LETTERS TO THE EDITOR

Halakhic Will

THE BETH DIN DECISION in "Drafting a Halakhic Will" (*Ḥakirah* volume 10, pp. 73–99, the "Decision") raises several issues I hope R. Warburg can clarify.

1. The Beth Din decision compelling R. Reuben Singer to share the inheritance of his father, R. Simeon, with his sisters and their husbands was based on the application of *kibbud* or *morah av* [Decision at 88.] Yet it is clear-cut *halakha* that neither *kibbud* nor *morah av* applies where the father commands his son to transgress Torah law (*Shulḥan Arukh Yoreh Deah* 240:15). If R. Levy's will was indeed invalid, as the Beth Din found [pp. 86-87], is not the Beth Din's holding tantamount to requiring R. Reuben to transgress the Torah requirement that R. Reuben be the sole inheritor? *Cf. Sdei Ḥemed, maarekhet mem,* at the end of *klal* 219 (*mitzva lekayeim divrei hamet* inapplicable *b'makom issur*). At the very least, would not R. Reuben have a good *kim li* claim against the application by the Beth Din of *kibbud* or *morah av* here?

2. The Beth Din acted to spare R. Simeon *kalone,* embarrassment [Decision at 88]. The Beth Din argues that "*morah* resonates in the words of R. Simeon Levy" and notes "the decedent's concern for his own dignity and the paramount significance of avoiding '*kalone avihem,*' embarrassment to the parties' father in the distribution of his assets... " [*id*.]. As proof, the Beth Din quotes the deceased's own words from his *will* as follows: "... And by utilizing every possible expression of appeal, I request there shall be no difference of opinion on any matter or matters, but that everything shall be peaceful and unanimous, for this is my dignity, the dignity of the family and the dignity of your mother" [i*d*.]. Yet it would seem that the Beth Din itself is guilty of embarrassing R. Simeon by deciding that, despite his best efforts to write and effectuate a valid *will* (especially his efforts with regard to the addendum that apparently was drafted and made effective under the auspices of a *rav*, Rabbi Israel [*id.* at 77]), the *will* was ineffective under *hilkhot shtarot,* the laws of *halakhic* documents, in transferring assets to

his daughters, non-Torah heirs. [*Id.* at 86.] It is only by coercing the parties to comply with the *mitzvot* of *kibbud* and *morah av* through enforcement of the signed arbitration agreement, the *shtar borerut*, that the Beth Din finds itself "propelled... to affirm this document, the wishes of R. Simeon Levy, and transfer the assets as set down in the *will*" [*id.* at 88 and note 36]. Essentially, by holding that the *will* was invalidly created, the Beth Din itself seemingly embarrassed R. Simeon by making him blameworthy of being *matneh al mah shekatuv baTorah,* making a stipulation that is contrary to what is enjoined by the Torah (an act that renders the stipulation invalid).

More important, the Beth Din's quote from the *will* is selective, as the Beth Din left out the critical sentence preceding the provision upon which it relies. That sentence reads: "In the event there will be any differences of opinion amongst my sons and daughters on any matter that relates to the estate, then I authorize Rabbi Reuben to decide on every significant or insignificant matter; he and his determination should be followed" [Decision at 98]. In light of that unequivocal directive, does not the Beth Din's *psak*, which contravenes R. Reuben's conclusion that his sisters were not entitled to the inheritance based on Torah law, leave R. Reuben in the position of failing to fulfill his father's wishes that he, and not others (perhaps even including a third party such as the Beth Din), be the final arbiter of disputes? Does not the Beth Din's *psak* result in a blatant disregard of the express wishes of R. Simeon and thus itself cause a failure in *kibbud* and *morah av* on R. Reuben's and his siblings' part?

3. The Beth Din warns the parties that they may not accept an award from the secular court, in which the daughters filed their own suit, if it is in excess of the award mandated by the Beth Din [Decision at 92]. Yet, according to the late Dayan Grunfeld in his English *sefer*, *The Jewish Law of Inheritance* (Targum Press 1987) at 71, R. Moshe Feinstein, *zt"l*, "maintains that a testament made by a Jewish person according to the law of the land [*dina demalchuta*], whilst he was in good health, is valid in Jewish religious law..." Thus, Rav Moshe apparently holds that "a testament, the dispositions of which will be put into effect by the authorities of the country [i.e., probate court], does not need a *kinyan* as one could not imagine a more effective *kinyan* than

this. Hence, since a *kinyan* is not necessary, the legatees can uphold their right also against persons who are the proper heirs by Torah law" [Grunfeld at 72 translating *Iggerot Moshe, Eban haEzer*, vol. I, ch. 104].

Under the circumstances, might the Beth Din have been better off awaiting a decision from the probate court before rendering its *psak?* More likely than not, as evidenced by the restraining order that it apparently granted the daughters [Decision at 76], the probate court ultimately would have reached the same decision that the Beth Din did, namely to grant R. Simeon's wishes evident from the face of the will [*cf., id.* at 85-86], that his daughters and their husbands share in the inheritance. Arguably, the Beth Din might simply have been able to rely on Rav Moshe that no *kinyan* was necessary and thus uphold R. Simeon's efforts in implementing and validating his *will*. Such a decision would have spared R. Simeon the embarrassment of a finding to the contrary, and would have avoided imposing a *psak* upon R. Reuben based on *kibbud* and *morah av* notions, which, as discussed above, arguably are inapplicable here.

Having said all this, I recognize that neither this nor any other Beth Din may wish to rely on Rav Moshe—whose apparent approach in upholding otherwise *halakhically* invalid *wills* through application of *dina demalchuta dina* in probate proceedings is rather novel—especially to the extent that such reliance cedes the Beth Din's own authority in independently adjudicating probate disputes outside of secular court. Nonetheless, Rav Moshe's approach is a *limud zekhut* for those whose wills, such as R. Simeon's, lack a proper *kinyan* or might otherwise fall short under strict *halakhic* scrutiny.

R. Warburg's elucidation on the points that I respectfully have raised, and particularly as to why Rav Moshe's *shitah* is not more universally accepted and was totally ignored by the Beth Din, would be much appreciated and instructive.

Yitzchak Kasdan
Silver Spring, MD

A. Yehuda Warburg responds:

In reply to Mr. Kasdan, Esq.'s, insightful comments:

1. Mr. Kasdan is correct in stating that *kibud av* is inapplicable if such behavior contradicts the norms of halakha. However, compliance with the wish of a

testator is the fulfillment of *kibbud av* and one need not construe that his intent was to nullify the Biblical laws of *yerusha* and deprive his sons of their inheritance. Secondly, given that his sons received a portion of the *yerusha*, there was no nullification of the Biblical laws of *yerusha*. See *Mishpat ha-Yerusha*, p. 478.

2. The assumption of the author is that the *psak din* addressed the halakhic shortcomings of the will in terms of *hilkhot shtarot* and *mitzvah lekayeim divrei hamet*. As such, by the beth din's discussion of this matter we embarrassed the testator. Nothing could be further from the truth.

As was pointed out in the introduction of the essay, this article was "inspired" by a *psak din* rather than offering a rendition of the *psak din*. In fact, my colleagues and I specifically stated in the *psak din* that we will not address the will from the point of *hilkhot shtarot* etc., and we proceeded to address the matter solely on the basis of respecting the testator's wishes.

The second assumption of the author is that we blatantly disregarded the testator's express wishes by usurping the role of the son who was to be the final arbiter of any and all differences among his siblings. Again, nothing could be further from the truth.

As our introduction to the essay notes, some facts have been deleted from our presentation. In fact, Rabbi Reuben tried to resolve with his other siblings (and he had more than 2 siblings) the matter of the equitable distribution of the family assets. However, for numerous reasons his negotiations reaped no fruits. Moreover, both R. Reuben and this panel understood that his designated role did not include rendering a decision that ran afoul of the clear and unambiguous wishes of R. Simeon, i.e. divide up my estate equally between my children. It was only when "his back was against the wall" and he could no longer maintain peace among his siblings that he enlisted the Beth Din's assistance.

3. There are four reasons that most halakhic authorities refuse to subscribe to R. Feinstein's opinion and endorse the execution of a civil will. Firstly, in the context of monetary affairs, the operative principle is "an individual may stipulate contrary to what is written in the Torah." One of the exceptions to this rule is matters of *yerusha*. Given that the Torah labels these halakhot as "*ḥukat mishpat*," loosely translated immutable law, it

falls in the category of *issurim*, i.e., ritual halakhah, and therefore one is proscribed from executing such arrangements. Hence, the execution of a civil will is in violation of an *issur*.

Secondly, pursuant to Shakh's posture (*HM* 7:13-14 note 39), normative halakha will recognize only matters of *dina demalkhuta* that are reflective of halakhic norms. Given that the execution of a secular will is in violation of halakha, one cannot accept this method as a halakhically bona fide avenue for estate planning. Though R. Feinstein endorses the view of Rema, *ad locum,* who disagrees with the Shakh, nevertheless, normative halakhah rejects Rema's view.

Thirdly, there is an accepted rule "*ein kinyan leaḥar mitta,*" loosely translated that one cannot acquire assets after death. Any assets that an inheritor acquires must be transferred prior to the testator's death. Consequently, a *matnat bari* is effective since the assets are transferred to the heirs prior to the demise of the testator. As such, given that in a civil will, assets are being transferred after death, such a mechanism is halakhically ineffective.

Finally, and this reason is rarely mentioned when discussing R. Feinstein's position: In offering a validation of a civil will, R. Feinstein states (among other rationales)that one does not require a *kinyan* given that "this is the best form of *gemirat da'ath*," loosely translated as firm resolve to conclude an agreement. In other words, by executing such a document one demonstrates the firm resolve of the testator to transfer his assets. And given that one of the central ingredients of the halakhot of *kinyannim* is *gemirat da'at,* a civil will ought to be recognized. Implicit in his position is that one can transfer assets based on *gemirat da'at* without the implementation of a *kinyan*. Though one can find some support for such a conclusion, many *poskim* reject such a position.

Rav Kook

I ENJOY *Ḥakirah* very much and look forward to reading the stimulating articles. Therefore, I was disappointed by the following:

In the article entitled "Two Controversies involving Rav Kook" by Chaim Landerer in *Ḥakirah* Volume 10 (Summer 2010), there are two serious errors.

On p. 245, fn. 6, the author mentions that Rav Kook wanted to attend the funeral of Rav Sonnenfeld but was dissuaded by