Estate Planning Council of North Texas

Religion and Diversity in Estate Planning

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Stacy E. Singer
The Northern Trust Company
Chicago, IL
312/444-3826
ses7@ntrs.com

I. Introduction [1]

Faith, religion and culture define people in ways other aspects of their lives do not. When an estate planning attorney is working with someone strong in his or her faith or culture, the attorney does a greater service to the client by having an understanding of how a person's faith or culture might impact the estate planning process.

A. The Power of Faith

According to the Pew Research Center's U.S. Religious Landscape Study, published in 2015, 77% of Americans identify themselves with a religion. Of those who identify with a religion, 70.6% of the U.S. population identifies themselves at Christians, with the following breakdown:

Christian Denomination	Percentage of U.S. Population
Evangelical	25.4%
Roman Catholic	20.8%
Mainline Protestant	14.7%
Historical Black Protestant	6.5%
Mormon	1.6%
Orthodox (all branches)	0.5%
Jehovah's Witnesses	0.8%
Other	0.4%

Among non-Christians who identify with a religion, the breakdown is as follows:

Religious Faith	Percentage of U.S. Population
Jewish	1.9%
Muslim	0.9%
Buddhist	0.7%
Hindu	0.7%
Other Faith	1.5%

Religious beliefs are as diverse as clients themselves. Some clients may identify with a particular religion but never consider that faith's views on inheritance when deciding on their estate plan. Other clients may consider only the beliefs of their faith and never contemplate if those religious beliefs fit their personal opinions. In either event, it is helpful to understand the religious beliefs that may come into play, even unconsciously, when clients who identify with a particular religion contemplate their estate plan.

We will explore those issues in this presentation as we deal with a population that continues to become more diverse as the years progress, religiously, culturally and otherwise.

[1] The materials on religion were originally prepared by Jason Ornduff, Harrison & Held, Chicago, and Stacy Singer. Stacy wishes to express her appreciation to Jason for his work on the original version of these materials.

II. Estate planning and drafting issues (in general).

When religion is an important consideration in a person's estate plan, several specific issues arise, including:

1. Selection of fiduciaries
2. Selection of guardians (for minor children)
3. End of life issues
4. Disposition of remains

A. Selection of Fiduciaries

In choosing a fiduciary, clients often want someone who shares the values and beliefs they do. The client's selection of fiduciaries has a profound effect on the client's ability to transmit values. Consequently, deeply religious clients often want trustees and executors who are strong in their religious beliefs and who share the same faith as they do. However, in many instances, the person who best fits these criteria may not be the person best suited to handle investment and other fiduciary responsibilities. The choice of fiduciaries should include not only trustees but also agents under a power of attorney and health care directive in the event that a chronic illness or other incapacity results in these powers being the operative document for many years.

Agents and fiduciaries should be given guidance, and granted legal authority, to disburse funds for religious education, charitable giving, and other purposes consistent with the client's religious goals. Boilerplate distribution provisions often will not suffice, nor just general reference to a testator's faith.

B. Guardian for Minor Children

Most religious individuals want to raise their children in the same faith tradition they practice. Indeed, even with some clients who identify with a faith but who may not be particularly "religious", this can still be an issue when children are involved.

C. End of Life Issues

Because of advances in medical science, people are living longer than ever. Issues of end of life care, whether it be extending life, pain and comfort control or dignity issues, are becoming a greater part of the estate planning discussion. Some faiths attempt to navigate these issues, particularly with respect to the "right to die."

Perhaps the single phrase in all of estate planning that has more potential religious repercussions than any other is the mandate in a living will or health care proxy that "no heroic measures" be taken. Apart from the definitional issues of the phrase, clients with religious sensitivities should be queried for appropriate modifications. Although some religious clients may assume that they cannot ever withdraw life support without violating their religious standards, this often is not correct.

Currently, none of the major religions condone physician-assisted suicide; but the withholding of life-sustaining treatment ("pulling the plug") is not generally treated as synonymous to suicide.

D. Disposition of remains

Religions have varied rules regarding disposition of remains. Some religions mandate burial and prohibit cremation (Islam, Judaism, many Christian Orthodox churches). Others mandate cremation (Hindu). Religious clients may want to spell it out in a will, Disposition of Remains document, or power of attorney for health care.

III. Specific Drafting Issues (Per Faith)

Each faith has its own religious texts, interpretations of those texts and customs around many estate planning issues. What follows is a brief overview of three of the most dominant religions in the United States. Note that even within a particular faith, there may be disagreement around a particular issue. As such, this summary is intended to share what appears to be the most common view within the faith; it does not profess to cover all permutations or opinions within a faith around any of these issues.

A. Christianity

1. Inheritance Issues

In general, there are no specific provisions or rules required for the testamentary documents of Christians. The Bible itself does not mandate or discuss inheritance rights. Christians in general are free to follow secular law and leave their property at death to whomever they wish.

There appears to be only one verse in the Bible on inheritance issues:

> *If a man dies and has no son, then you shall cause his inheritance to pass to his daughter*.
>
> (Numbers 27:8)

This passage notwithstanding, there does not appear to be any Christian denomination that suggests that there is a Biblical authority for daughters to be treated differently than sons in terms of inheritance of property, although in early Christian times, this was common practice in Europe.

2. Burial Issues

Many clients will want to have express directions regarding the disposition of their remains at death. In all denominations, there may be a preference to be buried in a cemetery affiliated with the client's denomination. Such instructions can be spelled out in the will, power of attorney for health care or even a set of instructions (Disposition of Remains statement) the client can leave behind for loved ones.

a. Cremation (Protestant View)

On account of the varied Protestant faith traditions, there is no rule per se regarding cremation. Cremation has become increasingly popular among clients, with the remains then kept by family or interred at a cemetery the same way a body would be. The Bible itself is silent on the subject, though the Old Testament is in part a history of the Jewish people, and Jewish tradition prohibits cremation of the

body except in exigent circumstances. Jesus, himself a Jew, was interred in a tomb, thus the longstanding Christian traditional way of body disposal has been burial (this also shows a stark contrast with the pagan tradition in Europe pre-Christianity of burning a dead body).

b. Cremation (Catholic View)

Cremation has been more discussed and considered in the Roman Catholic faith. Before 1963, the Catholic Church insisted that deceased Catholics be either entombed or buried, as that was what was done with Christ's body. Even now, the Church's Order of Christian Funerals acknowledges that "cremation does not hold the same value" as burial of an intact body.

The Catholic Church now allows for cremation. The cremated remains are to be placed in a respectful vessel and treated in the exact same way that a family would treat a body in a casket. The vessel is then to be buried or entombed immediately after the funeral in the same timely manner as a body. Cremated remains of a loved one are not to be scattered, kept at home or divided into other vessels among family members, just as it is clear that these practices would desecrate a body in a casket. The Church allows for burial at sea, providing that the cremated remains of the body are buried in a heavy container and not scattered.

The Catholic Church prefers that the full body be present for the funeral rites.

c. Cremation (Orthodox Churches)

There is no clear consensus on the issue of cremation in Orthodox faith traditions. Historically cremation was not allowed, based on the traditional Christian practice of burying the dead. Some Orthodox churches are beginning to permit cremation. When dealing with an Orthodox client, if the issue arises, it would be best to counsel the client to discuss the matter specifically with his or her religious advisor.

3. Organ Donation

There does not seem to be a general prohibition or discouragement of organ donations by Christians at death or during life. The primary concern of some churches is in the definition of death (cessation of brain function v. cessation of all bodily functions), as it is critical to the issue of some organ donation as to the condition of the body at the time of removal.

4. Mission Work (Mormon)

The Church of Jesus Christ of Latter-Day Saints has a strong tradition among its members of mission work. Indeed, at the end of 2019, there were 67,000 active missionaries in the world, the vast majority of them young single men. It is not uncommon in practicing Mormon households for young men, and to a lesser extent, young women, to defer college for up to two years after high school graduation in order to perform mission work.

Though the mission work is for the benefit of the Church, families are expected to financially support the mission work of a member of the family. Therefore, in cases involving Mormon clients with minor children, there might be a strong desire to include a specific instruction in any trust for a child that the trustee will financially support mission work by the child. Such support might otherwise be read into

the obligation of maintenance or support in reasonable comfort, but often Mormon clients will want a very specific instruction to guarantee such support for a child who might choose to go on mission after his or her parents are dead.

B. Judaism

1. Inheritance Issues (in General)

Jewish law (referred to as halachah) is found in two locations—the Torah (also known as the Old Testament), and the Talmud, which is a compilation of rabbinical opinions written over 2,000 years ago. Taken together, these address most issues of Jewish life, although debates continue. In addition, each movement (Orthodox, Conservative, Reconstructionist and Reform) may interpret issues differently. In general, Orthodox Judaism has the strictest approach to issues, hewing closest to the Talmudic view. Reform Judaism has the greatest flexibility in addressing issues, with far fewer absolutes. Halachah places some restrictions on Jewish testamentary freedom, requiring assets to pass to the closest relatives.

2. General Principles of Inheritance

Jewish laws on inheritance are found in the Torah, and provide that property passes without a Will to the certain beneficiaries, as determined by halachah. A distribution to anyone not designated for inheritance under Jewish law is deemed invalid. That means a halachic heir cannot be disinherited under halachah, even though the Will that disinherits him would still be valid. Note that halachic rules do not apply to jointly owned assets, including joint tenancy property.

Jewish law presumes that all assets are held in the husband's name; the rules for inheritance from a woman are much less clear. In addition, the rights of sons and daughters are different; sons are halachic heirs, while daughters are only entitled to certain levels of support (food, shelter, clothing, medical care and cost of living), and to payment of the expenses of their wedding. Adopted children do not inherit from their adoptive parents.

3. Halachic Inheritance

Inheritance is based on designated levels of priority; the survivor with the highest priority (or that person's descendants in accordance with halachah) receives the entire estate. Paternal heirs are deemed to be the proper heirs. The order of priority for inheritance is:

a. Husband
b. Sons (first born son receives a double portion of a father's estate)
c. Daughters
d. Decedent's father
e. Paternal brothers
f. Paternal sisters
g. Paternal grandfather
h. Paternal uncles
i. Paternal aunts
j. Paternal great grandfather
k. Paternal great grandfather's brothers
l. etc

The obvious omission is the decedent's wife. While she does not inherit from the decedent under halachah, she is entitled to either (i) a fixed amount established under a prenuptial agreement, or (ii) to be supported by her husband's estate until she remarries. That has been interpreted to mean food, shelter, clothing, medical care and living expenses. Under one interpretation of Jewish law, a surviving widow is entitled to a claim against most of the assets, but without the burdens of ownership. She has a right to as much of the assets as needed to maintain her standard of living, even if control of the assets rests with the children or other heirs.

However, her lack of controls restricts her ability to gift assets or otherwise direct their disposition.

a. Issues in complying with Jewish law

Many individuals will want to leave their assets in a manner that does not comply with the halachic requirements, particularly in terms of the double portion for the oldest son, the lack of funds given to a surviving wife and the lack of ability to leave funds to a daughter where there is also a son.

Because of the common desire to leave assets in a way that may differ from halachah, Jewish scholars have determined a number of ways to comply with halachah while leaving assets to individuals who would not otherwise be entitled to receive them under halachah. While there are a number of potential methods to comply with halachah and still carry out the testator's wishes, the consensus is that the best approach is through use of a financial penalty, known in Hebrew as a Conditional Shetar Chov. It is, in essence, a form of a Jewish *in terrorem* clause. It works as follows:

1) The testator prepares an estate plan that reflects his testamentary wishes. This may include distributions that vary significantly from what is required under halachah—leaving assets for his wife, providing equal distributions to his children, etc.

2) The testator creates a conditional debt to the beneficiaries named in his estate plan, in an amount that exceeds the value of his assets, payable a moment before death.

3) At the testator's death, the halachic heirs will have a choice. They can choose to comply with the terms of the estate plan, which would then void the debt by its terms and allow the assets to pass in accordance with the estate plan. Alternatively, they can demand that the asset be distributed in accordance with halachah, in which case the debt must first be satisfied, leaving no assets available for distribution to the halachic heirs.

Note that this approach only works, in practice, if each of the halachic heirs will receive something under the estate plan; if not, they may have nothing to lose from asserting that halachah should apply, as they will receive nothing in both scenarios.

Most scholars recommend including a provision in the estate plan that provides for a distribution of some amount (oftentimes $1000), to be distributed in compliance with traditional Halachic rules of inheritance. The preferred language also states that the provisions, other than the gift made in accordance with halachic inheritance rules, are a gift completed through a proper *kinyan*. Jewish law requires a *kinyan*, or formal act, to make any sale or transfer of assets valid. While a *kinyan* is not required if assets are passed in accordance with halachah, a *kinyan* is required if the assets pass in any other way. Rabbi Aryeh

Weil and Martin Shenkman, in their article "Wills: Halakhah and Inheritance,"[2] suggest the following language:

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

This approach only works for a husband's estate plan. In order to distribute a wife's assets in a manner other than what is proscribed by halachah, the husband must consent. Several examples of a halachic Will and addendum creating the debt are available at bethdin.org/wp-content/uploads/2015/07/HalachicWill.pdf.

While the use of a Conditional Shetar Chov may be the most traditional way to comply with halachah, modern estate planning techniques are also viable options, as halachah has been interpreted to apply only to assets that comprise the probate estate. As such, the use of lifetime gifts or a revocable trust is also an appropriate alternative. If a revocable trust is used, it is imperative to ensure that all assets are properly titled into the trust, as the will should still comply with halachah, either with or without a Conditional Shetar Chov.

4. Health Care Power of Attorney

There are multiple views on the continuation of life giving treatment for an individual who has a terminal illness within Judaism. In general, this split is reflected along the lines between the Orthodox and Conservative movements, each of which has created a model Health Care Proxy (see https://rabbis.org/wp-content/uploads/2020/11/RCA-HealthCare-Proxy_11-9-2020.pdf and https://www.rabbinicalassembly.org/sites/default/files/assets/public/publications/medical%20directives.pdf).

In general, Orthodox Judaism believes that only G-d can make decisions regarding life and death; therefore, all available methods to maintain life must be used. Food and hydration cannot be withheld.

Within the Conservative movement, there is a split of opinion. One view, advocated by Rabbi Avram Israel Reisner, requires the continuation of those things that are "of the body," such as food, medication and hydration; those items that reproduce, circumvent or supersede the body, such as respirators, may be removed. In contrast, Rabbi Elliott Dorff allows for more latitude to refuse treatment, believing that extending life without hope for a cure is not required; therefore, medication, food and

[2] Beth Din of America Halachic Will Materials 6 (2008), at www.bethdin.org

hydration may be withheld or withdrawn. Both positions are acceptable to the Conservative movement, and the choice between them must be made by each individual within the Health Care Proxy document.

The Reform movement allows its members to choose whether to maintain life sustaining treatment. Because the decision is seen as very personal, there is not a standard form to be used.

5. Organ Donation

Most Jewish movements allow for organ donation, as the ability to save a life is highly valued. However, the Orthodox definition of when death occurs may, as a practical matter, make organ donation impossible, as Orthodox Judaism does not deem brain death to be the same as death.

6. Burial Issues

Jewish law directs that burial should occur within 24 hours (unless the death occurs immediately before the Sabbath or other religious holidays, in which case the burial waits until those holidays are completed). No embalming is done, and burial is traditionally in a simple wood box. Men are often buried with their prayer shawls. Traditionally, cremation is not permitted, although it has become more acceptable in recent years.

C. Islam

1. Inheritance Issues (in General)

Whereas the Bible does not offer much authority or support on estate planning issues, the main sacred writings of Islam (the Qur'an and Sunna) do, as Islam establishes an entire legal code of its own, called Sharia. Indeed, the Qu'ran emphasizes the duty of every Muslim with property to provide for its proper disposition at his or her death.

The Qur'an is the revealed word of God (Allah) through the Angel Gabriel to the Prophet Muhammad. The Sunna are the statements, utterances and actions of Muhammad. The Qur'an and the Sunna do not answer all legal questions, but they do offer indications from which the law itself developed. Consequently, if you are doing estate planning for an observant Muslim client, it is not enough to refer to Sharia law of the Qu'ran in order to give proper instruction for division of property. Furthermore, as explained below, doing so could run counter to another provision in the estate plan (for example, the common treatment in secular documents of an adopted child as the same as a child of the bloodline).

When a Muslim dies, there are four duties:

a. Payment of funeral expenses;
b. Payment of his or her debts;
c. Execution of his or her will (equal to 1/3 of the estate); and
d. Distribution of remaining estate amongst the heirs according to Sharia

2. General Principles of Inheritance

There are a number of general principles regarding inheritance under Islamic tradition:

a. *One-third disposition by bequest*: In general, a Muslim has discretion to leave up to one third of his or her property to anyone he or she desires. This is called the wasiyya bequest, and is useful in providing for those dear to the Muslim not otherwise provided for by laws of inheritance. Inheritance of the other two-thirds of property is determined by operation of law based primarily on family relationships (intestacy rights).
b. *There are differences in the law depending on if the Muslim is Sunni or Shi'a*: The priority order depends on whether the Muslim is a Sunni or a Shiite. As long as there are close relatives of the decedent (spouse, mother, daughter, son), the rules between the two traditions of Islam are largely the same.
c. *Status of women*: While inheritance rights differ if the heir is a man or a woman, when these rules were created, Islam actually improved the legal status of women, who before were generally excluded from inheritance.

3. Qur'anic Inheritance

The Qur'an contains only three verses [4:11, 4:12 and 4:176] which give specific details of inheritance shares, though they provide some detail to the issue. Qur'an 4:11 has provisions that assign certain relatives as entitled to fractional shares of a person's estate. This includes a spouse, parents, daughter and siblings (these are the Qur'anic heirs).

The Qur'an mentions nine such Qu'ranic heirs. Muslims legal scholars have added a further three by analogy; so there are a total of twelve relations who can inherit as Qu'ranic heirs.

Interesting enough, sons are not among the Qur'anic heirs; but after Qu'ranic heirs are provided for, the balance of an estate goes to nearest male "agnate". However, the same verse says that "to the male the like of the portion of two females . . ."

Before Islam, Arab inheritance rules were strictly based on male bloodlines ("asaba"), so Islam changed that by carving out shares for females, and, depending on their relationship to the deceased, Islam places some female relatives of the decedent ahead of more distant male relatives.

In general, division of the estate of a Muslim is supposed to occur as follows:

a. One-third as directed by the testate instrument of the decedent (discretionary share or wasiyya bequest);
b. Qur'anic heirs assigned their portions, based on family relationship to the decedent (based on class of inheritors); and
c. Balance to nearest male agnate.

Sunni jurists take the view that the intention of the Qur'anic rules is not to replace the old customary agnatic system completely, but instead to modify it to enhance the position of women relatives.

Shia jurists, however, take the view that since the old agnatic customary system had not been endorsed by the Qur'an, it must be rejected and completely replaced by the new Qur'anic law – this is the essence of the difference between the two traditions as it pertains to inheritance rights. Consequently, the concept of asaba (based on male bloodlines) heirs is rejected in Shia theology. Again, if the decedent's heirs are close enough in relationship, the two major forms of Islam are the same.

a. Spouses

If the husband dies childless, a quarter of the property and assets of the husband are required to go to his spouse. If the husband had any children, one-eighth of the property and assets of the husband are required to go to the spouse. This is a minimum, not a maximum number, though there may be limitations based on obligations to other family members.

There are six arguments in favor of the way the system deals with the rights of women in marriage to their own property and the obligations of husbands:

1) Before marriage, any gift given by the woman's fiancé to her is her own property, and her husband has no legal right or claim to it even after marriage.
2) Upon marriage a woman is entitled to receive a marriage gift (Mohr), and this is her own property.
3) Even if the wife is rich, the full responsibility for her upkeep and that of the household is her husband's responsibility.
4) Any income the wife earns through investment or working stays as her separate property, and it is not required for upkeep of the household.
5) In case of divorce, if any deferred part of the Mohr is left unpaid, it becomes due immediately.
6) The divorced woman is entitled to get maintenance from her husband during her waiting period (iddat).

In modern times, these issues are less set in stone. For example, a Muslim couple in which both spouses are working tend to contribute jointly to the household, and they both are co-obligated for taxes, expenses of children and the like per state and federal law.

b. Daughters and Sons

"If (there are) women (daughters) more than two, then for them two-thirds of the inheritance; and if there is only one then it is half." [Qur'an 4:11]

If there are any sons the share of any daughters is no longer fixed because the share of the daughter is determined by the principle that a son must inherit twice as much as a daughter. In the absence of any daughters, this rule is applicable to agnatic granddaughters (a son's daughters). The agnatic granddaughter has been made a Qur'anic heir by Muslim legal scholars by analogy.

If there is only a single daughter or agnatic granddaughter, her share is a fixed one-half; if there are two or more daughters or agnatic granddaughters, then their share is two-thirds. Two or more daughters will totally exclude any granddaughters. Consequently, the common law concept of *per stirpes* distribution is not compatible in Sharia.

If there is one daughter and agnatic granddaughters, the daughter inherits one-half share, and the agnatic granddaughters inherit the remaining one-sixth, making a total of two-thirds. If there are agnatic grandsons amongst the heirs, then the principle that the male inherits a portion equivalent to that of two females applies.

c. Brothers and Sisters:

If the deceased is childless, and has any brothers and/or sisters, the share of brothers and sisters of the deceased shall be exactly the same as that of his sons and/or daughters respectively, if he had any. Thus the share of the brothers and sisters is as follows:

1) If there are both brothers and sisters, the share of each brother shall be double that of each sister, in the balance of the property and assets of the deceased after the wasiyya bequest.
2) If there are only brothers, all the brothers shall share equally in the balance of the property and assets of the deceased after the wasiyya bequest.
3) If there is only one brother, he takes all the balance of the property and assets of the deceased after the wasiyya bequest.
4) If there is only one sister (and no other brothers and/or sisters), she shall get half of the balance of the property and assets of the deceased after the wasiyya bequest
5) If there are two or more sisters (and no brothers), they shall share equally in two-thirds of the balance of the property and assets of the deceased after the wasiyya bequest.

d. Parents

In case a person has neither children nor brothers or sisters, then his parents shall share the balance of his property and assets after satisfying the claims of the wasiyya bequest.

e. Common Examples Incorporating the Above Four Rules:

Example #1: Husband dies survived by Wife, Son, Daughter and three sisters who survive him. Husband does not exercise the right to make a wasiyya bequest (so no discretionary one-third). Wife gets one-eighth, and Son and Daughter split the rest. Sisters are excluded. Son gets two-thirds of the remainder (after debts and expenses and the one-eighth going to Wife), and Daughter gets one-third of the remainder.

Example #2: Husband dies married but with no children, but he has a brother and a sister who survive him. Husband does not exercise the right to make a wasiyya bequest (so no discretionary one-third). A fourth to Wife, and the balance to the siblings, with the brother receiving twice the share of the sister.

Example #3: Young man dies unmarried and with no children. He is an only child but both his parents survive him. Dad gets two-thirds and Mom gets one-third.

f. Inheritance to or from a Non-Muslim

The majority view is that a Muslim cannot inherit from a non-Muslim, although a Muslim may inherit from an apostate (former Muslim). These rules again apply to the non-discretionary portion of the estate, and so for the discretionary one-third portion, the Muslim testator is free to make gifts to non-Muslims.

g. Illegitimate and Adopted Children

Only legitimate relatives with a blood relationship to the decedent are entitled to inherit under Islamic law. Illegitimate and adopted children have no part in inheritance.

Conversely, the adoption of a child by another does not cut off that child's inheritance rights to his or her birth family. Adoption does not cut off an orphan from his or her birthright. This is important as Muhammad himself, while knowing his parents and other kin, became an orphan while approximately eight years old (he was raised for a time by his grandfather).

h. Importance of Proper Estate Planning for Devout Muslims

Since the rules of inheritance for Muslims can contradict both state law of intestacy as well as forced shares for surviving spouses, for the devout Muslim who wants to avoid a conflict between local secular laws and Sharia, it is vital that planning be done during life to effectuate an estate plan to reflect the Muslim client's religious views. The surest way to achieve this is through planning with living trusts (planning with wills only could open the estate up to a spousal shares claim in probate). Note that Islamic law has no concept of beneficiary designations, paid-on-death clauses, or rights of surviving joint tenants, and property of this nature owned by a Muslim will be treated as part of the total estate subject to the inheritance rules. There are no rules on living trusts as well, but if treated like will substitutes, it would seem that they can be used to meet a Muslim client's wishes in adhering to the tenets of Islam with respect to inheritance rules, but not to circumvent those rules.

Interestingly enough, some Islamic countries (like Iran and Indonesia) do recognize the concept of marital property as something separate and distinct from these rules.

Finally, because of the obligations to family, there is no concept of a complete or substantially complete charitable bequest of an estate at death, even to a Muslim organization (outside of the discretionary one-third). Muslims wishing to make substantial charitable gifts might want to do so prior to death.

i. Investment Issues under Sharia

Three key tenants of Sharia may significantly impact estate planning, particularly with regard to a fiduciary's duty to invest in accordance with the prudent investor standard— a prohibition on riba (earning interest), a prohibition from investing in assets that are haram (prohibited) and a prohibition on gharar (excessive risk taking).

1. <u>Riba</u>

The prohibition on riba is based on the Islamic view of money, which is seen as a "medium of exchange", having no intrinsic value.[3] This view leads to the concept that exchanging money should not result in profit; thus, a Muslim cannot earn money from lending to someone or receiving money from someone. That means no charging or receiving of interest on money, including bank accounts and mortgages.

[3] "Islamic finance— The lowdown on sharia compliant money", The Guardian, October 29, 2013.

There are a number of approaches that can be used to avoid the need for formal (prohibited) lending. All require special conditions and additional flexibility by the bank, which may result in using a bank that has experience or was created with Islamic principles in mind.

One approach is to have the bank purchase whatever the item is for which a loan is needed (such as a car) and then lease it back to the individual. It can be structured as a lease or a lease buyback. This is known as *Ijara*. The bank can also purchase the item (oftentimes a home, but also commercial real estate or other investment) and then sell it to the individual in installments at a higher price that reflects a profit margin. This is known as *Murabaha*. Finally, the bank and the individual can enter into a joint venture to purchase the item, with each sharing the profit and losses. This is known as *Musharaka*. Note that there is some controversy within the Islamic community regarding these techniques. The final determination regarding compliance with Sharia law in any particular situation is made by a Sharia board, which is not bound by precedent and will make a decision based only on what is presented in the current situation under review. As such, it is not certain that any given technique will be approved at a given time.

The requirement not to charge interest is a separate challenge for investing, as all fixed income products, such as bonds, earn interest. Similarly, most companies earn interest on their balance sheet, and also have debt on it.

2. Haram

Islamic law does not allow investment in companies or entities involved in activities that are prohibited under Islamic law. These include companies involved in gambling, pornography, manufacturing or selling alcohol, financial services (because of the charging of interest as a primary source of revenue), and pork and pork products. Most scholars also advise not investing in tobacco and tobacco products.

3. Gharar

Islamic law does not allow for excessive uncertainty or risk. As a result, any terms of a contract that are unstated, unknown or based on things outsides the control of the parties is prohibited. That would include derivatives, futures and options, as all are based on the uncertainty of future events.

4. Investment implications of prohibition on riba, haram and gharar

Complying with the prohibitions on riba, haram and gharar investments pose particular challenges for fiduciaries. It is possible to screen various companies and investments to ensure they comply with Islamic law; in general, the screening is done with oversight by an Islamic organization or cleric who can certify the screening. However, because of the changing approach by companies to their revenue streams over time, continuous screening is required. As a result, many Islamic investors opt for mutual funds that are created and monitored continuously using an Islamic screen.

Numerous funds exist, including the Mizan Fund, Tat Ethical Fund, Taurus Ethical Fund, AI Ameen and Amana Funds. According to the Amana Funds website, their screens "seek to eliminate:

- bonds and other interest-based investments

- stocks of companies that have high debt (sometimes referred to as highly leveraged)
- securities of companies in industries that do not adhere to Islamic principles, such as liquor, gambling, pornography, pork, insurance, banks, etc.
- mutual funds or hedge funds that trade securities frequently (have high turnover rates) because frequent trading is seen as gambling by some Islamic scholars

In general, it is possible that Islamic screened portfolios will underperform typical investment portfolios, as many of the elements of risk have been removed from the potential investment options. There is now a Standard & Poor's BSE 500 Shariah Index, which was launched in May 2013 and provides a benchmark for performance of Sharia-compliant funds. However, in a fiduciary account, if the funds are not invested in a manner that complies with the Prudent Investor standard, the fiduciary may be subject to claims of breach of fiduciary duty.

The Prudent Investor Rule, as codified in Section 90 of the Restatement (Third) of Trusts (2007), states:

> The trustee has a duty to the beneficiaries to invest and manage the funds of the trust as a prudent investor would, in light of the purposes, terms, distribution requirements and other circumstances of the trust.

This standard requires the exercise of reasonable care, skill and caution, and is to be applied to investments not in isolation but in the context of the trust portfolio and as a part of an overall investment strategy, which should incorporate risk and return objectives reasonably suitable to the trust. In making and implementing investment decisions, the trustee has a duty to diversify the investments of the trust unless, under the circumstances, it is prudent not to do so. The prudent investor rule allows the trustee to consider risk and return in the context of the entire portfolio; it does not prohibit any given investment. The trustee has a duty to manage risk, not to avoid it. The Restatement approach judges a trustee's investment choices at the time the choices are made, not later in time based purely on the result of an investment portfolio.

Complying with Islamic law is likely to conflict with the standard prudent investor rule approach. As such, estate planning documents that intend for the fiduciary to comply with Islamic law in determining investments should clearly waive the prudent investor rule and specifically direct the trustee or other fiduciary to comply with Islamic law in all investment decisions. If there is any question regarding compliance, the grantor may wish to include language directing the fiduciary to consult with an Islamic scholar or leader to determine what is required or permitted under sharia, and direct that the Trustee may rely on such determination without further review or investigation.

4. Burial Issues

Muslim tradition dictates that burial must occur before the next sundown following the time of death. As a result, there is almost never a viewing of a body in Muslim tradition.

Cremation is forbidden.

5. Organ Donation

Organ donation is generally acceptable for Muslims, as it follows the Qur'an's teaching that "Whosoever saves the life of one person it would be as if he saved the life of all mankind." If there is any question as to whether or not organs may be donated, it is best to consult with an imam (religious leader) or Muslim funeral director.