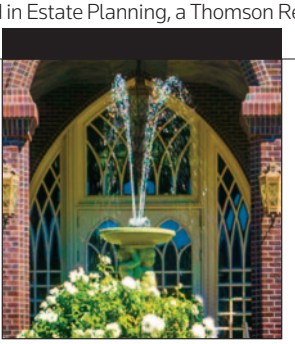
Originally appeared in Estate Planning, a Thomson Reuters publication.



Religion and Estate Planning

The first in a series of articles addressing the intersection of religious laws, beliefs, and motivations, and estate planning.

YASER ALI AND MARTIN SHENKMAN

Estate planning is a unique form of legal practice, one that relies on the oldest forms of legal documents and effectively serves as a form of communication between those who have passed to the heirs that they have left behind.

On its face, the term itself suggests a discipline that is narrowly focused on planning how to distribute assets after one's death. It may conjure up scenes from popular movies wherein anxious families gather together with the family lawyer to hear the "reading of the will," eager to learn who will receive the decedent's prized assets. For wealthy clients, estate planning engagements often involve structuring a client's assets in complex trusts and utilizing tools that circumnavigate various complicated provisions of the Internal Revenue Code in order to minimize the amount of money that might otherwise have been taxed by the government rather than being bequeathed to one's loved ones. Indeed, many trusts and estates practitioners earn professional accolades and reputation based on their ability to design creative tax-saving strategies.

While every client wishes to efficiently transfer wealth to their loved ones or favorite charities, for the majority, saving taxes is not the primary objective when seeking out the services of a seasoned trusts and estates practitioner. Thus, reducing the practice to such a narrow focus ignores the myriad other motivations a client may have – or should be considering – including the transmission of values, beliefs, and ethics to future generations.

YASER ALI, is a wealth planning attorney in Tempe, Arizona. An expert in Islamic estate planning, Yaser is the co-author of the American Bar Association's Guide to Estate Planning for the Muslim Client and speaks frequently around the country to attorneys, advisors, and clients on how to incorporate religious preferences in the estate planning context. Yaser is a graduate of the UC Berkeley School of Law, the Harvard Graduate School of Education, and the University of Florida and is also trained in classical Islamic law. Outside of the office, Yaser serves as the Imam at his local mosque and as the executive director of a non-profit scholarship organization in sunny Phoenix, Arizona where he lives with his wife and four children. MARTIN M. SHENKMAN, CPA, MBA, PFS, AEP (distinguished), JD, is an attorney in private practice in Fort Lee, New Jersey and New York City, New York. His practice concentrates on estate planning. Author of 44 books and more than 1,200 articles. Editorial Board Member of Trusts & Estates Magazine, CCH (Wolter's Kluwer) Co-Chair of Professional Advisory Board, and CPA Journal. Active in many charitable and community causes and organizations. Founded ChronicIllnessPlanning.org which educates professional advisers on planning for clients with chronic illness and disability and which has been the subject of more than a score of articles. American Brain Foundation Board, Strategic Planning Committee, and Investment Committee. Bachelor of Science degree from Wharton School, concentration in accounting and economics; MBA from the University of Michigan, concentration in tax and finance; Law degree from Fordham University School of Law. www.shenkmanlaw.com.

This comprehensive approach to estate planning that focuses on what truly matters most to the client allows the attorney to develop deep and lasting relationship with the client, and move beyond the role of a scribe, to that of a true counselor. The personalized documents that are ultimately drafted in this manner should convey an individual's hopes, wishes, and desires with regards to the handling of their person, the disposition of their assets, and the care of their loved ones.

These deeply personal values and wishes are often motivated by or inspired by religion. However, many estate planners are reluctant or uncomfortable discussing issues of religion, perhaps due to a lack of knowledge about the particular faith, or out of fear of offending the client. The latter issue can be quickly dismissed. Inquiring whether a client has religious issues that might affect their planning should not be viewed by any client as offensive and can be incorporated into the client intake process. This article, which is the first in a multi-part series that will be published in this journal, will review the role religion has played historically in addressing many of these issues, and outline when and how practitioners can effectively address these matters in contemporary estate planning engagements.

Religious History of the Last Will

To understand the significance of the role of religion in estate planning, it's useful to begin with some historical context. The act of preparing a will dates back thousands of years with evidence of use in Ancient Egypt.[1] The precursor to the modern will, however, traces back even earlier to ancient Greece and Rome as a method for landowning males to pass on their wealth to future generations. Under the Roman emperor Constantine, Christians were expected to leave a bequest to the Church as part of their will, which was generally required to be made in the presence of a priest and two witnesses.[2]

In Anglo-Saxon England, the Church was a ubiquitous presence in will-related matters. Wills were seen as a means of preparing for the transition from life to death, and a matter of resolving one's affairs before returning to God. It was typical to include provisions acknowledging one's mortality beyond simply the transfer of wealth.[3] King [AElig]thelwulf of Wessex (d. 858) in his will, for example, "reflected on his going the way of all flesh."[4] His great-grandson King Eadred (d. 955), meanwhile, endowed his land to be held "as long as Christianity endures, to the glory of God and the redemption of my soul."[5] Often the will included clauses that invoked spiritual retribution upon those attempting to change the will or hinder its execution, for instance stating such a person "be as hateful to God as was Judas…" or "may God remove him from all God's joy."[6] Shakespeare's will famously began with "In the name of God, Amen" a typical opening phrase used by draftpersons.[7] A form book published in the early twentieth century included the phrase "In the name of God, Amen" in a sample introduction.[8]

Language reflecting the religious nature of the will persisted throughout the centuries and remained a common feature of American wills at least until the early twentieth century. One will written in seventeenth century Maryland discusses the passage of the testator's soul: "I bequeath my Soul unto God my saviour and redeemer."[9] Other wills from the late nineteenth and to early twentieth centuries contained almost poetic language, with phrases such as "considering the uncertainty of this mortal life" and "I commit my soul to the mercies of my Heavenly Father."[10] Though such usage began to decrease by the mid-twentieth century, it was also the case that many wills remained (and still remain) religious in nature.[11]

In addition to explicitly religious language, wills throughout the Middle Ages were sometimes drafted by religious clergy.[12] Individuals who had the ability to write in the Middle Ages were rare, so clergy would be asked to "write down the wishes of the dying man" as last rites were performed.[13] That religious officials were involved in drafting estate planning documents is hardly surprising, given how impactful the role of religion is in many of the scenarios and decisions involved in estate planning, as outlined further below. It was not until the thirteenth century that attorneys got involved as draftsman or scriveners.[14]

1 Rollison, "History of Estate Planning," 37 Notre Dame L. Rev. 160 (1961).

2 Volume 28, Encyclopedia Britannica, 11th ed, "Will" (1911).

3 See Tollerton, *Wills and Will-making in Anglo-Saxon England* 99 (2011).

4 *Id.* at 46.

5 *Id.* at 94.

6 *Id.* at 25-26.

7 Honigmann, *Myriad-minded Shakespeare: Essays on the Tragedies, Problem Comedies and Shakespeare the Man* 222 (1998); Sneddon, "In the Name of God, Amen: Language in Last Wills and Testaments," 29 Quinnipiac L. Rev. 655, 696 (2011).

8 See Sneddon, *supra* note 7, at 698-699.

9 Friedman, *Dead Hands: A Social History of Wills, Trusts, and Inheritance Law* 231-232 (2009).

10 Sneddon, *supra* note 7, at 696.

11 See https://bahai-library.com/garis_will_preamble_template (accessed Aug. 10, 2022) (containing a sample will for members of the Bahai faith beginning with: "In the Name of God, the Glory of the All-Glorious!").

12 Sneddon, *supra* note 7, at 696.

13 *Id.* at 676-677.

14 *Id.* at 677.

Moreover, up until the nineteenth century in England, the validity and interpretation of wills was typically resolved by ecclesiastical courts which were responsible for the transfer of personal property as opposed to royal courts which handled the transfer of real property.[15] While the jurisdiction of ecclesiastical courts over testamentary matters diminished over the centuries before finally being transferred to a civil court in 1857 under the Court of Probate Act of England, these separate historical systems for real and personal property in England impacted the development of American law as well.[16]

Interestingly, in the eighteenth and nineteenth centuries, several state legislatures passed "mortmain statutes" which were laws disfavoring bequests to charity. These laws were in large part, aimed at the Church, with the intention of preventing the dead hand control of the Church over large swaths of land and to protect families from manipulation of clergy in a decedent's last moments.[17] The Maryland constitution of 1776, for instance, expressly stated that no one was to devise any land to support "any minister, public teacher, or preacher of the gospel . . . or any religious sect, order or denomination"; any "gift, sale, or devise of lands" of this sort was to be "void."[18] Over time, almost all of these laws were struck down as unlawful restrictions on testamentary freedom and the power of testators to dispose of their property as they wished, with giving by bequest equaling nearly 10% of all donations to charity in 2020.[19]

Despite the countless legal and procedural changes that evolved over time, estate planning remains a practice that was historically rooted in tradition and religious expression. Though it is generally not regarded as an overtly religious practice today, it remains an exercise with religious implications for many Americans.

Religious provisions relating to inheritance and estate planning

Beyond the ritualistic exercise of drafting wills, nearly all major religions emphasize the virtue of caring for family, giving charity, and planning for death. Many religions also include rules and ethics governing the acquisition of wealth during life, and its distribution upon death.

For instance, the Old Testament contains a number of references to the concept of estate planning and the distribution of property upon death. In *Proverbs*, King Solomon states that a good person leaves his wealth to his children's children.[20] The book of *Genesis* tells of Abraham giving "all that he had" to his son Isaac, the chosen heir, and gifts to the sons of his concubines.[21] Jacob, telling Joseph that he is about to die, also states, "I have given to you rather than to your brothers one mountain slope which I took from the hand of Amorites with my sword and with my bow."[22]

The Old Testament also provides specific guidelines for intestate succession: the eldest son was to inherit a double portion.[23] If there were no sons, then daughters were allowed to inherit:

> Say to the Israelites, 'If a man dies and leaves no son, give his inheritance to his daughter. If he has no daughter, give his inheritance to his brothers. If he has no brothers, give his inheritance to his father's brothers. If his father had no brothers, give his inheritance to the nearest relative in his clan, that he may possess it. This is to have the force of law for the Israelites, as the Lord commanded Moses.[24]

Early biblical law was not as explicit regarding bequests, as inter-vivos gifts could be made to others than those in identified in this order of succession, but this provided a basic inheritance scheme.[25]

Likewise, Islamic law – also referred to as Sharia law – includes

15 See Rollison, *supra* note 1, at 161.

16 See *id.* at 169.

17 See *Stephenson v. Short*, 92 NY 433 (1883) (discussing mortmain laws intended "to prevent the 'imposition upon pious and feeble minds in their last moments' and to restrain charitable impulses when they threaten 'the natural claims of blood and parental duty to children.'").

18 See Friedman, *supra* note 9, at 71-72.

19 2021 Annual Report, Giving USA (2021) https://givingusa.org/wp-content/uploads/2021/06/GUSA2021_Infographic_Digital.pdf (accessed Aug. 8, 2022).

20 *Proverbs* 13:22, https://www.bible.com/bible/116/PRO.13.NLT (accessed Aug. 8, 2022).

21 Hiers, "Transfer of Property by Inheritance and Bequest in Biblical Law," 10 J.K. & Religion 121, 148 (1993).

22 *Id.*

23 *Deuteronomy* 21:15-17, https://www.biblia.com/bible/esv/deuteronomy/21/15-17 (accessed Aug. 8, 2022).

24 *Numbers* 27:8-11, https://www.biblia.com/bible/esv/numbers/27/8-11 (accessed Aug. 8, 2022).

25 See Hiers, *supra* note 21, 153.

26 Al-Wasiyya (The Book of Bequests), Trans. of Sahih Muslim Book 13, No. 3987, www.iium.edu.my/deed/hadith/muslim/013_smt.html (accessed Aug. 1, 2022).

27 See Khattab, *The Clear Quran*, 4:6, Quran.com https://www.quran.com/4 (accessed Aug. 8, 2022).

28 See Khattab, *The Clear Quran*, 68:14-32, Quran.com https://www.quran.com/68 (accessed Aug. 8, 2022).

29 *Supra* note 26, No. 3990, www.iium.edu.my/deed/hadith/muslim/013_smt.html (accessed Aug. 1, 2022).

30 See Tomy, "Property Rights of Women under Hindu Law: From Vedas to Hindu Successtion (Amendment) Act 2005," 10 Supremo Amicus 24 (2019).

31 See Schopen, "Dead Monks and Bad Debts: Some Provisions of a Buddhist Monastic Inheritance law," 44 Indo-Iranian Journal 99 (2001).

32 Smith, *About Three-in-Ten U.S. Adults Are Now Religiously Unaffiliated*, Pew Research (Dec. 14, 2021) https://www.pewresearch.org/religion/2021/12/14/about-three-in-ten-u-s-adults-are-now-religiously-unaffiliated (accessed Aug. 4, 2022).

33 Newport, *2017 Update on Americans and Religion*, Gallup (Dec. 22, 2017) https://news.gallup.com/poll/224642/2017-update-americans-religion.aspx (accessed Aug. 4, 2022).

34 See *America's Changing Religious Landscape*, Pew Research, https://www.pewresearch.org/religion/2015/05/12/americas-changing-religious-landscape/ (accessed Aug. 5, 2022).

35 *Id.*

36 2021 Annual Report, Giving USA (2021) https://givingusa.org/wp-content/uploads/2021/06/GUSA2021_Infographic_Digital.pdf (accessed Aug. 8, 2022).

37 See Truog, "Lessons from the Case of Jahi McMath," Hastings Cent. Rep. S70 (2018).

a robust set of rules regulating the acquisition of wealth and distribution of assets upon death. Muslims are encouraged to prepare for death, as the Prophet Muhammad advised in a famous narration, "Do not let two nights pass without writing a will."[26] The Quran also expressly mandates ethical principles of sharing wealth and avoiding greed and rebukes those who devour others' inheritance greedily.[27] In another set of verses, the Quran describes the story of a family who inherited a garden from their righteous father who used to distribute fruits to the poor. Upon his death the children decided not to continue their father's philanthropic legacy and God destroyed the garden as a result.[28]

Among the major religions, Islamic law contains perhaps the most detailed set of instructions relating to the disposition of wealth upon death. It allows for charitable or discretionary bequests of up to one-third of the decedent's estate, based on a tradition of the Prophet Muhammed who instructed one of his companions not to donate all his wealth, stating: "One-third (as a donation is alright), yet it is still a lot, for it's better to leave your heirs wealthy than leave them poor, begging of others."[29] The remainder of the estate must be distributed in predetermined shares to the decedent's Islamic heirs as outlined in the Quran.

Though not as explicitly codified in other religions, many faiths do contain some form of guidance to inform the adherents of those faiths in relation to wealth transfer upon death. Two systems of Hindu law, based on the legal treatises Mitakshara and Dayabhaga (written by twelfth-century Indian jurists), for instance, contain different inheritance schemes and property rights, based upon doctrines of proximity of blood relation, or on consanguinity, respectively.[30] Buddhist texts such as the Mulasarvastivada Vinaya (a Buddhist Monastic Law Code) discuss a wide range of legal issues related to monks' estates, such as the case of a monk who has passed away with debt.[31] The variety of procedural and substantive developments in issues related to inheritance and the distribution of wealth across religions and cultural contexts illustrates the high importance most societies placed some form of estate planning.

A comprehensive approach to estate planning that focuses on what truly matters most to the client allows the attorney to develop deep and lasting relationship with the client, and move beyond the role of a scribe, to that of a true counselor.

What's religion got to do with it today?

It's well documented that religion plays less of a role today in informing the beliefs, ethics, and values of society than it used to. An increasing number of Americans are religiously unaffiliated, with about 29% identifying with no religion in 2021.[32] That said, that leaves 71% of the population for whom religion still plays a role – perhaps even a major role – in their lives. In fact, in one 2017 study, 37% of Americans identified as highly religious and 81% stated that they believed in God or a higher power.[33]

Looking more closely at recent demographic trends, the percentage of the population identifying as Christian has declined, but other religious communities have grown.[34] Judaism, Islam, Buddhism, and Hinduism have seen a rise in percentage of the national population in the past decade.[35] In addition, donations to religious organizations remains the largest category of philanthropic contributions with Americans having donated more than $131 billion in 2020, more than twice as much as the next category of education related causes.[36] As these statistics indicate, religion plays some role in the life of most Americans, and many care about preserving their religious institutions. Moreover, the religious values underlying so many of their decisions during life are also relevant in the estate planning context.

Finally, as families become more diverse, many clients may be interested in conditioning inheritance upon certain behaviors, practices, or traditions, or seek to incentivize their descendants to remain members of their faith. Perhaps a devout parent might ask whether they can include provisions preventing their descendants from marrying outside of the faith or even disinherit them entirely if they choose to leave the faith, raising a host of constitutional and ethical questions the estate planning attorney will need to be prepared to address.

In sum, religious beliefs may permeate every area of a client's life - financial, medical, legal, emotional, and spiritual. Incorporating these ideals ahead of time helps ensure that the person's true wishes are carried out.

Estate Planning and Religious Preferences

There is perhaps no area of law more greatly impacted by religion than estate planning. Every aspect of estate planning is imbued with a client's values and wishes for the future, so naturally a client driven by religious values may want various aspects of their estate plan tailored to be consistent with their beliefs. By way of introduction only, consider five such instances below with a few examples from various faith traditions.

Healthcare Directives and End-of-Life Bioethics. Views on medical treatment, quality of life, organ donation, and the definition of death are complex bioethical questions greatly impacted by one's ethics and religious values. A person who deems quality of life as fundamental might want life support to be removed if that quality of life cannot be maintained. However, a devout Catholic may view that decision as being akin to murder, or perhaps interfering with a natural process that is only in God's hands. Likewise, while most physicians and all state laws deem brain death to mean actual death, some Orthodox Jewish Rabbis hold a different view that only cessation of cardio-pulmonary function is what constitutes death. Even within one family, individuals can have drastically different views, and absent an express directive articulating the patient's preferences, the family may end up disputing how to resolve end-of-life care issues.

The recent highly publicized case of Jahi McMath illustrates the complexity at the intersection of religion, bioethics, and law. McMath was 13 years old when she underwent a routine tonsillectomy in 2013 in Oakland, California. After complications from surgery, she was declared brain dead by physicians. As observant Christians, her family challenged the determination and after weeks of intense legal battles she was ultimately issued a death certificate and released to her family who – with the assistance of the Terri Schiavo Life & Hope Network– subsequently airlifted McMath to New Jersey, one of two states where families can reject the concept of brain death if it violates their religious beliefs. In New Jersey, McMath was treated as a comatose living patient for four and a half years before ultimately dying in 2018.[37]

Of course, many will remember the Terri Schiavo saga as it represents perhaps the most well-known debate over end-of-life care decision making authority. Schiavo fell into a persistent vegetative state after cardiac arrest at age 26 and faced a years-long series of divisive court battles from 1998-2005 between family members with differing moral perspectives on prolonging Schiavo's life.[38] At issue was the question of what Schiavo believed and what she would have wanted. Her parents testified that she was a devout Catholic who would not have wanted her feeding tube removed, while her husband petitioned to remove her tube, arguing that she would not have wanted to prolong her life. She remained on life support for 15 years before she passed away in 2005.

Observant clients often look to religion and religious values to inform their answers to the moral challenges presented by the McMath and Schiavo cases. A particular understanding of death and what it means to die in turn impacts the acceptance or withholding of some end-of-life procedures. For example, a pain relief provision for a Greek Orthodox individual may request that medications be administered to alleviate pain, but only to the degree they do not compromise consciousness prior to death in order to participate in accepting Communion. Another client may request to withhold some pain medications, in order to preserve a conscious state to be able to worship God. Similarly, clients may want to add requirements to consult with a particular religious leader or representative before making any end-of-life care decisions.

Given the advancements in medical science and technology, it is not surprising that there are a multiplicity of opinions among religious traditions on issues such as organ donations. Sometimes those preferences or opinions differ even within one religious tradition. For instance, some Islamic scholars view organ donation to be a violation of human sanctity (*hurma*) and dignity (*karama*), and thus prohibited, while others view it as an act of charity.[39] An advance directive specifying a client's specific religious values can help the family and healthcare team honor their wishes.

Maternal health decisions are another area where religious preferences often play an important role. As a result of the Supreme Court's recent decision overturning *Roe v. Wade*,[40] depending on actions in a particular state, abortion may be prohibited. According to Jewish religious law if the fetus jeopardizes the mother's life, the mother's life is to be given precedence. Many liv-

[38] See Hook and Mueller, "*The Terri Schiavo Saga: The Making of a Tragedy and Lessons Learned*," 80 Mayo Clinic Proc. 1449 (2005).

[39] See Ahmed et. al., "American Muslim Physician Attitudes Toward Organ Donation," 57 J. Religion & Health 1717, 1725 (2018).

[40] *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 142 S.Ct. 2228 (2022).

[41] See Carpenter et. al., "Communicating with the Coroner: How Religion, Culture, and Family Concerns May Influence Autopsy Decision Making," 35 Death Studies 316, 319 (2011).

[42] *See* Ali and Shenkman, "Sharia Inheritance Estate Plans," Trusts & Estates (Aug 24, 2021).

[43] Wolf, "Resolving the Conflict Between Jewish and Secular Estate Law," 37 Hofstra L. Rev. 1173, 1175-1176 (2009).

[44] *Id.* at 1188-89.

ing wills specify that decision process for Jewish as well as other clients who viewed the mother's life as a priority. Now, however, those decisions may not be permitted under some state laws. Thus, to respect a mother's religious or moral wishes concerning priorities of life, it may become advisable to include express authorization in a health care directive for the agent to move the patient/client to another jurisdiction.

Finally, religious traditions also greatly impact post-death arrangements. Some Hindu traditions mandate cremation while many religions forbid it. In Islamic and Jewish law, autopsies and embalming are generally prohibited and the body should be buried as quickly as possible.[41] Thus, a provision explicitly rejecting an autopsy unless required by law along with specific funeral and burial preferences is advisable to be incorporated in an advance directive. Since such services may be expensive, the client's will should also expressly permit the executor to pay for those costs. In some cases, even where the client is not overtly religious, he or she may choose to expressly elect a particular religious ritual in order to provide closing and consolation for loved ones after their passing. And sometimes a client who no longer identifies as a member of a certain religious group may expressly want to not receive certain rites after their passing which should also be memorialized.

Careful planning in drafting an advance directive can both mitigate difficult decision-making by the family, and assure that client that their religious values are respected in the event of incapacitation or death.

Disposition of Assets upon Death. As outlined above, various religious traditions contain instructions relating to inheritance and estate planning.

Under Islamic law, for example, the priority of distribution from a decedent's estate is as follows:

1. burial, funeral, and administration costs;
2. payment of legally enforceable debts;
3. an optional discretionary share, up to 1/3 of the estate which is often used to support distant relatives and the client's favorite charities; and
4. the residuary share, which is to be distributed in fixed portions to predetermined heirs.

To respect a mother's religious or moral wishes concerning priorities of life, it may become advisable to include express authorization in a health care directive for the agent to move the patient/client to another jurisdiction.

A revocable living trust is generally recommended which can outline this regime, identify current Islamic heirs, and include mechanisms for recalculation in the event of changed life circumstances such as granting a Trust Protector a limited power of appointment to reallocate assets amongst Islamic heirs in accordance with the Grantors' intent.[42]

For observant Jewish clients, there are similar considerations. Jewish law (Halacha) provides a specific scheme for distribution, with an order of priority: sons (the oldest son receiving a double portion), daughters, father of the decedent, paternal brothers, paternal sisters, and so on.[43] At each level, women inherit only if there are no men at that level. There are also requirements to provide support for a widow, and unmarried and minor daughters are entitled to support for some expenses from the father's estate, similar to a constructive trust. To avoid these constraints religious commentators have suggested creating a debt from the estate as part of the estate plan that would not be payable until one moment before the client's death.[44] This has evolved into a common mechanism to show deference to biblical inheritance rules, all the while circumventing them.

For Catholics, general guidelines of charity and justice are prioritized. In each case, religious provisions need to be coordinated with tax, estate, financial, and succession planning goals in mind.

Selection of Agents and Fiduciary Powers. One of the client's most important and daunting decisions in the estate planning process is to select agents to carry out their wishes after they have passed on.

With regards to guardianship, clients who are devout members of a particular faith often hope for their children to be raised within the same faith tradition or at least impart some religious values to the next generation, in the event of one's death. Therefore, clients who are concerned about passing along a religious identity to a child will often designate guardians who are knowledgeable of the faith – ideally adherent members of that faith themselves, or at a minimum, sensitive and respectful of the specific needs the child would have in light of the client's religious goals and objectives.

Sometimes the individual who best fits these criteria for guardian is not well equipped to manage investments and finances, so it may be appropriate to designate an individual fiduciary sensitive to religious concerns and an agent or institutional co-fiduciary as an investment trustee.

Further, many faith traditions have rules relating to ethical investing and the types of investments that may or may not be permissible. Members of the Church of Latter-Day Saints, for instance, may choose not to invest in certain "sinful" industries such as alcohol, pornography, or nicotine etc. Many Muslims will add to that group investments which involve impermissible forms of interest or usury (*riba*).

In such cases, it would be advisable to provide express guidance to the fiduciary with regards to investment authority to waive the prudent investor rule or its statutorily analog under state law. This would apply to a financial power of attorney acting as a fiduciary, but these same principles would apply to a successor trustee under a revocable trust.

Finally, a client may also wish to customize the trustee's discretionary authority and power to allow the beneficiary to grow and develop in their faith. Examples may include disbursement of funds for religious education (e.g. supplemental religious education, or private school), religious travel (e.g., pilgrimages to holy sites), charitable giving (to inculcate a core religious value), and other purposes consistent with religious goals. Some of this can be done in the governing instrument itself, while other components are better suited for an ethical will or side letter of instruction. In some cases, it may also be advisable to appoint a religious advisor to serve as a trust protector to assist with determining the appropriateness of certain discretionary distributions related to such religious practices.

Conditional Bequests and Religious Clauses. Parents naturally want their children to succeed. As a result, they incentivize and reward certain behaviors and condition gifts during their lifetime upon performance of certain actions or withhold allowances or gifts as a form of punishment as a result of some negative behavior. This is of course, common practice, and totally legal.

Very often, parents may desire to continue such practices after death in order to ensure their children or descendants are productive, outstanding citizens. For example, a $50,000 bequest to a grandchild upon graduating from college or

stipulating receipt only if that grandchild graduates from college prior to attaining 25 years of age would be permissible. Similarly, a provision that requires a beneficiary to consent to a drug test in order to receive distributions may likewise be acceptable. In some instances, however, the client may wish to condition a gift to ensure their descendants continue to follow in their religious footsteps. Here, the legal issues become more complicated and the drafting needs to be precise.

Under most state laws, individuals are free to disinherit anyone they want, with the exception of a surviving spouse whose share is guaranteed through a spousal elective share or community property interest.[45] So a client may be allowed to expressly disinherit a family member who leaves the faith, but a condition that requires a beneficiary to actively practice the religion may be deemed void because it violates the beneficiary's constitutional right to religious freedom.[46]

In a recent case from Illinois, a grandfather, Max, executed a will and trust, which his wife, Erla, later amended under a testamentary power of appointment.[47] The trust contained a clause that prohibited the grandchildren from inheriting if they married outside the Jewish faith or if their spouse did not convert to Judaism within one year of marriage. The court of appeals upheld a trial court's decision that the clause at issue violated public policy.[48] The Illinois Supreme Court reversed, finding that the public policy of Illinois valued freedom of testation and that the beneficiary restriction clause did not encourage divorce but rather the matter involved a decision to marry. The court's decision rested on the fact that since the grandchildren did not receive a vested interest in the trust upon the death of the grandfather, the plan adopted by the grandmother had no prospective application, and thus there was no violation of public policy, stating "Erla did not impose a condition intended to control future decisions of their grandchildren regarding marriage or the practice of Judaism; rather, she made a bequest to reward, at the time of her death, those grandchildren whose lives most closely embraced the values she and Max cherished."[49]

An effective estate planning counselor should have three characteristics: (1) be sensitive to the client's world, (2) be honest and open, and (3) be creative.

Religious Dispute Resolution Mechanisms. Religious arbitration bodies are increasing in popularity and may be applicable in the estate planning context where individuals prefer to have questions of religious law resolved by experts in the respective tradition rather than secular courts.

The most well established religious arbitration body in which many Orthodox Jewish groups arbitrate matters relating to business, family law, and inheritance issues is known as the Beth Din.[50] Clients seeking to employ the services of the Beth Din should create an estate plan expressly requiring any disputes arising out of the document to be brought before and settled in a Beth Din.

Clients of other faiths may have similar faith-based concerns for wanting to resolve questions implicating religious law. For example, under Islamic law, an Islamic heir must be Muslim. Determination of an heir's eligibility and disputes arising from similar questions of Islamic law would be better left to religious panels or an independent Trust Protector, instead of a secular court that may be unwilling to resolve such matters.[51] As in the case of arbitration clauses in Jewish estate plans, the trust instrument can identify a Sharia-based arbitration body to resolve such questions and disputes. It can also empower a Trust Protector with the authority to identify eligibility of beneficiaries, or recalculate shares according to the Sharia in the event of a birth or death of an Islamic heir.

It is important to review state law regarding the enforceability of arbitration provisions to avoid ending up in litigation to compel arbitration. That said, if a client is concerned about whether the arbitration provision would be binding upon future beneficiaries, one solution might be to condition receipt of a gift upon acceptance of the arbitration panel. For example, "I leave $1 million dollars to my son, but only

45 See Friedman, *supra* note 9, at 25.

46 See Sonne, "Domestic Applications of Sharia and Exercise of Ordered Liberty," 45 Seton Hall L. Rev 725, at 737 stating that a "difference of religion" disqualifier would be upheld under the free exercise clause or under the general right to dispose property as one see's fit. But see *Drace v. Klinedinst*, 118 A. 907 (Pa. 1922)) (holding that a life estate willed to grandchildren on the condition that they remain faithful to a religion was not enforceable).

47 *Feinberg v. Feinberg (In re Estate of Feinberg)*, 235 Ill. 2d 256 (Ill. 2009).

48 *Id.*

49 *Id.*

50 See Fried, "The Collision of Church and State: A Primer to Beth Din Arbitration and the New York Secular Courts," 31 Fordham Urb. L.J. 633 (2004).

51 Ali and Shenkman, *supra* note 41, at 4.

if he agrees to be bound to resolve any disputes through arbitration by a certain panel." If the son does not agree, he would not receive the gift or inheritance. This approach would likely be enforceable and not a violation of public policy.

Conclusion

In an article aptly titled "Estate Planning Games" written 50 years ago, the esteemed legal jurist, Professor Thomas Shaffer of Notre Dame Law School wrote that an effective estate planning counselor should have three characteristics: (1) be sensitive to the client's world, (2) be honest and open, and (3) be creative.[52] In an age of abundant self-help options, increasingly sophisticated artificial intelligence solutions, and robust document automation systems, Professor Shaffer's comment is perhaps even more important today.

Being sensitive to a client's world requires understanding their background, values, and ethics, which are often rooted in, or at least impacted by, their religious preferences. Regardless of the religious faith the client practices, as an estate planner, it's important to become sensitive and build awareness to their faith-based needs. Recognizing that a multitude of faith practices exist and that it is impossible to become an expert in every faith, it is wise to directly ask clients if and how they want to include their religious practices into their planning.

Being honest and open means having open and transparent communication with the client. Building trust with the client allows for attorneys to guide and suggest strategies that a client more readily accepts because they truly felt understood by the estate planner. Although often more time consuming, when the client feels that their faith is being considered during the planning process, the act of creating an estate plan becomes much more personal and meaningful and equally rewarding for the planner.

Finally, be creative. Planners may be uncomfortable thinking outside the box and prefer to rely on existing forms and templates. Exploring some of the issues addressed in this article to understand the client's true motivations and customizing documents to achieve the client's wishes develops lasting inter-generational relationships and a deeper sense of personal fulfillment and satisfaction.

The authors hope this series will help practitioners become more sensitive to client's needs, allow them to communicate sensitive topics more effectively, and be more creative in their drafting. ■

[52] See Shaffer, "Estate Planning Games," 47 Notre Dame L. 865 (1972).