

# Halacha and your Will

Mr. Allen, (not his real name) an Orthodox Jew, wanted to make sure his will would survive his son's Scrutiny. The client was not worried about challenges to his capacity, or allegations of undue influence. Rather, his concern was Halachic.

Halacha is a Hebrew term describing the Legal Jewish Framework through which Orthodox Jews govern their lives. It is an all-consuming body of Jewish religious law that governs every aspect of life from the way one ties shoelaces to testamentary disposition. Halacha is based on rabbinic analysis and interpretation of biblical verses, Talmudic discourse and earlier rabbinic examination of these texts and questions. Orthodox Jews take upon themselves the observance of Halacha in all things including matters of commerce. It is not out of the ordinary for two Orthodox Jewish litigants to take their dispute to a Jewish Court called a Beit Din. While Jewish court rulings in Ontario are not generally enforceable by law, but, their decisions are taken very seriously by Orthodox Jews. Ignoring them risks bringing the litigants into dispute and subject to sanctions by their community. There are litigants who choose Jewish Courts as arbitrators. As long as there is compliance with the *Arbitrations Act*, the successful litigant may apply to an Ontario Court for enforcement of the Jewish court's decision.

Mr. Allen and his wife made each other the sole beneficiary of their respective estates. The survivor, on his or her demise, wanted everything divided equally between the

children. This is contrary to Halacha. The bible clearly sets out the rules governing the distribution of a person's estate. Male children are the only heirs. Wives and or daughters only inherit in the absence of sons. Mr. Allen's large law firm did not have many Jewish lawyers and those that were Jewish were not familiar with Halacha – so they contacted me. As an Orthodox Jew whose commercial litigation practice included Estate Litigation, I was familiar with the issues.

Estate Planning can comply both with Provincial Law and Halacha. The Halachic rules regarding testamentary disposition do not apply to gifts made prior to the Testator's death. This factor is one key to be considered when trying to comply with both religious and Provincial law. Mr. Allen's options included setting up an inter vivos gift and or a revocable inter vivos trust. The difficulty with a revocable inter vivos trust is that the majority of Religious Jewish Jurisprudence has held that title must be transferred absolutely, at the time of the gift being given, in order for the gift to be excluded from the estate. Other options included the testator acknowledging a financial debt to Mrs. Allen and their daughters, which if valid, had to be paid out of the estate. There were other methods and vehicles that could be used, but were rejected by the client.

Would a challenge to a Will be successful in a Jewish Court? I am unaware of an instance where such a challenge occurred and I would suggest that the Jewish

Court would be loath to invalidate the will. There is a Halachic principle of *dina d'malchuta dina* (the law of the land has Halachic validity). While the majority of the rabbinic rulings suggest that this principle does not override Halachic law regarding commercial or Estate dealings between Jews, there is an authoritative opinion that held that non Halachic wills would not be invalid under certain circumstances. Like most litigation, you roll your dices, you take your chances.

I prepared my legal research and forward it to Mr Allen's law firm. I applauded Mr. Allen's foresight and his firm for addressing the issue. Success in Estate Litigation often depends on the initial planning and care of solicitors drafting the will and helping in the Estate Planning. Having this in mind, it would prudent for anyone involved in Estate planning for an Orthodox Jew, to take the Halachic issues into account. For more information on this I would refer you to several articles on the topic which are collected at <http://www.jlaw.colm/articles/> and or to Norman Winter, [nw@nwinlaw.com](mailto:nw@nwinlaw.com), a lawyer with an expertise in this area.

Charles Wagner is a lawyer with a commercial litigation practice, focusing on Estate Litigation.