The Propriety of a Civil Will

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During the last twenty-five years, approximately a dozen different formulations of halakhic *wills* have been disseminated in our community; nonetheless, to this very day, many segments of our community continue to utilize a civil *will* as the vehicle for their estate planning.

As we know, in accordance with secular law and the wishes of a testator, an attorney will draft a last will and testament that will distribute assets to a surviving spouse, son(s) and daughter(s) upon demise of the testator. Given the continued use of a secular *will* in our community, the purpose of this essay is to examine how halakhic authorities dealt with a secular *will*.

1. The Torah's Order of Hereditary Succession, the *issur* of "*avurei aḥsanta*" and "there is no *kinyan* after death"

A Jew's disposition of his property transpires during his lifetime. Upon his demise, human ownership ceases and halakhic succession law determines who will inherit his estate. Inheritance occurs by itself. As Rabbeinu Gershon notes,[1] no one benefits man but rather he automatically receives his ancestor's inheritance.

There is no transfer of assets between the testator and his heirs via the implementation of a *kinyan*, i.e., a symbolic act of transfer such as an exchange of money or writing a *shtar* (a halakhic-legal document). As the Talmud states,[2] and as it is restated in the Shulḥan Arukh,[3] there is no *shtar* after death.

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1 *Bava Batra* 141b.
2 *Ketubbot* 55b; Bava Batra 152a.
3 *Ḥoshen Mishpat* (hereafter: *ḤM*) 250:9.

The signing of a *shtar* is an example of a *kinyan* that may serve as a vehicle to transfer assets provided that the person is alive. Upon death, the person is incapable of transferring assets, or as the *posekim* state, "there is no *kinyan* after death."

In the words of the late Dayan Grunfeld of London, England,[4]

> ... In Jewish law we have the rules ... There is no gift after death and ... There is no effective document after death ... The logical consequence of this is that any money in the hands of a beneficiary of a will under the law of the land, which as far as Jewish religious law is concerned belongs to a different person, namely, the proper heir in accordance with the Jewish law of inheritance, has to be returned to that heir.

Unlike secular law which permits a transfer of assets upon death, for halakha the moment of death preempts this possibility. It is the halakhic system rather than the effectuation of a *kinyan* by a Jew that allows man to benefit his heirs. Pursuant to the Mishnah,[5] upon demise of the decedent, i.e., the father, the order of succession is as follows: (1) the sons, (2) their descendants, (3) the daughters, (4) their descendants, (5) the father, (6) the brothers, (7) their descendants, (8) the sisters, (9) their descendants, (10) the grandfather, (11) the brothers of the father, (12) their descendants, (13) the sisters of the father, (14) their descendants, etc.

After presenting the halakhot of succession, the Torah concludes by stating that the order of hereditary succession is "*ḥukat mishpat*" (a statute of judgment). The description of *hilkhot yerusha* as a "*ḥok*" implies, among other things, that these halakhot, despite dealing with monetary matters, are immutable.[6] Generally speaking, halakha allows individuals to determine their own monetary relationships, provided that the arrangement complies with a proper form, i.e., *kinyan,* and is not violative of any prohibitions such as

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4 Dayan I. Grunfeld, *The Jewish Law of Inheritance*, New York: Feldheim, 1987, 53–55.

5 *Bava Batra* 88b.

6 *Mishneh Torah, Hilkhot Ishut* 12:9; *Hilkhot Naḥalot* 6:1; Ḥazan, *Naḥala le-Yisrael*, 49.

theft or the interdict against taking *ribbit*.[7] One of the exceptions to this rule is *hilkhot yerusha*. As Rambam states,[8]

> A man cannot cause his estate to descend to someone who is not potentially his heir; nor can he deprive the heir of the inheritance even though this is a money matter. For it says... 'And it shall be for the children of Israel a statute of judgment' ... that means, this statute cannot be altered and no stipulation can affect it.

In other words, stipulating that assets are to be distributed to a non-halakhic heir falls in the category of "*matneh al ma shekatuv ba-Torah, tnai batel*,"[9] and therefore for a testator to state "Reuven shall

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7 *Kiddushin* 19b; *Shulḥan Arukh, Even ha-Ezer* 38:5; *Shulḥan Arukh, ḤM* 291:17; *Beit Yosef, ḤM* 305:4; *Shulḥan Arukh, ḤM* 305:4; *Rema, ḤM* 344:1.

8 *Mishneh Torah, Hilkhot Naḥalot* 6:1. See *Teshuvot Maharit, ḤM* 6; *Teshuvot R. Akiva Eiger, Mahadurah Tinyanah*, 83.

9 *Kiddushin*, supra n. 7. Whereas Rambam argues that an estate distribution at variance with halakha is a violation of "*ḥukat mishpat*," others contend that the execution of such planning presumes that the assets of the testator during his lifetime can be designated as his *yerusha*. But, in fact, during the testator's lifetime these are his assets. It is only upon the testator's demise that halakha determines that these assets are now designated as "*yerusha*," are no longer in the testator's possession, and automatically the Torah heirs receive their rightful distribution. See *Ḥiddushei ha-Rashba, Bava Batra* 113b. Alternatively, since the *yerusha* belongs to the heir only upon the testator's demise, during his lifetime he cannot execute an arrangement at variance with the Torah order of *yerusha*. See Ran on Rif, *Ketubbot* 41a.
Though *Shulḥan Arukh, ḤM* 282:1 states that diverting a share of the estate to a non-Torah heir is characterized as a transaction that merely does "not find pleasure" in the eyes of scholars, decisors construe such conduct as a formal issur. See *Teshuvot Maharam me-Padua* 60; *Teshuvot Maharashdam, ḤM* 336; *Teshuvot Ranah* 1:118.
Clearly, the *issur* of disinheritance devolves upon the testator.
Should a *beit din* affirm such a distribution, the *beit din* is not engaging in any *issur*. See *Teshuvot ha-Rema* 78; File no. 592010/1, Tel Aviv Regional Rabbinical Court, Ploni v. Almoni, June 14, 2010. Cf. infra text accompanying n. 171.

inherit me" regarding a non-Torah heir is null and void[10] and one is prohibited to execute such an arrangement.[11] Moreover, pursuant to many *posekim*, the Torah heirs are entitled to the entire estate and there is an *issur* to transfer any portion from the Torah heirs to non-Torah heirs.[12] Moreover, should a non-Torah heir retain the assets, such conduct is viewed as stealing from a rightful heir.[13] Consequently, a civil *will* that provides an estate distribution to a non-Torah heir ought to be null and void.

Barring any halakhically sanctioned arrangement that allows an estate to be distributed to non-Torah heirs,[14] it should be no surprise to find that many *posekim*, both past and present, have invalidated a civil *will* due to the rule that 'there is no gift after death' and

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10 *Teshuvot ha-Radvaz* 1:543; *Teshuvot Mishpetei Shmuel* 103; *Teshuvot Maharashdam Even ha-Ezer (EH)* 110, *ḤM* 304; File No. 8820-41-1, Supreme Rabbinical Court, Ploni v. Attorney General, November 23, 2009.

11 Talmud Yerushalmi *Bava Batra* 8:6; Rashbam, *Bava Batra* 133b, s.v. *ma*; *Piskei ha-Rosh* 8:37; *Teshuvot ha-Rosh* 85:3; *Teshuvot Maharam me-Padua*, supra n. 9; *Maharashdam*, supra n. 9; *Teshuvot ha-Rema* 78; *Ranah*, supra n. 9; *Teshuvot Ḥatam Sofer, ḤM* 151; *Teshuvot Maharasham*, 7: 12; *Teshuvot Maharit* 1:29; *Teshuvot Zera Emet*, 2:110; *Mishpat ha-Yerusha*, Livorno, 1878, 25a. Cf. others who argue that it is improper rather than a prohibition to engage in disinheritance. See *Teshuvot Tashbetz* 2:177; *Shulḥan Arukh ḤM* 282:1; *Sema*, ad. locum. 2; *Teshuvot Divrei Malkiel* 1:103; *Agudat Eizov ḤM* 16.
For further discussion, see infra text accompanying note 80.

12 Rosh, supra n. 11; *Teshuvot Maharashdam*, supra n. 11; *Teshuvot Maharit* 1:29, 2, ḤM 5; *Teshuvot Mahari Ibn Lev* 3:31; Teshuvot *Ḥatam Sofer*, supra n. 11; *Teshuvot Yashiv Moshe* 2:236.

13 *Teshuvot ha-Rivash* 160; *Teshuvot Ḥatam Sofer, ḤM* 142; *Teshuvot Mahari ha-Levi* (Ettinger) 2:86; *Teshuvot Sha'ar Asher* 2, *ḤM* 29; *Teshuvot Maharsham* 2:15; *Dinei Mamanot* 3:208.

14 For a discussion of various halakha-sanctioned techniques that allow one to transfer one's possessions to non-Torah heirs, see Judah Dick, "Halacha and the Conventional Last Will & Testament," 3 *Journal of Halacha & Contemporary Society* 5 (1982); Feivel Cohen, *Kuntres me-Dor le-Dor*; Mattisyahu Schwartz, *Mishpat Hatzava'ah*, vols. 1-2; this writer's "Drafting a Halakhic Will," *Ḥakirah,* vol. 10, p. 73 (2010), which can be accessed at www.Hakirah.org.
For the validity of a revocable living trust, see this writer's *Rabbinic Authority: The Vision & the Reality*, volume 1 (*Urim*: 2013).

because compliance with a secular *will* would lead to "*avurei aḥsanta*" (disinheriting a Torah heir).[15]

2. The Propriety of a Civil *Will*

A. Rabbi Schwadron's and Rabbi Feinstein's Views

In reply to the contention that transfer of an estate based upon a secular *will* flies in the face of the recognized rule "there is no *kinyan* after death," Rabbi Moshe Feinstein states the following:[16]

> Although we are dealing here with a gift to be made after the death of the donor, and there is no such thing as a *kinyan* after death, as the object no longer belongs to the donor and such a gift is therefore not valid in Jewish law, nevertheless according to the law of the land a person can legally transfer with effect after death money or any other object that at that time no longer belongs to him or her ... but in essence it is clear, according to my humble opinion, that a testament of this kind, the disposition of which will certainly be put into effect by the authorities of the country, does not need a *kinyan* as one could not imagine a more effective *gemirat da'at* than this. Hence, since a *kinyan* is not necessary, the legal heirs can uphold their right also against those persons who are the proper heirs by Torah law, although there is no such thing in Jewish law as a gift after the death of the donor.

There are two ingredients required in transferring ownership to another individual: effectuating a *kinyan* and *gemirat da'at* (i.e., a concrete articulation of the parties' firm resolve to undertake this obligation). In other words, one requires a physical act such as the

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[15] Rosh, supra n. 11; *Maharashdam*, supra notes 10-11; *Teshuvot Maharit* 1:29, 2, *ḤM* 5; *Mahari ibn Lev,* supra n. 12; *Teshuvot Maharam Galante* 13; *Teshuvot Maharshach* 146; *Teshuvot Leḥem Rav* 219; *Teshuvot Ḥatam Sofer, ḤM* 151; *Teshuvot Lev Aryeh* 2:57; *Teshuvot Heishiv Moshe, ḤM* 90, 164; *Teshuvot Minḥat Yitzḥak* 2:95, 6:164-165; Cohen supra n. 14 at 3–7; Zalman N. Goldberg, 5 *ha-Yashar ve-ha-Tov* 3, 7 (5768).

[16] *Iggerot Moshe, EH* 104. The translation is culled (with certain modifications) from Grunfeld, supra n. 4, at 72.

execution of a *shtar* that memorializes the assets that will be transferred and the intention of the parties to transfer the assets.[17]

In the absence of a *kinyan*, can one argue that the intention of the parties suffices to transfer an asset? In reply to this question, Rabbi Shlomo Kluger states:[18]

> The essence of the *kinyan* of the Torah is to resolve in one's heart to transfer (an asset), as we learnt that, in consideration of the pleasure of our children marrying each other, each father undertakes certain prenuptial obligations. Therefore this proves that in an instance where we can discern that there is was a firm resolution, one does not require an act of *kinyan*. And in cases where we require a *kinyan* it is because we do not know what he resolved in his heart and possibly he did not resolve to transfer (an asset) ... And every act of *kinyan* is only in order to ascertain what he resolved in his heart. However, if we know what he resolved and it is being transferred with a full heart (clear intention) we do not mandate an act.

Implicitly, following in R. Shlomo Kluger's footsteps, Rabbi Feinstein argues[19] "that a testament of this kind, the disposition of which will certainly be put into effect by the authorities of the country, does not need a *kinyan* as one could not imagine a more effective *gemirat da'at* than this."

To put it differently, the execution by a testator of a civil *will* that will be recognized by the civil court corroborates for us that he understood that his instructions will be followed and therefore he firmly resolved in his heart to transfer his estate and consequently a *kinyan* is not required.

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17 Whether the *kinyan* is a vehicle for ascertaining that *gemirat da'at* exists or whether the performance of a *kinyan* is separate from the requirement of *gemirat da'at* is subject to debate.

18 *Teshuvot Tuv Ta'am ve-Da'at, Mahadura Kamma,* 269. For others who subscribe to this view, see *Ḥiddushei R. Shimon Yehuda ha-Cohen Shkop, Kinyanim* 11; Yeḥezkel Abramsky, *Monetary Laws (A Definition of Types)* (Hebrew), 9–13.
The citation of these authorities should in no manner be construed as an endorsement of a civil *will*.

19 See supra text accompanying n. 16.

Addressing a *will* prepared by Rabbi Me'sag that divided up his estate amongst his sons, daughters and grandchildren, relying upon Rabbi Doniel Tirnai,[20] Rabbi Shalom Schwadron states,[21]

> The requirement of a *kinyan* is to attest to his will and thought that he resolved in his heart to give with his soul. And wherever there is a presumptive *umdana* (sound inference / common sense) that demonstrates that he gave with his heart, a *kinyan* is superfluous.

To claim, in accordance with Rabbis Schwadron and Feinstein, that one can transfer an asset based on *gemirat da'at* without a *kinyan* is an argumentation based upon a well-trodden *mesorah* that is discussed in various places in the Talmud[22] and applied *halakhah le-ma'aseh* (practical halakha) in varying contexts by many authori-

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20 *Ikrei ha-Da'at*, infra, n. 31.

21 *Teshuvot Maharsham* 2:224(2). See also *Maharsham* supra n. 11. In effect, his view is identical to R. Feinstein's position. See Yosef Goldberg, 1 *Shurat HaDin* 319, 323 (5754). See also, *Piskei Din Yerushalayim* 10:346, 350.
According to Rabbi Aharon Lichtenstein, Rav Joseph Soloveitchik prepared a civil *will*. It is Rabbi Dr. Dov Frimer's understanding, who was the drafter of Rav Soloveitchik's testamentary disposition, that Rav Soloveitchik endorsed Rabbi Feinstein's view that *gemirat da'at* could be obtained based upon the testator's awareness that the provisions of a secular *will* would be enforced by civil law and therefore no *kinyan* was necessary.
Cf. *Teshuvot Maharsham* 7:12.

22 1) *Ketubbot* 102a-b: "These are the matters that can be acquired via the medium of speech." See *Tosafot Ketubbot* 102b, s.v. *a'libai*. (2) *Bava Batra* 142b, acquiring for the benefit of an embryo: see *SA, ḤM* 210:1. (3) *Beḥorot* 18b, transfer ownership of a firstborn animal to a kohen. See *Teshuvot R. Akiver Eiger, Mahadura Kamma* 37 in the name of *Tosafot Beḥorot* 18b, s.v. *ak'neuyei*. (4) *Bava Batra* 123b, The transfer of priestly gifts to *makire kehunah* (acquaintances of the kohanim). See Rashash, ad. locum. (5) *Bava Kamma* 102b, someone dedicates his assets to the *beit hamikdash*. See *Sefer ha-Terumoth, Sha'ar* 1, 1:5 in the name of Ra'avad. (6) *Bava Metzi'a* 74a, *situmta*. Rashash, ibid.; *Mishpat Shalom* 194:2. See Ron Kleinman, "The Foundations of Transference: Intent & the Act of Acquisition" (Hebrew) 3 *Mishpetei Eretz* 91, 98–102 (5770).

ties, including the validation of a civil *will* by Israeli *dayanim* R. Shlomo Sha'anan, R. Domb and R. Ben Shimon.[23]

Nevertheless, many *posekim* demur and argue that a *ma'aseh kinyan*, act of transfer, is mandated. For example, Beit Yosef and Rema, who allow parties to execute an agreement without the prescribed *kinyan*, stipulate that only a recognized *kinyan* may be utilized. For example, both Beit Yosef and Rema will permit *metaltilin* (chattel) to be transferred with *kinyan kesef* (an exchange of money) though generally *metaltilin* cannot be transferred with *kesef*. [24] In other words, minimally, parties must implement a recognized *kinyan* even if it is not the one prescribed for the particular object. And other *posekim*, among them Drisha and Shakh, take issue with this position and argue that transfer of ownership requires the prescribed *kinyan* for the particular matter whether it is real estate or chattel.[25] The consensus is that a recognized *kinyan* must be used.

Secondly, should a non-Jew adopt halakha for a particular transaction and purchase with a bona fide *kinyan* from a Jew, such

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[23] *Aliyot de-Rabbeinu Yonah, BB* 84b; *Rashbam, BB* 123b s.v. *hokhi garsinan* [as understood by Rashash ad. locum; R. Engel, *Tziyunim la-Torah, Kelal* 39]; *Tosafot, BB* ad. locum, s.v. *hokha* [as understood by *Kovetz Shiurim BB* 374]; *Teshuvot Maharashdam ḤM* 380; *Teshuvot Maharshach* 1:46, 2: 46, 113; *Teshuvot Maharshal* 36, 135; R. Shlomo Kluger, *Teshuvot Tuv Ta'am Veda'ath, Mahadurah Kamma,* 265, 269, *Mahadurah* 3, 2:146; *Teshuvot Ḥatam Sofer Yoreh De'ah (YD)* 314 (as understood by *Teshuvot Shem Aryeh YD* 48 and *Teshuvot Dvar Yehoshua* 4: 48:1 Cf. *Teshuvot Dvar Avraham* 1:1's understanding of *Ḥatam Sofer* and *Teshuvot Ḥatam Sofer YD* 314 and *ḤM* 12; *Rashash, Bekhorot* 18b; *Teshuvot Pnei Mavin* 161; *Teshuvot R. Akiva Eiger Pesakim* 37; *Teshuvot Divrei Ḥakhamim*, vol. 1, *ḤM* 32; *Pnei Yehoshua Gittin* 77b; *Teshuvot Ḥemdat Shlomo YD* 33; *Avnei Miluim* 30:3 [in the name of Ran]; *Teshuvot Ohel Moshe* 2:138.
See Ron Kleinman, *Kinyan Situmta* (Hebrew) 24 *Meḥkarei Mishpat* 243, 257–259 (5768).
For validating a civil *will*, see *Piskei Din Rabbanayim* (PDR) 20: 297, 306-307, 21:28, 37-38; 22:133, 167, 179.

[24] *Beit Yosef, Tur ḤM* 195; *Rema, ḤM* 195:5. See also, *Baḥ Tur ḤM* 198; *Ketzot ha-Ḥoshen* 198:3.

[25] *Derisha, ḤM* 201:3; *Shakh, ḤM* 198:10.

an agreement would be valid.[26] Again it is a valid agreement because a *ma'aseh kinyan* was employed.

Moreover, let's assume that our ḥakhamim (sages) nullified the recognized *ma'asei kinyan* (acts of asset transfer). Can parties then stipulate between themselves that the *kinyanim* such as an exchange of money or executing a *shtar* are to be effective? The reply is that such private stipulation will be invalid.[27] Finally, for many *posekim, kinyan situmta* (a commercial practice of transferring ownership) is based on either *minhag* (custom)[28] or *kinyan ḥalifin* (barter),[29] or grounded in *kinyan meshikha/ḥazaka* (the act of pulling or possession of real estate for three years).[30] To put it differently, there is a requirement of some 'objective' act or minimally a collective understanding (*minhag*) that creates the *gemirat da'at* of the parties.

In short, a civil *will* is invalid since a *ma'aseh kinyan* is required to transfer an asset and there is no *kinyan* after death. As such, the view of Rabbis Schwadron and Feinstein is problematic.

B. Maharam of Rothenburg's View: A Gift in Contemplation of Death

Alternatively, some authorities[31] have recognized a secular *will* by invoking the position of Rabbi Meir of Rothenberg who states,[32]

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26 *Ketzot ha-Ḥoshen* 198:3.

27 *Rema, ḤM* 198:5; *Shakh*, ad. locum, 10.

28 *Teshuvot haRashba* 2:268, 3:17, 4:125; *Teshuvot Ḥatam Sofer, YD* 314.

29 *Teshuvot Dvar Avraham* 1:1, *Anaf* 1.

30 *Piskei Halakhoth im Be'ur Yad Dovid, Ishut* 1, 228-229.

31 See decisors cited in *Ikrei ha-Da'at, Oraḥ Ḥayyim* (*OḤ*) 21; *Teshuvot Kapei Aharon*, 12; R. Shlomo Warmash, Rabbi in Fulda, Germany in 5639 cited in 58 *Moriah* 17 (5741).

32 *Mordekhai, Bava Metzia* 254, 602 and *Mordekhai Bava Batra* 591. For our understanding of *Maharam*, see *Teshuvot ha-Rema* 95; *Teshuvot Maharsham* 2:224 (1) in the name of Rabbi Meaglunza.
To avoid a challenge to his verbal instructions, the testator would have to memorialize his wishes into writing. See *Ikrei ha-Da'at*, supra n. 31, at p. 71a.
For the antecedents of this testamentary disposition, see *Gittin* 66a; *Bava Batra* 151b.

> Even a healthy person who says "give to this person that and that if I will die" and this is to be designated a mitzva due to death and he (the heir) has acquired it.

In effect, despite the absence of a *kinyan* similar to a civil *will*, the assets have been transferred with the verbal instructions of the testator provided that he mentions the day of death. To put it differently, whereas a *matnas shekhiv mera* is a bequest communicated by a person on his deathbed, here this is a gift of a healthy person prepared in contemplation of death (*mitzva maḥmas mita*). In effect, by the testator's instructions there is an *umdana demukach* (sound inference/common sense) that he is resolute in giving this gift and therefore no *kinyan* is required.[33] Hence, a non-Torah heir may be a beneficiary of an estate, without the gifting being a violation of halakhic order of *yerusha*. Though many decisors reject his approach, it may be considered within the context of the doctrine of *muḥzak* and the *kim li* argument, as we shall demonstrate.

When a dispute is submitted to a beit din, the court has to determine which claimant retains certain assets. In halakha, there is a concept whereby one of the claimants is considered as the one who is in possession of the disputed item [the *muḥzak*], while the other claimant wants to "extract" this item and transfer it to himself. In case of a disputed inheritance, the beit din has to ascertain, first of all, who the *muḥzak* is. Which of the two parties—the Torah heirs or the non-Torah heirs, should be considered as "owning" the inheritance that the other is trying to take away? Seemingly, one could argue that, inasmuch as the Torah grants the inheritance to certain people, ipso facto they are considered as *muḥzakim*. But, as we explained, in accordance with Maharam's view, the gifting pro-

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[33] *Ikrei ha-Da'at*, supra n. 31. And many have adopted his approach. See *Kapei Aharon*, infra n. 42; Mahara Sasson in the name of Rif, Rambam, Ran, Rabbeinu Tam. See *Teshuvot Mahara Sasson* 151.
In fact some have rejected his approach. See *Teshuvot Maharam me-Padua* 53; *Darkhei Moshe, Tur ḤM* 257:4; *Rema ḤM* 257:7; *Teshuvot Har Hamor* 40; *Teshuvot Maharashdam YD* 203; *Mishpat ha-Yerusha*, supra n. 11, at 4–6. However, others have endorsed it. See sources cited by *Ikrei ha-Da'at*, supra n. 31. Cf. *Mishpat ha-Yerusha*, supra n. 11, at 13a who claims it is a minority view.

cess is not in violation of the Torah order of succession. So therefore, the two heirs are on the same footing and the Torah heir has no title, by dint of the Torah order of *yerusha* which preempts a non-Torah heir's right to the estate. Consequently, since there is a *safek* (doubt) whether we follow Maharam's posture or not, if the non-Torah heir is *muḥzak*, he will prevail.[34]

The *safek* whether we follow the Maharam's posture or not is equally significant with regard to invoking the *kim li* argument. Pursuant to halakhic court procedure, a party in a dispute can argue as follows: I want the court to rule in my favor, which is based on the position of Rabbi _____, who affirms my claim. Under certain prescribed conditions, we will accept his position even if Rabbi _____'s view is in the minority and the majority rule differently.[35] Such an argument can be invoked either by a *muḥzak* or by beit din. Thus, if the non-Torah heir is considered the *muḥzak*, he can request the court to uphold the secular *will* on the basis of a *kim li* argument that "I want the court to rule in accordance with Maharam," who validates a secular *will*.[36]

Since Maharam may have issued contradictory rulings regarding the effectiveness of this testator's directive and may have changed his mind regarding its effectiveness as a vehicle to transfer an estate, Maharam's view may possibly not serve as grounds to recognize a civil *will* either on the basis of rule of *muḥzak* or by advancing the *kim li* argument.[37]

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[34] *Teshuvot Maharsham* 2:224; PDR 19:1, 4 (Rabbis Elyashiv, Zolti and Hadas).

[35] Ḥanina Ben Menaḥem, "Towards a Jurisprudential Analysis of the Kim-li Argument" (Hebrew) 6-7 *Shenaton ha-Mishpat ha-Ivri* 45 (1979-1980).

[36] For those who contend that one can advance such a plea when the non-Torah heir is *muḥzak*, see *Netivot ha-Mishpat ḤM* 25, *Dinei Tefisah* 23 and other *aḥaronim* cited in *Teshuvot Yabia Omer*, 7, *ḤM* 2:6.
Others argue that even if the non-Torah heir seizes the assets, one may advance a claim of "*kim li*" on his behalf. See *Pitḥei Teshuva*, *ḤM* 25 (end); *Yabia Omer*, ibid. (end).

[37] For the self-contradictory rulings that limit the Maharam's *psak* to instances of the testator dying, see *Mordekhai, BB* 592; *Teshuvot Maharam of Rothenburg*, Berlin ed., 46.

C. The Validity of *Minhag* in Estate Planning

Another approach focuses upon whether the existence of a *minhag*, to prepare and execute *wills* in accordance with secular law, ought to be recognized or not. To have binding force, a *minhag*, which is unaccompanied by rabbinic or communal sanction in the form of a legislative enactment,[38] must be clear and widespread amongst the majority of the members of the community, and have been practiced at least three times.[39] There are some eighteenth- and nineteenth-century authorities (and some of them despite various reservations) who have recognized the use of a civil *will* that employs the language of "giving" rather than "bequeathing" or "inheriting,"[40] if this is common practice (even among gentiles[41]) in the community wherein the testator and heirs reside.[42]And even if the Torah

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For attempts to reconcile these rulings, see *Maharam me-Padua* supra n. 33; *Teshuvot Maharik* 94; *Teshuvot Maharil* 75; *Teshuvot ha-Rema* 95; *Teshuvot Mahara Sasson* 151.

38 For the independent status of a custom involving a monetary matter, see *Shulḥan Arukh, ḤM* 176:10, 218:19, 229:2, 230:10, 232:6; 330:5, 331:12; *Rema, ḤM* 72:5; *Teshuvot ha-Rema* 19-20; *Teshuvot Mahara Ashkenazi* 33.

39 *Teshuvot ha-Rosh* 79:4; *Teshuvot ha-Rivash* 475; *Teshuvot Terumat ha-Deshen* 342; *Rema, ḤM* 331:1.

40 *Ikrei haDa'at*, supra n. 31, at 76b. Cf. *Teshuvot Radakh* 26:3 who argues that *minhag hamakom* is determinative. Though Radakh's ruling addresses the case of *shekhiv mera*, R. Shlomo Sha'anan applies it to a testator who prepares a civil *will*. See Sha'anan, *Shurat ha-Din*, infra n. 55, at 319, 329.

41 *Ra'avad, Mishneh Torah, Malveh ve-Loveh* 25:10; *Tur ḤM* 132; *Teshuvot Maharashdam YD* 221; *Teshuvot Mahari ibn Lev* 2:23; *Teshuvot Bnei Avraham, ḤM* 13; *Teshuvot Makor Barukh* 55; *Teshuvot Ḥikekei Lev*, vol. 2, 30, vol. 3, *ḤM* 2:30; *Teshuvot Mahara Ashkenazi*, supra n. 38; *Teshuvot Kapei Aharon* 13; *Mishpat ha-Tzava'ah*, supra n. 14 at 423.

42 See *Ikrei ha-Da'at*, supra n. 31, at 72a-b, 73b, 76b, 77a and citations cited in *Teshuvot Kapei Aharon ḤM* 12-13; *Teshuvot ha-Ramah* (Abulafia) in *Ohr Tzadikim* (Salonika, 1799), 299; *Teshuvot Ḥedvat Ya'akov; Teshuvot Torat Ḥayyim* 2:13; *Teshuvot Ta'alumot Lev* 1:7; *Radakh,* supra n. 40; *Teshuvot Maharash* 2:13; *Teshuvot Mishpetei Tzedek* 2:52; *Tevuot Shemesh, ḤM* 33-34; *Mishpat ha-Yerusha*, supra n. 11, at 24; *Teshuvot ve-Zot le-Yehuda* (Mesalton) ḤM 9; *Teshuvot Betzeil ha-Ḥochma*, vol. 2, *ḤM* 6; *Teshuvot Mahara Ashkenazi*, supra n. 38.

heirs seize the assets from the non-Torah heirs, the assets would have to be returned to the designated heir(s).[43] As R. Yeḥiel Epstein rules, in places where the government is insistent that all legal documents be drafted in accordance with civil law, we must comply with their laws. *A fortiori*, he concludes if the local custom has validated these documents a civil *will* is equally to be recognized.[44]

Alternatively, others conclude that to impart credence to such a *minhag* it must have been approved by Torah scholars (i.e., *minhag vatikin*) in order for the civil *will* to be validated.[45] Adopting this approach (given as we will show in our presentation that there are some *posekim* who validate a civil *will*), the existence of a *minhag* to distribute assets in accordance with a civil *will* would be halakhically justified.

Even though there are *posekim* who reject the validity of a civil *will* based upon *minhag*,[46] nevertheless neither a *kim li* plea[47] by the

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Clearly, there were instances where authorities sanctioned the use of a civil *will* based upon *minhag* or *dina demalkhuta dina* because the civil government would recognize only *wills* that were prepared in accordance with civil law. See *Teshuvot ha-Radvaz* 1:67; *Teshuvot Mahari* (R. Ya'akov) *ha-Levi* 75; *Teshuvot Rabach, ḤM* 8; *Teshuvot Aderet Eliyahu Riki* 23. As such these *teshuvot* fail to serve as grounds to validate a secular *will* today where the civil law allows individuals to execute estate-planning arrangements based upon halakha provided that the *will* is drafted in a legally acceptable fashion.

43 *Kapei Aharon*, 13 (159a).

44 *Arukh ha-Shulḥan, ḤM* 68:6. And R. Tzvi Yehuda ben Ya'akov concludes that therefore a secular *will* is valid. See *Teshuvot Mishpatekha Leya'akov* 4:7. In light of R. Epstein's ruling in *Arukh ha-Shulḥan ḤM* 369:17 this conclusion seems problematic.

45 *Teshuvot Mishpat Tzedek* 2:52 (end); *Mishpat ha-Yerusha*, supra n. 11, at 25a; *Teshuvot Torat Ḥayyim* 2:19; *Ikrei Hadat*, supra n. 31, at 75a; *Teshuvot Ramatz* 1:92; *Teshuvot Divrei Rivot* 78. For the definition of *minhag vatikin* as a practice approved by *posekim*, see *Ohr Zarua, Bava Metzia* 280.

46 *Teshuvot ha-Rashba* 6:254 cited by *Beit Yosef ḤM* 26; *Teshuvot ha-Radvaz* 1:545; *Maharashdam*, supra n. 10; *Teshuvot Maharik, Shoresh* 8; *Teshuvot Mishpetei Shmuel* (*Kal'i*) 53; *Teshuvot Tzit Eliezer* 20:71.

47 See supra text accompanying note 35.
In fact, pursuant to Ḥida, in cases where there is a clear *minhag* that distributes estate assets to a daughter based on civil law, one can invoke the

Torah heirs, nor a beit din will trump the *minhag*.[48] Since we have a dispute whether *minhag* can justify affirming a *will*, we have a *safek* what the halakha is. In cases where there is doubt in a monetary matter we cannot extract money from the defendant. Consequently, a defendant [in this case the non-Torah heir] can argue that there are authorities who agree that the *minhag* ought to be determinative and therefore the *will* should be validated. Others would contend that the Torah heirs, by dint of the Torah law of *yerusha,* are the muḥzak(im) and therefore retain the estate. As the Talmud instructs us, a Torah heir by virtue of *hilkhot yerusha* does not need to plead his right.[49] Consequently, the halakhic doubt concerning whether *minhag* ought to be determinative is irrelevant. The bottom line is that the Torah heir has possession of the estate.

One suggested justification for legitimating secular *wills* based on *minhag* dates back to a *teshuva* penned by Rivash. The *teshuva* deals with a fourteenth-century Jewish community composed entirely of *mumarim* (apostates) residing on the island of Majorca who decided to replace halakha with the governing civil law. Rivash ruled that their decision was to be understood as the communal practice and therefore binding.[50] Lest one assume that this ruling is limited to Jewish apostates,[51] Rivash clearly states that his decision is applicable to any Jewish enclave that decides to have their matters resolved according to secular law. And, in fact, Rema and R. Aharon ben Azriel understood Rivash in such a fashion.[52] Whereas numerous authorities have imparted validity to individuals who decide to resolve their matters in front of a beit din in accordance with secular law,[53] Rivash extends the applicability of civil law to a

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kim li argument of those who endorse the validity of this *minhag*, such as Rivash and Maharshach. See *Tuv Ayin* 17 and see infra text.

48 *Ikrei haDa'at*, supra n. 31 at 31a, 38b; *Kapei Aharon* 12; *Kuntres Yismach Moshe* 12; *Teshuvot Baei Hayei*, *ḤM* 1, 73; Goldberg, supra n. 21 at 322; *Teshuvot Yaskil Avdi* 6, *ḤM* 18.

49 *BB* 41a.

50 *Teshuvot ha-Rivash* 52.

51 *Ḥatam Sofer*, supra n. 11; *Mishpat ha-Yerusha*, supra n. 11.

52 *Rema, ḤM* 248:1; *Teshuvot Kapei Aharon* 14.

53 *Giddulei Terumah, Sefer ha-Terumoth, Sha'ar* 62, *Ḥelek* 1; *Sma ḤM* 26:11, 61:14; *Netivot ha-Mishpat* 26:11; *Teshuvot Divrei Ḥayyim, ḤM*, 2:30; *Divrei*

communal adoption of civil law. Subsequently, Rivash's position has been endorsed by Rema and in contemporary times has been invoked as one of the grounds for affirming a secular *will* in Israel.[54] In fact, the validity of secular *wills* executed by some Israeli battei din stems not only from the acceptance of the view of Rabbis Schwadron and Feinstein, that there is no need for a kinyan regarding a testamentary disposition, but equally from the authority of *minhag*, a practice of using a secular *will,* which exists both in Israel and in other parts of the world.[55]

That said, should a Jewish community adopt the practice to arrange their estate planning in pursuance of secular law, a position that has met with trenchant criticism,[56] such *shtarot* (documents) of gentiles would be binding.[57]

And as Ḥazon Ish notes,[58] *dina demalkhuta dina* is determinative of the expectations of the parties. Hence, if the parties' expectation

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Gaonim 25:3, 111:3; *Bnei Shmuel, ḤM* 26; *Maharitz ha-Ḥadashot*, no. 22; *Teshuvot Yosef Ometz*, no. 4; *Birkei Yosef* 26:3,8; *Tzedakah u-Mishpat, OḤ*, no. 7; *Leket Shikḥa* found in *Karnei Re'em*, Section 4 *Dayanim*; File No. 1-24-053917464, Haifa Regional Rabbinical Court; R. Ezra Batsri *Dine Mamanot*, vol. 3, 197; Z.N. Goldberg, *Lev ha-Mishpat*, volume 1, 286; Asher Weiss, 6 *Darkhei Horo'ah* 111 (2007); PDR 18:314, 324; *Teshuvot Minḥat Yizḥak* 9:112.

54 *Rema, ḤM* 248:1; *Piskei Din Yerushalayim*, supra. n. 21, at 347. To resolve the seemingly self-contradictory ruling of Rema, ibid. with *Rema, ḤM* 369:11, see *Sma, ḤM* 369:20.

55 *Piskei Din Yerushalayim*, supra n. 21; H. Shlomo Sha'anan, "A Will in Halakha," (Hebrew) 13 *Teḥumin* 317, 324-325 (5751); A Will that was Drafted Improperly, (Hebrew) 1 *Shurat ha-Din* 319 (5754) and in his decisions PDR 20: 297, 308, 21:28, 37-38. Cf. *Piskei Din Yerushalayim* 12: 329, 331 and *Teshuvot Mishpat Shlomo* 3:24.

56 *Teshuvot Tashbetz* 1:61, *Maharit,* supra n. 8; *Teshuvot Mishpat Tzedek* 2:68; *Ḥatam Sofer*, supra n.11, *Teshuvot Maharsham, EH* 131; and *Dinei Mamonot* 3, page 197.
Others have contended that the Rivash's position was not issued as an actual *psak*. See *Ketzot ha-Ḥoshen* 248:3 in the name of *Tashbetz* and *Maharit, Yosef Ometz* supra n. 53.

57 *Mahara Ashkenazi* supra n. 38; *Teshuvot Tevuot Shemesh,* supra n. 42.

58 *HM Likkutim* 16:1, 5, 9. Our citation of *Ḥazon Ish* is not to be misconstrued as implying that he validated the execution of a civil *will*.

is to arrange for a testamentary disposition in accordance with civil law, namely the *minhag*, the provisions of the secular *will* would be binding. Consequently, if the testator commissioned an attorney to prepare and draft a *will* in accordance with civil law, the expectation is to have his estate distributed in accordance with such law.[59]

Implicit in the above approach is the notion advanced by Rabbi Doniel Tirani of nineteenth-century Italy and others that such documents will be effective as a *kinyan situmta* (a transfer recognized by commercial practice).[60] To put it differently, just as authorities recognize a modern-day contract as a *kinyan situmta*,[61] halakha equally imparts validity to a civil *will* as another example of a *kinyan situmta*.

At first glance, invoking *kinyan situmta* in our situation poses various problems. Firstly, Rabbi Zalman N. Goldberg argues that *minhag,* which is reflective of civil law, is not binding. Since obedience to the law entails an element of coercion and *minhag* is predicated upon voluntary compliance, a *minhag* grounded in law is a self-contradiction and therefore is unenforceable.[62] As such, since the text of a civil *will* is drafted and executed according to the norms of secular law, we would deny its validity. Secondly, accord-

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59 See infra text accompanying note 132.

60 *Ikrei Hadat*, supra n.31, at 70a, 73b; *Teshuvot Maharsham* 2:224 (30); *Erekh Shai*, *ḤM* 235.

61 *Maharashdam,* supra n. 23; *Teshuvot Maharsham* 3:8; *Teshuvot Zemech Zedek* (Lubavitch) YD 233; *Kesef ha-Kodshin, ḤM* 201:1; *Teshuvot Maharshag* 3:113; *Teshuvot Maharsham* 5:45; PDR 3:363, 4:193, 275; 6:202, 14:43.

Implicit in this approach, according to certain *posekim,* is that secular law can nullify an individual's ownership of property while simultaneously the execution of the *kinyan* that is utilized in commercial practice serves to transfer this property to another individual. See *Pitḥei Ḥoshen, Kinyanim*, 219, note 9 (end).

62 PDR 14: 334 (R. Z.N. Goldberg's opinion); R. Goldberg, 2 h*a-Yashar ve-ha-Tov* 9 (2006). Subsequent to the issuance of his *psak din* and authoring the article, R. Goldberg has emphasized that his position regarding the halakhic ineffectiveness of *minhag* is limited to matters dealing with commercial modes of undertaking obligations and transferring of assets. See R. Kleinman, "Civil Law in the Nation: Minhag ha-Medina," (Hebrew), 32 *Teḥumin* 261, 269-271 (5773).

ing to some authorities, notably the Baḥ, one cannot transfer *karka* (real estate) via a *kinyan situmta*.[63] And pursuant to other opinions, one cannot transfer assets that are not yet in the testator's possession (*davar she-lo ba la-olam*) at the time the testamentary disposition was prepared and signed.[64] Should we subscribe to these positions, a testator would be unable to earmark real estate for inheritance purposes and/or authorize a future estate distribution of assets that were not in his possession at the time of the drafting of the will.

Yet, there are numerous authorities who will recognize a *kinyan situmta* that is reflective of a *minhag* that is based upon civil law,[65] which entails the transfer of real estate that is in existence[66] as well as assets that are not yet in existence.[67] Generally speaking, assets cannot be transferred if not yet in existence at the time the disposition is prepared.[68] Nevertheless, should the prevailing law allow a testator to transfer future assets at the time of drafting the testamentary disposition, by dint of commercial custom many decisors would recognize the power of *kinyan situmta* to effectuate a transfer not only of current assets but equally of future assets.[69] Hence, a civil *will* that provides for a future disbursement of real estate and/or the future acquisition of assets would be halakhically binding.

The more vexing issue, however, is that the transfer of assets in accordance with a secular *will* transpires after the testator's demise

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63 *Baḥ, ḤM* 202:1.

64 *Shulḥan Arukh, ḤM* 60:6, 209:4; *Rema, ḤM* 257:7.

65 *Teshuvot Divrei Yosef* (Iggeret), 21; *Teshuvot Nediv Lev* (David Ḥazan) 12; *Teshuvot Mahari ha-Levi* 2:111; *Iggerot Moshe, ḤM* 1:72,75; *Teshuvot Beit Yisrael* 172; *Pitḥei Ḥoshen, Hilkhot Halva'ah* 2:29.

66 *Teshuvot ha-Rashba* 3:132; *Beit Yosef, ḤM* 201:1; *Shakh ḤM* 201:1; *Sma, ḤM* 201:6; *Ḥiddushei R. Akiva Eiger*, *ḤM* 201:2; PDR 6:216, 12:292.

67 *Teshuvot ha-Radvaz* 2:278; *Teshuvot Ḥatam Sofer, ḤM* 66; *Teshuvot Aḥiezer* 3:79.

68 *Shulḥan Arukh ḤM* 60:6, 209:4.

69 *Teshuvot ha-Rosh* 13:20; *Mordekhai, Shabbat* 472-473; *Teshuvot Maharshal* 36; *Netivot ha-Mishpat* 201:1; *Teshuvot Maharashdam ḤM* 380; *Divrei Ḥayyim* 2, *ḤM* 26; *Teshuvot Beit Yitzḥak ḤM* 60:1; *Teshuvot Shoeil u-Meishiv, Mahadura Kamma* 2:39; *Teshuvot Mahariz Enzel* 1:37; PDR 3:363, 368-369, 2:193, 198-199.

and a *kinyan situmta* is effective in transferring ownership only during the testator's lifetime. As we noted, there is no *kinyan* after death. And for this very reason, Rabbi Z. N. Goldberg and Rabbi Judah Dick, Esq. rejected the effectiveness of *kinyan situmta* for halakhic estate planning.[70]

Others such as Rabbis Eliyahu Ḥazan, Yehuda Mesalton, Messas and a *psak* attributed to Rabbi Yosef Elyashiv contend that if there is a *minhag* to execute a civil *will*, the distribution will be effective based on *kinyan situmta* without elucidating the grounds for such a conclusion.[71]

The grounds for the effectiveness of a civil *will*, a form of a *kinyan situmta*, can be extrapolated from the positions of Rabbeinu Yonah of Gerondi, Spain and R. Yeshayahu Blau.[72] According to this position, the transfer of the assets from the testator to the heirs is subdivided into two stages.[73] Invoking the view that the rule of *dina demalkhuta dina* (the law of the kingship is the law), secular law divests the testator of the ownership of the assets.[74] Subsequently, based upon *minhag hasoḥrim* (commercial practice), utilizing a *kinyan situmta*, the assets are transferred from the testator to the heir. The execution of a *kinyan situmta* is contingent upon the fact (i.e. a *tenai*, condition) that the testator will pass away and with his demise the beneficiary(ies) will acquire the assets of the estate. In actuality, the *kinyan situmta* which embodies *minhag hasoḥrim* is

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70 Goldberg, supra n. 62; Dick, supra n.14.

71 *Ta'alumot Lev*, supra n. 42; v*e-Zot le-Yehuda*, supra n. 42; *Teshuvot Shemesh u-Magen* 1, *ḤM* 1; *Ma'ase Beit Din* 1: p. 401 (Rabbi Yissachar Hagar in the name of R. Elyashiv); Moshe Toledano, 5 *Kovetz Darkhei Horo'ah* 280, 291 (5768).

72 *Aliyot de-Rabbeinu Yonah*, *BB* 55a s.v. *vearisa de-parsai*, s.v. *oleh be-yadeinu*; *Piṯḥei Ḥoshen* 8:, p. 219.

73 For this explanation, see Shmuel Shilo, *Dina Demalkhuta Dina* (Hebrew) Jerusalem, 1975, 324–326 and Sinai Deutsch, "The Validity of a Will Drawn in a Foreign Court" (Hebrew) 12 *Dine Israel* 193, 223–229 (5754-5755).

74 The notion that *dina demalkhuta* is based upon "*hefker beit din hefker,*" loosely translated as the right of *beit din* to expropriate a person's property, resonates with others such as *Mahariz Enzel* 4; *Dvar Avraham*, supra n. 23.

being executed during the testator's lifetime only to be implemented upon his death.

Alternatively, echoing Rabbis Schwadron's and Feinstein's rationale, Rabbi Toledano states[75] that the customary practice demonstrates the *gemirat da'at* of the donor and recipient in the transaction that it will be effective in any fashion that it will be (as the law requires-AYW), and therefore it is effective instead of a kinyan, since it is clear that they firmly resolved the matter. And this conclusion should equally apply, as Rabbi Toledano claims, to matters of inheritance.

Regardless of which rationale is offered for the effectiveness of *minhag* relating to a civil *will*, seemingly this approach undermines the limited scope of the authority of *minhag*. As we know, *minhag mevatel halakha*, i.e., custom overrides the law, is limited to monetary matters.[76] In other words, the power of custom is that it can override an existing halakha in monetary affairs.[77] On the other hand, in matters of *issura* (prohibitions), custom cannot override the halakha.[78] In our instance, though we are dealing with a monetary matter (inheritance), nevertheless as we explained, *hilkhot yerusha* are labeled "*ḥukat mishpat*" (immutable) and therefore the *minhag* manifested in the execution of a *kinyan situmta* should be ineffective in overriding the halakhic order of testamentary succession. And, in fact, for the aforesaid reason, some authorities explicitly ruled that a *minhag* cannot override the Torah law of succession.[79]

Nevertheless, many authorities argue that if a significant share [fifty percent or twenty percent] of the entire estate, or according to others, a nominal amount is distributed to Torah heirs, one may distribute assets to non-Torah heirs.[80]According to Rabbi Wosner

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75 Toledano, supra n. 71, at 293, 295.

76 *Talmud Yerushalmi BM* 7:1; *Mishnah BM* 7:1; *BM* 83a-b.

77 See supra n. 76.

78 RH 15b.

79 See supra n. 46.

80 *Sefer ha-Ittur, Matnat Shekhiv Me-ra* 59b (p. 118); *Teshuvot Tashbetz*, 3: 147; *Teshuvot ha-Rivash* 168; *Teshuvot Maharshal* 49; *Taz, EH* 113:1; *Teshuvot Maharsham* 7:12 in the name of Rema; *Teshuvot Beit David ḤM* 137;

of Bnei Brak, the import of the passage in Talmud Yerushalmi, *Bava Batra* 8:6 and *rishonim* is that one engages in *issur* only if one transfers the entire estate to non-Torah heirs.[81] And Rabbi Dovid Feldman of London, England argues in his treatise on *yerusha* that the same conclusion may be drawn from the discussion in Talmud Bavli *Bava Batra* 133b.[82] In effect, there is no commission of the *issura* (prohibition) of "*avurei aḥsanta*" since a potential Torah heir receives a portion of the estate.

Since halakha recognizes the possibility of a redistribution of the estate among Torah heirs and non-Torah heirs, the matter of *issur* is no longer existent. To put it differently, if a *minhag* overrides a matter of *issur* such as divesting the Torah heirs from benefiting from any portion of the inheritance, then such a custom is null and void, resulting in the need to redistribute all the assets to the Torah heirs. However, should some of the estate be distributed to the Torah heirs and the balance amongst non-Torah heirs, then the *minhag* of implementing a civil *will* and distributing assets to

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Ḥiddushei ha-Rashash BB 133; *Zerah Emet* supra n. 11; *Teshuvot Pnei Moshe* 1:70; *Teshuvot Avkat Rokhel*, 92; *Teshuvot ha-Rema*, 92 [as understood by *Taz, Even Haezer* 113:1 and *Teshuvot Shoeil u-Meishiv, Mahadurah Batra*, 1:1 [in the name of *Teshuvot ha-Rema* 92]; *Naḥalat Shiva* 21:4, 6; *Agudat Eizov*, ḤM 15; *Ketzot ha-Ḥoshen* 282:2; *Teshuvot R. Akiva Eiger*, *ḤM* 16; *Iggerot Moshe*, *EH* 1:110, *ḤM* 2:49-50; *Teshuvot Shevet ha-Levi* 4:216; Rabbi Z. N. Goldberg, 2 *Shurat ha-Din* 360, n. 11. Pursuant to one opinion, as long as some of the same property that is distributed to a non-Torah heir(s) is given to the Torah heir there is no violation of *hilkhot yerusha.* See *Teshuvot Pnei Moshe* 1:70.

One exception to the rule is that one cannot withhold a portion of the *bekhor's* double share. See *Teshuvot ha-Geonim*, Harkavi ed. 260; *Shulḥan Arukh and Rema, ḤM* 281:4. For an exception to this rule, see infra, text accompanying notes 83–85.

The fact that the distribution of a portion to a Torah heir and the balance to a non-Torah heir does not contravene an *issur* cannot be taken as proof that a distribution based upon a civil *will* would be recognized by the above authorities.

81 *Teshuvot Shevet ha-Levi* supra n. 80.

82 *Otzrot ha-Mishpat, Naḥalot* 228.

non-Torah heirs should not be tainted by any element of *issura*.[83] Consequently, if there is a prevailing custom that divests a *bekhor* (firstborn) entirely from his double portion of inheritance, such a *minhag* has no validity. However, if he has been disinherited from only a portion of that share, the *minhag* will be determinative.[84] Similarly, if an estate is entirely distributed to a daughter(s) without distribution to the son(s), such a secular *will* is not halakhically effective. Nonetheless, if a Torah heir such as a son receives at least a portion of the estate, such an arrangement is valid.[85]

Whether the need to distribute a portion of the estate to the Torah heirs exists only when enforcing a civil *will* based upon *minhag*, we leave as an open question. Should a *posek* rely upon the positions of Rabbis Meir of Rothenburg, Schwadron and Feinstein for recognizing a civil testamentary disposition, or if the estate has been structured based upon one of the halakhically sanctioned techniques, [86]according to various *posekim*, provisions may have to be made for a distribution to Torah heir(s).[87]

Others contend that validating a secular *will* based upon a secular legal system contravenes the prohibition for Jews to litigate matters in a secular court. In other words, the prohibition is not limited to litigating one's affairs in secular courts but extends to adopting

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[83] *Ketubbot* 52b (the matter of *takanat benin dikhrin*); *Talmud Yerushalmi, Ketubbot* 9:1; *Rema, EH* 52:4 (end).

[84] *Yad Rama*, supra n. 42; *Maharik,* supra n. 46; *Rema, ḤM* 281:4 (in the name of Maharik); *Maharashdam*, supra n. 10; *Radvaz* supra n. 46. The same is applicable when daughters inherit the entire estate and the son(s) receives nothing. See *Teshuvot Torat Ḥayyim* 2:19; *Maharit,* supra n. 8.

[85] See supra n. 80.

[86] See supra n. 14.

[87] *Sefer Hashtaroth le-Rav Hai Gaon, Shtar* 48; *Teshuvot ha-Rivash* 168. However, R. Hai Gaon contends that if one utilizes a technique such as a matnas bari or a matnas *shekhiv mera* (a deathbed gift), one need not distribute a portion to a Torah heir. See *Sefer ha-Shtarot*, op. cit, *Shtar* 8-9 and 12. Cf. *Teshuvot Ḥatam Sofer*, supra n. 11.

Whether a testator executing a *matnas bari* (a gift donated by a healthy person) must avoid transferring property to a non-Torah heir is subject to debate. See R. Hai Gaon, ibid; *Teshuvot ha-Rosh* 25:3; *Rema EH* 113:1; *Ḥatam Sofer*, ibid.; *Teshuvot Maḥaneh Yehuda, ḤM* 282; *Mishpatekha le-Ya'akov* 3:28 (3).

practices that imbibe secular law.[88] Others contend that affirmation of such a *minhag* is a violation of "*avurei aḥsanta*."[89]

D. The Scope of *Dina de-Malkhuta Dina*

Under certain prescribed conditions, halakha is willing to recognize some secular laws based upon the rule "*dina de-malkhuta dina*," lit., the law of the kingship is the law.[90] Though the rule addresses a kingship governmental structure, nevertheless the rule is applicable to any order that has been established with the consent of its citizens, has a legislative body[91] and enacts legislation that does not discriminate against its citizenry.[92]

Seemingly, a civil *will* drafted in accordance with the governing laws of a democratic order such as the United States ought to be recognized based upon the following *psak* of the Rema.[93]

> There are some authorities who state that the law of the kingship is the law in regard to taxes and tariffs dealing with immovables ... but other matters not. And there are others who disagree and argue that the law of the kingship is law regarding any matter that will be beneficial to the citizens of the state.

In accordance with Rema's commentary on the Tur, something beneficial for a state's citizenry is any matter that relates to interaction between individuals.[94]

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88 See infra n. 54. For the *issur* of litigating one's matters in civil court, see Simcha Krauss, "Litigation in Secular Courts," 3 *Journal of Halacha and Contemporary Society* 35 (Spring 1982).

89 *Naḥalah le-Yisrael*, 38, 53; *Teshuvot Mishpatei Tishmaru* 25.

90 *Nedarim* 28a; *Gittin* 10b; *Bava Kamma* 113a-b; *Bava Batra* 44b-45a. Many of the sources dealing with *dina demalkhuta dina* have been culled from *Shilo*, supra n. 73.

91 *Teshuvot ha-Rashba* 1:612, 637; *Teshuvot Yaskil Avdi* 6:28; Yosef Henkin, "Dina Demalkhuta Dina," (Hebrew) 31 *Hapardes* 3–5; *Yeḥaveh Da'at* 5:63.

92 *Mishneh Torah, Hilkhot Gezelah ve-Aveida* 5:14; *Shulḥan Arukh, ḤM* 369:8; *Teshuvot Tashbetz* 1:158; *Teshuvot ha-Ritva* 53; *Teshuvot ha-Radvaz* 3:968; *Teshuvot Ḥatam Sofer EH* 126; *Teshuvot Torat Emet* 153; *Teshuvot Ḥikkekei Lev ḤM* 6.

93 *ḤM* 369:8.

Though the Shakh vigorously opposes incorporating a rule of secular law when it is contrary to halakha,[95] nevertheless, historically dating back to the *rishonim*, the majority of *posekim* endorse the position of Rema.[96]

Although in the past most authorities subscribed to Rema's view, in contemporary times in Eretz Yisrael and elsewhere, normative halakha endorses the Shakh's position.[97] Moreover, though Rema invokes *dina de-malkhuta dina* regarding matters relating to the benefit of the citizenry of a particular country, nevertheless, following in the footsteps of the Shulḥan Arukh,[98] Rema opposes applying this rule as grounds for validating a civil *will*.[99] Similarly, though R. Moshe Feinstein subscribes to Rema's view regarding the scope of *dina de-malkhuta dina*, nevertheless, R. Feinstein explicitly rejects the notion that a civil *will* can be validated based upon that view.[100]

Furthermore, since American law does not mandate that inheritance matters be resolved in accordance with civil law, there is no reason to invoke *dina demalkhuta dina* as a basis for validating a secular *will*.[101]

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94 *Tur ḤM, Darkhei Moshe* 369.

95 *Shakh, ḤM* 73:19

96 *Teshuvot Doveiv Mesharim* 1:76. For a list of other *posekim*, see Shilo, supra n. 73, at 156. In addition, see *Tumim, ḤM* 26:1: *Teshuvot Ḥakham Tzvi* 148; *Teshuvot Noda be-Yehuda, Kamma ḤM* 10; *Teshuvot Harei Besamim Tanina* 2:41; *Teshuvot Avnei Tzedek ḤM* 9; *Teshuvot Divrei Yoel* 2:147.

97 *Ma'adnei Aretz* 18:1; *Amud ha-Yemini* 1:8; PDR 5:269-270; 8:78, 81. In the most trenchant terms, Israeli *posekim* lambast those who argue that *dina demalkhuta dina* can serve as grounds for validating a civil *will*. See Ben Tzion Uziel, "Mishpat Yerushat ha-Banot," (Hebrew) 9 *Talpiyot* 27, 44 (5725); Avraham Tzvi Yehuda Kook, "Dina Demalkhuta Dina Regarding Inheritance" (Hebrew) 3 *Teḥumin* 231 (5742); Eliezar Waldenburg, "The Proposed Inheritance Law according to Halakha" (Hebrew), Jubilee Volume to Federbush, Jerusalem, 5721, 221; *Teshuvot Yeḥave Da'at* 4:65.

98 *Beit Yosef, Tur ḤM* 369; *Teshuvot Rav Pe'alim*, vol. 2, *ḤM* 15.

99 *Rema, ḤM* 369:11.

100 *Iggerot Moshe ḤM* 2:72.

101 See *Aliyot de-Rabbeinu Yonah,* supra n. 72; *Teshuvot ha-Rashba* 1:895; *Teshuvot ha-Rivash* 495 in the name of Rashba; *Teshuvot Ḥukot Ḥayyim* 1;

Moreover, in cases where there is an element of *issur*, as Tashbetz notes, one cannot invoke *dina de-malkhuta dina*.[102] In fact, numerous *posekim* will reject invoking *dina de-malkhuta dina* in order to validate a civil *will* that provides for an estate distribution to a non-Torah heir which entails the commission of an *issur*.[103] For example, in the seventeenth century, R. Moshe Benveniste mandated that a daughter return her share in the inheritance to her brother because it was lost property [*hashavat aveida*].[104]And he records that all scholars of the period rejected the validity of a secular *will* based upon *dina de-malkhuta dina*. In R. Benveniste's words, "And they struck that opinion with a hundred measures against one." As such, at first glance, one must reject the validity of a secular *will*. Subsequently, addressing a case of inheritance that occurred in 1851 in Ancona, Italy, Rabbi Yisrael Moshe Ḥazan rails against those who equate the halakhic recognition of *dina de-malkhuta dina* in estate distribution with the halakhic validity imparted to parties who arrange their monetary affairs in variance with halakhah. R. Ḥazan explains,[105]

> What has the maxim of *dina de-malkhuta dina* to do with the Jewish law of inheritance? For the laws of inheritance and the laws ruling commercial transactions such as purchase and sale of goods, or deals in real estate, which are resolved according to the law of the land, are as removed from one, as is East from West.

Teshuvot Shemesh Tzedaka, ḤM 33:15; *Teshuvot Mahari Assad* 2:114; *Teshuvot Mishpetei Uziel* 3:28; Ḥazon Ish, *Likkutim ḤM* 16.
And therefore, if the validity of a *will* is based upon *situmta* (see infra text accompanying notes 109–113) and the governing civil law does not mandate the implementation of a certain *kinyan* regarding estate disposition, *situmta* will not be effective. See PDR 18:207, 240.

102 *Teshuvot Tashbetz* 1:158.

103 *Teshuvot Maharam me-Padua* supra n. 9; *Teshuvot Be'er ha-Mayim* 120–122; *Teshuvot Edut be-Ya'akov* 71-72.

104 *Teshuvot Pnei Moshe* 2:15.

105 *Naḥalah le-Yisrael*, 9. Cf. *Teshuvot Maharitz ha-Ḥadashot* 32.

As R. Akiva Eiger notes, these civil matters are monetary in nature while the laws of a *yerusha* have the element of *issur*.[106] Consequently, it is unsurprising to find numerous *posekim* who invalidate a civil *will* based upon *dina de-malkhuta dina*.[107] Hence, any assets, including but not limited to *yerusha* awarded by a civil court, halakhically continue to belong to the Torah heir(s), and as such a non-Torah heir who has won in court cannot enforce the award lest he be labeled a thief.[108]

Notwithstanding what we have presented here, without impinging upon the element of *issur* of *hilkhot yerusha*, according to contemporary *posekim* such as Rabbis Mesas and Sha'anan, one can still invoke the rule of *dina de-malkhuta dina*.[109] A last will and testament is a document that entails gifting an estate to various individuals. Though its provisions and the terminology employed by the document may not be in conformity with the halakhot of a *shtar matana,* a bona fide document that grants a gift, nevertheless, it is a *shtar matana* that is valid in the eyes of secular law. The question is whether halakha recognizes a *shtar kinyan* (vehicle to transfer an asset) such as a *shtar matana* that was prepared and valid in accordance with civil law.

Pursuant to the majority of *rishonim*[110] and some *aḥaronim*,[111] a *shtar matana* drafted in accordance with secular law will be recog-

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106 *Teshuvot R. Akiva Eiger, Mahadura Tinyana* 83.

107 Supra n. 103; *Ḥida, Tuv Ayin* 17:4; *Teshuvot Yosef Omeitz* supra n. 53; *Teshuvot Rav Peʿalim* supra n. 98; *Ḥatam Sofer,* supra n. 13; *Teshuvot Minḥat Yitzḥak* 2:95; *Teshuvot Tzitz Eliezer* 6: 42(8); *Teshuvot Mishneh Halakhot* 9:326.

108 *Teshuvot Maharashdam, ḤM* 145; *Teshuvot Maharik* 154; R. Z. N. Goldberg, 5 *ha-Yashar ve-Hatov* 3, 5 (5768).

109 *Tevuot Shemesh*, supra n. 57; *Sha'anan*, supra n. 55. See also, R. Yirmeyahu cited in *Pnei Moshe,* supra n. 104.

110 *Ittur*, Vol. 1, *Ma'amar Shemini, Kiyum Tofsim ve-ḥotmim; Mordekhai, Gittin* 325; *Ḥiddushei ha-Ramban, Gittin* 10b; *Ḥiddushei ha-Rashba, Gittin* 10b; *Beit ha-Beḥira, Gittin* 10b; *Piskei ha-Rosh, Gittin* 1:10; *Ḥiddushei ha-Ritva, Gittin* 10b; *Magid Mishneh, Malveh ve-Loveh* 27:1; *Teshuvot ha-Ran* 37; *Teshuvot ha-Rivash* 203; *Tashbetz* supra n. 102; *Ḥiddushei Nimmukei Yosef, Gittin* 10b.

111 *Teshuvot ha-Radvaz* 1: 545, 6:1183; *Teshuvot Mayim Amukim* 53.

nized. The majority view of *rishonim* notwithstanding, *Shulḥan Arukh* and many *aḥaronim* relied upon the minority view of *rishonim*[112] to invalidate a *shtar matana*.[113] Nevertheless, relying upon the majority of *rishonim* and some *aḥaronim* who validate a *shtar matana*, Rabbis Mesas and Sha'anan argue that a civil *will* ought to be recognized. Since a *shtar matana* is a *shtar kinyan* and there is no *kinyan* after death, on what grounds can one legitimate such an estate distribution in accordance with a secular *will*?

Here again, as we mentioned previously in our presentation, the grounds for the effectiveness of a civil *will* as a *shtar matana* is based upon the position of Rabbeinu Yonah and Rabbi Yeshayahu Blau as an example of a *kinyan situmta*. According to this position, the transfer of the assets from the testator to the heirs is subdivided into two stages: Invoking the view that the rule of *dina de-malkhuta dina*, secular law divests the testator of the ownership of the assets. Subsequently, executing a *shtar matana* of estate distribution that is a *kinyan situmta*, the assets are transferred from the testator to the heir. The execution of a *kinyan situmta* is contingent upon the fact (i.e., a *tenai*, condition) that the testator will pass away and with his demise the beneficiary(ies) will acquire the assets of the estate. In actuality, the *kinyan situmta* that has been drafted in accordance with civil law is being executed during the testator's lifetime only to be implemented upon his death.

In short, clearly, the need to distribute a portion of the estate to the Torah heirs is not limited to an instance of enforcing a civil *will* based upon *minhag* or *dina de-malkhuta dina*. Should a *posek* rely upon the positions of Rabbis Maharam of Rothenburg, Schwadron and Feinstein for recognizing a civil testamentary disposition or if the estate has been structured based upon one of the halakhically sanctioned techniques,[114] according to various *posekim*, provision

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However, clearly Radvaz will reject a *will* as a *shtar matanah* that reflects the *minhag* of disinheriting Torah heirs.

112 *Rif, Gittin* 1:410; *Mishneh Torah, Hilkhot Malveh ve-Loveh* 27:1

113 *Shulḥan Arukh, ḤM* 68:1; *Teshuvot Binyamin Ze'ev* 2:415; *Teshuvot Mishpetei Shmuel* 103; *Teshuvot Oraḥ le-Tzadik ḤM* 1; *Sha'ar Mishpat ḤM* 68:1

114 See supra n. 14.

has to be made for a distribution to Torah heir(s).[115] These approaches of Rabbis Rothenburg, Schwadron and Feinstein are predicated upon the fact that a partial distribution to a Torah heir will suffice to nullify the issue of "*avurei aḥsanta*."

Accordingly, the basis for the father's preparation of a civil *will* can be grounded in the *pesakim* of Maharam of Rothenburg, R. Schwadron and R. Feinstein and those *posekim* who affirm the *minhag* and the validity of *dina de-malkhuta dina*.

Based upon the foregoing presented in section 2, subsections a-d, assuming various conditions are obtained as dictated by the adoption of a particular view, we presented the positions of Rabbis Rothenburg, Schwadron and Feinstein as well as those *posekim* who endorse the effectiveness of *minhag* or *dina de-malkhuta dina*, which would serve as grounds for preparing and drafting a civil law as a vehicle for distributing one's assets to one's heirs. In fact, Rabbi C. Shlomo Sha'anan, a dayan serving on a Tel Aviv Rabbinical Court, factored all four views in order to validate a civil *will*.[116] What is important to stress is that all of these approaches are grounded in a particular halakhic-legal technique that allows for an estate distribution to any individual, regardless of whether the person is a Torah heir or not. In effect, the estate has been effectively transformed from a potential source of inheritance for a Torah heir into an asset that can be acquired by anyone no different from any article for sale in the marketplace.

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[115] See supra n. 80; *Sefer ha-Shtaroth le-Rav Hai Gaon, Shtar* 48; *Teshuvot ha-Rivash* 168. However, R. Hai Gaon contends that if one utilizes a technique such as a *matnas bari* or a *matnas shekhiv mera* (a deathbed gift) one need not distribute a portion to a Torah heir. See *Sefer ha-Shtarot*, op. cit, *Shtar* 8-9 and 12; *Teshuvot ha-Geonim*, supra n. 80. Cf. *Halakhot Gedolot*, Hildesheimer ed., Vol. 2, 511; *Teshuvot Ḥatam Sofer*, supra n. 11.
Whether a testator executing a *matnas bari* (a gift donated by a healthy person) must avoid transferring property to a non-Torah heir is subject to debate. See R. Hai Gaon, ibid; *Teshuvot ha-Rosh* 25:3; *Rema EH* 113:1; *Ḥatam Sofer*, ibid; *Teshuvot Maḥaneh Yehuda, ḤM* 282; *Mishpatekha le-Ya'akov* 3:28 (3).

[116] Sha'anan, "The Matter of a Will Improperly Written," (Hebrew) 1 *Shurat ha-Din* 319 (5754); *Iyunim be-Mishpat, ḤM* 34; and supra n. 55.

As we have discussed, however, others reject these techniques and therefore affirm the Talmudic and *Shulḥan Arukh* rule that "*yerusha ein lo hefsek*" (the succession of inheritance cannot be interrupted)[117] and reject all of these solutions.

E. The Parameters of "*Mitzva le-Kayeim Divrei ha-Met*"

As we explained, many would argue that the *will* is ineffective in transferring an estate either because "there is no *kinyan* after death"[118] or because one may not disinherit a Torah heir from his rightful share as dictated by the Torah view of succession. Distributing a partial share to a Torah heir will not obviate the halakhic fact that the Torah view of succession is "*ḥukat mishpat*." Any distribution of a share to a non-Torah heir entails the contravention of an *issur*.[119] Hence, even *be-di-avad* (ex post facto) one may not rely upon a secular *will*.

However, according to some *posekim* one can validate a secular *will* based upon "*mitzva le-kayeim divrei ha-met*," the halakhic duty to carry out the wishes of the deceased.[120]

Amongst *rishonim* there are two primary approaches in trying to understand under what conditions one has complied with this mitzva:

Should the testator state "give to Reuven," such a clear instruction without transference of the actual asset to a *shalish* (a third party) will suffice to comply with "*mitzva le-kayeim divrei ha-met*."[121] Others require that the assets be deposited for purposes of eventual

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117 *Bava Batra* 125b, 129b; *Shulḥan Arukh, ḤM* 248:1. See supra n. 15 and infra n. 164.

118 See text accompanying supra notes 3-4.

119 *Teshuvot Maharashdam ḤM* 336; *Teshuvot Maharit* 1:29; *Teshuvot Maharshakh* 2:164; *Teshuvot Ḥatam Sofer*, supra n. 11.

120 *Gittin* 14b, 15a; *BB* 149a.

121 *Ḥiddushei ha-Ramban, Gittin* 13a, s.v. *ve'od*; *Rashi, Gittin*, *ad locum* s.v. *be-bari*; *Tosafot, BB* 149a, s.v. *deka*; *Beit Yosef, ḤM* 252 who cites Rosh, Ritva and Ra'ah; *Teshuvot Binyan Tzion ha-Ḥadashot* 2:24; *Shakh, ḤM* 252:4.

estate distribution (*hashlasha*) with the *shalish*.[122] Normative halakha mandates that the asset(s) be deposited with the *shalish* for the express purpose of carrying out the testator's wishes, and the language of the *will* should preferably employ *matanah* (gift) terminology (such as "I give") rather than *yerusha* terminology (such as "I bequeath").[123]

Based upon the foregoing, Maharit contends that a civil *will* does not conform to the dictates of "*mitzva le-kayeim divrei ha-met*":[124] The absence in a civil *will* of a clear directive to the heirs,[125] and the need that full disclosure of the provisions of the future distribution have been delivered in the presence of the future heirs,[126] coupled with the fact that an *issur* is committed by disinheriting a Torah heir,[127] renders impossible for a civil *will* to be affirmed. Finally, to argue that the depositing of a *will* with an attorney and its subsequent enforcement by a probate court as a form of *hashlashah* and therefore a fulfillment of "*mitzva le-kayeim divrei ha-met*" is predicated upon invoking Rabbi Ḥayyim Ozer Grodzenzky's ruling which will be discussed later. However, argues Maharit, one cannot find support for such a position since his *teshuva* addresses charity bequests[128] and his ruling may therefore not necessarily extend to private testamentary dispositions.

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122 Rabbeinu Tam, *Tosafot Ketubbot* 70a, s.v. *veho*; *Teshuvot ha-Rosh* 15:1; *Piskei ha-Rosh, Gittin* 1:15; *Teshuvot Mahari Ibn Lev* 2:39; *Teshuvot Maharit* 2, *ḤM* 95. Others claim that the deposit with a third party must have been executed prior to the verbal directive. See *Teshuvot Mahari Ibn Lev,* op. cit.

123 *Shulḥan Arukh, ḤM* 250:23, 252:2; *Teshuvot ha-Rema* 48.
Whether one can fulfill the wishes of the deceased by employing *yerusha* terminology in a testamentary disposition rather than the language of gifting is subject to debate. See *Ketzot ha-Ḥoshen* 248:1; *Netivot ha-Mishpat* 248:6.

124 *Maharit,* supra n. 8.

125 Supra n. 121.

126 *Ḥiddushei ha-Rashba, Gittin* 13a, s.v. *be-mai*; *Teshuvot R. Akiva Eiger* 1:150.

127 *Teshuvot Mishpatim Yesharim* 44; *Teshuvot Avkat Roḥel* 93.

128 *Teshuvot Aḥiezer* 3:34, 4:66.

Admittedly, both of Rabbi Grodzensky's decisions deal with *tzedaka;* nevertheless, in one of his rulings he writes,[129]

I have always doubted the propriety of the *wills* executed in civil courts since there is no *shtar* after death, yet a Jewish court will affirm their provisions.

As such, though his decision addressed matters of charitable bequests, clearly his ruling regarding the invoking of "*mitzva le-kayeim divrei ha-met*" applies equally to the conventional last will and testament. And, in fact, contemporary decisors understood Rabbi Grodzensky's *psak* in a similar fashion.[130]

To buttress his position, Rabbi Grodzensky found precedent in a *teshuva* of Rabbi Ya'akov Ettlinger dealing with a secular *will*.[131] The facts are the following: a healthy individual prepared a testamentary disposition in accordance with civil law wherein upon his demise, his estate would be distributed among Torah and non-Torah heirs. Since the estate arrangement failed to comply with halakha, the non-Torah heirs inquired of R. Ettlinger whether this civil *will* would be halakhically valid. Since the assets were in the hands of the beneficiaries in accordance with secular law, these individuals are *muḥzakim* in these assets. Lest one argue that the assets must be deposited with a third party prior to invoking "*mitzva le-kayeim divrei ha-met*," R. Ettlinger argues that since the testator communicated explicit instructions to transfer these assets upon his demise,[132] this suffices to comply with the mitzva. The fact that executors were appointed to ensure that his wishes would be fulfilled and the *will* would be enforced by secular authorities suffices to comply with the dictates of "*mitzva le-kayeim divrei ha-met*."[133] Relying upon R. Ettlinger's argumentation, R. Grodzensky posits,[134]

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129 *Teshuvot Aḥiezer* 4:66.

130 *Teshuvot Ḥeshev ha-Ephod* 2:106; *Teshuvot Netzaḥ Yisrael* 20; *Pithei Ḥoshen, Yerusha*, pp. 145-146; *Mishpatei Tishmaru*, supra n. 89; *Kuntres me-Dor le-Dor*, supra n. 14, at 2; *Mishpat Shlomo*, supra n. 55.

131 *Binyan Tzion* supra n. 121.

132 See text accompanying supra n. 130.

133 Ramban, supra n. 120; *Teshuvot ha-Ritva* 54 in the name of Ra'ah; Ran on *Rif, Gittin* 5b; *Teshuvot ha-Rema* 48 in the name of Rambam.

> For some time, I have inclined to the view that the beneficiary in a *will* executed in accordance with the law of the land is to be considered as a *muḥzak*, since the testamentary disposition will be carried out in accordance with the law of the land, and as such we do not need the halakhic requirement of a deposit for the purpose of estate distribution. However, I have not found a source ("*gilluyei*") for this halakha.

In effect, the preparation and execution of a civil *will* and its subsequent enforcement by civil authorities is tantamount to depositing the assets with a third party for the express purpose of future estate distribution, i.e., *hashlashah*.[135] His position has been endorsed by some *posekim*.[136]

A similar approach has been espoused by Rabbi Shmuel Shor, who recognizes that *hashlasha* applies only when one gives a gift to a stranger. However, when one gives a gift to a daughter and she is considered *muḥzaketh* according to civil law, a deposit is not required and such a testamentary disposition is therefore valid.[137]

Arguing somewhat differently from Rabbis Shor and Grodzensky, Rabbi Henoch Padwa writes that the initiation of the executor's action to probate the *will* is to be viewed as a type of *hashlashah* and therefore, "*mitzva le-kayeim divrei ha-met*" at this juncture has been fulfilled. In other words, the preparation of a testamentary disposition in accordance with secular law and its enforceability by the court are insufficient to establish *hashlashah*. One requires the probating of the *will* by the executor. [138]

The existence of an executor of a *will* creates *hashlashah* (deposit). See *Teshuvot Ḥeshev ha-Ephod* (in the name of *Ḥelkat Meḥokeik*), 3:25.

134 *Teshuvot Aḥiezer* 3:34. Here again, R. Grodzensky's argument demonstrates that his decision is not limited to cases of *tzedaka*. Though in this *teshuva* he does not definitively resolve that executing a civil *will* is valid, elsewhere he validates it. See *Kovetz Iggreot*, No. 25.

135 See text accompanying supra n. 133.

136 *Binyan Tzion*, supra n. 121; *Teshuvot ve-Hanhagot* 1:853; *Teshuvot Minḥat Shai* 75. And *Minḥat Shai* argues that both Ḥatam Sofer, supra n. 13 and Radvaz, supra n. 42 agree with his position.

137 *Minḥat Shai*, supra n. 136.

138 *Ḥeshev ha-Ephod*, supra n. 130. See also, PDR 17: 175, 278.

The ramifications of Rabbis Grodzensky's, Shor's and Padwa's view that the preparation of a civil *will* and/or probating it is a form of *hashlashah* and therefore serves to ascertain *gemirat da'at* would be applicable to all segments of our Orthodox Jewish community. Many Jews who identify and affiliate with religious institutions in our Orthodox Jewish community execute such testamentary dispositions. Although many different documents have been suggested as complying with halakhic estate planning, and there are attorneys with the expertise and experience to address the observant Jewish community's concerns in drafting a halakhic *will*, it is not unusual to find, amongst our families across the Orthodox spectrum, numerous testamentary instructions prepared in accordance with civil law. And, in fact, many contested *yerusha* matters addressed in beit din today deal with civil *wills* executed by members of all segments of our community.

Seemingly, R. Yosef Elyashiv will invalidate such testamentary dispositions. He argues in a written *teshuva* that R. Grodzensky's view that the preparation and enforcement of a civil *will* is a form of *hashlashah* is applicable only to secular Jews who do not exhibit "a deficiency in their *gemirat da'at*."[139] To put it differently, since secular Jews do not comply with halakha, should a civil *will* be prepared, they firmly intend to have the *will* probated in secular court. Hence their *will* is valid. On the other hand, the allegiance of observant Jews is to halakha, and should they prepare a civil *will*, there is no firm intention to have the document probated civilly. The *gemirat da'at* of an observant Jew is to follow halakha, and since in R. Elyashiv's view a civil *will* cannot be validated for observant Jews either *lekhatḥila* or *be-di-avad*, a testator's *gemirat da'at* is actualized only if halakhically compliant in one's estate planning. A similar view is espoused by *Meishiv be-Halakha*, a publication of Machon Lehoro'ah, a beit din in Monsey, New York.[140]

However, as noted by R. Schwartz, R. Elyashiv's line of reasoning should equally apply to any observant Jew who files a civil divorce, trusting that his testamentary disposition will be executed in

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[139] *Kovetz ha-Teshuvot* 3:225.

[140] *Meishiv be-Halakha* 211, n. 288.

accordance with his wishes upon his demise.[141] In fact, in a *mesorah* attributed to Rabbi Elyashiv, in situations where people recognize one mode of estate planning, i.e. executing a civil *will* and preparing such a testamentary disposition, we assess (*umdana*) that their intentions were to transfer the estate as a gift, similar to *hashlashah* in accordance with secular law.[142] To state it differently, even observant Jews who have their estate wishes executed in accordance with civil law trust that their instructions will be complied with, and therefore a civil *will* ought to be recognized as a vehicle for *hashlashah*.

Nonetheless, Rabbi Elyashiv contends based upon "*mitzva le-kayeim divrei ha-met*" that a *peshara* (compromise) should be executed by the Jewishly observant who utilize secular estate arrangements.[143] And *Meishiv be-Halakha* contends that it is "*midat ḥassidut*" to comply with the provisions of a civil *will* and invokes the possibility that confirmation of such a testamentary disposition is a fulfillment of *kibbud av*, a matter we will discuss later in our presentation.[144]

Finally, regarding Maharit's opposition to invoking "*mitzva le-kayeim divrei ha-met*" when executing a civil *will* is in violation of the *issur* of "*avurei aḥsanta*," [145] we may reply, if one adopts the view that "*mitzva le-kayeim divrei ha-met*" is a form of a *kinyan*[146] and that therefore one may invoke it as grounds for recognizing a non-Torah heir's entitlement to estate assets, seemingly we are involved in the contravention of an *issur*. And, in fact, in another *teshuva* penned by Maharit, he seems to endorse this understanding of "*mitzva le-kayeim divrei ha-met*,"[147] and therefore we can readily

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141 *Mishpat ha-Tzava'ah*, vol. 2, 309.

142 Shlomo Zafrani, 20 *Moriah, gilyon*, 122 (Tevet 5756). Cf. R Turetsky who attributes a contradictory *psak* to R. Elyashiv. See *Teshuvot Yashiv Moshe*, 475.

143 See supra n. 139.

144 See infra text accompanying notes 153–161.

145 See supra n. 80.

146 *Rashi, Gittin* 15b, s.v. *de-amru*; *Maḥaneh Ephraim Hilkhot Zekhiyah u-Mattanah* 29; *Teshuvot Maharsham* 2:224(10).

147 *Teshuvot Maharit* 2:95.

understand his opposition to invoking this notion in cases of disinheritance of Torah heirs.

However, most *posekim* contend that "*mitzva le-kayeim divrei ha-met*" is not an act of *kinyan*.[148] Rather this concept, as the words denote, informs us that it is a halakhic duty, a mitzva, to fulfill the wishes of the deceased. As Rabbi Shaul Nathanson notes,[149]

> It is a matter of kindness of truth [*ḥessed shel emet*] that we do with the departed... and it is a duty to comply with the wishes of the deceased.

Yet, as we explained,[150] should the testamentary disposition provide that Torah heirs, alongside non-Torah heirs, will benefit from the estate distribution, the *issur* of "*avurei aḥsanta*" is nonexistent and the mitzva may be fulfilled.

In short, though not explicitly stated, we assume that despite the recognition of a civil *will* by Rabbi Grodzensky, Rabbi Shor and the others who recognize a civil *will be-di-avad,* they will all concur that Torah heirs must receive a distribution from the estate[151] lest the execution of the *will* entail a contravention of this *issur* of "*avurei aḥsanta*." Even if the language employed by the testator is "to bequeath" or "to inherit" rather than "to give" his assets, such language will not invalidate the civil *will* that reflects the deceased's wishes.[152]

F. The Parameters of *Kibbud Av*

Finally, in the absence of affirming a civil *will* as a means to per-

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148 Rabbeinu Tam, *Tosafot Gittin* 13a, s.v. *ve-ho*; *Shitot Kadmonim* and *Ḥiddushei ha-Ramah, Gittin* 13a; *Mordekhai, BB* 629; *Teshuvot Tashbetz* 2:53; *Rema ḤM* 252:2; *Ketzot ha-Ḥoshen* 248:5; *Divrei Ḥayyim* (Urbach) *YD* 48.

149 *Teshuvot Shoeil u-Meishiv, Mahadura Tanina* 1.

150 See text accompanying note 80.

151 See text accompanying supra n. 80.

152 *Netivot ha-Mishpat* 248:1. Though *Ketzot ha-Ḥoshen* 248:1 and *Teshuvot ve-Hanhagot* 1:872 disagree, nonetheless, since there is halakhic doubt as to who ought to possess the assets, we do not extract them from the *muḥzak*. See *Mishpat ha-Tzava'ah* 2:22 (225). However, it is questionable whether such terminology will validate such a disposition based upon the mitzva of *kibbud av*. See infra text accompanying notes 153–157.

form the "*mitzva le-kayeim divrei ha-met*," there are *posekim* who argue that compliance with a parent's wishes is a fulfillment of the mitzva of either *kibbud av*, honoring one's father, [153] or *morah*, filial reverence.[154] The implicit premise of this position is that a *beit din* can coerce a child to comply with his parent's wishes[155] and that a child is obligated in *kibbud av* after his father's demise.[156] Such a conclusion would equally apply to a secular *will*.[157]

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153 *Teshuvot Tashbetz*, 2: 53; *Mahari ha-Levi*, supra n. 13; *Minḥat Shai*, supra n. 136; *Maharashdam*, supra n. 33; *Teshuvot Ḥavot Yair* 214; *Maharsham*, supra n. 21, at 15–18; *Kovetz ha-Teshuvot ḤM* 215; *Iyunim be-Mishpat*, *ḤM* 33.

Rabbi Ya'akov Reicher argues that in accordance with the dictates of *lifnim meshurat ha-din* (lit. beyond the limit of the law), one may invoke *kibbud av* regarding a testamentary disposition. See *Teshuvot Shevut Ya'akov* 1:168. Even though he contends that one cannot coerce the child to respect his parent's wishes, nevertheless, should such a matter be resolved by a beit din, the signing of an arbitration agreement would be grounds to effectuate his compliance. A beit din can mandate compliance with one's halakhic-moral obligations. See *Teshuvot Mahari Bruna* 241; Rabbi Zalman N. Goldberg, *Shivḥei ha-P'shara* section 5 (letter sent to Kollel Mishpetei Aretz, Ofrah, Israel).

Since one is saved from transgressing an *issur* by performing the mitzva of *kibbud av*, we may assume that these *posekim* hold that as long as the Torah heir(s) receives a portion of the *yerusha*, there is no nullification of the halakhot of Torah succession.

154 *Ḥazon Ish, YD* 148:8. R. Akiva Eiger is unsure whether to affirm a *will* based upon these grounds. See *Teshuvot Rabbi Akiva Eiger* 1:68.

155 *Teshuvot ha-Rashba ha-Meyuḥosot le-Ramban* 88; *Sefer ha-Ḥinukh*, no. 33; *Rema, ḤM* 97:16; *Shakh*, ad. locum 1. Alternatively, even if one contends that there is no basis for coercing an individual to honor his parent, by dint of signing on the arbitration agreement, the child is duty-bound to obey a beit din that mandates that the parent be accorded honor and respect. See supra n. 153.

156 *Teshuvot Shivat Tzion* 58; *Birkei Yosef, YD* 240:17.

For example, after his father's demise the heir is obligated by the mitzva of *kibbud av* to pay off his father's debts and restore an object the father stole or *ribbis* he took. See *Ketubbot* 91b; *Bava Kamma* 94b, 112a; *Bava Batra* 157a.

157 *Ḥeshev ha-Ephod*, supra n. 130.

Others disagree for one of three reasons. Firstly, one cannot coerce a child to comply with his parent's wishes.[158] Some argue that *kibbud av* is limited to personal service of a parent, whereas incurring a financial loss by being unable to benefit from a testamentary distribution does not fall within the ambit of the mitzva.[159] Consequently, since foregoing one's share in an estate entails an expense to the child without reimbursement by the parent; the mitzva of *kibbud av* is inapplicable.[160] Finally, some argue that since there is no obligation to honor and/or respect a parent after his demise,[161] the child is exempt from complying with the parent's testamentary wishes, which will be actualized after his death.

We should be mindful of the words of a well-respected halakhic arbiter. After stressing the importance of complying with the order of succession prescribed in the Torah, drafting a halakhic *will* using a *matnas bari* or *shtar ḥatzi zakhar* to transfer assets to a daughter(s) in order to avoid the *issur* of "*avurei aḥsanta*,"[162] Rav Tucashinsky concludes with the following:[163]

> And if he erred and wrote to his daughter or wife in a language that is ineffective for estate transfer, it is desirable that the sons

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158 Rashi, *Ketubbot* 91b, s.v. *mitzva*; *Piskei ha-Rosh, Ketubbot* 9:13-14; *Maharsham*, supra n. 21.

159 *Shulḥan Arukh YD* 240:1.
Firstly, though many *posekim* argue that there is no mitzva of *kibbud av* when he does not benefit from the child's action, there are decisors who disagree. See *Teshuvot Ḥavot Yair* 214; *R. Akiva Eiger* supra n. 154; *Teshuvot Maharsham*, 2:224 (in the name of Rivash and Tashbetz). Secondly, as R. Schwadron aptly notes, benefit accruing to a parent is not limited to personal service but encompasses equally his monetary assets. See Maharsham, op. cit, subsection 14. Hence, there should be unanimous agreement that a parent derive benefit, albeit it may be of a psychological nature, from his children's receiving his assets in accordance with his instructions.

160 *Emes le-Ya'akov ḤM* 282. Cf. *Mahari ha-Levi*, supra n. 13 and others who argue that the son has not benefited from receiving a *yerusha* rather than incurring a loss by being deprived of it.

161 *Teshuvot Tashbetz* 2:53; *Shevut Ya'akov,* supra n. 153.

162 See supra n. 14.

163 *Gesher ha-Ḥayyim*, vol. 1, 41.

> agree to distribute the estate equally with their sister and mother, and it is a mitzva to fulfill the words of the father...and also to avoid friction and controversy.

The *pesika* of Rav Tucashinsky which was forged in the crucible of his learning experience and investigation of the halakhic sources led to him to conclude that various halakhic techniques for drafting a will were the order of the day. And in his writings he suggested various texts of halakhically sanctioned *tzvaot*. Nevertheless, he concludes his presentation with the point that our Torah has been described as "ways of pleasantness and all her paths are shalom."

Though Rav Tucashinsky was hard pressed to find grounds to validate a secular *will*, nonetheless, he experienced clear personal anguish regarding disrespecting a father and his personal wishes, the potential family strife and instability that is caused by a son who contests a civil *will*, and therefore directed the son(s) to agree and accept the estate distribution to the non-Torah heirs based upon *mitzva lekayeim divrei ha-met*, *kibbud av*, and fostering shalom.

A similar approach, albeit much more subtle in form, resonates in the writings of Rabbi Mattisyahu Schwartz. After his exhaustive, over-four-hundred-page treatment of advancing the paramount importance of drafting a halakhic *will*, examining the advantages and disadvantages of the various techniques proposed for drafting a *will*, rejecting the views of Rabbi Feinstein and *posekim* who endorse minhag as well as *dina demalkhuta dina* as grounds for recognizing a secular will and his fifty-five-page review in Volume 1 of *Mishpat ha-Tzava'ah* of all the differing views on whether *kibbud av* is applicable, in Volume two, R. Schwartz summarizes his conclusion by stating[164]

> In Volume 1 of *Mishpat ha-Tzava'ah* we had a lengthy presentation in explaining why the *posekim* argue that one must affirm a civil *will* due to honor of a father [and we discussed the views that rejected *kibbud av*].

In other words, his aforesaid summary indicates that R. Schwartz is subscribing to the view that ex post facto one should affirm the *will* based upon *kibbud av*. In other words, a halakhic

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[164] *Mishpat ha-Tzava'ah*, vol. 2, 85.

will is the prescribed method for estate planning, however he affirms a civil *will* based upon *kibbud av*. In fact, R. Schwartz argues that even those *posekim* who opine that children are exempt from *kibbud av* regarding complying with his estate-distribution directives concur that if the children fulfill his wishes, they do fulfill the mitzva.[165]

His posture reverberates when dealing with the following scenario: A father's *will* mandates that portions of his estate be distributed to non-Torah heirs, but upon his demise his wife demands that the estate be distributed to other non-Torah heirs. Applying rulings emerging from different case patterns, R. Schwartz concludes with three approaches to parental precedence and the role of filial responsibility. Dealing with the situation wherein the parents dispute over whether their daughter should marry a particular man and upon the father's demise, the question emerges whether the mother's wishes should be complied or not, R. Yehzekel Landau concludes that since the wife is alive, *kibbud em* trumps *kibbud av*.[166] On the other hand, addressing whether a son should incur a financial loss if engaging in *kibbud av* becomes the subject of the dispute between the child's parents, R. Akiva Eiger contends that we comply with the husband's wishes due to *kibbud av*.[167] Should a father oppose his son's recitation of *Kaddish* for his deceased mother, some *posekim* argue that *kavod av* and *kavod em* in such a situation are on equal standing and that the *avel* (mourner) can therefore choose whose instructions he wants to follow.[168] In other words, eliciting from fact patterns dealing with a prospective marital mate, a child incurring a financial loss through *kibbud av*, and the propriety of *kaddish* recitation for a parent despite the other parent's protestation, R. Schwartz draws three diametrically contrasting conclusions regarding how to confront a mother's desire to modify her husband's estate disposition relating to a distribution to other non-Torah heirs.[169] To state it differently, there is no discussion whatsoever

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165 *Mishpat ha-Tzava'ah*, vol. 1, 501.

166 *Teshuvot Noda be-Yehudah, Mahadura Tanina, EH* 45.

167 *R. Akiva Eiger*, supra n. 154.

168 *Teshuvot Ḥayyim She'ol*, vol. 1, 5; *Teshuvot be-Tzel ha-Ḥokhma*, 5:15.

169 *Mishpat ha-Tzava'ah*, vol. 2, 82–88.

about tearing up the *will* and giving all the assets to the Torah heirs. The question is simply whose *kavod* will be the determining factor in the estate distribution. And therefore, there are no grounds to distribute the entire *yerusha* to the Torah heir.

In conclusion, numerous decisors invalidate a civil *will* either because there is no *kinyan* after death and/or because affirming the *will* entails the violation of "*avurei aḥsanta*."[170] And should the assets earmarked in a civil *will* be distributed to non-Torah heirs, many battei din will redistribute the lion's share of the estate to the Torah heir(s) in accordance with the order of Torah sion.[171]And other battei din will rely upon the views expressed in our presentation that would validate a civil *will*.[172]

Should a beit din choose to invalidate the estate distribution in the will, a nominal distribution will be given to the daughter(s). Since legally, a daughter(s) must sign off in order for the son(s) to inherit his (their) share of the estate, a daughter(s) can rely on the *posekim* who do not obligate a daughter to sign off the estate distribution,[173] and therefore she has a right to receive a portion of the estate.

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[170] In addition to the *posekim* cited supra n. 15, see *Teshuvot Ḥatam Sofer*, *ḤM* 172; *Rav Pe'alim,* supra n. 98; File No. 5528-42-1, January 20, 2005, Ploni v. Plonit, Petach Tikva Rabbinical Court; File no. 8820-41-1, November 23, 2009, Ploni v. Attorney General, Great Rabbinical Court; Asher Weiss, 6 *Darkhei Horo'ah* 130, 133–137 (2007).

[171] *Teshuvot Teshurat Shai, Mahadura Kamma* 259; *Kovetz ha-Teshuvot* supra n. 139.

[172] See supra notes 55 and 116.

[173] Whether one can coerce a daughter to sign a waiver is a matter of controversy. See *Pnei Moshe* supra n. 104; *Teshuvot Shoeil u-Meishiv*, 2, *Mahadurah Tiltali*, 1:78; *Teshuvot Mahari ha-Levi* 1:4; *Ḥeshev ha-Ephod*, supra n.130; *Erekh Shai, ḤM* 60:9; *Beit Shlomo* (Sklai) *OḤ* 85:3, *YD* 2:79, *ḤM*, 108-109; *Teshuvot Mahariz Enzel* 28; *Naḥalat Tzvi ḤM* 276.
However, if this matter is being resolved by a beit din empowered by signed arbitration agreement to address this matter, then even those *posekim* who contend that generally one cannot coerce a daughter to sign a waiver document, the beit din does possess such authority.

In exchange for her signature, there is a *minhag* to give her at least ten percent of the value of the estate's assets[174] or an amount determined by a beit din panel.[175] In effect, offering assets to a daughter is a *peshara*, a compromise. Generally speaking, in an instance of *issur*, one cannot implement a *peshara*;[176] nevertheless, the *issur* may be inoperative. As we earlier noted, though the entire estate belongs to the Torah heirs and consequently, according to certain decisors a partial distribution to a daughter entails a violation of "*avurei aḥsanta*,"[177] some *posekim* permit the distribution to a non-Torah heir. Implicit in their allowance of distribution to a daughter is their endorsement of the position that distribution to a non-Torah heir is permissible if he shares in the estate distribution.[178] Alternatively, since secular law mandates a daughter's signature for the son to receive his estate distribution, halakha allows her to sign off. Consequently, in the absence of an extant *issur*, a *peshara* may be implemented.

Others such as Rabbis Maharam of Rothenberg, Schwadron and Feinstein will sanction the use of a civil *will* either based upon the *gemirat da'at* of the testator, "the mitzva due to death" or *minhag*. Regardless of the grounds for validating a secular *will*, it may be effective in transferring assets to a non-Torah heir only if there is a partial distribution to a Torah heir.[179]

On the other hand, some *posekim* will validate a secular *will* based upon "*mitzva le-kayeim divrei ha-met*" or *kibbud av*. Here again, to avoid the *issur* of "*avurei aḥsanta*" such recognition may require that the Torah heir receive a partial distribution of the estate. Others as we have shown oppose both approaches.

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174 *Pnei Moshe,* supra n. 104 (in the name of Maharit); *Ḥukot Ḥayyim* 73; *Seder Eliyahu Rabba ve-Zuta* 15.

175 *Teshuvot Mahari ha-Levi* 1:4; *Teshuvot Divrei Ḥayyim, ḤM* 2:3; *Teshuvot Birkat Yosef* (Landa) *ḤM* 22; *Teshuvot Divrei Malkiel* 5:211; PDR 9, 115, 126–131.

For a text of a waiver document, see *Teshuvot Tzitz Eliezer* 15:60.

176 *Teshuvot Avnei Nezer ḤM* 23; *Teshuvot Yad Eliyahu* 48; *Teshuvot be-Tzel ha-Ḥokhma* 3:36.

177 See supra n. 12

178 See supra text accompanying n. 80.

179 See supra n. 80.

Deciding between competing arguments regarding the propriety of a civil *will* will be the sole prerogative of the *posek* and beit din. The relative strength of each argument and plausibility will continue to be scrutinized within the framework of future *pesakim* and *piskei din*.

Conclusion

Since the halakhic propriety of a civil testamentary disposition is subject to debate, it behooves our community to seriously consider that a Torah heir may decide [based upon either his own halakhic convictions, desire for material aggrandizement or hatred of his siblings who are non-Torah heirs, or at the behest of his spouse's inveighing] to challenge in beit din his father's civil *will* that distributes portions of the estate to his siblings who are non-Torah heirs. Such claims have in the past been advanced in beit din and continue to this very day to be submitted to battei din. Never assume that family infighting regarding a *yerusha* will happen only in somebody else's backyard. Since there is no halakhic consensus to affirm a civil *will*, the chance of the overwhelming majority of the assets to be redistributed and awarded to a Torah heir(s) by a beit din is a distinct possibility. Optimally, our community ought to seek halakhic and legal counsel regarding halakhic estate-planning techniques that will avoid the potential challenges to the halakhic efficacy of a civil *will*.[180] Should a civil *will* be contested and settlement negotiations fail, it is advisable that one approach a rabbinic authority who has expertise in *Even ha-Ezer* and *Ḥoshen Mishpat* and preferably experience in *dayanut* for counsel on how to handle this matter. ☙

[180] See supra n. 14.