



Case Western Reserve Journal of International Law

Volume 28 | Issue 1

1996

Fraud on the Surviving Spouse in Jewish and American Law: A Model Chapter for a Jewish Law Casebook

Jeffrey I. Roth

Follow this and additional works at: <https://scholarlycommons.law.case.edu/jil>

 Part of the [International Law Commons](#)

Recommended Citation

Jeffrey I. Roth, *Fraud on the Surviving Spouse in Jewish and American Law: A Model Chapter for a Jewish Law Casebook*, 28 Case W. Res. J. Int'l L. 101 (1996)

Available at: <https://scholarlycommons.law.case.edu/jil/vol28/iss1/4>

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Journal of International Law by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

FRAUD ON THE SURVIVING SPOUSE IN JEWISH AND AMERICAN LAW: A MODEL CHAPTER FOR A JEWISH LAW CASEBOOK

*Jeffrey I. Roth**

INTRODUCTION

THIS ARTICLE BEGINS WITH A PREFATORY note to explain its format. The article presents comparative law material in the form of a model chapter for a Jewish law casebook. The purpose of the prefatory note is to sketch the background of this project.

At many American law schools, courses and seminars in Jewish law have become an established feature of the curriculum. In recent years, the field has experienced dramatic growth in the number and variety of course offerings.¹ The most striking recognition of the place Jewish law has achieved in American legal education came in 1992 when the Association of American Law Schools created a Section on Jewish Law.

While students register for Jewish law courses for a variety of academic, professional, and religious reasons, certain topics tend to interest them the most. For example, what is the role of law in protecting the environment? Do the homeless have legal rights enforceable against society at large? Are there ever circumstances under which abortion is justified? Or capital punishment? Or euthanasia? May a law ever distinguish between individuals based on their gender? What all of these questions have in common is an important moral dimension, coupled with the fact that the secular legal system to date has failed to supply a definitive answer that is satisfactory to shape a national consensus on the

* Associate Professor of Law, Touro College Jacob D. Fuchsberg Law Center. B.A., Yeshiva University 1968; M.A., Columbia University 1969; J.D., Yale Law School 1974. The author would like to thank Professors Steven F. Friedell and Rena Seplovitz for their comments on drafts of this Article.

¹ A survey of Jewish law courses and seminars at American law schools published in February, 1994, reported 33 courses at 28 institutions. Institute of Jewish Law, Touro College Jacob D. Fuchsberg Law Center, *JEWISH L. REP.*, Feb. 1994, at 27-28. The course title was "Jewish Law" or "Introduction to Jewish Law" at 15 schools and ranged from "Talmudic Legal Studies" to "Judaic Sources of American Law" at other institutions. Previous surveys reported 17 courses at 15 schools in 1989, Institute of Jewish Law, Touro College Jacob D. Fuchsberg Law Center, *NEWSLETTER*, June 1989, at 9, and 21 courses at 26 schools in 1991. Institute of Jewish Law, Touro College Jacob D. Fuchsberg Law Center, *JEWISH L. REP.*, June 1991, at 15-16. It is likely that a small number of additional courses not mentioned in the surveys were also offered.

issue. In such cases, students often find a comparative approach useful to help them develop answers of their own, and some students want to study the answers provided by the great religious traditions as part of this process. In this respect, Jewish law, which has something to say on each of these questions, can have a profound impact on the education of new lawyers in the modern world.

The appearance in print of classroom teaching materials on Jewish law suitable for use in American law schools has not kept pace with the proliferation of courses. For the most part, professors assemble their own teaching materials from primary and secondary sources available in English. In part, this reflects the unique backgrounds, interests, and approaches each professor brings to this complex and fascinating subject.² But it also reflects the fact that to date no casebook on Jewish law has appeared in print although at least two are currently being prepared for publication.

A Jewish law casebook is possible. Jewish law has in its responsa literature an extensive record of its case law as applied from late antiquity until the present day.³ In modern times, additional case law is developing in Israel. Matters of personal status, governed by religious law, are litigated in rabbinical courts that publish their decisions — majority opinions as well as dissents.⁴ In addition, under the Foundations of Law Act (1980),⁵ nonrabbinical judges are directed to consult certain aspects of Jewish law — those parts of it that correspond to “the principles of freedom, justice, equity and peace of Israel’s heritage” — when they find a gap in Israeli statutes and case law. Under the Act, references to Jewish law in Israeli judicial opinions are likely to increase as Israeli judges become more familiar with its principles and with their obligation to

² For examples of two contrasting approaches, compare AARON M. SCHREIBER, *JEWISH LAW AND DECISION-MAKING: A STUDY THROUGH TIME* (1979), with ELLIOT DORFF & ARTHUR ROSETT, *A LIVING TREE: THE ROOTS AND GROWTH OF JEWISH LAW* (1988). These two excellent volumes, written by law professors, contain materials that originated in connection with their courses at Temple University and the University of California at Los Angeles, respectively. *A LIVING TREE* is still in print and available for adoption by professors at other law schools.

³ See SOLOMON FREEHOF, *THE RESPONSA LITERATURE* (1955); see also 1-4 JACOB BAZAK & STEPHEN M. PASSAMANECK, *JEWISH LAW AND JEWISH LIFE: SELECTED RABBINIC RESPONSA* (1977). It has been estimated that the number of published responsa is 300,000. Menachem Elon, *The Legal System of Jewish Law*, 17 N.Y.U. J. INT'L L. & POL. 221, 231 (1985).

⁴ These decisions may be found in the multi-volume reporter entitled “Piske-din Bate Ha-Din Ha-Rabaniyim” (Decisions of the Rabbinical Courts) [hereinafter P.D.R.].

⁵ Foundations of Law, 5740-1980, 34 LAWS OF THE STATE OF ISRAEL 181 (Ministry of Justice trans., 1980).

consult it to fill lacunae in the law.⁶

While the problems involved in selecting, translating, annotating, and arranging these materials into a coherent casebook (or casebooks) to meet the needs of a diverse audience of American law school professors and students are vast, the effort is worthwhile. In the first place, the availability of a casebook will reduce barriers to entry into the field. First-time teachers could adopt the casebook rather than embark upon the arduous task of assembling their own materials as a precondition to teaching the course. Second, a casebook may facilitate the approval of new Jewish law courses at schools where the subject has not previously been taught. With a casebook, a proposed Jewish law course would resemble most other law school offerings and could even be taught to some extent in the traditional Socratic way. Finally, while no single casebook will ever be acceptable to all professors and some will always prefer to use their own materials, even they might wish to assign to their students selected cases or units of instruction from the casebook.

What should a chapter in a Jewish law casebook look like? The present effort is one attempt to answer that question. The chapter is divided into six sections:

1. *Introduction* — The chapter begins with a brief, general introduction to the topic, fraud on the surviving spouse's share.

2. *The principal case* — A decision of the Israeli Supreme Court⁷ is presented in English translation with a minimum of footnoting and commentary. The aim is to make the students' initial encounter with the material as free from editorial imposition as possible. It is hoped that the students will take this opportunity to wrestle with the material on their own and thus become engaged in the issues raised by the case before they have the benefit of the author's views.

3. *Notes* — A sequence of detailed notes follows the case. Their aim is to deepen the students' understanding of the principles of Jewish law raised in the principal case and to compare and contrast them with analogous principles derived from the common law and American and Israeli statutes and cases. The notes encourage the students to study the legal rules in light of the values they embody and the instrumental social policies they foster. The notes also expand the coverage of Jewish law by addressing related legal principles that were not raised in the principal case. For example, while *Shefi* treats the widow's right to receive mainte-

⁶ For a collection of references to Jewish law in Israeli court decisions from 1948-1987, see 1-2 NAHUM RAKOVER, MODERN APPLICATIONS OF JEWISH LAW (1992).

⁷ The case presented in this sample chapter is *Shefi v. Shpitz*, (1955) 9 P.D. 1077. See *infra*, § II.

nance from the estate, the notes explore also the widow's related right to continue to reside in her husband's residence.

For students who have not taken a course in the substantive area of law under consideration, the notes are designed to serve as an introduction to the law of decedent's estates; for students who have completed a course in the topic, the notes should serve as a refresher. These features of the ideal Jewish law course — its comparative treatment of the materials, its coverage of many topics in a single course that are more commonly treated in separate courses, and its ability to function as a review for many subjects the students may have taken previously — are part of what attracts students to Jewish law courses in the first place.

4. *Words and Phrases* — Important concepts of Jewish law mentioned in the principal case but not central to its theme and hence only briefly discussed are singled out in this section for more extensive treatment. For each concept, the section presents an excerpt from the work of a noted authority who has researched the topic and written about it, exposing the students to a variety of authors and perspectives.

5. *Questions and problems* — Questions raise broad issues both for the students to ponder in their reading and also for the instructor to use as a guide for classroom discussion if he or she wishes to do so. Problems pose the actual fact patterns of cases reported either in the responsa literature or rabbinical court decisions without, however, stating the conclusions reached. Instead, the students are asked how they would decide the cases based on the principles they have just studied.

6. *For further reference* — A list of books and articles is provided to assist students who have selected this topic for research, since most Jewish law courses are offered as seminars and it is more than likely that students will be asked to submit a research paper as a requirement of the course.

In rendering the material suitable for use in American law school courses, several factors have governed. The use of Hebrew terms is kept to a minimum. Wherever primary sources are cited, the citations refer to English translations if they are available. Full names and dates are given for the Hebrew legal authorities who will be mostly unfamiliar to the students. The list of works for future reference concentrates on articles and books in English.

Teachers of Jewish law are invited to assign the chapter to their students if they wish to teach a unit on the inheritance rights of spouses. It is hoped that this chapter will be just the first in a series of model chapters to appear in print. In this manner, a "*de facto*" Jewish law casebook may appear, chapter by chapter, in the not too distant future.

Fraud on the Surviving Spouse in Jewish and American Law:

A Model Chapter for a Jewish Law Casebook*

I. Introduction

“All happy families are like one another; each unhappy family is unhappy in its own way.”⁸

Granting the kernel of truth in Tolstoy’s observation, many unhappy families display a similar pattern of attempts to deprive a surviving spouse of access to a deceased partner’s property. Under both Jewish and American law there are cases in which one spouse, contemplating death and on unfriendly terms with the other, has attempted to insulate assets from the survivor by transferring them to a third party before death. As we shall see, in the Jewish cases, the purpose is to deplete the husband’s estate so that his heirs will not be obligated to support his widow for her life, while in the American cases, the aim is to reduce the estate in order to deprive the surviving spouse of a set share of the decedent’s assets by way of inheritance. But in all of the cases, the transferor appears to be acting with one axiomatic principle in mind: “If he died possessed of nothing, the widow, of course, would receive nothing.”⁹

Both legal systems permit married individuals to make effective gifts of assets to third parties and in theory one could defeat a spouse’s expectations by giving away all of one’s property during life. But most people are reluctant to part with all of their wealth and pauperize them-

* © Jeffrey I. Roth, 1995.

⁸ LEO TOLSTOY, *ANNA KARENINA* 17 (David Magarshack trans., 1961).

⁹ *In re Shupack’s Will*, 136 N.E.2d 513, 515 (N.Y. 1956).

selves in the process. This leads to common forms of evasion, transfers of property that on the surface appear to be absolute gifts but in reality leave the donor entitled to the benefits of the property. In some cases, the donor gives away assets with strings attached so that the donor remains in control in substance if not in form; in other cases the donor engages in a sham transfer that merely appears on its surface to vest ownership in another while the benefits of the property continue to flow back to the donor until death. How should such transfers be treated in light of legal principles that require an economic benefit to flow to the survivor at the death of a spouse? Consider the following materials.

II.

SHEFI ET AL. V. SHPITZ

Supreme Court of Israel

(1955) 9 P.D. 1077¹⁰

GOITEIN, SUSSMAN, AND BERINSON, Justices.

Goitein, J. The first appellant, Haim Shefi, is the son of the decedent, Yehiel Shpitz, whose estate is the second appellant. The respondent is the decedent's widow and stepmother of the first appellant. Mr. Shefi is the decedent's only child and was born to him from a prior marriage.

The respondent married the decedent on November 20, 1941. The match did not fare well. The respondent filed a claim for maintenance against her husband in a rabbinic court and was awarded the sum of 50 Israeli pounds per month for expenses.

Some twelve years after the second marriage, Mr. Shpitz died. The decedent left no assets because, some three years prior to his death, he had made a gift of all of his property to his son, Mr. Shefi. Following her husband's death, the widow sought maintenance from the estate and from her stepson but the latter refused. He claimed, among other things, first, that the estate lacked any assets from which the widow could collect support and second, that he is not under any obligation to maintain her from his private property.

No one disputes the right of the widow to be maintained out of property that passes by inheritance. It is also clear that the right does not become effective if the heirs receive nothing by way of inheritance. Therefore the primary question we must resolve concerns the property the father purported to transfer to his son *inter vivos*. Should it be considered as property acquired by the son during the father's lifetime or should it be considered an inheritance from which the widow is entitled to collect maintenance?

To begin with, if the assets had been transferred as an absolute gift, no one could argue that they had been received as an inheritance since

¹⁰ Translation by the author. Notes 11-25 were added to the opinion for purposes of this Article.

the assets were already registered in the son's name during the father's lifetime. Even so, the District Court decided in its careful and instructive opinion that despite the registration, the property did not pass to the son in the father's lifetime since the father's purpose in making the transfer was to conceal his assets and thus prevent his widow from collecting maintenance from them. Under Jewish law, such a transfer is not effective to transfer title from the father to the son. The District Court found that the transfer was a sham since the rights to the property remained in the father until death. Accordingly what the father purported to do, namely, to place the property beyond the widow's reach, is not effective under Jewish law and does not prevent her from collecting support from the property that was ostensibly transferred to the son. As a result the District Court ordered the son together with the estate to pay the widow support from the assets the father transferred to the son during his life. This appeal followed.

The attorney for the appellants directed most of his arguments against the court's finding that the transfer was a sham. We turn then to the grounds upon which the learned judge established that the gift was illusory. The court found:

1. Despite the fact that the transfer was recorded as a sale without consideration, the decedent and his son had agreed at the time of the transfer that the former would enjoy the income for life. Although all of the details of the agreement were not proven, the learned judge concluded that the father's intention was not to transfer all the property to his son as an absolute gift but rather to leave to the son at his death whatever property might be left, the father having enjoyed the fruits thereof during his life.

2. The father continued to live in one of the buildings.

3. The father continued to collect rent from the tenants after transferring the property to his son.

4. The son obligated himself to pay 600 Israeli pounds to various individuals and signed notes which were deposited in escrow with an attorney.

5. It was the son who paid the respondent her support pursuant to the rabbinic court decrees entered during the father's life.

6. The father and son concealed the transfer from the respondent until it was revealed to her by chance some three months prior to the father's death.

From these findings the judge concluded that the entire purpose of

the transfer was only to conceal assets from the widow so she would be unable to collect maintenance from them. Although the appellants' attorney attacked every finding, in my opinion there is within the evidence sufficient factual basis to justify the findings and to reach the conclusion the learned judge reached . . .

In light of the findings and the conclusion, it is incumbent upon us to know what rule of Jewish law applies to the case before us.

In 1938, during the mandatory period, it was decided in Palestine by the Special Tribunal (Spec. Trib. 1/28; (1920-33), P.L.R. Vol. 1, p. 395, [2]) that the obligation of the husband to support his wife flows from the marriage and that this obligation continues as a lien upon the husband's estate after his death until the marriage contract is paid

After the creation of the State of Israel, the Supreme Court also had occasion to make known its views concerning the duty to maintain a widow. Justice Assaf wrote as follows in C.A. 100/49 *Miller v. Miller* (1951) 5 P.D. 1301:

In *Maimonides*¹¹ and the *Shulhan Arukh*,¹² the law is decided that "even when an individual commands at the hour of death not to support his widow from the assets of his estate, he is paid no heed." (*Id.* at 1313). . . .

The liability to maintain the widow is not a new duty that is created upon the husband's death, and it cannot be compared to the heir's right to succeed to the decedent's property. Rather it is a duty that is created with the marriage and at the time of the marriage although it does not accrue until the husband's death. This is explicit in *Shulhan Arukh, Even ha-Ezer* 69:

When a man marries a woman he becomes obligated to her for ten matters . . . [including] to be supported by his estate and to reside in his house after his death so long as she remains a widow. . . .¹³

¹¹ Rabbi Moses ben Maimon, 1135-1204, author of a code of Jewish law entitled *Mishneh Torah*.

¹² Code of Jewish law written by Rabbi Joseph Caro, 1488-1575.

¹³ When a man marries a woman, he undertakes 10 obligations and receives 4 entitlements:

The obligations are: (a) to provide her with sustenance or maintenance; (b) to supply her clothing and lodging; (c) to cohabit with her; (d) to provide the *ketubbah* (i.e., the sum fixed for the wife by law); (e) to procure medical attention and care during her illness; (f) to ransom her if she be taken captive; (g) to provide suitable burial upon her death; (h) to provide for her support after his death and ensure her right to live in his house as long as she remains a widow; (i) to provide for the support of the

Thus it is the marriage that creates the duty to maintain the widow, and the duty attaches at the time of the marriage although it is not discharged until the husband's death. This is similar to the duty to pay the essential *ketubah* [marriage contract] which attaches at the moment of marriage but the time of payment does not accrue until the wife is divorced or widowed. It follows that if the husband wishes to be free of the duty to support his widow, he must enter a stipulation to this effect at the time of the marriage.

One may regard the widow's support as a sort of continuation of the support she received while the husband was living. Not a moment in time separates them. Now if one should inquire why Maimonides and Shulhan Arukh enumerate them separately as if they were separate and distinct duties, the answer would be that for Maimonides, the wife's support is a duty derived from the *Torah*¹⁴ while the widow's maintenance is a duty derived from rabbinic law and a condition of the *ketubah*. Therefore the authorities distinguish between them But it is clear that the obligation to support the widow is not derived from the *ketubah* but from the marriage itself. (*Id.* at 1314.)

The *halakhah* concerning the hiding of assets has two facets. It matters whether the person who engages in the concealing is the husband or the wife. The rule differs in accordance with the identity of the party who conceals.

First there is the case of a woman about to remarry who does not want her prospective husband to have the benefit of her property. For this reason, she deeds her property either to her children by a prior marriage or to a third party. The deed is known as a "deed of concealment."¹⁵

daughters of the marriage from his estate after his death, until they become betrothed . . . or reach the age of maturity; and (j) to provide that the sons of the marriage shall inherit their mother's *ketubbah*, in addition to their rightful portion of the estate of their father shared with his sons by others wives. The husband's rights are those entitling him: (a) to the benefit of the wife's handiwork; (b) to her chance gains or finds; (c) to the usufruct of her property; and (d) to inherit her estate.

Ben-Zion Schereschewsky, *Husband and Wife*, in *THE PRINCIPLES OF JEWISH LAW* 379-80 (Menachem Elon ed., 1975).

¹⁴ According to Maimonides, three of the 10 obligations are imposed by Biblical law — the wife's maintenance, clothing and cohabitation. The remaining seven are imposed by rabbinic law. 4 MAIMONIDES, *MISHNEH TORAH: THE BOOK OF WOMEN, Laws of Marriage* 18:2 (Isaac Klein trans., 1972) [hereinafter *Laws of Marriage*]. For a discussion of the distinction in Jewish law between Biblical laws (Heb. *de-oraita*) and rabbinic laws (Heb. *de-rabbanan*), see Menachem Elon, *De-Oraita and De-Rabbanan*, in *THE PRINCIPLES OF JEWISH LAW* 9, 9-10 (Menachem Elon ed., 1975).

¹⁵ Heb. *shetar mabrakhat*. For the translation "deed of concealment," see 2 NAHUM RAKOVER, *MODERN APPLICATIONS OF JEWISH LAW* 744 (1992).

Maimonides summarizes the law that pertains to it as follows:

If a woman about to be married deeds all her property either to her son or to a stranger, then marries and thereafter is divorced or widowed, the law is that her gift is not valid because it is the gift of a *mabrahah*, i.e., she has deeded all her property only for the purpose of excluding her husband from it so that he may not inherit it and so that it be returned to her when she needs it.

Therefore if she dies while the husband is still alive the donee acquires title to everything.¹⁶

This rule has its source in the *Talmud, Ketubot* 78b-79a. It relates the case of a woman who before her second marriage deeded all her property to her daughter. Later she divorced and sought to recover the property from her daughter who refused. When the parties appeared before Rav Nahman,¹⁷ he tore the deed of gift and announced that the gift was void, basing his action on the presumption that a person will not rid himself of [all] his property and give it to another. The mother's purpose in transferring the property to her daughter was not to vest title in the daughter but to conceal it from her prospective husband so that he would not have the benefit of it. The donee did not acquire a vested right to the property since the donor lacked the donative intent to make an absolute gift to her, even though the transaction appeared from the deed to be an absolute gift.

The second aspect of the rule involves the case of a man about to marry who wishes to insulate his assets from his future wife's claim for her *ketubah* or maintenance. The obstacles to accomplishing this — if it be possible at all — are obvious from what we stated earlier, citing Judge Assaf, for the rule is that a husband has a duty to support his wife from the instant of marriage, that this duty continues as a charge on his assets upon his death, and that only a stipulation made at the time of the marriage can release him from the duty. Further, there is no difference between a first or second wife.

Halakhic authorities disputed over the centuries whether a husband may conceal assets from his wife by transferring them to a stranger and thus prevent her from collecting maintenance or her *ketubah*. At present,

¹⁶ 5 MAIMONIDES, MISHNEH TORAH: BOOK OF ACQUISITION, Laws of Original Acquisition and Gifts 6:12 (Isaac Klein trans. 1951) [hereinafter Laws of Original Acquisition and Gifts]. The paragraph in *Mishneh Torah* ends with the following statement: "But if she reserves anything for herself, even movables, her gift is valid, so that even if she becomes divorced she cannot retract." *Id.*

¹⁷ A scholar of Jewish law who lived in Babylonia in the 4th century C.E. (4th century A.D.).

however, the law is clearly established that he cannot.

The minority position is represented by the view of Rabbenu Tam¹⁸ who holds that a person can conceal property from his wife by transferring it to a third party. The matter is briefly stated in *Tosafot*¹⁹ on *Tractate Ketubot* 79 as follows:

A case of a deed of concealment came before Rabbenu Tam. A person wanted to borrow money but not to create a lien in favor of the creditor nor, by way of deed of concealment, to charge his property for his wife's *ketubah*. Rabbenu Tam ruled that the deed was valid.

The majority took the contrary position in light of the principle that "where one endeavors to evade a rabbinic rule by fraud or contrivance, let alone to steal from a neighbor, it is incumbent upon the rabbinic sages of the generation to frustrate his intention even though there is no evidence but only well-proven legal assumptions." (Responsa of the *Rosh*,²⁰ No. 78:3.) This principle found clear expression in *Shulhan Arukh, Hoshen ha-Mishpat* 99:6:

When an individual is indebted to his neighbor and gives all he has to others to evade the debt, his fraud will not succeed and his creditor may collect the debt . . . from the donee.

Similarly, in the responsa of the *Rosh*:

Where one purchases land, directing that title be placed in his brother rather than in himself, and the deed is drawn in the brother's name to evade the wife's lien, my teacher Rabbi Meir ruled that the wife may collect from the property. Since the purchaser fraudulently intended to evade a rabbinical rule, his stratagem will not avail him. (Responsa of the *Rosh*, No. 78:1.)

The purpose of the rule was neither to negate the rights of owners to deal with their property as they pleased nor to interfere in the ordinary conduct of their affairs. If an owner sincerely wishes to raise cash from his immovable property or to give property as a gift to another, nothing prevents him from doing so. But if the transactions are undertaken with a fraudulent intent to deny creditors' rights, the court will intervene to permit a creditor or a wife to secure their due. They will receive payment from the "transferred" property and no attention will be paid to the

¹⁸ Rabbi Jacob ben Meir (1100-1171), grandson of Rashi.

¹⁹ A collection of glosses on the *Talmud* containing the views of Jewish scholars active in Franco-Germany in the 12th century.

²⁰ Rabbi Asher ben Jehiel, 1250-1327.

transactions undertaken by the owner.

The *halakhah* in this area may be summarized as follows:

A. If the intent of the donor was to vest absolute ownership in the donee and the donor lacked any intent to defraud, the transfer is valid and effective even though the consequence is to deny the rights of creditors, the wife among them.

B. If the donor's intent was indeed to vest absolute ownership in the donee but, along with this intention, he also had the fraudulent intention to deny creditors' rights, then if this additional intention is not apparent from the transaction — i.e., it is not a legal assumption supported by proof²¹ — then the additional intention has only the weight of an unexpressed thought²² which, it is commonly known, does not have the power to nullify an act of transfer.

C. If, however, the intention to defraud is discernible in the transaction and is a legal assumption supported by proof, then even though the donor also had true donative intent to vest absolute title in the donee, the transfer will not take effect because the intention to defraud has become a legal assumption supported by proof. . . .

A number of halakhic authorities contend that a distinction must be made between a gift to children and a gift to a stranger. Thus Maharam²³ wrote:

Even where a gift supersedes the *ketubah* or maintenance, a gift an individual makes to a child or heir, even while in good health, does not. . . . In the final analysis a gift to one's heirs is the same as an inheritance. . . and it follows that such a gift will not be more effective than an inheritance ordained by the Torah to override the *ketubah* and the duty to maintain a widow. (Cited in *Yam Shel Shlomo*,²⁴ *Ketubot* 4:28.)

Having summarized the *halakhah* pertaining to the case, let us see how the learned judge below decided. . . . He correctly emphasized the difference between a transfer to one's child and a transfer to a stranger. The rule that a widow may not collect maintenance from property transferred to a stranger is based on reasons of social policy,²⁵ as the

²¹ "Legal assumption supported by proof," Heb. *umdana de'mukhah*. See Words and Phrases, § IV, *infra*.

²² "Unexpressed thought," Heb. *devarim shebelev*. See Words and Phrases, § IV, *infra*.

²³ Rabbi Meir ben Baruch of Rothenburg, 1220-1293.

²⁴ Talmudic commentary by Rabbi Solomon Luria, 1510-1573.

²⁵ Heb. *mipne tikkun olam*. See Words and Phrases, § IV, *infra*.

Mishnah states (*Gittin* 5:3): “We do not collect . . . support for wife and daughters from mortgaged property for reasons of social policy. . . .”

He then asks, “Does she also not collect in a case where the transfer was intended to defeat her right to maintenance and it was made fraudulently or in a sham transaction?” After investigating the rule in the sources he writes:

Among the legal assumptions which the *Rosh* enumerates according to the *Talmud*, one answers our case, and that is we assume a person will not give away all of his wealth to others and reduce himself to begging at doorsteps. If a person transfers all of his property, even to his son, the legal assumption is that his intention was fraudulent concealment rather than an effective transfer. When a matter of an alleged concealment arises (according to *Ketubot* 79b), it appears that even if the transferor left himself something although very little, the legal assumption remains that his intention was concealment This assumption seems to me consistent with the rules of circumstantial evidence in modern law.

The judge turned to the facts cited previously and reached the necessary conclusion that determines the outcome of this appeal: there was here an intent to defraud and conceal assets and the gift was not absolute.

I believe the judge was correct and reached the only possible conclusion permitted by the facts cited above, namely, that the father did not succeed in transferring the property absolutely to his son during his lifetime and that the son did not receive an absolute gift. Although civil law may view the son as having obtained the property from his father as an *inter vivos* gift, under Jewish law the property is deemed to have passed by inheritance, subject to the charge for the widow’s maintenance and the duty to permit her to continue to reside in the house where she lived with her husband during his life.

In light of what was said above, we dismiss the appeal and affirm the judgment of the District Court

III. Notes

1. How important was the deceased husband’s intent to the outcome in *Shefi v. Shpitz*? On the one hand, it appears to be the crucial factor, for it was Mr. Shpitz’s intent to conceal assets from his wife that rendered the lifetime gift to his son a fraud, permitting the widow to claim her maintenance. On the other hand, the husband’s purely subjective intention, in the sense of a “mental reservation” that may have accompanied the gift, cannot affect the transaction, constituting nothing more than “words

in the heart."²⁶ What in the end turns out to be crucial for the widow's recovery are the outward manifestations of the donor's intent — the external indicia that permit the court to infer that the husband intended not an absolute transfer but the concealment of assets. After all, intention is a state of mind. How can anyone know what another person's intentions were? The best evidence would be truthful testimony directly from the actor. Putting aside questions of mixed motivations and people who are not truthful even to themselves, such testimony is, of course, not available where the actor is not living. A written memorandum of intention would be the next best evidence but is unlikely to exist, especially where the intention was indeed to defraud. This leaves the fact finder with the necessity of drawing inferences about the actor's intentions from directly observable evidence, such as the characteristics of the transaction in which he engaged. In *Shefi*, the court pointed to these:

- (1) The father retained the income from the transferred assets and collected rent from tenants.
- (2) The father continued to reside in one of the buildings.
- (3) The son undertook to defray some of the father's debts in consideration of the gift and paid his stepmother's support under a court order entered against the father.
- (4) The parties concealed the transfer of assets from Mrs. Shpitz who discovered it by chance just three months prior to her husband's death.

In Jewish law, the "legal assumption" (Heb. *umdana*)²⁷ is that a person will not give away all of his assets and impoverish himself. The factors just mentioned make the assumption a proven assumption (Heb. *umdana de'mukhah*), showing the donor did not intend to divest himself of the property in favor of his son by gift but, rather, he sought to insulate the assets from his widow's claim while retaining the benefits of the property until death when the property would, in substance if not in form, pass to the son.

2. It has been suggested that it is useful in this area of the law to distinguish between "motive" and "intention."²⁸ *Motive* is the motivation or incentive that impels an individual to act. *Intention* connotes the individual's purpose or purposes which he deliberately sets out to accom-

²⁶ Heb. *devarim she-be-lev*. See Words and Phrases, § IV *infra*.

²⁷ See Words and Phrases, § IV, *infra*.

²⁸ For a discussion of this point, see WILLIAM D. MACDONALD, FRAUD ON THE WIDOW'S SHARE 98-119 (1960).

plish by acting.²⁹ To fully understand the distinction, consider the following case: X and Y are husband and wife and their relationship is good. X has a net worth of \$50,000. X has an indigent friend, Z, who is in need of medical treatment that costs \$50,000. X decides to make a gift of all of his assets to Z for his medical treatment. The *incentive* for the gift, what motivates X's action is, of course, Z's medical condition. Depriving Y of her marital rights is not what impels X to act. But in making the gift of his assets to Z, which X does deliberately, he must necessarily and at the same time *intend* to deprive his wife of those assets, just as he deliberately intends to deprive himself, his heirs, and his creditors. Although removing his assets from their reach is not what motivates the gift to Z, it is a definite consequence of X's deliberate act. In undertaking to make the gift, X cannot possibly be unaware of the cost to himself, his wife, his heirs, and his creditors.

Return to Justice Goitein's summary of Jewish law on this point in the principal case where he writes:

If the intent (Heb. *kavanah*) of the donor was to vest absolute ownership in the donee and the donor lacked any intent to defraud, the transfer is valid and effective even though the consequence is to deny the rights of creditors, the wife among them.

In which of the two senses mentioned above does Justice Goitein use the word "intent"? He must mean motivation, because there can *never* be a case of an absolute transfer of assets by a married man to a stranger in which the transferor "lacks *any* intent" (in the second sense of "acting purposefully and deliberately") to deprive his spouse of the transferred assets.

3. Under Jewish law, as explained in the principal case, the widow's right to maintenance from her husband's estate attaches at the time of marriage, although the obligation to pay it does not accrue until the moment of the husband's death. The same was true under English common law with regard to dower — the widow's right to a life estate in one-third of her husband's lands. Inchoate dower rights arose by operation of law at the moment of marriage. At the husband's death, when inchoate dower became consummate, one-third of the husband's land was set off to the widow for her life either by court order or by agreement with his heir.³⁰

Inchoate dower inhibited free transfers of land since the wife's release of her dower was required for the husband to make an effective

²⁹ *Id.* at 103.

³⁰ ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY* 74-77 (1984).

sale to a third party.³¹ In part to remedy this situation, and also in recognition of the fact that an increasing proportion of wealth in modern society consists of property other than land, most American states enacted statutes that replace dower with elective share rights.³² The statutes provide a surviving spouse, husband or wife, with a right to take a share of the decedent's estate, often one-third or one-half of real and personal property, unless the decedent made an equivalent or greater provision for the survivor by will.³³ If a spouse dies without a will (intestate), the surviving spouse is an heir along with children and in some cases parents and will inherit under the state statute of intestate succession.³⁴ Unlike dower, in American common law states today the inheritance rights of spouses attach only at the moment of death and do not encumber property while the spouse is living.

Thus, it is possible to draw three contrasts regarding the position of a widow under Jewish and American law. First, the widow is not an heir of her husband under Jewish law but she is an heir under American law. Second, the widow is entitled to maintenance from her husband's estate under Jewish law but not under American law. Third, the widow's rights under Jewish law attach to the husband's property at the moment of marriage while her rights to an elective share under American statutes do not arise until the husband's death.

Prof. Shilo has summarized the widow's position under Jewish law as follows:

³¹ *Id.* at 80.

³² In nine states (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin), community property principles govern the spouses' inheritance rights. See JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS AND ESTATES* 474, 476 (5th ed. 1995).

³³ For representative statutes, see, e.g., UNIFORM PROBATE CODE, art. II, part 2 (1991) (elective share of surviving spouse), adopted in approximately half of the states, and NEW YORK ESTATES, POWERS & TRUSTS LAW § 5-1.1-A (McKinney 1981 & Supp. 1995) (giving a right of election to the surviving spouse). Both statutes, to prevent disinheritance by lifetime transfers, provide that the value of certain assets that were transferred during the decedent's lifetime must be taken into account for purposes of computing the amount that the surviving spouse is entitled to receive as his or her elective share. UNIF. PROB. CODE § 2-205 (listing the decedent's non-probate transfers that are included in the value of his or her augmented estate) and N.Y. EST., POWERS & TRUSTS LAW § 5-1.1-A(b) (treating enumerated *inter vivos* dispositions as testamentary substitutes for the purpose of election by the surviving spouse.)

³⁴ See, e.g., UNIF. PROB. CODE § 2-102 (describing the surviving spouse's share when the decedent died intestate); N.Y. EST., POWERS & TRUSTS LAW § 4-1.1 (describing the descent and distribution of an intestate decedent's estate.).

The wife is not a legal heir to her husband's estate (BB 8:1) [*Bava Bathra*, a Talmudic tractate] but has a number of rights which afford her a share therein and ensure provision for her sustenance and essential needs until her death or remarriage. The widow receives from the estate her husband's *ketubbah* obligations, the dowry increment, and her own property brought into the marriage and she is further entitled to maintenance from the husband's estate until her death or remarriage.³⁵

4. Jewish law treats the inheritance rights of husbands and wives differently. As noted, a husband inherits his wife's estate but not the reverse, while the widow is entitled to support from her husband's estate but not the reverse. Further, as discussed in the principal case, a wife can utilize a "deed of concealment" to defeat her husband's inheritance rights while, according to the majority of authorities, a husband cannot execute such a deed to defeat his widow's right to support.

Widows and widowers were also treated differently under the common law regime of dower and curtesy.³⁶ By contrast, modern U.S. statutes providing for intestate succession and elective share afford equal rights for each surviving spouse without regard to gender. Where this is not the case, the statute is subject to judicial scrutiny under state and federal constitutional guarantees of equal protection of the laws.³⁷

In part to eliminate the disparity of inheritance rights between husbands and wives under Jewish law, the Israeli Knesset in 1965 enacted the Succession Law.³⁸ Deputy Attorney General Uri Yadin of Israel has written of the statute:

One of the outstanding trends or features of the Succession Law is

³⁵ Shmuel Shilo, *Succession*, in *THE PRINCIPLES OF JEWISH LAW* 447, 449 (Menachem Elon ed., 1975).

³⁶ On dower, see textual discussion *supra*, Note 3. Curtesy was the husband's right at common law to a life estate in all of his wife's lands where issue had been born to the marriage. CUNNINGHAM, *supra* note 30, at 73-74.

³⁷ See e.g., *Hall v. McBride*, 416 So.2d 986 (Ala. 1982), where the court struck down a state statute providing a forced share for widows only. It held that the surviving spouse's gender could not be used as a reliable proxy for need. There were indigent widowers who needed assets from their wife's estates as well as wealthy widows who did not need to inherit anything from their husband's estates. In the court's view, a statute premised on the belief that widows would tend to need more economic assistance than widowers was based on a paternalistic view of women as homemakers and was at odds with the contemporary reality of large numbers of women in the workforce.

³⁸ Succession Law, 5725-1965, 19 LAWS OF THE STATE OF ISRAEL 58 (Ministry of Justice trans., 1980) [hereinafter Succession Law].

the equality among members of the family. Rights of the widow and widower are identical for inheritance purposes as well as for maintenance out of the estate.³⁹

Shefi v. Shpitz was decided before the Succession Law was enacted, when inheritance rights in Israel were a matter of personal status governed by the parties' religious law. Section 155 of the Succession Law⁴⁰ provides that parties may consent in writing to have their inheritance rights determined in their religious court under the religious law that applies to them. Thus Jewish law, including the principles described in *Shefi*, remains available in Israel today to determine inheritance rights upon consent of the parties involved.⁴¹ The Succession Law provides, however, that if one of the parties is a minor or legally incompetent, his

³⁹ Uri Yadin, *The Succession Law as Part of Israeli Civil Law Legislation*, 1 TEL AVIV UNIVERSITY STUDIES IN LAW 36, 42 (1975) [hereinafter Yadin, *The Succession Law as Part of Israeli Civil Law Legislation*]; see also Uri Yadin, *The Law of Succession and Other Steps Towards A Civil Code*, in STUDIES IN ISRAEL LEGISLATIVE PROBLEMS 104, 107 (Guido Tedeschi & Uri Yadin eds., 1966).

⁴⁰ Succession Law, *supra* note 38, at 83-84.

⁴¹ For rabbinical court cases applying Jewish law to determine inheritance rights upon the parties' consent under § 155(a) of the Succession Law, see, e.g., A. v. B. and C., Case No. 7586/29, 9 P.D.R. 115 (5729) (adjusting inheritance between son and daughter where son was their father's sole heir under Jewish law but certain assets of the decedent were registered in the daughter's name or in her possession); B. and C. v. A., Appeal No. 117/39, 11 P.D.R. 289 (5739) (rejecting appeal of decedent's widow to revoke her consent to rabbinical court jurisdiction upon learning she would inherit nothing from deceased husband's estate); A. v. B., Case No. 12170/39, 12 P.D.R. 45 (5739) (granting widow support from heirs where she was estranged from their deceased father but not divorced); A. v. B., Appeal No 179/42, 13 P.D.R. 199 (5742) (dividing decedent's property between his bother, as sole heir under Jewish law, and his widow, where decedent during his life had executed a deed of gift conveying all of his property to her); and Rotar v. Public Administrator, Case No. 12571/44, 13 P.D.R. 319 (5744) (holding rabbinical court may accept jurisdiction under § 155(a) where all known heirs have consented although no one can prove conclusively, in view of the Holocaust, whether additional heirs of the decedent may be living).

In *Meshullam v. Rabbinical Court of Appeals*, 45 P.D. 594 (1991), the Israeli Supreme Court transferred an inheritance matter from rabbinical court to the Israeli district court upon application of the decedent's reputed spouse, to whom he was never married. The decedent's three children had consented to the application of Jewish law but the reputed spouse objected. The rabbinical court found her consent was not necessary because, on the facts presented, she was not an heir under Jewish law. The Supreme Court held that the question of who is an heir for purposes of the consent required under § 155(a) should be decided by the Israeli district court. Justice Elon dissented, arguing that the court in which the issue of jurisdiction was raised, in this case the rabbinical court, should decide the matter.

inheritance rights, as determined under religious law, may not be less than they would be under the Succession Law.⁴²

5. One consequence of the shift from dower to elective share in American common law states was to render a married individual's property freely transferable during life. This gave each spouse the potential ability to defeat the other's elective share rights through lifetime gifts, a problem identical to the situation the court confronted in *Shefi*. When the validity of such gifts was challenged after the donor's death by the surviving spouse who was disinherited, most American courts concluded that a test based on the transferor's purely subjective intent was unworkable. The leading American case, *Newman v. Dore*,⁴³ stated the reasons as follows:

Motive or intent is an unsatisfactory test of the validity of a transfer of property. In most jurisdictions it has been rejected, sometimes for the reason that it would cast doubt upon the validity of all transfers made by a married man, outside of the regular course of business; sometimes because it is difficult to find a satisfactory logical foundation for it.⁴⁴

In *Newman*, the husband, who was estranged from his wife, transferred all of his assets to a trust just prior to his death. It was clear that his purpose was to deprive his widow of her statutory share in favor of the trust beneficiaries. But his intention was not what invalidated the trust against the widow's claim to elective share. Instead, the court looked to the control over the property that the husband retained. He had retained full control over the trustees and could direct their actions in writing. This made the trustees his agents. The result of the arrangement was that the husband retained full control over the property, just as if he had never transferred his property to a trust in the first place. The transfer to a third party (in this case, trustees) was a sham to disguise the husband's retention of control until death. "In this case it is clear that the settlor never intended to divest himself of his property. He was unwilling to do so even when death was near."⁴⁵

American courts, whether following the reasoning of *Newman v. Dore* or applying more recent statutes or case law, would mostly concur with the analysis of the husband's transfer in *Shefi* and why it was not effective to insulate his assets from the widow's claim. In addition to the degree of control over the assets retained by the transferor, other important considerations include (i) the proximity of the transfer to the date of

⁴² Succession Law, *supra* note 38, at 83, § 155(b).

⁴³ *Newman v. Dore*, 9 N.E. 2d 966 (N.Y. 1937).

⁴⁴ *Id.* at 968.

⁴⁵ *Id.* at 970.

death (in *Shefi*, the transfer took place three years prior to the husband's death; in *Newman*, three days prior); (ii) the amount of the transfer in relation to the size of the decedent's estate (in both cases, the husbands transferred *all* of their assets); (iii) whether the transaction was known to or concealed from the other spouse (in both cases, the transfer was concealed); (iv) whether the transferor retained the right to revoke the transfer, (v) what benefits the transferor retained, such as the income from the property, (vi) whether the donee was a stranger or someone the donor would naturally want to benefit apart from any intent to deprive the spouse (in *Shefi*, the transfer benefitted a son; in *Newman*, a niece) and (vii) whether the surviving spouse had assets of her own with which to support herself.

6. Although the two cases, *Shefi* and *Newman*, reach the same conclusion, the judges reveal different attitudes towards the husband's behavior. Judge Lehman, writing for the New York court, is not prepared to condemn a husband for taking actions in an attempt to defeat his wife's elective share rights and is even unwilling to term his actions an attempted "evasion." He makes this point by citing an eminent jurist who preceded him, Justice Oliver Wendell Holmes, in two decisions of the U.S. Supreme Court:

In strict accuracy, it cannot be said that a "purpose of evading or circumventing" the law can carry any legal consequences. "We do not speak of evasion, because, when the law draws a line, a case is on one side of it or the other, and if on the safe side is none the worse legally that a party has availed himself to the full of what the law permits" "The fact that [the defendant] desired to evade the law . . . is immaterial, because the very meaning of a line in the law is that you intentionally may go as close to it as you can if you do not pass it."⁴⁶

By contrast, drawing his approach from the sources of Jewish law, Justice Goitein clearly disapproves of the husband's behavior. His attempt to deprive his wife of maintenance from his estate, to which she is entitled by rabbinic regulation, is a stratagem that should not succeed. Justice Goitein also cites an eminent predecessor to support this proposition, the *Rosh*, Rabbi Asher ben Jehiel, a thirteenth century German authority who served as chief rabbi in Toledo, Spain, who wrote, "where anyone attempts to evade a rabbinic regulation by fraud or contrivance . . . it is incumbent upon the rabbinic sages of the generation to frustrate his intention even though there is no proof but only well-found-

⁴⁶ *Id.* at 967 (citations omitted).

ed legal assumptions.”⁴⁷

Does this contrast express a difference between a secular system of law and a religious one? Does the secular system not concern itself with what lies in the heart of the individual as he or she approaches a line drawn by the law, while the religious system will stress the purity of heart and good intentions of its adherents as they organize their affairs in the light of religiously ordained obligations and requirements?

7. Whether, under Jewish law, the heirs may elect at their option to pay the widow a lump sum in lieu of her continuing right to support was debated by halakhic authorities and the subject of various local customs. In reading the following excerpt, remember that the lump sum monetary payment mandated by the *ketubah* (marriage contract) was in most cases likely to be less than the amount payable to the widow to defray her maintenance over the course of her widowhood:

Since the widow — if she has not lost her right to maintenance otherwise — is entitled to maintenance only so long as she has not received or claimed her *ketubbah* by legal process, opinion was divided already in the time of the Mishnah as to whether the heirs may compel her to receive it and thereby be released from their obligation to maintain her. It was finally decided that this question depends upon custom, because maintenance of the widow is one of the provisions of the *ketubbah*, and in all matters relating to the *ketubbah*, “local custom,” i.e., the custom of the place of the marriage, applies, such custom being considered a condition of the marriage and therefore not to be varied but with the consent of both spouses. According to the custom of the people of Jerusalem and Galilee, the choice lay with the widow alone, and therefore they inserted in the *ketubbah* a term, “You shall dwell in my house and be maintained in it out of my estate throughout the duration of your widowhood.” According to the custom of the people of Judea, however, the choice was left with the heirs and there the corresponding term in the *ketubbah* deed was therefore “until the heirs shall wish to pay you your *ketubbah*.” As regards this difference in custom it was said that while the people of Jerusalem cared for their honor, the people of Judea cared for their money. The *halakhah* was decided in accordance with the custom of Jerusalem and Galilee, i.e., whenever there is no other fixed custom or rabbinical *takkanah*, the choice lies solely with the widow and the heirs cannot deprive her of maintenance against her wishes.

⁴⁷ Responsa of the Rosh, No. 78:3, quoted in *Shefi v. Shpitz*, (1955) 9 P.D. 1077, 1081.

Inasmuch as economic conditions during marriage may so change that the estate might be insufficient to provide both for the maintenance of the widow and for inheritance for the heirs — a state of affairs which the husband certainly did not intend — many of the authorities were of the opinion that it is proper to make a *takkanah* permitting the heirs to deprive the widow of her maintenance by payment to her (against her will) of her *ketubbah*

In . . . Israel there is a distinction between the Sephardi and Ashkenazi communities.⁴⁸ The former follow the author of the *Shulhan Arukh*, i.e., that the choice lies with the widow alone and the heirs cannot rid themselves of the obligation for her maintenance against her wishes. The Ashkenazim permit the heirs to do so by payment unto the widow of the *ketubbah* even if she does not agree to it.⁴⁹

8. The widow's right to support from her husband's estate includes the right to continue to reside in his dwelling so long as she remains a widow.⁵⁰ The residence right is personal to her and nontransferable. For example, she may not rent the residence to a third party and use the rental income to secure a different dwelling for herself.⁵¹ Further, the right is highly specific and applies only to the exact residence the couple occupied while the husband was alive in its condition at the time of his death. The widow does not have the right to repair it. If the residence is destroyed, her right of residence is terminated.⁵² At that point, however, as a distinct part of their obligation to maintain the widow, the husband's heirs are required to provide her with funds to secure an alternate dwelling.⁵³ By the same token, if the husband did not own a residence at death, even in a case where the husband sold his residence just prior to death, the heirs, as part of their general obligation to support the widow, must provide funds so that she can rent one.⁵⁴

The question arises why Jewish law imposes on the heirs a separate obligation to allow the widow to remain in her husband's house, when at the same time it requires them to provide her with a suitable dwelling as part of their general duty to maintain her? A distinction may be drawn between the types of needs these two separate legal duties address. While

⁴⁸ On the origins of Ashkenazic and Sephardic Jews and the differences between their communities, see HIRSCH J. ZIMMELS, *ASHKENAZIM AND SEPHARDIM* (1976).

⁴⁹ Ben -Zion Schereschewsky, *Widow*, in *THE PRINCIPLES OF JEWISH LAW* 402 (Menachem Elon ed., 1975) (citations omitted).

⁵⁰ *Laws of Marriage*, *supra* note 14, at 12:1-2.

⁵¹ *SHULHAN ARUKH, EVEN HA-EZER* 94:1 (Remah in the name of Rashba).

⁵² *Laws of Marriage*, *supra* note 14, at 18:2.

⁵³ *Id.* at 18:3.

⁵⁴ *Id.*

the heirs' general support obligation seeks to satisfy the widow's material needs, the specific right to remain in her husband's house is addressed to her social and psychological well-being. Allowing her to remain in her husband's residence saves her from the disgrace of being evicted upon his death.⁵⁵ It protects her status within the family by encouraging the heirs, some of whom may not be her children, to treat her with the same respect as they did while their father was alive.⁵⁶ It also allows her to continue her role in the care and education of minor children without the interruption of eviction.⁵⁷ Thus the right to remain in the marital home tends to minimize for the widow the social and psychological dislocations occasioned by her husband's death.⁵⁸ In addition, it insulates her from a decrease in her standard of living that might force her to seek remarriage,⁵⁹ a situation that would not honor the decedent's memory. For all these reasons, the heirs' right to dominion over the house as part of their inheritance is deferred while the widow remains in residence.⁶⁰

9. A husband in the United States who owned a residence and wished to leave his widow in approximately the same position she would occupy under Jewish law might grant her a life estate in the residence by a provision in his will. He would make the life estate inalienable and defeasible on her remarriage or the destruction of the house. He would also expressly withhold from the widow, as life tenant, the authority to

⁵⁵ Nahum Shachar, *Madur Ha-Almanah Biveit Baalah* [Widow's Residence in Her Husband's House] 4 LIMUDAI MISHPAT BAR-ILAN [BAR-ILAN L. STUD.] 204, 209 (1985) (citing Responsa of Rabbi Solomon ben Abraham Adret, RASHBA, Part 5, No. 106).

⁵⁶ *Id.* at 210 (citing Responsa of Rabbi Judah ben Asher, ZIKHRON YEHUDAH, No. 78).

⁵⁷ *Id.*

⁵⁸ But once the dislocations have in fact befallen the widow, her right of residence is terminated. For example, if the widow was forced to move out because the husband's house was destroyed and later the heirs rebuilt it, the widow does not have the right to move back in or to rebuild it herself. SHULHAN ARUKH, EVEN HA-EZER 94:3.

⁵⁹ The widow's remarriage terminates her right to reside in her previous husband's home.

⁶⁰ The deferral illustrates the far-reaching impact of rabbinic legislation, since the father's house comes to the heirs at his death as part of the order of succession prescribed by the *Torah*. For this reason, some halakhic authorities held that the heirs had the unilateral option to supply the widow with an equivalent substitute residence and could take their father's house at his death free of the widow's right. See SHULHAN ARUKH, EVEN HA-EZER 94:1 (Remah in the name of Mordechai). But the decided law is to the contrary.

make repairs or improvements. He would leave the remainder to his heirs. If, however, the husband and wife owned the marital residence as joint tenants with right of survivorship or as tenants by the entirety, which is frequently the case in American common law property jurisdictions, this avenue would be foreclosed to the husband. Upon the death of the first to die, the home will belong absolutely to the survivor.

10. Where one spouse owns the family home individually and by will leaves it to someone other than the surviving spouse, legislation in many American states allows the survivor and minor children to remain in the family residence only for a limited period. In some states, statutes grant to the survivor and children a sum of money, known as a homestead allowance, in lieu of a right to residence:

Homestead. The homestead allowance [of \$15,000] provided for by UPC [Uniform Probate Code] section 2-402 (1990) is derived, in name at least, from a uniquely American contribution to the laws giving a decedent's dependent survivors limited protection in the family home.⁶¹ English law is the source of a different idea. Under Magna Carta, the widow had a right, called the widow's quarantine, to "tarry in the chief house of her husband for forty days,"⁶² and there are early American decisions recognizing this as a part of the common law. Some American legislation has extended this right for a year, as in Michigan and Ohio, or until dower is assigned, as in Virginia. By contrast, more prevalent American homestead legislation, though framed primarily in terms of exempting the homestead from the claims of the owner's creditors during her or his lifetime, commonly grants a decedent's spouse or minor children a right of occupancy in certain real estate of the decedent that may continue for much longer periods. (A title in fee simple passes to homestead beneficiaries in Wyoming.) These homestead statutes vary markedly in the amount and scope of protection given to family survivors. For example, though homestead titles are typically subject to ceilings of rather low value, the ceiling may be as high as \$30,000, as in Massachusetts and Wyoming, or there may be no ceiling at all, as in Minnesota.

The UPC homestead allowance shifts the exemption from a right of occupancy of realty to a money substitute. In doing so, the UPC

⁶¹ The laws are said to have originated in 1839 in the Republic of Texas. Craig A. Gargotta, *Trouble at Blackacre: The Fifth Circuit Takes on the Texas Homestead Exemption in First Gibraltar Bank, FSB v. Morales*, 13-Aug. AM. BANKR. INST. J., 19, 19 (1994), citing *Woods v. Alvarado State Bank*, 19 S.W.2d 35, 36 (Tex. 1929).

⁶² 4 JAMES KENT, COMMENTARIES ON AMERICAN LAW 61 (1st ed., 1830).

protects all surviving spouses and minor children, including those of renters, owners of mobile homes not classified as real estate, and decedents who owned no interest in a residence of any sort.⁶³

In light of the materials describing the widow's right to her husband's residence under Jewish law, what do you think of the authors' description of the homestead statutes as "a uniquely American contribution" to the laws protecting a decedent's surviving dependents?

11. Under Jewish law, in addition to a right to reside in the decedent's home, the widow has a right to continue to use the household furnishings and utensils located therein:

Just as the widow is entitled to maintenance out of her husband's estate after his death, so is she entitled to garments, utensils and living quarters, or she may continue to reside in the living quarters occupied by her in her husband's lifetime, and use the bolsters and cushions, and the services of the slaves and bondswomen, used by her in her husband's lifetime.⁶⁴

In many American jurisdictions, statutes guarantee to the surviving spouse categories of "exempt property" — items of property used around the home that pass to the spouse by operation of law upon the death of the decedent free from the claims of his creditors. Where the decedent is not survived by a spouse, the exempt property passes to the minor children. Compare to the excerpt from *Mishneh Torah* the following representative New York statute:

(a) If a person dies, leaving a surviving spouse or children under the age of twenty-one years, the following items of property are not assets of the estate but vest in, and shall be set off to such surviving spouse. . . . In case there is no surviving spouse, such items of property shall vest in, and shall be set off to the decedent's children under the age of twenty-one years:

(1) All housekeeping utensils, musical instruments, sewing machine, household furniture and appliances, including but not limited to computers and electronic devices, used in and about the house, fuel, provisions and clothing of the decedent, not exceeding in aggregate value ten thousand dollars.

(2) The family bible, family pictures, video tapes, and computer tapes, discs, and software used by such family, and books,

⁶³ LAWRENCE WAGGONER ET AL., FAMILY PROPERTY LAW 509-10 (1991).

⁶⁴ Laws of Marriage, *supra* note 14, at 18:2.

not exceeding in value one thousand dollars.

(3) Domestic animals with their necessary food for sixty days, farm machinery, one tractor and one lawn tractor, not exceeding in aggregate value fifteen thousand dollars.

(4) One motor vehicle not exceeding in value fifteen thousand dollars⁶⁵

Note that ownership of exempt property vests in the widow or minor children, as the case may be. Under Jewish law, the widow has only the right to use her husband's tangibles. Upon her death, they will pass to his heirs.

12. There are striking similarities (and differences) between two principles of Jewish law discussed in *Shefi v. Shpitz* and their common law analogues:

A. Justice Goitein cites Rabbi Asher ben Jehiel (*Rosh*) for the following proposition:

Where one purchases land, directing that title be placed in his brother rather than in himself, and the deed is drawn in the brother's name to evade the wife's lien, my teacher Rabbi Meir ruled that the wife may collect from the property. Since the purchaser fraudulently intended to evade a rabbinical rule, his stratagem will not avail him.⁶⁶

The common law analogue is its doctrine of the "purchase money resulting trust." Courts held that where one person paid the purchase price for a parcel of land and at his direction title was placed in the name of another, the latter held title as a trustee for the benefit of the purchaser unless it was clear that the purchaser intended to make a gift, for example, where the transferee was a natural object of the purchaser's bounty.⁶⁷ In some cases, the purchaser's reason for directing that title be

⁶⁵ NEW YORK ESTATES, POWERS AND TRUST LAW § 5-3.1. Exemption for benefit of family.

⁶⁶ Rabbi Asher ben Jehiel, Responsa No 78:1.

⁶⁷ RESTATEMENT (SECOND) OF TRUSTS §§ 440-42 (1959). A wife or a child would be considered a natural object of the purchaser's bounty for these purposes, *see* AUSTIN W. SCOTT, ABRIDGMENT OF THE LAW OF TRUSTS § 442 (1960), but not a husband:

Since, in the early days of the development of the common law, the wife was economically inferior and had legal disabilities with regard to taking, holding and managing property, and normally did not make gifts to her husband, the law presumed that if she paid for property and had it conveyed to her husband, she expected him to be trustee for her and did not intend a gift.

GEORGE T. BOGERT, TRUSTS 272-73 (6th ed. 1987). The change in the economic status of women has led many courts to alter their thinking so that a gift from a wife to her

placed in the name of another might have been quite innocent, for example, to avoid publicity. But when the motive was an improper one, such as placing the property beyond the reach of the purchaser's creditors, the courts would enforce the trust for their benefit, allowing them to collect their debts from the property. The courts, however, would not enforce the trust on the purchaser's behalf under the equitable doctrine that requires the claimant to come to court with "clean hands:"

It has been held in numerous cases that where A purchases property and takes title in the name of B for the purpose of defrauding his creditors, A cannot enforce a resulting trust. The creditors, of course, can reach the property; but the debtor himself is not permitted to reach it.⁶⁸

As the *Rosh* might have expressed it, "his stratagem will not avail him."

B. Justice Goitein cites Rabbi Meir of Rothenberg (*Maharam*) for the proposition that "a [lifetime] gift to one's heirs is the same as an inheritance." The effect is to charge the gift property with the same obligations that would encumber inherited property, including the widow's maintenance.

At common law, certain lifetime gifts of a parent to a child were considered advances against the child's inheritance.⁶⁹ When the parent later died, the amount of an advancement reduced the size of the child's inheritance. The purpose was to equalize the inheritances of children surviving a parent who, during life, had treated them unequally in relation to gifts. However, the property a child had received by way of advancement was not considered inherited property for all purposes. It was not subject to the decedent's debts or estate obligations.⁷⁰

By contrast, equalization of children's shares is not a principle of Jewish law.⁷¹ The firstborn son takes a double share (unless the firstborn

husband will be presumed. *Id.*

⁶⁸ SCOTT, *supra* note 67, at § 444.

⁶⁹ See THOMAS A. ATKINSON, HANDBOOK OF THE LAW OF WILLS 716-20 (2nd ed. 1953) (stating the gift would be considered an advancement against the child's inheritance where the amount of the gift was quite large, was not in discharge of a parental duty, or could be utilized to earn a profit, unless surrounding circumstances convinced the court that the parent had intended an absolute gift).

⁷⁰ Modern statutes, such as UNIF. PROB. CODE § 2-109, alter the common law by requiring written evidence, such as a statement contemporaneous with the gift signed by the parent or the child, in order to find an advancement, since "[m]ost inter-vivos transfers today are intended to be absolute gifts or are carefully integrated into a total estate plan." *Id.* cmt. Further, the requirement of a writing dispenses with the difficult post-mortem inquiry into the now deceased parent's intention that was necessary under the common law rule.

⁷¹ As Attorney General Yadin has written:

are twin boys, in which case the double share is canceled⁷²) and daughters receive nothing if the decedent is survived by a son. Rabbinic regulation mitigated the status of surviving daughters somewhat by requiring sons who inherit from the father to maintain their sisters until the latter marry and to give them dowries from the father's estate.⁷³

IV. Words and Phrases

1. "Words in the heart," from LOUIS JACOBS, *THE TALMUDIC ARGUMENT* 101-102 (1984):

Devarim she-be-lev eynam devarim: mental reservations in contracts are disregarded

. . . *Devarim she-be-lev eynam devarim* literally translated is: 'words in the heart (= the mind) are not words.' As a technical, legal term the meaning is: if, in any contractual arrangement, there are mental reservations contrary to its verbal or practical implications, these reservations are disregarded.

The *sugya* [Talmudic discussion] in *Kiddushin* 49b-50a opens with an actual case in which the fourth-century Babylonian Amora, Rava, gave a ruling. A man sold all his property with the clear intention of emigrating from Babylon to the Land of Israel but said nothing of this at the time of the sale. Neither in the bill of sale nor in any verbal statement was any condition attached to the sale, yet all the circumstances are such that the man's intention was for the sale only to be valid if, in fact, he did emigrate, otherwise he wished to retain his property. Now if the man had stated explicitly at the time of the sale that it was conditional on his emigrating, if eventually he remained in Babylon the sale would be null and void, the condition being unfulfilled. In the case under consideration, however, there was no explicit condition, only an assumed one, although the assumption was perfectly clear. Rava ruled that the sale was valid even if the man did not eventually emigrate. 'It is a case of words,' declares Rava, 'that are in the heart

If there are typically Jewish rules of succession, that is, rules which especially reflect the Jewish view, they are: inheritance by blood relatives even to the furthest degree; exclusion of the widow and daughters if the decedent is survived by a son; a double share to the first born; and testaments in the language of a 'gift,' rather than of a will.

Yadin, *The Succession Law as Part of Israeli Civil Law Legislation*, *supra* note 39, at 41.

⁷² See Shilo, *supra* note 35, at 447.

⁷³ See *id.* at 450.

and words that are in the heart are not words.' The mental reservation that would invalidate the sale was disregarded by Rava. The point here is not that the man is disbelieved about his true intention. All the circumstances go to show that it was. Yet since he made no condition at the time of the sale, the act of sale itself is without reservation and the man's mental qualification is insufficiently strong to upset the categorical nature of the sale. The reason for Rava's ruling would appear to be that unless the condition has been verbalized it remains vague and inchoate, without sufficient power to upset the sale. The man's determination to sell only conditionally is weak, otherwise he would have stated it explicitly. His mental reservation consists only of 'words in the heart' and these are not treated as 'words.'

Can you think of any other reasons for not allowing mental reservations to invalidate or alter the express terms of a sale?

2. "Legal assumption," from 1 ENCYCLOPEDIA TALMUDICA 373-75 (Shelomoh Y. Zevin ed., 1969):

Definition of Assumption

The use of assumption (Heb. *'Umd'na*) is a special feature of Talmudic Law. This arises in the absence of sufficient evidence as to the truth of some facts in a case which is the subject of legal investigation. Judgment is then given by reason of an assumption supported by proofs judicially admitted. Assumptions are of two kinds. There is an assumption which serves to determine the intention of the one who did the act in question; and there is an assumption which serves to establish that that particular act had been done, or who was the person who did it. . . .

Where, however, the act itself does not afford the slightest proof as to the nature of intention behind it, no intimation of intention is of any avail unless the person has expressly made a proper stipulation of the condition to which his act was to be subject.

Assumption in Monetary Cases

[I]f a man on his sick-bed (likely to die) assigned *all* his property as a gift, and kept back nothing for himself, if he recovered from his illness, he can retract even though his gift was fortified by a legal mode of acquisition (*Kinyan*). For it is assumed that his intention had been for the gift to be valid only if he died, and that should he recover it would automatically revert to him. In the same way, if one assigns in writing

all his property to his wife, it is assumed that he merely intended to appoint her administratrix over his heirs. For there is adequate proof for the assumption that no man would leave his children destitute and give everything away to his wife, and that therefore his intention was merely to make her administratrix so that she might enjoy the respect of the children.

If a woman about to be married assigned *all* her property in writing to another person, it is assumed that her intention was to exclude her husband from her property so that he should not enjoy the profits, and her gift is accordingly invalid.

Regarding the last statement in the excerpt, return to the discussion of the point by Maimonides quoted in the principal case — the gift is invalid *only if* the husband dies first; if the wife, the transferor, dies first, the transferee acquires good title to the property as against the husband.⁷⁴

Query: How is the concept of “legal assumption” (Heb. *umdana*) related to the broader concept of a “legal presumption” (Heb. *hazakah*)? For a discussion of the latter, see Menachem Elon, *Hazakah*, in *THE PRINCIPLES OF JEWISH LAW* 590, 590-96 (Menachem Elon ed., 1975).

3. “Social policy”

Tikkun olam is a broad concept with an elusive definition. It encompasses all of the considerations an Anglo-American jurist might include when basing a decision on a public policy rationale, and some authors have translated the Hebrew term as “public policy.”⁷⁵ In *Shefi*, it was translated as “social policy” to indicate the ultimate objective of any action taken *mipne tikkun olam*, namely, to remedy and repair an aspect of social relationships in a manner that will ultimately redound to the social betterment of all mankind. For further insights into the term, consider the following attempt to pin down the meaning of the term in talmudic literature, from Eugene J. Lipman, *Mipne Tikkun Ha'Olam in the Talmud: A Preliminary Exploration*, in *THE LIFE OF THE COVENANT* 97 (Joseph A. Edelheit ed., 1986):

This concept has a long and convoluted evolution in Judaism

The verb *taken* derives from the Assyrian root *takenu*, “to set straight.” In the Hebrew Bible, it appears only in the book of Kohelet, Ecclesiastes. In two verses (1:15, 7:13) it is declared that individuals cannot *set straight* the fundamental futility of human life

The Tannaim, the creators of rabbinic Judaism, whose thoughts and

⁷⁴ See *Laws of Original Acquisition and Gifts*, *supra* note 16, at 6:12.

⁷⁵ See, e.g., RAKOVER, *supra* note 15, at 747.

decisions are recorded in the Mishnah and the Tosefta, were the historical instituters of the *Takkanah* [ordinance] and of the *G'zerah* [decree]. It was also during the period of their work (fourth century B.C.E. to the end of the second century C.E. (A.D.)) that the phrase *mipne tikkun ha'olam* came into the vocabulary of Judaism. . . .

. . . [T]he words of Chaim Tchernowitz must be given serious consideration: "In truth, one cannot support these matters (*Takkanot*) on the basis of law but only on the basis of the proper and moral, which the Sages called *mipne tikkun ha'olam*. . . ."

It is as impossible to designate the legal status of *tikkun olam* in the Talmud as it is to define the phrase in a way which will cover all its uses in talmudic literature. Most of the classical medieval commentators appear to have taken it for granted as an idiom which is used periodically to serve as basis for one form of *Takannah* or another

Olam literally means "world" — the whole world

Many translations appear for the word *Tikkun*. Some of them:

"precaution for the general good" (Danby)

"to prevent abuses" (Soncino ed. Babylonian Talmud)

"for good order" (Strack)

"amendment" (Zeitlin)

It seems to me that in the Talmud, *tikkun ha'olam* means "for the proper order of the Jewish community."

. . .

It is a long way from that definition to "build a better world." The evolution was a tortuous one over many centuries. It needs tracing.

V. Questions and Problems

1. From the widow's perspective, contrast the advantages and disadvantages of (a) becoming entitled upon the husband's death to receive periodic support payments from his heirs during widowhood, on the one hand, with (b) inheriting a fixed share of the husband's estate payable in one lump-sum shortly after his death, on the other.
2. While Jewish law permits a woman to use a "deed of concealment" to defeat her husband's right to inherit her property, it does not permit a husband to use a similar deed to defeat his wife's right to maintenance from his estate. What explanation(s) can you offer for this disparity of treatment?
3. As noted, under Jewish law, the widow's right to maintenance attaches to the husband's assets at the moment of their marriage, while under American law, her elective share rights arise only at the

time of the husband's death. Should this distinction make any difference in determining whether to regard a husband's lifetime attempts to defeat his wife's rights as "fraudulent?"

4. A widower married a widow but before the marriage drew a promissory note in favor of a daughter by a previous marriage for a sum of money and set the due date of the note at "one hour before my death." After his death when the widow came to collect the sum stipulated in her marriage contract, the daughter produced the earlier note and claimed priority over the widow. What result? Would it make any difference if the father had made the promissory note due "ten years from the date hereof," fully expecting that his daughter would never demand payment while he was alive?⁷⁶
5. Regarding the widow's residence right under Jewish law, consider the following cases:
 - A. While the husband was alive, three generations of the extended family lived together in a single residence — the husband and his wife, his sons and their wives, and his grandchildren. Now the husband has died and his heirs are unwilling to continue the arrangement. They claim the house is too small to accommodate the widow along with them and their families. If the heirs are willing to provide the widow with a suitable alternative residence, must she move out? If the residence was adequate at the time the husband died but in the course of time the children's families grew, making the house too small to accommodate everyone, what result?⁷⁷
 - B. A mother gave her son as a gift an apartment that she owned retaining a life estate, i.e., reserving for herself the right to live in the apartment for the rest of her life. Later the son married and he and his wife resided in the apartment together with his mother. Now the son has died and his mother wants to evict her daughter-in-law. The latter claims she has a right to remain in the apartment, which was her husband's residence, for the duration of her widowhood. Who should prevail?⁷⁸
 - C. After their father's death, and while their mother was exercising her right to continue to reside in his residence during her

⁷⁶ See *Shefi v. Shpitz*, (1955) 9 P.D. 1077, 1083 (quoting the responsa of Rabbi Yair Hayim Bachrach, 1639-1702, HAVOT YAIR, No. 200); see RAKOVER, *supra* note 15, at 746, for an English rendition of this passage.

⁷⁷ See Shachar, *supra* note 55, at 226-29.

⁷⁸ See *id.* at 225 (citing the Responsa of Rabbi Moses ben Joseph Trani, the MABIT, No. 270).

widowhood, the heirs sold the house to a stranger. Under Jewish law, the sale is void.⁷⁹ After the widow dies, who is entitled to the house — the heirs or the third-party purchaser?⁸⁰

VI. For further reference:

LOUIS EPSTEIN, *THE JEWISH MARRIAGE CONTRACT: A STUDY IN THE STATUS OF THE WOMAN IN JEWISH LAW* (1973).

ISIDOR GRUNFELD, *THE JEWISH LAW OF INHERITANCE: PROBLEMS AND SOLUTIONS IN MAKING A JEWISH WILL* (1987).

WILLIAM D. MACDONALD, *FRAUD ON THE WIDOW'S SHARE* (1960).

Arie Rosen-Zvi & Asher Maoz, *Principles of Intestate Succession in Israeli Law*, 22 ISRAEL L. REV. 287 (1988).

Nahum Shachar, *Madur Ha-Almanah Biveit Baalah [Widow's Residence in Her Husband's House]* 4 LIMUDAI MISHPAT BAR-ILAN [BAR-ILAN L. STUD.] 204 (1985)

Ben-Zion Schereschewsky, *Husband and Wife; Ketubbah; Dowry; Maintenance; and Widow*, in *THE PRINCIPLES OF JEWISH LAW* 379-403 (Menachem Elon ed., 1975).

Uri Yadin, *The Law of Succession and Other Steps Towards a Civil Code*, in *STUDIES IN ISRAEL LEGISLATIVE PROBLEMS* 104 (Guido Tedeschi & Uri Yadin eds., 1966).

⁷⁹ KETUBOT 12:3 in *MISHNAYOTH* 187 (Philip Blackman trans., 2d ed. 1963); KETHUBOTH 103a, in 4 *SEDER NASHIM* 654-57 (Isadore Epstein ed. & Israel Slotki trans., 1936); *Laws of Marriage*, *supra* note 14, at 18:2; SHULHAN ARUKH, *EVEN HAEZER* 94:4.

⁸⁰ See Shachar, *supra* note 55, at 221 (citing decisions of the Rabbinical Courts in Israel).