

Jewish Estate Planning

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1 A KEY ESTATE PLANNING GUIDE

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Jewish Estate Planning

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Additional Disclaimer – Jewish Estate Planning

- If there are any errors in how a Jewish religious practices are portrayed please email shenkman@shenkmanlaw.com and I will correct the materials and recirculate them.
- This program endeavors to present a traditional or Orthodox view of Jewish estate planning. Several caveats are important:
 - 1. There are many different views on several critical issues within the Orthodox community. This program is not trying to advocate any one view over another, merely to inform. Every client endeavoring to create an estate plan compliant with Jewish law ("Halacha") should be advised to consult with his or her Rabbi (Rav) to determine if the approaches taken are appropriate.
 - 2. There are various branches of Judaism including Reform, Conservative and Reconstructionist. This program has not addressed how those interpretations of these materials may differ.
- Estate, retirement and financial planning raise a myriad of Jewish legal (Halachic) issues. This presentation endeavors to point out a number of them. The issues raised are not complete and in all events appropriate Rabbinic authority should be consulted.

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Jewish Estate Planning

A Jewish Perspective to Planning

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A Jewish Planning Perspective

- The "Jewish" perspective on planning includes some significant points that many are familiar with and which must be addressed:
 - Modifying your living will/health proxy to address a range of Halachic issues.
 - Addressing if and when and for what purpose you can be an organ donor.
 - Address the Jewish laws of inheritance (Yerusha), e.g., by executing a legal document to conform secular distributions to Jewish law (e.g. a Shtar Chatzi Zachar).

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A Jewish Planning Perspective

- But the "Jewish" perspective on planning includes a myriad of points that too often may be overlooked:
 - Bequests of tangible property.
 - A desire to fund the costs of religious summer camp, Yeshiva instead of public school, a child or grandchild learning in Israel for a year+.
 - Permitting non-interest bearing loans or otherwise addressing the laws of Ribbis.
 - Kevurah in Eretz Yisroel.
 - And many other points.

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A Jewish Planning Perspective

- Failing to address Jewish considerations may:
 - Violate your client's most fundamental beliefs and values.
 - Result in your client's budget and financial plan falling far off track.
 - Make your client's later years (which may be several decades or longer) a far more challenging time than you anticipated.
 - Leave your client and his/her family unprotected.
- Address the Jewish perspective requires much more than signing a few additional standard forms.

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Common Issues Jewish Clients Face

- **Issue:** Too many young families have little or no life insurance. Can the community afford to help when a disaster strikes? **Solution:** Encourage young couples to be inexpensive term insurance.
- **Issue:** Too many older couples spend too much, and give too much, to their children and have thereby jeopardized their own financial security. Who will care for them? **Solution:** Address the keeping up with the neighbors syndrome (huge costly weddings, unaffordable houses, etc.). Financial planning for many is vital.
- **Issue:** Too many Jewish clients have done no planning. How much strife will this create? How many costly court proceedings? How many infirm congregants will be found after a catastrophe? **Solution:** Encourage congregants to get documents, and just as important planning, in place.

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Religion and Estate Planning

Jewish Letters of Instruction

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Letters of Instruction

- A letter of last instruction should be written to family and loved ones addressing religious matters. A separate letter should be written to any institutional trustee. This will enable your client to communicate religious feelings in their own words.
- Description of the Jewish religious faith and religious desires for a range of matters, including upbringing of heirs, etc.
- What type of funeral is desired? Burial in Israel?
- Which religious customs, if any, should govern?
- What about guidance for those that you leave behind? What type of life do you want your children or grandchildren to lead? What should trustees pay for?
- Within each religion there are tremendous variations of customs. Provide guidance to your heirs. Even within an Orthodox or traditional Jewish framework there are a wide range in views on many issues.

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Jewish Estate Planning

Investment and Financial Planning

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Investment and Financial Planning

- What budget assumptions are being used? Standard assumptions may not reflect a Jewish client's religious lifestyle. Incremental costs to consider might include: e.g., synagogue (shul) dues, private school for children (Yeshiva), spending a year studying in Israel between high school and college, a high level of charitable giving (tzedakah), incremental costs of purchasing food that complies with Jewish religious requirements (kosher food generally and for Pesach in particular), etc.
- Financial plans should use real numbers that make sense for the client, not average figures or numbers used as defaults in financial planning software.

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Investment and Financial Planning

- Tailor an investment plan in light of your specific circumstances, not generalizations or assumptions.
- Common budget milestones may include paying for a wedding, but what about a grandchild's yeshiva bills? A down payment on a child's home near a synagogue (shul) which may be a dramatically different figure than a starter home many parents might help with.
- A major and growing dilemma in the religious community is parents helping children and grandchildren to such a degree that they undermine their own financial security. This is a significant issue for many people that seems worthy of much more discussion!

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Investment and Financial Planning

- A Jewish client may be more likely than clients generally to own any assets overseas, e.g., in Israel. IRS reporting requirements are strict and the IRS has targeted specific foreign institutions and countries for examination. If you have any doubts whatsoever that you have not complied fully with the law in this regards consult a specialist immediately.
- Some clients might be enticed by proposals to pay a child or grandchild's private tuition (Yeshiva) bill. But, however they twist it, these cannot be made to be charitable contribution deductions.

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Investment Provisions and IPS

- "The duty of loyalty requires the trustee to act exclusively for the beneficiaries---no form of 'social investing' is consistent with the duty of loyalty if the investment activity entails sacrificing the interests of trust beneficiaries – for example, by accepting below-market returns – in favor of the interests of the persons supposedly benefited by pursuing the particular social cause."
- What the above comment means practically is that if a testator or grantor wishes a socially acceptable method of investing, and a Jewish religious objectives would be covered under that category, he or she must carefully word the governing instrument to make this an exception to the Prudent Investor Rule.

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Jewish Estate Planning

Powers of Attorney for Financial Matters

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Financial Powers of Attorney

- A durable power of attorney is ubiquitous in estate planning. Practitioners are no doubt familiar with addressing common issues such as whether the power should be springing vs. not, general vs. special, etc.
- Following are some issues that may be relevant specifically to Jewish clients:
 - Should loan provisions address Jewish laws on the charging if interest on loans ("Ribbis")? Is it ever possible for an agent in a fiduciary capacity to make a loan and not charge interest?
 - Should specific language be added to broaden standard language so that the support of children can include paying for Jewish summer camps? A year spent learning in Israel after high school? Private school (yeshiva) tuition?
 - Should gift provisions contemplate the client helping grandchildren, an elderly parent, others?
 - Should charitable giving be perpetuated? Should it be mandated?

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Jewish Estate Planning

Health Care Documents

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HIPAA Release

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- HIPAA = acronym for the Health Insurance Portability and Accountability Act of 1996 (Pub. L. No. 104-191, 110 Stat. 1936 (1996)); 45 C.F.R. Sec. 164 (2002). HIPAA, as amended (GINA too).
- One Goal of HIPAA is to maintain the confidentiality of Private Health Information ("PHI") from being made available or being disclosed to unauthorized persons.
- If you're ill, can your daughter-in-law the doctor get to see your medical chart to monitor your care?
- HIPAA documents rarely if ever raise Jewish (Halachic) issues but the person you select as agent may be essential to assuring that medical decision making is addressed in conformity with Jewish (Halachic) requirements.

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Living Wills

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- Religious and personal preferences should be addressed in the document. Standard living will forms will not address Jewish concerns and many "standard" secular forms completely violate many Jewish religious (Halachic) considerations.
- Experimental treatment are specifically mandated in some forms. How will Jewish law (Halacha) view the provision of unproven treatments?
- Organ and tissue donations raise particular issues and are discussed in terms of organ donations in greater length below. But what about organ and tissue donations for research? **Example:** Alzheimer's disease (AD) can only be confirmed 100% through a brain autopsy. What if a Jewish client suffering with AD wishes to include a specific consent in their living will directing that a brain autopsy be permitted and their brain be donated to promote scientific research into AD? Religious issues must be addressed. Organ donations for research rather than for transplant present significant issues under Jewish law and according to many may not be permissible.

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Living Wills

- Should the client's Rabbi be name to determine any religious decisions should they arise? If so, what if that Rabbi is unavailable? Should successors be named?
- Would it be safer to name a Jewish religious institution whose philosophy is consistent with that of the client so that the institution can designated someone to act?
- If the Rabbi cannot be reached are the health care related documents worded so an agent can still act or make decisions? If the language mandates that a Rabbi must be consulted a medical institution may not accept the Agent's decision without that of the Rabbi too.
- Should the Rabbi's role be advisory and not binding on medical providers?
- **Jewish Law and Autopsies:** I specifically request that my funeral be in accordance with Jewish religious customs. Autopsies and dissections are, absent extenuating circumstances, generally prohibited by Jewish law. Therefore, I request that unless extenuating circumstances exist, such procedures not be permitted. This provision shall not affect my Wishes

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Health Care Documents and Pregnancy

- Women should carefully address the issues of pregnancy in a living will since considerations of mother versus fetus vary greatly between different religions.
- Under Jewish law (Halacha) saving the mother's life is generally given preference over the life of the fetus. This is quite different than other more common religious views, highlighting the importance of communicating wishes to health care providers.

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Living Wills – Funeral and Autopsies

- **Sample Clause:** "I specifically request that my funeral be in accordance with Jewish religious customs. Autopsies and dissections are, absent extenuating circumstances, generally prohibited by Jewish law. Therefore, I request that unless extenuating circumstances exist, such procedures not be permitted. This provision shall not affect my Wishes regarding organ donation, if any."

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Jewish End of Life Medical Decisions

- The view from Orthodox authorities can vary. Even within the Orthodox community there can be wide variance in how different aspects of end of life decisions can be handled.
- Clients should be certain to consult their Rabbi as to any document to be signed.
- The fact that the quality of life cannot be what one hopes for, cannot justify a decision to shorten life. Life is sacred, even when it can only be for a limited period of time. Everything must be done to save and prolong life (pikuach nefesh).
- However, Jewish law does not require that every life saving measure be taken in every situation. Even a terminal, near death patient (goses), is considered in all respects to be a living person. When a person is near the precipice of death a slight action could be the action that pushes the person to the point of death which is not permitted. To hasten the death of such a person, even with such minor steps as closing his eyes, can be equated with murder.

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Jewish End of Life Medical Decisions

- It can, however, be permissible to passively remove a mere impediment to death since it is improper to prolong the act of dying. For example, if a patient experiences great pain and suffering, medications which will merely prolong a life of suffering, may be refused.
- The application of the distinction between these standards however, must be applied on a case-by-case basis.

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Jewish Estate Planning

Organ Donations

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**Organ Donation & Brain Death
in Jewish Law (“Halacha”)**
 Halachic Organ Donor Society
www.hods.org

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THE NEED

- 100,000 Americans are waiting for organs.
- Every year 7,000 Americans die “on the list.”
- In 2001, organ donor cards were held by more than 40% of Americans

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**Many Jewish Clients Are Not
Organ Donors but Can Be**

- Superstitions that scare Jews away from donation
- Emotionally Difficult to Donate
- Timing of the Donation: At Brain-Stem Death
- Jewish Law (Halachic) Prohibitions Concerning a Corpse

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Jewish Law (Halachic) Prohibitions
About a Corpse and Organ Donations

1. *Issur Nivul Hamet*
2. *Issur Hana'at Hamet*
3. *Issue Halanat Hamet*

PIKUACH NEFESH OVERRIDES
THESE COMMANDMENTS

that is the why Rabbi Yechezkel Landau (known by his magnum opus the Nodah B'yehuda) writes we can do autopsies if the results will most likely help us save someone else's life ("*choleh lefanecha*")

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Emotions

Emotionally, for many people, it is difficult to donate organs, however...

- consider that if your loved-one needed an organ you would want someone else to 'get over' the emotional inhibition and donate their organ
- Rav Moshe Feinstein writes (I.M. Y.D. V.III, Siman 174) "...though it is the nature of people to be very distressed over their deceased (loved one)... nevertheless, there is a mitzvah [good deed] not to be overly distressed [about donation] in order to save a life with the organ of the deceased."

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Superstitions Prevent Some
from Donating Organs

1. *Ayin harah*

- The rationalist understanding is that *ayin harah* is simply means a metaphor for jealousy (see Rav Shlomo Aviner's video on at www.hods.org)
- If you really believed in *ayin harah* you should not sign a *ktuba*, life insurance, health insurance, flood insurance, theft insurance, etc
- If *ayin harah* really worked, there would be plenty of organs to go around because there are thousands of people with organ donor cards.

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Superstitions Prevent Some from Donating Organs

Some mistakenly believe that they need to be buried with all their organs (e.g. in order to enable god to resurrect them).

1. No source for this belief
2. Counter-factual because as all organs and even bones eventually decompose
3. Theologically problematic to say God can't do something.
4. Illogical: You died because your organs failed. You need NEW organs to live again.

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Timing of Organ Donations

Most organs are taken from "Brain Dead" patients/corpses.

If you view brain-stem death to be death, you can donate organs and save lives.

But if you think that although the person is brain dead but his heart is beating for a few more days because it artificially gets oxygen from a ventilator, then you can't donate organs because you would be killing the donor.

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What is Brain Death?

Watch 7 minute film

http://hods.org/english/hissues/YouTube_video%20pages/Animation.asp

Anatomy

The Brain, by and large, consists of brain-stem and cortex

Terms: What should you call the machine that gives you oxygen?

1. Life-Support Machine? This falsely implies a football could be alive if attached to a ventilator.

2. Respirator? This falsely implies there is respiration which means autonomous breathing.

3. Ventilator? This is an accurate name for a machine that vents air in and out

Coma: Cortex is not working but brain stem is alive. Person is not dead, might wake up

Persistent Vegetative State (PVS): aka "Vegetable" is simply a long term coma, most likely never wake up, but still alive

Brain Death: (aka Whole Brain Death) both brain-stem and cortex are dead. Heart is beats for about 3 more days before it stops. Heart can beat because it artificially gets oxygen from a ventilator.

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Talmudic Sources

- **Mishna Ohalot**
Chapter 1, Mishna 6 (in Rambam it is 7)
אדם אינו מטמא, עד שתצא נפשו
הוחזו ראשיתה-אף על פי שהן מפרכסין-טמאין
- **Talmud Yoma 85a**
תנו רבנן עד היכן הוא בודק עד חוטמו ויש אומרים עד לבו...
אבל לענין פקוח נפש אפי' אבא שאול מודי דעיקר חיותא באפיה הוא דכתיב
(בראשית ז) כל אשר נשמת רוח חיים באפיו אמר רב פפא מחלוקת ממטה
למעלה אבל ממעלה למטה כיון דבדק ליה עד חוטמו שוב אינו צריך דכתיב כל
אשר נשמת רוח חיים באפיו

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ACTION LIST

1. Email your family asking them what they think
2. Email your rabbi asking him what he thinks
3. Consider getting an organ donor card at www.hods.org
4. Learn more by watching videos at www.hods.org

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Jewish Estate
Planning

Wills and
Revocable Trusts

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Tangible Property

- How tangible assets are distributed under a will or revocable trust can be affected by assets that have particular Jewish significance. This should be factored into bequests and planning.
- For example, Jewish books (s'forim), candelabra light on the Jewish Sabbath and holidays (lachter) and other assets may have modest financial value, but incredible emotional value, are distributed can be critical to preserving harmony amongst heirs (Shalom Bayit).

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Tangible Property

- Confirm that the client's scheduled property on a homeowner's policy should reflect Judaica items if they are valuable. There can often be significant value in commonly used religious items that may be made of silver, gold, etc. such as a Chanukah Menorah, art work, etc.
- Is the tangible property appropriately covered? If the client has a condo in Miami, or an apartment in Israel, they may have property located in multiple locations. Be certain that they have obtained appropriate property, casualty and liability coverage.

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Wills/Revocable Trusts

- Should you include a mandatory arbitration provision requiring disputes be brought before a Bet Din? Bear in mind that arbitration may not be binding on anyone who does not agree to the terms. Should you have a separate document signed by all heirs agreeing to be bound by the arbitration provision?
- Should you address issues of charging interest (Ribbis)? Just as mentioned above in the context of a durable power of attorney, an executor or trustee may be restricted from charging interest on certain loans by Jewish law. Can a fiduciary make a no-interest loan? What about the tax implications of such a loan?

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Wills/Revocable Trusts

- Should you include a mandated distribution in accordance with the laws of inheritance (Yerusha) (e.g., \$1,000 to be divided amongst Jewish/Torah heirs)?
- How can your client use a will, revocable trust and estate plan to inculcate Jewish values in heirs? Should precatory language be included to encourage trustees to expend funds on Jewish camps, private Jewish education, etc.?

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Revocable Trusts - Distributions

- Consider authorizing, or even mandating expenditures to support certain lifestyle choices (e.g., religious affiliation, etc.).
- Consider religious preferences as well. With the increasing trend to using institutional trustees specificity may be more important than it had been in the past. In some/many situations it may be preferable for your client to provide a non-binding detailed letter of instruction as to religious and lifestyle financial wishes (e.g., pay for children/grandchildren religious summer camp or learning in Israel). These are not expenditures which would appear in a typical budget projection and absent express direction an institutional trustee may be concerned about making them.
- Consider for a revocable trust including religious directives: e.g., if the client is disabled then any nursing home facility shall have Kosher food, etc.

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Sample Agreement to Conform Secular Will to Jewish Inheritance Law

- WHEREAS, the undersigned "Testator ("Testator") hereby accepts upon myself this Chov to "DAUGHTER INHERITOR the sum of CHOV AMOUNT Thousand Dollars (\$1,000,000), effective immediately, but not payable until one minute before my death, on the condition that I do not retract this obligation at any time prior to my death. All the property which is mine at that time, both real and personal, shall serve as security for the payment of the said obligation. I hereby stipulate that my heirs, as defined by Biblical requirements as interpreted in accordance with Orthodox Jewish law (Halacha) (the "Heirs") shall be given the option of paying the above obligation, or, in lieu thereof, of carrying out the terms as specified in my Last Will and Testament executed in "MONTH "DAY, "YEAR, and in addition, carrying out all transfers of property on my death which are considered "non-testamentary transfers" in accordance with the laws of the State of "STATE-NAME. Should my Heirs choose and comply with this option, then this Conditional Shtar Chov shall become void. The above condition(s) is (are) made in accordance with the laws of the Torah, as derived from Numbers XXVII, 5-11. Any dispute arising out of this document, or the transactions contemplated hereunder, shall be brought before, and settled in a court of Jewish Law, a Bet-Din.

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Sample Clause for Nominal Bequest in Accordance with Jewish Law

- It is my intent that all transfers of property made under this Will shall be in conformity with Orthodox Jewish law (Halacha). Therefore, for the sole purpose of meeting this objective, I provide as follows: I hereby devise and bequeath the sum of One Thousand Dollars (\$1,000.00) to my heirs, as defined in accordance with Halacha, to be divided among them in strict accordance with Halacha. Each and every distribution or other transfer of any property under this Will, except for the bequests set forth in the provisions governing taxes and expenses above, shall be deemed to be made by way of gift, effective the instant prior to my death. Each such transfer by gift shall be deemed to have been completed through a proper Kinyan, as appropriate for each type of property, all such terms and transactions as defined by Halacha.

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Bet Din Arbitration – Sample Clause

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Sample Jewish Arbitration Clause

- Jewish Trust Arbitration Clause.** "It is Grantor's express intent that certain provisions of this Trust instrument be interpreted in accordance with Orthodox Jewish Law, or "Halachah," including [reference provisions] by an Orthodox Jewish Bet Din convened by the [name of Rabbinic Organization] located in [name of city or area] (the "Bet Din"). The Bet Din shall determine and resolve any issue arising as to the interpretation of such provisions, or the application of Halacha to such provisions. Grantor expressly directs and authorizes the Trustee to consult with the Bet Din concerning the resolution of such matters. If any beneficiary hereunder, in any manner, directly or indirectly, contests the application of this provision or the holding of the Bet Din, including but not limited to any interpretation given to the dispositive provisions intended to be in accordance with the dictates of Halacha, or brings suit or other action against any other beneficiary with respect to any matter authorized hereunder to be within the purview of the Bet Din, then such contest or dispute shall be submitted to binding, non-appealable, arbitration, before such Bet Din.

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Sample Jewish Arbitration Clause

- It is Grantor's specific intent that the holding of any such Bet Din be non-appealable, even in instances of claimed fraud, bias, or if the Bet Din is claimed to have exceeded its powers. Each beneficiary hereunder shall execute an agreement, as part of any receipt or release prior to receiving any distribution of assets hereunder, consenting to this provision. If any beneficiary fails to execute and agree to such a provision, or to adhere to such provision, or if any beneficiary brings any contest, suit or action against any beneficiary hereunder before any court, arbitrator, mediator or other person or body other than as provided for in this provision, then any share or interest under this Trust of such contesting beneficiary is revoked and Trust income and corpus shall be distributed in the manner provided herein as if the contesting beneficiary and his or her issue had predeceased Grantor. Each clause in this provision is intended to be severable. If any term or provision of this clause is held to be illegal or invalid for any reason whatsoever, such illegality or invalidity shall not affect the validity of the remainder of this clause.

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Sample Jewish Arbitration Clause

- This provision shall be construed in all respects as if such invalid or unenforceable clause or portion thereof were omitted, or if feasible, reformed in a manner that is enforceable with alternative terms or provisions to effectuate as closely as possible Grantor's original intention to the extent lawful and practical. This clause shall be governed by and construed in accordance with the laws of the State of [name state], and each beneficiary hereunder agrees to personal jurisdiction in said state, and before the Bet Din hereinabove specified."

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Jewish Estate Planning

Bet Din of America

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Jewish Dispute Resolution

- Additional Resources from the Beth Din of America
- The website of the Beth Din of America (www.bethdin.org) contains many resources for individuals seeking rabbinic dispute resolutions services, attorneys representing clients before rabbinical courts, and others interested in both substantive and procedural aspects of beth din dispute resolution.
- Articles published in The Journal of the Beth Din of America can be accessed at www.bethdin.org/journal. Reasoned arbitration decisions issued by the Beth Din (anonymized and published following consent from the parties) are available at www.bethdin.org/decisions. The website also includes various forms relevant to beth din practice, as well as iska forms (for preparing loan documents that comply with Jewish law) and estate planning documents in accordance with Jewish law at www.bethdin.org/forms.
- In the summer of 2019, the Beth Din of America launched a new blog called Jewish prudence (available at www.bethdin.org/jewishprudence), dedicated to exploring issues of Jewish law and beth din jurisprudence. Posts have covered a variety of issues, both substantive and procedural. You can sign up on the blog page to receive future postings by email.

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Jewish Estate Planning

Bet Din Arbitration –
Mikel Case

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Bet Din Arbitration – Mikel Case

- **Religious Considerations and Estate Planning.** Second and the focus of the following discussion, Mikel points out the importance of religious considerations in estate planning for many clients. The Mikel's incorporated a religious dispute resolution mechanism into their planning. Dispute resolution is but one of many different aspects of estate planning impacted by religious considerations. Yet Mikel is discussed largely from the tax perspective. Although religious considerations are of primary importance to many clients, the topic is rarely, if ever, addressed in the literature or national conferences. As the focus of estate planning shifts from estate tax minimization to longevity planning, personal considerations, including religious matters, should grow in importance as part of the planning process.

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Bet Din Arbitration – Mikel Case

- **Summary of the Mikel Case.**
- Israel and Erna Mikel made large gifts to an irrevocable trust totaling \$3.262 million. If the \$12,000 per donee x 60 donees annual exclusion gifts were respected, the aggregate gifts for each spouse would have been below the then available \$1 million estate tax exemption. The trust provided each beneficiary a limited period of time to withdraw their share of any contribution, subject to a cap based on the federal gift tax annual exclusion amount in effect at the time of the gift. The trust required the trustee to give notice to each beneficiary when any contribution was received by the trust, and the trustee gave these notices in a timely manner. In sum, this was a rather standard Crummey power situation, only with a larger than typical family.
- The IRS argued that the withdrawal rights were not legally enforceable and, therefore, the beneficiaries did not have a "present interest" in the trust sufficient to support annual exclusion treatment.

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Bet Din Arbitration – Mikel Case

- The trust required a beneficiary to use arbitration with a Jewish court, a "beth din" before commencing a lawsuit.
- The trust provided: *"If any dispute arises concerning the proper interpretation of the declaration, Article XXVI provides that the dispute shall be submitted to arbitration before a panel consisting of three persons of the Orthodox Jewish faith." Such a panel in Hebrew is called a beth din. This panel is directed, in the event of any dispute, to [6] "enforce the provisions of this Declaration * * * and give any party the rights he is entitled to under New York law." Article XXVI states that the declaration as a whole shall be construed "to effectuate the intent of the parties * * * that they have performed all the necessary requirements for this Declaration to be valid under Jewish law."*
- The IRS argued that this mandatory use of a Jewish court constrained a beneficiary's ability to compel the trustee to make a distribution pursuant to the Crummey withdrawal right, thereby negating it.

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Bet Din Arbitration – Mikel Case

- The Tax Court found that the clause was similar to any mandatory arbitration clause and that it did not preclude a lawsuit and therefore did not make the withdrawal right unenforceable. A problem with this reasoning is that many religious arbitration clauses do preclude lawsuits for religious, not tax reasons. These clauses may require resolution of issues before a religious tribunal and that should not undermine the viability of an annual demand power, or any other tax oriented right.
- The Court reasoned: *"Here, if the trustees were to breach their fiduciary duties by refusing a timely withdrawal demand, the beneficiary could seek justice from a beth din, which is directed to "enforce the provisions of this Declaration * * * and give any party the rights he is entitled to under New York law." A beneficiary would suffer no adverse consequences from submitting his claim to a beth din..."*

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Bet Din Arbitration – Mikel Case

- The Court noted that New York State law would not enforce an arbitration award against a party that did not consent to the arbitration.
- The Mikel trust also included an in terrorem clause that would result in a contesting beneficiary forfeiting his or her beneficial interests in the trust. The IRS argued that this provision undermined a beneficiary's ability to challenge the trustee's discretion as to distributions. But a Crummey power is an automatic right and not discretionary to the trustee. On this basis the Court held that the Crummey withdrawal powers were valid.

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Religion and Estate Planning

Vacation Home Agreements for Jewish Clients

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Vacation Home Tenants in Common Agreement- 1

- **Example:** Parents bequeath a residence to their three children. Three families now have the residence for shared use (e.g. an apartment in Israel). A tenants in common agreement governing the use of a vacation home is prepared. In addition to the usual issues concerning repair and maintenance, financing, sale, etc. However, religious sensibilities can be important in such an agreement. Consider:
- Rotation of dates of use considering religious holidays (e.g., family A get's use of the apartment on Passover every third year).
- Should religious dietary restrictions be observed in the kitchen (e.g., Jewish Kosher religious restrictions must be maintained).
- Should the financing of the property be structured to comport with religious restrictions against charging interest (e.g., Jewish law restrictions on interest, Ribbis).

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Vacation Home Tenants in Common Agreement - 2

- A dispute resolution mechanism can be included that respects religious sensibilities (e.g., a provision for issues to be brought before a Bet Din or Jewish court).

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Jewish Estate Planning

Charity

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Charity

- Tailor charitable planning to coordinate with your needs as well as personal objectives.
- Charitable giving can and should be part of educating heirs (Chinuch), not just tax planning.

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Making a Charitable Statement

- Add to your will a bequest to an organization that has been to your life, or which embodies the Jewish values you hold dear. "I give and bequeath \$10,000 to "NAME-OF-ORGANIZATION." Making a charitable bequest to a religious organization is a wonderful way to demonstrate the importance of charitable giving, religious values, priorities and more for your heirs.
- But, with a modicum of additional effort you can perhaps emphasize those values even more. What if the will included the bequest written in the following manner: "I give and bequeath \$10,000 to "NAME-OF-ORGANIZATION to demonstrate to my children the importance of my religious value of charity, and the importance of the "ORGANIZATION/RELIGION in my life, with the hopes that each of my children establish a similar bond with the "ORGANIZATION."
- Write a letter of final instructions, often referred to as an ethical will, to your heirs.

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Jewish Estate Planning

Prenuptial Agreement

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Prenuptial Agreement

- Under Jewish law when a couple divorces the husband must give the wife a Jewish divorce called a Get.
- If the woman is not give an get she is restricted on remarriage and is referred to as an Agunah.
- Couples before marriage are encouraged to sign a Jewish prenuptial agreement to address the impact on the woman if the husband in the future refuses to grant a Jewish divorce.
- Sample language to incorporate into marital agreements can be found on the Bet Din of American's website: <http://bethdin.org/wp-content/uploads/2015/07/GetContingency.pdf>

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Conclusion and Additional Information

Sub-Title

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Conclusion

- For Jewish clients inquire whether and how they wish to address religious issues in their estate and financial plans.
- Be certain to inquire as to the client's specific wishes as there are many variations in views and each client may have their own personal views and wishes.
- In most instances where there is a question as to what Jewish law might provide, direct the client to consult with their Rabbi to provide direction. The practitioner does not have to be expert in any of these matters to help Jewish clients plan in accordance with their faith.

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Additional information

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