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**Rabbi Joseph Perelman**

## **Halachic Aspects of Estate Planning**

(Adapted from a shiur given on 17 Teves 5760 at the  
Golders Green Beth Hamedrash, London)

### **A) Attitude to wealth**

Before we discuss the Halachos of wills and inheritance, it is worthwhile giving a brief overview of the Torah's attitude to accumulation of wealth.

As with everything else, wealth accumulation has its good and bad features. When people become wealthy, they often turn away from Judaism as a result.<sup>1</sup> Amassing wealth can present a real challenge. Furthermore, the Gemoro<sup>2</sup> says that one should "take care with the children of the poor, for from them shall come the Torah." Let us not forget the adage of the Sages<sup>3</sup>, *Marbeh nechasim marbeh de'ogoh* – the more possessions, the more worry.

On the other hand, there are certainly advantages to being wealthy.<sup>4</sup> Obviously a wealthy person is in a better position to distribute charity. Furthermore, one can afford to spend more on the performance of mitzvos – *Hiddur Mitzvah* – such as buying a beautiful menorah or esrog.<sup>5</sup>

The ideal attitude, then, is to be satisfied with what one has and to utilise it wisely.<sup>6</sup> The Torah tells us,<sup>7</sup> "And Yitzchok sowed in that year and he found a hundredfold, and Hashem blessed him." One would have

expected the verse to say first that Hashem blessed him before it relates his success. R' Simcha Rubin, the late Sassover Rebbe ז"ל, suggested that the Torah wishes to tell us that after Yitzchok became wealthy, he was blessed by Hashem in that he merited to use it wisely and not to succumb to its drawbacks.

### **B) Restrictions on free use of one's money**

Apart from the obvious directive not to use one's money for forbidden things, there are also additional constraints that the Halachah imposes upon the use of one's assets. For example, one is not allowed to donate more than one fifth of one's assets to charity.<sup>8</sup> There are qualifications to this rule, however. Some *poskim* rule that this does not apply to an *oshir muflag* – an outstandingly wealthy man. The reason one may not give away more than a fifth of one's assets is in order to ensure that one does not end up becoming poor oneself, in which case this would not apply to someone very rich. Similarly, the Biur Halacha in Hilchos Lulav<sup>9</sup> suggests that this does not apply to an extremely poor man, since he anyway needs to rely on others.

Also, if there is an *oni lefonechah* – a poor man standing in front of you, the Gaon of Vilna rules that you may give him more than a fifth of your assets. Furthermore, if one feels that one needs to atone for various sins and wishes to donate to *tzedokkoh* as part of one's atonement, one may forgo the one-fifth rule.

The Gemoro<sup>10</sup> relates that when Mar Ukva was on his deathbed he surveyed his possessions and declared, “*Zabdoi kalili ve’urcha rechikta* – The provisions are short although the journey is far.” By this he expressed his concern that he may not have sufficient merits for the “journey” to the World to Come. Thereupon he gave away one half (according to some versions, one third) of his possessions to Tzedokoh.

Some authorities learn from this that although during one’s lifetime one may give away only one fifth to charity, on one’s deathbed one may give away up to half.<sup>11</sup> Others, however, suggest that this applied only to Mar Ukva who was a very wealthy man.<sup>12</sup> Furthermore, in his case he explicitly stated that he felt he had not given away enough in his lifetime – perhaps that was the reason that he allowed himself to give away more than a fifth. Still others suggest that perhaps one can give away everything on one’s deathbed; Mar Ukva gave a half but he did not say that this is the limit permitted.<sup>13</sup> Although there are differing opinions, the consensus seems to be that one may give away to charity up to one half of one’s property on one’s deathbed.<sup>14</sup> The Aruch Hashulchan<sup>15</sup> adds a reasoning to this figure. A person’s closest relative is surely himself. It is therefore fair that he splits his assets equally, one half to benefit his relatives and one half as a merit for his own soul.

### **C) Priority to one’s heirs**

In this context, it is worth pointing out the ruling of the Remo<sup>16</sup> that in a case where a man left instructions that his estate should be apportioned “In the best possible way,” one should give it to the Torah-mandated

inheritors – there is no better way to distribute one’s estate than that. If one’s children are learning Torah, one could fulfil both criteria, for since the heirs need the money to continue learning Torah, this means that in essence the inheritance that they receive would also provide a merit of charity for the father.

#### **D) Avoidance of favouritism**

Chazal teach us<sup>17</sup> that one should learn from the mistake of Yaakov Ovinu who favoured Yosef over his other sons, which caused jealousy, resulting in them selling him as a slave which eventually caused them all to go into exile in Egypt. The Rambam<sup>18</sup> writes that one should not favour one child during one’s lifetime – the implication being that after one’s demise it would be permitted to leave one child a larger portion of one’s estate than another child. (This leads us into another question to which we shall return later as to how it is possible, and whether, and if so when, it might be desirable to circumvent the laws of inheritance to ensure that the estate goes to someone other than the Torah-mandated heirs?) However, the Tur<sup>19</sup> implies that favouritism is discouraged at all times.

#### **E) Advance preparation**

The Sha’ar Bas Rabbim<sup>20</sup> derives an important lesson with regard to planning one’s affairs in advance from Yaakov Ovinu. He writes that just as Yaakov called in Yosef towards the end of his life and gave express instructions as to what should be done after he dies, so too one should prepare one’s affairs well in advance to avoid uncertainty and squabbling amongst one’s relatives after one dies.

## **F) The Torah laws of succession**

When a man dies and leaves sons as well as daughters, the sons inherit his estate whereas the daughters get nothing.<sup>21</sup> Although reasons have been given for this, ultimately the Torah refers to the laws of succession as *Chukkas Mishpot*<sup>22</sup> – a statute of law. This means that these laws are Divinely ordained and mandatory upon us even if we see no apparent reason for them.

In the event that the man leaves only daughters and no sons, the daughters inherit.<sup>23</sup> Sometimes this will result in only females inheriting despite the fact that there may be male descendants. For example, a man dies, with his son and daughter predeceasing him. If the son left a daughter and the daughter left a son, the female grandchild will inherit everything.<sup>24</sup> This is because we first consider the immediate relatives, in this case the children. In our case the son inherits and not the daughter. Because the son is no longer alive, the estate passes on to his nearest relative i.e. his daughter. Again, this is a result of the Torah's *Chukkas Mishpot* – Divine statute.

Another such law is that a firstborn son inherits from his father (but not from his mother) twice as much as any other son.<sup>25</sup> This is limited, though, to those things that were in the father's possession at the time he died (technically termed *muchzak*), and not to things that subsequently come to the estate, such as unclaimed debts (called *ro'uy*)<sup>26</sup>.

Another rule is that a father inherits his children (in the event that they do not leave children of their own)<sup>27</sup> whereas a mother does not. Furthermore, a man inherits his wife but a wife does not inherit her husband.<sup>28</sup> Nonetheless Chazal instituted various *takanos* (enactments) to ensure that she is financially protected in the event that her husband predeceases her.<sup>29</sup>

#### **G) No obligation to preserve estate for next generation**

Incidentally, there is no obligation to leave anything over for one's heirs.<sup>30</sup> The correct Torah perspective is to live within one's means and distribute charity from what is left. As one approaches the twilight years, however, one should make provisions to ensure that whatever is left is distributed in a satisfactory manner. (It is worth noting that R' Moshe Feinstein<sup>31</sup> rules that it is perfectly in order to take out a life-insurance policy – this is considered as suitable *hishtadlus* to provide for yourself or your descendants in later years.)

#### **H) Necessity to make a secular will**

Nowadays, it is essential to arrange one's will in advance, because secular law has different rules of intestacy, and in the event that no will is made, the law will ensure that the estate is divided up in a very different way from that of the Torah.

However one cannot simply leave a will stating that one would like the estate to be divided up according to the Halachah for a number of reasons. Thus as we shall see there may be very valid reasons for needing to

vary the halachic intestacy provisions (e.g. to protect one's widow or vulnerable daughters or unmarried children, or to give charity).

Secondly, one may end up paying very heavy estate duty and inheritance taxes, which could swallow up much of the estate. And thirdly, this sort of will provision could lead to lack of clarity and consequent dispute, since there are sometimes differences of opinion in Halachah in certain circumstances. The final ruling depends on the nature of the dispute, and may be affected by the location of the possessions under discussion.

Assuming, then that we decide we ought to make a will, there are two questions which now face us. Firstly, how to ensure it is Halachically valid? If it is not, the normal automatic Halachic inheritance occurs, with the estate passing on to the Torah-mandated heirs. In the event that someone uses the secular law to force these heirs to hand over all or part of the estate to anyone else relying on this will they are in fact stealing from the rightful heirs. One would therefore need to ensure that any will complies with the Halachah, and effects a Halachically endorsed transfer of property.

The second question that we encounter is, even assuming that we can find a method to validate the will Halachically, is it at all permitted by doing so to evade the Torah-mandated rules of succession? In other words, even if we can interfere with and change the rules of succession legally, is it acceptable or not to do so?

### **I) The first question – the Halachic validity of an attempt to change the Torah intestacy rules**

One method that works according to the Halachah is the *Matnas Shchiv Mera*.<sup>32</sup> If a person is on his deathbed, Chazal were concerned that if he were not able to easily apportion his estate it might lead to a worsening of his condition thereby hastening his demise. They therefore instituted that such a person can distribute his estate to whomever he wishes merely by oral instruction. There are, however, a number of limitations to this. Most prominent of them is the fact that this only works for someone who is on his deathbed. Thus this is not a viable option for a well person who wishes to plan his inheritance in advance.

To effect a *Matnas Bori* – a gift of a well person, one would need a *kinyan* – an act of acquisition. The problem with this is that this does not work for inheritance, since one cannot perform a *kinyan* that would come into effect only after one's demise – *Ein kinyan le'achar missoh*.<sup>33</sup> Furthermore, *ein odom makneh dovor shelo bo le'olom*<sup>34</sup> – one cannot perform a *kinyan* on something that does not yet exist. If one were to apportion one's estate via a regular *kinyan*, one would only be able to deal with possessions that one owns at the time. Anything subsequently coming into one's possession would not be included.

### **J) Mitzvoh lekayem divrei hamess**

Another method is based on the axiom that there is a *mitzvoh lekayem divrei hamess*<sup>35</sup> – which means to say there is a mitzvah upon us to carry out the instructions of a person who has passed away, with regard to



the distribution of his estate. This mitzvah is even more incumbent on the children of the deceased.<sup>36</sup> There is a matter of dispute amongst the poskim, though, whether one needs to actually hand over the assets to a third party or trustee in order for this to apply, or if it is sufficient to give a clear instruction to someone beforehand.<sup>37</sup> Furthermore, even if done correctly, there is only a mitzvah to carry out the deceased's wishes. Should the heirs decide to go against his wishes, their action would be Halachically valid. (A *matnas shchiv mera*, though, would take effect automatically.)

Another relevant point is that the *mitzvah* may not be binding upon minors or persons under incapacity. Furthermore it is invalidated should the donee predecease the donor. Also, interest or profit accrued to the gift would remain with the heirs, and they would be obligated only to give the exact sum instructed.<sup>38</sup> (Again, *matnas shchiv mera* is different – since the gift transfers automatically upon the death of the donor, all profits subsequently accrued belong to the donee.)

#### **K) Effect (if any) of Dina Demalchusa Dina**

There is a principle that *Dina Demalchusa Dina*<sup>39</sup> – the laws of the land in which one lives are Halachically binding upon us. However, with regard to the rules of inheritance, the overwhelming majority of poskim hold that *Dina Demalchusa Dina* is not applicable. Therefore in a case where for example a man dies and leaves sons and daughters, the estate passes to his sons, whatever the secular law of the land says. However, *Dina Demalchusa Dina* is not completely irrelevant. Under some legal systems, if a man dies without leaving a will, the government will not release the estate

until all the legal heirs give their consent. Since the law recognises daughters as equal inheritors, the estate will not be released to the sons until the daughters sign their consent to waive their rights. Some *poskim* (though not all) maintain that in exchange for this service of signing their consent the daughters can request a share in the estate. The actual amount they may charge will vary according to the circumstances and local custom.<sup>40</sup>

Writing a legally valid will also has some effect due to *Dina Demalchusa Dina*. Rabbi Yaakov Ettlinger<sup>41</sup> holds that if one writes a will, that would create a *mitzvoh lekayem divrei hamess*. R' Moshe Feinstein<sup>42</sup> goes further, ruling that a will actually constitutes a valid *kinyan*. R' Chanoch Padwa<sup>43</sup> rules that in England, where according to the law the estate does not pass automatically to the heirs but passes on to the government who then release it to the heirs, a will that appointed executors has the effect of *Hashlosho*<sup>44</sup> – handing over the estate to trustees, and therefore the *mitzvoh lekayem divrei hamess* would apply. However, this ruling is disputed by several authorities.<sup>45</sup> As such, if one of the Torah-mandated heirs gets hold of the estate, he might claim that he follows those authorities that rule that the will is invalid.<sup>46</sup>

We therefore require a method that will ensure that the deceased's estate will be divided up according to his wishes without any possibility of any of the heirs claiming otherwise.

### **L) Shtar Chatzi Zochor**

The time-honoured method that was used is called the *Shtar Chatzi Zochor*<sup>47</sup>. The way it works is that a man writes a document that obliges him to pay a very large sum of money, usually more than the value of the entire estate, to his daughter, with a condition attached that in the event that his heirs pay the daughter a share of the estate, she releases them from the obligation to pay the debt. It was known as a *Shtar Chatzi Zochor* because the custom was to award the daughter a portion of the estate equivalent to half of that of each of the sons. When the man dies, his sons will have a choice. Either they give their sister/s a half share in the estate and thus be released from the debt that has been charged on the estate, or else they will have to pay off the debt resulting in them being left with nothing.

The document explicitly stated that the debt was only payable one hour before the man dies – this was in order to ensure that the daughter would not claim the debt from her father in his lifetime. Furthermore, it was customary to add a clause that excluded the daughter from any share in the deceased's *seforim* or in any real estate.<sup>48</sup>

### **M) The second question – When is it in order to evade the intestacy provisions**

Although the above methods work and are effective Halachically, is it permitted to use them and in effect create a redistribution of one's estate in a different manner to that dictated by the Torah? In fact, the Gemora<sup>49</sup> strongly discourages this practice. However, there are exceptions.

Certainly in one's lifetime one is permitted to spend or give away one's assets at will<sup>50</sup> – the problem only arises when one wants to effect changes to one's inheritance. Nonetheless, to avoid family strife one is permitted to arrange that all get an equal share.<sup>51</sup> Furthermore, in order to ensure that one's wife is adequately taken care of, one may arrange that she get a share of one's estate. Similarly with regard to one's daughters, especially unmarried ones who may need to enhance their marriage prospects.<sup>52</sup> Another exception is for charity, as we discussed above<sup>53</sup> in connection with the case of Mar Ukva. Perhaps it would also be permissible to write a will if the purpose is to avoid inheritance tax, seeing that if one does not do so the money will anyway be taken by the government.<sup>54</sup>

#### **N) Godol Hasholom**

Finally, it is worth noting that *Godol Hasholom* – wherever possible one should avoid strife and *machlokes*. It is incumbent upon the inheritors to compromise on their rights and ensure that all the children are satisfied with their portion of the estate, in order that there should be peace and harmony in the family.<sup>55</sup> This will surely stand as a source of merit for the deceased parent.

<sup>1</sup> e.g. Devorim 32:15, *Vayishman Yeshurun* etc., *ibid* 28:47 *Tachas asher lo avadeto es Hashem Elokecho besimcho uvetuv leivov merov kol*

<sup>2</sup> Nedorim 81a

<sup>3</sup> Ovos 2:8

<sup>4</sup> cf. Eruvin 86a *Rebbe mechabed ashirim*, Brochos 54a *Ve'ohavto es Hashem... Bechol me'odecho* – with all your money

<sup>5</sup> See Bovo Kammo 9b

<sup>6</sup> Ovos 4:1 *Eizehu oshir? Hasomeiach bechelko*

<sup>7</sup> Bereishis 26:12-14

- <sup>8</sup> Kesubos 50a *Takonas Usha – Hamevazvez al yevazvez yoser michomesh*
- <sup>9</sup> 656:1 d.h. *Afilu*
- <sup>10</sup> Kesubos 67b
- <sup>11</sup> Birkei Yosef Y.D. 249 s15
- <sup>12</sup> Bach, Tur Y.D. 249 d.h. *Shiur*
- <sup>13</sup> Beis Yosef and Remo *ibid*
- <sup>14</sup> See Chochmas Odom k. 144:12
- <sup>15</sup> Y.D. 249:1
- <sup>16</sup> Choshen Mishpot 282, quoting the Mordechai
- <sup>17</sup> Shabbos 10b and Megilloh 16b
- <sup>18</sup> Nachalos 6:13
- <sup>19</sup> Choshen Mishpot 282
- <sup>20</sup> Bereishis 47:28
- <sup>21</sup> Bamidbor 27:8, Bovo Basro 110a, et v. Torah Temimoh n 15
- <sup>22</sup> *ibid* 27:11
- <sup>23</sup> *ibid* 27:8
- <sup>24</sup> Bovo Basro 115a
- <sup>25</sup> Devorim 21:17
- <sup>26</sup> Bechoros 52a
- <sup>27</sup> Bovo Basro 109a and 115a
- <sup>28</sup> Bovo Basro 111b derived from Bamidbor 27:11
- <sup>29</sup> See Kesubos chapter 4
- <sup>30</sup> E.g. Gittin 46a Resh Lokish – *ve'ozvu le'acherim cheilom* and Eruvin 54a *Shineno chatof ve'echol* etc. and Rav *Im yesh loch heitiv loch* and Medrash Kohelles 2:22 R' Meir *Lo ro'isi tzadik ne'ezov*. See also Kesubos 67b the episode of Mar Ukva *supra*.
- <sup>31</sup> Igros Moshe O. Ch. II:111 and IV:48 who actively encourages it and see R' Ovadiah Yosef in Yechaveh Da'as III:85 who permits it (without actively encouraging it and subject to caveats regarding autopsies and interest sometimes contained in Israeli policies)
- <sup>32</sup> Bovo Basro 156b
- <sup>33</sup> *Ibid* 152a *ein shtar le'achar missoh*
- <sup>34</sup> Bovo Metzia 33b et al
- <sup>35</sup> Gittin 14b, Kesubos 70a etc.
- <sup>36</sup> Teshuvos R' Akiva Eiger 68
- <sup>37</sup> Choshen Mishpot 250:23
- <sup>38</sup> Cheshev Ho'ephod II 138
- <sup>39</sup> Gittin 10b, Bovo Kamo 113a et al
- <sup>40</sup> see Pischei Choshen hil. Yerushoh 1:4 n.5 who deals with this subject at length
- <sup>41</sup> Tshuvos Binyan Zion Hachadashos ch. 24 and see Achiezer 3:34 and Kovetz Igros 25
- <sup>42</sup> Igros Moshe E.H. I: 104 – but see Lev Aryeh (by Dayan Grossnass) II:59 who questions this view
- <sup>43</sup> Cheshev Ho'ephod II:106
- <sup>44</sup> See Tosefos Kesubos 70a d.h. *ho* and Gittin 13a d.h. *veho*
- <sup>45</sup> See Lev Aryeh loc. cit., Minchas Yitzchok VII:132, Jewish Law of Inheritance by Dayan Grunfeld chs. 4 and 5 etc.

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<sup>46</sup> Following the principle of *kim li*, where a *muchzak* can retain possession following even a minority opinion

<sup>47</sup> Remo Choshen Mishpot 281:7

<sup>48</sup> Chasam Sofer Tshuvos Even Ho'ezer 147

<sup>49</sup> Kesubos 53a, Bava Basra 133b Shmuel told R' Yehudah, "Don't be a party to the disinheritance of the lawful heir, even from a bad one to a good one and certainly not from a son to a daughter."

<sup>50</sup> See section G) above

<sup>51</sup> See Remo Choshen Mishpot 257:7

<sup>52</sup> See Kesubos 53a

<sup>53</sup> above section B) from Kesubos 67b

<sup>54</sup> For further qualifications, see Ketzos Hachoshen 282:2 in name of Tashbatz, and Igros Moshe Choshen Mishpot II:50 and Cheshev Ho'ephod II:107

<sup>55</sup> For a practical example see Cheshev Ho'ephod II:135