

SURVEY OF RECENT HALAKHIC PERIODICAL LITERATURE

DO THE DECEASED ENJOY PROPERTY RIGHTS?

All sectors of the observant Jewish community have undergone a remarkable transformation in the post-World War II era. There has been a slow but marked progression from religiosity expressed in matters such as ritual observances and dietary restrictions to application of Jewish law and values to the manifold aspects of ordinary, mundane daily life. There is a growing awareness that Jewish religious concerns extend to virtually all aspects of human behavior. With that awareness has come a growing consistency in adherence to the minutiae of Jewish law in all its aspects. It would not be an overstatement to say that in many circles cultural religiosity has given way to a truer form of halakhic Judaism.

Growing recourse to *batei din* rather than to secular courts is one aspect of that phenomenon. That shift is born not only of a recognition of the prohibition “Before them but not before the courts of the gentiles” (*Gittin* 88b) but also of the awareness that an award of funds that is inconsistent with provisions of Halakhah is halakhically categorized as extortion, pure and simple.

Absent the freely-given consent of halakhic heirs, division of an estate in accordance with the terms of a conventional last will and testament is halakhically problematic, to say the least. If the will is not valid in Jewish law, the putative testator must be regarded as having died intestate and halakhic laws of inheritance must govern disposition of the estate. The testator’s wishes can be given halakhic effect only by execution of a will that is valid and effective in accordance with the relevant provisions of Jewish law.

There was a time when even for observant Jews this aspect of Halakhah was largely either unknown or ignored. Public awareness has changed dramatically. The noteworthy early article authored by the late Judah Dick, “Halacha and the Conventional Last Will and Testament,” was emblematic of the beginning of that shift.¹ The ensuing spate of

¹ *Journal of Halacha and Contemporary Society*, II, no. 1 (Spring, 1982), pp. 5-18.

publications addressed both to scholars and laymen is reflective of the growing concern with regard to this matter.² More and more Jewish attorneys have endeavored to familiarize themselves with the nature of “halakhic wills.” Indeed, the drafting of such instruments has evolved into a specialty practiced with varying degrees of proficiency. The need for such an enterprise deserves elucidation.

I. Devising Property After Death

R. Moshe Feinstein, *Iggerot Mosheh*, *Even ha-Ezer*, I, no. 104, is virtually alone among rabbinic authorities in maintaining that a last will and testament not drafted in accordance with the applicable provisions of Halakhah but in conformity with the laws of the civil jurisdiction are valid and enforceable even according to Jewish law.³ *Iggerot Mosheh* regards a will drafted in a manner acceptable for probate, not as a means of divesting property after death, but as an actual halakhic *kinyan* or conveyance of property by the testator that takes effect immediately prior to death.

In order to effect transfer of title, Halakhah generally requires not simply a meeting of minds but also a formal, overt act of conveyance known as a *kinyan*.⁴ The appropriate mode of *kinyan* varies with the nature of the property conveyed, e.g., a deed for transfer of real property, “pulling” or moving the object (*meshikhah*) for chattel and transfer of the reins for an animal. The different forms of *kinyan* required for acquiring various types of property are prescribed by biblical statutes as elucidated by the Oral Law. Rabbinic legislation allows for supplementary modes of *kinyan*. One of the rabbinic forms of *kinyan* is *situmta*, a *kinyan* designed

² See works cited *infra*, note 3.

³ Other authorities maintain that Jewish law extends no recognition to a conventionally drafted instrument and will recognize only a so-called “halakhic will” drafted in the form of an *inter vivos* gift conveying property “an hour” before the demise of the testator or in the form of an acknowledgment of indebtedness due and payable only upon death. For a detailed explanation of the methods employed in drafting a halakhic will as well as sample forms see R. Ezra Basri, *Dinei Mammonot*, III (Jerusalem, 5740), *sha’ar shlishi*, chap. 7; *idem*, *Sefer ha-Zava’ot: I Hereby Bequeath* (Jerusalem, n.d.), chap. 9; R. Ya’akov Yeshayah Blau, *Pithei Hoshen*, VII (Jerusalem, 5756), 166-175; R. Feivel Cohen, *Mi-Dor le-Dor*, (n.p., 5742), chap. 2; R. Matisyahu Schwartz, *Mishpat ha-Zava’ah*, 2nd ed. (n.p., 5765), I, chaps. 8-11; and R. Nachman Chaim Koller, *Kuntres ha-Zava’ah* (n.p., 5772), pp. 3-38. A pamphlet titled “Making a Will the Jewish Way,” published by Mechon L’Hoyroa (Monsey, 1995) should be noted. See also Rabbi I. Grunfeld, *The Jewish Law of Inheritance* (Oak Park, n.d.), pp. 106-111.

⁴ For a discussion of the underlying theories of *kinyan* see this writer’s “The Metaphysics of *Kinyan*,” *The Philosophical Quest: Of Philosophy, Ethics, the Law, and Halakhah* (2013), pp. 325-347.

to facilitate consummation of a sale in circumstances in which primary forms of *kinyan* would be unwieldy. In talmudic times sellers would bring grain to market in large sacks. Purchasers would examine samples of the grain offered for sale by various purveyors, make their selections, negotiate a price, and reach an agreement. Rather than take immediate possession of the sacks of grain, the purchaser would close the sack with wax and affix his seal, thereby signifying that the contents of the sack had been sold and were no longer available to other prospective purchasers. The purchaser would later return to take custody of and transport the earlier purchased grain. In order to prevent either party from withdrawing from that agreement the Sages promulgated legislation endowing this “common trade practice” with the status of *kinyan*. That mode of *kinyan* was known as *situmta*.

Virtually all authorities regard *situmta* as a paradigmatic form of *kinyan*, i.e., they maintain that the rabbinic enactment extended recognition as *kinyan* to any act customarily employed by merchants to indicate finality of transfer. *Iggerot Mosheh* maintains that ubiquitous reliance upon wills to devise property serves to generate actual *kinyan* in the nature of *situmta*.⁵ The objection to that line of reasoning is that, in Western legal systems, property cannot be devised until death has occurred. At that point, halakhically, the property has already vested in the statutory heirs and, consequently, can no longer be transferred by the testator; hence the *kinyan* is a halakhic nullity. *Iggerot Mosheh*’s thesis is cogent only if one assumes as a given the notion that a corpse can remain seized of property to be an absurdity and therefore construes a will as a conveyance effective at the moment the testator draws his last breath.

Common law certainly did not recognize *post mortem* transfer of property. Wills did not exist until legislation providing for bequest of property was enacted by Parliament in the Statute of Wills in the year 1540. The will, then, is a creature of law and can well be categorized as a legal fiction. Either of two fictions might be employed: The law might view deceased as retaining title to property devised by will and thereby allow for property to be transferred to beneficiaries after death has occurred or it might give effect to the testator’s last will and testament by providing for constructive transfer of the title immediately prior to death.

⁵ For forceful expressions of a contradictory position see, *inter alia*, R. Chaim Ozer Grodzinski, *Teshuvot Abi’ezer*, III, no. 34; *Pithei Hoshen*, VIII, chap. 4, note 69; and *Dinei Mammonot*, III, *sha’ar shlishi* 8:2. Cf., R. Matisyahu Schwartz, *Mishpat ha-Zava’ah*, 3rd ed. (n.p., 5768), II, chap. 20.

The notion of a corpse retaining a property interest in his estate would strike most people as a legal absurdity. The common perception is that only living human beings can own property. Property cannot be vested in an animal, much less so in an inanimate object. Thus, property cannot be willed to a pet; instead, legal title must be vested in a (human) trustee with directions to use the property for the benefit and welfare of the pet. Then, logically, how can property be devised after death? Moreover, if property vests in heirs immediately upon death, how can those heirs be divested of title by means of a will?

I vividly recall coming upon a reproduction of a woodcut in a legal textbook whose title I have long forgotten. The photograph depicted the deceased lord of the manor being carried from the manor house and placed upon a horse-drawn carriage. The accompanying text explained that death was deemed to occur only upon the lord's removal from the manor house. This writer is unaware of any basis for that notion but it would certainly have served as a convenient "myth" to explain the effect of a will. A corpse cannot own property and hence cannot pass property to its beneficiaries. But if the deceased is still legally "alive" before removal from his domicile the notion that he may transfer property during the interim between clinical death and legal death is cogent. There is no compelling logical reason for deeming legal death to coincide with biological death.⁶ Definition of death for legal purposes may be a mere convention.⁷ Be that as it may, contemporary legal theorists certainly regard wills as a legal device designed to vest property in beneficiaries after death – a concept rejected by Jewish law.

Iggerot Mosheh justifies his depiction of a will as a valid form of *situmta* by claiming that title vests precisely at the moment of death. As described by *Iggerot Mosheh* in somewhat picturesque terms: "This one departs for death and this one departs for life." *Iggerot Mosheh* asserts that title cannot be conveyed after death solely because the donor is no longer capable of performing an act of *kinyan*. Accordingly, if no act of *kinyan* were necessary, title might transfer at the time of death and, indeed, at least in theory, even after death, but for the fact that title vests in the statutory heirs immediately upon death and such vesting of title preempts any other acquisition of title. Accordingly, he argues, since a will is

⁶ See Baruch A. Brody, "How Much of the Brain Must Be Dead?" *The Definition of Death: Contemporary Controversies*, ed. Stuart J. Youngner, Robert M. Arnold, and Renie Schapiro (Baltimore, 1999), 71-82.

⁷ See this writer's *Contemporary Halakhic Problems*, IV (New York, 1995), 316-318.

executed prior to death, it enables title to pass to beneficiaries seamlessly at the very moment of death.

Iggerot Mosheh's thesis appears to assume as a matter of course that the fundamental impediment that prevents a corpse from conveying property is incapacity to enter into an act of *kinyan*. Alternatively, it may be argued that such incapacity is not due to either physical or halakhic incapability of performing the requisite act but because the deceased is longer seized of his property with the result that he no longer possesses a property interest that might be conveyed. It is the latter consideration, rather than *Iggerot Mosheh's* thesis, that seems to be the primary reason for a person's lack of capacity to devise property after death. The presumption that property rights are extinguished upon death is reflected in other halakhic regulations. A person can enter into *kinyan* to effect transfer of title thirty days in the future. If the requisite mode of *kinyan* is employed, title will pass at the stipulated time. However, if the donor dies in the interim, transfer of title does not occur. The defect in transfer cannot be attributed to a lack of capacity to perform an act of *kinyan* since such act has already been consummated. The defect must lie in the halakhic premise that the donor has been divested of title by death and hence, when the time designated for transfer to become effective arrives, there is no longer any property interest that might be subject to conveyance. Although he does not formulate his argument in quite this manner, this seems to be the first objection to *Iggerot Mosheh's* view advanced by R. Leib Grosnass, *Teshuvot Lev Aryeh*, II, no. 57, sec. 2:1.

Lev Aryeh presents yet another objection. At the moment of the testator's death there are two potential successors to his property: the designated beneficiary whose claim is based upon the previously completed *kinyan* and the heir or heirs who automatically succeed to the estate *no-lens volens*. On what grounds is the claim of the beneficiary to be given priority? Again, *Lev Aryeh* does not fully develop the argument, but it would appear that the *kinyan* upon which the beneficiary must rely cannot be effective in such circumstances. The general rule is "*kol she-eino be-zeh ahar zeh afilu be-bat ahat eino* – two acts that cannot take effect *in seriam* cannot take effect simultaneously" (*Eiruvim* 50a; *Kiddushin* 50b; and *Nedarim* 69b). For example, a married man cannot contract a valid marriage with his wife's sister during his wife's lifetime. An attempt to marry two sisters simultaneously fails with regard to both. Since a subsequent marriage to the sister of one's wife is a nullity, neither of the two marriages is valid even if they are designed to take effect simultaneously. Since the two marriages cannot exist simultaneously, when entered into

concurrently neither has priority over the other with the result that each potential marriage serves to thwart the other from coming into existence. Applying that principle to devising property would yield a similar result: since the *kinyan* cannot be effective a moment after death because it is preempted by automatic succession of the heirs, it cannot be made effective simultaneously with their succession at the moment of death. The rights of the heirs effectively thwart the efficacy of the beneficiaries' *kinyan*. Vesting of title in the heirs, on the other hand, requires no *kinyan* or other halakhic act to become valid.

In rebutting the position of *Iggerot Mosheh*, *Lev Aryeh* presents a more technical argument. Kernels that fall to the ground in the course of harvesting grain are called *leket* and may be gleaned from the field but only by the needy. Produce that is *res nullius* (*hefker*) or formally abandoned by the owner before harvesting does not become *leket* and hence may be acquired by any person. Kernels that become detached from their stalk become *leket* immediately and, having already become the property of the needy, can no longer be declared *res nullius* by the owner of the field.

The Gemara, *Temurah* 25b, poses an interesting problem. Suppose the proprietor declares that the kernels are to become *res nullius* at the very moment that they become more than fifty percent detached from the stalk. The Gemara queries:

Are the kernels *leket* or [are they] *res nullius*? Are they *leket* because their sanctification is at the hands of Heaven or perhaps they are *res nullius* because both poor and rich may acquire them? Abaye responded, "What is the question? *Divrei ha-rav ve-divrei ha-talmid*, *divrei mi shome'in* – The words of the Master and the words of the student, to whose words does one hearken?"

Rashi adds the comment:

Since both [*leket* and *hefker*] seek to devolve [upon the kernels] simultaneously, the words of the Master and the words of the student, certainly the words of the Master have priority. And the Holy One, blessed be He, made them *leket*.

Posing the problem in anthropomorphic terms, the Gemara portrays a struggle between God and the proprietor of the produce. God wishes the kernels to become *leket* at precisely the moment that the major portion of the kernel detaches itself from the stalk while the human proprietor wishes to abandon the kernels at precisely that moment. Abaye, in invoking the dictum "The words of the Master and the words of the

student, to whose words does one hearken?" declares that God must prevail. Similarly, argues *Lev Aryeh*, the situation arising as a result of a will in which the testator purports to convey title at the moment of death is one in which God seeks title to pass to heirs at the time of death, while the testator seeks to have title pass by means of *kinyan* to a beneficiary designated by will at the same moment. Who shall prevail, God or man?

The Gemara's application of the dictum "The words of the Master and the words of the student, to whose words does one hearken?" in this context is clearly figurative.⁸ The problem lies in elucidating the halakhic principle couched in that figurative expression. *Lev Aryeh* assumes that the Gemara is asserting that the two events are not really simultaneous. Human events are always of temporal duration; divinely ordained events are always instantaneous in the sense that they do not endure over a period of time. Thus the divine act of conferring the status of *leket* upon kernels falling from a stalk is completed instantaneously at the moment that God desires *leket* to occur whereas the human act of abandonment is of some, albeit infinitesimal, duration. Accordingly, although proceeding simultaneously, the divine act is always completed while the human act is yet in progress.

This writer finds that analysis somewhat incomplete. Physical acts take place in time and hence, arguably, cannot be instantaneous. Nevertheless, there is no reason to assume that an already completed physical act designed to become halakhically effective at a particular moment cannot take effect instantaneously at the precise moment that has been stipulated.

Proper understanding of Abaye's invocation of the dictum "The words of the Master and the words of the student, to whose words does one hearken?" requires analysis of the halakhic concept of time. Scripture, Exodus 12:19, declares that God announced that the death of the first-born in Egypt would take place precisely at midnight. The problem is that "midnight" is not an identifiable point in time. The night may, of course, be divided into two exactly equal parts. But, then, there exists only a moment of time immediately *before* midnight and another moment of time immediately *after* midnight; there is no single moment that can be labeled "midnight." There could be a moment termed "midnight" only if night were comprised of an odd number of moments. Since time is

⁸ The primary thrust of the dictum "The words of the Master and the words of the student, to whose words does one hearken?" as employed in the Gemara, *Kiddushin* 42b, is that there can be no agency for performance of an illicit act. In that context the dictum is more literal in nature.

infinitely divisible there is no such moment. The *Brisker Rav*, R. Yitzchak Ze'ev Soloveitchik, is reported, perhaps apocryphally, to have responded that the verse is literally accurate because, in context, it predicts that the death of the first-born would take place "at midnight." But, just as there is no moment of midnight, there is no moment of death. Rather, at one moment a person is still alive and the next moment he is already dead. Thus, there is no midnight and there is no moment of death.⁹

As presented, the answer not only begs the question but actually compounds the question. If there is no midnight, then death could not take place at midnight. And if there is no moment of death, then death cannot take place at any moment. The verse states that death of the first-born *was* to take place at an identifiable moment in time and also identifies the moment scheduled for their death as midnight.

A full resolution of the problem must presuppose a Cartesian view of the nature of time. A rough approximation of Descartes' theory is that time is, in effect, a fourth dimension composed of a series of discrete time quanta.¹⁰ All moments of the world's duration are independent of one

⁹ See R. Shimon Mosheh Diskin, *Mas'at ha-Melekh* (Jerusalem, 5758), Exodus 12:29.

This problem should not be confused with the difficulty identified by Rashi, Exodus 11:4. Rashi comments upon the disparity between the words employed by God and the message that Moses subsequently conveyed to Pharaoh. God announced that the event would actually take place "*ba-hazi ha-lailah*", i.e., *at* midnight; Moses reported that it will take place "*ka-hazot ha-lailah*", i.e. *at* "*about* midnight." Rashi explains that Moses was concerned lest Pharaoh err with regard to calculation of time and erroneously conclude that God did not abide precisely by His word. Moses' concern was with regard to human perception. The problem addressed by the *Brisker Rav* is that, given the nature of time, God's own formulation seems inherently absurd.

¹⁰ The view herein described as Cartesian is that commonly ascribed to Descartes by historians of philosophy. For identification of scholars who interpret Descartes in that manner see J. E. K. Secunda, "Descartes and Causality," *The Philosophical Review*, Vol. XLIX, no. 1 (January, 1990), p. 45, note 1 and Ken Levy, "Is Descartes a Temporal Atomist?" *British Journal of the History of Philosophy*, XIII, no. 4 (2005), p. 627, note 2. That understanding is based primarily upon what has been termed Descartes' "Second Causal Proof" for the existence of God presented in the *Third Meditation*. A vigorous defense of that interpretation of Descartes is presented by Levy, pp. 627-674.

For a list of authors who maintain that Descartes regarded time as continuous, see Secunda, p. 45, note 3 and Levy, p. 627, note 3. See also Geoffrey Gorham, "Descartes on Time and Duration," *Early Science and Medicine*, XII, no. 1 (January, 2007), pp. 28-54 and *idem*, "Descartes on God's Relation to Time," *Religious Studies*, LXIV, no. 4 (December, 2008), pp. 413-431. A third group of scholars maintains that there is "no strong reason" for attributing either view to Descartes. See Daniel Garber, *Descartes' Metaphysical Physics* (Chicago, 1992), pp. 269ff. and Secunda, pp. 45-72.

another and, accordingly, all moments of existence are discrete and independent.¹¹ Consequently, “From the fact that I was in existence a short time ago it does not follow that I must be in existence now, unless some cause at this instant... produces me anew.”¹² Time is discontinuous and discontiguous: “... its parts do not depend upon one another and never coexist.”¹³ This notion of time serves to establish the doctrine of constant conservation: “Therein lies a proof for the existence of God. Continued existence of the universe depends upon its re-creation in every moment of time. In order to be conserved in each moment in which it endures a substance has need of the same power and action as would be necessary to produce and create it anew.”¹⁴ For Descartes, continuous creation is necessary as the means of passing from one quantum of time to another.¹⁵

My reading of Descartes has always been in agreement with the “classical thesis” usually termed the doctrine of “temporal atomism,” i.e., the notion that time is composed of indivisible “time atoms.” Far more to the point, I have come to recognize that such a notion of time is reflected in rabbinic sources. I have chosen to describe that notion as the “quantum theory of time” rather than “temporal atomism” and to speak of “time quanta” rather than “time atoms” simply because it seems to me that those terms are more felicitous in enabling the reader to comprehend both the theological and halakhic nuances that are contingent upon elucidation of the nature of time.

¹¹ This does not necessarily contradict the Aristotelian notion formulated in the *Physics*, Book IV, chap. 11, that time is an accident of motion which, in turn, is an accident of matter. That view is adopted by Rambam, *Guide of the Perplexed*, Part I, chap. 52 and Part II, chap. 13. Although as noted *infra*, note 15, Rambam rejected the notion of discontinuous moments of time, the two do not appear to be essentially irreconcilable. Time is best described as a fourth dimension and, although one-dimensional temporal quanta might be conceivable, in point of fact, those quanta exist only together with the other dimensions of matter. We cannot perceive time directly but only in conjunction with motion, i.e., matter seamlessly re-created in different points of space and, from our perspective, as a series of successive positions of a material substance.

¹² Descartes, *Third Meditation; Oeuvres de Descartes*, ed. by Charles Adam and Paul Tannery (Paris 1897-1913), IX, 39.

¹³ Descartes, *Principles of Philosophy*, I, 21; *Oeuvres*, VII, 13. See also *Oeuvres*, V, 53 and 165 and VII, 48-49, 110 and 369.

¹⁴ *Third Meditation; Oeuvres*, IX, 39.

¹⁵ Rambam, *The Guide of the Perplexed*, Part I, chap. 73 presents the atomic doctrine of time as the third of the twelve propositions of the Mutakallemim. Rambam rejects that view in arguing that, if motion is naught but the disappearance of a body from one point in time and its reappearance in another, the velocity of all bodies should be constant. The reply of the atomist is that the pauses or gaps that separate atoms of time from one another are not equal. Using the cinema as an analogue, it is evident that a “moving picture” is but a series of discrete individual or “atomic” images. We perceive movement because of the speed at which discrete and independent pictures are presented. The frames presented in the motion picture are certainly discontinuous but, since we cannot perceive the gap between the separate and discrete frames, they

Using the Cartesian notion of time as a model it is easy to conceive of motion as re-creation of an entity in a different place. Think of a series of ice floes in an ocean and a polar bear atop one of those floes. Both the ice and the polar bear must be re-created each moment but a re-created polar bear can be located upon a different ice floe. If each quantum of time is analogous to a separate ice floe, the gap between discrete quanta of time can be regarded as akin to the waters of the ocean that separate the various ice floes. Descartes does deny the existence of a vacuum or empty space: "And therefore, if it is asked what would happen if God removed all the body contained in a vessel without permitting its place to be occupied by a different body, we should answer that the sides of the vessel would surely come into immediate contiguity with each other."¹⁶ Thus, for Descartes, there can be no space between particles of matter. That is so because, for Descartes, distance is a mode of extension, and there can be no extension other than in association with substance.

Descartes is silent with regard to the existence of gaps between quanta of time. Presumably, if we regard time as a fourth dimension of matter there can be no time without extension just as substance itself cannot exist without extension. Nevertheless, Descartes himself does not label time as an extension of matter.

More to the point, God is transcendental: "He is the locus in which the world exists, but the world is not the locus of His existence" (*Bereshit Rabbah* 68:10). Substance exists only in the physical universe. In the physical universe there is no vacuum and no gap between the quanta of time that substances might traverse. But the Deity is transcendental. He created both substance and time but exists in neither.¹⁷ From His transcendental perspective, He discerns both the points of demarcation that mark the boundaries of diverse particles of substance and those that mark the boundaries of different time quanta.

From the vantage point of human perception, there is no midnight because there is no point between moments of time that the mind can grasp. For man, there is no moment of death because there is no state of

are perceived by us as a single continuum. The same cinematic reel can be shown in "slow motion," i.e. longer gaps are allowed between the frames. The gaps are nevertheless imperceivable but because they are longer we deem their movement or "motion" to occur at a slower pace.

¹⁶ *Principles of Philosophy*, 2, 18; *Oeuvres*, VII, 50.

¹⁷ See R. Sa'adia Ga'on, *Emunot ve-De'ot*, Second Treatise, chap. 13. See also Malbim, Psalms 88:2. For the relevance of God's transcendence of time to Sa'adia's resolution of the problem of divine omniscience and free will, see this writer's *With Perfect Faith: The Foundations of Jewish Belief* (New York, 1983), p. 496.

being that man can conceive as being neither alive nor devoid of life. The Deity, on the other hand, is not constrained by substance which, in turn, must be endowed with extension. As a transcendental being, He is not limited by categories of either physical existence or human comprehension. Man cannot comprehend space as a vacuum devoid of extension. The Deity can contemplate space without substance and hence space without extension. Moreover, His transcendental and all-pervasive being permeates even such space. God is the locus of the world; the world is located within Him. God's essence permeates all material substances including unextended space between particles of matter.¹⁸ Hence, time quanta are located within God and His essence permeates even the unextended gaps between time quanta.

Thus, man can declare produce to be *res nullius* only upon the arrival of a particular time quantum because his mind cannot comprehend gaps between quanta of time. For man, time quanta blend seamlessly into one another, leaving no gaps between them. For man, there can be no death "at midnight" because there is no "*mid*-night." From the human vantage point, such a "moment" does not exist. God does perceive and recognize temporality in the "space" between quanta of time and can act in the gap between discrete quanta of time. Man cannot pronounce a kernel *res nullius* at the moment of detachment of the major portion of the kernel even in advance of the occurrence of that event because he cannot comprehend the existence of such a "moment." It is within the power of the Deity to do so and therefore He declares the kernel to become *leket* in that infinitesimal gap between quanta of time apprehended only by Him. Accordingly, one should hearken to "the words of the Master" before "the words of the student", i.e., the divine edict preempts the human pronouncement because the divine act takes place in the gap between discrete time quanta and is completed instantaneously whereas a human act takes place within a time quantum and spans the duration of that quantum, infinitesimally brief as it may be.

Similarly, God apprehends the gap between the last moment of life and the first moment of death and ordains that the property interest of heirs vests at that very "moment." That apprehension is beyond the ken of the human intellect and therefore man cannot declare *kinyan* to be effective at that unfathomable "instant," with the result that the inheritance decreed by God occurs before human *kinyan* could possibly take effect.

¹⁸ See this writer's discussion of panentheism in *The Philosophical Quest*, pp. 60-61 and the analogy to smoke-permeated clothing.

II. Property Interests Retained After Death

There is no gainsaying the principle that the deceased has no capacity to transfer property. The question of whether a deceased can retain certain property interests and prevent those interests from vesting in his heirs is an entirely separate issue. Of course, the rule that a corpse that has no one to bury him acquires *kinyan* to the spot at which he died – *met mizvah koneh mekomo* (*Sanhedrin* 47b) – and hence the notion that every person has a property interest in the “four cubits” of land required for his burial – may be understood figuratively. Nevertheless, there are sources that indicate that there does exist an ontological concept of a *kinyan* of that nature.

Relying upon *Ketubot* 48a, *Shulhan Arukh* rules in two places, *Hoshen Mishpat* 253:30 and *Yoreh De’ah* 348:2, that a person lacks the right to direct that his estate not be used to defray expenses incurred in his burial. *Shakh*, *Yoreh De’ah* 348:3, and *Sema*, *Hoshen Mishpat* 353:69, explain that ruling with the comment that a person cannot enrich his children by making himself a burden upon the community. *Shulhan Arukh*, *Hoshen Mishpat* 253:30, employs somewhat different language in stating that heirs must be compelled to defray burial expenses by using the deceased’s own funds for that purpose. *Perishah*, *Hoshen Mishpat* 253:48, remarks that “*memmono shel zeh ha-met meshu’bad likah memeno zorkhei kevurato*,” i.e., burial expenses are secured by a lien against the property of the deceased.

The basic point is reflected in comments of *Tosafot*, *Bava Batra* 154:6. The Gemara relates the following incident:

It once happened in Bnei Brak that a person sold his father’s estate and died. The members of the family thereupon protested [that the heir] was a minor at the time of [his] death. They came [to] R. Akiva and asked whether the body might be examined. He replied to them: You are not permitted to dishonor him; and, furthermore, [the] signs [of maturity] are likely to undergo a change after death. . . .

But, according to your interpretation, that evidence [is present] in the attestation of the deed, why should they [wish] to examine [the body]? Let them procure the attestation of their deeds and [thus] gain possession of the property! – Do you think, [replied Resh Lakish], that the property was in the possession of the members of the family and the buyers came to protest? [This was not the case.] The property was in the possession of the buyers and the members of the family protested. Logical

reasoning also [supports] this [presumption] since when he said to them, “You are not permitted to dishonor him,” they remained silent. If it is granted [that] the members of the family protested, one can well understand why they remained silent; if, however, it be assumed [that] the buyers protested, why [it may be asked] did they remain silent? They should have replied to him, ‘We paid him money; let him be dishonored!’ — If [only] because of this [there would be] no argument, [for R. Akiva may] have said to them thus: In the first place, [a *post mortem* examination must not be performed] because you are not permitted to dishonor him; and furthermore, in case you might say, ‘He took [our] money, let him be dishonored’, the signs [of maturity] usually undergo a change after death.

The Gemara establishes the right of purchasers (who have expended the purchase price) to demand exhumation of the body in order to substantiate their claim to take possession of the property. However, if the purchasers have already come into possession of the property, the heirs have no right to demand exhumation in order to invalidate the sale by the deceased and recover the property.

Tosafot quite aptly question the distinction. The Gemara declares that purchasers may legitimately demand disinterment of the body in order to substantiate their claim but heirs faced with the loss of the same property cannot demand exhumation in order to reclaim property that is lawfully theirs. Why must the heirs forego recovery of their property? *Tosafot* offer two separate answers to that question. *Tosafot*’s first answer is that the purchasers have expended funds but the heirs “have given nothing.” That answer does not appear to be cogent: The heirs, no less so than the purchasers, allege a loss; the parcel of land that they claim is theirs by right of inheritance is now in the possession of parties who, they allege, do not have rightful title. That certainly constitutes loss of a property interest. The nature of the claim of the heirs and that of the purchasers are quite similar; there appears to be no logical or legal distinction between loss of cash and loss of a parcel of property.

However, if it is postulated that the deceased retains a property interest in his estate at least to the extent necessary to cover burial expenses, that is so because it is only the portion of the estate for which the deceased no longer has a need that passes to his heirs. The deceased retains a property interest in funds required for burial because burial remains an unsatisfied need of the deceased. Burial of a corpse is required as a matter of human dignity in order to prevent *nivul ha-met*, i.e., ignominy to the corpse. The deceased requires burial in order to prevent putrefaction; the

deceased also has a need to prevent other forms of violation of his body. Preventing desecration of the corpse represents a need of the deceased and hence expenses incurred in preventing such desecration constitute a charge against the deceased. Since the deceased retains an interest in his estate to the extent that he has financial needs that survive death, he retains a *post mortem* interest in funds necessary to prevent violation of his corpse. Funds required to satisfy such needs do not pass to heirs by way of inheritance.

The words of *Tosafot*, “for they [the heirs] have given nothing,” are to be understood as expressing precisely that concept. Purchasers have expended the purchase price; heirs do indeed stand to lose their inheritance. Both purchasers and heirs face a potential loss. But, if the property they seek to inherit is required to prevent *nivul ha-met*, such property never vested in them and hence they suffer no out-of-pocket loss. Thus, since prevention of *nivul ha-met* requires that the corpse not be disinterred, heirs, even if justified in their factual allegations, cannot demand exhumation in order to protect their inheritance. The heirs succeed only to property for which the deceased has no need. Assuming the deceased’s sale of the property was invalid because he was a minor, the property would ordinarily pass to the heirs. But in order to substantiate their claim they must exhume the body. Foregoing their claim obviates the need for exhumation. The deceased, in effect, must retain that property in order to allow the property to remain in the hands of the purchasers and thereby obviate the need to exhume his body. Since he has a need for the property in order to prevent desecration of his corpse the property does not pass to his heirs. That is simply an application of the general rule that the funds necessary for prevention of *nivul ha-met* do not become part of the estate; those funds remain the property of the deceased.

This principle is reflected in other sources as well. A husband is sole heir to his wife’s estate. Creditors of the husband may seize that inheritance to satisfy their claims against the husband. Yet those creditors cannot seize the portion of the wife’s estate necessary in order to pay her burial expenses.

Application of that rule in situations in which the marriage antedates incurrence of the debt is readily explainable. The husband becomes liable for payment of his wife’s burial expenses from the moment of marriage. That obligation is senior to claims for repayment of funds borrowed during the period of the marriage. But R. Pinchas ha-Levi Horowitz, *Hafla’ah, Kunteres Aharon* 89:1, declares that the rule that the husband’s creditors cannot seize the portion of the wife’s estate necessary to cover

burial expenses is also applicable to creditors who lent money to the husband *prior* to the marriage. Logically, the husband's proceeds from inheritance of his wife's estate should be treated no differently from any other assets, i.e., the claim of creditors who lent the husband money before his marriage should have priority over satisfaction of his obligation to bury his wife.¹⁹

Nevertheless, the rule is that the wife's burial expenses must be satisfied from her estate before any claims of the husband's creditors can be entertained. The explanation must be that the creditors' lien does not attach to the portion of the wife's estate necessary for payment of burial expenses by virtue of the fact that those funds did not become part of the estate inherited by the husband. The husband does not inherit those funds because the deceased wife retains title to funds necessary for her burial. Thus, when the wife leaves an estate, it is not the husband who pays the burial expenses out of his inheritance; rather, the wife defrays her own burial expenses from funds that remained vested in her and hence did not become part of her estate.

This thesis also serves to resolve a problem posed by a comment of *Nemukei Yosef*, *Bava Kamma* 22a. *Nemukei Yosef* addresses the situation of a person who kindles a fire and dies before property damage has occurred. *Nemukei Yosef* regards that situation as comparable to that of a person who shoots an arrow and perishes immediately thereafter. The arrow completes its trajectory and pierces a garment after the demise of the archer. *Nemukei Yosef* rules that the owner of the damaged garment has a claim against the estate of the tortfeasor despite the fact that the tort occurred only subsequent to the death of the tortfeasor at which time the estate had already vested in the heirs. If the estate has already passed from the tortfeasor to his heirs, what grounds does the victim have to "claw back" and seize funds from the guiltless heirs?

A person is responsible for the results of his physical acts. An archer who shoots an arrow is immediately liable for the act of setting the arrow in motion. Assuming, as is the opinion of R. Yohanan recorded by the Gemara, *Bava Kamma* 22a, that setting a fire is comparable to shooting an arrow, any resultant conflagration is directly attributable to the act of the person who kindled the fire. To be sure, no liability is incurred unless there is actual financial damage to a property owner, but that is so only because there can be no liability without pecuniary loss to the victim.

¹⁹ As recorded by Rema, *Shulhan Arukh*, *Hoshen Mishpat* 107:2, the general rule is that creditors may demand satisfaction of the debt owed by the deceased even if, as a result, there will not be sufficient funds remaining to defray burial expenses.

When, however, harm *is* caused, liability is assigned to the tortfeasor only because he was the author of the earlier tortious act. If the harm accrues after the death of the tortfeasor, a claim exists against the estate to satisfy that liability even though title vested in the heirs earlier immediately upon the death of their progenitor. At that time, since no harm had as yet occurred, the progenitor had no actual liability whatsoever. The explanation must be that, since the deceased has a "need" to satisfy claims against him, the estate did not ever fully vest in the heirs; heirs do not succeed to the estate to the extent that the deceased has need for his property after his demise. That interest remains vested in the deceased.²⁰

That principle is even more obvious in the rule applicable in another set of circumstances. The property of a proselyte who dies without issue is *res nullius*. As such, his estate may be lawfully seized by any person. There is a talmudic dispute with regard to whether a fetus may be seized of property. Nevertheless, even assuming that a fetus cannot own property, the Gemara, *Bava Batra* 142a, declares that, if a proselyte dies leaving a wife pregnant with child, upon birth the child succeeds to the estate of the proselyte and those who took possession of the estate in the interim are divested thereof. Again, the explanation must be that the deceased has a "need" to bequeath his property to his statutory heirs.²¹ Accordingly, the deceased retains a property interest even in death enabling him to do so.²²

²⁰ See R. Elchanan Wasserman, *Kovez Shi'urim*, II, no. 11, sec. 1. Similarly, according to this analysis, there could be no claim against a person who purchased property from the tortfeasor during the interim period between commission of the tortious act and the occurrence of the harm. Cf., however, R. Shimon Shkop, *Hiddushei R. Shimon Yehuda ha-Kohen, Bava Kamma*, no. 1, sec. 2 and the note appended thereto.

Reb Elchanan goes beyond this analysis in asserting that a resurrected individual may reclaim his property from his heirs because death does not at all extinguish the progenitor's property rights. Quite to the contrary, the progenitor retains a property interest to the extent necessary to satisfy all future needs. Tenuous support for that view may be found in the comments of *Tosafot, Peshim* 3b, s.v. *me-alyah*, who fail to offer the case of a person resurrected by a prophet as an example of a person who owns no real property. Cf., Azriel Rosenfeld, "Refrigeration, Resuscitation and the Resurrection," *Tradition*, IX, no. 3 (Fall, 1967), p. 88.

²¹ Cf., however, *Kovez Shi'urim*, II, no. 12, sec. 5, who advances an entirely different thesis in explaining this case.

²² Less obvious, but of the same pattern, is the case of a person who dies without issue leaving a wife and a number of brothers. The brothers divide the estate equally but if one of their number later enters into levirate marriage with the widowed sister-in-law he dispossesses his brothers and takes the entire estate. It does not appear to be the case that title to the estate vests retroactively or contingently at time of death; rather, it seems that the title of the other brothers is extinguished at the time of

Recognition that a person may retain an interest in his estate that survives his demise serves to illuminate a ruling of R. Moshe Sofer, *Teshuvot Hatam Sofer*, *Hoshen Mishpat*, no. 151. The Gemara, *Bava Batra* 133b, declares that a person who disinherits his son and devises his property to others incurs the displeasure of the Sages.²³ Nevertheless, *Hatam Sofer* observes that bequests to charity are a matter of routine and rules that the practice is entirely permissible. He justifies the practice by explaining that a person's own benefits have priority over the interests of his heirs. Since the testator is in need of the merit that accrues to him from distribution of charity in order to mitigate punishment after death, his charitable bequest cannot be regarded as depriving his heirs of their inheritance. Although, to be sure, the charitable bequest cannot be made in a manner such that it vests only after death, that is so only because the deceased is under no legal obligation to contribute funds to charity. However, his need to allocate the funds for a personal need, according to *Hatam Sofer*, is sufficient to overcome rabbinic censure attendant upon extinguishing the anticipatory interest of his heirs.

A concept akin to that formulated by *Hatam Sofer* was later developed by R. Malkiel Zevi Tennenbaum, *Teshuvot Divrei Malki'el*, I, *Hoshen Mishpat*, no. 103, sec. 9. *Teshuvot ha-Ran*, no. 46, maintains that rabbinic forms of *kinyan* are ineffective in matters involving a halakhic transgression. If that is so, queries *Sha'ar ha-Melekh*, *Hilkhos Zekhiyah u-Matanah* 9:10, how is it that a moribund person can confer his entire estate upon one of his sons and disinherit the others since, ostensibly, disinheriting statutory heirs constitutes a transgression? *Divrei Malki'el* develops the thesis that disinheriting heirs is described by the Gemara as resulting in loss of favor in the eyes of the Sages but does not constitute an actual transgression.

Divrei Malki'el proceeds to assert that the argument developed in response to the problem posed by *Sha'ar ha-Melekh* does not substantiate the conclusion that no actual transgression is incurred. The rabbinic enactment providing for deathbed bequests without *kinyan* was designed to prevent emotional anguish that might be occasioned by inability to dispose of one's estate in accordance with one's desires. The Sages feared that such anguish might hasten the death of an already moribund individual. Since the gift vests only upon death, by which time the statutory

levirate marriage because the deceased retains a property interest enabling him to pass the estate to the brother who weds his widow.

²³ For a detailed explanation of the parameters of this principle see *Pithei Hoshen*, VII, 4:1-3; *Mishpat ha-Zava'ah*, 2nd ed., volume II; and *Mi-Dor le-Dor*, chap. 60.

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heirs have already acquired title, *Divrei Malk'iel* questions the propriety of a person prolonging his own life by means of appropriating funds rightfully belonging to others. *Divrei Malk'iel* responds that, since the death-bed gift is designed for the testator's own benefit, *viz.*, to avoid his own premature death, he retains a property interest in his estate to the extent necessary to satisfy his own needs. Thus, the moribund testator is utilizing his own fortune in order to satisfy a personal need and, by the same token, his "bequest" cannot be considered a gift circumventing the laws of inheritance but must be deemed an expenditure on his own behalf.