

**Religious and Ethical**  
**Issues**  
**and Estate Planning**

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I.



**Estate planning should not be just about the transmission of wealth.**

**Estate planning should be about the transmission of values.**

1. Estate Planning is not Just about Taxes and Wills.

Estate planning, to be properly done, must be planning about life as much, if not more, than planning for death. You have to make sure that your assets are secure, disability planning is addressed, insurance coverage is appropriate (not just life insurance, but casualty and property insurance) and so on. An estate plan must address the needs of all people involved. You need to organize and document your financial and legal records so those you will rely on in the event of an emergency will have the information they need to help. These steps, however, are still not adequate to address the entire person. For many people, personal wishes, which often include (or expressly don't include) religious issues, need to be addressed as well.

2. Plan with a Heart.

Most people tend to focus with their professionals on technical issues, such as taxes, proper legal documents, and so on. While all these points are vital, they can never be effective to protect the people involved if you do not focus on the human element. Have your documents and planning prepared with a heart. Carefully think through how the steps you take will affect the people that you care about. If you are leaving more to one child than to another, why? How will it affect the children? Is your concern that one does not have the financial wherewithal than the other does? What if there is a reversal of fortunes in the future? If you are naming one child before the other as an executor, how will that child feel? All this sounds perhaps a bit fuzzy wuzzy. This goes directly to the heart of what estate planning is about. Its about people, emotions and caring. Taxes are important, but easy to deal with by comparison.

3. Objectives.

How can the overall estate planning process, in its broadest sense, be used to preserve and promote desired religious and other values for yourself, your heirs and your community. Transmission of your values to future generations requires much more the sterile legal documents most people sign . If you feel its important that your children or grandchildren be afforded an opportunity to learn of your culture, heritage, or religion, will the trustees of your trusts understand this objective? Even if the trustees appreciate the importance of such qualitative objectives, will they have the latitude under the terms of the trust document to disburse funds for this purpose. Numerous provisions can be included in many different types of estate planning documents to help you achieve these vital goal.

A number of religious organizations have published living wills that address contemporary medical issues while conforming with the requirements of a particular faith. Forms to conform a secular will with the dispositive schemes of various faith's, such as the biblical or Quraan's, laws of inheritance, have been published by several organizations. However, these forms, however useful, address only a tiny percentage of the legal issues which should concern every person with a particular philosophical or religious attempting to organize tax, estate, financial and succession planning. Scores of sample clauses and provisions for wills, trusts, and other documents, each expressly intended to help you address religious and other values and issues throughout your estate plan are presented below.

4. The Importance of Religion to Estate Planning.

According to many surveys, 95+ percent of Americans believe in G-d or some type of higher power, yet few estate plans address any aspect of religion or philosophy. This is an oversight of tremendous personal importance because no area of the law is more fraught with religious issues then estate planning. If you endeavored to live your life in conformity with your religious beliefs, then your final medical decisions, funeral arrangements and distributions under your will should have a similar foundation.

If religious rituals, or even values, aren't important to you, respect for family or others may encourage your addressing religious considerations. Most importantly, the solace that religious traditions, and the guidance of a priest, rabbi, imam or other religious figure can bring to a family suffering through tragedy, are immense. Finally, ignoring religious issues, even if it means making the effort to specify what you don't want, can lead to painful family strife.

5. Most Estate Plans Ignore Religious and other "Soft" Issues.

The sad truth is that most wills and estate plans are standardized (boiler plate) forms, focusing on saving taxes or simply dividing assets. Estate planning, however, should be much more. In my many years of guiding clients through the difficult decisions of estate planning, it is almost always the personal issues that create the most pain for families. You should insist that your estate plan be tailored to meet your personal and family situation and not be a mere prepackaged set of forms focusing on tax issues or other legal formalities (although both obviously remain important). Religion is but one of the many important personal issues that needs to be addressed. Even if religious issues are not a particular concern for you, that does not mean they may not be very relevant to family members and other loved ones. Even where there are no religious issues, the following discussion will help you understand how personalized you can really make your estate plan.

There have been too many family tragedies that a modicum of advance planning could have avoided. Fist fights have occurred at funerals over which religious customs to observe. Families have fractured forever over an issue as to which cemetery a parent should be buried in. Couples that have grown up with different faiths but have not arranged ahead of time to be buried in nonsectarian cemeteries leave their heirs with Solomon-like choices to make at a very difficult time.

With the dynamics of the current society, it has become commonplace for parents to be of different religious denominations from each other and even from their own children. One of the most common scenarios I have seen played out scores of times are clients who are adamant about their lack of religious beliefs and feelings. However, as they approach the end of their lives, perhaps through a progressing illness, they often find tremendous solace in re-connecting to the religious roots with which they were raised. Ignoring any of these issues can make the process of losing a loved one ever more difficult. You owe it to yourself and to your family to give serious thought to these issues in advance and to express them, or the lack of them, in the essential documents discussed below.

6. Letter of Instruction.

The most important way to begin to address religious, philosophical and other personal issues in your estate plan does not require a lawyer or any expense. Consult with your Priest, Rabbi, Imam, or other religious advisor and discuss what religious options exist for you and what they believe might be best to help your family through the process. A letter of last instruction should always be written to family and loved ones, and one of the issues that should always be addressed are religious issues. Issues which heirs may need to hear in your words (not with legal formalities). A letter of instruction should state the religious faith or faiths, or lack thereof, which you were raised, as well as your current faith, affiliations and general religious desires. What type of funeral do you want? What type of mourning process should be observed? Which religious customs, if any, should govern? It is just as important if you don't want a particular religious custom to apply to state that you don't as it is to state that you do. What about guidance for those that you leave behind? What type of life do you want your children or grandchildren to lead? Do you want them brought up with a particular religious value system?

Even within each religion there are tremendous variations of customs. Without some guidance to your heirs, there is no way for them to know what you would want. Even when there is no doubt among heirs as to what religion you are affiliated with that you do or don't want religious customs considered, there is often a wide variance as to levels of observance between different family members. Some guidance in that regard can be critical.

Religion is far more than merely addressing your end of life decisions. While you certainly can't control what will be done, expressing your wishes can provide an important level of guidance. The majority of children and other heirs accord tremendous respect to a parent's last wishes, even a parent with whom they may have vehemently disagreed with on the same issues during their lifetime. If religious issues are important, let it be known. Also, there are few things that carry more moral persuasion than a heartfelt letter from a parent.

7. Living Wills\Health Care Proxies.

There are important religious issues to living wills. If you have religious beliefs you must discuss the religious implications with your religious adviser. Religious beliefs can affect a broad range of issues. What is defined as death? Can your agent ever withhold nutrition and hydration without violating your religious precepts? Does quality of life have any relevance in light of your personal religious beliefs? Must certain medical procedures be avoided? What of funeral and burial customs? Should maximum pain relief be tempered to preserve some consciousness to enable you to partake in end of life rituals. Don't lightly dismiss religious issues. If you do not want religious considerations addressed it is just as important to specify that as well. There is no assurance what your family might believe is appropriate.

There is not a single religion that does not have important issues that need to be addressed in a living will (the document which sets forth your wishes for medical care, especially as you approach the end of your life) and a health care proxy (a document in which you designate someone to make health care decisions for you). No pre-printed secular form even begins to address these concerns. Many of the forms prepared by different religious organizations do an admirable job of addressing religious issues, but often fall short on important legal formalities and details. Therefore, the only workable approach is to have a lawyer customize a form that addresses your specific religious needs. Work with both a lawyer and religious advisor and try to get the best of both advisors' guidance and insight embodied in the resulting legal documents.

Religious considerations are vitally important to every living will. Do not assume that because you are not religious that you can ignore religious implications. Your family, loved ones, or others may all have religious beliefs that may conflict with your health care wishes, or they may not be certain about your beliefs. Therefore, whether you do, or do not, wish your end of life decisions to be based on religious beliefs, you need to communicate those decisions.

For those with strong religious convictions, it is imperative to specifically address religious concerns to avoid having your beliefs compromised when you may be unable to express your desires. Since health care wishes are such a personal matter, it is also vital to address religious concerns to avoid your family members or those others involved with your health care from pushing their beliefs (or lack of beliefs) on you.

The legal community, the right to die organizations, and many others involved with the health care decision process have all but ignored religious considerations. Many, perhaps most, people signing living wills while they are healthy aren't concerned about religious issues. Many of these same people, when faced with a major catastrophe such as terminal illness or loss of a close family member, fall back to their religious roots for guidance and comfort. Unfortunately, it may then be too late for these people, or their loved ones, to remedy the situation. The solution is to give consideration to the religious implications of the entire health care process while you are able to, so that

in the event you or your family experience tragedy, you won't have to regret what was done.

Whether or not you have any religious convictions your living will should communicate your decision. If you were born to parents with a particular religious affiliation, other members of your family could assume that it would be appropriate to consult with clergy of your religious background before making a decision. This may, or may not, be what you wish to have done. Religiously influenced decisions could differ from the types of decisions you may prefer. For example, several religions restrict the ability to cease "heroic measures" as most people would define the terms. If you want nutrition and hydration withdrawn when there is no hope of your regaining quality of life, it is important to communicate whether you wish religious principles to be considered in making this decision.

Religious doctrines may have a very specific effect on what can be done medically to sustain or not sustain life. Regardless of how you presently feel about the effects the tenets of your faith may have on these decisions, it can be a terrible mistake not to address these issues with your clergy. Your family's religious convictions should be considered. It may be possible to carry out your wishes with perhaps only modifications and yet be within the religious tenets of your faith.

If you decide, after consulting with your clergy and discussions with your family, that you wish to take a position contrary to the tenets of your faith, your living will should indicate this in very precise terms. You may wish to provide the name and address of a clergy member to be consulted for interpretations of your religious beliefs and the name of a religious organization or institution to be contacted should the clergy member not be available.

The remainder of this chapter contains comments addressing possible religious considerations of many different religious groups. These comments and sample clauses are based on experiences with clients over many years. Not all religions have been addressed, and for any religion which is addressed, not all components of that faith have been addressed. Therefore, it is important that you discuss the form and positions you wish to keep with your personal religious adviser. Thus, the following should be viewed as no more than a starting point to open a dialogue.

Living wills should specify religious implications or aspects of your health care wishes. Define with detail what quality of life might suffice to justify heroic measures even if you are terminally ill. Different religions, and different levels of observance within any particular religion can have significant impact on this. What religious, or non-religious end of life requests do you have. This should address religious considerations of funeral, burial, services, memorials, and other requests. Are there other important religious matters such as organ donations, religious beliefs, desire to be informed or not informed of all medical conditions, etc.

The agent named in your health care proxy should carry out to implement the religious or non-religious wishes you outlined in your living will. There have been no shortage of legal battles, some publicized but most not, where an agent's beliefs differ from those of the person they are asked to make decisions for. The guidance of the living will should provide enough information for your agent to have an understanding of your wishes, but not so much specificity that you bind the agent to decisions that may prove to be inconsistent with your wishes or impractical from a medical perspective. Most importantly these wishes should help determine whether the agent you've selected will have the moral ability to effect your stated wishes.

If you have no one to name as agent, or if your agent cannot be reached in an emergency, a living will included in your medical records may be the only communication of your religious and other wishes to your medical providers. In these incidents the clarity of your wishes set forth in your living will must provide a physician who may never have met you sufficient understanding of what you would have wanted done.

What happens when a patient has not communicated religious beliefs?

Example: John Smith was born a Jehovah's Witness but married outside the faith. Jehovah's Witnesses have strong beliefs against the use and administration of blood and blood products. John signed a health care proxy and named the wife Cindy Smith as agent. Tragically, John is in a car accident and rushed to the local hospital. The family arrives. The physicians inform the family that John needs emergency surgery to survive. Cindy is ready to authorize the blood infusion necessary to conduct the surgery. The family argues that John has strict religious beliefs that prohibit the use of blood and which must be considered. John's living will and health care proxy are silent as to religious beliefs. Cindy argues that John has long ago moved away from the faith and would want every measure taken to save his life. The family argues to the contrary that the restrictions of a Jehovah's Witness are exactly what John wants. While a Jehovah's Witness may be treated in a manner that results in the dilution of blood within an extracorporeal circuit that does not involve storage or more than a brief interruption of blood flow and that is constantly linked to his circulatory system this may present greater risk. What should be done? The family might truly believe that John has remained faithful and wishes his faith respected. Cindy may truly know that the John has moved away from the faith and would not wish any restrictions on his medical procedures. Is it possible that John has

remained faithful but Cindy sees an opportunity to hurt a family that has never fully welcomed her?

Since Cindy was named agent the medical professionals would follow the wife's instructions as agent unless they felt she were acting in bad faith. Obviously the better choice is to be precise and address in detail to what extent you want a particular religious belief recognized in your treatment.

Example: What is a heroic measure. The following example illustrates how the same language in two different living wills can mean such different things in different circumstances. These two examples demonstrate why discussion with a medical provider is so important.

Example 1: An elderly man, Michael Franklin, suffering with diabetes, kidney failure, heart failure, and Alzheimer's dementia is hospitalized having just suffered a stroke. He becomes short of breath. It is discovered that he has a pulmonary embolus (blood clot in the lungs). He cannot maintain adequate oxygenation. The patient cannot be given anti-coagulants (blood thinners) because of the stroke, so instead an inter-venous filter may be inserted surgically to prevent further clots from reaching his lungs. The issue is how much more invasive or aggressive should treatment be? To you intubate him? Do you put him on life support and breath for him by attaching him to a ventilator? Alternatively, do you let nature take its course at that point? Many people would view intubation of a patient like Michael as a heroic measure under these circumstances.

Example 2: Contrast the above situation with that of Carol Saints, a 38 year old women, who is active and generally in good health, after a long airplane ride from Asia back to the United States on a direct flight, suffers a pulmonary embolus (blood clot in the lung). Carol would likely be given anti-coagulants (blood thinners) (instead of the more invasive insertion of an inter-venous filter done for the elderly man) should clearly be intubated if she is short of breath and unable to maintain adequate oxygenation. Intubating Carol is unlikely to be viewed as "heroic". Once this otherwise healthy young patient is on a ventilator and the pulmonary embolus is dealt with, she can probably

be weaned from the ventilator and will likely return to a full and normal life.

The distinctions illustrated between Carol and Michael are substantial and vital to the medical decisions to be made, yet most living wills don't clarify the different decisions.

There are many examples of how religious values can be imbued into your living will and health care proxy. In the Buddhist tradition, it is among many a belief that incense should be burned near death to help provide symbolism of the path upward toward enlightenment and to guide your last thoughts upward. Many Buddhists believe that for a period following death often for a minimum of at least one week, the spirit may remain with the body and, therefore, the body should not be tampered with or even moved. These traditions may be impossible to carry out in any medical or health care facility so that advance arrangements to spend one's last days in a hospice sensitive to these religious beliefs or at home could be quite important. Unless this is addressed in a living will, it is unlikely to be known to many and, therefore, unlikely to occur.

Pregnant women should carefully address the issues of pregnancy in a living will since the decisions which need to be made to accord with Catholic religious doctrines may not be obvious to those unaware. Generally speaking no direct action may be taken that would likely cause the death of the unborn child. Thus you cannot choose the life of the mother over the life of the unborn child since the church views that all life is sacred and is in God's hand. Unless this is expressly set forth in the living will, no one may know the degree of your devotion and you cannot expect health care providers not schooled in these rules to have the knowledge necessary to carry out your wishes.

Under Jewish law, saving the mother's life is generally given preference. This is quite different than the Catholic view, highlighting the importance of people of all faiths to communicate their wishes to health care providers.

Many people and health care providers view the alleviation of all pain to be an essential and critical goal. However, for an Orthodox Christian, for example, the act of suffering can be an experience providing for purification, redemption, and salvation. While suffering is clearly not encouraged, pain relief to the point of making someone unconscious during their last days may prevent them from addressing profound and moving observances essential to their religious beliefs. The customs of the Christian Orthodox church encourage you to be lucid during your last days so that you may be free to confess sins and receive Holy Communion. If the attending physicians are not aware of this, they cannot be assumed to respect and foster this type of care.

a. Hospital Inquiries as to Religious Preferences.

The uncertainty of religious affiliation might be resolved in that most hospitals ask information on religious affiliation which should be in the hospital chart and the hospital computer system, at admission. This information could be relied upon if no living will exists. If the existence of a living will is noted already in the system, on subsequent visits, the patient is often asked whether they have amended the living will. The problem is that a mere indication of religious affiliation may not afford the opportunity to provide the depth of clarity given the wide range of religious observances, even within the same religion.

b. Living Will Provisions to Address Your Religious Convictions.

Regardless of which religious beliefs you may apply to your living will, there are a number of points which should be considered. First, should the religious beliefs specified apply to all aspects of your living will, or only certain components. The two most common approaches are to have religious beliefs govern all aspects of your living will, or to have religious beliefs only apply to funeral service and burial. This latter approach is common because many people wish to be respectful of the faith, but are concerned that religious restrictions will force them to be maintained on life support long after they have no hope of recovery or quality of life. Although religious restrictions can prevent the withdrawal of life support in some situations, religious restrictions are often more flexible, and sophisticated than many people realize. Before concluding that your personal wishes won't be met because of religious restrictions, consult with your religious adviser.

If you do condition any portion or all of your living will and end of life decisions on religious beliefs it might be helpful to designate a particular religious adviser (and successor) or an organization, to advise on and resolve any issues. If your agent under your health care proxy is reasonable knowledgeable of your religious beliefs you might simply suggest that a religious adviser selected in your agent's reasonable discretion, and in accordance with my statement of religious beliefs, be selected.

If you do designate a religious adviser your living will should state that no health care provider shall be required in any situation to require any approval from such religious adviser in order to carry out your instructions. This is recommended so that no health care provider insist on a sign off on a medical decision by your religious adviser in addition to your agent. This could create administrative difficulties in your living will.

8. Durable Powers of Attorney.

While few would ever consider a power of attorney a document with religious implications, it can have profound ones. Every major religious sect promotes charitable giving. If you have been charitable during your lifetime and would wish such charitable giving to continue, or even if you have not but would like charitable giving to be a factor considered in your last days, enabling an agent under a durable power of attorney to make charitable bequests on your behalf is essential or no one may have access to your funds to do so.

Islamic law and Jewish law have restrictions on money lending and banking transactions.

If these are important factors to you during your lifetime, they should not be disrespected because of your disability or last illness that incapacitates you.

A patient with Alzheimer disease can live for a decade or more without being able to control their financial affairs. The only method to assure that your wishes are respected is to communicate them to your financial agent under a power of attorney. If children or grandchildren are to be aided with religious education you may wish to expressly provide your agent with the authority under your power of attorney to pay such expenses. Addressing this in your will alone may not suffice in many situations. If paying for grandchildren's religious education is a major goal of yours, as it is for my own father, and different children have different degrees of religious observance, will jealousy or animosity be promoted or even an agent be prevented from spending money for that religious education. Fortunately, this has not affected my family because of advance planning but I have seen it affect many families. Specifying in your power of attorney that private religious school education should be paid for any grandchild may prevent family disputes over what was really intended.

9. Wills.

There are a host of religious implications, whatever your religious affiliation is, as to how your will should be handled. Even before getting to the nuances of what a specific religion may require every religion promotes charitable giving, as noted above. Providing a bequest in your will is something that is viewed quite positively by all. If you have a strong religious affiliation providing for a bequest to a major religious institution is not only a positive way to fulfill your religious obligations but a wonderful way to transmit the values of religion and charitable giving to your heirs. If for nothing else, make a bequest in your will to demonstrate to your heirs that charitable giving, giving back to society, is something of importance to you and a wish you hold for them. Don't hesitate to add a personal thought to the will stating that it is your hope that by making this gift you encourage and demonstrate to your heirs the importance of charitable giving. While caution must be exercised when including any personal thought in a legal document, it doesn't mean that it cannot be done and done in a very positive way.

Many religions have special customs attending to burial that often can create considerable expense. Authorizing these in your will can assure that your executor will have the legal authority to pay for them without any arguments from dissenting heirs who may have different views.

If you are Hindu to be cremated and have your ashes spread over the Gandhi River is an act of importance.

For a religious Jew to be buried in the ancient land of Israel is an important rite.

In both of these cases, and there are many more examples, the cost should be authorized in your will by authorizing and directing this type of funeral arrangement. It is often common for many people to provide for some type of continued remembrance in their will through a donation or contribution to perpetuate their memory. This might include payments for perpetual grave site maintenance, donation to a religious organization for annual or other periodic rites in your memory to be carried out, and so on. Even for most people with a moderate religious feeling, they hope for their descendants to follow in the same path. How far you wish to go can be reflected in your will. While it can raise religious issues you can, with some care and caution, make certain bequests contingent upon outcome. For example, you could specifically authorize the payment of private school education if and only if it is for a certain religious denomination for grandchildren. Some people have gone so far to have even tied bequests to a descendant marrying within their faith. Great care, however, must be exercised in this type of planning. If you are seeking to encourage someone to follow a particular religious path this stick is not always the best approach not to mention that it could raise legal challenges. If your descendant strays from the path you hoped for threatening them with disinheritance may only encourage their never returning. A more effective long-term approach I have seen work to mend and heal families is to instead give the descendant a full inheritance in trust, with a trustee who is sensitive to the parent's religious feelings, and the child's situation, to distribute funds in a positive way. For example, paying the child's expenses to attend family functions, holiday celebrations and the like may heal.

Buddhism has an interesting perspective in using disinheritance, sadly something I have seen too many parents do over the years, to achieve a certain result. The Buddhist theory of Karma provides that everything done in a particular life, as well as in past lives, influences and affects future lives. If you undertake an act of disinheriting an heir out of anger, it can be viewed as creating a negative influence that may be carried on through rebirth to the next life. Buddhism would advocate that you take action out of compassion and not anger.

In the Christian Orthodox religion, if you do not provide for your family and own relatives it is as if, according to many, you have disowned the faith and are worse than a non-believer. The church encourages you to give consideration to the needs of family members, even beyond spouse and children.

A simple pot trust in your will which can serve as a safety net for a host of family members is something that may prove quite appropriate.

For Catholics, general guidelines of charity and justice are vital. Any estate planning created out of anger would likely violate these important moral principles.

For an orthodox Jew, the biblical laws of inheritance often do not comport with modern economic realities so additional steps of creating a side document is often used as a mechanism to technically comply with biblical law while simultaneously addressing current society and economic needs.

The Quraan includes detailed provisions as to how inheritance must be handled. The mandates of the Quraan are mandatory for every Muslim to use as their dispositive scheme in their wills. They are not likely to be something a secular non-Muslim attorney would be aware of.

If any of the above or other religious precepts are important to you, a boiler plate estate plan will do little to address them. Certainly no intent was intended in this article to ignore or not address any particular religion but simply to demonstrate how each document in each phase of your planning can be tailored to address religious and other personal needs. To really give yourself peace of mind, to provide solace to you in your last days, and to send the messages you wish to your heirs, an estate plan tailored to reflect religious and other personal needs is not a luxury but an essential step. Remember estate planning is not only about the transmission of wealth. It should be about the transmission of values.

10.                    Disinheriting an Heir.                    Should You Disinherit a Child Who Marries Outside of Your Faith/Culture?

Such a dramatic and sever step cannot be taken lightly from either a personal or legal perspective. What happens if the marriage falters? What if the child returns to the roots you want? If you disinherit the child, how will this affect the child? What will the affect be on any siblings? How will you feel to disinherit a child? Does your faith prohibit or encourage such an action? Whatever choice you make will have to eventually be incorporated into your estate planning documents. Many people who attempt to deal with this issue, handle it in an inappropriate, and counter-productive manner.

b.                    Sample Clause Many People Use to Accomplish This.

The initial reaction which most people have to addressing the issue of a child intermarrying is to provide in their will that such a child should not receive any inheritance if that child intermarries. The following provision is illustrative:

Restriction on Beneficiaries. Notwithstanding anything in this Will to the contrary, if a person shall be entitled to receive a bequest or distribution, whether of income or principal, at a time when that person is married to, or shall be cohabiting with, an individual who is not a member of the \_\_\_\_\_ religion, as

such term is defined below, then the bequest or distribution shall not be made to such person and instead the provisions hereunder for such bequests or distributions shall be applied and administered as though that person were then deceased with none of his or her issue then surviving. For purposes of this provision, the determination as to whether the beneficiary's spouse, or the person with whom the beneficiary is cohabiting, shall be based on [specify definition or standard].

c. Public Policy Considerations Prohibit a Blatant Disinheritance Clause Based on Religion.

You can't prevent someone from marrying a particular person, or disinherit anyone who intermarries. Public policy will likely prohibit the enforcement of such a provision in your will. Thus, if you included such a provision in your will the disinherited child would likely take the matter to secular court, suing by challenging the will, and most likely succeeding. The result will thus be an ineffective disinheritance, the embarrassment, expense and of the proceeding. The end result will be even more disharmony in the family.

d. Trusts as a Better Option to Address These Concerns.

Trusts provide greater flexibility, privacy and less secular court involvement. When affordable, you will find trusts generally to be the best planning option.

11. Investment Issues Affect all Estate Planning Documents.

The prudent investor rule, in its various forms in various states, has and is, dramatically changing the view of how investments of trusts, estates, and other assets should be made.<sup>1</sup>

(1) The standard of determining investment prudence is applied to the portfolio as a whole, rather than to individual securities.

(2) The trade off between risk and return is a central consideration of the fiduciary.

(3) No class or type of security is not permissible, as long as it fits within the overall investment plan and is, as part of such plan, prudent.

(4) Assets will have to be diversified (modern portfolio theory) unless a specific reason not to is present.

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<sup>1</sup> See Uniform Prudent Investor Act: With Prefatory Note and Comments, August 13, 1993 Revision ("Uniform Act Comments"), page 1 "Objectives of the Act".

(5) Investment management can be delegated, and should be delegated, where the fiduciary does not have requisite skills.

The revised rule results in fiduciaries having to formulate a comprehensive investment plan for each trust based on the facts and circumstances affecting that trust, including expected distributions, inflation, etc. While these simple sounding goals make the important step toward conforming fiduciary investment standards to those of the general investment community, there are many issues and problems, some quite thorny, which must be addressed by testators writing wills, grantors establishing trusts, beneficiaries of estates and trusts, trustees of trusts, executors of estates, attorneys, accountants and investment advisers advising all of the above.

Can a fiduciary invest in a socially acceptable manner under the Prudent Investor Rule? Perhaps.

"The duty of loyalty is perhaps the most characteristic rule of trust law, requiring 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 benefitted by pursuing the particular social cause.<sup>2</sup>

What the above comment means practically, is that if a testator or grantor wishes a socially acceptable method of investing, he or she must carefully word the governing instrument to make this an exception to the Prudent Investor Rule. But will this be enough?

For many people, maintaining a portfolio which is consistent with their underlying social morals is important. However, this may not always be reconcilable with a Prudent Investor Standard. For example, is it still feasible to use index funds if those indices would include investments which violate the social goals? Presumably, the universe of appropriate investments would be narrowed to exclude those investments which are inappropriate. Thus, a more personalized portfolio (depending on the restrictions of the particular grantor's or testator's language in the governing instrument) may have to be developed. If this occurs, it may affect the fees which can be charged. Assume that the fiduciary may have otherwise (i.e. but for the special request for a special socially oriented investment philosophy) been able to use common trust funds, but now must retain an investment manager to construct an individualized

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<sup>2</sup> Uniform Act Comments, §5, pages 13-14.

portfolio. What should happen with the cost of the investment manager? This could result in the fiduciary's compensation being reduced.

The Prudent Investor Act §8, provides that: "In investing and managing trust assets, a fiduciary may only incur costs that are appropriate and reasonable in relation to the assets, the purposes of the trust, and the skills of the fiduciary.... Since the social goal (the same rationale should apply when a religious goal, see below, applies) is part of the purpose of the trust, that may justify a larger overall fee structure. This additional cost of the investment manager, if required primarily (solely?) because of the special investment standard, may bring a reduction of the fees and commissions paid to the fiduciary.

Would it be appropriate to incur significantly increased costs to achieve this goal:

"Companies with records of human rights abuses, environmental problems or sweat-shop conditions are difficult enough to ferret out in the United States. Getting information about companies abroad is nearly impossible...<sup>3</sup>

In order to achieve this goal, is an election out of the Prudent Investor Rule required, or is merely a modification required? The statute states that §21 Amends N.J.S.3B:20-25 to provide that the Prudent Investor Act will not apply where "the trust instrument contains provisions inconsistent with or contrary to the provisions of this article". Is a social standard inconsistent with or contrary to the Prudent Investor Act? If it is, then it may make the decision an all or nothing choice. But is that really fair? Why can a grantor or testator not state that he or she wants the Prudent Investor Rule followed, subject to adhering to socially responsible investing?

It would appear that based on the general language of the Prudent Investor Act, §2.b. that these matters could be resolved in any fashion the grantor or testator desired. That provision provides: "The prudent investor rule is a default rule that may be expanded, restricted, eliminated, or otherwise altered by express provisions of the trust instrument." A difficult problem will arise where the governing instrument is silent. When this occurs, then the general compensation provisions above will apply. The result of their application is not clear.

Similar to the issue of socially responsible investing is the matter of investing in accordance with a prescribed religious standard. Each of the issues raised in the preceding paragraphs concerning socially responsible investing, must be addressed where a religious standard applies. Can a

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<sup>3</sup> Ken Brown, "Investing Abroad With a Conscience: It's Not Easy", The New York Times, Sunday June 2, 1996, page F 5.

fiduciary invest in a manner under the Prudent Investor Rule that is consistent with both the rule and the religious beliefs of the grantor, testator, or beneficiaries? Perhaps.

"The duty of loyalty is perhaps the most characteristic rule of trust law, requiring 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 benefitted by pursuing the particular social cause.<sup>4</sup>

What does the above comment mean with respect to a religious preference? Even of greater concern is the manner in which the Prudent Investor Act requires application to existing trusts and estates. What if the pre-existing governing instrument did not specify a requirement to invest in accordance with Islamic law because it was assumed by all involved that such a standard was obvious. The Prudent Investor Act will now apply and, based on the Comment cited, is it possible for the fiduciary to use such a standard without risking surcharge? Furthermore, if the beneficiaries are minors, will a court approval be necessary to confirm this?

12. Conclusion.

In my many years of estate planning practice, a few general lessons have been clear. There is no correlation between wealth and family happiness. Frankly, there seems to be a negative correlation. Those who seem to have the most joy in life and leave their heirs with most joy and a chance for a meaningful life are those that tend to focus on caring for families, making a contribution back to society, and generally helping others. Use your estate plan to achieve these wonderful goals and you and all of your descendants will benefit.

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<sup>4</sup> Uniform Act Comments, §5, pages 13-14.

## II. Catholic Considerations and Estate Planning.

### A. Introduction to Catholic Considerations and Estate Planning.

Religious issues are almost always overlooked during the estate planning process. This is unfortunate, because for many clients, they are important, especially when facing a crises such as a terminal illness or the impending loss of a loved one.

### B. Catholic Religious Issues and Living Wills.

#### 1. General Issues.

Living wills raise a host of Catholic religious issues, the following of which are but a few. It is advisable for a Catholic to sign a living will clarifying that Catholic religious observances should be respected. It puts you in control of decision making when you cannot be in physical control, so that you can plan what the Lord is calling you to do. It is also of great help to the family which is always torn at such difficult times.

Unfortunately many Catholics assume the Church will mandate that they be kept alive no matter what. As a result many don't sign living wills in accordance with Catholic religious principles. But this is an unfortunate misunderstanding. Catholics can secure living wills which are not only consistent with their personal wishes, but which are consistent with their religious heritage as well.

An example of some optional clauses that you can amend to a standard living will to conform it to your Catholic ideals are related below. They are clauses meant to be integrated into the body of the standard living will in addition to or instead of some of the standard clauses. Be certain to consult your priest to confirm any provisions.

The following are examples of general clauses meant to infuse your living will with a sense of the Catholic tenets. These particular clauses, if added, should be integrated into the "Recitals" component of the standard living will.

Sample Clauses: WHEREFORE, God is the creator and preserver of life. Since life is a journey from God and back to God with death as part of that journey, it follows that life is sacred, but not an ultimate value. From this perspective, death is not a failure or an absolute evil, but the culmination of the journey. WHEREFORE, My Christian heritage holds that life is the gift of a loving God. I see life as a sacred trust over which I can claim stewardship, but not ownership. Therefore, I believe that euthanasia and suicide constitute an unwarranted destruction of human life and are not morally permissible. I understand, as a Catholic, that I may never choose to cause my death as an end or a means.

1. Heroic Measures.

The Church does not mandate that a person be kept alive no matter what. We believe that a person can decide to avoid overly invasive and experimental procedures, not ordinary means of care. "Ordinary means" could include feeding someone, assuring they have air to breathe, etc. The Church believes that a patient must continue to receive ordinary care, otherwise you are effectively acting to cause the patient's death. The extraordinary means go beyond this and seek to reverse a process which is already underway. Extraordinary means can be refused, but not ordinary means.

The following is a "no heroic measures" directive, as it is understood based on various interpretations of the Catholic church. It can be added to or substituted for the general "No Heroic Measures" directive found in a typical living will to conform your living will to include the Catholic beliefs your deem important.

2. "No Heroic Measures" Language As Understood by the Catholic Church Shall be Taken.

**Sample Language: If I (i) have an incurable or irreversible, severe mental or severe physical condition; (ii) am in a state of permanent unconsciousness of profound dementia; (iii) am severely injured; and in any of these cases there is no reasonable expectation of recovering from such severe, permanent condition, and regaining any meaningful quality of life, then in any such event, it is my desire and intent that heroic life-sustaining procedures and extra-ordinary maintenance or medical treatment, as understood in the moral tradition of the Catholic Church, be withheld and withdrawn.**

**It is not my desire to prolong my life through mechanical means where my body is no longer able to perform vital bodily functions on its own, and where there is little likelihood of ever regaining any meaningful quality of life. The condition and degree of severity and permanence contemplated by this provision are of such a nature and degree of permanent illness, injury, disability or accompanied by pain such that the average Catholic person might contemplate, in the moral tradition of the Catholic Church, the decisions addressed herein (regardless whether such person would make the decisions I have made herein).**

In any such event, I direct all physicians and medical facilities in whose care I may be, and my family and all those concerned with my care, to refrain from and

cease extraordinary or heroic life-sustaining procedures and artificial maintenance and/or medical treatment, as understood in the moral tradition of the Catholic Church. The procedures and treatment to be withheld and withdrawn include, without limitation, surgery, antibiotics, cardiac and pulmonary resuscitation, ventilation or other respiratory support.

3. Nutrition and Hydration.

What about nutrition and hydration provisions in a living will? Withholding nutrition and hydration for a Catholic should only be done if in accordance with Catholic religious doctrines. Generally, nutrition and hydration will be considered ordinary means and should not be withheld. To withhold nutrition or hydration could be equivalent of starving a person to death. Attorneys must exercise care with using "standard" living will forms because many will authorize withholding nutrition and hydration contrary to the wishes of many Catholic clients.

The following is an example of a clause that could be included in the "Nutrition and Hydration" section of your living will to conform your will to your Catholic tenets.

Sample Clause: Withhold Nutrition and Hydration Only If Permissible Under Catholic Religious Doctrines. Any artificially administered nutrition and hydration (feeding and fluids), if considered extraordinary and heroic measures in accordance with standards and principles as set forth by the Catholic Church, may be withheld or withdrawn. For purposes of this provision, nutrition and hydration shall include, by way of example, and not limitation, tube feedings, Corpak tubes, nasogastric tubes, Levin tubes, gastrostomy tube, or hyperalimentation.

4. Pain Relief. Where the objective is to relieve pain, any action is always proper. If the objective is to actively hasten the onset of death it is inappropriate to authorize such an action in the Church's view. God is the lord and master of life, we are not. The Church believes that we are always safe in God's hands because he loves us more than we love ourselves. Therefore, to actively hasten death would be a violation of these fundamental beliefs.

An example of a possible directive to be integrated into your living will to address the issues of pain relief is:

Sample Clause: Provide Pain Relief To The Extent Permissible Under Catholic Religious Doctrines. Where procedures and treatment are to be withheld or

withdrawn, I wish that all treatment and measures for my comfort, and to alleviate my pain, be continued, so long as they do not actively hasten the onset of death.

5. Pregnancy.

What about pregnancy? Catholic women should consider Catholic religious issues concerning pregnancy in their living wills. If there is a physical condition in the mother that should be corrected, and if to rid her of this the fetus, incidentally and by accident dies, that is permissible. But you cannot take any affirmative action which would likely cause the death of the fetus. You cannot choose the life of the mother over the life of the fetus. All life is sacred and is in God's hands. This is important to address since it can differ from what many people might assume if uninformed.

The following clause is an example of a possible directive concerning pregnancy. It should be integrated into the "Pregnancy" provision of your living will to address Catholic doctrines regarding pregnancy and end of life situations.

Sample Clause: Issues of Pregnancy Should Be Resolved in Accordance With Catholic Religious Doctrines. My life shall not have precedence over the life of my fetus if a choice must be made between my survival and the survival of my fetus. My fetus' life shall not have precedence over my life if a choice must be made between my survival and the survival of my fetus. I direct that no action be taken which would likely lead to the death of either myself or my fetus, even if such action is necessary to the saving either myself or my fetus.

6. Organ Donation and the Definition of Death.

What about the definition of death and organ donation? The Catholic Church's position in regard to the definition of death mirrors that of many state statutes. Death is the irreversible cessation of all brain functions. This definition facilitates the possibility of organ donations. The Church is not in favor nor does it oppose organ donations. It leaves the decision up to the individual to do what his heart desires. There is no right or wrong in the eyes of the Church when it comes to organ donations. It is enough to have a simple directive stating your desires. For example, "I am (not) willing to donate any organs that may help others".

7. Last Rites.

What about last rites? Last rites are an important ritual for those facing death. They include the sacrament of the anointing of the sick, confession and reception of communion. The presumption is that any Catholic would want last rites. However, given the diversity of today's society, attorneys you should

specify in their living wills that you wish to have last rites to avoid any confusion.

8. Funeral Provisions.

What about funeral provisions for Catholics to include in a living will? Too often Catholics have dispensed with a religious service and use a funeral chapel's service instead. The service at the Parish Church for a funeral mass, which is very important, is thus missed. This service is important, not only for the deceased who we believe can gain from the prayers of the congregation and the grace of the sacramental action, but it is also a tremendous consolation for the family and friends. When the bereaved pray together they can experience their own grace-filled strength and the support of the others who pray with them. This is so important for the solace of the survivors. For us, the Mass in church is the appropriate way to say farewell to a loved one. You should consider including an express request for such a service in your living wills. Even if you personally are indifferent, for the benefit of your survivors, it should still be addressed.

9. Cremation.

What about cremation? Cremation is allowed according to some authorities, although, not necessarily preferred.

C. Charitable Giving and Estate Planning for Catholics.

A religious person near the end of their life starts to look more towards spiritual matters. They often have the idea to do something good for their Parish, church or other worthy cause. Its important for estate planners to facilitate giving clients the opportunity to accomplish these goals. Such gifts provide benefit to the donor and society. Testamentary gifts are essential for Church functions to continue. Many of these bequests are from people who grew up in a particular Parish, were schooled there, but moved away. Often they reminisce of this Parish where they grew up near their last days and find comfort in making bequests.

It is always recommended that one use some of his wealth to help not only the present but the future. When Jesus looked at the widow's plight he recommended to give not only of your surplus, but of your substance (principal) as well. The call of the New Testament to give charity is a loud and vigorous call. You cannot understand Christianity without understanding charity. St. Paul, while traveling, heard of the needs of the Church in Jerusalem, and said "G-d loves a cheerful giver".

Ideally, people should think about charitable giving while in good health and not wait for testamentary gifts. Attorney's cooperation in helping and encouraging clients to structure charitable gifts and to help the poor is itself a graced activity. For more information call the Deferred Giving of the Arch Diocese of Newark at 973-497-4125.

D. Doctrines and Guidelines For Inheritance.

General guidelines of charity and justice always should be considered. But specifically, how they would apply will vary based on the circumstances of the family. Obviously, to the extent attorneys can help guide clients to make their estate plans charitable, just and fair amongst heirs, and consistent with the many Catholic doctrines discussed in this article, they will be providing a wonderful service to their clients, and their client's families.

E. Case Study - Bequest to a Priest under a Vow of Poverty.

If a family wishes to make a bequest to a priest (or nun) who has taken upon themselves a vow of poverty, how can this be done without violating the vow. How can this be done in a manner that is respectful and supportive of such a vow and choice, but while nevertheless preserving some of the assets for the possible future retirement use of the intended beneficiary? If the intent by the benefactor is merely to make the bequest, unconcerned about the issue as to whether then assets bequeathed will simply be given by the recipient to charity, the matter is simple. To preserve the assets is far more complex and will require inquiring of the particular priest's or nun's superiors as well. This issue is likely to become more common as the population involved ages. The following is sample language and comments used in one situation in an attempt to address these issues.

Following is a sample provision endeavoring to address a family objective of protecting the assets bequeathed to the beneficiary under a vow of poverty for future use, while, respecting the vow:

1. One (1) share ("\*SON'S-NAME 's Share") shall be distributed as follows:

(1) If \*SON'S-NAME is then living:

(a) If \*SON'S-NAME, is subject to the vow whereby he has removed himself from any involvement with his financial affairs (the "vow of poverty"), then \*SON'S-NAME 's Share shall be paid to my Trustee, in trust for the benefit of \*SON'S-NAME, to be disposed of in accordance with the provision below entitled "Special Trust for Father \*SON'S-NAME Under the Vow of Poverty".

(b) If at the time of my death, \*SON'S-NAME, is released from the vow of poverty, then \*SON'S-NAME 's Share shall be paid to \*SON'S-NAME outright and free of trust.

2. Special Trust for Father \*SON'S-NAME Under the Vow of Poverty.

\*SON'S-NAME 's share shall be held by the Trustee, in trust (the trust being referred to as the "Father \*PRIEST-NAME's Trust"), and Father \*PRIEST-NAME's Trust shall be administered as follows:

a. During the term of the trust:

(1) My Trustee is hereby directed to manage, invest and reinvest the Trust Estate, collect the income thereof, and pay over, to or for the benefit of \*SON'S-NAME (the "Lifetime Beneficiary"), so much, all or none of the net income from and/or the principal of such trust, in such amount and proportions and at such time or times, as the Trustee shall determine in accordance with the Standard for Payment consistent with his vow of poverty in accordance with Carmelite Tradition, defined below, without court order, and after taking into account the following considerations:

(a) In making such determinations, the Trustee shall not take into account the Lifetime Beneficiary's sources of income, and the Lifetime Beneficiary's expenditures, or tax status. The Trustee expressly may not request financial data, tax returns or other information of the Lifetime Beneficiary. I expressly relieve the Trustee of such obligation to do so as to make such inquiries of the Lifetime Beneficiary would, in my belief, violate the spirit of the vow of poverty under which the Lifetime Beneficiary conducts his life (this is the prime objective of this trust).

(b) The Trustee should invest and hold the Trust Estate and shall make distributions for the benefit of Lifetime Beneficiary for his life and with consideration to the vow of poverty under which he lives. Any such distribution to the Lifetime Beneficiary shall be made only if consistent with his vow of poverty. The Lifetime Beneficiary shall only accept property hereunder if any required approval is first obtained from the Prior of the local community, or if necessary, the Prior Provincial of the Province. However, the Lifetime Beneficiary's actual acceptance of any property shall be conclusive proof that any such approvals were obtained. In no event shall any Fiduciary be required to confirm the approval of such persons.

(c) In the event that distributions are to be made to or for the benefit of the Lifetime Beneficiary, the Trustee should endeavor to provide for such distributions without involving the Lifetime Beneficiary in the details of financial or administrative matters to an extent that in the Lifetime Beneficiary's view would be inconsistent with the vow of poverty. By way of example and not limitation, should the Lifetime Beneficiary wish to take a trip which, as determined by the Prior of the local Community, or if necessary, the Prior Provincial of the Province is acceptable under the vow of poverty, (however, in all instances the Lifetime Beneficiary's acceptance shall be determinative that accepting same is permissible), and if the Trustee shall make a distribution of income and/or principal to provide for the trip, the Trustee should arrange for the payment for such trip, by distribution to the Lifetime Beneficiary directly or as directed by him.

(d) Any distributions from the trust for the benefit of the Lifetime Beneficiary should be made after consideration to what is traditionally provided for by the province with which the Lifetime Beneficiary is associated at the time. By way of example and not limitation or direction, if it is customary for the province to provide for housing for all of its

members, then the Trustee may choose not to make a distribution to pay for housing. However, in all such situations, the determinations of the Lifetime Beneficiary shall be respected.

(e) Distributions of income and/or principal may be made either directly to the Lifetime Beneficiary, such as by giving him a distribution of an amount necessary for him to make reasonable expenditures, consistent with the vow of poverty, or by the Trustee making payments for the Lifetime Beneficiary's benefit.

(2) In each taxable year of the trust, the Lifetime Beneficiary shall have the right to direct the Trustee, in writing, to pay to a charities or charity or for a charitable purpose designated by the Lifetime Beneficiary, an amount not to exceed equal to Five percent (5%) of the net fair market value of the assets of the trust valued as of the first business day of each taxable year of the trust ("Unitrust Amount"), except as otherwise provided below for a tax year of less than Twelve (12) months.

(a) In the case of a taxable year which is for a period of less than Twelve (12) months the Unitrust Amount shall be prorated by multiplying the Unitrust Amount by a fraction, the numerator of which is the number of days in the taxable year of the trust and the denominator of which is 365 (366 if February 29 is a day included in the numerator).

(b) In determining what is a charity or a charitable purpose, the Trustee shall rely on the Lifetime Beneficiary and shall not be required to determine whether the organization, if so designated by the Lifetime Beneficiary qualifies for charitable tax deductions or whether the individual, if so designated by the Lifetime Beneficiary, is worthy of such a payment.

(3) In order to comply with the Lifetime Beneficiary's prohibition of filing an income tax return while under the vow of poverty, the Trustee shall pay all local, state, federal or other taxes, including income taxes on distributions of income which would otherwise have been deemed to be allocated to the Lifetime Beneficiary under the distributable net income rules, directly on the trust's income tax return and file any statements the Trustee deems reasonable with the Internal Revenue Service, state, local and other tax authorities concerning same. Should a procedure become available to address the prohibition of not filing an income tax return for the beneficiary the Trustee has broad authority to modify the procedures herein to address, and to the extent not inconsistent with the prime objectives of this trust, adhere in whole or part to such procedures. The Trustee may also apply for a private letter ruling, or the equivalent, from any tax authority, at the expense of the trust, to seek approval of the procedures herein, or some modified version of such procedures that complies with the prime objectives of this trust.

(4) It is my desire to benefit the Lifetime Beneficiary and the Trustee need not take the interests of any remaindermen into consideration when making discretionary distributions of income and principal.

(5) Any net income not so applied shall be added to the principal of the Trust, at least annually, and thereafter shall be held, administered, and disposed of as a part thereof.

b. The trust shall terminate upon the earliest to occur of the following events:

(1) The complete distribution of the trust estate.

(2) The death of the Lifetime Beneficiary.

(3) The written notification from the Lifetime Beneficiary to the Trustee of the release of the Lifetime Beneficiary from his vow of poverty.

(4) Renunciation of the Lifetime Beneficiary.

c. Upon the termination of the trust:

(1) If the Lifetime Beneficiary is then living, the Trust Estate shall be paid to the Lifetime Beneficiary, outright and free of trust.

(2) If the Lifetime Beneficiary is not then living, then the Trust Estate shall be divided into the number of equal shares required so that one equal share shall be allocated to each then living child of mine and one equal share shall be allocated to the then living issue, per stirpes, of each then deceased child of mine. Any distribution under this provision to any issue more remote than children shall be subject to the provision below entitled "Bequests and Devises to Persons Under Age Thirty Five (35)" for any issue then under age Thirty Five (35).

### III. Christian (Eastern) Orthodox Considerations and Estate Planning.

#### A. Introduction to Orthodox Christian Issues and Estate Planning.

There are few areas of the law more personal than estate planning. Confidential family issues, matters of life and death, and other deep and profound issues must be addressed. At this level, personal goals and concerns must be considered. For many clients religious considerations, especially toward the end of life, are vitally important, even comforting. Unfortunately, few legal treatises, seminars or other sources exist to help practitioners gain the modicum of understanding necessary to address these matters. While it is certainly not necessary to become an expert in religion, especially since concerned clients can always involve their religious advisers, you must be aware of the issues in order to raise them with appropriate clients, and to understand how to pursue them. To help you achieve this goal, this article is the first in what will be a series, interviewing religious experts of different faiths as to some of the important religious issues which should be addressed in estate plans for adherents to their beliefs.

The Orthodox Christian Church includes all Eastern Orthodox Churches, Greek, Russian, Antiochian, etc. The Orthodox Christian Church developed in the eastern portion of the Roman empire and as such many congregants are from the Middle East (Lebanon, Syria, Israel), and the Greek speaking parts of the world (Greece, the Islands, Cyprus, Turkey) as well as Russia, Ukraine, Poland, Romania, etc. However, because of intermarriage and conversion the reach of the Church is really quite broad and may include a wide number of clients.

#### B. Living Wills and the Orthodox Christian.

##### 1. Introduction.

Living wills and health care proxies raise a host of religious issues, what are some concerns that attorneys helping Orthodox Christians should address? The Church's view of life and death issues should ideally be reflected in the living will and health care proxy. A major tenant of the faith is that it is unethical to take a life. It is not the highest of all values to stay alive, but you cannot affirmatively take steps to kill someone. The Church is strongly against euthanasia and suicide. But often if the patient and medical care providers permit nature to take its course without heroic intervention, the persons life may be taken by God. So it is a narrow path. Taking a life is inappropriate. But on the other hand, using heroic medical measures to keep a body biologically functioning, would not be appropriate either. Mere biological existence itself is not considered to be a value. It is not a sin to allow someone to die peacefully and with dignity. We see death as an end to be transformed into a victory by faith in God. The difficulty is discussing these issues in abstraction; they must be addressed on a case by case basis.

Drafting Comment: Practitioners should incorporate in the recital clause of the client's living will language affirming the client's affiliation with the Church, and these basic values. This is especially important because it has become so common in today's society for family members to intermarry and/or

adopt different faiths, that a client's religious beliefs should not be left unstated "because the family knows". They often don't! Consider the following sample provision:

WHEREFORE, My Orthodox Christian beliefs hold that it is unethical to take a life. While it is not the highest of all values to preserve life, affirmative steps to cause death, including but not limited to euthanasia or suicide, are inappropriate. It can be permissible, and even appropriate in some circumstances, to allow nature to take its course without heroic medical intervention, until God determines to take my life. Using heroic medical measures to merely maintain my body's biological functioning is not appropriate since mere biological existence itself is not considered to be of value. My death, if with dignity and proper observance and respect for the rites and traditions of the Church, can be a victory of faith.

2. Pain Relief.

What about provisions concerning administration of pain relief? The Christian Orthodox Church affirms meaning to the act of suffering. It can be an experience providing purification, redemption and salvation. However, we do not encourage suffering -- steps can and should be taken to alleviate suffering. Our religion teaches us to alleviate suffering, but you cannot alleviate suffering by taking a life.

3. Consciousness.

Particular attention needs to be given to consciousness, in particular concerning traditions near death. Much of the decision has to do with lucidity. An Orthodox Christian should make provisions in advance by specifying their wishes in a living will and telling their family. Your client's living will should state that he wishes to have a priest present before death since there are many profound and moving prayers and observances for such a time. These traditions can bring great comfort to the patient and loved ones.

4. Pre-Death Rituals.

The entire process of dying is sanctified by a series of prayer services and sacraments. It is very important that the patient be lucid and free to confess his sins and to receive Holy Communion. The need for consciousness to participate in these sacraments should be considered when administering pain medication. There is also the rite of anointing a person with holy oil for healing of soul and body. Selected prayers are read throughout the illness: as suffering increases, as the patient nears death, and after he expires. For example, when the patient is in great pain and approaching death, the priest may also say the Prayer of Separation of Soul and Body, asking God to take the life of the person and help him die in peace. Faithful members of the family

are encouraged to be present during these prayers. The priest may also read a prayer immediately upon death.

The desire to have a priest present to say these prayers and to administer the sacraments should be communicated in your client's living will. If the family is not present and the living will does not inform the medical care providers, the spiritual needs and wishes of the patient could be overlooked without this provision. And if the children or other family members do not have the same religious beliefs, they may not know of these rites and traditions, or that the parent was faithful.

Drafting Comment: A provision governing pain relief included in many living will should be modified to reflect these important near death wish. Consider the following sample provision: Provide Pain Relief To The Extent Permissible according to Eastern Orthodox Christian Doctrines: I wish that all treatment and measures for my comfort, and to alleviate my pain, be provided, so long as they do not arise to the level of constituting euthanasia. In making decisions concerning the administration of pain relief I request that consideration be given to my Orthodox Christian beliefs, and in particular the importance of my having some level of consciousness prior to death to be able to participate in accepting Holy Communion and making a final confession of my sins, as well as participating in certain prescribed prayer services. I request that my health care agent and medical care providers endeavor to humanely and compassionately balance my desire for pain relief and my desire to participate in these my last religious observances.

5. Involvement of a Priest.

It is essential that a priest be called to administer these rites and address the decisions since many of the issues to be decided are "gray". Also, the traditions are rich and require time.

Drafting Comment: Consider designating a particular priest or church to be contacted and providing contact numbers in the living will: Religious Principles Shall Apply To the Interpretation of This LIVING WILL AND MEDICAL INSTRUCTION DIRECTIVE: I wish to condition the effectiveness of this directive upon its conforming to Orthodox Christian doctrines and beliefs to which I subscribe. In order to effectuate my wishes, if any question arises as to the requirements of my religious beliefs, I direct that my health care Agent consult

with and follow the guidance of [insert name and telephone number of the priest], or if not available [insert name and telephone number of an alternate priest and/or the Church].

6. Organ Donations.

The Christian Orthodox Church has no theological problems with organ donations so long as those involved are not trafficking in payments for organs, or taking a life to obtain the organ. There is generally no problem from a religious perspective. Many pastors are in fact encouraging organ donations out of compassion for those in need.

7. Definition of Death.

One of the issues many religions have been grappling with is the definition of death. If you cannot take a life to harvest an organ, the definition of death is vital because removing an organ too early could be the cause of death. Generally, if the life support were removed the patient would die, then, although it is a grey area from a religious perspective, it is unlikely to be an ethical problem to harvest organs at that time. Our ethical experts would probably use the modern medical test of cessation of brain stem activity as a definition of death.

8. Informing the Patient. It is critical that the patient have complete information as to his or her condition otherwise the patient will never be able to know when to begin the many important religious observances which are to accompany the process of dying.

Wishes Concerning Knowledge of my Condition: I specifically direct my Agent and all attending medical personnel to fully and completely inform me and my Agent of my medical condition, including but not limited to the fact that I may have a terminal illness and my anticipated life expectancy. This information is vital to my carrying out important religious practices as an Orthodox Christian.

C. Charitable Giving.

Charitable giving is an important principal of many faiths. How does the Church view this in the context of adherents' estate planning? The Christian Orthodox Church encourages Church members to consider charitable bequests as part of their planning. We especially urge advisers to encourage their clients to consider charitable giving. We have found that people are grateful for the reminder. We believe that providing opportunities for doing good, such as giving charity, is very important. Historically, tithing -- giving a tenth of one's wealth, was the standard. People still speak about this religious ideal. We believe that it is a religious obligation for people to use what they need and to share with others any excess. It would be wonderful for an attorney to suggest that if the client is a believing member of the Eastern Orthodox

Church, that sharing their wealth with others is part of the teachings of the Church. We have a rich history of charitable giving beginning with the legacy with St. Constantine. Constantine was a Roman emperor in the 4th century who used his wealth to build churches, schools and hospitals. The Slavs have a similar history of giving beginning with St. Vladimir in the 9th century. There have always been members for whom giving large gifts to the Church was a normal part of their religious life. The great majority of American people do not consider themselves wealthy, but collectively they can provide tremendous help to the Church. People with limited resources, who give according to their means, make a vital contribution to help others. In James 1:27 it states: "Religion that is pure and undefiled before God and the Father is this: To care for orphan and widows in their affliction..." People are becoming more aware of the religious concept of charity.

D. Inheritance.

There is a religious obligation to take care for your household. Scriptures say in a Letter to Timothy by the Apostle Paul [1 Timothy 5:8]: "If anyone does not provide for his relatives, and especially for his own family, he has disowned the faith and is worse than an unbeliever." Family then extended to more than just the nuclear family. It clearly included the wife and children and other relatives as well. People should give consideration to the needs of family members even beyond spouse and child. How can you love your neighbor if you don't care for your own household? There are a host of provisions in scripture concerning your responsibility to your family, and, indeed, to the human community as a whole. This is the reason why Orthodox Christians must reasonably address life insurance needs, writing a will and all aspects of estate planning. We preach to our people that they have obligations to their spouses and children, and to their church and society at large after they die. They must fulfil these duties during their lifetime.

#### IV. Islamic Considerations and Estate Planning.

##### A. Introduction.

The main issues which a Muslim should consider when planning an estate include the impact of Islamic laws of inheritance, and hence every estate plan. Living wills and health care decisions are affected by Islamic law. Charitable giving is encouraged. The key sources which are relevant to determining Islamic law that affects estate planning are based on the Quraan. Every Muslim is under the obligation to follow what the Quraan states. There are also sayings of the Prophet Mohammed, peace be upon him, which were made relating to inheritance based on the Quraanic injunctions. Finally, there are decisions, called "Figh", which is analogous to case law in the American legal system. These Fiqhs are analyses by jurists of the issues covered by the Quraan and the sayings of the Prophet. If the above sources are silent then a decision must be made that is consistent with the spirit of them; for example, in a community property state in the United States. These laws only establish ownership, not the distribution so the Muslims can follow them.

##### B. Living Wills and Islamic Considerations.

###### 1. Islamic Law and Living Wills Generally.

What about health care issues? Islamic law permits the use of living wills. Decisions concerning health are primarily given to the physicians. If the decisions will enable someone to be restored to health they should be taken. If the medical decision would merely keep a person alive but are not able to restore the person to health, they need not be taken. If the only result is to artificially keep someone alive on life support those decisions are not mandatory under Islamic law, but these heroic measure may be continued if the family so wishes. Generally though, these decisions should be made by the physician.

Issues for every Muslim to consider include: the definition of death, organ donations, and the appointment of an attorney or agent on your behalf. In regard to these issue consider the following comments when drafting your living will to conform it with your beliefs of Islam.

###### 2. Heroic Measures.

Concerning heroic measures to be taken in these situations, consider this comment when drafting the living will: The use of heroic measures under Islamic religious principles, according to at least one Islamic scholar, may be required if according to the physician, a reasonable probability exists that the individual will survive with a reasonable quality of life. However, since the question of whether or not heroic measures may only arise when the person is in a severe vegetative state, or the like, it would seem, that heroic measures in such instances are not required.

###### 3. Who Should Be Designated as Your Agent.

Under Islamic law, according to one Islamic scholar, the agent who should make the decisions may be required to be your parents, regardless of their age, because of the significance and importance Islam affords ones parents. Consult

several Imams (religious scholars/leaders) for clarification. The ISNA (the Islamic Society of North America) may be able to provide forms and further clarification.

4. Definition of Death.

With regard to the definition of death, consider the following. While modern medicine many consider a person deceased when he or she registers a flat line electroencephalogram, i.e. brain death, the issue may not be certain under Islamic religious principles. Consult several Imams (religious scholars/leaders) for clarification. The ISNA (the Islamic Society of North America) may be able to provide forms and further clarification.

5. Organ Donations.

With regard to organ donations, this seems to be somewhat of a grey area. At least one Islamic scholar indicated that interpretations of the Koran allow organ donations. Another scholar noted that human life in religion is paramount and everything should be done to perpetuate it. This scholar than stated that one should ideally make the decision while competent. However, if that is not possible, one's family should make that decision, and if there is no family, the another person should make the decision on behalf of the potential donor. Another opinion, that cited on ShiaNews.com in an article by Active-Islam.com, is that organ donations from a deceased Muslim are only allowed to another Muslim if his life depended on it, donations to non-Muslims are prohibited. As noted, there are a multitude of opinions on the matter. It is recommended to consult several Imams (religious scholars/leaders) for clarification. The ISNA (the Islamic Society of North America) may be able to provide forms and further clarification.

6. Pregnancy.

In regards to pregnancy, the opinion of one scholar is that the life of the mother takes precedence. Ideally, if the unborn child is capable of being saved, whatever is necessary to save it should be done. However, not at the expense of the mother's life. If the life of the unborn must be sacrificed in order to save the mother, as hard as that may be, that would be the proper course of action.

7. Respect of the Deceased.

In Islam there is a strong belief not to do anything that desecrates the body. After death, a corpse is surrounded by loved ones who recite prayers for the deceased for swift entry into the world to come. The body is not left alone for this whole period of time until he is buried. The body is put into the ground without a coffin. Some try to bury the body facing Mecca. Before the deceased is covered with dirt, a family member or religious person recites the Shahadah (the Muslim profession of faith that there is no God but Allah and no prophet but Muhammad) into his ear one last time.

C. Islamic Laws of Inheritance.

Historically, men could inherit but women could not. This issue has been resolved so no discrimination now exists and women cannot be disinherited. Now any natural born child cannot be prohibited from receiving an inheritance. Equality for male children and female children are separate. The males inherit twice the value (shares) of what female children inherit. Two-thirds of the estate must be distributed among the heirs as prescribed in the Quraan:

"Forever parent and relative We have appointed the rightful heirs to inherit what they leave. As for those with whom you have made firm agreements, give them their share. Surely Allah is a Witness to everything". 4:[33]

The distribution in all the following cases shall be after fulfilling the terms of the Will and the payment of Debts.

Allah commands concerning your children:

- a. that the share of a boy shall be twice that of a girl.
- b. If there are more than two girls, their share will be two thirds of the estate; but if only one girl, her share will be one half of the estate.
- c. If the deceased left children, each of the parents shall get one-sixth of the estate;
- d. but if the deceased left no children and parents are the only heirs, the mother shall get one-third of the estate;
- e. but if the deceased left brothers and sisters, then the mother will get one-sixth.

With regards to your parents and children, Allah issued this ordinance.

- (1) You shall inherit one-half of your wife's estates if they leave no child,
- (2) but if they leave a child, then you will get one-fourth of the estate .....
- (3) Your wife shall inherit one-fourth if you leave no child,
- (4) but if you leave a child then the wife gets one-eighth of your estate .....

(5) If a man or a woman leaves neither ascendant nor descendant but has left a brother or a sister, each inherit one-sixth; but if more than two, they shall share one-third of the estate

Consider naming an Islamic religious court to have binding arbitration to resolve any uncertainty.

In Terrorem: It is my express intent that certain dispositive provisions of my Will be interpreted in accordance with the laws of inheritance specified in the Quraan. In the event of any issue arising as to the interpretation of those provisions of this Will, or the application of Quraanic law, I expressly direct and authorize my Executor to consult with \*QUARRANIC-AUTHORITY for the resolution of same. If any beneficiary under my Will in any manner, directly or indirectly, contests this will or any of its provisions, in particular any interpretation given to the dispositive provisions intended to be in accordance with the dictates of the Quraan, or brings suit or other action against any other beneficiary with respect to any matter hereunder, or with respect to any asset received hereunder, then such contest or dispute shall be submitted to binding, non-appealable, arbitration, in \*CITY, \*STATE, in accordance with the rules of the \*\_\_\_\_\_ Islamic Court to be designated by \*WHO-SHOULD DESIGNATE, or its successors. It is my specific intent that the holding of any such Islamic Court be non-appealable, even in instances of claimed fraud, bias or if the Islamic Court 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 in my estate given to such contesting beneficiary under my Will is revoked and such assets shall be disposed of in the same manner provided herein as if the contesting beneficiary and his or her issue had predeceased me. Each clause in this In Terrorem provision is intended to be severable. If any term or provision of this In Terrorem 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. 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 were enforceable with alternative terms or provisions to effectuate as closely as possible my 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 New York and each beneficiary hereunder agrees to personal jurisdiction in the State of \*STATENAME and before the Islamic Court hereinabove specified.

..... without prejudice to the rights of the heirs. See Chapter 4:[11-12]

If they ask you for a legal decision (**relating to inheritance in the case of a childless person**), say: Allah gives you His decision about those who leave no descendant or ascendant as heirs. ... Allah has perfect knowledge of every thing". See Chapter 4:[176]

It is mandatory for every Muslim to use this dispositive scheme in their wills.

There is a limitation that up to one-third of the estate can be given to anyone the decedent wishes. This one-third includes charities, non-muslims, non-family, anyone other than those required as per the above requirements.

2. Sample Clauses Considering Islamic Law.

The following are a selection of sample clauses that reflect modifications to distribution and power provisions included in a will to give consideration to Islamic religious beliefs. These are not a comprehensive listing of clauses in a typical will that may have to be adjusted. Also, these clauses are based on modifications of provisions used in an actual act pattern which may not have fully conformed with Islamic law on all points.

a. In Shares To Named Beneficiaries.

Upon the death of my spouse if my spouse survived me, the principal and any undistributed income not then added to principal of the Applicable Exclusion Trust; or if my spouse did not survive me, upon my death, my residuary estate (herein my "Remaining Estate"), as the case may be, shall be divided into the number of equal shares (or sub-shares) required by this provision, and such shares (or sub-shares) shall be distributed to or for the benefit of the persons or institutions named or referred to below. Should any such bequest lapse, then the remaining persons listed shall continue to share in my Remaining Estate in the proportions set forth. The number of shares (or

sub-shares) into which my Remaining Estate shall be divided shall be the number of shares (or sub-shares) for those beneficiaries listed below, and which bequests have not lapsed by the death of the beneficiaries. The following beneficiaries shall take under this provision:

Note: At the second death, 1/3 of the remaining estate will pass to charity, specific charities could be named or alternative arrangements could be made. The remaining 2/3rds could be divided among your children. Your sons will receive 2 shares each. Your daughter will receive 1 share. Each child will receive his or her share outright or in trust. If a child predeceases, then his or her share will pass to his or her children. The client should verify with his religious advisors to make sure that his disposition is in accordance with Islamic law.

(1) One (1) share to my Executor to establish a charitable Donor Advised Fund (the "Fund") through \*CHAIRTY-NAME Investments. The Fund shall be used only for charitable, educational or religious purposes (or any combination of such purposes). The Fund shall be the property of \*CHARITY-NAME held by it in its normal corporate capacity, it shall not be deemed a trust fund held by it in a trustee capacity. \*CHARITY-NAME in its normal capacity, shall have the ultimate authority and control over all property in the Fund, and the income derived therefrom for charitable, educational and religious purposes. My surviving children may, from time to time, submit to \*CHARITY-NAME recommendations with respect to such distributions, which recommendations shall be solely advisory. All investment decisions shall be made in due accord and with full respect for Islamic law.

I direct my Fiduciary to distribute the bequest outright to the charitable organizations named. If the institution named does not exist at the time of distribution, or is for any reason unable or unwilling to accept the bequests under the terms and conditions of this provision, if any, then the bequest and devise to such charitable organization shall be distributed to a charity designated by my Fiduciary. If the organization is subject of a mere change in name, or merger into a successor organization serving substantially the same purposes, such organization shall be considered to exist and the gift and bequest below shall not lapse. Where any such charitable organization shall not be qualified as a tax-exempt organization under the Internal Revenue Code as an organization to which testamentary gifts are deductible for federal estate tax purposes then the bequest to such organization shall lapse.

(2) Two (2) shares to be divided into as many equal sub-shares as shall be necessary to provide the following: [\*FAMILY-BEQUEST]\*.

Note: The following is a provision intended to direct the investment of funds in a will or trust in

accordance with Islamic law. Be careful to note that the prudent investor act does not necessarily sanction such investment standards so it is especially important to expressly address them in the document.

D. Investment Issues.

Islamic law can make it inappropriate to pay or earn interest based on a prohibition of making a guaranteed profit on capital. Stock mutual funds have also been formed which invest in a manner which conforms with Islamic law by purchasing stocks for investment, while avoiding stocks of companies that engage in businesses involving alcohol, gambling or pornography. Bank stocks can also be problematic for the reasons noted above.

A sample clause to be used in a will or trust might appear as follows: Further, the Trustee is authorized and directed, to structure any investments and assets, to the extent feasible, to be in accordance with Islamic religious principles, if the beneficiaries of any Trust formed hereunder request such standard in writing. Such standard may include by way of example, a prohibition against paying or earning interest based on a prohibition of making a guaranteed profit on capital. Stock mutual funds formed which invest in a manner which conforms with Islamic law by purchasing stocks for investment, while avoiding stocks of companies that engage in businesses involving alcohol, gambling or pornography. Bank stocks may also be prohibited. In the event that there is a conflict between beneficiaries of any Trust as to whether such standard shall apply, then the Trustee shall divide such Trust into separate parts and invest each part accordingly. This limited right of a beneficiary to designate whether or not Islamic investment standards should apply shall not be interpreted as providing any further rights or powers to any beneficiary. In the event of any dispute as to the application of Islamic investment standards the Trustee shall consult the ISNA (the Islamic Society of North America) for further clarification. If such action is not feasible, or not determinative, the Trustee may consult any Islamic scholar or Imam of the Trustee's choice and rely on the determination of same.

1. Investment Goals.

(1) In Accordance with Islamic Law

The Trustee is authorized and directed, to structure any investments and assets, to the extent feasible, to be in accordance with Islamic religious principles, if the beneficiaries of any Trust formed hereunder request such

standard in writing. Such standard may include by way of example, a prohibition against paying or earning interest based on a prohibition of making a guaranteed profit on capital. Stock mutual funds formed which invest in a manner which conforms with Islamic law by purchasing stocks for investment, while avoiding stocks of companies that engage in businesses involving alcohol, gambling or pornography. Bank stocks may also be prohibited. In the event that there is a conflict between beneficiaries of any Trust as to whether such standard shall apply, then the Trustee shall divide such Trust into separate parts and invest each part accordingly. This limited right of a beneficiary to designate whether or not Islamic investment standards should apply shall not be interpreted as providing any further rights or powers to any beneficiary. In the event of any dispute as to the application of Islamic investment standards the Trustee shall consult the ISNA (the Islamic Society of North America) for further clarification. If such action is not feasible, or not determinative, the Trustee may consult any Islamic scholar or Imam of the Trustee's choice and rely on the determination of same.

b. Fiduciary Responsibility For Implementing Investment Policy.

Assets may consist of securities of one issuer, or securities of a few issuers, or a diversified portfolio of various types and issuers of securities. The Fiduciary is not directed to distribute or dispose of any particular securities or other assets which may come into the Fiduciary's possession, where such distribution or disposition is primarily for the purpose of diversification of investment holdings. The Fiduciary is not required to liquidate or adjust holdings solely because such holdings have a limited market. The Fiduciary is not obligated to diversify the investment holdings and is hereby indemnified and held harmless from any such failure to diversify.

d. Flexible Investment Policy Permitted.

In addition to the investment powers and the discretion conferred on the Fiduciary under this Will or any Trust formed hereunder, the Fiduciary is authorized (but is not directed) to acquire and retain investments not regarded as traditional or prudent for trusts, allocations of investments within the Trust's portfolio which would not be deemed prudent or advisable, including but not limited to investments and/or investment strategies that would be forbidden by the prudent investor standard applicable at such time. The Fiduciary may therefore invest, any portion or even all of the Trust Estate, or my residuary estate, in any manner in the Trustee's discretion, including in any type of security, option, improved or unimproved real property, tangible or intangible property, direct or indirect interests, joint ventures, limited liability companies, general partnerships, limited partnerships, mutual funds, corporations, foreign or domestic investments, closely held business investments, and so forth. This authorization, however, shall not be given, and shall not be executed to such extent that, where such investment must be made in a particular manner to avoid an adverse tax result, by way of example and not limitation the disqualification of a trust for the marital deduction where such deduction would be advisable or intended.

Note: When drafting a will, trust or other document for a client wishing to have documentation conform to Islamic law the general power provisions in these documents need to be reviewed and perhaps modified. The following is a selection of provisions that warrant consideration. This is not necessarily a complete list of provisions.

E. Fiduciary Powers and other "Standard" Provisions.

1. Fiduciary Powers.

a. Loan Funds or Assets.

To advance money to any corporation, the stocks, bonds or other securities of which shall constitute assets of my estate or any trust created hereby, in order to prevent or defer any defaults in the performance of the terms and conditions thereof. Any loans shall be made without interest, in accordance with Islamic law.

b. Borrow Funds.

To borrow money for the purpose of raising funds to pay taxes or for any other purpose deemed by the fiduciary beneficial to my estate or any trust created hereby and upon such terms as the fiduciary may determine, and to pledge as security for the repayment of any such loan or loans any assets of my estate or any trust created hereby. Any loans shall be made without interest, in accordance with Islamic law.

c. Borrow From Fiduciary.

To borrow from a fiduciary (but only on arm's-length terms and upon execution of a written note) or whether for the purposes of raising funds to pay taxes or otherwise, and to give or not to give security therefor, all upon such terms and for such periods as the fiduciary shall deem advisable. Any loans shall be made without interest, in accordance with Islamic law.

d. Interests in Closely Held Business.

With respect to securities in any closely-held corporations, or any interests of mine in any unincorporated business enterprises, to retain such securities or interests and to allow any assets of my estate or any trust created hereby invested in any such corporations or businesses to remain so invested for such time as may appear desirable. To advance money to any such corporations or businesses in order to aid them in their operations or with the view to maintaining or increasing the value of the interest therein of my estate or any trust created hereby. To provide for the management, operation and conduct of such businesses, either singly or in conjunction with others interested therein. To engage and delegate duties and powers to any employees, managers or other persons, without liability for any delegation except for negligence in selection. To borrow money for such corporations or businesses, and to secure such loans by a pledge or mortgage not only of interests held in

such corporations or businesses but also of any other assets held in my estate or any trust created hereby.

Any loans shall be made without interest, in accordance with Islamic law. To vote any stock so as to effect the election as an officer or director, or both, of any such corporations of any fiduciary hereunder and also to provide for reasonable compensation to such officer or director (which compensation shall be in addition to and not in lieu of any compensation to which such fiduciary may be entitled for acting hereunder). To enter into agreements for voting trusts and to deposit securities with the voting trustees, to delegate duties to such trustees with all powers of an absolute owner of such stock, to authorize such trustees to incur and pay expenses and receive compensation, and to accept and retain any property received under such agreements. To take business risks in the management, operation, conduct and disposition of any such corporations and business enterprises, notwithstanding that my estate or any trust created hereby shall have an interest therein. To sell the securities or assets of any such corporations or businesses, or to liquidate, dissolve or otherwise dispose of the same. To organize, either singly or in conjunction with others, a corporation or corporations to carry on any business enterprise, transferring assets or cash thereto for stock.

F. Marital Residence.

The marital residence cannot be disturbed or distributed for one full year. The wife must be given the right to live in the house for one year. This is in addition to any inheritance. If the wife decides not to exercise this right it can be avoided.

G. Unborn Child.

What happens if a child is conceived but not born? The distributions for all inheritances, other than maintenance, will be held in abeyance until the child is born. This approach will help assure protection of the expectant mother.

H. Lifetime Gifts.

There are no restrictions on gifts (lifetime transfers). Thus, any Muslim can convey property as they wish while alive. The above distribution requirements only apply following death.

I. Charitable Giving.

This is one of the reasons that the one-third discretionary distributions of estate assets are permitted. Giving charity is looked upon very favorably as it can provide the donor rewards even after death. There is no ruling to give any specified amount to charity but it is encouraged to give to a charity where it will be used in perpetuity. This could include a school system which can educate children for many years to come, rather than for a one time use.

J. Charging of Interest.

There are different scholarly views on what constitutes "riba". Some say modern interest comes under the concept "riba" which connotes usuary in modern concepts. If there is no change in form, such as money is repaid with interest as money, it may be viewed as "riba". Other scholars say that modern interest, such as a mortgage is not "riba". Therefore, there must be care exercised in any estate planning transaction which is based on an interest payment.

V. Jewish Issues and Estate Planning.

A. Jewish Values and Estate Planning.

1. Estate Planning Can and Should Reflect Your Religious Goals and Values.

The Jewish religion provides a comprehensive framework on how man is to conduct himself. Many Jewish values can be reflected in your estate plan. While a host of articles have been written concerning the key issues which arise in the context of estate planning (the right of the males to an inheritance, and the eldest son to a double portion, defining the time of death, etc.), and many people have taken steps to assure that their wills and living wills conform with these Jewish laws, there are additional steps which can be taken to incorporate other Jewish values in your estate planning documents. Several of these will be mentioned below.

2. Charity as a Basic Value.

The Chofetz Chaim specifically encouraged that large charitable gifts be made under one's will.<sup>5</sup>

The Jewish scholar and commentator, the Rambam, said the following about charity:

We are obligated to be careful about fulfilling the Mitzvah of charity more than any other Commandment because the righteous descendants of Abraham are identified through the giving of Charity...The Jewish people will not be redeemed except through the giving of charity.

There has been a custom to give 1/10 of a persons' wealth to charity. While there is a dispute as to whether this is merely a custom, a mandate of the Torah, or a Rabbinic decree, the point is apparent. Giving charity is clearly an important part of your life, and one which it behooves you to teach to your children.<sup>6</sup> Charitable giving as part of your estate plan can, subject to addressing the Jewish issues of a charitable bequest under your will, provide an excellent opportunity to inculcate this important Torah value in your heirs.

3. Your Obligations and Responsibilities To Your Parents and Grandparents Under Jewish Law.

"Honor your father and your mother." (Exodus 20:12). Adult children must assume the responsibility for clothing, food, shelter and other necessities of their parents if necessary. Traditional methods of honoring ones parents, even after death, include the saying of Kaddish and the making of charitable

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<sup>5</sup> Ahavas Chessed, 3:4.

<sup>6</sup> Nachum Amsel, "Tzedakah: More than Charity", Chapter 68, The Jewish Encyclopedia of Moral and Ethical Issues (Jason Aronson, Inc., Northvale, New Jersey).

contributions in their memory. Certainly including bequest in your will in memory of deceased parents, including perhaps a bequest to a Yeshiva which will assure the saying of kaddish, memorial prayers, after your death

There is a saying in the Gemarah: "The sons of children are like children."

Just as there is an obligation to honor one's parents, there is an inferred obligation to honor one's grandparents as well.

Giving gifts to one's to ones mother and father, if they are in need, is considered as giving charity, Tzedakah. Including bequests to parents in need, or including parents as "sprinkle power" beneficiaries of a by pass (applicable exclusion) trust under your will, are two methods of meeting this need. A "sprinkle power" is a power given to the trustee of a trust to distribute funds to any one or more people, in any amounts the trustee determines, within a specified class of people. For example, a common class of people to name as beneficiaries of a by pass trust is the surviving spouse and all descendants. The trustee can then distribute money to those family members in need. This can be taken a step further. What if your parents are financially in need of assistance, but your spouse's parents are not? The initial and common approach would be to include your parents as beneficiaries under a by pass trust, but not your spouse's parents. However, "He has told you what is good and what G-d requires of you, but to act justly, to love kindness, and to walk humbly with your G-d." (Micha 6:8). How kind can it be to name one set of parents, and not the other? The more compassionate approach, and the one to maintain Shalom Bayit, would be to name both sets of parents, both those in need and those not, or at a minimum, to state that the parents not named as beneficiaries were omitted, not for lack of affection or respect, but in light of differing financial needs.

When a parent is ill what responsibilities do you have for medical matters?<sup>7</sup>

When a parent, G-d forbid, is dying how must you as a child behave? What actions must you take or refrain from? A host of issues exist.<sup>8</sup>

#### 4. Your Obligations and Responsibilities To Your Spouse Under Jewish Law.

Shalom Bayit, a peaceful home, is the most essential and important value of the Jewish home. A proper estate plan can and should include steps to promote this. The selection of fiduciaries should be made with an eye toward preserving Shalom Bayit.

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<sup>7</sup> See: Abraham S. Abraham, The Comprehensive Guide to Medical Halacha, (Feldheim Publishers, New York 1990), Chapter 20, page 123.

<sup>8</sup> See for a discussion: Rabbi Zev Schostak, "Ethical Guidelines for Treatment of the Dying Elderly", Journal of Halacha and Contemporary Society, Number XXII, Fall 1991, page 62.

A husband is responsible to assure his wife is provided with food, clothing and basic necessities. A man should honor his wife with proper clothing and dwelling place. (Hullin 84b). (Exodus 21:10). Insurance, insurance trusts, by pass trusts or marital trusts are all techniques which can help achieve these goals.

5. Your Obligations and Responsibilities To Your Children and Grandchildren Under Jewish Law.

Your obligations as a parent to your children is all encompassing.<sup>9</sup> Many of your responsibilities, to be effectively carried out, demand that your estate plan address them.

Moshe received the Torah at Mount Sinai, he taught it to Joshua, and Joshua to the Elders, and the Elders to the Prophets, and the Prophets to the Men of the Great Assembly. The key to our faith has been and remains the proper passing of Jewish traditions, the Mesorah, from generation to generation. One of the primary methods for transmission of these values is through education: "Train a child according to his way" (Proverbs 22:6). How can this be accomplished if you don't survive? By providing the appropriate steps to secure the funds through the use of an insurance policy, an insurance trust, and/or a trust to benefit your children. Just as importantly, the proper selection of guardians and trustees, and providing the appropriate letters of instruction, to assure that your children will receive the Jewish education you desire.

The following highlights an important part of the obligation you have to your grandchildren as well as your children:

"Only take heed and watch yourself very carefully so that you do not forget the things that your eyes saw. Do not let this memory leave our hearts all of the days of your life. Teach your children, and your children's children."

You can use your estate plan as a tool to transmit Torah values and ideals to your heirs. The discussions that follow will illustrate a host of opportunities to achieve this worthwhile goal. These can include structuring charitable gifts to demonstrate the importance to your children and grandchildren of charitable giving, including express language in estate planning documents stating that it is your hope that the charitable gifts made serve as an example to your children and grandchildren, structuring charitable lead trusts to enable your heirs to make charitable gifts, and so forth. Charitable bequests can demonstrate the important attribute of Chesed, Ahavat Torah and Ahavat Yisroel.

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<sup>9</sup> See generally: Rabbi Noach Orlowek, My Child, My Disciple, (Feldheim Publishers, New York 1993); Miriam Levi, Effective Jewish Parenting, (Feldheim Publishers, New York 1986).

B. Letter of Instruction.

It is essential to communicate your desires and objectives for the care and upbringing of your children. One of the most important steps is a detailed letter. The following framework can be used as an example:

Sample Letter:

\*YOUR-NAME  
\*YOUR-ADDRESS

\*DATE  
\*EXECUTOR NAME  
123 Main Avenue  
Any town, Some State

RE: Letter of Instructions.

Dear Executor:

This letter is to address a number of important issues. It is not binding legally, but it is my hope that you will be morally bound to carry out its instructions.

1. Care of children.

- o Upbringing:
- o Kosher Home:
- o Yeshiva Education:
- o Summer Camp:
- o Learning in Israel:

2. Financial provisions for children.

- o While Young:
- o Education:
- o Work:
- o Learning:
- o Bar Mitzvah:
- o Wedding:

3. Burial and funeral details.

4. Distribution of personal property.

Sincerely,

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\*YOUR-NAME

C. Wills.

When Jewish issues and wills are considered, most people think of addressing how to circumvent the Biblical requirements for specified distributions to the eldest son, and a smaller specified distribution to other sons. While addressing this Torah requirement is important, there are a host of provisions in a typical will which can have implications to Jewish values and beliefs. The following discussion endeavors to highlight some of these.

1. Burial Clause.

Instructions concerning burial, funeral services, and the related issues, should best be addressed by discussions in advance with family members. This will minimize the difficulties which family will have in attempting to ascertain your wishes under the difficult times following death.

Next, instructions should be included in your living will/health care proxy since this document is likely to be readily available to inform family or others of your decision. It is also common for a will to include provisions concerning burial and related arrangements. This can be important if the arrangements are expensive since the inclusion of them in the will can constitute an authorization for the executor to pay the costs involved. For example, if you wish burial in Israel, Kvurah in Eretz Yisroel, consider specifying this in your will.

Burial Instructions. I direct that I be buried in accordance with Conservative/Orthodox Jewish law and that \*I be buried in Eretz Yisroel \*SPECIAL-BURIAL-INSTRUCTIONS.

2. Guardianship Appointment.

If you are disabled, a court may be required to appoint a guardian of your person to assure that you are protected. What is the likelihood of a secular court being sensitive and knowledgeable of your religious beliefs and requirements? It behooves everyone to take reasonable steps to assure that they, any dependent child, and any older family member, has been properly protected from this risk. Failing to do so will minimize the likelihood of your religious objectives being adhered to.

a. How to Assure that the Children are Raised by a Family Unit.

Consider the possibility of divorce, death and other matters on the nature of the guardian maintaining responsibility for your child.

Sample Provision: Specified Couples Only Named As Guardian. If any child of mine shall not have attained his or her majority at the time of my death, I appoint \*GUARDIAN-1, who resides at \*GUARDIAN ADDRESS-1, and such persons spouse, \*GUARDIAN SPOUSE-1, or the survivor of them, as Guardians of the person and

property of any such minor. If either of them is able or willing to serve, or should they divorce, I appoint \*GUARDIAN-2, who resides at \*GUARDIAN ADDRESS-2, and such persons spouse, \*GUARDIAN SPOUSE-2, or the survivor of them, as Guardians of the person and property of any such minor. If neither of them is able or willing to serve, or should they divorce, I appoint \*GUARDIAN-3, who resides at \*GUARDIAN ADDRESS-3, and such persons spouse, \*GUARDIAN SPOUSE-3, or the survivor of them, as Guardians of the person and property of any such minor.

b. Coordinating Financial and Guardianship Matters.

To assure that your children are raised in the manner you wish, care must be taken in naming the persons to serve in each fiduciary capacity. Consider the advantages of naming co-trustees to provide a built-in check on each trustee's actions. You must coordinate the guardian and trustee. You should generally not name the guardian as the sole trustee as well since your children will be in the hands of one person with more limited independent oversight.

c. Addressing the Possible Divorce of a Guardian.

What happens if a guardian divorces? Who gets custody of your children? It may depend on how much care you exercised in discussing and having your lawyer draft the appropriate provisions.

3. Charitable Giving.

a. Is a Charitable Bequest in a Will Valid?

Given the Biblical prerequisites for estate distributions will a bequest under a will be valid Halachically?

b. Using Charitable Bequests as an Instruction to Your Children.

As discussed above, inculcating the important Torah value of charitable behavior can be accomplished in many ways. The simplest is just making a bequest under the will to serve as an example.

4. Your Will Should Not be a Vehicle For Revenge.

You've decided to leave five of your nephews each an equal sum of money in order to assist them in completing their education, or to enable them to spend a year in Israel. However, your fifth nephew somehow had offended you in the past so you left him out of the bequest. To minimize the likelihood of a legal challenge by the nephew left out of the bequest, you follow the advise of your counsel to list the nephew who is not to receive a bequest to avoid any issue that he was accidentally left out of the will. Apart from the dissension that this approach will create, is it appropriate from a Jewish perspective? "You shall not harbor a grudge...You shall not take revenge." (Lev. 19:18).

5. Disinheriting a Child Who Inter-marries.

a. Should or Must You Disinherit a Child Who Inter-marries?

From a Jewish standpoint, many Rabbis and experts believe that it is not only appropriate, but advisable to disinherit a child in intermarries. Such a dramatic and severe step cannot be taken lightly from either a personal or legal perspective. What happens if the marriage falters? What if the child returns? If you disinherit the child, how will this affect the child? What will the affect be on any siblings? If the child is your daughter, her children, your grandchildren, will be Jewish. How should they be affected? How will you feel to disinherit a child? Whatever choice you make will have to eventually be incorporated into your estate planning documents. Many people who attempt to deal with this issue, handle it in an inappropriate, and counter-productive manner.

b. Sample Clause Many People Use to Accomplish This.

The initial reaction which most people have to addressing the issue of a child intermarrying is to provide in their will that such a child should not receive any inheritance if that child intermarries. The following provision is illustrative:

Restriction on Beneficiaries. Notwithstanding anything in this Will to the contrary, if a person shall be entitled to receive a bequest or distribution, whether of income or principal, at a time when that person is married to, or shall be cohabiting with, an individual who is not "Jewish" as such term is defined below, then the bequest or distribution shall not be made to such person and instead the provisions hereunder for such bequests or distributions shall be applied and administered as though that person were then deceased with none of his or her issue then surviving. For purposes of this provision, the determination as to whether the beneficiary's spouse, or the person with whom the beneficiary is cohabiting, shall be based on:  
[ ] The definitions in accordance with Orthodox Jewish law, Halacha. [ ] The definitions in accordance with secular law. [ ] The definitions of common English language usage. [ ] The opinion of the Bet Din of the Rabbinical Council of America, presently located at 275 Seventh Avenue, New York, New York 10001, or any successor organization, shall be conclusive with respect to whether an individual shall be Jewish as defined above.

This approach, however, will create more problems, as discussed below.

6. Investment Clause.

a. Jewish Issues and Investments.

Is it appropriate for a Jew to invest in a business which produces non-Kosher food? Whether or not harm is done to any other person, Jewish values

should imbue business and investment conduct to assure that we each remain mindful of G-d as the source of all material wealth and blessing.

A number of laws define the parameters of appropriate business ethics and practice. For example, in a codification of Jewish law referred to as the Shulchan Aruch, the author, Rabbi Joseph Caro notes many of these rules, including a prohibition on dealing in commodities which are forbidden to eat. How far should the prohibition against dealing with food which is not kosher (not permissible to be eaten) to be interpreted? Might the investment in the stocks of a corporation dealing solely in such products be an issue? It would appear that the answer will generally be "no" in the context of a well diversified portfolio. However, it may be inappropriate to take a substantial and active position in such a stock.<sup>10</sup>

Jewish law also contains certain restrictions on charging interest on a loan transaction which can affect the form of certain business and investment transactions.

7. Arbitration Clause - Bet Din.

A Jew should avoid disputes with other Jews begin brought before a secular court. To this end, including a reasonable Bet Din provision can solve problems. However, consult an estate planner as there will be a host of issues.

a. Background - Why a Bet Din Clause is Essential for Every Will.

Airing dirty laundry in public court is never a great option.

b. In Terrorem Clause.

An In Terrorem clause is intended to "terrorize" potential heirs from suing against the will at the threat of losing their inheritance.

Sample: If any beneficiary under my Will in any manner, directly or indirectly, contests this will or any of its provisions, any share or interest in my estate given to the contesting beneficiary under my Will is revoked and shall be disposed of in the same manner provided herein as if the contesting beneficiary and his or her issue had predeceased me.

c. Sample Clauses.

The following sample clause illustrates some of the many issues to address concerning these matters:

General Bequest of Tangible Personal Property. To Surviving Spouse. I give and bequeath all of my tangible personal property, not disposed of in prior

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<sup>10</sup> See Rabbi George M. Lintz, "May a Jew Purchase Stock in McDonald's? (And Related Questions)", Journal of Halacha and Contemporary Society, Number XXIV, Fall 1992, at 69.

provision of this Will, wherever located, to my spouse, \*SPOUSE-NAME (herein "spouse"). By Lottery to Designated Persons. If my spouse shall not survive me, I give and bequeath to such of my children \*CHILDREN-NAMES (hereafter defined individually as "Child" and collectively as "Children"), as shall survive me, the balance of my personal property as may be selected by each of them as provided below. In making such selections, in the first round of choice the eldest Child shall choose first. The remaining children shall choose thereafter in age order, oldest to youngest. In alternate rounds the positions shall reverse and the youngest shall choose first and then all other children shall choose thereafter in age order, youngest to oldest. Each person shall have the right to select one item per round, and this procedure shall continue until all of the property designated in this provision shall have been selected or the above-named persons, at the end of a round, have no interest in proceeding. In case of any difference of opinion with respect to the property passing under this provision, the decision of the Bet Din, as set forth in the "In Terrorem" provision below, shall be final and conclusive upon all parties. [insert In Terrorem Clause here] I direct that all articles not effectively appointed shall be sold by the Fiduciary and I give and bequeath the net proceeds thereof to and among such of my children and the issue of any deceased child of mine in such proportions and amounts as shall equalize, so far as may be practicable, the value of the articles previously appointed to or for the benefit of each of my children and the issue per stirpes of any deceased child of mine.

8. Overview of Inheritance Issues and Jewish Law.<sup>11</sup>

Although many parents prefer to leave their estates to their children in equal shares, there are many different ways in which you can decide to leave your assets. Biblical law, however, prescribes certain specific distributions of assets following death. This raises the issue as to what you can do where your will provides for the distribution you believe best for your family, but you would also prefer to show allegiance to the requirements of traditional Jewish law. There is a practical approach to achieving both objectives with little difficulty.

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<sup>11</sup> See generally, Andre Isaacson (Editor), Halachic Implications of Death, Wills & Inheritances, (Response Dynamics Books, New York 1991); Judah Dick, "Halacha and the Conventional Last Will and Testament", Journal of Halacha and Contemporary Society, Vol. II, No. 1, Spring 1982, at 5.

Under Biblical law, a widow effectively is entitled to support and maintenance for life, or until remarriage. A widow could also elect to forego, at any time, this support and instead claim a lump sum settlement provided for in her marriage contract (Ketubah). Sons are generally the exclusive heirs, with the first born son being entitled to a double portion. Single daughters are to receive support and maintenance for and a dowry upon marriage. Numbers XXVII, 5-11. This presents an obvious difficulty if you wish to distribute your estate according to your own design, but would prefer not to violate the precepts of Jewish law. The solution is generally found through a combination of two documents: (1) A will reflecting your intended distributions of your estate, drafted in accordance with current civil law; and (2) A document creating a means of circumventing the biblical inheritance requirements (yerusha) without technically violating them, drafted in accordance with Jewish law. The ease of compliance should serve as an encouragement to those concerned to comply with the religious precepts.

To understand the suggested approach, some of the basic principles and issues should be noted. Jewish law makes an important distinction between an inter-vivos (lifetime) gift and a testamentary (effective on death) bequest. Generally, a person can gift any property while alive, and in any manner. This is because Halachic guidelines concerning inheritance only apply to assets owned at death.

The obvious solution then, would be to make an inter-vivos gift to the desired heir (such as a daughter). If you gave a deed to your daughter for property which was only to become effective on your death, this would not be effective under Jewish law. This is because at the instant of your death the Jewish laws of inheritance (yerusha) would apply and the assets would have to be distributed accordingly. Alternatively, if you attempted to make a gift which was to become effective at a later date, a number of additional problems are raised. One problem with this approach is that the transfer of most property requires a formal act (kinyan). A kinyan cannot be effective for property which is not owned at the time of the gift transaction. Also, for a transfer to be effective under Jewish law, a kinyan must generally be completed at the time of the transfer.

The solution to this situation is the creation of a debt in favor of the persons you wish to inherit property in excess of what they would be entitled to under Jewish law. This technique creates a technical compliance with biblical law through a separate contractual document (a shtar) which creates a fictional debt (a chov). There is no prohibition in Jewish law concerning the creation of such a debt. The debt is stated to mature one minute prior to your death. The amount of the debt is set at some amount greater than the intended inheritance. The heirs, under Halacha, are given the option of paying this substantial debt, or as an alternative, agreeing to the distribution provided for under your secular will. The intent is that they would obviously comply with this alternative in order to preserve a greater inheritance for themselves.

Example: Father leaves an estate worth \$3 million. His will provides that Son-1, Son-2 and Daughter each receive \$1 million. Halacha would require the following distribution: Son-1 \$2 million, Son-2 \$1 million and Daughter Support and a dowry. Father executes a Conditional Shtar Chov creating a debt of \$2 million in favor of Daughter. The Sons can agree to the equal one-third allocations provided for in Father's will, or in the alternative attempt to secure their \$3 million inheritance provided under Jewish law, and then make a payment of \$2 million to Daughter. The choice will be obvious, each child will receive an equal \$1 million inheritance as Father intended, and Father's estate will have technically been distributed in accordance with the precepts of Jewish law. The fictitious debt will lapse by its own terms.

This approach is not without both religious and secular doubts. All authorities are not in full agreement concerning the effectiveness of this approach under Jewish law. From a civil perspective the creation of this fictional debt could conceivably raise a number of issues. Although the contractual form of debt (Shtar Chov) does not have to contain a fixed maturity date or stated interest rate (two factors used to identify a debt for tax and civil purposes) there is no guarantee that the debt will not be regarded as a true indebtedness for all purposes. If the debt is in fact a valid indebtedness could the payee enforce the payment of the amount due and hold your estate liable? What if one of the heirs wished to create problems for the other family members by using the documents as part of a will challenge? If the debt is recognized under civil law will the imputed interest rates provided under the Internal Revenue Code apply to create income and expense for family members. Would the eventual relief of the debt without payment (which is obviously not intended) create relief of indebtedness income. Does the creation of the debt itself trigger a gift tax? It is hoped, although no assurance can be given, that should such a situation ever arise, the civil legal and tax authorities would recognize the intent and purpose of the transaction and not permit such unwarranted and harsh results to occur. Two steps can be taken to minimize this risk. First, some of the language used in the contractual arrangements creating the debt should be the appropriate Hebrew terms, so as to distinguish the document from what may be considered a Shtar Chov under civil law. Secondly, there does not seem to be any delivery requirements under Jewish law to make the Shtar Chov valid under religious law. As a result, only a single executed copy of the Shtar Chov should be prepared. This copy should be held in safekeeping by your Rabbi. This alone should serve as a substantial safeguard to avoid unintended problems.

As a final step in addressing the compliance with the Halacha of inheritance, it is suggested that an additional paragraph be added to your

secular will. This additional provision has two purposes. The first is to provide for some amount of money which should be distributed in accordance with Jewish law. This will serve to remind your heirs of the rules and customs involved and thus encourage them to take similar steps to make their estate plans conform to Jewish law. The second objective of this additional provision is to provide language which would make the distributions called for under even your secular will come closer to compliance with the Halachic requirements of inheritance. As discussed above, everyone is free to complete inter-vivos gifts. Thus, all transfers under the will could be stated to have been effected by gift transfers, effective one minute prior to your death, and in accordance with the completion of a proper kinyan as required under Jewish law. This language should provide some basis for a Rabbinic Court (Beit Din) to sanction the distributions under your secular will on the basis of your conformity with local custom and certain minority Rabbinic opinions concerning inheritance.

a. Legal, Tax and Other Secular Issues of a Shtar.

The Shtar raises a host of legal, tax and other issues. How will the IRS view such a document if it fines it? What happens if and when a child attempts to enforce the Shtar? While this is not the intent of the document or the technique, would someone actually sue? By analogy, consider the use of a Heter 'Iska form to address the prohibition of Ribbis. Clearly the intent of a Heter 'Iska is to address commercial realities while complying with Torah requirements prohibiting interest. Unfortunately, lawsuits endeavoring to enforce a Heter 'Iska, brought in secular court, are not unheard of.<sup>12</sup> If suits can be brought to enforce a Heter 'Iska contrary to the intended purposes, it is not inconceivable that a suit may be brought concerning a Shtar intended to address estate planning distributions.

b. Sample Clause.<sup>13</sup>

CONDITIONAL SHTAR CHOY WHEREAS, the undersigned \*Testator ("\*Testator") hereby accepts upon myself this Chov to \*DAUGHTER INHERITOR the sum of \*CHOV AMOUNT Thousand Dollars (\$\*,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

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<sup>12</sup> Kenneth H. Ryesky, Esq., "Secular Law Enforcement of the Heter' Iska", Journal of Halacha and Contemporary Society, Vol. # \_\_\_, at 67.

<sup>13</sup> See sample form, "Tzavoah - Will" published by Mechon L'Hoyroa, P.O. Box 782 Monsey, New York 10952. Telephone: 914-425-9565.

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.

9. Bequest in Accordance with Biblical Law.

Consider the inclusion of the following:

Taxes Specifically Included In Above Provision

"Priority of Provisions for Payment". Taxes payable on, or attributable to (on a pro-rata and not on a marginal basis), specific bequest provided for in the provision below entitled "Specific Bequest in Accordance With Jewish Law" shall not be paid out of such bequest and shall be paid as directed by the preceding provision "Priority of Provisions for Payment".

Specific 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.

10. Use of Gift Language for Every Bequest to Address Biblical Issues and Inheritance.

The language of "I give, devise and bequeath" can simply be added so that language of inter-vivos or gift/lifetime transfer would simply apply.

11. Can Secular Law Be Ignored For Transactions Between Jews if the Marginal Tax Rate of 60%+ Makes The Government Your Primary Beneficiary?. The restrictions on Ribbis is not applicable to transactions with a non-Jew. Under the U.S. transfer tax system (gift tax, estate tax, and generation skipping transfer tax) can charge on the margin, when combined with GST and local taxation, a maximum tax which can reach confiscatory levels.

Example: You become a grandfather and wish to gift to your grandchild a \$1 million gift (cash, an interest in a property, or another asset). The GST tax, assuming you have used up your \$1 million lifetime exemption is in the maximum tax brackets, \$550,000! Further, if the GST tax which is due on the gift is paid by you the amount of GST tax you pay is itself subject to tax! This is done by the tax laws treating the amount of GST tax you paid as another gift to your grandchild as well. So the gift tax to be paid on the \$1 million transfer is based on a total gift of \$1,550,000 [\$1 million actual gift + \$550,000 GST tax which is deemed to be a further gift]. At the 55 percent maximum gift tax rate, you will owe a gift tax of \$852,500. To make the \$1 million gift you will have had to pay taxes totalling \$1,402,500 [\$550,000 GST tax + \$852,500 gift tax]. Thus the total cost of making the \$1 million gift is \$2,402,500.

Many of the estate tax minimization techniques require the payment of interest, and hence the issue of Ribbis may arise. A general exception from the Ribbis rules exists for lending to or borrowing from a non-Jew.<sup>14</sup> "To the Gentile you may lend upon interest." Deut. 23:21. However, considering the above example, if the interest payments are made to a Jew, and Ribbis restrictions might apply, should they? If the result is reducing or nearly eliminating the confiscatory tax illustrated in the above example, is it really the Jew who is paying interest or is it the government who is losing the substantial tax revenues? With a tax which can exceed 100% of the amount given, should an estate tax minimization arrangement be said to be between anyone other than a non-Jew?

12. Use of a Revocable Living Trust to Address Biblical Inheritance and Other Issues.

A revocable living trust may be the ideal vehicle to address the Biblical inheritance rules and other Jewish values.

D. Trusts for Children or Grandchildren to Imbue Jewish Values.

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<sup>14</sup> Meir Tamari, With All Your Possessions Jewish Ethics and Economic Life, (The Free Press, New York 1987), at 179.

1. Trust Distribution Standards Can Support and Encourage Jewish Education.

The distribution provisions of your trust are vital to make certain your wishes are carried out. How should the trustees named, use the powers given to them, to distribute trust assets to the beneficiaries you have named? That determination is the objective of the distribution provisions of the trust. Distribution provisions are not as simple as many people think. For example, in prior years many trusts provided that income would be paid out annually or more frequently. Principal (the actual assets of the trust) may have been held for the remainder beneficiaries (the beneficiaries who receive their interests after the initial phase of the trust). However, modern investment theory has resulted in trusts generally investing for total return (i.e. current income and appreciation or capital gains). Thus, for a trust to merely state that income should be distributed currently may not be workable. Similarly every trust contain rules for when principal of the trust can be distributed. What types of modifications to typical trust distributions standards should you consider?

How important is education? The Gemarah in Yevamot, 109b, states: "All who are obligated to observe [the Torah] are obligated to study it." The Gemarah in Shabbat, 119b, states: "A city that does not have a school for children is deserving of destruction." Thus, a trust for a child or grandchild should address specific issues supporting and encouraging distributions for education. Is this really sufficient from a Torah perspective? No. The best Jewish schools, Yeshivas, are alone not sufficient. A Jewish education involves inculcating the appropriate value system and lifestyle in the young impressionable child. Basic Jewish values can be taught:

- o Love of Jewish values, Ahavat Torah.
- o Love of Israel, Ahavat Yisroel.
- o Proper conduct, Derech Eretz.
- o Good deeds, Chesed.
- o Truthfulness, Emes.

A summer camp with the appropriate environment, a period of study in Israel, and other steps are viewed by most as an integral part of a Jewish education. To provide for this type of "educational" funding from a trust, specific steps could be taken.

If you don't provide an indication of your priorities for expenditures, and some detailed guidance as to how funds should be expended, a trustee may be reluctant to make distributions for fear of lawsuits, an institutional trustee may be unwilling to make distributions, especially for items which are not "traditional" in the institutions trustee experience. With the growing trend to involve institutional fiduciaries, this guidance becomes essential.

How should the guidance be given? In the trust or a side letter? Should the guidance be mandatory or merely suggestive? A key point in answering these

questions is to avoid including mandatory directives that could be viewed as being against public policy as requiring a particular religious observance.

2. Trust Distribution Standards Can Encourage Secular Education Among Devout Beneficiaries.

Note: Addressing religious issues can take many forms. The following provision is intended to encourage a secular education for devoutly religious heirs.

a. Distributions To Named Beneficiaries.

The Trustee shall hold the Trust Estate for the following purposes and subject to the terms and conditions hereof:

(1) During the term of the trust, the Trustees shall manage and invest the assets of the trust, collect the income from the trust, pay over so much, all or none of the net income from and/or the principal of the trust, in equal or unequal amounts, at such times as the Trustee shall determine, to or for the benefit of the Grandchildren, as hereinafter defined, subject to the following:

(a) Distributions to or for the benefit of the Grandchildren shall be for the sole purpose of paying for books relating to courses at and the tuition at an accredited college in North America, or Bar Ilan University or Hebrew University in Israel.

(b) Distributions may only be made for the tuition or books of a Grandchild who is enrolled in a full time program towards obtaining a college or post graduate degree with a major or concentration in a secular discipline and which will result in a degree with a reasonable likelihood of furthering his or her opportunities for gainful employment.

(c) Distributions shall be made on a first come first serve basis. Grantor recognizes that there may not be sufficient funds left to made distributions to or for all of the Grandchildren.

(d) Any distributions shall be made without court order and without regard to the duty of any person to support such Grandchildren.

(e) Any net income not distributed shall be added to the principal of the trust, at least annually, and thereafter shall be held, administrated, and disposed of as a part thereof.

(2) The Grandchildren are children born to or adopted by Grantor's children [CHILDREN-NAMES-]. Each of the Grandchildren will be referred to individually as "Grandchild".

(3) The trust shall terminate upon the earliest to occur of:

- (a) The complete distribution of the Trust Estate.
- (b) The youngest living Grandchild alive as of the date of this trust attaining age Twenty Five (25).
- (c) The death of all of the Grandchildren.
- (4) Upon the termination of the trust, the Trustee shall divide the remaining Trust Estate, if any, into the number of shares required by this provision and shall distribute such shares as follows: [\*SPECIFY-DISTRIBUTION].

E. Living Wills and Health Care Proxies.<sup>15</sup>

1. Overview.<sup>16</sup>

Deciding how you should be cared for in the event of grave illness is an extraordinarily difficult and emotional decision. The importance of making your wishes for health care treatment known in the event you are unable to communicate your decisions when you are gravely ill has become an integral part of estate and personal planning for everyone. Without advance preparation, living wills and health care proxies (the forms used to communicate your health care wishes), your health care wishes may not be carried out. Your family could face gut-wrenching decisions with no solace in knowing what you would have wanted.

Religious considerations are also vitally important.<sup>17</sup> It is imperative to specifically address religious concerns to avoid having your beliefs compromised when you may be unable to express your desires. Since health care wishes are such a personal matter, it is also vital to address religious concerns to avoid family members, or others involved with your health care, from incorrectly interpreting your beliefs. The legal community, the right to die organizations, and many others involved with the health care decision process have all but ignored religious considerations. Most people signing living wills while they are healthy aren't concerned about religious issues. Thus, if you do not act affirmatively to be certain that religious issues have been addressed, they probably won't be. To assure that religious issues are dealt with properly you must give consideration to the religious implications of the entire health care process while you are able to, so in the event you experience a tragedy, your family won't have to regret what was not done.

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<sup>15</sup> Portions of the following discussion were adapted from an article by Martin M. Shenkman in J Magazine published by the Jewish Standard, Teaneck, New Jersey.

<sup>16</sup> See: Rabbi A. Jeff Ifrah, "The Living Will", Journal of Halacha and Contemporary Society, Number XXIV, Fall 1992, page 121.

<sup>17</sup> See: Dr. Fred Rosner, "Jewish Perspectives on Issues of Death and Dying", Journal of Halacha and Contemporary Society, Number XI, Spring 1986, page 50, at 67.

Several Jewish organizations have recently released forms for living wills and health care proxies which conform to Jewish law. The decisions of what steps to take, from a religious standpoint, however, require careful attention.

2. Heroic Measures.

The media, the legal profession and various right to die organizations have created dangerous misconceptions about the entire process. Too many people still believe that a living will is a statement that you don't want "heroic" health care measures taken where you are terminally ill. It can be the exact opposite -- a statement that you value life and wish every effort to be made to preserve your life. Most standard forms provided by legal publishers and other secular organizations don't even hint at the important religious implications. Many of these forms reduce vital health care issues to overly simplistic phrases or "check the box" responses. This approach can mask complex medical and religious issues.<sup>18</sup> Worse yet, many people prepare these forms solely with the guidance of a lawyer who may have no understanding of the medical or religious implications of what is being signed.

The process of signing a living will and health care proxy should, address a broad range of health care and related issues to protect your dignity, family and beliefs concerning your health care.

To properly address your health care concerns, avoid the quick fix approach. As important as the documents you sign, is the process through which you determine what they should contain. The process should include discussions about your feelings with your family, doctor, and rabbi. All may be involved in the decisions concerning your health care if you should ever be unable to express your own wishes. They can't be expected to carry out your desires without you first informing them of your feelings. The more openly you discuss your feelings with family, the more likely that you can ease the burden of the decisions they could face. While your Rabbi can assist your doctors and family in reaching a decision that is in accordance with Jewish law and your personal religious beliefs, an awareness of your feelings can be important in properly guiding your family and physicians. The process of communicating your beliefs and feelings is one of the most important steps, and this can't be done with by signing a quick-fix form with your lawyer.

Once you've discussed your feelings, and solicited input from family, rabbi, doctor and lawyer, get the right legal documents tailored to your needs. The list is far more comprehensive than just a one-page living will because, again, the quick fix approach just won't protect you and your family.

3. Life is Sacred.

Life is sacred. The fact that the quality of life can never be what one would hope for cannot alone justify a decision to shorten life. Life is sacred,

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<sup>18</sup> For a discussion of some of the medical and Halachic issues, see: Fred Friedman, M.D., "The Chronic Vegetative Patient: A Torah Perspective", Journal of Halacha and Contemporary Society, Number XXVI, Fall 1993, page 88.

even when it can only be for a limited period of time. So great is the value of life that in some instances a patient can, according to Jewish law, be encouraged, convinced, or even forced, to accept medical treatment. Everything must generally 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. To hasten the death of such a person, even with such minor steps as closing his eyes, can be equated with murder.

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, where a patient experiences great pain and suffering, medications which will merely prolong a life of suffering, may be refused. It is even permitted to pray for someone in such pain to die, to end the suffering.

The application of the distinction between these standards, however, must be applied on a case by case basis.

#### 4. Aggressive versus Passive Action.

The intent behind a medical decision can be important. For example, where a doctor recommends surgery to save a patient's life, not to undertake the surgery would be tantamount to an active decision to die. It would be called a Kum va' Asseh - "stand and do", an active or aggressive position. Jewish law would require surgery. Where the surgery itself could entail a risk to life, than Jewish law may not require surgery. The decision in this instance would be called a shev v'al ta'asseh - "sit and don't do", a passive decision. Where the risk to life of a procedure is greater than the risk of not performing the procedure, i.e. non-intervention, then non-intervention can be chosen. These principles can be applied in various situations. Where a decision concerning resuscitation must be made, if the patient's general health is so frail that resuscitation itself could entail substantial risks to life, resuscitation may be avoided under the principle of shev v'al ta'asseh. Experimental, or unconventional therapies raise additional issues.<sup>19</sup>

These principles can create important difference in Jewish law between withholding treatment or withdrawing treatment.

#### 5. Definition of Death.

The issue of when death is deemed to occur has profound religious implications, and repercussions to several health care decisions.<sup>20</sup> One

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<sup>19</sup> See: Dr. Fred Rosner, "Unconventional Therapies and Judaism", Journal of Halacha and Contemporary Society, Number XIX, Spring 1990, page 81.

<sup>20</sup> See: Rabbi J. David Bleich, Time of Death in Jewish Law, (Z. Berman Publishing Co., New York 1991). Dr. Fred Rosner, "Jewish Perspectives on Issues of Death and Dying", Journal of Halacha and Contemporary Society, Number

position is that death should be defined as brain stem death. Other rabbinic authorities interpret Jewish law as providing for a definition of death based on the historical definition of cessation of cardiac and respiratory function.

6. Administration of Pain Relief.<sup>21</sup>

Pain relief, where the primary intent is to make the patient more comfortable, not to hasten death, is permitted, even though the administration of pain relief may hasten death.

7. Respirators.

Where a patient is on a respirator which is assisting breathing, disconnecting the respirator is generally prohibited. If a respirator may be disconnected temporarily to care for the patient, or maintain the equipment, the question of whether it must be reconnected can be difficult. Where a respirator is merely artificially maintaining breathing, the response may differ. However, where the patient has died (pursuant to an acceptable definition of death under Jewish law) removal is mandatory since not to do so would merely delay burial, which is not permitted.

8. Nutrition and Hydration.

The refusal of food and water is generally not permitted. Jewish law, according to some authorities, views the provision of food and water as a supportive care which must be given, and not as a medical treatment which can be avoided. However, where the inserting a tube, such as a gastric tube, is inherently harmful, there may be a basis to argue that the risks are sufficient to argue against insertion. The side effects which the tube feeding may have must be evaluated if a decision is to be made not to insert such tubes. The evaluation of the medical risks and the implications of such risks to Jewish law is dependent on the specific circumstances of each patient. The issue is a difficult one, since the failure to provide nutrition and hydration will certainly and directly lead to death. Thus, great care must be exercised in making any general statements concerning withdrawal or non-provision of nutrition and hydration.

9. Do Not Resuscitate (DNR) Orders.

Cardiopulmonary resuscitation can be effective in many patients, so that a blanket DNR order will often violate Jewish law. However, where the patient's health is so frail that the procedure would be medically futile or severe injuries may result from the process, refusal of resuscitation may be sanctioned.

10. Surgical Procedures.

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XI, Spring 1986, page 50, at 60-67; Marshall J. Keilson, M.D., "Medical Aspects of Brain Death", Journal of Halacha and Contemporary Society, Number XVII, Spring 1989, page 7.

<sup>21</sup> See generally: Rabbi Alfred Cohen, "Whose Body? Living With Pain", Journal of Halacha and Contemporary Society, Number XXXII, Fall 1996, page 39.

The determination of whether surgical procedures can be denied must be made with consideration to many of the principles discussed above. Where there is no significant chance for cure, surgery which also has substantial inherent risks may be declined. Rabbi Moshe Feinstein stated that where the chances of the surgery being successful are about 50% it may be undertaken. Where the chances are greater than 50%, it must be undertaken.

11. Burial.

Jewish law has a number of requirements concerning burial. To assure that your burial is in accordance with Jewish law, consider making advance arrangements with a Jewish burial society, a Chevra Kadisha. Advise your family and health care agent.

12. Directives Concerning Autopsies and Burial.

Autopsies are generally not permitted under Jewish law. Consider including a provision similar to the following in your living will:

I specifically request that any such funeral be in accordance with Reform/Conservative/Orthodox Jewish religious customs and law. 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.

13. No Heroic Medical Efforts.

Be certain to consult your Rabbi in modifying the sample provisions below. 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 generally 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. To hasten the death of such a person, even with such minor steps as closing his eyes, can be equated with murder. 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, where 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.

Jewish Religious Principles Shall Apply. If I (i) have an incurable or irreversible, severe mental or severe physical condition; (ii) am in a state of permanent unconsciousness or profound dementia; (iii) am severely

injured; and in any of these cases there is no reasonable expectation of recovering from such severe, permanent condition, and regaining any meaningful quality of life, then in any such event, it is my desire and intent that heroic life-sustaining procedures and extra-ordinary maintenance or medical treatment be withheld to the extent permissible in accordance with Orthodox Jewish religious doctrines and beliefs as described below. It is not my desire to prolong my life through mechanical means where my body is no longer able to perform vital bodily functions on its own, and where there is little likelihood of ever regaining any meaningful quality of life. The condition and degree of severity and permanence contemplated by this provision are of such a nature and degree of permanent illness, injury, disability or accompanied by pain such that the average person might contemplate the decisions addressed herein (regardless whether such person would make the decisions I have made herein). In any such event, I direct all physicians and medical facilities in whose care I may be, and my family and all those concerned with my care, to refrain from and cease extraordinary or heroic life-sustaining procedures and artificial maintenance and/or medical treatment. The procedures and treatment to be withheld and withdrawn include, without limitation, surgery, antibiotics, cardiac and pulmonary resuscitation, ventilation to the extent permissible in accordance with the Jewish religious doctrines and beliefs as described below.

14. Nutrition and Hydration.

The following is language approved by some Rabbinical sources. It is inconsistent with the second illustration of sample language below. Consult an appropriate Rabbinic authority before deciding on any sample language.

Withhold Nutrition and Hydration Only If Permissible Under Jewish Law. Any artificially administered nutrition and hydration (feeding and fluids), if considered extraordinary and heroic measures in accordance with Jewish law, may be withheld. For purposes of this provision, nutrition and hydration shall include, by way of example, and not limitation, tube feedings, Corpak tubes, nasogastric tubes, Levin tubes, gastrostomy tube, or hyperalimentation.

The above paragraphs, and the issues concerning the withdrawal of nutrition and hydration, raise a host of complex medical and religious issues beyond the scope of this brief handout.

15. Designating a Rabbinical Authority to Address Halachic Issues.

Consider the following provisions:

Religious Principles Shall Apply To the Interpretation of This LIVING WILL AND MEDICAL INSTRUCTION DIRECTIVE. I wish to condition the effectiveness of this directive upon its conforming to Orthodox Jewish Religious doctrines, Halacha, and beliefs to which I subscribe. In order to effectuate my wishes, if any question arises as to the requirements of my religious beliefs, I direct that my health care Agent consult with and follow the guidance of [ ] A religious adviser selected in my Agent's reasonable discretion and in accordance with my statement of religious beliefs made in this paragraph. [ ] The following person in such regards: \*RELIGIOUS ADVISOR. If such person is unable, unwilling or unavailable to provide such consultation and guidance, then I direct my Agent to consult with and follow the guidance of the person appointed by the following religious institution: \*RELIGIOUS INSTITUTION. [ ] I expressly state that no health care provider shall be required in any situation to require any approval from such religious adviser in order to carry out the instructions of any Agent hereunder.

16. Definition of Death.

Some rabbinic authorities take the position that death should be defined as brain stem death. Other rabbinic authorities interpret Jewish law as providing for a definition of death based on the historical or biblical definition of cessation of cardiac and respiratory function.

17. Organ Donations.

The perception among many people is that organ donation is improper and that every limb is to be buried with the deceased. According to many opinions, however, this view is not correct. Organ donations present an opportunity to save another's life and hence are not only permissible, but should be encouraged. There is a question as to the definition of death. Where a definition of brain stem death (hutaz rosho -- the head was severed) is considered the controlling definition of death, then certain organs, such as the heart, may be removed for the purpose of saving another life. Where a cardiopulmonary definition of death is used the question of donation of certain organs becomes more problematic. However, for any organ donation to be permitted, it must be predicated on the principle of saving a life. Therefore, organ donation can only be permitted where the organs are used to save a life

and not to have the organs placed in a donor pool. According to this standard, donations of corneas to an eye bank, for example, is considered acceptable because of the frequent use.

Organ donations present a unique opportunity to save life. They also raise a host of Halachic issues. The following brief comments may serve at best as an introduction. Consult with an appropriate Rabbinic authority before proceeding.

To carry out my wish to be an organ and tissue donor upon my death by informing the attending medical personnel that I am a donor. To execute such papers and do such acts as shall be necessary, appropriate, incidental or convenient in connection with such gifts. To make anatomical gifts that will take effect at my death for the: [ ] sole purpose of transplant to save another person's life or [ ] sole purpose of transplant to save the life of a family member of any needed organs and tissues where such gifts are permissible in accordance with Conservative/Reform/Orthodox Jewish law.

18. Pregnancy Clause. Pregnancy issues must be addressed in all appropriate living wills if Halachic requirements are to be met.

Issues of Pregnancy Should Be Resolved in Accordance With Jewish Religious Doctrines. My life shall have precedence over the life of my fetus if a choice must be made between my survival and the survival of my fetus. Any decision to be made hereunder shall be made in accordance with the Jewish religious preference indicated above.

## VI. Hindu Considerations and Estate Planning.

### A. Introduction.

There are important estate planning implications of those of the Hindu faith and philosophy of life (for some believe the latter description more appropriate)

### B. Basic Faiths and Beliefs of Hindus which Effect Estate Planning.

Hindus believe in reincarnation, that all life forms, including humans, go through a recurring cycle of birth, death and rebirth. The consequences of one's actions in one's life determine the form and fate of one's reincarnation. The Four Yogas, or disciplines, may be followed by all Hindus. The Four Yogas are: Jnana Yoga (yoga of Knowledge), Karma Yoga (yoga of work), Bhakti Yoga (yoga of Devotion) and Saranagati Yoga (yoga of Absolute Surrender to God) and form the four paths to discerning the true nature of reality, enlightenment and self-realization.

### C. Tradition to Give to Charity.

A Hindu believes in God in such a way that God will take care of everything as long as one follows the Hindu laws and does his duties. The ancient scriptures of Hindu laws called "The Laws of Manu" set forth the codes by which all Hindus must conduct their day to day life. Although some of the ancient laws of Manu are not practical and even considered improper in the present days, the Hindus in general try to follow the laws of Manu. "Dana" (charitable giving) plays a very significant role in a man's life. Over his lifetime, a Hindu should give approximately 6% of his life's assets to charity. Every Hindu religious occasion requires feeding the poor and giving "Dana" to the needy. According to Hindu traditions, on the 11th day after death, the family donates gold, silver, rice, vegetables, land, cow, umbrella, shoes and other specified gifts to the poor and needy in memory of the departed. How much should be given will depend on the person's financial ability. It is believed that the blessings from the receivers of the charitable gifts will guide the departed soul in its journey to the next life. The Will should direct the executor to purchase these items and give them to charity for the poor directly. It is recommended that a certain percentage of the assets be given to the temple or a charity.

### D. Hinduism and Living Wills.

What are some of the basic faiths and beliefs of Hindus with which those helping them with estate planning should have some familiarity?

Hindus believe in reincarnation, that all life forms, including humans, go through a recurring cycle of birth, death and rebirth. The consequences of one's actions in one's lifetime determine the form and fate of one's reincarnation. The Four Yogas, or disciplines, may be followed by all Hindus. The Four Yogas are: Jnana Yoga (yoga of Knowledge), Karma Yoga (yoga of work), Bhakti Yoga (yoga of Devotion) and Saranagati Yoga (yoga of Absolute Surrender to God) and form the four paths to discerning the true nature of reality, enlightenment and self-realization.

Living Wills and health care issues are important but raise concern to many faiths. What issues might a Hindu face in executing a living will? Life support is not permitted. One lives as long as one naturally can and accepts the end as and when it happens. If a person has suffered severe brain damage and there is no hope of recovery, there is no basis for prolonging life by artificial means. Do Not Resuscitate (DNR) orders should be standard for every Hindu. If a bad drug or reaction to a drug were the cause of this issue, DNR would still apply. A medical mistake would not be considered as acceptable as that person's destiny. Supporting a life by artificial means is not permitted spiritually. A Hindu may not be kept on a respirator as this interferes with the life cycle. Blood transfusion and dialysis are very difficult and personal issues and should be carefully discussed with the persons involved.

Taking medication and health care is permitted, but supporting life artificially is not.

According to Hindu faith, all are supposed to be vegetarians, in the present age called Kali Yuga. However, if someone doesn't follow that regimen it cannot be forced. In India 60% of the population are probably vegetarians. Food should be addressed in one's religious habits. Hindus are supposed to observe certain fasting days ( like the eleventh day after the full-moon day and New-moon day, called Ekadasi) and so this should be mentioned in living will and also certain types of foods are not permitted on certain days or during the funeral ceremonies.

Pain relief is an important issue to address. Beliefs can differ considerably from those assumed to be natural by many Western faiths. For instance, if a Hindu were dying in an unconscious state it is not viewed essential to maintain life through heroic measures. With the cycle of birth and rebirth, deferring death when there is no consciousness is not as critical as from a Western perspective. However, trying to maintain consciousness at the time of death is an important goal for a Hindu. One wants to be conscious to perform certain important rituals and chants that ideally a Hindu wishes to perform before and at the time of death.

What about the concepts of abortion, euthanasia etc.? Pregnancy is also viewed in the same belief. One cannot take the life of a mother or the fetus to save one or the other. Euthanasia is not permitted. To the Hindu, suicide, euthanasia, and abortion are no different than murder. An elderly person who is suffering and who is given medication to hasten his death is considered murdered. Mercy killing is not permitted.

Are there any customs prior to death? According to Hindu tradition, it is not considered proper to die in a bed. If it is within a few hours of death, the person should be laid out on the floor and an oil lamp should be lit by the head. The family should try to give the person holy water and should chant prayers for the peaceful passing of the soul. The significance of lying on the floor is to make one realize the inevitability of death and the futility of

materialistic affluence. These customs cannot always be implemented, as family members prefer to keep the person in a health care facility anxious to prolong life. These customs are difficult to perform in a typical hospital setting, and that encourages a Hindu to spend his last days at home.

What are the customs following death? According to Hindu law, the body should be cremated within 24 hours of death. However, a female child before marriage should be buried and a male child before baptism, which occurs generally at age 8, should be buried and not cremated. Again, these are ancient rules and not followed by all Hindus and the living will should specify this. Funeral rites are always performed by the oldest male child. If a person does not have a son, it is customary to name a male family member to perform the rites.

The mourning or quarantine period is for 10 days after death, including the day of death. On the 11th, 12th and 13th days, various funeral rites are to be performed for the departed soul to rest in peace and donations and charitable gifts are made.

For the first year after death, every month, on the day the person died, special rituals are performed by the sons. After one year, on the anniversary day of death, prayers are offered by the sons for the rest of their lives. Feeding the poor and charitable giving are important parts of these rituals.

After cremation, the ashes should be immersed in a holy river, specifically the holy river Ganges in India. A will should specify if the ashes should be taken back to India. The ashes can be maintained until someone returns to India to deliver them. Ashes should be kept safe and in a dignified manner until this can be done.

Rebirth. What does this mean to a Hindu and how does this affect estate planning and living wills? Hindus believe in reincarnation. Human life is a transition point. The results of one's actions are reflected in one's next life. Through one's actions, one can elevate oneself to the level of angels or decline to the level of animals. Humans have a highly developed consciousness to attain salvation; which is freedom from the cycle of repeated births and deaths. Animals and plants do not have this advanced consciousness. Positive actions will be weighed against negative actions and the ultimate salvation may take thousands of births and re-births to achieve. Provisions in a Hindu will could address this.

The goal of Hindu philosophy is to guide a person for spiritual elevation, not material success. The path of desire, or the attractions of worldly success, is ephemeral and seductive. The spiritual way has sanctions for material advancement, but this should not take the dominant role.

E. Steps A Hindu Should Consider In Planning A Will.

In India many people do not have a will. Traditionally, inheritance goes to the sons, but this is not a religious mandate. Manu dharma scripture says all people have the same rights - whether sons or daughters. In the United States we write wills and usually leave our assets to our spouse and then to the children. At least 6% of assets should be given to charity. The 6% figure comes from Manu as written in the Hindu scriptures. There should be equal distribution of wealth among children. The will must specify who should take care of the spouse of the decedent. Whoever takes care of the parent will get the parent's share after his or her death. By pass trust, for example, might include provisions for the care of the mother and then inherit her portion. If you don't have sons, then your property goes to your daughters. If you don't want your daughter to misuse your assets, then you can give your daughter's share to her children. If you don't have son, you can adopt any boy or a grandson(daughter's son) to perform your funeral rites which is a very important decision; as a son or a chosen male person is needed to perform the funeral rites. You should specify in your will that this person will be and that person should then receive a bequest of property.

## VII. Buddhist Considerations and Estate Planning.

### A. Introduction.

Buddhism's views have a profound affect on the estate planning process for adherents. Caution must be exercised, however, in making any generalizations. This is because Buddhist traditions are variable among adherents. It is important to provide some background here on the development of Buddhism in order to understand some of the many differences and diversities which exist. Unlike many other "religions," Buddhism developed and spread to many different countries and has, over the centuries, adopted many diverse local customs that are not, however, inconsistent with the original Buddhist philosophy and approach to life. As a result, a Buddhist client with origins in Taiwan might have a number of customs distinct from those of a Buddhist client whose origins are from Japan or elsewhere. Thus, many of the comments, while applicable to a broad range of Buddhists, can be subject to substantial local or customary differences. Attorneys should be alert to this diversity, because it might be difficult to generate standardized clauses to use automatically for any client that is an adherent of Buddhism.

### B. Buddhist Living Will Considerations.

How would a Buddhist orientation affect the tenor of a living will and health care proxy? There are significant differences between how the Buddhist philosophy views death and how most other Western religions view it, and these differing concepts should be conveyed in the drafting of a living will. No Buddhist would want to suffer unnecessary pain, so provisions authorizing and directing pain relief would be appropriate.

However, a Buddhist also wishes to die consciously. Your state of consciousness at the moment of death is believed to strongly influence your rebirth in the next life. As a result, it is important that the living will convey the client's desire for consciousness, since this is a perspective that can differ considerably from how many Westerners might view the process.

Buddhist traditions are not necessarily fairly consistent among adherents so that standardized forms or language to address all Buddhist are not feasible. It is important to provide some background here on the development of Buddhism in order to understand some of the many differences and diversities which exist. Unlike many other "religions," Buddhism developed and spread to many different countries and over the centuries has adopted many diverse local customs that are not inconsistent with the original Buddhist philosophy and approach to life. As a result, a Buddhist with origins in Taiwan might have a number of customs distinct from those of a Buddhist whose origins are from Japan or elsewhere. Thus, many of the comments, while applicable to a broad range of Buddhists, can be subject to substantial local or customary differences. Being alert to this diversity is important to assure that your wishes are addressed.

Many living wills mention a preference for a particular type of funeral, cremation, service, etc. What practices and customs do Buddhist beliefs

suggest, and what might Buddhist practitioners wish to consider mentioning in their living wills? In substantial contrast to many other religious faiths, the Buddhist custom is to avoid removing the body from the place of death for at least 7 days. There are a number of rituals or customs performed following death. The belief is that the spirit of the deceased can remain with the body until rebirth, which will occur within 7 days, so the body should not be moved or tampered with during this 7-day period. Because of the impossibility of adhering to these customs in a hospital, it is strongly recommended that a Buddhist practitioner endeavor to spend his last days at home, where it would be more likely that one would be able to respect such traditions. Thus, a living will or letter of instruction for a Buddhist should suggest that, if feasible, you be permitted to spend your last days in an appropriate facility or home.

Following death, and, again, hopefully after the minimum one-week waiting period, either cremation or burial is permissible. Buddhism itself does not have any requirements as to whether cremation or burial is preferred. The decision is usually culturally-based. This is why as a Buddhist you might wish to specify in your living will some details as to the type of funeral service he wants. In addition to the cultural differences which dictate either cremation or burial, there are many cultural differences for the type of funeral service as well. Although there are common elements among the different Asian traditions - in particular, the practice of reading from the Buddhist holy books, the *Sutras* - there are many factors varying from culture to culture.

It is common during the last living days or hours of a Buddhist for your loved ones to read from the *Sutras* and to converse with you, because it is believed that even if a patient is unconscious and incapable of communication, hearing might remain. It is a Buddhist belief that hearing is the last sense to go.

What other traditions and customs exist for a Buddhist prior to death? It is common to bring a statue or picture of the Holy Buddha or a Bodhisattva and a book of the holy *Sutras* to the patient's room soon before his death. A very important custom is that of burning incense. Incense is a symbol of the Buddhist path; the smoke rises upward just as our thoughts should be of a spiritual tenor. The slow and consistent burning of incense is a sign of spiritual growth and is symbolic of the slow and consistent path that is necessary over the course of a lifetime in order to attain enlightenment. The burning of incense in particular raises considerable difficulties in any medical institution. Many hospitals have tried to look the other way for perhaps the burning of a single stick of incense. However, this is why the preference would be to spend one's last days at home - so these customs can be followed. The general objective is to pursue as natural a death as possible from the Buddhist perspective.

What about the DNR order? How is that affected under Buddhist traditions? From the Buddhist standpoint, if the patient has severe brain damage, you would not want to resuscitate the patient. Rather, you would wish to allow the patient to pass on. The goal is to die with as clear and calm a mind as possible. Thus, the heroic measures which might otherwise be taken could in fact be quite contrary to a major lifetime objective of a Buddhist patient. Because of the many differences in Buddhist traditions from those of most Western religions, it is strongly advisable that you carry a wallet card indicating that they are of the Buddhist tradition, perhaps even summarizing some of its key points.

Are organ donations permissible under Buddhist tradition in any situation? The difficulty with organ donations is that the body is not to be disturbed for 7 days. On the other hand, Buddhism views any selfless act of charity to help another as very admirable. Thus, there is a tremendous incentive to try to assist others in need. There are differences among the cultures in how a Buddhist from any given tradition will view the concept of organ donations in light of the above conflict. Those of Chinese descent will often, out of their great respect for ancestry, have a tremendous reluctance to permit organ donations of a deceased family member. On the other hand, Tibetan Buddhists do not take the same view of a decedent's body. The Tibetan Buddhist viewpoint is that a dead person no longer resides in the body, and therefore organ donations are more acceptable to Tibetans.

C. Charity Within the Buddhist Tradition.

"Dana" or charitable giving - good deeds - are considered a vital component of Buddhism. The practice of "dana" is viewed as a good way for a Buddhist to overcome greed and other negative characteristics. There is a Buddhist tradition of giving one sixth of one's income to the Buddhist temple," noted Reverend Guna. "On death, however, it is generally up to the person to decide how much to give, although the same one-sixth portion remains common. Buddhist adherents should be careful in making generalizations, however, because there are many cultural differences in how charitable giving is handled from one Buddhist tradition to another.

D. Buddhist Traditions and Customs Affect Trusts and Wills.

Clearly the use of trusts with trustees considerate of the Buddhist traditions of the heirs, naming guardians sensitive to children's Buddhist beliefs, and a general focus on passing on and fostering the Buddhist religious upbringing and lifestyle in one's children and other heirs is quite important. There is no religious imperative as to how one should distribute one's estate, although when one has "excess," then provisions for charity are uniformly encouraged.

Many Buddhists are very strict vegetarians out of compassion for animals and other living beings. Since again this practice differs significantly from mainstream American culture, it is advisable for attorneys to note this in the documents when preparing revocable living trusts and living will health care

proxies. Otherwise, people may not be aware of a Buddhist's vegetarianism, especially when his family members are not nearby.

There is a host of Buddhist traditions and beliefs which should be reflected in the drafting of the will as well as the handling of probate. Given the increase of adherence to Buddhism in the United States, it has become common for a child or other heir to become Buddhist when the family or parents are not. Unfortunately, the child's conversion sometimes results in families cutting off or disinheriting the Buddhist child without first fully understanding his lifestyle and perspectives. Given the strong Buddhist focus on eliminating anger and greed, to the extent that the attorney can assist the family in trying to reconcile or understand their child's lifestyle better, it will be as much a tremendous help for the child emotionally as it would be for him financially.

Any time there is an opportunity to encourage a client to act in a manner which minimizes or eliminates anger and greed, attorneys should encourage it. So, for example, should a Buddhist client wish to write somebody out of his will because of anger or hatred, it is considered inappropriate to the point that it is the antithesis of what Buddhism stands for and should therefore be discouraged.

On the other hand, if disinheriting a person is being done in a manner which minimizes anger and hatred, or is even done from the standpoint of compassion and an effort help the individual in question, then the decision to eliminate that person from the will would not be looked upon as inappropriate. It is important to remember from the Buddhist perspective that a significant negative act out of anger or greed not only has an impact on the testator, but on the survivors as well. Under the Buddhist theory of 'karma,' everything done in a particular life as well as in past lives influences and affects future lives. Thus, if a client undertakes an act out of anger, it can be viewed as creating a negative influence that may be carried in through rebirth to the next life. Since the greatest Buddhist goal is to achieve enlightenment, the objective is to commit acts out of compassion and not anger."

E. Special Considerations for Converts to Buddhism.

How should a convert to the Buddhist faith respond if his or her parents have disinherited him ? In the Buddhist tradition, this should be 'accepted with grace.

F. Buddhism and Estate Litigation.

A will challenge and other estate litigation has special considerations for adherents to the Buddhist tradition. Buddhist tradition would not state that a will challenge or any other type of litigation would be inappropriate per se. Yet, again, it is inappropriate for a Buddhist to proceed out of a motivation of hatred or anger. So, for example, if someone was acting in an inappropriate way to commence a law suit against a Buddhist, it would be

perfectly acceptable for the Buddhist to participate in the lawsuit if he does so from a perspective of trying to guide that person back to a moral or positive way of behaving. Again, it would be unacceptable if done out of anger, greed for the money that it may provide, or for other negative reasons.

#### VIII. Christian Scientist Considerations.

Adherents of the Church of Christ Scientist (Christian Science) believe that healing occurs through the realization of God's allness, goodness, power and presence. Illness can be overcome through the power of the divine Mind and God. While Christian Scientists typically choose prayer for healing themselves and their children, individuals are free to choose whatever form of treatment or care they feel will best answer their needs. While it may be customary to pray for yourself, you may call a Christian Science practitioner. If you are a Christian Scientist, you should expressly address adherence to Christian Science beliefs, and specifically request care by a Christian Science nurse in your living will, if that is what you wish.

Consider language similar to the following to include in the preamble of your living will:

**Sample Clause: I am an adherent to the Church of Christ Scientists (Christian Science) and believe that healing derives from reflecting the false concept in favor of the trust. I believe that by turning human thought to the enlightening and saving power of the divine trust of God healing will result from drawing close to God . In the event of illness or disease my preference and wish is to have a Christian Science nurse, and if appropriate the assistance of a Christian Science practitioner or lay Reader assist me, rather than be given medication and medical intervention. Further, by way of example and not limitation, my preference is only accept a vaccine if required by law, and that drugs and blood products not be given to me. Given my wish to have only permitted Christian Science treatments, I request that in the event of my illness, to the extent feasible, I be cared for in my home or in a Christian Science sanatorium or care facility. I expressly authorize the cessation or non-provision of any medical care, surgical treatment, including by way of example, the use of a ventilator, CPR or feeding tube. I do not believe in euthanasia.**

Since the Church does not coerce or pressure members who choose to avail themselves of medical treatment it is vital that you address to what extent you do or do not wish medical treatment. Should you be given palliative care? Pain relief? To what extent?

## IX. Jehovah's Witness Considerations.

Since a Jehovah Witness' living will has specific instructions which differ markedly from what many other people would expect, you should clearly label your living will as demanding care in conformity with the tenants of Jehovah Witnesses to alert medical staff: "Application of Living Will in Accordance with Religious Tenants of A Jehovah's Witness". The use of blood products in many medical procedures creates a host of problems for the Jehovah's Witness, and these issues may not be known or anticipated by medical care providers.

The following sample clauses are intended to comply with the religious principles of Jehovah's Witnesses in regard to many issues, e.g. blood transfusions, heroic measures, and end of life decisions. Be certain to consult with the elders of your Church to review the appropriateness of these provisions and to determine whether other special arrangements may be necessary. It may be advisable when traveling to determine in advance if medical facilities capable of following your religious tenants are available.

**Sample Clause: I am a Jehovah's Witness. I clearly and expressly state that my religious beliefs (based in part on the provisions of Acts 15:28 and 29) I do not wish to have homologous blood transfusion or even autologous blood (my own stored blood) under any and all circumstances, no matter what my medical condition. This restriction shall apply to any type and manner of blood, blood product (platelets or plasma). This restriction shall apply regardless of medical experts or other health care providers stating that blood transfusion is essential to preserve my life or the life of my unborn fetus.**

**I may be given non-blood alternatives to regenerate my own blood, to minimize blood loss, to replace lost circulatory volume, or to stop bleeding. These may include by way of example, volume expanders such as dextran, saline or Ringer's solution, or hetastarch.**

**I may be treated in a manner that results in the dilution of my blood within an extracorporeal circuit that does not involve storage or more than a brief interruption of blood flow and that is constantly linked to my circulatory system. I also will accept contemporaneous recovery and reinfusion of blood lost during or after surgery that does not involve storage for more than brief interruption of my blood flow. However, in no event may any equipment used in such treatments contain any blood products or remnants.**

The prohibitions against blood transfusions may or may not be defined by you to include other related products, such of which might contain blood products. Therefore, you should clarify in your living will how you feel about the following items by expressly stating that you wish to be given them if medically indicated, or if you would not even if they were medically indicated. You should discuss each one of these with a physician knowledgeable in treating Jehovah's Witnesses and with your Church elders.

- o Albumin which is a protein which can be used for fluid resuscitation that can temporize my condition in the event of my blood pressure dropping and used in some radionuclide scan preparations.

- o Streptokinase which is used to dissolve blood clots.

- o Recombinant products which are artificially made from viruses that replicate human DNA, such as erythropoietin (EPO) which a hormone made by the kidney which may allow my body to make more red blood cells and synthesized clotting factors.

- o Immunoglobulins which can be given to build immunity. This might include: Rh immune globulin (during pregnancy if you are Rh negative and have a fetus which is Rh positive), gammaglobulin (if exposed to a virus for which you did not receive a vaccine), etc.

- o Clotting factors, such as fibrinogen which is a protein your body makes in clot formation.