Basic Principles of Estate Planning within the Context of Jewish Law

By K. Eli Akhavan

In *Shariah-Compliant Wills—An Overview*, Prob. & Prop. 58, Jan./Feb. 2011, Omar T. Mohammedi highlighted the essential issues of which practitioners need to be aware in drafting wills intended to conform with Islamic law. Jewish law, the *halakha,* also places certain limitations on an individual's testamentary freedom. Practitioners with clients who wish to synthesize their Jewish religious beliefs with testamentary flexibility face unique and complex challenges. The following article familiarizes attorneys with the basic principles of Jewish inheritance law and provides them with an overview of the techniques that can be employed to resolve potential disparities among three competing influences: (1) religious law, (2) testator intent, and (3) secular law.

Basic Structure of Jewish Law

The *halakha* is derived from two sources: the Old Testament and the Oral Law. The Oral Law was originally transmitted verbally from generation to generation but has been canonized in the *mishna* and the *gemara* (popularly known as the Talmud). The *mishna* delineates general principles underlying the laws of the Old Testament, while the *gemara* provides the

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details and analytical framework of those general principles through debate and discussion. Jewish rabbinic scholars have provided the codification of these rules over the course of many centuries. The Jewish legal system provides the flexibility for the modern-day application of *halakha*, and estate planning in the current legal and tax climate is no exception.

Laws and Regulations Governing Inheritance

The rules governing Jewish inheritance laws are found in the Book of Numbers 27:8–11 and the Book of Deuteronomy 21:17. Under *halakha,* a decedent's property transfers automatically to certain beneficiaries, even without a will. In fact, the *halakha* does not allow for the transfer of property to persons other than those enumerated by Jewish law. In other words, a will that designates beneficiaries other than those allowed by Jewish law is invalid for the purposes of *halakha.*

Beneficiaries inherit under the *halakha* based on a system of different levels of priority. A person of a first order of priority who survives the decedent inherits the decedent's entire estate. If no member of the first order of priority is alive at the time of the decedent's death, then the lineal descendants of that person inherit that person's share on a per stirpes basis. If neither the first order of priority person nor his descendants survive the decedent, then the estate passes on to the next level of priority. The order is as follows:

1. Son (the eldest son receives a double portion, under a version of primogeniture inheritance),
2. Daughter,
3. Decedent's father,
4. Paternal brothers,
5. Paternal sisters,
6. Paternal grandfather,
7. Paternal uncles,
8. Paternal aunts, and
9. Paternal great-grandfather.

This order of priority continues for each previous generation.

A decedent's wife does not have a share of inheritance in her husband's estate. Instead, an individual's wife is entitled (1) to receive the pre-fixed amount as provided for in her antenuptial agreement (the *ketubah*) or (2) to be supported from the decedent's estate until she remarries. Furthermore, although daughters are not beneficiaries if the decedent is survived by sons, daughters are entitled to payments for their wedding expenses, and the estate is obligated to pay minor daughters certain levels of support. If someone who is not entitled under Jewish law takes possession of the decedent's property (for example, through estate litigation in surrogate's court), the *halakha* deems such a person as *stealing* from the estate.

A testator who wishes to bequeath his estate while not compromising his observance of *halakha* may confront certain hurdles.

The *halakha* has fairly complex rules for property owned by a woman before and after marriage, which are beyond the scope of this article. Accordingly, unless otherwise noted, the following discussion assumes that the testator is the husband and not the wife.

Potential Issues in Complying with *Halakha*

A testator who wishes to bequeath his estate while not compromising his observance of *halakha* may confront certain hurdles. For example, if a married individual has a wife, a son, and a daughter, and he bequeaths his entire estate to his wife or to his daughter, he would be violating *halakha.* Alternatively, a married individual with a son and daughter may not want to bequeath his entire estate to his son without providing for his daughter and also may not want his wife to be solely reliant on the antenuptial *ketubah* agreement or payments from his estate. Even if an individual dies intestate, the local jurisdiction will in all likelihood distribute his assets in a manner not consistent with *halakha*, and this may not be in conformity with the decedent's intent.

Estate Planning Techniques in Compliance with *Halakha*

The following are four techniques that allow a testator to comply with *halakha* and yet maintain some level of testamentary flexibility: (1) inter vivos gifting, (2) transfers to revocable trusts, (3) the doctrine of *dina d'malchuta dina*, and (4) estate indebtedness through a promissory note. See generally Benjamin C. Wolf, *Resolving the Conflict Between Jewish and Secular Law*, 37 Hofstra L. Rev. 1171 (2009).

Inter Vivos Gifting

Generally, the *halakha* allows an individual to make inter vivos gratuitous transfers as he pleases. Based on this principle, one recommended technique is to execute a deed of gift through which an individual transfers his property as he deems fit. Isador Grunfeld, *The Jewish Law of Inheritance: Problems & Solutions in Making a Jewish Will* 102–03 (1987). The deed of gift would contain a provision that the deed is to be effective one hour before the donor's death and that the deed is revocable at any time.

The primary benefit of this method is that it allows a testator to dispose of his assets as he wishes while being in full compliance with *halakha.* According to *halakha,* however, an individual cannot make a gift of property that he does not own. As such, if the testator acquires any property after executing a gift document, another deed of gift must be drawn to cover the new property. This can impose an excessive burden on the testator. Furthermore, an individual may not want to effectively transfer his entire estate during his lifetime because of tax planning concerns.

Transfer to a Revocable Trust

Another method suggested is for the testator to create a revocable trust whereby he would be the trustee and beneficiary while he is alive, and his wife and children would be the beneficiaries when he dies. Jonathan Porat, *Kosher Revocable Trusts: The Jerusalem Trust Form*, at www. jlaw.com/Articles/revocable.html. Because the testator does not retain title to the property, this technique is effectively the same as inter vivos gifting. The *halakha* views any transfer of property through a revocable

trust as occurring outside the jurisdiction of the default inheritance laws.

The revocable trust technique is most effective when all of the decedent's property has been transferred to the trust. Any property remaining outside the trust would be subject to the inheritance *halakha.* As such, an individual must continuously transfer all of his assets to the revocable trust for the technique to work, and for a variety of reasons this may be impracticable.

Doctrine of *Dina d'Malchuta Dina*

The *halakha* recognizes the principle of *dina d'malchuta dina*, which literally means the "law of the land is the law." The doctrine generally has been interpreted to mean that the secular law governing an individual's jurisdiction also governs that individual's civil and monetary activities for the purposes of *halakha.* For example, according to many rabbinic scholars, compliance with the local jurisdiction's tax laws is mandatory under *halakha.* One of the foremost and most-renowned authorities on the application of *halakha* to modern times was Rabbi Moshe Feinstein. Rabbi Feinstein authored a response in which he opined that the doctrine of *dina d'malchuta dina* operates to bind a testator's secular will on his heir for purposes of *halakha.* See Rabbi Moshe Feinstein, Responsa, *Iggros Moshe, Even Ha'Ezer* § 104. According to Rabbi Feinstein's opinion, there would be no need for a testator to employ any techniques or methods other than drawing up and executing a will.

Although reliance on Rabbi Feinstein's opinion would be the simplest method to resolve the conflict between *halakha* and secular law, this method is not the recommended technique to adopt for two reasons. First, the majority of rabbinic scholars disagree with Rabbi Feinstein and maintain that the secular law does not trump the inheritance laws of *halakha.* Second, even Rabbi Feinstein himself maintained that his opinion should only be applied ex post facto, when someone already has passed away with a will. Ex ante, however, an individual optimally should avoid relying on the doctrine of *dina d'malchuta dina.*

Estate Indebtedness

A highly recommended technique that can be used to help a *halakha*-observant client is the estate indebtedness method. See Rabbi Feivel Cohen, Treatise, *Kuntrus Midor L'Dor* (1987); and Wolf, *Resolving the Conflict Between Jewish and Secular Law*, supra. Under this method, an individual executes a standard will in combination with a promissory note to an individual who would not be an heir under *halakha.* The note would provide for an obligation far in excess of the projected value of the estate and would be payable within a moment before the testator's death.

This technique's effectiveness arises from the fact that the note would confer to the beneficiaries under *halakha* the option of either paying the debt from the estate or consenting to the terms of the testator's will. Similar to an *in terrorem* clause, this "option" would compel the beneficiaries under *halakha* to agree to the distribution scheme under the will because otherwise they would receive nothing from the estate because of the value of the debt obligation.

Because this technique incentivizes the beneficiaries under *halakha* to consent to the inheritance scheme of the secular will, the beneficiaries under the secular will are not considered to have stolen from the beneficiaries under *halakha.* The *halakha* does not recognize "theft" when there is consent.

The estate indebtedness method avoids the major practical drawback of both the revocable trust and gifting methods because there is no requirement to continuously fund the trust or execute deeds of gift for property acquired after such transfer or execution. This method also can be especially attractive to most estate planning practitioners because it operates in tandem with a standard will drawn by U.S. attorneys, and the method can be combined seamlessly with other components of the client's general estate planning.

Mechanics of Executing a Debt on the Estate

The estate indebtedness technique is commenced by the testator and his attorney drawing up a debt instrument with the names of the obligor and the obligee in addition to the amount of the debt. It should be noted that *halakha* generally does not allow for the imposition of interest in this context and therefore there cannot be any stated interest. In addition, the *halakha* requires that the testator perform a symbolic physical act of acquisition to demonstrate his pledge to create the note of indebtedness. This act is called the *kinyan sudar* and generally involves (1) the testator's verbal declaration of accepting a debt on himself, (2) the receipt by the testator of an object, such as a pen or handkerchief, from a third party, and (3) the raising of the object to the height of approximately one foot. See Cohen, *Kuntrus Midor L'Dor*, at 18. The testator then signs the debt instrument, encloses it with his will, and entrusts the will with his attorney or agent.

Potential Issues with the Estate Indebtedness Method

The Surviving Husband

The *halakha* provides that if a husband survives his wife, he has first order of priority in inheriting her estate. Accordingly, any indebtedness on her estate would be subordinate to the husband's inheritance claim. As a result, the efficacy of the wife's estate indebtedness as a technique to avoid *halakha* violations is substantially minimized if her husband survives her. One way to resolve this potential problem is for the husband to execute a second note of indebtedness in which he would assume a debt in favor of his and his wife's heirs, which would be payable only on his wife's death and conditioned on his own acceptance of the estate distribution scheme delineated in the wife's will.

Obligations Under *Halakha* That Exceed the Estate's Value

The estate indebtedness method may not allow full compliance with an individual's religious obligations in certain situations. Under the *halakha,* when a wife survives her husband, his estate must cover either the wife's (1) food, shelter, clothing, living, and medical expenses until she remarries or (2) the value of her antenuptial agreement. These religious obligatory payments may exceed the amount bequeathed by the testator to his wife in his will (assuming that he did not leave his entire estate to his wife). The same issue presents itself when a decedent's minor children survive him. *Halakha* requires that the minor daughters'

food, shelter, clothing, medical care, and cost of living expenses be covered by the estate. This obligation may exceed the daughters' share in the estate as provided by the secular will.

Because these issues are religious in nature and can require creative, outside-the-box thinking to help avoid intra-family litigation and dispute, one noted rabbinic authority on Jewish inheritance laws has suggested that, in addition to executing the will and the promissory note, the testator also should execute a letter instructing his beneficiaries and descendants to consult appropriate rabbinic authorities about how to proceed in such situations to comply with *halakha.*

Potential Income and Gift Tax Consequences

Some practitioners have expressed concern that adverse tax consequences can arise from the estate indebtedness method. See, e.g., Aryeh Weil & Martin Shenkman, *Wills Halacha and Inheritance*, in Beth Din of America Halachic Will Materials 6 (2008), at www.bethdin.org. In particular, there are four federal income and gift tax concerns:

1. *Cancellation of Indebtedness.* The debt forgiven by the beneficiaries may give rise to cancellation of indebtedness income to the estate.
2. *Imputed Interest.* Because no interest rate is stated in the promissory note, there may be imputed interest implicating IRC § 7872 and causing tax liability to the beneficiaries.
3. *Gross Income.* Issuing a note in favor of an heir could be includable as gross income for the heir.
4. *Gift Tax.* If the note is not gross income to the heir, the note could be deemed a gift to the heir resulting in potential gift tax liability for the testator (although valuing such a gift may prove somewhat difficult, if not unprecedented).

The key issue is whether the Internal Revenue Service would consider the promissory note as valid debt for federal income and gift tax purposes. See Wolf, *Resolving the Conflict Between Jewish and Secular Law*, supra. Although there is no authoritative guidance on the matter, it would appear that the promissory note would not be considered debt because in most jurisdictions, consideration is required for the debt to be enforceable, and it is highly unlikely that a court would rule that there was consideration in this context.

Conclusion

Although this article does not serve as a substitute for consulting with a competent rabbinic authority, it highlights the issues and techniques of which practitioners should be aware when drafting wills for clients wishing to observe the *halakha.*

It should be noted that many sophisticated estate and asset protection plans involve techniques such as grantor retained annuity trusts, qualified personal residence trusts, family limited partnerships, and intra-family loans, all of which frequently require interest to be paid. Interest is generally forbidden to be collected or paid under the *halakha.* ■

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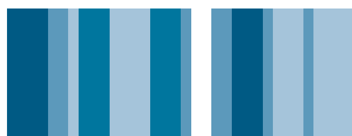

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