

NOTE

RESOLVING THE CONFLICT BETWEEN JEWISH AND SECULAR ESTATE LAW

I. INTRODUCTION

Fred and Judith are an observant¹ Jewish couple. They have two children, David and Esther. The majority of their million dollars in assets, which comprise their life savings, are in Fred's name, as is the interest they will use to support themselves during their retirement. Fred and Judith drafted mirror wills, each one giving their entire estate to the other, or, if he or she should die first, to their children David and Esther, in equal shares. Recently, Fred learned that by bequeathing the entirety of his estate to his wife, or to both Esther and David equally, he may be transgressing certain Jewish civil laws.²

The purpose of this Note is to recommend a solution to the conflict that observant Jewish clients face in estate planning between their adherence to Jewish inheritance law and their desire to create an estate plan that is both effective and practical according to state law.

Many scholars have written about the potential conflicts between Jewish law and an observant Jew's role as a lawyer in a number of different contexts, primarily focusing on how the lawyer's role can be reconciled with Jewish law.³ Most articles have only addressed these issues from the lawyer's perspective.⁴ They have primarily discussed how observant Jewish lawyers may engage in the practice of law without violating their own religious commitments. But few have addressed how

1. Throughout this Note, I have chosen to use the term "observant," as opposed to "orthodox," in order to broaden this Note's audience. Some Jews may consider themselves "observant" of Jewish law, but not orthodox. For instance, many reform and conservative Jews may be observant of many of the Jewish laws, including those associated with inheritance. Also, many members of the Chabad movement do not consider themselves "orthodox." KIDMA—The Southwest Community, <http://www.kidma.org/2007/03/what-modern-orthodoxy-means-to-me.html> (Mar. 16, 2007, 10:33 EST). This Note, therefore, is intended to be relevant to the broader population of those who may identify with the more general term, "observant."

2. See *infra* text accompanying notes 37-39.

3. See MICHAEL BROYDE, *THE PURSUIT OF JUSTICE AND JEWISH LAW*, at xiii-xiv (2d ed., Yashar Books 2007) (1996) (noting a number of areas of Jewish law that observant Jewish attorneys must consider in various areas of legal practice); Amy Porter, *Representing the Reprehensible and Identity Conflicts in Legal Representation*, 14 TEMP. POL. & CIV. RTS. L. REV. 143, 155-61 (2004) (discussing ethical dilemmas that attorneys of various religions face in the field of criminal law). See generally Steven H. Resnicoff, *A Jewish Look at Lawyering Ethics: A Preliminary Essay*, 15 TOURO L. REV. 73 (1998) (analyzing ethical conflicts that observant Jewish attorneys face in a number of contexts).

4. See, e.g., BROYDE, *supra* note 3, at xiii.

an attorney can assist observant Jewish clients in achieving their legal goals without transgressing their religious obligations.

Due to the localized nature of estate law, it was necessary to pick a jurisdiction for purposes of this Note. I have chosen to use New York State law as the pertinent jurisdiction because it has the highest Jewish population in the United States.⁵ That said, the purpose of the Note is to recommend a solution to the apparent conflict between secular and Jewish law in estate planning anywhere in the United States. Therefore, it is this author's hope that readers will test these proposals against their own state's laws so that they may apply the solutions offered in their own legal practice.

For purposes of this Note, I will refer to heirs who inherit under Jewish law as "*halachic* heirs" and those who would not inherit under Jewish law as "non-*halachic* heirs." Additionally, I will often refer to estate planning clients using masculine pronouns because, as the reader will discover in the following pages, the major challenge for an observant Jewish individual exists for a man who is trying to ensure that his wife and daughters are adequately provided for after his passing.

Part II of this Note will start by explaining the basic structure of Jewish inheritance law. It will explain the automatic nature of succession under Jewish law and the order of priority in which heirs inherit a decedent's estate. It will focus, in particular, on the fact that under Jewish law, no last will and testament can alter this succession plan.⁶ It will then proceed to outline the probate and intestate schemes under New York State law. It will then explain how, under Jewish law, any posthumous gift given through a will is wholly invalid.⁷ Because all of a decedent's property automatically transfers to his *halachic* heirs *at death*, any beneficiaries who take under any other distribution scheme, such as under a will, are effectively stealing from the *halachic* heirs.

Part III will outline four methods of allowing individuals to make an estate plan that comports with their goals for their family while avoiding any violation of Jewish law. It will explain each of the four methods, each approach's relative advantages and disadvantages and the reason or reasons why each approach may not be an ideal solution.

5. Ira M. Sheskin & Arnold Dashefsky, *Jewish Population of the United States, 2007*, in 107 AMERICAN JEWISH YEARBOOK 133, 159 (David Singer and Lawrence Grossman eds., 2007), available at http://www.ajcarchives.org/AJC_DATA/Files/AJYB708.CV.pdf.

6. See *infra* text accompanying notes 37-39.

7. See *infra* text accompanying notes 37-39.

The first method offered is the Jewish law doctrine of upholding the last wishes of the deceased.⁸ Under this approach, the decedent's last will and testament is viewed as evidence of his wishes as to the distribution of his property after death.⁹ The original context in which this principle was used will be analyzed and this method will be shown to be inapplicable as a solution to the conflict between Jewish and secular inheritance law.

The second method considered is the Jewish law principle known as "the law of the land is the law."¹⁰ This principle incorporates certain provisions of secular law into Jewish law. If this concept were applicable to inheritance law, it would obviate the conflict between Jewish law and modern estate planning goals under secular law by creating a unity between the two systems. Although some major authorities in Jewish law do use this method to address the problem, it is not recognized as a valid solution by the vast majority of Jewish law authorities.¹¹

The third method this Note considers is the establishment of a revocable trust.¹² Under Jewish law, the property that one holds title to at death transfers automatically to his *halachic* heirs.¹³ But any non-probate property, such as property held in trust, would not be subject to automatic transfer because the decedent does not hold title to that property at his death. Even under Jewish law, property would be distributed according to the terms of the trust instrument under which it is held. This method suffers from some practical challenges, however, that may make it less than ideal as an estate planning device for many people.

The fourth method involves the use of revocable, contingent inter vivos gifts. These types of gifts effectuate the transfer of all of a decedent's property shortly *before* death¹⁴ in order to preempt the automatic transfer of property at death to the decedent's *halachic* heirs.¹⁵ This Note will explain this method and the reasoning of those authorities who advocate it. This approach has certain practical difficulties in its

8. 3 CHAIM JACHTER, GRAY MATTER: EXPLORING CONTEMPORARY HALACHIC CHALLENGES 281 (2008).

9. *Id.* at 282.

10. I. GRUNFELD, THE JEWISH LAW OF INHERITANCE: PROBLEMS & SOLUTIONS IN MAKING A JEWISH WILL 17 (1987).

11. *See infra* text accompanying notes 76-78.

12. Jonathan Porat, *Kosher Revocable Trusts: The Jerusalem Trust Form*, JEWISH LAW, 1998, <http://www.jlaw.com/Articles/revocable.html>.

13. Michael J. Broyde & Steven H. Resnicoff, *Jewish Law and Modern Business Structures: The Corporate Paradigm*, 43 WAYNE L. REV. 1685, 1772 (1997).

14. GRUNFELD, *supra* note 10, at 102-05.

15. 7 EMANUEL QUINT, A RESTATEMENT OF RABBINIC CIVIL LAW 164 (1996).

application and certain legal challenges, however, that make it an unreliable avenue to pursue.

Part IV will explain the note of indebtedness method¹⁶ that this author believes to be the most practical and legally enforceable method of resolving the conflict for the majority of observant Jewish clients. This method consists of a testator writing a last will and testament and then executing a note of indebtedness to one or more of his non-*halachic* heirs which will become due shortly before his death, but will not be payable if the *halachic* heirs willingly consent to the testator's distribution plan as described in his last will and testament. If, however, the *halachic* heirs challenge the will's distribution in a Jewish tribunal ("beis din"), the note would be due and owing against the estate and would effectively wipe out the portion they would have received under the will to satisfy the debt to the non-*halachic* heirs.¹⁷

Some situations exist wherein the note of indebtedness method may still contravene Jewish law.¹⁸ This Note will explain when these issues are raised, and solutions to these challenges will be considered in light of their practicality and legal enforceability under both Jewish and secular law.

Part V will consider the ethical considerations inherent in any approach that circumvents Jewish inheritance law.¹⁹ After considering sources in the Jewish legal tradition which argue against bypassing Jewish law's order of succession, this section will demonstrate how these ethical principles are not applicable to the majority of modern estate planning situations and how failing to use one of these methods may, in fact, lead to additional violations of Jewish law and rabbinic public policy.

16. *Id.* at 245. Rabbi Quint does not cite specific sources for this approach. Samuel J. Levine, *A Restatement of Rabbinic Civil Law, Volumes VII and VIII*, 17 J.L. & RELIGION 251, 253-54 (2002) (book review). This approach is also advocated by Rabbi Feivel Cohen. FEIVEL COHEN, KUNTRUS MIDOR L'DOR 5 (1987).

17. 7 QUINT, *supra* note 15, at 243-44.

18. COHEN, *supra* note 16, at 6-7.

19. See BABYLONIAN TALMUD, *Kesubos* 53a (discouraging inter vivos gifts that effectively disinherit one *halachic* heir over another); BABYLONIAN TALMUD, *Bava Basra* 133b (stating that although inter vivos gifts to non-*halachic* heirs are effective to disinherit *halachic* heirs, this practice is frowned upon by the sages).

II. THE CONFLICT

A. *The Scheme Under Jewish Law*

Jewish law is a system that encompasses both the sacred and the mundane aspects of an observant Jew's life. Jewish religious law determines not only how one should keep the Sabbath and pray, but it also dictates how its adherents conduct themselves in the areas of employment law, contracts, business ethics, criminal law, and torts.²⁰ They do not recognize any distinction between their religious and secular obligations.²¹ Therefore, a clear understanding of Jewish civil law is very important to observant Jews because they strive to observe that aspect of Jewish law no less than any of their other, ostensibly more "religious," obligations.

The same religious duty that exists with regard to Jewish civil law in general exists for the Jewish law of inheritance. The following paragraphs comprise a brief summary of Jewish inheritance law.

Under Jewish law, a decedent's property automatically transfers²² to pre-designated beneficiaries at death.²³ The principles governing the transfer and the order in which *halachic* heirs take are as follows:

Halachic heirs take their share of a decedent's estate according to an order of priority.²⁴ If someone of a higher priority level survives the decedent, then that person takes the entire estate.²⁵ If no member of a higher priority level survives the testator, then the lineal descendants of that person take his share, per stirpes.²⁶ If no one on the higher priority level, or his or her lineal descendants, survive the decedent, then the estate goes to the individual or individuals at the next lower priority

20. See Judge Martin E. Ritholtz, Remarks at the Touro College Jacob D. Fuchsberg Law Center Symposium: The Enforcement of a Jewish Marriage Contract in a Civil Court: Is Jewish Law a Religious Law? (Nov. 23, 1998), in *JEWISH L. REP.*, Apr. 2000, at 15-16, http://www.tourolaw.edu/academic_programs/institutes/pubs/jewish%20law%20report-april%202000.pdf.

21. Asher Maoz, *Can Judaism Serve as a Source of Human Rights?*, 64 *HEIDELBERG J. INT'L L.* 677, 680 (2004).

22. Broyde & Resnicoff, *supra* note 13, at 1772.

23. For the rules defining the order of priority of heirship, see *Numbers* 27:8-11. If a decedent has surviving heirs in the level of priority, they or (if they predecease the decedent) their offspring, would inherit the entire estate. If not, then heirs in the second order of priority would inherit the estate, and so on at each level of priority. *Id.*; see also *Deuteronomy* 21:17 (establishing the rule that the firstborn son gets a double portion relative to all sons that are born after him).

24. See generally SHULCHAN ARUCH, *Choshen Mishpat* 276 (setting forth the entire *halachic* inheritance scheme).

25. SHULCHAN ARUCH, *Choshen Mishpat* 276:1.

26. *Id.*

level.²⁷ At each level of succession, women only inherit in the absence of men.²⁸ The order of priority is as follows:²⁹

- sons (the oldest son receiving a double portion);
- daughters;
- father of the decedent;
- paternal brothers;
- paternal sisters;
- paternal grandfather;
- paternal uncles;
- paternal aunts;
- paternal great-grandfather;

this pattern continues back through the generations, *ad infinitum*.³⁰

Under this scheme, therefore, a wife does not inherit a share of her husband's estate. More specifically, a wife is entitled to choose between two options. She is entitled to an amount equal to the value of her prenuptial agreement, known as a *ketubah*, from the estate.³¹ Alternatively, she may choose to be supported from the estate until she remarries.³²

Under the *halachic* system, if there are sons, daughters do not inherit,³³ but they are entitled to have their wedding expenses paid from their father's estate under certain conditions.³⁴ Minor daughters are

27. SHULCHAN ARUCH, *Choshen Mishpat* 276:1-2.

28. SHULCHAN ARUCH, *Choshen Mishpat* 276:2.

29. SHULCHAN ARUCH, *Choshen Mishpat* 276:1.

30. *Id.* Although many people may have significant questions about the equity of these rules, a full analysis of the policies and history underlying this system is beyond the scope of this Note. It suffices to say that reasons are provided by Jewish law to explain the fact that daughters do not inherit where there are sons and why a wife does not take a regular share of her husband's estate. For one explanation, see GRUNFELD, *supra* note 10, at 99.

31. SHULCHAN ARUCH, *Even Ha'ezer* 91:1. The *ketubah* is a prenuptial agreement signed before Jewish couples marry. It is a contract that obligates the husband to pay the wife a sum of money in the event that they are divorced—somewhat similar to modern day maintenance payments. Michael Broyde & Jonathan Reiss, *The Value and Significance of the Ketubah*, 47 J. HALACHA & CONTEMP. SOC'Y 101, 101 (2004). In the event he passes away while they are married, the *Ketubah* is a lien against the estate for the purpose of providing support for the widow. *Id.* Rabbis Broyde and Reiss suggest that the value of the *ketubah* in U.S. dollars may be between approximately \$8000 and \$167,000, according to the holdings of various rabbinic responsa. *Id.* at 107 & n.24, 108. According to one of the principal *halachic* authorities on Jewish law at the Beth Din of America, the current value of the *ketubah* is approximately \$33,000. Mordechai Willig, *The Halachah of Wills*, in BETH DIN OF AMERICA, *HALACHIC WILL MATERIALS* 2 (2008), http://www.bethdin.org/docs/PDF14-Halachic_Will_Materials.pdf.

32. See THE CODE OF MAIMONIDES, BOOK FOUR: THE BOOK OF WOMEN 18:1-20:14, at 114-30 (Isaac Klein trans., 1972) (stating that a widow is entitled to maintenance from the estate property, but if she chooses to claim the value of the *ketubah* in a *beis din*, she no longer has any claim to maintenance); Mary F. Radford, *The Inheritance Rights of Women Under Jewish and Islamic Law*, 23 B.C. INT'L & COMP. L. REV. 135, 171-72 (2000).

33. SHULCHAN ARUCH, *Choshen Mishpat* 276:1.

34. COHEN, *supra* note 16, at 24 (citing SHULCHAN ARUCH, *Even Ha'Ezer* 113).

entitled to financial support and medical care from estate assets.³⁵ The amount daughters are entitled to receive for these expenses is calculated based on their father's financial means and how much he paid for the weddings of older sisters.³⁶

Any attempt to posthumously transfer property by means of a will, or by intestate succession, to heirs other than those designated by Jewish law, is invalid³⁷ and a violation of Jewish law³⁸ due to the reasons noted by Professors Broyde and Resnicoff:

[T]here is no decedent's estate from which to transfer funds. As a matter of Jewish law, all of the decedent's possessions are automatically and immediately transferred to the Jewish law heirs upon the decedent's death. Consequently, for the beneficiaries under the will to take possession of the decedent's property would, under Jewish law, be tantamount to taking property that was owned by the Jewish law heirs and would be prohibited as a form of theft.³⁹

If one applies these rules to Fred and Judith's circumstances, the result is that if Fred predeceases Judith, only their son David would inherit, and neither Judith nor their daughter Esther would take a share in Fred's estate according to Jewish law. Although it is true that Judith would be cared for as long as necessary from estate funds until she remarries, Fred is likely to seek an estate planning method that would allow him to directly bequeath Judith all of his assets.

Furthermore, after Fred and Judith both pass away, David would inherit the entire estate, and Esther would inherit nothing. Although it is true that if Esther were a minor, she would be supported from their estate, Fred and Judith would like to know if there is a way to bequeath their assets to David and Esther equally.

B. The Scheme Under Secular Law

Under New York State law, if a decedent leaves a last will and testament, the court will probate the will and the executor then distributes the assets of the testator to the beneficiaries named in the will.⁴⁰ If someone dies without a will, his assets are disposed of

35. *Id.* at 23-24.

36. Yirmiyohu Kaganoff, *Is a Will the Halachic Way?*, BEIT-EL YESHIVA, Nov. 25, 2008, <http://www.yeshiva.org.il/midrash/shiur.asp?id=9233>.

37. SHULCHAN ARUCH, *Choshen Mispat* 281:1; 8 YAAKOV YESHAYA BLAU, PISCHEI CHOSHEN 134 (1996).

38. 7 QUINT, *supra* note 15, at 240.

39. Broyde & Resnicoff, *supra* note 13, at 1773.

40. N.Y. EST. POWERS & TRUSTS LAW § 3-1.1 (McKinney 1998).

according to New York's rules of intestate succession.⁴¹ Just as under Jewish law, there is an order of priority among heirs in an intestate succession scenario. The following is the order of intestate succession:⁴²

If the decedent is survived by:

A spouse and children, the spouse receives \$50,000 plus half of the remainder of the estate. The children share the remainder equally by representation;⁴³

A spouse and no children, the spouse receives the entire estate;⁴⁴

Children, but no spouse, the entire estate goes to the children, by representation;⁴⁵

Parents, but no spouse or children, the whole estate goes to the surviving parents;⁴⁶

Siblings (full or half), but no spouse, children or parents, the whole estate goes to those surviving siblings;⁴⁷

Grandparents or their lineal descendants, but no spouse, children, parents, or siblings, then one half of the estate to any surviving grandparents and the remainder to the grandparents' lineal descendants by representation, but stopping at the first cousins of the decedent;⁴⁸

Great-grandchildren of the decedent's grandparents, then half of the estate to the paternal great-grandchildren and half to the maternal great-grandchildren, per capita;⁴⁹

If the decedent is not survived by any of the aforementioned heirs, the estate escheats to New York State.⁵⁰

41. *Id.* § 4-1.1.

42. *Id.* § 4-1.1(a).

43. *Id.* § 4-1.1(a)(1). "Representation" is defined as the division of property into as many equal shares as there are (i) surviving issue in the generation nearest to the deceased ancestor which contains one or more surviving issue and (ii) deceased issue in the same generation who left surviving issue, if any. Each surviving member in such nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the surviving issue of the deceased issue as if the surviving issue who are allocated a share had predeceased the decedent, without issue.

Id. § 1-2.16.

44. *Id.* § 4-1.1(a)(2).

45. *Id.* § 4-1.1(a)(3).

46. *Id.* § 4-1.1(a)(4).

47. *Id.* § 4-1.1(a)(5).

48. *Id.* § 4-1.1(a)(6).

49. *Id.* § 4-1.1(a)(7). "Per Capita" refers to when "[a] disposition or distribution of property . . . is made to persons, each of whom is to take in his own right an equal portion of such property." *Id.* § 1-2.11.

50. See N.Y. SURR. CT. PROC. ACT § 2222(1) (McKinney 1997) (requiring that unclaimed funds of a decedent be paid to the Comptroller of the State "for the benefit of the person or persons who may thereafter appear to be entitled thereto").

Furthermore, under New York State law, if a spouse executes a will, but does not include any provision for his or her spouse, the spouse may take an “elective share,” which is \$50,000 or, if the estate is less than \$50,000, either the entire estate or one third of the net estate after debts (other than taxes) are paid.⁵¹

C. The Dilemma Facing Observant Jewish Clients

Given the state of secular and Jewish inheritance law, Fred and Judith have a major problem. If Fred writes a will that bequeaths his entire estate to his wife Judith, or to their children Esther and David equally in the event Judith predeceases him, he will either cause his wife Judith or his daughter Esther to violate Jewish law. This is because, as noted above, Fred’s estate automatically passes to his son David alone at the moment of his death.⁵² Thus the probate court’s distribution of his estate to Judith, if she survives him, or Esther, if Judith predeceases him, would cause them to effectively “steal” a portion of David’s inheritance from him.

Fred may consider simply conforming the terms of his will to the succession plan under Jewish law.⁵³ Thus, he would simply draft his will to give his entire estate to David, making no provision for his wife Judith, other than the value of her *ketubah*, nor to his daughter Esther, other than the amount necessary for her support if she is a minor. In the alternative, he may consider incorporating the terms of Jewish inheritance law by reference in his will. However, both of these plans would be ineffective because Judith would only receive the value of her *ketubah* which, according to many scholars of Jewish law, is valued at less than \$50,000.⁵⁴ In such a situation, Judith could sue for her elective share⁵⁵ under New York State law. The terms of the will, therefore, would not be carried out in either case.⁵⁶

51. N.Y. EST. POWERS & TRUSTS LAW § 5-1.1-A(a)(2) (McKinney 1997).

52. See *supra* text accompanying note 23.

53. See 8 EMANUEL QUINT, A RESTATEMENT OF RABBINIC CIVIL LAW 117-27 (1997) (delineating the laws of intestacy under Jewish law).

54. See Broyde & Reiss, *supra* note 31, at 107-08 (describing the various dollar values attributed to the *ketubah* by rabbinic scholars).

55. NY EST. POWERS & TRUSTS LAW § 5-1.1-A(d)(1) (McKinney 1999 & Supp. 2009).

56. It should be noted that even though one may assume that the majority of the time, the members of the testator’s family are likely to conduct themselves in accordance with Jewish law, this is not always the case for a variety of reasons. Sometimes a testator’s spouse or children are not as committed to the observance of Jewish law as the testator. It could also be that members of the family may rely on divergent rabbinical holdings to justify challenging a decedent’s efforts to make a distributional plan that conforms to Jewish law. Regardless of the reason, it would be prudent for a testator to anticipate potential weaknesses in his estate plan as if he expected any adversely affected family members to challenge his estate plan, whether in secular court or in a Jewish tribunal. See,

Alternatively, Fred might consider not writing a will, thinking that he will thus avoid any violation of Jewish law by abstaining from any action which would actively cause a violation of Jewish law. He may assume that the court will distribute his assets according to the rules of intestacy and that Judith, Esther, and David will be taken care of. This approach, however, does not avoid a violation of Jewish law either, because, by causing his estate to pass according to the intestacy statute, Fred causes his non-*halachic* heirs, Judith and Esther, to effectively “steal” property from the *halachic* heir, David.⁵⁷ Someone who is committed to Jewish law will generally not want to indirectly cause his loved ones to sin any more than he, himself, wants to sin.⁵⁸

In any case, neither of these options is likely to appeal to Fred and Judith or other observant Jewish clients today, who want, first and foremost, to see that their spouses are financially secure after their passing and who want their daughters to take equally with their sons. Such individuals may want to do so without violating Jewish law and may approach their attorney seeking a method by which they may effectuate their desires within the parameters of both Jewish and secular law.

III. SOME PROPOSED RESOLUTIONS

A. The Principle of Upholding the Wishes of the Deceased

The conflict between Jewish and secular inheritance law may be resolved by utilizing the principle in Jewish law that provides heirs with a religious obligation to honor the wishes of the deceased.⁵⁹ According to this principle, the *halachic* heirs would be religiously obligated to willingly forego the additional amount of the decedent’s estate that they would have been entitled to under Jewish law. The will of the deceased

e.g., *In re Estate of Feinberg*, No. 106982, 2009 WL 3063395 (Ill. Sept. 24, 2009) (reversing the lower court’s invalidation of a trust clause that would have disinherited any heir who married outside the Jewish faith, which the testator drafted out of a recognition that some of his children and grandchildren did not maintain their Jewish observance to the extent that he would have liked).

57. Broyde & Resnicoff, *supra* note 13, at 1773.

58. COHEN, *supra* note 16, at 7-8. *But cf.* Resnicoff, *supra* note 3, at 87 (utilizing the Jewish law prohibition of *Lifnei Iver*—causing another person to transgress a Jewish religious or civil prohibition—to explain why observant Jewish attorneys should have an ethical obligation not to enable their clients to violate Jewish law).

59. JACHTER, *supra* note 8, at 281 (noting the importance of “mollify[ing] the anxieties of the seriously ill by assuring them that others will honor their instructions should they expire”).

would thus serve as evidence of the decedent's desires, and his or her heirs would be religiously obligated to honor those wishes.⁶⁰

This proposed solution poses several difficulties. It is only effective in some circumstances as a post facto solution, after a testator has passed away having made no arrangements other than a typical last will and testament.⁶¹ Also, this principle only applies where the decedent delivered his money and property to a third party as his death neared, with instructions regarding its distribution.⁶² The typical testator does not deposit his property with a third party.⁶³ Furthermore, other rabbinic scholars point out that even where it does apply, the commandment to uphold the wishes of the decedent does not apply to minor children.⁶⁴ Thus, if David, Fred and Judith's son, would have been less than thirteen years old, the age of majority under Jewish law,⁶⁵ he would have no obligation to honor Fred and Judith's wishes, as expressed in their wills, and Esther, the non-*halachic* heir, would effectively be stealing half of David's share of the estate.⁶⁶ For the foregoing reasons, one may not rely on the principle of upholding the testator's wishes ab initio, as an ideal solution for estate planning.⁶⁷

B. The Law of the Land is the Law

There is a general principle in many areas of Jewish civil law that the secular civil law of the country in which an individual lives is incorporated into Jewish law.⁶⁸ This principle functions primarily to incorporate each industry's customary business practices⁶⁹ and the

60. SHULCHAN ARUCH, *Choshen Mishpat* 252:2.

61. JACHTER, *supra* note 8, at 282-83. According to the minority opinions quoted by Rabbi Jachter, where a non-*halachic* legatee has already received an inheritance according to a decedent's last will and testament, he may keep the bequest despite the fact that the majority opinion is that he may not accept it. This is because his possession of the property places the burden of proof on the *halachic* heirs. Because minority opinions do exist that maintain that he may keep the property, the *halachic* heirs will be unable to overcome their burden of proof to cause a rabbinic tribunal to obligate the non-*halachic* heir to relinquish the property he already possesses. *Id.*

62. COHEN, *supra* note 16, at 3 (citing SHULCHAN ARUCH, *Choshen Mishpat* 252:2).

63. *Id.*

64. *Id.* (citing RABBEINU NISSIM 8b (commenting on BABYLONIAN TALMUD, *Gittin* 13a)).

65. BABYLONIAN TALMUD, *Niddah* 45b.

66. COHEN, *supra* note 16, at 4.

67. JACHTER, *supra* note 8, at 283.

68. GRUNFELD, *supra* note 10, at 17 (citing BABYLONIAN TALMUD, *Bava Basra* 54b-55a; BABYLONIAN TALMUD, *Bava Kama* 113a; BABYLONIAN TALMUD, *Gittin* 10b; BABYLONIAN TALMUD, *Nedarim* 28a).

69. SHULCHAN ARUCH, *Choshen Mishpat* 201:1. Under Jewish law, a transaction between two parties only becomes binding after they perform a specific act of acquisition, called a *kinyan*. SHULCHAN ARUCH, *Choshen Mishpat* 189:1. *See, e.g., infra* text accompanying note 103. However, other words or acts which would not normally have any significance under Jewish law can,

state's right to levy taxes into Jewish law.⁷⁰ However, a broad consensus exists among rabbinic scholars throughout the ages that the principle of "the law of the land is the law" is only a limited incorporation, and not a *general* incorporation of the local secular law as the operative Jewish civil law.⁷¹

Rabbi Moshe Feinstein, one of the preeminent authorities on Jewish law in the last generation,⁷² extends this principle to resolve the conflict between Jewish and secular inheritance law.⁷³ He maintained that a secular last will and testament is binding on a testator's legatees in Jewish law, just as it is under secular law.⁷⁴ According to Rabbi Professor Michael Broyde's interpretation of Rabbi Feinstein's responsa, as long as the will uses language implying "giving," (as opposed to "bequeathing" or "inheriting") the will is valid according to the principle that "the law of the land is the law."⁷⁵

However, a majority of rabbinic authorities disagree with this ruling and maintain that such a secular will is invalid according to Jewish law⁷⁶ because the principle that "the law of the land is the law" only applies to areas of law governing relations between Jews and Gentiles.⁷⁷ They maintain that this doctrine is ineffective in giving secular law effect under Jewish inheritance law.⁷⁸

1. Advantages

The practical advantage of applying the doctrine of "the law of the land is the law" to Jewish inheritance law is that it is the easiest and least complex approach to solving the conflict. This approach does not require any ancillary documents to be signed by the testator, and it solves the problem by taking away the conflict between the Jewish law of inheritance and secular law by simply incorporating secular into the Jewish inheritance law.

nevertheless, render a transaction binding under Jewish civil law if that practice is standard within an industry. For example, the custom in some jurisdictions was to seal a transaction by shaking hands or exchanging a nominal sum of money. Where such actions were the custom of the local merchants, these acts bound both parties to the sale according to Jewish law as well. SHULCHAN ARUCH, *Choshen Mishpat* 201:2.

70. GRUNFELD, *supra* note 10, at 18.

71. *Id.* at 40-41.

72. *Id.* at 73.

73. 3 MOSHE FEINSTEIN, IGGROS MOSHE, EVEN HA'EZER § 104 (1961).

74. *Id.*

75. BROYDE, *supra* note 3, at 128.

76. *See, e.g.*, GRUNFELD, *supra* note 10, at 73; JACHTER, *supra* note 8, at 278.

77. Non-Jews.

78. GRUNFELD, *supra* note 10, at 73.

2. Disadvantages

The disadvantage of any attempt to rely on a secular will alone as one's sole estate planning tool is that the principle that "the law of the land is the law" is inapplicable to Jewish inheritance law according to the vast majority of rabbinic scholars.⁷⁹ Thus, even though one eminent scholar applies this doctrine to Jewish inheritance law, observant Jewish individuals may seek out an approach which allows them to operate in accordance with Jewish law.

Furthermore, Rabbi Feinstein himself stated his position in a post facto context, where someone had already died with a last will and testament as her only estate planning device.⁸⁰ He did not state that he held that the application of "the law of the land is the law" to Jewish inheritance law was a preferred estate planning tool, *ab initio*.⁸¹ Thus, there is no reason to infer that even Rabbi Feinstein himself advocated the use of this approach to estate planning where other options are available.

C. Revocable Trusts

The use of a trust is another potential way to circumvent the conflict between Jewish and secular estate law. A trust is an instrument whereby one person (the "settlor") grants property to another (the "trustee") to hold title, with fiduciary duties, for the benefit of another person (the "beneficiary").⁸² Thus, where the settlor of a trust makes another person the trustee, he must grant the property that he wishes to be held in trust, the "trust corpus," to the trustee. The trustee then owns the property for the benefit of the beneficiary.⁸³ In New York, where the settlor makes himself the trustee, he must transfer the trust corpus into the name of the trust, rather than hold it in his own name.⁸⁴

1. Advantages

Mr. Jonathan Porat, an Israeli attorney, suggested the use of revocable trusts to alleviate the conflict between secular and Jewish law in estate planning.⁸⁵ He opined that one could create a revocable trust,

79. *Id.* at 41.

80. FEINSTEIN, *supra* note 73, § 104.

81. *Id.*

82. RESTATEMENT (THIRD) OF TRUSTS § 2 (2003).

83. N.Y. EST. POWERS & TRUSTS LAW § 7-1.18 (McKinney 2002). New York law permits the settlor to transfer title to the property he wishes to place in trust to either the trust itself or to the trustee, in his capacity as trustee. *Id.*

84. *Id.*

85. Porat, *supra* note 12.

make himself the trustee and beneficiary as long he is alive and make his wife or children the beneficiaries of the trust corpus upon his death.⁸⁶ This would achieve the same testamentary disposition that he would have effected using a will. But since, in New York, the settlor must transfer title of the trust corpus to the trust itself or to the trustee,⁸⁷ rather than allowing it to remain in his own name, this is an inter vivos gift, and not a posthumous one.⁸⁸ Thus, it would be valid according to Jewish law.⁸⁹

In New York State, the trust itself, or the trustee holds title to the “trust corpus,” and not the settlor. The New York Estate Powers and Trusts Law requires that in order to fund a trust that has been created, one must transfer title of that property into the name of the trust or the trustee.⁹⁰ In the case of items that can be registered like real estate, bank accounts, investment accounts, and stocks and bonds, the settlor of the trust must record the deed to the property or register the stock or account in the name of the trust.⁹¹ Merely listing the property to be included in the trust is insufficient.⁹² The property must actually be transferred to the trustee, as trustee,⁹³ even when the settlor is both trustee and beneficiary.⁹⁴

The trust instrument thus has the effect, under Jewish law, of making the trust corpus the property of an entity other than the settlor. Under Jewish law, this has the effect of excluding the trust property from the settlor’s probate estate, which would have automatically transferred to his *halachic* heirs at death.⁹⁵ Thus it would not automatically revert to the *halachic* heirs at death, and the trust

86. *Id.* For background on New York trust law, see section 7-1.18.

87. § 7-1.18.

88. Attorneys in states other than New York should do further research to confirm whether this method would be effective in states that do not require transfer of the trust corpus into the name of the trust when the settlor is also the trustee. In those states, a settlor simply signs a “declaration of trust,” declaring that specific property that he already holds is now being held in trust for the benefit of specific beneficiaries. RESTATEMENT (THIRD) OF TRUSTS § 10(c) (2003). Since he still holds the trust property in his own name, it may still be considered “probate property” according to Jewish law, and thus, subject to the order of succession usually prescribed by Jewish law, which may be in conflict with the client’s desired testamentary plan.

89. *See supra* note 37-39 and accompanying text. Thus, since the trust corpus is not directly owned by the decedent, it is not subject to the *halachic* order of succession, and therefore distribution to the non-*halachic* heirs would be valid according to Jewish law. Porat, *supra* note 12.

90. § 7-1.18.

91. *Id.*

92. *In re* Estate of Rothwell, 730 N.Y.S.2d 664, 666 (Sur. Ct. 2001).

93. *In re* Estate of Fontanella, 304 N.Y.S.2d 829, 831 (App. Div. 1969).

94. *See* § 7-1.18 (requiring that “[a] lifetime trust shall be valid as to any assets therein to the extent the assets have been transferred to the trust” and making no exception where the settler is also a beneficiary).

95. Porat, *supra* note 12.

instrument's terms would take effect without causing anyone to violate Jewish law.⁹⁶

2. Disadvantages

When an individual has even a small amount of personal property that falls outside the scope of the trust that he has established, that property would then comprise his probate or administrative estate and distribution of that portion would still violate Jewish inheritance law. Typically, a settlor would avoid this problem by executing a "pour over" will to transfer any probate assets into a trust after death.⁹⁷ However, as stated above, this is not effective according to Jewish law.⁹⁸ This will result, in the majority of cases, in at least some of a testator's property passing by will or intestate succession without the attempted benefit of the revocable trust to avoid any conflict with religious law.

Another practical problem with this approach is that it would require one to individually transfer all property he would like to dispose of in this manner to the trust. Aside from the inconvenience in this requirement, any property that one acquires over time would not be in the trust, which necessitates further transfers of newly acquired property throughout one's life, which is less than practical.

Solutions to this problem are possible, although still present more trouble than most people would be willing to take on. In the case of Fred and Judith, each one could place all of their checking accounts, direct deposit transfers, life insurance policies, investment accounts, pension plans, etc. into the name of the trust. Transfers of real estate do not take place very frequently so they could easily hold title to those in the name of their trusts. However, many items of personal property that they acquire over time will not be readily transferred into the name of the trust. Therefore, some property will invariably fall outside of the trust corpus when one or both of them pass away. And this property would be subject to either their will or to intestate succession, either of which would conflict with their commitment to Jewish law, as stated earlier in this Note. Thus, there are several challenges to utilizing this approach, though they are not insurmountable.

96. *Id.*

97. N.Y. EST. POWERS & TRUSTS LAW § 3-3.7(a) (McKinney 1998).

98. *See supra* text accompanying notes 37-39.

D. *Inter Vivos Gifts*⁹⁹

Dayan (Judge) Isador Grunfeld, former judge in the London Beth Din, Great Britain's highest Jewish court,¹⁰⁰ has offered another solution to enable observant Jews to effectuate their desired testamentary plan without violating Jewish law. He recommends that one execute a gift document indicating that he is giving all of his assets—real, personal, and intangible—to X, Y, and Z as of the date of execution, with the stipulation that the gift is only effective one hour before his death and with the right of revocation.¹⁰¹ This type of document is also referred to by the Hebrew term, *shtar matnas bari*, or, “gift of a healthy person,” as distinguished from the gift of a dangerously sick person, a gift *causa mortis*.¹⁰² Because this approach requires one to make an *inter vivos* gift, it would also entail performing a symbolic act of acquisition to effectuate the gift under Jewish law, called a *kinyan sudar*.¹⁰³

Dayan Grunfeld recommends, however, that the *shtar matnas bari* only be used in conjunction with a last will and testament, because standing alone, it would be open to challenges under secular law.¹⁰⁴ As applied to New York law, this is also true because in order for an *inter vivos* gift to be upheld in New York State, the donee has the burden of proving three things: donative intent, delivery, and acceptance by clear and convincing evidence.¹⁰⁵ While the donees may be able to prove donative intent and acceptance easily,¹⁰⁶ delivery will be more difficult to prove. If one executes this gift document and the only accompanying

99. A sample gift document may be found in GRUNFELD, *supra* note 10, at 108-11.

100. *Id.* at xxiii.

101. *Id.* at 102-03. This approach is also advocated by Rabbi Chaim Shlomo Sheanon as a solution to the same issues that this Note addresses, but with regard to Israeli law. Chaim Shlomo Sheanon, Tzava'ah: K'halacha, <http://www.daat.ac.il/DAAT/mishpach/zavaah-4.htm> (last visited Oct. 23, 2009).

102. GRUNFELD, *supra* note 10, at 102-03.

103. *Id.* The best form for this transfer is *kinyan sudar*. See BETH DIN OF AMERICA, *HALACHIC WILL MATERIALS 4* (2008), http://www.bethdin.org/docs/PDF14-Halachic_Will_Materials.pdf. For Rabbi Feivel Cohen's explanation of the procedure, see *infra* text accompanying notes 132-36.

104. GRUNFELD, *supra* note 10, at 104-05.

105. *Gruen v. Gruen*, 496 N.E.2d 869, 872 (N.Y. 1986).

106. The test for donative intent is “whether the maker intended the [gift] to have no effect until after the maker's death, or whether he intended it to transfer some present interest.” *McCarthy v. Pieret*, 24 N.E.2d 102, 103 (N.Y. 1939). Since the *shtar matnas bari* clearly states that the donees are to have ownership of the specified property *prior* to the testator's death, and not after death, donative intent would be established. GRUNFELD, *supra* note 10, at 108-11. Acceptance is also usually presumed where the court finds donative intent and a valid delivery because acceptance is presumed due to the beneficial nature of the gift. *First National Bank v. Fitzpatrick*, 289 N.Y.S.2d 314, 320 (App. Div. 1968), *aff'd sub nom. In re Kelsey's Estate*, 257 N.E.2d 663 (N.Y. 1970).

act of symbolic acquisition is the *kinyan sudar*,¹⁰⁷ the donees may not be able to meet their burden of proving delivery.¹⁰⁸ And even if the donees would ultimately succeed, standing alone, this method lacks reliability as a method of property distribution because such gifts are susceptible to invalidation because of the high burden of proof placed on the donee.¹⁰⁹

1. Advantages

In conjunction with a last will and testament that mirrors its terms, the *shtar matnas bari* solves the main problem that this paper addresses, because it allows the testator to dispose of his property to his chosen heirs without violating Jewish law.¹¹⁰ Since the testator's property is given to his heirs before death, without the opportunity for the Jewish inheritance law scheme to take effect, one would not violate the Jewish laws of inheritance by using either of these instruments.¹¹¹

As applied to Fred and Judith, Fred would sign a document giving all of his assets to Judith, to take effect one hour before his death, and if she should predecease him, to his children David and Esther equally, also one hour before his death. And Judith would execute a mirror gift document as well.

107. See *infra* text accompanying notes 132-36 for an explanation of procedure for conducting a *kinyan sudar*.

108. Evidence of acts or statements of the decedent indicative of delivery to the donee may be adequate to prove delivery, even absent evidence of physical delivery. *In re Wolf's Will*, 214 N.Y.S.2d 168, 171 (Sur. Ct. 1961). The element of delivery and the clear and convincing standard of proof, however, place a heavy burden on the donees. Under New York State law, a donee must prove that the donor completely relinquished control of the property without any power to revoke or annul his gift. *In re Kennedy's Estate*, 290 N.Y.S.2d 964, 968 (Sur. Ct. 1968), *modified, aff'd sub nom. Estate of Kennedy v. May*, 318 N.Y.S.2d 759 (App. Div. 1971). In *Dayan Grunfeld's* model *shtar matnas bari*, however, it is explicit that he recommends making the gift revocable, so as to allow the testator greater flexibility in his estate planning. GRUNFELD, *supra* note 10, at 109.

109. See *supra* note 108 and accompanying text. Donees face an uphill battle to prove the validity of their gift. The possibility of having to go to court to prove the gift's validity, the high burden of proof, and the uncertain outcome render the inter vivos gift method less than ideal as an estate planning solution because of the high likelihood that the donee will not be able to meet that burden.

110. Tangentially, one should not outline a different disposition of his property in his last will and testament than he does in his *shtar matnas bari*, regardless of which one he executes first. GRUNFELD, *supra* note 10, at 105. It is inadvisable to do so because a last will and testament and an inter vivos gift with different terms appear to nullify one another. If one executes the *shtar matnas bari* first, and then executes a will bequeathing all of his property at death, this implies that he continues to hold title to his property at death, which would further imply that the gift taking effect one hour *before* death was invalid or revoked. However, if he executes the gift document after the will, it implies that he is revoking the will by subsequent instrument, since he is using a method other than the will to dispose of all his property before death. Therefore, if one does intend to use a *shtar matnas bari*, he should execute it alone, without any "back-up" last will and testament. *Id.*

111. GRUNFELD, *supra* note 10, at 105.

2. Disadvantages

The primary problem with this method seems to be that it is impractical. An inter vivos gift would only be effective under Jewish law as to the property held by the testator at the time of the execution of the *shtar matnas bari*.¹¹² According to Jewish law, one cannot give any assets that he has not yet acquired by inter vivos gift.¹¹³ Practically speaking then, one would be forced to execute these gift documents on a regular basis in order to include assets that one acquires throughout his life in the gift. For practical reasons, many people would prefer another, more low-maintenance, approach.

However, even if he would repeatedly execute these gift documents throughout his life, “man does not know his time,”¹¹⁴ and he may die before he is able to execute an inter vivos gift to dispose of the property that he acquired in his last days in accordance with Jewish law. As such, that property which was not included in his most recent gift document would be disposed of through his will. And as to that property, the same problem of theft from his non-*halachic* heirs would arise.¹¹⁵

IV. THE PREFERRED METHOD: NOTES OF INDEBTEDNESS¹¹⁶

This approach consists of executing a typical last will and testament in conjunction with a document that creates a sizeable indebtedness to a non-*halachic* heir.¹¹⁷ This debt would take effect immediately, but would not be payable until one moment before the testator’s death.¹¹⁸ The note of indebtedness document would stipulate that the *halachic* heirs have the option of either paying the debt from the estate, effectively wiping out their entire inheritance, or consenting to the terms of the testator’s last will and testament, wherein they would receive an equal share with their siblings.¹¹⁹ The *halachic* heirs will almost certainly choose not to

112. COHEN, *supra* note 16, at 2 (citing SHULCHAN ARUCH, *Choshen Mishpat* 211:1).

113. SHULCHAN ARUCH, *Choshen Mishpat* 211:1.

114. *Ecclesiastes* 9:12.

115. *See supra* text accompanying note 39.

116. A note of indebtedness, traditionally called a *shtar chatzi zachar* (“half the male portion”), existed in a family with one son and one daughter, where a parent wanted to bequeath half of his estate to each child. Where the son would take the entire estate according to Jewish law, the *shtar chatzi zachar* was used to give the daughter “half the male [heir’s] portion”—in other words, half of the estate. COHEN, *supra* note 16, at 5-6.

117. 7 QUINT, *supra* note 15, at 245. Rabbi Quint does not cite specific sources for this approach. Levine, *supra* note 16, at 253-54. However, Rabbi Feivel Cohen advocates the same method. COHEN, *supra* note 16, at 5.

118. 7 QUINT, *supra* note 15, at 246.

119. *Id.* at 247.

challenge the will, lest they take nothing at all, if the estate were to be liquidated to pay the note of indebtedness to the non-*halachic* heirs.¹²⁰

As applied to Fred and Judith's situation, Fred and Judith would each execute a note indicating that their respective estates would be liable for a debt in the amount of one million dollars payable to Esther, but only if David does not consent to Esther taking an equal share pursuant to their father's last will and testament.¹²¹ However, if he consents to the will's distribution to his mother and to his sister Esther, he will retain his share under the will and the note in favor of Esther will never become payable. Thus, by inducing David to agree to distribution

120. *Id.* at 244. For a sample note of indebtedness, see BETH DIN OF AMERICA, *supra* note 103, at 4, 7 or COHEN, *supra* note 16, at 9-17. The sections of Rabbi Cohen's basic text for the note of indebtedness most pertinent to this Note are as follows:

I, _____, on the ___ day of the month of _____, in the year _____, hereby declare the following:

1. In the event that:

(a) any of my Torah Heirs (as defined in paragraph (2) below) will not waive his or her rights to my Estate under Torah law and abide instead by the terms of my Last Will and Testament ("Will") and

(b) the condition set forth in paragraph (3) below is complied with

Then I hereby assume upon myself as of this moment an indebtedness in the amount of \$_____ (the "Debt") to _____, (hereinafter referred to as the "Obligee"). This debt shall be payable in full one moment prior to my death.

2. The term "Torah Heirs" shall mean those individuals who are entitled to inherit all or part of my Estate under the Torah and the Code of Jewish Law.

3. In the event that certain Torah Heirs will waive their rights to my Estate under Torah law and abide instead by the terms of my Will, the Obligee shall release those Torah Heirs from any obligation under the Debt.

4. All real and personal property and all monetary assets which I now possess or may hereafter acquire are pledged to secure this debt.

.....
9. The Debt set forth in this document has been undertaken in a Jewish Court of high standing ("Beis Din Choshuv") through an instrument legally fit to establish a transaction ("Kinyan Suddar").

.....
11. On the other hand, in the event that:

(a) all of my Torah Heirs will waive their rights to my Estate under Torah law and abide instead by the terms of my Will, or

(b) the Obligee fails to comply with the condition set forth in paragraph (3) above, or

(c) no will is admitted to probate (or is filed in a proceeding to manage my Estate without formal court administration)

Then the Debt set forth herein shall be null and void and of no effect whatever, for the Debt was not entered into under these conditions.

.....

Signature

Id. at 9-12 (footnotes omitted).

121. *See, e.g.*, 7 QUINT, *supra* note 15, at 247 (explaining how a note of indebtedness would function where the non-*halachic* heir is the decedent's spouse).

according to the will, this method avoids the problem of “theft” from the *halachic* heirs because the note of indebtedness merely functions as leverage to persuade David to willingly consent to the equal division of Fred and Judith’s estate.

A. Advantages

The note of indebtedness has the advantage of inducing the *halachic* heirs willingly to assent to the distribution plan laid out in the testator’s will. The *halachic* heirs’ consent removes the concern that the non-*halachic* heirs who take pursuant to the testator’s will are effectively “stealing” the portion of the estate that would have gone to the *halachic* heirs according to Jewish inheritance law.

Furthermore, this method is effective regardless of the enforceability of the debt according to secular law. Although, in many instances, it will not be enforceable under secular law because of an apparent lack of consideration supporting the promise,¹²² it would still serve its intended function. This is because the testator’s will is, in any case, enforceable under secular law independent of the indebtedness,¹²³ and in a *beis din*, consideration is not required to make the note of indebtedness enforceable.¹²⁴ Therefore, even if the *halachic* heirs would consider suing the non-*halachic* heirs in a *beis din* for their share of the estate, they would be motivated to abstain from doing so because a *beis din* would enforce the note of indebtedness against their portion of the estate.¹²⁵ Thus, by suing in *beis din* for their *halachic* portion of the

122. See *Felt v. Olson*, 425 N.Y.S.2d 686, 687 (App. Div. 1980) (“In order for [a creditor] to succeed on her cause of action based upon these two notes it was necessary for [creditor] to prove that there was consideration for the notes.”). However, the Court of Appeals has held, in some instances, that if a husband creates a debt to his wife, a non-*halachic* heir, his general obligation to support her will constitute consideration to support the creation of this debt. *Buchanan v. Tilden*, 52 N.E. 724, 726 (N.Y. 1899). The same cannot be said of a testator’s other non-*halachic* heirs. With regard to whether consideration exists to support the promise made through the note of indebtedness to one’s spouse, the Court of Appeals in New York stated that “[i]t is quite true that the husband is under an obligation to support the wife, and it may be that any contract which he makes with a third party, having for its object the carrying out of that obligation, would be enforced in the courts.” *Id.*

123. N.Y. Surr. Ct. Proc. Act § 1414(1) (McKinney 1995).

124. See SHULCHAN ARUCH, *Choshen Mishpat* 257:7 (stating that a person’s unilateral declaration that he owes another person money is sufficient to create a debt); Judah Dick, *Halacha and the Conventional Last Will and Testament*, 2 J. HALACHA & CONTEMP. SOC’Y 5, 11-12 (1981) (“A person may create an indebtedness even if none previously existed, even if no loan or other consideration was ever given, merely by executing a note in favor of another person.”).

125. If a dispute arises between observant Jews, they are religiously obligated to litigate their disagreement in a *beis din*. BABYLONIAN TALMUD, *Gittin* 88b. In fact, if one party summons another party to *beis din* and that party refuses to respond to the summons, the *beis din* may issue a contempt order (called a “*seruv*”) against the recalcitrant party, which carries with it social ramifications within the observant Jewish community. See Jonathan Reiss, *Jewish Divorce and the*

estate, the *halachic* heirs would lose the portion they would have received under the will, which would clearly be against their own interests.¹²⁶

The note of indebtedness method does not suffer from the inconveniences of the trust method. Using a trust, the conflict between Jewish and secular law is only obviated as to the property with which one funds the trust. Thus, for the revocable trust method to be effective, one must first fund the trust by transferring checking and savings accounts, real estate holdings, and personal property into the name of the trust.¹²⁷ He would also want to register the trust as the beneficiary in his life insurance and pension plans. After that, on an ongoing basis, he will have to continue signing checks and all official documents as “John Doe, as trustee for the John Doe Revocable Trust,”¹²⁸ an inconvenience that not everyone is willing to take on. However, with a note of indebtedness, one need not make any transfers of property, since the debt will accrue against any and all property that the testator owns at the time of death. And since the testator’s property will not be held in trust, he will not be required to sign his documents in any special way. Thus, a note of indebtedness does not involve the same inconveniences and requires less maintenance than a trust.

Furthermore, the note of indebtedness does not have the practical disadvantages of the inter vivos gift. One who disposes of his property with successive revocable inter vivos gifts must continually execute new gift documents.¹²⁹ A note of indebtedness, however, is lower maintenance because it takes effect against all property held by the testator at the time of his death, and no ongoing transactions are required.¹³⁰ Even if one executes multiple wills, after signing a note of indebtedness, he is not required to execute new notes of indebtedness because the potential debt accrues against his estate if his *halachic* heirs

Role of Beit Din, JEWISH ACTION, Winter 1999, at 50, 52, available at <http://www.ou.org/publications/ja/5760winter/biet%20din.pdf>. Here too, if a *halachic* heir challenges the distribution of the will in *beis din*, the non-*halachic* heir, for whose benefit the testator executed a note of indebtedness, could summon the *halachic* heir to *beis din* to collect on the full value of the note of indebtedness.

126. Thus, the *shtar chatzi zachar* functions much like a “no contest clause” in a secular will, which is defined as “[a] provision designed to threaten one into action or inaction; esp., a testamentary provision that threatens to dispossess any beneficiary who challenges the terms of the will.” BLACK’S LAW DICTIONARY 485 (3d Pocket ed. 2006).

127. See N.Y. EST. POWERS & TRUSTS LAW § 7-1.18 (McKinney 2002).

128. See JOHN W. REILLY, THE LANGUAGE OF REAL ESTATE 397 (6th ed. 2006).

129. See *supra* text accompanying note 112-115.

130. See COHEN, *supra* note 16, at 6 (noting that a considerable debt will prevent the *halachic* heirs from inheriting the decedent’s estate); 7 QUINT, *supra* note 15, at 245 n.24 (explaining that a note of indebtedness serves as a lien on the deceased’s assets).

object to the terms of whichever last will and testament is valid and unrevoked at the time of his death.¹³¹

B. Procedure

According to Rabbi Feivel Cohen, the attorney convenes the testator or testators along with the executor or his agent.¹³² After the names, date, and the amount of the indebtedness are filled out, the testator must perform a symbolic physical act of acquisition in order to demonstrate his commitment to create the note of indebtedness.¹³³ This act is called *kinyan sudar* and it is performed according to the following procedure:

The testator declares to the [executor or his agent] his intention to execute a Kinyan Suddar in order to establish an indebtedness upon himself, whereupon the [executor or his agent] gives the testator some object (e.g. a handkerchief, a writing implement, etc.) with the intent of entitling himself thereby to the indebtedness in symbolic exchange for the object. The testator then raises the object thirty centimeters (approx. twelve inches); he has thus acquired the object and the indebtedness has thereby been established. The testator then returns the object to its original owner.¹³⁴

Although the testator will write two notes of indebtedness, as will be explained in Part IV.C.1 of this Note, he need only perform one *kinyan sudar*.¹³⁵ The testators would then sign the notes and deposit them, along with their wills, with whomever they would have otherwise deposited their wills.¹³⁶

C. Disadvantages

1. A Woman's Note of Indebtedness: Problem and Solution

However, the note of indebtedness method by itself does not adequately address all potential problems and loopholes. A note of indebtedness signed by a woman will be as effective as a note of indebtedness signed by a man, where her husband predeceases her and then she passes away.¹³⁷ But, according to Jewish law, if the *wife*

131. COHEN, *supra* note 16, at 7.

132. *Id.* at 10 & n.2, 18.

133. *Id.* at 18.

134. *Id.*

135. *Id.* at 19.

136. *Id.*

137. *Id.* at 6-7.

predeceases her husband, he would have the initial claim as sole heir of her estate.¹³⁸ Any other mortgage or lien she had made against her property, like a note of indebtedness, would be in a secondary position as creditor against the estate, subordinate to her husband's primary position.¹³⁹ Thus, if he would consider suing his late wife's non-*halachic* heirs who inherited from her under her will, in a *beis din*, there would be no lien against her estate in favor of the non-*halachic* heirs to prevent him from doing so.¹⁴⁰ Thus, her note of indebtedness would be wholly ineffective in this situation.

The solution to this problem would lie in a husband executing a second note of indebtedness in which he would assume a debt in favor of his and his wife's non-*halachic* heirs, which he would have to pay only upon his wife's death, and conditioned on his own acceptance of the distribution plan laid out in her last will and testament.¹⁴¹

2. Special Rules: Problems and Solution

There are other situations in which the last will and testament, accompanied by a note of indebtedness, would not assure compliance with all Jewish laws of inheritance. If a husband predeceases his wife, his estate is obligated to provide for all of her food, shelter, clothing, living, and medical expenses or the value of her *Ketubah* until she remarries.¹⁴² These payments can be significant and may exceed her share of the estate, in a case where a testator does not leave his entire estate to his wife.¹⁴³

Similarly, a problem exists where a testator is survived by minor sons and daughters. According to Jewish law, the minor daughters must be supported from the estate with food, shelter, clothing, medical care, and the cost of living until they reach maturity.¹⁴⁴ This obligation may

138. *Id.* at 7.

139. *Id.* at 6 (citing SHULCHAN ARUCH, *Even Ha'Ezer* 90:9).

140. COHEN, *supra* note 16, at 7.

141. *Id.* A sample text for an additional note of indebtedness to be signed by a husband can be found in COHEN, *supra* note 16, at 13-17.

142. *Id.* at 23 (citing SHULCHAN ARUCH, *Even Ha'Ezer* 79:1, 93:1, 93:5, 94:1); *see also supra* note 31 and accompanying text.

143. COHEN, *supra* note 16, at 23. It is self-evident that if the testator does indeed bequeath his entire estate to his wife, using a will and a note of indebtedness, that even if these expenses do exceed the value of the estate, the testator would not be faulted under Jewish law simply because his estate was not large enough to pay all of the expenses it owed his widow.

144. *Id.* (citing BABYLONIAN TALMUD, *Kesubos* 50b; SHULCHAN ARUCH, *Even Ha'Ezer* 112:1). *Tosafos*, commenting on *Kesubos* 50b, further supports the proposition that minor children are supported from the decedent's estate only until they reach the age of majority. *Id.*

also exceed the daughters' share in the estate, and the daughters' share under the testator's will would thus be inadequate under Jewish law.¹⁴⁵

In order to resolve the aforementioned difficulties, Rabbi Feivel Cohen recommends executing a letter, in addition to the will and note of indebtedness.¹⁴⁶ In this letter, the testator would make known to the beneficiaries of his will and to his executor, that there are situations, such as those mentioned in the previous two paragraphs, where his will and note of indebtedness may not ensure complete compliance with Jewish law, and that he directs them to consult specific competent rabbinic authorities about how to proceed in order to ensure that, if applicable, minor daughters and his widow would be supported in accordance with the mandates of Jewish law.¹⁴⁷

3. Secular Law Ramifications: Problems and Solutions

Marvin Shenkman and Rabbi Aryeh Weil suggest that there may be tax consequences to the use of the note of indebtedness.¹⁴⁸ They are concerned that the IRS may consider the value of the discharged debt in the note of indebtedness to be "gross income." When the *halachic* heirs consent to the distribution made in the last will and testament, the value of the forgiven debt may be considered includable in gross income to the estate.¹⁴⁹ They also posit that because no interest rate is defined in the note of indebtedness, the IRS may impute an interest rate to the loan¹⁵⁰ and consider that amount as credited to the beneficiaries, thus resulting in a tax liability.¹⁵¹ They also suggest that the mere creation of the note of indebtedness in favor of the non-*halachic* heir could be includable as gross income for the heir.¹⁵²

Although an attorney must explore all angles in order to protect his client's interests, it is this author's belief that it is highly unlikely that any tax liability would result from the use of a note of indebtedness. The

145. COHEN, *supra* note 16, at 23-24.

146. *Id.* at 24. For sample letters for male and female testators, see *id.* at 39-44.

147. *Id.* at 24.

148. Aryeh Weil & Martin Shenkman, *Wills: Halakhah and Inheritance*, in BETH DIN OF AMERICA, *HALACHIC WILL MATERIALS* 6 (2008), http://www.bethdin.org/docs/PDF14-Halachic_Will_Materials.pdf.

149. See I.R.C. § 61(a)(12) (2006); Treas. Reg. § 1.61-12(a) (as amended in 1997) ("The discharge of indebtedness, in whole or in part, may result in the realization of income.").

150. See, e.g., I.R.C. § 163(b)(1) (2006) (establishing that interest may be imputed to certain contracts that do not state an interest rate).

151. See Treas. Reg. § 1.61-7(a) (as amended in 1966) ("As a general rule, interest received by or credited to the taxpayer constitutes gross income and is fully taxable. Interest income includes interest on . . . a promissory note[and] . . . interest on legacies.").

152. Weil & Shenkman, *supra* note 148, at 6.

note of indebtedness is likely not enforceable under secular law.¹⁵³ Thus, it will not be considered an “indebtedness” subject to discharge for the income tax purposes because the Internal Revenue Code defines the term “indebtedness” as a debt “(A) for which the taxpayer is liable, or (B) subject to which the taxpayer holds property.”¹⁵⁴ A note of indebtedness fails to meet either of these statutory definitions of an indebtedness because (A) the taxpayer (here, the *halachic* heir) is not liable to pay back the debt in a secular court because the promise to pay lacks consideration,¹⁵⁵ and (B) the taxpayer would not receive any property or services with proportional value to the amount of the “debt” being discharged.

A note that is executed for the benefit of one’s spouse or children without receipt of specific goods, services, or promises in return is thus given without consideration and would thus be unenforceable in secular courts.¹⁵⁶

Although it is true that the New York Court of Appeals did hold one hundred years ago that a contract is enforceable as to a third party, for which the only consideration is a husband’s general obligation to support his wife,¹⁵⁷ modern courts applying tax law have not taken the view of the Court of Appeals as it applies to the status of discharges of indebtedness as part of gross income. The Sixth Circuit held that where a taxpayer’s creditor discharged a debt that she had taken on for her husband’s benefit, without consideration, by executing a note of indebtedness to her husband’s creditor, the discharge of the debt was not includable in gross income.¹⁵⁸ Similarly, if a testator executes a note of indebtedness for the benefit of his wife or daughter without consideration, the debt would not be considered subject to collection in secular courts, indicating that the note of indebtedness that this Note addresses would not meet the first prong of the Internal Revenue Code’s definition of an indebtedness.¹⁵⁹

This author would also like to suggest that the note of indebtedness would never be considered indebtedness for the purposes of the Internal Revenue Code because it never attains the status of a debt to the testator

153. See *Bradford v. Comm’r*, 233 F.2d 935, 938 (6th Cir. 1956) (holding that where a spouse executed a note of indebtedness for no consideration, cancellation of that debt is not includable in gross income).

154. I.R.C. § 108(d)(1) (2006).

155. See *Bradford*, 233 F.2d at 938.

156. See RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (1981) (“[T]he formation of a contract requires . . . a consideration.”).

157. *Buchanan v. Tilden*, 52 N.E. 724, 726 (N.Y. 1899).

158. *Bradford*, 233 F.2d at 938.

159. See § 108(d)(1).

or to his estate. The Third Circuit stated that “[a] debt...for federal tax purposes [is] an ‘unconditional and legally enforceable obligation for the payment of money.’”¹⁶⁰ Here, because the testator’s whole obligation to the non-*halachic* heirs is conditioned on the *halachic* heirs challenging the testator’s will, the debt is not unconditional, as required under the Internal Revenue Code. It is also not legally enforceable as noted above.¹⁶¹ Thus, no “unconditional and legally enforceable obligation” to the non-*halachic* heirs exists in the note of indebtedness prior to any will challenge by the *halachic* heirs. And if they do challenge the will in a *beis din*, the note will immediately become payable and will thus not be discharged. Therefore, no situation exists wherein a subsequently discharged note of indebtedness would ever constitute a clear “unconditional and legally enforceable obligation for the payment of money.”

Weil and Shenkman themselves acknowledge that it is unlikely that any tax liability would arise from the discharge of the note of indebtedness that would take place when the *halachic* heirs accede to the terms of the testator’s will, but they nevertheless suggest that one take steps to ensure that the note of indebtedness is drafted in such a way as to minimize the likelihood that the IRS would consider its discharge to be income to the estate of the testator.¹⁶² They suggest using Hebrew terminology in the note of indebtedness to differentiate it from other documents which would normally be enforceable in secular courts.¹⁶³ They also suggest not delivering the note of indebtedness to the non-*halachic* heirs, for whose benefit the note is executed.¹⁶⁴ By doing so, they posit that the note would be less enforceable under secular law because of the absence of the delivery requirement, which is required for valid gifts under secular law.¹⁶⁵

V. THE SPIRIT OF THE LAW

A. The Problem

One may wonder why, even if the aforementioned methods of “circumventing” Jewish inheritance law are valid, they do not violate the

160. *Comm’r v. McKay Prods. Corp.*, 178 F.2d 639, 644 (3d Cir. 1949) (quoting *Autenreith v. Comm’r*, 115 F.2d 856, 858 (3d Cir. 1940)).

161. *See supra* note 155 and accompanying text.

162. Weil & Shenkman, *supra* note 148, at 6.

163. *Id.*

164. *Id.*

165. *See supra* note 105 and accompanying text.

spirit of the law. The sages in the Talmud state that although one may find a way of validly and effectively disinheriting his *halachic* heirs, one should not be party to the disinheritance of a *halachic* heir.¹⁶⁶ The Talmud further states that if one disinherits *halachic* heirs, “the spirit of the sages are not pleased with him.”¹⁶⁷ This view is also codified in the Code of Jewish Law.¹⁶⁸ How then do those authorities who advocate any of these methods of “avoiding” the Jewish inheritance law requirements address the contention that they are violating the “spirit of the law,” if not the letter?

B. Solutions

There are four major reasons why, given the circumstances within which modern testators conduct their estate planning, the aforementioned methods of estate planning do not violate the “spirit of the law.” Where, as this Note suggests, a testator bequeaths equal shares of his estate to his daughters and sons, many Jewish law authorities maintain that this practice does not constitute a violation of the “spirit of the law,” because, first, rabbinic authorities want to encourage people to leave their daughters equal shares of their estates to serve the public policy of facilitating the marriageability of the testator’s daughters.¹⁶⁹ Second, distributing one’s estate equally does not violate the spirit of Jewish inheritance law because many authorities maintain that as long as one’s sons receive at least some portion of the estate, one has not violated the spirit of the law.¹⁷⁰ Third, equal distribution of an estate furthers the public policy of promoting harmony and preventing acrimony in the family.¹⁷¹ And fourth, bequeathing one’s entire estate to his sons, to the exclusion of his wife and daughters, will likely motivate them to litigate the matter in the secular court system, which is prohibited under Jewish law.¹⁷²

Devising equal share to daughters serves the function of improving their marriage prospects.¹⁷³ According to the authorities who offer this reason to explain why efforts to circumvent the standard Jewish law of

166. BABYLONIAN TALMUD, *Bava Basra* 133b; BABYLONIAN TALMUD *Kesubos* 53a.

167. BABYLONIAN TALMUD, *Bava Basra* 133b.

168. SHULCHAN ARUCH, *Choshen Mishpat* 282:1.

169. COHEN, *supra* note 16, at 27. By increasing independent wealth among women, the rabbis hope to increase their marriage prospects.

170. *Id.* at 31-32.

171. JACHTER, *supra* note 8, at 295.

172. Mordechai Willig, *Inheritance Without a Fight: Writing a Will in Modern Times*, TORAHWEB (2007), http://www.torahweb.org/torah/special/2007/rwil_will.html.

173. COHEN, *supra* note 16, at 27.

inheritance maintain that facilitating marriage by increasing the financial resources of women overrides the general disapproval of disinheriting sons from their normal status as sole *halachic* heirs.¹⁷⁴ Even if a testator's daughters are already married, the general policy of increasing daughters' marriage prospects would still be served by ensuring that they receive equal shares in the testator's estate. The general expectancy by the testator's daughter's potential grooms that she would be left an equal share of her father's estate increases her chances of finding a mate. Thus, the father's subsequent decision to ensure that his daughter receives an equal share of his estate retroactively increased his daughter's marriage prospects.¹⁷⁵

Furthermore, many Jewish law authorities hold that one only violates the sages' expressions of disapproval for disinheriting *halachic* heirs where they are completely excluded from the estate.¹⁷⁶ The methods this Note discussed, which are designed to ensure that a male testator's daughters receive an equal share of his estate, address ways of achieving parity between sons' and daughters' inheritance rights. They do not advocate completely disinheriting sons. Therefore, these authorities would hold that the aforementioned methods do not violate "the spirit of the law."

Many modern authorities in Jewish law also state that the public policy of avoiding the acrimony and bitterness that would result when some children receive an inheritance, while others do not, supersedes the policy against partially disinheriting *halachic* heirs.¹⁷⁷ Thus, in order to avoid the family strife that is likely to result from an unequal distribution of shares of an estate between a testator's children, a testator will not violate the "spirit of the law" of inheritance by granting equal shares of his estate to both sons and daughters.¹⁷⁸

174. *Id.*

175. *Id.* at 31.

176. *Id.* at 31-32 (citing a number of *halachic* responsa who maintain that only total disinheritance of one's Jewish law heirs invites the disapproval of the sages).

177. JACHTER, *supra* note 8, at 295-96. One may argue that this factor is not unique to modern times. If acrimony and discord would be the result of an unequal distribution of the estate, it would be no less so in the past than it is today. However, women's liberation and the advent of feminism in relatively modern times have changed the family dynamic even in observant Jewish circles. Differences in the treatment of sons versus daughters, that may not have raised an eyebrow even 200 years ago, would now be viewed as highly offensive and unfair. Sylvia Barack Fishman, *The Impact of Feminism on American Jewish Life*, in 89 AMERICAN JEWISH YEARBOOK 3, 44 (1989), available at http://www.ajcarchives.org/AJC_DATA/Files/1989_3_SpecialArticles.pdf.

178. COHEN, *supra* note 16, at 29.

Rabbi Mordechai Willig, dean and *rosh kollel* at the Rabbi Isaac Elchanan Theological Seminary of Yeshiva University,¹⁷⁹ points out that if a testator decides to follow the strict letter of the law and exclude his wife and daughters from his estate, he is effectively encouraging them to violate Jewish law in two ways. First, he is encouraging them to transgress the prohibition against litigating in secular courts to increase their share of his estate.¹⁸⁰ Second, if they are successful and the court deviates from the terms of the testator's will, he is also causing his non-*halachic* heirs to violate the prohibition of theft from his *halachic* heirs.¹⁸¹

As applied to Fred and Judith's situation, we see that if Fred decides to leave his entire estate to his son David, and nothing to Judith or Esther, he runs into many problems. Esther's financial means would be lessened, thus decreasing her marriage prospects. He would create acrimony and bitterness in that his widow, Judith, would resent him for not fully supporting her after his death, and Esther and David's relationship is likely to be permanently damaged, if not destroyed, by their unequal treatment. Furthermore, Judith or Esther may attempt to challenge Fred's distribution under the will, thus transgressing the prohibition against litigating in secular courts, and if either of them were successful, they would be guilty of theft for taking away part of David's share under the will without his consent.

Thus, most Jewish law authorities maintain that a testator should use some method to ensure that his wife receives a full share of his estate, and that if both husband and wife pass away, that all of their children receive equal shares of the estate. One should use one of the methods explained in this Note to effectuate this distribution in accordance with Jewish law because such a plan is preferable not only as a matter of public policy and family harmony, but also because it is the preferred method in most situations according to Jewish law.

VI. CONCLUSION

The note of indebtedness method, in conjunction with a typical last will and testament is likely to be the most practical approach to eliminate any conflict between secular and Jewish inheritance law for the majority of observant Jewish individuals. As this Note has demonstrated, this

179. *Bella and Harry Wexner Kollel Elyon and Semikha Honors Program is Established at RIETS: Rabbi Mordechai Willig is Rosh Kollel*, CHAVRUSA, Oct. 1998, at 3, 7, http://www.yu.edu/cms/uploadedFiles/Chag_HaSemikha/VOL%20XXX11%20NO2%20OCT%201198.pdf.

180. Willig, *supra* note 172 (citing SHULCHAN ARUCH, *Choshen Mishpat* 26:1).

181. *Id.*

method would alleviate the conflict between observant Jews' estate planning goals according to most authorities on Jewish law. And since its enforceability in secular courts is irrelevant,¹⁸² its effectiveness under secular law poses no difficulty.

Relatively high net-worth clients may prefer to use methods other than the note of indebtedness to address the conflict between Jewish and secular inheritance law. They may use various other methods of estate planning that are often used to minimize tax liability or to avoid the costs associated with probating one's estate.¹⁸³ Such individuals may give the maximum nontaxable gift to each of their grandchildren directly or to a trust established for each grandchild's benefit every year. Alternatively, they may set up trusts for themselves or their spouses in order to avoid probate costs and ensure that their assets are used in accordance with their wishes after they pass away. Estate plans such as these would place those assets outside the scope of one's "probate estate" which would have reverted to his *halachic* heirs at death, thus solving the Jewish/secular inheritance law problem. However, this author believes that it would still be advisable for such individuals to execute a last will and testament and a note of indebtedness to remove the conflict between secular and Jewish inheritance law as to the small amount of property that he may own at death which he failed to give or transfer out of his "probate estate."

Although it is not appropriate for every circumstance, it is this author's opinion that for the majority of individuals, the method with the widest rabbinic acceptance, the most practical, and lowest maintenance method of *halachic* estate planning would be the execution of a typical last will and testament by both a husband and wife, according to their wishes, and executing notes of indebtedness along with the letters recommended by Rabbi Feivel Cohen.¹⁸⁴ It should also be noted that some clients may follow rabbinic authorities that differ with the approach laid out in this Note. If an attorney is consulted by a client whose rabbi does not recommend the note of indebtedness method, this author would encourage him to communicate with that client's rabbinic authority in order to discover which estate planning methods are acceptable to that client.

182. See *supra* notes 122-24 and accompanying text.

183. See generally, David Joulfaian & Kathleen McGarry, *Estate and Gift Tax Incentives and Inter Vivos Giving*, 57 NAT'L TAX J. 429 (2004), available at [http://ntj.tax.org/wwtax%5Cntjrec.nsf/EE5B02D0E7DB37D285256EB3005EA36E/\\$FILE/Article%2004-McGarry.pdf](http://ntj.tax.org/wwtax%5Cntjrec.nsf/EE5B02D0E7DB37D285256EB3005EA36E/$FILE/Article%2004-McGarry.pdf) (examining the role of estate and gift taxes on inter vivos gifts).

184. See *supra* notes 132-36 and accompanying text.

However, even those clients who dispose of the majority of their assets by inter vivos gift or through trusts should probably execute a note of indebtedness in order to create the incentive for the *halachic* heirs not to challenge the distribution of those items that fall outside of the trust corpus in a *beis din*.

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