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**TALMUDIC METHODOLOGY**

**By Rav Moshe Taragin**

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**IN LOVING MEMORY OF**

**Jeffrey Paul Friedman**

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**לע"נ**

**יהודה פנחס בן הרב שרגא פייוועל**

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**Shiur #14: R. Yochanan ben Brokah's Novel Idea of *Yerusha***

Unlike transfer of items through *kinyan*, inheritance transfer occurs automatically and independent of the person who has passed away. The Torah establishes an elaborate system of inheritance, and the “flow” or transfer of the deceased person's estate occurs automatically; the person is powerless to affect the distribution. A person CAN preempt the inheritance flow by executing standard *kinyanim*, which can distribute his estate and circumvent the flow of inheritance. If these *kinyanim* are scheduled to obtain just prior to death, they can "mimic" inheritance. In fact, “Halakhic wills” are premised upon standard *kinyan*-based distribution of estate scheduled to take effect just prior to death. In this manner, daughters are typically awarded equal portions even though their position in the inheritance hierarchy would often preclude them from inheritance entirely. Similarly, non-first born are allocated equal amounts to their oldest *bechor* brother. Inheritance has not been altered; it has merely been preempted.

R. Yochanan ben Brokah (*Bava Batra* 130) poses a radical idea – that a person can refashion inheritance patterns themselves. He derives this from the employment of the phrase, "*Ve-haya bayom hanchilo*," (*Devarim* 21:16) which describes the day on which the father “inherits” his children – implying that a person is ACTIVE in delivering inheritance. There are different opinions as to the scope of this ability, but without question, according to R. Yochanan be Brokah, the dying person is empowered to affect inheritance patterns. How does this mechanism operate?

The simple approach – articulated by many *Rishonim* – would be to empower the father to ASSIGN supreme inheritors. The Torah creates a default inheritance hierarchy, but a person is authorized to re-landscape that list. Once he has re-assigned the primary inheritors, the inheritance transfers automatically, as in standard inheritance. He does not DIRECTLY power the inheritance process, but rather redefines the recipients of the standard halakhic process.

The Rosh clearly disagrees and offers a different model for R. Yochanan ben Brokah. The *gemara* (141b) initially suggests that a person can assign primary inheritor status to an unborn child. However, it ultimately rejects this theory and disallows assignment of an unborn inheritor. The Rosh viewed this disqualification as affirming that R. Yochanan ben Brokah's mechanism is similar to classic *kinyan*. The special dispensation based on the *pasuk* allows the *kinyan* to be executed even without an ACT of *kinyan*. However, the PROCESS is still fashioned upon classic *kinyan* transfer powered by the *makneh* (the current possessor who is actively transferring the item). Since the process is modeled upon classic *kinyan*, only recipients who can receive actual *kinyan* can benefit from this process. Since an unborn baby cannot acquire items through *kinyan*, he cannot be assigned the *kinyan* through R. Yochanan ben Brokah's apparatus.

This question – whether the mechanism of Rebbi Yochanan ben Brokah works by assigning inheritors or by actively transferring through *kinyan* – may lead to some very interesting questions. Which people can be the beneficiaries of this assignment? It is clear that non-relatives are not candidates for R. Yochanan ben Brokah benefits. What about "secondary" relatives, relatives who typically receive inheritance through *mishmush* (see [*shiur* #13](http://www.vbm-torah.org/archive/metho73/13metho.htm)). May they be upgraded through R. Yochanan ben Brokah's declaration?

Many *Rishonim* allow brothers to be assigned inheritance priority (see, for example, the Rambam, *Nachalot* 6:2, and the Rif, 59b). However many *Rishonim* (including possibly the Rambam) viewed a brother as a primary inheritor and not a secondary *mishmush* recipient. Hence, his ability to benefit from R. Yochanan ben Brokah may not indicate that this rule can be extended to ACTUAL *mishmush* inheritors. The Tosafot Ha-Rosh (*Kiddushin* 60b) discusses distributing inheritance to NEPHEWS through R. Yochanan ben Brokah's process. Since nephews are clearly NOT primary inheritors, but merely *mishmush* candidates, it is clear that the Rosh allowed this process for *mishmush* inheritors. When the Rambam (*Hilkhot Zechiya Ve-Matana* 12:1) describes R. Yochanan ben Brokah, he lists the ability to assign to children, siblings, and OTHER *yorshim*, suggesting that even secondary *mishmush* candidates can benefit from R. Yochanan ben Brokah.

Without question, if R. Yochanan ben Brokah's process were similar to classic *kinyan* (without an act of *kinyan*), it would be open to ALL inheritors, primary and secondary. To be sure this process would not apply to non-inheritors, who would require a conventional *kinyan* process, including an act of *kinyan*. However, any inheritors – even those who receive only indirectly through *mishmash* – should be included, as the process is not affecting inheritance hierarchies. Since *mishmush* candidates are potential destinations for inheritance – although indirectly – they can receive this special *kinyan* transfer. However, if the process assigns inheritance priorities, perhaps *mishmush* candidates cannot be affected. Since they are not truly inheritors, but rather inheritors of inheritors, their status cannot be altered by a person reshaping his inheritance lineage. Of course, this also depends upon the definition of *mishmush* and whether a *mishmush* candidate is truly considered part of the inheritance lineage of the dead person.

A striking discussion in the Ritva (*Bava Batra* 136b) highlights a different outcome of comparing R. Yochanan ben Brokah to typical inheritance. Even R. Yochanan ben Brokah disallowed tampering with the double inheritance of the first born. The Torah specifically protects such activity, issuing the prohibition "*Lo yevaker*" (*Devarim* 21:16, against altering this allocation. What would happen if a father assigns a double portion of the remaining estate (not including the actual *bekhor*'s double portion) to a particular son? Would his inheritance simulate the inheritance of a firstborn? A *bekhor* cannot receive a double portion from assets that entered the possession of the estate posthumously? (“*ein* *ha-bekhor* *notel* *be-ra'uy* *ki-be-muchzak*”). Can a regular son who has been rewarded a double volume of inheritance, through *mishmush*, receive his allocation from assets acquired by the estate posthumously? The RItva cites two opinions and ultimately concurs that the son CAN receive a double portion even from posthumous assets. The opinion which limited his rights to *bekhor* limitations clearly fashioned R. Yochanan ben Brokah upon inheritance. If the mechanism delivers classic *kinyan*, there should be no residual limitations upon the rights of the lucky brother who received a double *kinyan*. Clearly, this position that does limit his benefits to *bekhor* like assets assumes that R. Yochanan ben Brokah's rule allows re-designation of inheritors. A brother who receives double has been redefined as a *bekhor*, and his portion is therefore limited by the classic limitations of *bekhor*.

Of course, if R. Yochanan ben Brokah described a classic *kinyan*, the process would be shaped in *kinyan* terms. No ACT of *kinyan* would be necessary, but other elements of a classic *kinyan* process may be required. For example, can a recipient waive the privileges intended for him? This question was raised by R. Elchanan Wasserman and presumably revolves around the nature of R. Yochanan ben Brokah. If the recipient has been assigned “alpha” inheritor status, he cannot reject that assignment (similar to the inability of a classic inheritor to reject their status). Of course, ONCE they inherit, they can dispossess the inheritance, but they cannot prevent the initial inheritance. If the process is driven by classic *kinyan*, perhaps the standard parameters would apply and an unwilling recipient would not acquire the item. Of course, the counter argument would suggest that even though the process is modeled upon *kinyan*, the execution is quite different. The very fact that an ACT of *kinyan* is unnecessary underscores the difference in the execution. Perhaps just as an act of *kinyan* is not necessary, acquiescence of the recipient is similarly not necessary.

A more compelling question – and one hotly debated by *Rishonim* and *Acharonim* – concerns the ability to acquire *davar she-lo bah le-olam* items through R. Yochanan ben Brokah's process. Would the process affect items which at the point of declaration had not yet materialized but emerge prior to the actual death? The Rashba (*Kiddushin* 61b) claims that R. Yochanan ben Brokah's process is ineffective, while others, including the Maharit Algazi (late 18th century) in his comments to the Ramban's *Hilkhot Bekhorot*, claim that it does impact *davar she-lo bah le-olam*. Presumably, they are discussing the structural question as to how R. Yochanan's process operates. If it assigns PEOPLE as supreme inheritors, it should affect any assets. Once assigned as an inheritor, the person should receive all available assets – even those which were not material at the point of declaration. If, however, the process is similar to an actual *kinyan*, it cannot apply to items upon which classic *kinyan* is inoperative. The absence of an ACT of *kinyan* notwithstanding, the process cannot affect items which cannot be affected by *kinyan* dynamics.

Having inspected several issues raised by the *Rishonim* which may stem from this question, we may be better able to appreciate two questions which already appear in the *gemara* proper. First, the gemara in *Bava Batra* (130a) cites a debate about the scope of R. Yochanan ben Brokah. Can a person upgrade a latter inheritor prior to a prior one? For example, can a person determine that a daughter should inherit prior to sons or a father prior to a daughter? Or is the authorization limited only to restructuring equal inheritors – that is, highlighting a particular son to receive prior to other sons or a particular daughter to receive prior to other daughters? R. Yishmael claims that his father never intended the broader application of upgrading inferior inheritors above superior ones. One reading of the *mishna* (130a), however, suggests that indeed R. Yochanan did intend a broader application. Without question, a *kinyan*-based apparatus would be more extensively applied. As stated earlier, a *kinyan* is a common convention which can be executed between ANY two parties. Indeed, THIS *kinyan* of R. Yochanan ben Brokah is exceptional in that no ACT of *kinyan* is required and is therefore limited only to potential inheritor candidates. However, all inheritors can receive this gift – be they *mishmush* candidates (as discussed earlier) or later inheritors being given a gift which will preempt earlier inheritors. If, however, R. Yochanan allowed inheritor re-assignment, perhaps he only allowed prioritization among equals, highlighting a particular son or a particular daughter. He may not have allowed upgrading a later inheritor above an earlier one.

Rava (*Bava Batra* 131a) raises a different question, but one which evolves from the aforementioned discussion. Would a healthy person be able to employ this process, or only a *shechiv meira*, a person nearing his death? Presumably, a *kinyan* based apparatus would be available to a healthy person as well. Alternatively, if the process assigns inheritors, it may be limited only to someone who is at the STAGE of determining inheritance- a *shechiv meira*!!