that the testator truly intends to transfer the assets. If a secular will, in a practical sense, ensures the instructions will be followed, there is no requirement for a formal *kinyan*. Igros Moshe adds that this mechanism works even if the will takes effect upon death.
This ruling completely obviates the need for any independent *halachic* will. However, this ruling was not accepted by all *poskim*.

4. The Law of the Land- Dina D'malchusa Dina

Another potential justification for secular wills is the concept of *dina d'malchusa dina*. As a general matter, *halachah* gives binding effect to laws passed by civil governments. As such, one may argue that a will drafted in accordance with prevailing legal requirements should be *halachically* binding as *dina d'malchusa dina*. This rationale is advanced by Rivash[89] and Rama[90] to honor secular Wills. However, virtually all later *poskim* either qualify the Rivash's ruling[91], or reject it completely[92]. Chasam Sofer[93] goes as far as to say that a beneficiary who receives assets through a secular Will is guilty of theft if he does not return them to the rightful *halachic* heirs.

While a detailed analysis of *dina d'malchusa dina* is beyond the scope of this work, there are some basic limitations to the concept that are relevant to this case. Many opinions maintain *dina d'malchusa dina*applies only to matters where the government has a direct vested interest[94]. Others extend *dina d'malchusa dina* to laws that are for the public good[95]. However, a law that dismisses the *halachic* requirements of a *kinyan* in favor of a set of alternate rules would not meet either of

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[88] Even Haezer 104
[89] 352. See also Maharitatz Hachadashos 32 that agrees to Rivash especially when it is consistent with the *Minhag*.
[90] Choshen Mishpat 248. See however Rama 369 and Baey Chayey 158.
[91] Maharit Choshen Mishpat 6, Chasam Sofer Choshen Mishpat 142, Nesivos 248 (3) write that Rivash applies dina d'malchusa only to define the terms used in a will. Rivash presumes the parties intended the legal definition of such terms, even if the *halachic* interpretation would differ. However, even Rivash concedes that there must be a valid *kinyan* for the secular Will to be effective.
[92] Tashbetz 61 points out that Rivash was justifying the practice of the community of Majorica who relied on dina d'malchusa. However, Tashbetz continues, we should not aspire to follow their example. The entire Jewish community of Majorica ultimately assimilated. As such, we cannot follow their custom in an area that is inconsistent with *halachah*.
[93] Choshen Mishpat 142
[94] Choshen Mishpat 68, Minchas Yitzchak 6:165.
[95] Rama Choshen Mishpat 73, 369.

these criteria[96]. As such, according to these opinions, a secular Will would not qualify for *dina d'malchusa dina.*

5. Honoring one's Parents- *Kibbud Av*

Another *halachic* factor that must be considered is the commandment of honoring one's parents, *kibbud av v'aim*. Even if a will does not meet the strict *halachic* criteria to affect a transfer, the will certainly reflects the testator's wishes regarding the disposal of his assets. As such, an argument can be made that the commandment to honor one's parents creates an obligation on the children to follow the testator's wishes[97]. Of course, this only applies to the testator's children[98]. If the testator has no descendants and the *halachic* heirs are the testator's parents or nephews, there would clearly be no rationale of kibbud *av* .

Limitations

Although some *poskim* accept this rationale, it is important to note that this obligation is not enforceable[99]. Just as Bais Din does not step in and enforce every command that a father gives a child, Bais Din would not be able to force the *halachic* heirs to honor a will simply because it reflects the parent's wishes. As such, if the children refuse to honor the will, the intended beneficiaries would have no *halachic* recourse.

Expenses

The *mitzvah* of *kibbud av* has another important limitation: Although children have an obligation to honor their parents, the parent must reimburse them for any expense they incur[100]. Rav Akiva Eiger points out that asking one's children to forgo their rightful inheritance because of the mitzvah of *kibbud av* violates this rule. Since the parent is not compensating their children for the share of the estate that they are being asked to forego, they are essentially asking the children to honor their wishes without compensating them for the resulting expense. As such, the children should have no obligation to honor the will, and the obligation of *kibbud av* should not apply[101].

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[96] Vehaishiv Moshe Choshen Mishpat 90.
[97] Maharsham 2:224, Mahri Halevy 86.
See however Rav Akiva Eiger 68 who is unsure.
[98] See Mahrsham 2:224:18 that *kibbud av* would not require grandchildren to forgo their share of the inheritance.
[99] Yoreh Deah 240:1. In contrast, *Mitzvah Lkayem Divrey Hameis* (which will be discussed in the following section) is enforceable.
[100] Yoreh Deah 240:5
[101] See Emes Lyaakov Choshen Mishpat 282 footnote 20 that rejects *kibbud av* for this reason. However, Emes Lyaakov maintains it is a '*hiddur*' to honor the will regardless.

However, other *poskim*[102] argue that foregoing an inheritance is not considered an 'expense'. The child is not spending his own money to fulfill his parent's wishes; rather, the parent is giving instructions on how *their own estate* should be distributed. Although in a technical sense the assets immediately transfer to the children, directing them to relinquish such assets is not classified as an 'expense', and would still be subject to the obligation of *kibbud av*.

No direct benefit to Parent

Another issue is that *kibbud av* typically involves actions that directly benefit the parent[103]. However, if a parent orders[104] the child to do something that has no direct impact on the parent, some *poskim* maintain there would be no *mitzvah* to obey.[105] This argument is even more compelling after the parent passes away, and disobeying their request will not cause them any pain[106].

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[102] Mahari Halevy 86. Rav Akiva Eiger 68 is unsure. See Kesef Mishnah Mamrim 6:11 that argues.

[103] See Kiddushin 31b.

[104] See Rav Akiva Eiger 68 that explains that if a parent instructs his child how to distribute his estate, the commandment of *kibbud av* could apply (subject to the limitations mentioned above). If, however, the parent never gave any instructions to his child, but simply executed a legal document that guided the courts about how to deal with his estate, the mitzvah would not apply. If the will is not *halachically* enforceable, the children would have no obligation to fulfill the parent's implied intent.

The reason for this is that the obligation to obey a parent's command arises from the fact that disobeying a command shows a lack of respect and may cause pain. It follows that this applies only if the request was made to a child. However, if a parent sells an item before his death and neglects to execute a proper *kinyan*, there would be no obligation on the children to consummate the deal. The child was never instructed to transfer the assets; his refusal to honor the deal would not violate any direct instructions of his parent.

Modern wills are not written as instructions to one's children. They are instead legal documents that direct how the estate should be distributed. Therefore, one could question whether the technical *mitzvah* of *kibbud av* would apply at all. Nevertheless, an argument can be made that a will reflects the wishes of the parents, and it is widely viewed as an affront to a parent when children refuse to honor it. As such, the *mitzvah* of *kibbud av* would apply. (based on a conversation with HaRav Mendel Shaffran).

[105] Rashba and Ramban Yevamos 6, quoted by Biur Hagra 240 (37), Maharik 166 (although see Chazon Ish Yoreh Deah 149:8 that limits the Maharik's ruling), Maharam Lublin 136.

See, however, Taz, Shach Yoreh Deah 240:16, Chavos Yair 214, Imrey Yosher 2:165, implying that there is an obligation to obey a parent's command even if it does not directly impact the parent.

Chazon Ish Yoreh Deah 149:8 suggests that even if the technical *Mitzvas Aseh* does not apply, it is nevertheless a *mitzvah* to obey. Chazon Ish adds that even this limitation is only when the parent doesn't really care about the matter; if he does and disobeying would cause pain, all would agree that there is an obligation to obey.

See also Rav Yehshaya Pick on Sefer Hamitzvos Lrav Saadia Goan page 200 for a discussion of the matter.

[106] Tashbetz 2:53, Shvus Yaakov 1:168 conclude there is no *mitzvah* after the parent's death. Nevertheless, it is *lifnim meshuras hadin* to comply.

See also Rav Akiva Eiger 68 who concludes there is an obligation to obey a will even after the parent's death, and it may also be Moreh Av.

The status of a will, which instructs the children how to divide the estate after the parent's death, would seem to be subject to this dispute[107].

Practical Application

Because of the numerous technical issues, it is difficult to say as a matter of strict *halachah* that there is an obligation of *kibbud av* to honor a will. Nevertheless, the *poskim* write that the concept of honoring one's parent applies, and a child should honor the will regardless of its form[108].

This concept is extremely important, but has limitations: If a parent passes away without a *halachically valid* will, it is certainly appropriate for the children to honor their parents' wishes. If one is in a position to persuade the children to do so, it would be highly commendable. However, the *mitzvah* is not enforceable. If a child refuses to honor the will, he cannot be forced to do so.

6. Mitzvah Lkayem Divrey Hames

There is a concept of *Mitzvah Lkayem Divrey Hames*[109]; a *mitzvah*[110] to fulfill the orders of the deceased regarding his assets[111]. In contrast to the mitzvah of honoring one's parents, *Mitzvah Lkayem Divrey Hames* is an enforceable obligation. Bais Din will force the *halachic* heirs[112] to fulfill the deceased's command

There are different opinions as to the requirements for *Mitzvah Lkayem Divrey Hames*. The four opinions are as follows:

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[107] See however Maharsham 2:224:14 that maintains that the exclusion applies only when the parent has no direct interest in the matter. If, however, either the parent or their assets are directly involved, the mitzvah of *kibbud av* will apply.

[108] Rashdam Yoreh Deah 23, Tashbetz 2:53, Mahri Halevy 86, Emes Lyaakov Choshen Mishpat 282 footnote 20. See also the *poskim* mentioned in the previous footnotes.

[109] The source of this concept is unclear. Shoel Umaishiv Tinyana 1 quotes Ramban that this concept is derived from Yaakov Avenu's deathbed instructions to his children. Shoel Umaishiv disagrees with this source and maintains it is simply an act of *chessed*. Because the deceased is powerless to 'help himself', the obligation to fulfill his wishes is binding.

Tashbetz 2:53 writes *Mitzvah Lkayem Divrey Hames* is part of the mitzvah of inheritance.

Tosphos Kesubos 86a "Prias", Rashdam Yoreh Deah 173 write that *Mitzvah Lkayem Divrey Hames* is a rabbinic obligation. Simchas Yom Tov 29 explains that it was enacted to prevent a dying person from worrying that his instructions would not be fulfilled.

[110] Because *Mitzvah Lkayem Divrey Hames* is a mitzvah as opposed to a *kinyan*, it applies even to assets that cannot be transferred via a classic *kinyan*. See Mordechai Bava Basra 591, Machaneh Ephraim Zichiyah 31, Achiezer 3:34 quoting Maharival 3:43.

[111] Tashbetz 2:53 points out that the concept of *Mitzvah Lkayem Divrey Hames* applies only to the distribution of one's assets.

[112] Rav Akiva Eiger 68, Mahriah Halevy 2:86 based on Ran Gittin suggest that *Mitzvah Lkayem Divrey Hames* does not apply to minors. Thus, if the testator left sons below the age of 13, there would be no *Mitzvah Lkayem Divrey Hames* on that portion of the inheritance. Simchas Yom Tov 21, Tumas Yesharim 78, and Minchas Shay 75 argue. Chikray Lev Choshen Mishpat 2:42 is unsure about the matter.

1) *Mitzvah Lkayem Divrey Hames* applies only to assets that are in the hands of a third party. Such assets are divided as per the testator's instructions. However, assets that remained in the testator's possession until his death would not be subject to *Mitzvah Lkayem Divrey Hames*.[113]
2) *Mitzvah Lkayem Divrey Hames* applies only if the testator transferred the assets to a third party specifically[114] to carry out his instructions. In other words, if a testator gave assets to a third party for the specific purpose of distributing them according to his wishes, there would be *Mitzvah Lkayem Divrey Hames*. However, if the assets remained by the testator, or if they had been previously given to a third party for an unrelated reason, there would be no *Mitzvah Lkayem Divrey Hames*[115].
3) *Mitzvah Lkayem Divrey Hames* applies if the *halachic* heirs[116] were directly[117] instructed how to distribute the assets, even if the assets remained in the testator's possession.
4) *Mitzvah Lkayem Divrey Hames* will apply if either a) the assets were given to a third party in order to fulfill the directive (as per opinion 2), or, alternatively, if the testator gave the instructions directly to his *halachic* heirs (as per opinion 3). When the instructions are made directly to the heirs, there is no need for a third party to be given possession.[118]

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[113] Mechaber 252:2, Mahrival 2:39 quoting Rashba Gittin 13a.

[114] According to some *poskim*, the primary purpose of giving the assets to the third party must be to fulfill his testamentary instructions. If, however, the assets were given for a different purpose, and the testamentary instructions were a secondary benefit, *Mitzvah Lkayem Divrey Hames* would not apply. Accordingly, a bank account would typically not be subject to *Mitzvah Lkayem Divrey Hames* even if the depositor specified a beneficiary at the time the account was opened. The reason is that a bank account is primarily for the benefit of the account holder; the beneficiary instructions are an added benefit. As such, it would not qualify for *Mitzvah Lkayem Divrey Hames*. (Based on Mordechai 592, quoted by Darkey Moshe 252, Ginas Vradim Choshen Mishpat 5:10, Nesivos, Rav Akiva Eiger 252. However, see Pischay Choshen Yerusha 4:86, and Maharam Chaviv quoted by Ginas Vradim Choshen Mishpat 5:11 that disagree.) However, see footnote 12 that bank accounts may pass to the beneficiaries without being subject to the laws of *yerusha*.

[115] Tosphos Gittin 13a quoting Rabbeinu Tam, Rosh Gittin 1:15. This approach is reflected by Rama 252:2

[116] Ramban, Ritvah and Reuh Gittin 13. The instructions must be given to either the *yorshim* or to an executor that has control of the assets (Ran Gittin 13a).

[117] Rashba Gittin 13a quoting Ramban, Ritvah (as per Maharit Choshen Mishpat 6) add that the instructions must be given directly to the heirs. Telling witnesses to instruct the *halachic* heirs would not suffice. See, however, Minchas Shay 75 that the *halachic* heirs need not be present at the time the instructions are given, provided they accept the instructions when they learn about them.
Ritvah requires that the *halachic* heirs accept to follow the instructions. If, however, they immediately protest, *Mitzvah Lkayem Divrey Hames* would not apply.

[118] Shut Rama 48, Sma 252 (8), Shach 252 (4) quoting Ritvah.
Rav Akiva Eiger 1:150 maintains that the opinion that applies *Mitzvah Lkayem Divrey Hames* to instructions given to a *yoresh* argues on the opinion that requires the asset be given to a third party. Rav Akiva Eiger concludes that since the accepted *halachah* is that the assets need to be transferred, instructions to heirs would be insufficient.

Secular Wills creating Mitzvah Lkayem Divrey Hames

Under normal circumstances, a testator does not relinquish control of his assets when he executes a secular Will. Accordingly, opinions 1 and 2 are not satisfied. Furthermore, the testator generally does not tell his *halachic* heirs what the provisions of the will are, and certainly does not give them explicit instructions. Accordingly, secular Wills do not seem to meet any of the classic requirements of *Mitzvah Lkayem Divrey Hames*.

However, some *poskim*[119] maintain that executing a will is the equivalent of transferring the assets to a third party. They explain that the reason that *Mitzvah Lkayem Divrey Hames* requires a third party is to demonstrate *gemiras da'as*; by relinquishing control over his assets and instructing the agent how they should be distributed, the testator is making it clear he is very serious that his instructions be followed. Based on this rationale, it can be argued that a secular Will, which will be enforced by the courts, demonstrates an equal level of *gemiras da'as* and determination that the instructions be honored. Therefore, although the testator remains in possession of the assets until his death, the instructions contained in the will are his clear and unquestionable intent[120], and *Mitzvah Lkayem Divrey Hames* would apply.[121]

This approach is quite novel, and a number of *poskim* have raised objections to it[122]. Nevertheless, it should be noted that according to some *poskim*, even when the technical requirements of *Mitzvah Lkayem Divrey Hames* are not met and there is no enforceable obligation, the concept applies and it would be a mitzvah to honor the will.[123]

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[119] Minchas Shay Choshen Mishpat 75, 79, Radvaz 1:67, Achiezer 3:34, Kovetz Igros 25.

[120] See Kovetz Teshuvos 3:225 that if the testator was not religious, *Mitzvah Lkayem Divrey Hames* would apply since the testator clearly relied upon the secular Will. In contrast, a religious Jew that understands his obligation to go to Bais Din would not necessarily have the required level of *gemiras da'as* simply by executing a secular Will. One can question whether this ruling would apply in countries where it is very prevalent even among Observant Jews to rely on secular Wills.

[121] If an executor is appointed to ensure the will is honored, Cheshev Haephod 3:50 suggests that it would certainly qualify for *Mitzvah Lkayem Divrey Hames*. See, however, Netzach Yisroel in the following footnote.

[122] See Netzach Yisroel 20 that points out that a legal will does not give the executor any powers until after the testator's death. At that time, as a matter of *halachah*, the estate has already passed to the *Halachic* heirs and the executor's legal powers should have no *halachic* effect. That being said, the justification of Achiezer is that by executing a legal will, one demonstrates a strong *gemiras da'as*. Thus, appointing an executor who has the legal ability to fulfill the instructions creates *Mitzvah Lkayem Divrey Hames* regardless of the technicalities. As such, it may not matter when the legal powers of an executor begins.

See also Sma 250 (23) that if one intended to transfer assets via a *kinyan*, but it was ineffective, *Mitzvah Lkayem Divrey Hames* would not apply. This may undermine Achiezer's approach. If a person executed a will with the mistaken belief that the will itself affects a valid transfer, it would not create a *Mitzvah Lkayem Divrey Hames*. Only if the intent of the will was to record his directive to his *halachic* heirs would the Achiezer's approach be relevant. וצ"ע לדינא

[123] Rashdam Yoreh Deah 203, Minchas Shay Choshen Mishpat 79, Simchas Yom Tov 29 (quoting Rashdam).

Direct Instructions

Mitzvah Lkayem Divrey Hames applies to instructions given to the *halachic* heirs or to an executor. However, instructions that were sealed until after the testator's death and were never communicated directly to the *halachic* heirs would not qualify for *Mitzvah Lkayem Divrey Hames*[124].

As a practical matter, testators typically do not disclose the provisions of their will to their beneficiaries during their lifetime. This would undermine the argument that *Mitzvah Lkayem Divrey Hames* can apply to secular Wills. See the footnote below for a possible resolution of this issue.[125]

Required Language

Mitzvah Lkayem Divrey Hames is to follow the directives of the testator. As such, it should be written as instructions to the *halachic* heirs; i.e., 'my heirs or executor should give these assets to specific beneficiaries'. A statement of fact that certain beneficiaries should inherit certain assets, or an attempt by the testator to directly transfer the assets, would not be effective according to some *poskim*.[126]

See also HaRav Elyashiv in Kovetz Teshuvos 3:225 and quoted by Mishpat Shlomo 3:24.

[124] Rav Akiva Eiger 1:150, Har Hamor 39.

[125] Although the classic cases of *Mitzvah Lkayem Divrey Hames* involve precise instructions about how the estate should be distributed, an argument can be made that it would be sufficient to instruct one's *halachic* heirs to follow the provisions of the will without actually disclosing what those provisions are. Since the *halachic* heirs received direct orders to obey the will, *Mitzvah Lkayem Divrey Hames* may apply regardless of the fact that the heirs were unaware of the details and terms of the will. Chesed Lavraham Choshen Mishpat 43 seems to follow this approach.

A similar concept can be found in Mordechai Bava Basra 600 quoting Rashbam that *Mitzvah Lkayem Ldivrey Hames* would apply if a testator granted an executor broad powers to distribute the estate as he sees fit. Apparently, *Mitzvah Lkayem Divrey Hames* does not require a set of rigid instructions, and can bind the *halachic* heirs to follow broad outlines of his wishes. Following the contents of a will would presumably qualify for this as well. (However, Shut Rama 21 rejects Rashbam)

In a conversation with the author, Harav Mendel Shaffran accepted this approach.

[126] Maharit Choshen Mishpat 6.

Tosphos Bava Basra 149, Ramban Bava Basra 149, Ran Gittin 13a, Toras Emes 52 write that *Mitzvah Lkayem Divrey Hames* requires a directive, instructing one's heirs to give these assets to the beneficiary. However, a statement such as 'this asset should go to ___" , or if the testator attempts to transfer the assets but does so in a manner that is ineffective and would not create a *Mitzvah Lkayem Divrey Hames*.

However, these *poskim* are all of the opinion that there is no need to transfer the assets to a third party for *Mitzvah Lkayem Divrey Hames*, and simply instructing the *yorshim* how to distribute the assets is sufficient. Maharival 2:39 maintains that the *poskim* that argue and require the assets be transferred to a third party, also argue on this requirement and apply *Mitzvah Lkayem Divrey Hames* regardless of the language used. Simchas Yom Tov 29 agrees with this logic in most cases.

Real Estate

According to some opinions, *Mitzvah Lkayem Divrey Hames* does not apply to real estate[127]. However, it would seem that the opinions that accept secular Wills as *Mitzvah Lkayem Divrey Hames* (see the following section) would not differentiate between real estate and other property.[128]

Directives that Violate Halachah

As explained before, *Mitzvah Lkayem Divrey Hames* is not a *kinyan* that gives the beneficiaries monetary rights to the assets. Rather, it creates a *mitzvah* on the *halachic* heirs to follow the deceased's instructions. As such, a clause that violates *halachah*[129] or is considered a cruel *middas sdom*[130] would not be valid.

In conclusion, when the assets are given to a third party, these restrictions do not apply. However, if one is relying on the opinions that instructions given to a *yoresh* or executor qualifies for *Mitzvah Lkayem Divrey Hames*, the appropriate language should be used.

[127] Ketzos 252:4 based on Maggid Mishna 22 Mechira 16 maintains that since *Mitzvah Lkayem Divrey Hames* requires a third party to take possession of the assets, real estate, which cannot be physically transferred, would not be subject to *Mitzvah Lkayem Divrey Hames*.
See however Cheshev Haephod 2:106 quoting Chelkas Mechokek that *Mitzvah Lkayem Divrey Hames* does apply to real estate if it will be controlled by a third party.

[128] Neither is physically in a third party's possession, but both are under their legal control.

[129] Maharit Choshen Mishpat 6 in regards to a *Mitzvah Lkayem Divrey Hames* that completely disinherited a child, Achiezer 33.
Accordingly, a will should not use language of 'inheritance' to transfer assets to non-halachic heirs. Such wills conflict with the *Seder Hayerusha*, and therefore would not create a *Mitzvah Lkayem Divrey Hames*. Rather, the will should be written in the form of instructions that the assets should be given to the legal beneficiaries. As such language does not directly contradict the Torah's Order of Inheritance, it could create *Mitzvah Lkayem Divrey Hames*. Maharit Choshen Mishpat 6, Chikrey Lev Choshen Mishpat 2:53, Chesed Lavraham Choshen Mishpat 43, Teshuvos Vhanhagos 1:853

[130] Character traits of Sdom, a city infamous for its cruelty.
Gur Aryeh Yehuda Choshen Mishpat 126 quoting Shita Mekubetzes Kesubos.

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7. Practical Application- Secular Wills

As described above, there are numerous *halachic* arguments advanced to support the validity of secular Wills. However, for the most part, these approaches are controversial, and there are significant issues with any given rationale. It is therefore not recommended to rely solely on these opinions. Even if one is personally comfortable with one of the particular arguments, there is no guarantee that the *halachic* heirs, who stand to lose a portion of their inheritance on account of the secular Will, will accept this position. Ultimately, the issue will need to be resolved between the beneficiaries and *halachic* heirs. They, or their rabbis, may have different opinions about the matter, and there is room for significant *machlokes*. Such situations could easily be avoided by executing a proper *halachic* will.

That being said, as far as a *halachic* heir is concerned, it is certainly appropriate to honor a parent's will even if it was not drafted *halachically* . The concept of *kibbud av*, and in some cases *Mitzvah Lkayem Divrey Hames*, may apply to such wills, and it ought to be honored. While *kibbud av* is not enforceable, and *Mitzvah Lkayem Divrey Hames* does not apply to all cases, the consensus of *poskim* is that a will should be honored regardless[131].

Furthermore, as both Achiezer and Igros Moshe point out, it was the common practice for people to rely on secular Wills. Although it may be difficult to understand the particular rationale that justifies this reliance, the fact that it was done for periods of our history with little protest from the Rabbis indicates that there is firm basis to honor such wills. See the letter written by Harav Chaim Kohn as part of his *haskama* to this work for further discussion of the matter.

If the heirs refuse to voluntarily honor the will and the matter is litigated in Bais Din, it is likely that some form of compromise will be reached. Because of all of the various arguments, it is highly unlikely a Bais Din will disregard a secular Will completely. It is also unlikely that a Bais Din will grant the beneficiaries the entire amount of their legal benefit. Bais Din will likely arrive at a compromise based on the specific circumstances.

If the Estate was already distributed

If the estate was divided in accordance with a secular Will, many *poskim* do not require the beneficiaries to return the assets to the *halachic* heirs.[132] In contrast, if

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[131] Emes Lyaakov Choshen Mishpat 282 footnote 20 states that although a will is not binding in Halachah, it is a "*hiddur*" of the *mitzvah* of kibbud av to comply with the will.

[132] Binyan Tzion 24, Achiezer 3:34, Igros Moshe Even Haezer 104, Cheshev Haephod 3:50.
See also Cheshev Haephod 2:106 that even if one rejects secular Wills as a matter of *halachah*, the concept of *kibbud av* would apply. One may presume that the *yorshim* willingly followed these opinions, and therefore one need not refund the inheritance.
See also Tukfo Kohen 72, Nesivos Klaley Tefisa 6 that although a question remains among the *poskim* as to whether a testator may verbally give one *halachic* heir a greater share of the estate without a *kinyan,*if the recipient is in possession of the assets, he may keep them.

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there was no will and the estate is divided as per secular law, the legal recipients have an obligation to return the assets to the *halachic* heirs.[133]

8. Practical Application- Trusts

Trusts present a unique *halachic* challenge. Although they are widely used in modern estate planning, they are a relatively recent innovation, and therefore have little *halachic* precedent. Furthermore, there are many different types of trusts, and the *halachic* ramifications of each may be different. The following is a brief discussion of some of the questions involved in Trusts, along with some *halachic* suggestions. However, due to the complexity of the subject, it is advisable to consult with a Dayan before setting up such trusts to discuss their *halachic* ramification.

Revocable Trusts

When the settlor is the trustee

If assets are transferred into a revocable trust where the trust creator – or settlor – is the trustee, the trust would have the same *halachic* effect as a secular Will. The assets remain under the direct control of the settlor, and the only change is that the trust documents direct how the assets will be distributed upon death. This is the *halachic* equivalent of a will, with the successor trustee the equivalent of an executor. Thus, all *poskim* that recognize secular Wills would recognize a revocable trust as well. Conversely, the opinions that reject wills would also reject revocable trusts.

Independent trustee

If the settlor appoints an independent trustee, *Mitzvah Lkayem Divrey Hames* would depend on the purpose of the trust (see footnote[134]). See the footnote below for a

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[133] Chasam Sofer 15, Teshuras Shay 259.
If the courts will not release the estate until the spouse or daughters sign a waiver, many *poskim* rule that the daughters may demand compensation before executing a waiver. This issue is subject to substantial debate in the later *poskim*, and the custom seems to have evolved to make a *p'shara* on the matter. If, however, there is no need for any waiver and the daughter files a lawsuit, all opinions agree that the suit must be withdrawn without any compensation.

[134] Mordechai 592 maintains if assets were transferred to a third party to give to a beneficiary, but the grantor specifically reserves the right to take the assets back for himself, there would be no *Mitzvah Lkayem Divrey Hames*. A revocable trust, where the grantor retains the right to revoke the trust, would seem to have the same status. However, Mordechai refers to a case where the primary purpose of the third party was to hold the assets for the benefit of the grantor. The instructions regarding the beneficiary were secondary. In contrast, if the primary purpose of the trust is for the beneficiary, then the fact that the grantor reserves the right to change his mind would not preclude the *Mitzvah Lkayem Divrey Hames*. Therefore, if the primary intent of a trust is to arrange an orderly transfer to the beneficiary, Mordechai would agree that *Mitzvah Lkayem Divrey Hames* applies. If, however, the trust was created to hold and manage the assets for the grantor's benefit, *Mitzvah Lkayem Divrey Hames* would not apply. See also Ulam Hamishpat 252:2. See also Ginas Vradim Choshen Mishpat Klal 5 chapter 11 that rejects Mordechai's distinction. See also footnote 128.

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discussion of the *halachic* status of a trust if the settlor modifies the trust provisions after the trust had been funded[135].

Irrevocable Trusts

When assets are transferred to an irrevocable trust, the settlor immediately loses all legal rights to the asset. As such, they are no longer his, and should not be subject to the *halachos* of inheritance. Nevertheless, for numerous reasons explained in footnote[136], it is advisable to execute an addendum that will ensure that the trust provisions are enforceable in halachah.[137]

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[135]As explained before, according to some *poskim* it is not sufficient that the assets be transferred to a third party. They must be transferred for the specific purpose of fulfilling these particular instructions. In this case, the instructions that were given at the time the trust was created would be subject to *Mitzvah Lkayem Divrey Hames*. However, if the instructions were subsequently updated, the status may change. The assets were not given for the purpose of fulfilling these instructions since there were a different set in force at the time the trust was created, and *Mitzvah Lkayem Divrey Hames* may not apply.

A counterargument can be made that if the assets are transferred to a third party for the purpose of following the final wishes whatever they may be, *Mitzvah Lkayem Divrey Hames* may apply regardless of when the last revision is made. (In a conversation with the author, Harav Mendel Shaffran followed this approach)

See also Mordechai Bava Basra 600 quoting Rashbam that *Mitzvah Lkayem Divrey Hames* can apply when the testator gave an executor broad powers to distribute the estate as he wished. The implication is that *Mitzvah Lkayem Divrey Hames* does not require a specific set of instructions; broad outlines are sufficient. Arguably, that would apply here as well. However, it should be noted that Mordechai argues on Rashbam, and Shut Rama 21 follows the ruling of Mordechai.

See also Achiezer 3:34 concerning *Breirah* by *Mitzvah Lkayem Divrey Hames*.

[136] The ownership of a trust presents a unique halachic question. There are generally three parties to a trust; the grantor (settlor), beneficiaries, and trustees. From a legal standpoint, the trustee has legal title to the assets, for the benefit of the future beneficiaries. In *halachah*, we do not find such distinctions. Thus, we have a problem determining the true *halachic* owner. If the settler did not properly transfer the *halachic* ownership to either the trustee or beneficiary, he may remain the *halachic* owner regardless of the legalities.

The situation seems analogous to a *kinyan al minas l'haknos*, which is discussed in Nedarim 48b. The Gemara discusses a scenario where a father (the settler) wanted to disinherit his son, but wanted his grandchild to receive a share in the estate under certain conditions. He therefore gifted the assets to his son (trustee) in order to give it to the grandchild (beneficiary) at a future time. The son (trustee) had no rights to the assets other than to transfer them to the beneficiary (grandchild).The Gemara records that this arrangement is called a *kinyan al minas l'haknos*, and is subject to a dispute between Rav NaChoshen Mishpatan, who accepts the transfer as valid, and Pumpedesa, who rejects the *kinyan*. Ritvah and Nemukei Yosef (quoted by Shach Choshen Mishpat 210:1) explain that if the *kinyan* does not begin until a later time, all opinions agree that the *kinyan* has no effect. If the transfer begins immediately, and vests at a later time (*meachshav u'leachar misa*), all would accept the *kinyan* as valid. The dispute applies only where it was unclear from the language used. Rav NaChoshen Mishpatan presumes the intent is for a *kinyan mehayom u'leachar misa*, and therefore recognizes the transfer, while Pumpedesa presumes that nothing takes effect until the grandchild is worthy of the asset, and therefore the entire *kinyan* is void.

It should be noted that such transfers may violate the proscription against disinheriting a *halachic* heir[138]. Nevertheless, the transfer would be valid.

We can infer from this Gemara that 1) conceptually, a trustee can 'own' an asset with the sole right to distribute it to a third party, 2) the trust can be set up for the benefit of a child that was not yet born (See Pischey Choshen Yerusha 4 (34) that maintains that the trustee may also be given the right to designate beneficiaries), and 3) for this to be effective, the transfer must begin immediately (*meachshav u'leachar misa*).

As a matter of *halachah*, Ramban, Nemukei Yosef quoting Rambam "and all other meforshim", maintain that the *halachah* is according to Rav NaChoshen Mishpatan. Therefore, any *kinyan al minas l'haknos* is presumed to have been done in an effective manner. Ritvah adds that this would be effective even for beneficiaries that were not born at the time the trust was created. See Zayis Raana 2:76 and 77, Maharit Choshen Mishpat 49, 50 for similar situations.

Although the above seems to provide firm *halachic* basis to rely on irrevocable trusts, because this concept is relatively new and untested in Bais Din, it is advisable not to rely on the trust structure alone for *halachic* estate planning. See also the following footnote for another common concern.

[137] Trusts are often abused. A grantor may collude with a trustee to create a paper trust, without any real intent to relinquish ownership. While this arrangement may violate secular law, its *halachic* impact is unclear. To avoid such issues, one should execute a *Shtar Chatzi Zacher* for all assets in the trust. Alternatively, one may execute a *shtar* stating that the grantor intended to make a true transfer into the trust, and that it was done with appropriate *kinyanim*, *mehayom u'leachar misa*. Care must be taken to ensure that all of the assets being transferred into the trust can be transferred via a valid *kinyan*.

[138] This is dependent on whether the prohibition applies to a gift made during one's lifetime, or only to a distribution that occurs at one's death. See Chapter Two for further discussion of the matter, and the exceptions to this prohibition.

As explained above, halachah ordinarily requires a formal kinyan for any sale or transfer of assets. Thus, if a person wishes to modify how his estate will be distributed, it typically needs to be done in accordance with the classical requirements of a kinyan. This chapter will focus on the practical considerations involved in the creation of a halachically enforceable will or Trust .

Standard Halachic Methods of Transferring Assets

The simplest way to transfer assets is to gift them directly to the intended beneficiaries(s). This can usually be accomplished via a standard *kinyan suddar*. However, this method is ill-suited for estate planning: the testator typically retains the assets until he dies, and has little interest in immediately transferring the assets to the beneficiaries[139].

An alternative is to make a *kinyan mehayom u'leachar misa*. Under this arrangement, the assets are transferred effective immediately, but the testator retains the use and income of the assets until his death. While this allows the testator to retain control of the assets during his lifetime, this method has other significant drawbacks. The *kinyan* is final and the testator may not sell the assets in which he has given his beneficiaries an interest, nor would he be able to modify the distribution or change his beneficiaries at a later date.

This problem can also be resolved through a conditional *kinyan*. A *kinyan mehayom u'leachar misa* may be made, contingent on the testator not changing his mind. If he changes his mind before his death, the *kinyan* would be voided and the testator would be free to do as he pleases with the assets.

The drawback with this approach is that this *kinyan* can only be executed on assets that are currently owned. A person may not make a *kinyan* on assets that he will obtain at some point in the future. Therefore, any assets received or income generated after the *kinyan* was executed would not be covered by the *kinyan*, and would be divided in accordance with default *Seder Hayerusha*. In addition, certain assets cannot be transferred via a classic *kinyan suddar;* for example, cash, debt, and stocks.

Another concern is the potential tax consequences of such gifts. Estates may be taxed differently than gifts, and making gifts may create significant tax liability.[140]

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[139] See Chapter Two that it is not advisable to gift away assets if there is any chance one will need them in the future.

[140] A possible solution to this issue would be to execute two documents: a secular Will that divides the estate in a manner that takes full advantage of any available tax benefits, and a second document with

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Halachic Will Addendum

To resolve this issue, a method known as a *chachmay sfarad*[141] or *chatzi zachar*[142] is used. This method relies on a financial penalty to ensure that the testator's instructions are respected. It consists of the following steps.

1. The first step is for the testator to write a set of instructions detailing how he would like his estate to be divided. (See Chapter Two for a discussion of the appropriate way to distribute the estate). It is highly recommended to have an attorney prepare a legal will/Trust that reflects the testator's wishes. Instructions written without professional assistance may not be legally valid, and may expose the estate to significant tax liabilities.

2. The next step is for the testator to obligate himself to pay his beneficiaries[143] an amount greater than the value of the assets that he wishes to transfer to the beneficiary. The debt is payable a moment before the testator's death. This debt is not intended to actually be collected; it is intended to force the halachic heirs to honor his wishes. This is accomplished with the next step.

3. The debt is conditional. If the *halachic* heirs respect the will and distribute the estate in accordance with its provisions, the debt is null and void. If, however, the *halachic* heirs refuse to honor his wishes, the debt is payable in full from his estate.

This creates an interesting situation. Legally, the estate is distributed in accordance with the will or Trust. According to *halachah* (notwithstanding the opinions mentioned in section three "Secular Wills"), the *halachic* heirs are the true owners. Nevertheless, if they insist on their rights and demand their share in the estate, the debt that the testator created vests, and is payable from his estate. Assuming the debt is greater than the value of the estate, the *halachic* heirs will end up with nothing. It is therefore in their best interest not to contest the will, and to give the legal beneficiaries what they are due.

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appropriate *kinyanim* that takes effect a moment before death, along with a disclaimer that it is for *halachic* purposes only. This solution assumes that a secular court would ignore the document that categorizes the transfer as a gift, since it was drafted solely for religious purposes. A competent attorney should be consulted before relying on this assumption.

[141] This method is quoted by Shulchan Aruch Choshen Mishpat 207:16 as a way to avoid *asmachta* issues. The name is derived from the sages of Sfarad who used this method.

[142] Literally "half a male (portion)". This was the standard share of the inheritance given to daughters. See footnote 35

[143] A debt should be created for each of the intended beneficiaries that are receiving more than their halachic share of the estate.

This arrangement avoids all of the problems discussed above. It is effective on all assets, even those that the testator obtains subsequent to executing the Addendum. The reason is simple—the Addendum does not transfer any assets. It simply creates an incentive for the *halachic* heirs to follow his instructions. Motivated by the debt that will otherwise materialize, the *halachic* heirs 'voluntarily' gift to the legal beneficiaries any assets to which they are legally entitled.

For this approach to work, each of the *halachic* heirs must be receiving a share of the estate. If they are completely cut out of the will, they would have nothing to lose by challenging the will in Bais Din, as the vesting of the debt would not have any impact on them. Therefore, in addition to the *halachic* prohibition against disinheriting a child, there is a practical benefit to ensuring that each *halachic* heir will receive a large enough share that its potential loss would be enough to discourage him from challenging the will in Bais Din.

The testator may also change his will at any time. The will does not create any *kinyan* or transfer any assets. It is simply the set of instructions necessary to fulfill the conditions negating the debt. If the debt is conditioned on fulfilling his last set of instructions, those instructions must be followed to avoid having to pay the debt that was created.

An additional benefit of this approach is that according to some opinions[144], the restrictions against modifying the *Halachic* Order of Inheritance does not apply to such transfers. If a testator redistributes his estate with a direct *kinyan*, he may violate those restrictions. However, when a *shtar chatzi zacher* is executed, the testator transfers nothing. Rather, in order to avoid paying the debt, the *halachic* heirs 'voluntarily' transfer a share to the legal beneficiaries. Since it is the *halachic* heirs doing the transfer, the testator would not be violating any *halachah*.[145]

Waiver and Release

The effect of the Halachic Will Addendum is that the halachic heirs are forced to honor the terms of the secular will/trust. However, it is important that the halachic heirs execute the appropriate kinyanim to actually transfer halachic ownership of the assets to the legal beneficiaries. To accomplish this, the executor/trustee should have the halachic heirs make a kinyan suddar and execute the Waiver and Release document before distributing the assets.

Collusion

The way many *halachic* wills are structured, it is possible for one of the *halachic* heirs to collude with the beneficiary. For example, a will that states that the *halachic*

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[144] Nachlas Shiva 21:6, Rav Elyakim Schlessinger

[145] The *halachic* heirs would not be violating anything either, as there are no restrictions on a *yoresh* giving a share of the estate to others. Shut Rama 78

beneficiaries receive 30 percent of the estate and the legal beneficiaries receive the remaining 70 percent. One of the *halachic* beneficiaries may collude with the legal beneficiary and contest the will. If one *halachic* heirs contests the will, the debt is payable in its entirety to the beneficiary of the secular Will. As a result, the legal beneficiary will receive 100 percent of the estate, which he may share with his co-conspirator. The result will be that the testator's wishes that the *halachic* beneficiaries receive 30 percent will be frustrated.

To avoid this issue, many *halachic* wills state that in the event that only some of the *halachic* heirs contests the will, the debt is payable from the contesting heirs portion only. Thus, the parties gain nothing from colluding. Only the share of the colluding *halachic* heir will be paid to the legal beneficiary for the debt, and the other heir's share will not be diminished.

While there are other potential problems that may arise[146], this method is highly effective in the vast majority of situations.

Unintended Consequences

There is an important drawback to this approach. In the event that a *halachic* heir challenges the will, the debt immediately vests. This may result in a *halachic* heir being completely disinherited. While this is uncommon, and the entire point of the Addendum is to ensure that the *halachic* heirs will not contest the will, it is important to be aware of the potential result of executing such agreements.

Married Women

Because a husband has certain rights in his wife's assets, a married woman's *halachic* will Addendum would not be effective in *halachah*. Accordingly, if the couple prefers that her assets be distributed to others, the husband must sign the *halachic* will Addendum to acknowledge his acquiesce.[147]

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[146] See Kuntris Midor Ldor for some potential issues.

[147] See Even Haezer 90.9,10. If the husband consents to the gift, it would be valid. In order to avoid any dispute about the matter, the husband should sign an acknowledgement that the will was executed with his consent. See Pischay Choshen volume 8 chapter 4, *k'laley arichas tzava'ah* 8, and chapter 8, 41-44.

Appendix- Instructions and Sample Halachic Will Addendum

Instructions for executing a Halachic Will Addendum

After determining how the estate should be distributed (see section Two), a qualified attorney should be retained to draft a will/trust that is effective in civil law. Once completed, the next step is to execute a *shtar chatzi zachar* as an Addendum to the will. The following steps are necessary.

1) First, one must determine which beneficiaries of the legal will are receiving a greater share of the estate than they would be entitled to according to the *Seder Hayerusha*. Typically, this will include a spouse, daughters, and grandchildren. If there is a *bechor* who will not be receiving a double share, all other beneficiaries would need to be listed in the Addendum. If the will/trust includes a bequest to charity, the charities should be included as well.
2) Next, the testator should create a debt to each of those beneficiaries. The amount of debt should be greater than the amount the beneficiary would receive under the provisions of the secular Will[148]. If one is unsure, or if the value may appreciate between the time the will is executed and the testator's death, the debt created should be large enough that under all circumstances it will be greater than what the beneficiaries would receive under the provisions of the will. Practically, the debt is never paid out, so one need not be concerned about the debt being too large. In contrast, if the debt is smaller than the difference between the *yoresh*'s *halachic* rights and legal benefit, it will be worthwhile for him to challenge the will in Bais Din, and agree to pay off the debt. Thus, if one is unsure about the size of the debt needed, one should err on the side of being too large. Nevertheless, one should try to make the debt as 'reasonable' as possible[149].
3) If there are multiple beneficiaries who are receiving more than they are *halachically* entitled to, a debt should be created for each one. Depending on the *halachic* will form used, a separate addendum may be required for each beneficiary, or it may allow multiple beneficiaries to be included on one form. It is irrelevant if the total debt created is greater than the value of the entire estate.

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[148] Technically, the amount only needs to be greater than the difference between what the beneficiary will receive under the will, and the amount that he would be entitled to according to *halachah*. Because of the difficulties determining the precise amount, the above-mentioned formula is used.

[149] The entire concept of creating a debt that one has no intention of ever being paid can be considered a *harama,* subterfuge. While the Addendum contains language that binds the testator regardless, one should try to minimize the level of *harama* and make the debt as close as possible to the actual value that he intends to transfer to the beneficiary. Nevertheless, it is vital that the debt not be too small, and one should err on the side of caution.

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4) If some of the beneficiaries have not been born (for example, if a portion of the estate is being distributed to all future grandchildren), a conventional *shtar chatzi zachar* is not effective. Instead, one must create a debt to a trusted third party, conditioned that the debt is void if the estate is distributed as per the will/Trust[150]. This third party should be someone who the testator trusts will voluntarily distribute the assets as per the will, if the need arises.
5) To effectuate the debt, a *kinyan sudder* should be executed. This is accomplished by having someone give the testator a pen or handkerchief on behalf of the beneficiary[151]. By accepting the *suddar*, the testator obligates himself to the debts, as per the terms of the Addendum. It should be noted that while *halachah* validates a debt that was created through a suddar, the legal requirement of 'consideration' is lacking, and this debt would likely not be enforceable in civil court. That is not a problem; the secular Will should be enforceable in court, as this document is needed only for its *halachic* effect.
6) Although witnesses are not required, it is advisable to have two kosher witnesses that would be able to verify that the Addendum was executed by the testator. Furthermore, the witnesses should also be testifying on the testator's mental condition at the time the Addendum was executed. The witnesses may not be related to the testator or to each other.
7) The Addendum should be given to a third party for safekeeping. It is advisable for it to be given to the attorney who is handling the secular Will or trusts.
8) Upon the death of the Testator, the executor/trustee of the estate should have the halachic heirs execute a Kinyan and sign the Waiver and Release document to formalize their acceptance of the terms of the Directives/Halachic Will Addendum.

[150] Alternatively, the assets may be given to the trustee as a *kinyan al minas l'haknos*. See footnote 136.
[151] The beneficiary need not be aware of the existence of this Addendum or *kinyan*.

Exclusions and Disclaimers"), by virtue of a *kinyan agav*[159]. These obligations are severable, as defined below.~~~
If, however, any of Clauses "A" through "D" above are not satisfied, then, subject to the severability clause below, said obligation(s) shall be rendered null and void for I never intended to obligate myself under such conditions[160].~~~

Additional Requirements:

I) In the event that any Obilgee(s) receive a larger share of my assets on account of this Addendum at the expense of any Non-Contesting Heir(s), Obligee(s) shall promptly transfer such excess share to the Non-Contesting Heir(s) in the amount necessary to ensure that no Non-Contesting Heirs suffer any loss on account of this Addendum[161].~~~

II) In the event that there are outstanding debts that are *halachically* payable from my estate, Obligee(s) shall (proportionally) pay such debts in the amount necessary to ensure that no creditor will suffer any loss on account of this Addendum[162].~~~

III) In the event that the vested amount of the abovementioned obligation(s) is greater than all my property available to satisfy said obligation(s), Obligee(s) shall (proportionally) forgo that portion of the obligation that exceeds the available assets.[163]~~~

IV) In the event that any Obligee(s) has a *halachic* claim against my estate for support, dowry, or kesuba, Obligee(s) shall waive and release such claims against the estate, in the amount that they are receiving by either collecting this obligation, or taking possession of the assets as per my Directives[164].~~~

V) Obligee(s) shall accept the jurisdiction of the Bais Din as per "Dispute Resolution" below.~~~

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[159] This language creates a 'lien' upon the testator's assets that will allow the beneficiary to collect the debt if necessary. Without such language, the debt may not attach to all of the testator's assets, which would defeat the purpose of this document.

[160] If the *halachic yorshim* honor the will, the debt is void. This is the intent of the document.

[161] This prevents some of the beneficiaries colluding with each other to deprive other innocent beneficiaries of their rightful share.

[162] This prevents the *yorshim* from using this debt to avoid paying other bona fide creditors that have *halachic* claims against the testator's estate.

[163] This forces the beneficiaries to waive any of the debt that they cannot collect, so that the testator does not 'owe' any money which cannot be collected from his assets.

[164] A woman is entitled to support from the husband's estate until she either remarries or claims her *kesuba*. If the intent of the will is to give the spouse a portion of the estate instead of that support, this text is needed to create a waiver. Otherwise, the woman may still claim support from the estate after receiving her legal inheritance. If one desires to gift to his wife a share of his estate in addition to her support, this clause may be deleted.

Severability: The above-mentioned Obligations are severable; Clause A shall only trigger the Obligation with respect to the Obligee(s) whose benefit is being contested. Clauses B and C shall only effect the obligation to the Obligee(s) whose action, inaction, or status causes the failure of the requirements.~~~

Miscellaneous: Any mention herein with regard to my "Directives" refers collectively to my Last Will, including all codicils and/or amendments, and any and all Trusts (including all amendments or restatements) whose assets are *halachically* considered part of my estate, both those already executed and those that will be executed at a later date, and any transfer of assets that will be legally effective upon my death, including jointly owned assets, assets with rights of survival, and POD accounts[165]. This Addendum shall be in full force and survive all future testamentary documents, unless such documents contain a superseding clause that specifically references this Addendum[166]. I hereby instruct my Heirs to follow all of the wishes expressed in my Directives and in this Addendum[167]. This document is valid for its *halachic* effect only; in case this document is presented to any secular court it shall have no legal effect[168].~~~

Halachic Exclusions and Disclaimers: I, hereby state that any terms of bequests or other terms of inheritance mentioned in my Directives were employed for their legal effect only, but for *halachic* purposes they shall be construed to mean gifts[169]. Additionally, all of the wishes expressed in my Directives shall be abided by with the exclusion of the following items: all Jewish books, pairs of *tefillin*, and the sum of four thousand dollars ($4,000), for which I bequeath such items exclusively to my

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[165] To avoid any disputes whether these assets are subject to the laws of *yerusha*, they are incorporated into the Addendum.

[166] Because of the structure of the Addendum, the testator may change his will at any time and need not execute another *halachic* Addendum. The reason is that the actual will is not directly enforceable; rather, as long as the inheritors honor the provisions of the last will—whatever that may be—the debt is void. As such, even if the will is modified, the debt would still be void as long as the final will is honored by the *halachic* heirs.

In order to preclude claims that the testator subsequently modified his instructions, the addendum states it is valid unless modified in writing in a manner that specifically overrides this clause.

[167] This language is intended to create a *Mitzvah Lkayem Divrey Hames*.

[168] The legal implications of this Addendum have not been tested. The point of this language is to make it clear that this Addendum is not intended to change the legal rights of the parties granted by the secular Will, but is rather to make the terms of that will enforceable from a *halachic* perspective.

[169] There is a prohibition against depriving the *Bechor* of his double share. This applies when a will is drafted using terminology of inheritance that attempts to make such changes. To avoid this issue, the addendum contains a disclaimer that any language of *yerusha* is for legal purposes only, but the intent is a gift.

halachic heirs according to the formula prescribed in the Code of Jewish Law. [170] All gifts or bequests mentioned in my Directives are intended to be outright gifts, and not an appointment as a guardian.~~~

Dispute Resolution: All disputes that may arise associated with this document or my Directives shall be resolved exclusively by binding arbitration at the Bais Din Maysharim of Lakewood or its designee, in accordance with the terms delineated in the arbitration agreements of said Bais Din. Judgment rendered by the aforesaid authority may be entered in any court having jurisdiction thereof.~~~

Agreement Validation: I, irrevocably and without time limit, accept upon myself and my heirs, even if they are minors, the testimony of any Obligee or their heirs, regarding the validity, lack of payment, or waiver of the said obligation, with the same effect as testimony from two qualified witnesses, without the need of any form of verification, including, an oath, *cheirem* or *hin tzedek*, even after payment is made, unless I or my heirs present *halachically* determinative proof to the contrary[171]. I accept as binding the position of any *halachic* authority, even if in the minority and not generally accepted, that most broadly supports the validity of this Addendum and its implied intent[172]. All terminology in this Addendum shall be interpreted in the manner that most broadly supports the validity of this Addendum and its implied intent.~~~

All of the above was effected and finalized concurrently herewith by virtue of all required *kinyanim,* including *kinyan agav sudar*, and was stated and intended to be effective immediately, all in accordance with all procedures set out in the Code of Jewish Law, and with use of a valid *sudar[173].* The *kinyanim* were made before a *Bais Din chashuv* in

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[170] There is a prohibition against disinheriting a *halachic* heir. Many *poskim* maintain that if part of the estate is distributed in accordance with the Halachic Order of Inheritance, one may distribute the rest as they please. Therefore, the addendum carves out specific assets that will be divided as per the Order of Inheritance.
As explained earlier, this exclusion must be a meaningful amount of the estate. Accordingly, the addendum excludes $4,000.
A *bechor* does not receive a double share of funds deposited in a bank account. To ensure a double share is given in at least some assets, the addendum excludes some tangible assets of value. This list is simply a suggestion, and one may pick or choose from it, or leave a different asset of value instead.

[171] The addendum allows the beneficiaries to collect the debt without having to make an oath or provide other *halachic* proof, which would greatly complicate the enforcement of the Addendum.

[172] Many areas of *halachah* are subject to dispute. The testator is specifically accepting the opinions that support the validity of the Addendum.

[173] This is an admission that the debts and obligations were created in a manner consistent with *halachah*. Even if the correct *kinyan* was not done, this language would act as a *Kinyan Odeeysa*.

accordance with all of the procedures required, so that all *halachic* authorities deem the entire Addendum valid, without any *asmachta* or any other claim of invalidation. In addition, the conditions and stipulations referred to in this document were set forth as a *T'nay B'nei Gad U'B'nei Reuvein* in accordance with all requirements set out in the Code. 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[174]. This document is intended to be, and is, binding, consistent with the binding nature of all agreements, documents, obligations and acquisitions that are properly effected in a Jewish Court of Law in accordance with the laws and rules established by Rabbinical authorities. THIS IS ALL VALID AND IN GOOD STANDING.

I hereby affix my signature on this ____ day of _____ 20__.

_____, Avraham Ploni

The Obligor executed all this, knowingly and willingly, with sound of mind[175] and without duress or pressure, in front of us, the below signatories, and we signed at the direction of the Obligor.~~~

_____, Witness

_____, Witness

This entire Addendum was executed with my consent.~~~

_____<<signature of husband>>[176]

_____<name of Husband> executed this, knowingly and willingly, with sound of mind and without duress or pressure, in front of us, the below signatories, and we signed on his direction.~~~

_____,Witness

_____,Witness

[174] A document or *shtar* typically has effect only when delivered to the beneficiary, or to a third party on behalf of a beneficiary. This clause is intended to overcome this problem.

[175] This clause prevents the *halachic* beneficiaries from claiming that the testator was not mentally capable of executing the addendum.

[176] A husband has certain rights to his wife's assets, and must sign an acknowledgement that he consents to the will and Addendum.

Waiver and Release for the *halachic* heirs

I, the undersigned, hereby admit (with the same effect as if verified by the testimony of 100 valid witnesses) that I have executed all appropriate Kinyanim and transfers necessary to ensure that all of the Directives of _____ (as defined in a certain Halachic Will Addendum executed by the same), with respect to any assets that I have halachicaly inherited from the same, are fully honored. In the event the Directives call for a portion of said assets to be in held in trust for another party or class of parties, I have transferred all such assets to the trustee(s) with a *kinyan al mnas lhaknos* in an effective manner. In the event there are any assets that cannot currently be transferred via a standard kinyan, I have (effective immediately at the time of the kinyan) created a valid debt upon myself to said beneficiaries/trustee(s) in the amount of twice the value of such assets, conditioned on my ultimate compliance with said Directives. In the event I do not fully comply with said Directives, the debt shall vest and be payable immediately. In the event I fully comply with said Directives, the debt shall be null and void.~~~

This Waiver and Release Agreement ("Agreement") was effected and finalized concurrently herewith according to Jewish Law by formal Kinyan Agav Sudar, and were stated and intended to be effective immediately (at the time of the Kinyan), all in full accordance with all requisite procedures set out in the Code of Jewish Law (the "Code") and with use of an object valid to effect a Kinyan sudar. The kinyan was made in a duly constituted Jewish Court of Law (*Bais Din Chashuv*) in accordance with each of the varying procedures required by all of the various Jewish Halachic authorities, so that all Jewish Halachic authorities deem the covenants, waivers, and acquisitions valid, without any Asmachta (as defined in the Code) claim of invalidation and without any other claim of invalidation. In addition, the conditions referred to in this Agreement are and were all set in the manner used by Bnei Gad and Bnei Reuven and in accordance with all other requirements that are set out in the Code for the valid and binding setting of conditions. I accept as conclusive and binding the position of any Jewish Halachic authority, even if in the minority or otherwise not generally accepted, that most broadly supports the validity and enforceability of this Agreement and its implied intent.~~~

A separate Kinyan was made for each asset, and for each of the beneficiaries of said Directives, and in the event a part of this Agreement is void or unenforceable, the remainder of this Agreement shall remain in full effect.~~~

I have executed all provisions of this Agreement knowingly and willingly and without duress or pressure. I, irrevocably and without time limit, void any declaration of disclaimer (including any declaration of disclaimer that purports to disclaim the voiding effect of this paragraph, ad infinitum) that they may ever have made regarding this Agreement, and I represent and warrant that I did not make or purport to make any such declaration of disclaimer. I hereby irrevocably void and waive any defense or counterclaim that could void or impair or in any way limit the validity and enforceability of this Agreement.~~~

All disputes that may arise regarding or associated with this Agreement, shall be resolved and established exclusively by binding arbitration at the Bais Din Maysharim of Lakewood, (or their designee) as per the Bais Din's standard arbitration agreement. Judgment rendered by the aforesaid authority may be entered in any court having jurisdiction thereof.~~~

This Agreement is intended to be, and is, binding, consistent with the binding nature of all agreements, documents, obligations, and acquisitions that are properly effected in a Jewish Court of Law in accordance with the laws and rules established by Rabbinical authorities. **My signature signifies that I have read and accepted each and every clause in this agreement.** THIS IS ALL VALID AND IN GOOD STANDING.

I hereby affix my signature on this _____ day of _____ .

_____

This Agreement was executed knowingly and willingly in front of us, the below signatories, and we signed at the direction of the Obligor.~~~

_____, Witness

_____, Witness

  info@shtaros.com

Letters of Approbation/הסכמות ודברי ברכה

בס"ד

לכבוד ידידי מזכה את הרבים בחיבוריו המחוכמים ירו"ש הרה"ג ר' ארי מארבורגר שליט"א
דיין בבית דין מישרים בעי"ת לייקווד יצ"ו

הנני למלאות בקשתך להיות שותף לדבר מצוה בנפש חפיצה, לעמוד לימינך לפרסם את גודל התועלת בחיבור זה בעניני ירושה צוואה, להורות לציבור הרחב והמומחים בהערכת צוואות את הדרך המובחר בהערכת הצוואות. כתיבת צוואות שיש להם תוקף בבית דין היא עצה נכונה למוריש לדור הבא אחריו כדי למנוע מצה ומריבה, ועל ידי זה לא יבואו ח"ו לידי משפטים בל ידעום. אני הגבר ראיתי עני, עצת היצר המפריד לבבות הקרובים להיות רחוקים כאשר אינם מודעים לחומר חוקת משפט.

וכבר איתמחי גברא בחיבורו הקודם שנכתב בכשרון רב, הן בשפה המדוברת והן במהדורה בלה"ק, המפיץ אור בעניני חו"מ, ובע"ה אף החיבור הזה יביא את התועלת המצופה של זיכוי הרבים.

והנני לברכך בברכת ידיד וכהן שתצליח במשימתך זאת ויתקדש ש"ש על ידך

חיים קאהן

וכאשר בקשת שאכתוב את אשר עם לבבי בנושא הזה, אוסיף זאת בקיצור מילין.

כאמור, נושא הספר היא ההדרכה הנכונה לסדר את הצוואות שיהיה להם תוקף על פי הלכה. וזאת, כדי למנוע החששות בצוואות שלדעת הרבה פוסקים יש להם תוקף רק בערכאות ולא בדיננו. סידור צוואות אלו אינו חידוש של דור האחרון, גם בדורות שלפנינו נהגו מסיבות שונות לערוך צוואות שמשנים את סדר הירושה, וחתרו למצוא דרכים שיהיה לצוואות אלו תוקף בבית דין. ואכן סידור הצוואות בזמנינו מיוסדים על סדר צוואות אלה. ובכל זאת כפי הנראה הגישה בזמנינו שונה מאשר בדורות הקודמים.

המבקשים לעקוף את סדר הירושה בוחרים בדרך כלל בשטר שמקורו בשטר חצי או שלם זכר המובא ברמ"א סימן רפ"א ס"ז, והמיוסד על תיקון חכמי ספרד המבואר בסימן ר"ז סט"ז. בשטר זה המוריש מחייב עצמו בחוב למי שאינו יורש על פי דין תורה אם היורשים לא יקיימו את הצוואה. לפי דעת הרבה פוסקים אין בסידור זה חשש של העברת נחלה, שהרי המוריש אינו מקנה כלום מנחלתו לפני מותו, רק מחייב עצמו בחוב גדול למי שאינו יורש אם לא יקיימו את הצוואה ועל ידי זה כופה בפועל את היורשים לציית לצוואתו.

והנה בטעם שהנהיגו בזמנם לכתוב שטר חצי זכר, כתב בשו"ת מהר"ם מינץ סימן מ"ז ששטר זה דומה לעישור נכסים שתיקנו חז"ל לתת לפרנסת בתו ולהשיאן, וגם על ידי שטר זה הובטח לבת חלק מהירושה העתידה כדי להשיאה. ובכן לא היה במנהג זה שום כוונה לעקור את סדר הנחלות שבתורה, ואדרבה הלכו בעקבות חז"ל ששקדו על תקנת בנות ישראל.

כמו כן היו במשך הדורות תקנות שונות שהנהיגו הקהלות בענין ירושת הבת כפי שראו בזה צורך שעה, ולא מטעם דינא דמלכותא דבזה הביא הבית יוסף בסימן כ"ו משו"ת הרשב"א שלא אמרינן דינא דמלכותא בדיני צוואה, וכן כתב הרמ"א בסו"ס שס"ט, אלא בכח דומה להפקר בי"ד הפקר. לדוגמא, תקנות קשטיליא (מובא בשו"ת הרשב"א חלק ג' סימן תל"ב) תקנו לתת לבת חלק בירושה הגם שאינה יורשת מדין תורה.

אכן כפי הנראה בדורות הסמוכים לנו לא חתרו למצוא דרך לעקוף את סדר הירושה באופן שיהיה תקף על פי דין תורה, ועם כל זה לא מחו נגד קיום הצוואות אלה, ואכן כמה מגדולי אחרוני זמנינו כתבו שנהגו לסמוך על הצוואת שנעשו אצל עורך דין ותקיפים בערכאות, ובשו"ת אגרות משה אה"ע חלק א' סימן ק"ד – לאחר שהעיר כנ"ל - חידש לדינא שבית דין יכול להוציא ממון על פי צוואות העולים בערכאות, עיין שם, וסיים על זה דישראל אם לא נביאים הם בני נביאים הם. ואף בשו"ת חשב האפוד חלק א' סימן נ"ג נקט לשון זה, והביא משו"ת אחיעזר סימן כ"ה שנהגו לקיים צוואות שנעשו אצל עורך ותקיפים בערכאות על כל פנים מדין מצוה לקיים דברי המת.

ומלבד שמבואר מהאגרות משה שהצוואות תקיפים על פי דין, הרי מספרי השו"ת הנ"ל נשמע שאין שום חיוב להודיע ליורשים שעל פי דין תורה יש להם זכות וטענה לבטל הצוואה. וביותר מבואר זה מתוך דברי שו"ת מהרי"א (יהודה יעלה) אה"ע סימן קי"ד שנשאל מתלמידו האם חייב להשיב מה שאחי אשתו נתנו לה מרצונם על פי הצוואה שהשאיר אביהם, והשיב על זה שהגם שאסור להוציא המגיע לו בדינא דמלכותא, אבל אינו חייב להשיב מרצונו מה שכבר נתנו. והנה בשו"ת תשורת ש"י חלק א' סימן רנ"ט כתב באם המקבל שאינו יורש על פי דין תורה יודע שהיורשים סברו שחייבים לתת על פי דין כפי שכתוב בצוואה, ולכן נתנו למי שאינו יורש על פי תורה, זוהי מחילה בטעות וחייב להחזיר, עיין שם, וכפי הנראה מדבריו לא היה צוואה והיורשים תובעים שלא ידעו שהדין נותן שהבת אינה יורשת ובזה פסק דתלינן בטעות ולא במחילה עיין שם, אבל באם היה צוואה באופן שמצוה לקיים דברי המת או אפילו רק בצוואה מהורים לבניהם שלדעת הרבה פוסקים יש בזה משום כיבוד אב, אף לדבריו יש לומר דתלינן במחילה ולא בטעות, ועיין בשו"ת מהרש"ם חלק ב' סימן רכ"ד אות י"ד והלאה, וביותר בחלק ג' סוף סימן רכ"ח סוד"ה ועוד נראה, ודו"ק.

מכל הנ"ל נראה שבנכסים שהיורשים חילקו ביניהם הירושה על פי צוואה מהמוריש ולא היה על זה ערעור בבית דין, אין לחוש שמחזיקים בזה שלא כדין, ומובן מאליו שאין כוונתי בכל זה לערער על הכוונה הטובה למצוא דרכים שיהיה לצוואה תוקף בבית דין, דזה ודאי ראוי ונכון למנוע הריב והיגון, ואין צריך בזה לדידי ולדכוותי, רק באתי להוציא מה שנראה לי דעת מוטעת כאילו המקיימים מרצונם הטוב את הצוואה ככתבה ולשונה עושים שלא כדין ויש לחוש שהמחזיקים בנכסים אלה על פי החלוקה הנ"ל גזילה בידם.

והנני בזה לכפול ברכתי לברכה והצלחה להגדיל תורה ויאדיר

חיים קאהן

יום ב' י"ד כסלו תשע"א

בס"ד

כ"ד אדר א' תשע"ה

משה רבנו באר התורה בשבעים לשון ובמשך כל הדורות הוברו ספרים בלשון המדוברת בפי העם ומי לנו גדול מהרמב"ם שחיבר פי' המשניות וספר המצות ומורה נבוכים בלשון ערבי וכן רבנו בחיי את ספר חובת הלבבות וזה גם בספרים שמיועדים לתלמידי חכמים וגדולי ישראל וגם חיבור היד החזקה נסתפק הרמב"ם באיזה שפה לכתבו ואפי' הש"ס יסוד תורה שבע"פ חובר בלשון ארמי שהי' מדובר אז [ועי' סנהדרין ד' כ"א ע"ב שבזמן עזרא ניתנה תורה (תורה שבכתב) בכתב ארמי ולשון ארמי וכו']. וכן גדולי ישראל באשכנז חיברו עבור ההמונים ספרים ופירשו חומש ורש"י, משניות ועין יעקב בלשון אשכנז ויידיש המדוברת. דבר חשוב עשה הרה"ג ארי' מארבורגר שליט"א מלייקווד ארה"ב שחיבר בלשון אנגלית ספר הבא לבאר ולהזהיר עניני זהירות בממון שאינם ידועים להמון ולסוחרים כמו דיני צוואות איך לכתוב צוואה כדין וכן עריכת הסכמים וחוזים כדין ועני המהפך בחררה, מחוסר אמנה, בר מצרא, אונאה ומק"ט, רבית והיתר עיסקא, עובד ומעביד, שוכר ומשכיר, ערכאות ודין תורה ופשרה. ומה טוב עשה שהכניס עניני דינא דמלכותא שרבים לקו בה הן ע"י עבר ושנה והן ע"י הוראות היתר שונים ויש בזה גם משום גזל ישראל דמלכיות שלנו שותפות כל האזרחים הם וכספי המלכות הוא של כל האזרחים כולל היהודים בנוסף לחילולי השם שנעשים מגל זה וכמעט שדינם כרודפים על מעמדם שי ישראל במדינות שונות. ראיתי חלקים גדולים של הספר והוא בא במדה נכונה ובמשקל נכון לעורר על הנקודות שיש בהב שאלה [ולא ח"ו כעורכי הדיינין שמלמדין איך לרמות].

הספר בודאי יוסיף הזהרת הזהירות בדיני ממונות ויוכל לשמש כלי עזר למורי הוראה לדעת את המושגים וההגדרות בשפה המדוברת כדי לכוון את שואליהם לעשות עפ"י התורה וההלכה וע"י יתרבה הדעת וקיום ההלכה למעשה בחיי היום יום.

המברכו בברכת כהן

[illegible]