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DIVIDING ESTATES NOT FAMILIES

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Scenario

- Client's Circumstances and Assets:

- Woman age 68, recently widowed, has three daughters and one son, planning to remarry.
- She presently resides in New York, but is contemplating moving to New Jersey.
- Husband left all his assets to her but only executed secular Will – no halachic documents.
- Husband's assets were a total of \$3mm – \$1.5mm personal residence (which they owned jointly), \$500k in stocks (with wife designated as the beneficiary) and \$1mm in investment real estate (which was in his name alone and needed to be probated and retitled in her name).
- She also has about \$1mm of her "own" assets in an IRA, from the money she managed to save from her paycheck all the years.

Assets	Residence	Stock	Investment/Savings	Total
Husband		\$500k	\$1mm	
Client	\$1.5mm	\$0	\$1mm	\$4mm

CLIENT HAS A NUMBER OF CONCERNS



Client's Concerns

- ➔ If she remarries, her new husband and/or his children will “inherit” some or all of her assets (“Second Husband Issue”)
- ➔ Her son (who has always been a problem child) will go to bais din after her death and claim that everything belongs to him (“Problem Child Issue”)
- ➔ She will deplete a significant portion of her assets to pay for nursing home care or home care (if needed) - she doesn't have any long term care insurance (“Long Term Care Issue”)
- ➔ How to and who will handle her finances should she become infirm/incapacitated (“Incapacity Issue”)
- ➔ Might differences between the laws of New York and New Jersey impact her decision to move to New Jersey (“Relocation Issue”)



Resolutions/Strategies

- **Trust**
 - Separate legal entity – Settlor/Grantor, Trustee and Beneficiaries
 - Insulates assets from taxes/creditors and can resolve long term care concerns by enabling eligibility for government benefits
 - Creating and funding estate plan before questions of incapacity and/or undue influence arise helps ensure family peace and harmony
 - More difficult to challenge in court than a Will
- **Prenuptial Agreement**
 - Valid and enforceable under halacha/bais din and secular law/court
 - Alone or in conjunction with a trust
 - One or two agreements
 - Consummating the agreement
- **Appointment of Agent(s) and Retitling Ownership**
 - Child(ren) as financial agents
 - Checks and Balances
 - Joint owners of property/accounts
 - Revocable Trust



Summary of Concerns

I. **Second Husband Issue**

- Legal ramifications if nothing is done
- Halachic ramifications if nothing is done
- Legal methods to avoid this issue
- Halachic validity of such methods

II. **Problem Child Issue**

- Legal ramifications if nothing is done
- Halachic ramifications if nothing is done
- Halachically valid methods to avoid this issue

III. **Long Term Care Issue**

- Ramifications if nothing is done
- Methods to avoid this issue



Summary of Concerns



IV. Incapacity Issue

- Ramifications if nothing is done
- Methods to avoid this issue

V. Relocating Issue

- Legal considerations
- Practical considerations



I. Second Husband Issue

Legal ramifications if she does nothing

Under NY and NJ law, the second husband is entitled to approximately 50% of her assets (even “non-probate” assets) if she doesn’t leave a Will and approximately a third of her assets (“elective share”) if she leaves a Will leaving him less than that amount.



Halachic ramifications if she does nothing

If the second husband survives her, he would inherit most of her assets – at least from whatever is halachically hers.

- Halachic validity of first husband’s secular Will
- Halachic status of assets held jointly (i.e., personal residence)
- Halachic status of money earned by a woman during her marriage (i.e., client’s IRA)



I. Second Husband Issue

Legal methods to avoid this issue

- Prenuptial agreement
 - DRAWBACK – Can be costly (i.e., legal fees for both sides) and needs to be negotiated with prospective second husband (not very pleasant)



- Transfer assets (before second marriage) to irrevocable trust for benefit of children
 - DRAWBACK – No control (or limited control) of assets transferred to trust



I. Second Husband Issue

Halachic validity of such methods

- Prenuptial agreement
 - Needs to be done in very specific manner to be valid
- Transfer assets to irrevocable trust
 - Does Halacha recognize that trust is separate entity in general and specifically in the yerusha context?
 - If trustee is different person and trust is irrevocable then it is considered a *Kinyan al menas l'haknos* and is definitely considered a separate entity and a recognized transfer
 - Does Halacha emphasize the fact that trustees will likely listen to the settlor and give you whatever you need from trust?



I. Second Husband Issue

Halachic validity of such methods (Continued...)

Transfer assets to (irrevocable) trust

- If trustee is different person but trust is revocable, then it still can be argued that it is considered a *Kinyan al menas l'haknos* and a recognized transfer
 - The fact that the settlor can revoke is just a shiyur, which is considered to be like a t'nai and doesn't invalidate the kinyan
 - Similarly, in the context of an irrevocable trust, if the settlor reserves for himself a power to appoint the assets of the trust among his descendants (a "Power of Appointment" – which is done many times for tax reasons), this also might be considered a shiyur/t'nai, and the transfer is still a valid transfer
- If trustee and the settlor are the same person, then the transfer is not recognized in Halacha, whether the trust is revocable or irrevocable
 - Accordingly, the typical revocable trust which is done as a Will substitute (to avoid probate and for other reasons) is only that under Halacha as well – i.e., it will have the validity of a secular Will, nothing more



II. Problem Child Issue

Legal ramifications if you do nothing

- No concern from a legal standpoint.
 - All children will inherit equally if there is no Will (the assets that the surviving husband is not entitled to under law), and as specified in Will if there is one.





II. Problem Child Issue

Halachic ramifications if you do nothing

- Her son (if he survives her, or if he predeceases her but has surviving children) would inherit all, or almost all, of her assets, leaving nothing to her surviving daughters
 - Not only is this a concern if her son would go to bais din, but there are serious questions of gezeila according to some poskim if her daughters keep assets which are not theirs according to halacha even if her son would respect her wishes and not challenge her estate plan under her secular Will



II. Problem Child Issue

Halachically valid methods to avoid this issue

- Shtar chatzi zachar (i.e., halachic conditional note)
 - Historical background of this document
 - Does it help for all assets (i.e., assets inherited from first husband)?
 - Does it resolve Second Husband Issue?



II. Problem Child Issue

Halachically valid methods to avoid this issue

- Transfer assets to irrevocable trust for benefit of children with ultimate equal distribution upon your death
 - As discussed above, the questions is under what circumstances will Halacha consider the transfer to trust a real transfer and relinquishment of ownership?
 - Even if the transfer to the trust is valid, it will only help for assets which are considered yours (i.e., the client's) according to Halacha
 - However, if her son signs as trustee of the trust, essentially agreeing to administer the trust assets (including assets which are not hers according to Halacha) according to the trust terms, is this considered a mechila in Halacha?
 - If it is considered a mechila, can son be moser modaa'h before signing as trustee?
 - Is this considered to be an oness?



III. Long Term Care Issue

Ramifications if you do nothing

- Very simple. She will need to pay out of her own pocket for her long term care costs (about \$120 per day for home care and approximately \$400 per day for nursing home care)



Method to avoid this issue

- Transfer assets to irrevocable trust for benefit of her children to become eligible for government benefits (i.e., Medicaid)
 - However, no control (or limited control) of assets transferred to trust and she can't directly benefit from assets transferred to the trust
 - Transferring assets to an irrevocable trust can also help for estate tax concerns – not needed in this situation because of estate tax exemption – but important in cases of high net-worth individuals



IV. Incapacity

Legal ramifications if you do nothing

- Upon incapacity:
 - Finances frozen
 - Lose ability to strategize and plan with trusts
 - Require guardianship proceeding

Methods to avoid this issue

- Appointment of Agent(s)
 - Child(ren) as financial agents
 - Importance of checks and balances
- Retitling Ownership
 - Joint owners of property/accounts
 - Revocable Trust



V. Relocating Issue

- Halacha:
 - Universally and geographically consistent, however, application can be different depending on the bais din
 - Documents should be prepared and executed in a manner that it is enforceable according to all
- Secular Law:
 - Estate Taxes
 - New York: Presently \$5.25M estate tax exemption per person
 - New Jersey: Presently \$2M estate tax exemption per person and NO estate tax as of 2018
 - Intestacy: Assets passing upon death in the absence of a Will
 - New York: Split generally 50/50 between spouse and children
 - New Jersey: All to Spouse in “nuclear” family (in “our scenario” NJ would be similar to NY)



V. Relocating Issue

- Long Term Care: Eligibility
 - New York:
 - Home Care: Medicaid eligibility determined without 5 year look-back and generally unlimited coverage
 - Retirement Accounts: Not a countable asset when determining Medicaid eligibility
 - Spousal Refusal: Is recognized
 - New Jersey:
 - Home Care: Medicaid eligibility determined with 5 year look-back and limited coverage
 - Retirement Accounts: A countable asset when determining Medicaid eligibility
 - Spousal Refusal: Is not recognized
- Practical Considerations:
 - Proximity to children, other family and friends; other conveniences and cost of living



Conclusion

Pre-nuptial agreement can protect assets from second husband and his descendants

Transferring assets to an irrevocable trust can protect the assets from both legal and halachic claims against an estate made by a second husband and a son(s)

Funding a trust also can enable planning for long term care and estate tax concerns

Proper titling of assets, appointment of agent(s) and trustee(s) can ensure that assets will be managed appropriately

Relocating decision needs to be made after weighing the various factors

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Questions?





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