Halachic Estate Planning – Tax and Litigation Risks

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There are approximately 55,000 people in Canada who identify themselves as Orthodox Jews.[1] By definition, these individuals adhere to religious Jewish law ("*Halacha*"[2]), which does not recognize the right to make testamentary dispositions. *Halacha* has a forced heirship regime[3] that stands in contrast with Ontario's doctrine of testamentary freedom.[4] These clients often wish to comply with *Halacha* while still exercising some testamentary autonomy, which presents a mandate for legal counsel to create "*Halachic* Wills"[5] that fulfill estate planning goals[6] substantially different from those mandated by Jewish law. To that end, some rabbinic authorities accept certain *Halachic* work-arounds built on the premise that, notwithstanding the impact on one's *Halachic* heirs, living individuals are free to enter into certain transactions and/or effect *inter vivos* transfers of their property.[7] The purpose of this paper is to orient estate planning professionals to these *Halachic* concepts and assist them in formulating an estate plan by examining the tax and litigation risks of these *Halachic* work-arounds.

I. Why the Forced Heirship Regime is Relevant to Orthodox Jews

Halacha is based on rabbinic analysis and interpretation of Biblical verses, Talmudic discourse, and earlier rabbinic examination of those texts and questions. It is a fundamental belief of Orthodox Judaism that G-d[8] gave the Jewish people the Torah[9] at Mount Sinai and that *Halacha* governs every aspect of a Jew's life. Consistent with the belief that *Halacha* represents G-d's law is the position that choosing Ontario law over *Halacha* constitutes a rejection of G-d's law. Hence the desire of some to ensure that their estate plan complies with *Halacha.*

II. *Halacha's* Forced Heirship Regime

The Torah sets out the *Halacha*'s forced heirship regime in Numbers, Chapter 27, verses 8-11 and Deuteronomy, Chapter 21, verse 17.[10]

Hebrew Version of Numbers, verses 8-11 and Deuteronomy, verse 17	**JPS translation of Numbers ,verses 8-11 and Deuteronomy, verse 17**
ח וְאֶל בְּנֵי יִשְׂרָאֵל, תְּדַבֵּר לֵאמֹר: אִישׁ כִּי יָמוּת, וּבֵן אֵין לוֹ וְהַעֲבַרְתֶּם אֶת נַחֲלָתוֹ, לְבִתּוֹ	**8** Further, speak to the Israelite people as follows: 'If a man dies without leaving a son, you shall transfer his property to his daughter.
ט וְאִם אֵין לוֹ, בַּת וּנְתַתֶּם אֶת נַחֲלָתוֹ, לְאֶחָיו.	**9** If he has no daughter, you shall assign his property to his brothers.
י וְאִם אֵין לוֹ, אַחִים וּנְתַתֶּם אֶת נַחֲלָתוֹ, לַאֲחֵי אָבִיו.	**10** If he has no brothers, you shall assign his property to his father's brothers.
יא וְאִם אֵין אַחִים, לְאָבִיו וּנְתַתֶּם אֶת נַחֲלָתוֹ לִשְׁאֵרוֹ הַקָּרֹב אֵלָיו מִמִּשְׁפַּחְתּוֹ, וְיָרַשׁ אֹתָהּ; וְהָיְתָה לִבְנֵי יִשְׂרָאֵל, לְחֻקַּת מִשְׁפָּט, כַּאֲשֶׁר צִוָּה קוקי , אֶת מֹשֶׁה. {פ}	**11** If his father had no brothers, you shall assign his property to his nearest relative in his own clan, and he shall inherit it.' This shall be the law of procedure for the Israelites,

Hebrew Version of Numbers, verses 8-11 and Deuteronomy, verse 17	JPS translation of Numbers ,verses 8-11 and Deuteronomy, verse 17
	in accordance with the LORD's command to Moses."
יז כִּי אֶת הַבְּכֹר בֶּן הַשְּׂנוּאָה יַכִּיר, לָתֶת לוֹ פִּי שְׁנַיִם, בְּכֹל אֲשֶׁר יִמָּצֵא, לוֹ: כִּי הוּא רֵאשִׁית אֹנוֹ, לוֹ מִשְׁפַּט הַבְּכֹרָה.	**17** But he shall acknowledge the first-born, the son of the hated, by giving him a double portion of all that he hath; for he is the first-fruits of his strength, the right of the first-born is his.[11]

In their article "Jewish and American Inheritance Law: Commonalities, Clashes, and Estate Planning Consequences," Donna Litman and Steven Resnicoff[12] explain:

> Jewish intestacy law provides that sons have first priority as the heirs of a father, and a husband has first priority as heir of his wife. This leaves daughters with secondary inheritance rights and provides wives and some daughters with contractual or other specified legal rights for support … The father's daughter will inherit only if the son and his descendants died before the father… The order of inheritance is burdened by the claims of the decedent's creditors. Among these are claims by the decedent's widow and daughters, and one source of these claims is the marriage contract, the ketubah, entered into at the outset of the marriage. The ketubah includes the husband's obligation to pay the widow a specific sum of money in the event that he predeceases her. At a minimum, rabbinic law provides that a husband has the duty – … to bury [his wife] if she dies; to provide for her maintenance out of his estate [and] to let her dwell in his house after his death for the duration of her widowhood; [and] to let her daughters sired by him receive their maintenance out of his estate after his death, until they become espoused. Thus, a wife may receive a conditional life estate, one that will terminate if she remarries. In addition, the wife's male children inherit her ketubah and a specific portion of the dowry she brought into the marriage, and they inherit equally with the husband's son. The estate of a male decedent is also obligated to provide a dowry for each of the decedent's unmarried daughters. The first daughter to get married receives ten percent of the estate, the second receives ten percent of the remainder of the estate, etc. These dowries are provided to the daughters even if they exhaust the estate's assets, forcing the sons to maintain themselves by begging for alms."[13]

One should be mindful when advising clients that Rabbinic authorities are not all in agreement about the issues of *Halachic* work-arounds.[14] Some oppose their use and insist that only the *Halachic* forced heirship regime should be complied with.[15] In his text entitled the *Jewish Law of Inheritance*, Dayan Grunfeld provides a letter from Rabbi Abraham Isaiah Karelitz, known best as the Hazon Ish. This revered rabbi lived during the establishment of the State of Israel. In his letter, the Hazon Ish explained why he opposed the State of Israel's proposed inheritance laws that departed from the *Halachic* forced heirship regime. He wrote as follows:

> … it devolves upon every faithful Jew to hold fast by his faith when asked to condone such heresy […] the law belongs to G-d, the Master of the Universe who put it into our charge. I see those who waver and look for excuses to give in to the heretics. Their aim is to make us conduct ourselves like all nations […] and thus give support to the view of

> our adversaries that the Law of Inheritance of the Torah does indeed not fit an enlightened nation.[16]

This excerpt of the letter does not do it justice, but is meant to provide a flavour of how opposed some rabbis were to any change to the forced heirship regime set out by the Torah.[17]

The view of a majority of the *Hareidi poskim*[18] is that a beneficiary relying on a secular will as opposed to the Jewish law of inheritance may be guilty of theft[19] as well as noncompliance with other aspects of Jewish law. [20] In contrast, there are some Modern Orthodox rabbis who take the position that secular wills are *Halachically* valid. The basis for the latter position is that an acknowledgment of debt or *inter vivos* gifts designed to thwart the Biblical order of succession are still valid, so long as they are executed with a *kinyan* – a formal act signifying commitment to a transaction. Since the holder of a secular will knows that the civil government will honour it,[21] the holder is deemed to have performed a *kinyan*. This means that it is viewed as an *inter vivos* gift.[22] That position is based on the writings of Rabbi Moshe Feinstein. Some, however, argue that those writing have been misunderstood and taken out of context.

As an aside, it is important to be mindful that *poskim* disagree as to whether a gift must be accompanied by a *kinyan*. While some *poskim* hold that a *kinyan* is necessary, others hold that any valid gift under Ontario law[23] will be a valid gift in accordance with religious Jewish law.[24] If the client wants to ensure that a contemplated *inter vivos* transfer complies with religious Jewish law, consultation with the client's rabbi would be advisable.

III. *Inter Vivos* Gifts

Halacha recognizes that a capable living person may give away his assets as gifts without contravening the *Halachic* forced heirship regime.[25] This would appear at first glance to be an elegant solution for those clients seeking to work around the forced heirship regime.[26] As Danyan Grunfeld observes:

> All that is needed is a deed of gift valid in Jewish law, effected with the necessary *kinyanim* whilst the donor is in good health, so as to avoid a breach of the Jewish Law of Inheritance when making a will in accordance with the law of the land. It is also not advisable to make up two testaments, one according to Jewish law and one according to secular law, as it is sometimes suggested. For if the 'will' according to Jewish law is made first, a legal uncertainty arises in view of the general disavowal by the terms of the will in secular law and other non-Jewish legal systems of earlier testamentary documents. If, on the other hand, the will is made first in the law of the land, a breach of the Jewish Law of Inheritance is almost inevitable. […] It is therefore best to effect in one's healthy days simply a deed of gift in accordance with the terms of Jewish law.[27]

Unfortunately, while elegant from a *Halachic* perspective, this solution can create a host of practical and legal problems. From an estate planning perspective, it is rarely advisable for a client to give away all or most of everything he or she owns while still alive. Indeed, this type of transfer makes the client extremely vulnerable to the recipient of the gift. There are also risks from a litigation perspective because the gifts could be attacked:

a. as failing to meet the requirements for a valid gift;
b. as invalid due to the donor's incapacity;
c. as the result of undue influence exercised by the recipient;
d. as a fraudulent conveyance under the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29 (the "FCA"); and/or
e. as contrary to the deceased's statutory obligation to "dependants" under the *Succession Law Reform Act*, R.S.O. 1990, c. S.26 (the "SLRA").

Each of these types of legal attacks are described in more detail below. If a gift it held to be invalid for any reason, the recipient may be declared a constructive trustee[28] or resulting trustee[29] holding the gift in trust for the donor or his estate, which would defeat the purpose and frustrate the estate plan.

While a valid *Halachic* gift may be an effective work-around and avoid offending Jewish Law's forced heirship regime, it still must be a valid gift under Ontario law in order for the work-around to be effective.

IV. The Life Estate

A different *halachic* work-around is a gift called *kinyan mehayom u'leachar mita.* It appears to be the equivalent of a life estate, which has been defined as "the total rights of use, occupancy, and control, limited to the lifetime of a designated party."[30] In effect, the donor transfers the asset effective immediately but retains the use and income of the asset until his death. Note that the language must clearly state that the transfer occurs immediately. The *kinyan* is final and the donor may not sell the assets in which he has given his beneficiaries an interest, nor would he be able to modify the distribution or change his beneficiaries at a later date.

From an estate planning perspective there are two problems with this vehicle:

1. This gift does not replace a testamentary bequest because any income received after it was made is not part of the gift. It is also not available for cash, debts or stocks.[31]

2. At common law, creating life estates ordinarily applies to real property – not chattels. To create a similar result with shares in private and public companies, bonds, cash etc., trusts are used.[32]

V. The *Inter Vivos* Trust

a. The mechanism

A trust has been described as "an equitable obligation, binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property) for the benefit of persons (who are called beneficiaries or *cestuis que trust*), of whom he may himself be one, and any one of whom may enforce the obligation."[33]

If a person wants to maintain control of certain property during his lifetime, but gift away beneficial interest so as to comply with the forced heirship regime of *Halacha*, he might consider creating an *inter vivos* trust.

Separate and apart from *halachic* considerations there are many estate planning benefits to using an *inter vivos* trust. Martin J. Rochwerg and Leela A. Hemmings in a paper originally prepared for a conference of the International Academy of Estate and Trust Law in Cape Town, South Africa,[34] concisely explained the role of *inter vivos* trusts in estate planning:

> *Inter vivos* trusts have a number of tax and non-tax advantages over wills. As noted above, non-income tax advantages of establishing an *inter vivos* trust include potential probate savings and confidentiality as to the terms and assets of the trust. Further, *inter vivos* trusts provide continuity in the management of assets before and after death. As will be discussed below, *inter vivos* trusts also offer some protection against the claims of creditors, spouses and dependants …"
>
> Common income tax reasons for establishing an *inter vivos* trust include income-splitting with spouses and/or children, benefiting from reduced provincial tax rates if there is jurisdiction shopping, and avoiding a deemed disposition on death. With standard *inter vivos* trusts, however, there will be a deemed disposition at the time property is transferred into the trust and every 21 years thereafter. As well, income and gains earned and retained in *inter vivos* trusts are taxed at the highest marginal rates, whereas certain testamentary trusts benefit from the graduated tax rates of an individual.

It should be noted that for income tax purposes, one should ensure that the settlor is not a beneficiary or a trustee of the *inter vivos* trust. As Rachel Blumenfeld stated in her article, "The Jewish Laws of Inheritance and Estate Planning in Canada":

> … *inter vivos* trusts — that is, trusts established during lifetime, as opposed to on death or in a will — are useful estate planning tools where one wishes to remain within a *halakhic* framework for inheritances. Assets can be transferred to a trustee to hold in trust with the transferor maintaining the control over and benefit of the assets during lifetime and dictating how the assets are distributed on death. Trusts can last for several generations, thereby avoiding the *halakhic* problem for the next generation (at least in relation to the assets held in the trust).[35]

Ms. Blumenfeld recommended a "self-benefit trust." To assist the reader in understanding her recommendation, let's review how this might work. The 'settlor' is the person who creates the trust. In the context of our discussion, the settlor would be the original owner of the property who wishes to effect an efficient estate plan that complies with religious Jewish law. The terms of a self-benefit trust ensure that only the settlor is entitled to all the income and capital of the trust during his or her lifetime. The trust provides also that, upon the settlor's demise, a new person (presumably the intended heir that the *Halachic* forced heirship regime would exclude) becomes the beneficial owner. Ordinarily, the tax advantage of such as trust is that the *Income Tax Act* provides for a deferred roll-over of the capital and income of the trust. Presumably, Ms. Blumenfeld is arguing that the creation of a self-benefit trust, which includes the granting of a future beneficial ownership that crystalizes on the settlor's demise, constitutes an *inter vivos* transfer and does not contravene Jewish religious law. We are unaware of how rabbinic

authorities would treat this suggestion. Even if permitted by *Halacha*, Jewish law only permits the formal immediate transfer of title to the property that is in possession of the donor at the time the gift is effected. It does not deal with future acquired property.

Another author, Johnathan Porat suggests that

> … a revocable trust used for bequests that are *halachically* proper. It may be used by an attorney,[36] with an orthodox rabbi, to provide a kosher bequest that avoids probate, and may be modified easily to avoid estate taxes. A bequest trust is called in Hebrew *Matanoss Boree*, a gift while healthy, indicating that the trust resulted from careful, optimistic planning and not a last minute improvisation. The kosher bequest trust is made for purposes that take discretionary precedence over and/or support the family structure which is the basis of inheritance. Some purposes, such as specifically to disinherit someone, are not kosher intents. However, specifically to give to someone who would otherwise not receive is usually a kosher intent, even if the usual heirs are mostly supplanted.[37]

There does not seem to be any tax advantage to a revocable trust. Outside the context of someone wanting to comply with *Halacha* and still remain in control of his property, these trusts are most often used when an elderly person needs help managing his assets or to protect children of a first marriage. In the latter case, assets are put into an *inter vivos* trust to ensure that those children retain the capital upon the person's demise.[38] There are trusts where there is less certainty as to whom the beneficiaries might be, such as the discretionary trust. That raises the question of whether a discretionary trust would be an acceptable *halachic* vehicle.

As Donovan Waters explains:

> A discretionary trust arises when property is vested in trustees and a class of beneficiaries or named persons appear as the trust objects, but the trustees have complete discretion as to the payment of the income, or the capital, or both. The trust may obligate them to distribute all the trust property among the class, but give them a discretion as to whom they make payments within the class, and as to how much they pay to each. A more extensive discretion arises where the trustees are not obligated to distribute the trust income or capital unless given circumstances occur, and any surplus then arising passes as on a gift over.[39]

The viability of a discretionary trust as a *Halachic* work-around may depend on the alternative distribution dates set out in the trust. *Halacha* only permits the future beneficial interest in property if the transfer takes place during the life of the transferor.[40]

There are those who question the validity of trusts as a *Halachic* work-around. Rabbi Professor Steven Resnicoff notes:

> Jewish law differs from American law in a number of fundamental ways, two of which need to be mentioned. First, unlike American law, Jewish law does not simply contain mandatory prescriptions and proscriptions. Sometimes, Jewish law merely encourages certain actions or discourages others Second, contemporary Jewish law lacks several of the most important judicial and legislative institutions of American law. *Thus, there is no Jewish supreme court or legislature today that can determine whether testamentary gifts or revocable trusts can effectuate valid gifts under Jewish law.*[41](emphasis added)

When advising clients who request a *Halachic* estate plan, the lawyer should ascertain the client's view of Jewish law and coordinate the plan with the rabbinic authority relied upon by the client.

b. Trust litigation concerns

There are a number of issues to consider when seeking to protect an *inter vivos* trust from attack. As described above, a trust divides the rights to an asset into legal and beneficial ownership. Anyone who intends to attack the legitimacy of the trust will first analyze the trust document itself and determine if the document creating the trust is technically valid.[42] Does the trust clearly articulate with certainty:

(a) the intention to create a trust;
(b) the property in the trust; and
(c) the beneficiaries of the trust (the objects).

If these three certainties[43] are not present or if the object of the trust is unlawful, then the trust is invalid.

Contravening the *Fraudulent Conveyances Act* would be considered an unlawful purpose of the trust as would contravening public policy,[44] or creating a trust to defraud creditors.

Concerns about capacity and undue influence also apply to the creation of a trust. Moreover, the trustee has certain fiduciary obligations that, if breached, could give rise to his removal. If the client is interested in retaining control of the asset until his demise, then the lawyer ought to review those fiduciary duties and explain that the trustee's breach of same could lead to his removal and loss of control. This also could give rise to damages for breach of trust. For example, has the trustee invested the trust funds properly, has he acted impartially between beneficiaries? Has he complied with his duty to disclose and keep accounts? There are many more ways that a trustee may be found to be in breach of trust, but it is beyond the scope of this paper to list them exhaustively. Suffice to say that creating a trust and administering same carries certain responsibilities that should be fully appreciated.

VI. The Verbal Declaration of a Dangerously Ill Person

a. Parameters of verbal declaration

Under *Halacha*, someone who is dangerously ill may gift his property to another person with a verbal declaration. This concept in religious Jewish law is called *Matanah Shechiv Meira.*[45] As explained by Rabbi Professor Resnicoff:

> The early sages decreed that if a dangerously ill person, one whose whole body is afflicted and is so weakened from his sickness that he is unable to walk on his feet in the marketplace and he is confined to bed, gives oral instructions as to the disposition of his assets, his words are effective. In this case, there is no need for any *kinyan*. In fact, this rabbinic rule is even more dramatic than the religious obligation to fulfill a decedent's instructions…The Talmud explains that the rabbis enacted this rule as a safety measure. They feared that if such a sick person were legally unable to provide for the distribution

of his or her estate, the person might become excited and distraught and such a reaction could precipitate death.

In Jewish law this is an i*nter vivos* transaction that, arguably, does not require a *kinyan* to be effective.[46] According to Dayan Grunfeld, the declaration is itself a *kinyan*.

Should the donor's health recover, the gift would then become invalid unless the transfer was effected through a written form of *kinyan*.

b. Enforceability in Ontario[47]

As explained above, a gift will only be valid if it satisfies a three-pronged test. Whether the gift satisfies each of those requirements is often the subject matter of litigation. Those seeking to challenge the validity of gifts will question whether there was, in fact, an intention to donate. They will call into question the capacity of the donor, and they will raise the spectre of undue influence. For these reasons, the gifting of assets, while theoretically possible, is not a practical estate planning device.

VII. The Artificial Debt

a. Challenges to enforceability in Ontario's Courts

Halacha will recognize a person's acknowledgment of debt even if no debt was incurred.[48] Both under Ontario law and *Halacha*, debtors must be repaid out of the estate prior to the beneficiaries receiving any inheritance. Accordingly, if the testator acknowledges a debt in favour of a person otherwise not entitled under *Halacha's* forced heirship regime, Jewish law permits that debt to be paid out of the estate prior to the *Halachic* heirs receiving their inheritance. So, in our example, the testator may acknowledge a debt to his daughter of more than 50% of the value of his estate. The debt is due and owing at the moment immediately prior to the testator's death. It is not intended to be collected, rather it is an inducement for the *halachic* heirs to honour the testator's wishes.

The litigation risks with this work-around are problematic. The heirs under the testamentary document may challenge the debt.

Let's accept for the moment that for the purposes of *Halacha* this fictional acknowledgment of a debt is enforceable in a religious court. That does not mean it is enforceable in Ontario. Given that the "creditors" never advanced any money, arguably, this is not a valid debt and not enforceable against the estate.

In *Kirkham v. Kirkham Estate*,[49] the testator wrote his ex-wife (who was then his common law wife) a letter in which he confirmed a previous agreement between them that the motor home would be returned to his estate. The ex-wife signed a promissory note in which she agreed to pay the testator US$305,000. There was no loan and no consideration for the promissory note. The estate sought the money. The court wrote as follows:

> The testator realized that the defendant wanted only the house and had never wanted the motorhome. He clearly changed his will to leave her the house after full consideration that this had been their understanding from an early time in the relationship. He voluntarily altered the will on January 4th, 1992 to reflect this understanding. The defendant's signature of the promissory note and the "Dear Brennetta" letter were expressions of her voluntary agreement to convert the motorhome to money and to pay it over to the estate. There is no evidence of a reciprocal undertaking or consideration for the promise to pay. The gratuitous promise of the defendant under the letter and the promissory note is unenforceable.

b. Possible ways to deal with these challenges

For the purposes of our discussion, the takeaway is clear. Gratuitous promises are unenforceable in the secular courts. A promissory note rooted in a fictional debt is open to attack. Working from basic principles promissory notes, which evidence a debt, are contracts[50] subject to all the normal rules of contract law.

Ontario's Court of Appeal has defined a contract as "… an exchange of promises, acts, or acts and promises, as a result of which each party to the contract receives something from the other. For a contract to be binding, consideration must flow between the parties. Absent consideration, there is no contract."[51] Still, it is possible that a *bona fide* exchange of consideration would adequately defend this work-around from being attacked.

VIII. Harken to my wishes

Under Jewish law, there is an obligation to fulfill a dying person's instructions.[52] This is not a transfer at all. Rather, it is an instruction to the heirs to engage in certain transactions among themselves. If the heirs disobey, there are no practical ramifications; the wishes of the deceased have no judicial teeth. A number of conditions must be met for this to be *Halachically* valid.

a. The dying person must transfer the property in question to a third party to be held in escrow;

b. The grantor must instruct the third party to whom the property is to be transferred upon the grantor's death. According to Jewish law this is considered an *inter vivos* transfer.

c. The grantor must express his testamentary wishes in front of the *halachic* heirs.[53]

The grantor would make a testamentary document in keeping with his dying instructions. Accordingly, the wishes would be valid both under *Halacha* and Ontario law pursuant to the testamentary document.

IX. *Halachic* Estate Planning & Tax Issues

a. *Tax issues with* inter vivos *gifts*

Tax considerations for *Halachic* estate planning are rooted in the premise that *inter vivos* transfers of wealth are permitted. So let's review the options and their tax consequences.

When a Canadian resident taxpayer gifts property during his lifetime, there are income tax consequences relating to the gift. Canada does not generally tax the recipient at the time of any gift, nor does it limit the amount that a giver can gift to anyone. The transferor, however, may be subject to income tax on a gift.

Canadian income tax law establishes that the transferor will be deemed to have disposed of the asset, and the transferee will be deemed to have acquired the asset, at its fair market value ("FMV") at the time of the gift. Therefore, any accrued gains on the asset (that is, the difference between its FMV at the time of the gift and its cost to the transferor) will be considered a gain[54] to the transferor and will be taxed at his marginal income tax rates. If one is gifting liquid assets such as public company shares, paying the income tax is straightforward. For example, if one is gifting shares in Apple Inc. that have market value of $100,000 and were originally purchased for $50,000, the transferor will recognize a gain on the disposition of $50,000. One can easily pay the income tax on this gain by selling some of these shares. When gifting illiquid assets such as real estate, however, an issue can arise when funds may not be readily available to pay the income tax on the deemed disposition, as one has to pay income tax without receiving the proceeds that one would receive had the real estate actually been sold. A possible solution to gifting the illiquid assets would be to sell the asset first so that the gift is that of cash and not real property. The seller would then have the cash to pay the income tax. Alternatively, if a sale of the property is not an option, the transferee could re-finance the property, generating funds that could then be used to assist with the payment of the income taxes on the gift.

If one gifts assets to a spouse, there is an automatic rollover of the asset at its cost to the transferor spouse. This ensures that there is no taxable event to the transferor on the gift. However, one must be aware of the attribution rules, which dictate that, on a future disposition of the property, the transferor will be required to report the gain on his income tax return while also reporting all income earned from the property between the date of the gift and its eventual disposition. However, one can opt out of this automatic rollover by paying income tax on the accrued gains at the time of transfer. Another potential mechanism to escape the attribution on a gift is by transferring the asset in exchange for a debt on which the transferee pays interest at a prescribed rate within certain specified time parameters set out in the *Income Tax Act* (Canada). However, it should be noted that these rules are complex. Transferring an asset in return for debt is also available for gifts to certain minors, including one's nieces and nephews where certain attribution rules also apply.

One must be aware of the classic tax trap when transferring assets to a family member: If a transferor decides to sell the property to the recipient for an amount below FMV, there is a punitive mechanism put in place to ensure double income tax. In these circumstances, the seller will be deemed to have sold the asset at FMV and the recipient will be deemed to have acquired the asset at the (lower) amount he paid for it. Thus, there is no step-up in the cost to the buyer even though the seller will be deemed to have sold the asset at its FMV. Similarly, if the asset is

sold above FMV, the deemed proceeds to the seller will be the amount of the actual (higher) proceeds, while the recipient will be deemed to acquire the asset at a cost equal to its (lower) FMV.

There are two chief benefits to gifting assets while one is alive:

1. Income tax savings: With proper tax planning, if the transferor is in a high-income tax bracket and the recipient is not, any future income could be designed to be taxed at the recipient's lower marginal tax rate.
2. Probate tax savings: If the property is transferred prior to death, there will not be probate taxes to pay, which will keep a higher value in the hands of the recipients and less in the hands of the government.

b. *Tax issues with* inter vivos *trusts*

Generally speaking, there is a disposition at FMV when property is transferred to a trust. The FMV of the property on the date of transfer becomes the trust's cost of the property. Therefore, there is a potential for the transferor to pay income tax on the disposition of property to a trust.

Trusts are taxed as individuals in Canada, with key differences. Firstly, trusts pay income taxes at the highest marginal rate. However, income allocated to beneficiaries will be deductible by the trust, and thus not be taxed in its hands. Instead, such allocated income will be taxable in the hands of the beneficiaries to whom the allocation is made. For example, if a trust earns $20,000 of income in the year and it allocates $15,000 to its beneficiary, the $15,000 will be taxed in the beneficiary's hands and only $5,000 will be taxed in the trust. It should be noted that if the beneficiary of the trust is the spouse of the transferor or a minor child who does not deal at arm's length with the transferor, attribution rules similar to the ones described above will apply.

There are many advantages to creating an *inter vivos* trust from an income tax perspective as opposed to only transferring these assets upon death or via a gift:

1. The deemed disposition to the transferor on the transfer of assets to a family trust may be lower than a deemed disposition on death.[55]
2. The *inter vivos* trust may allow for income splitting opportunities with its beneficiaries.
3. As mentioned earlier, transferring assets during one's lifetime will minimize probate taxes on death.
4. The trust can be flexible and structured in such a way as to allow for the distribution of the assets to the beneficiaries at any time, thus allowing for an early wind up of the trust.

There are some pitfalls relating to an *inter vivos* trust that must be recognized as well:

1. Trusts are subject to a deemed disposition of assets every 21 years. One must be careful of the 21-year point in time, regardless of when the assets in the trust were acquired. Many practitioners have been sued for forgetting the date

2. By transferring assets to a trust, one might end up prepaying income tax during one's lifetime as opposed to at one's death.
3. Depending on how the trust is structured, the transferor might be giving up control of the transferred property, which might be against his wishes for a multitude of reasons.
4. Maintaining a trust requires compliance costs as there are annual filings required while the trust is in existence.[56]

c. *Tax issues with the* Manatah Shechiv Meira

While Jewish law regards the *Manatah Shechiv Meira* as an *inter vivos* gift, there is a question as to whether an Ontario court would reach the same conclusion and treat the *Manatah Shechiv Meira* as a gift that comes into effect on one's death. Canadian income tax law stipulates that a deceased taxpayer is deemed to have disposed of his property immediately prior to his death for proceeds equal to its FMV. Any accrued gains on property in excess of its cost will be taxable in Canada. This deemed disposition could create a substantial income tax bill on the death of a taxpayer. As stated above, if there is a surviving spouse or common law partner, the property automatically transfers to the survivor at its cost to the deceased, thereby deferring the gain until the survivor's death.

d. *Tax issues with the artificial debt*

In this situation, the individual creates a debt immediately, but payable just prior to his death. Assets in the estate are then used to repay this debt. Whether or not this debt is enforceable by Canadian law, there will be a disposition of the assets on death. It is of no bearing if the assets go to the heirs of the will or the party to whom the debt is owing. There is still a deemed disposition of the assets and income tax will need to be paid on any accrued gains. In the event there is a surviving spouse or equivalent, if they were to receive the assets in the ordinary course by virtue of a testamentary disposition, there would be an automatic rollover and thus a deferral of any potential income tax. However, using the assets to repay the debt would create a taxable event which would have otherwise not occurred if the assets were subject to the spousal rollover.

X. Conclusion

There is not one definitive opinion acceptable to all Orthodox Jews about estate planning. This is key to estate planners advising their Orthodox Jewish clients. Depending on the client and his rabbinic authority's understanding of religious Jewish law, deviation from the forced heirship regime might be strictly forbidden. Other religious Jews they may accept that there are work-arounds, such as *inter vivos* dispositions to implement the desired estate plan. There are other Orthodox Jewish clients who might rely on the position, articulated at the end of Section II, that any valid secular will is also valid in the eyes of *Halacha*.[57]

Creating one document that complies with both Jewish law and Ontario law has risks as described above. Clients might consider making an *inter vivos* agreement enforceable in accordance with religious Jewish law, but not the law of Ontario. If that were to be done and the heirs abided by religious Jewish law, they could renounce any entitlement under secular law and

abide by the religious ruling of the religious courts. This would also allow the testator to choose the most effective estate plan based on considerations outside of religious law.

As discussed, there are income tax benefits and drawbacks to both *inter vivos* estate planning and testamentary planning. One must carefully analyze the facts of the situation to determine what is best for the client. An effective estate plan often has a blended approach – transferring certain assets during the client's lifetime and transferring others upon death. One should consult an income tax professional to determine the best strategy. One should also be cognizant of the fact that life insurance proceeds are payable on death and that, if one does carry life insurance, the proceeds from the insurance can help pay the income tax on the client's deemed disposition at death. These funds will not be available to pay income tax on a disposition that occurs during one's lifetime.

The purpose of this paper is to provide some insight to estate planning professionals on how to respond to clients who request a *Halachic* estate plan. The authors are not purporting to make a *halachic psak* (religious legal ruling) on the permissibility for a specific client on how to effect a particular estate plan. Our role as professionals is to ascertain the client's instructions and, to that end, we have endeavoured to provide the background for the professional to have an informed discussion with clients and *Halachic* authority on how to proceed.

So how do we advise our Orthodox Jewish clients seeking counsel on making an estate plan that complies with Jewish law? How do we fulfill the testator's desire to divide his estate in a way that still complies with *Halacha* notwithstanding the deviation from the *Halachic* forced heirship regime?

1. We review the *Halachic* work-arounds created by the rabbis;
2. We confirm with the client (and Rabbi if so desired by the client) whether the *Halachic* work-around is acceptable; and
3. We address the tax issues and litigation risks with the client and reflect on the possible pitfalls of implementing an estate plan using *Halachic* work-arounds.

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[1] Centre for Israel and Jewish Affairs, 'Basic Demographics of the Canadian Jewish Community' (2015), online: <http://cija.ca/resource/canadian-jewry/basic-demographics-of-the-canadian-jewish-community/>.

There are approximately 391,665 Jews in Canada. Approximately 14% identify themselves as Orthodox. Of the 188,710 Jews in Toronto, 14.2 % consider themselves to be Orthodox. UJA Federation of Greater Toronto, online: <http://www.feduja.org/jewishtoronto/census/2001_Census_Jewish_Demographics.pdf>.

[2] *Halacha* is a Hebrew word from the root *Halacha*, meaning "to go." This term is not easily defined and we invite the reader to access the *Encyclopedia Judaica* (MacMillan, 1978), Vol. 8, p. 1155, for an appreciation of what this term has meant in the context of Talmudic study from the Middle Ages to the 21st century. See also M. Elon, *Jewish Law: History, Sources, Principles*, trans. B. Auerbach and M.J. Sykes (Philadelphia, Jerusalem: 1994), Vol. I, p. 93:

> The term *Halacha* [...] refers to the normative portion of the Oral Law […] The *Halacha* includes all of the precepts in Judaism — those laws involving the commandments concerning the relationship between people and G-d as well as those laws applicable to relationships in human society.

In the context of this paper, *Halacha* describes the Jewish legal framework through which Orthodox Jews govern their lives.

[3] In his article, Wolfe Goodman, 'Dealing with Foreign Assets and Foreign Beneficiaries' 19 *Estates and Trusts Reports* 269 explains that the terms 'compulsory shares', 'réserves', 'légitimes', 'forced heirship', etc., are used in various places to describe similar restrictions on freedom of testation. We refer the reader to *Black's Law Dictionary*, 9th Ed., *sub verbo* "*forced heir*. *Civil law*. (1813) A person whom the testator or donor cannot disinherit because the law reserves part of the estate for that person. In Louisiana, only descendants are forced heirs. La. Civ. Code art. 1493."

[4] Testamentary freedom is a doctrine that stands for the principle that a person is free to entitle, or otherwise disentitle, anyone he or she wished from his or her estate upon death, regardless of any moral or natural claims on the testator. In *Spence* v. *BMO Trust Co.*, 2016 CarswellOnt 3345 (C.A.), the Court of Appeal explained at paras. 30-31:

> A testator's freedom to distribute her property as she chooses is a deeply entrenched common law principle. As this court emphasized in *Canada Trust Co. v. Ontario (Human Rights Commission)* (1990), 74 O.R. (2d) 481 (Ont. C.A.), at p. 495, citing *Blathwayt v. Cawley* (1975), [1976] A.C. 397, [1975] 3 All E.R. 625 (U.K. H.L.): The freedom of an owner of property to dispose of his or her property as he or she chooses is an important social interest that has long been recognized in our society and is firmly rooted in our law.
>
> The Supreme Court has also recognized the importance of testamentary autonomy, holding that it should not be interfered with lightly, but only in so far as the law requires: *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807 (S.C.C.), at p. 824.

[5] In our view, the term "*Halachic* Will" is a misnomer. In Ontario, the doctrine of testamentary freedom presupposes that a person has the legal capacity to effect the transfer of his/her own property after death. There is no such legal capacity under *Halacha*. Under Jewish religious law, the ability to transfer property ceases at death. See Donna Litman and Steven H. Resnicoff, 'Jewish and American Inheritance Law: Commonalities, Clashes, and Estate Planning Consequences,' in L. Moscovits (ed.), *Jewish Law Association Studies XXII* (2012), online: <https://ssrn.com/abstract=2252912> ("Litman & Resnicoff").

[6] Donovan Waters et al., *Waters' Law of Trusts in Canada*, 4th Ed (Toronto: Carswell, 2012). Professor Waters explains: "… an examination of the personal and family situation of the taxpayer, his present and probable future property (or estate), his asset requirements, given both his commitments and his aims, and thereafter the arrangement of his property affairs so that the maximum advantage is taken of his assets during his lifetime, and the maximum amount of it is passed on to the spouse and the succeeding generations of the family."

[7] It is beyond the scope of this paper to provide Rabbis or students of *Halacha* with an in-depth understanding of these *halachic* issues for the purposes of making a *psak halacha*. For those seeking a deeper understanding of the *halachic* issues as they relate to this *halachic* work-around, please refer to *Shulkhan Aruch Hoshen Mishpat* 250:5.

[8] Orthodox Jews are wary of writing out their Lord's name because any documents in which it appears will be, by definition, sacred. The concern is that if the writing is erased or the document is thrown out it would contravene the manner in which Orthodox Jews believe such documents should be treated. Sensitive to those concerns, the authors have not written the Lord's name in full or as it appears in the Torah.

[9] In this context, the term "Torah" not only refers to the Pentateuch. It also refers to what Orthodox Jews believe to be the oral tradition that Moses received from G-d on Mount Sinai. For a fuller explanation, I refer the reader to p.138 of Charles B. Wagner et al., 'Advising the Orthodox Jewish Litigant' (2016) 46 *The Advocates' Quarterly* at pp. 135-159.

[10] The Hebrew-English text is taken from the 1985 JPS edition, which is available at the Sefaria Blog. 'Tanakh: The Holy Scriptures' (1985), online: <https://www.sefaria.org/Numbers.27?lang=en>. Based on the Talmud in Baba Bathra 115; Maimonides Hild. Nhaloth 1; Shulchan Arukh Hoshen Mispat 26; Dayan I. Grunfeld, *The Jewish Law of Inheritance* (Oak Park, Michigan: Targum Press, 1987) ("Grunfeld") at p. 10, provided the following short sketch of the order of succession, based on the interpretation of the Oral Law:

(1) sons;
(2) the sons' descendants;
(3) the daughters;
(4) the daughters' descendants;
(5) the father of the deceased;
(6) the brothers of the deceased;
(7) the descendants of the brothers of the deceased;
(8) the sisters of the deceased;
(9) the descendants of the sisters of the deceased;
(10) the deceased paternal grandfather;
(11) the patrilineal grandfather's brothers and their descendants;
(12) the patrilineal grandfather's sisters and their descendants, and so on.

[11] This verse mandates that the first-born son takes a double share of his father's property. As the reader will see, *Halachic* work-arounds exist for the purposes of circumventing requirements such as this one. See Grunfeld, *supra*.

[12] Steven H. Resnicoff is a professor at DePaul University College of Law and director of its Center for Jewish Law & Judaic Studies (JLJS).

[13] *Supra*, Litman & Resnicoff.

[14] There is extensive literature in English available. For those interested in such a review, the authors refer the reader to:

- *Supra*, Litman & Resnicoff
- *Supra*, Grunfeld.
- Rabbi Pinchus Rabinowitz, *The Tzavo'ah* (Monsey: Hamatik Printing, 2012).
- Rabbi Mordechai Willig, 'The Halachah of Wills' (2015), online: <http://teamshabbos.org/wp-content/uploads/2015/12/Halachic-Will-from-Beth-Din-of-America.pdf>.
- Rachel Blumenfeld, 'The Jewish Laws of Inheritance and Estate Planning in Canada' (March, 2009) *B'nai Brith Law Journal*, Vol. 1, No. 1; ("Blumenfeld").
- Rabbi Chaim Jachter, 'Yerusha and Dina DeMalchuta Dina, Parshat Lech Lecha – Part 1 of 1' *Rabbi Jachter's Halacha Files* (12 Cheshvan 5767; November 3, 2006), Vol. 16, No. 7, online: <http://www.koltorah.org/ravj/Yerushah_and_Dina_DeMalchuta_Dina_1.html>
- Rabbi Chaim Jachter, 'Introduction to the Laws of Yerushah and the Ethics of Jewish Estate Planning, Parshat Noach – Part 1 of 1' *Rabbi Jachter's Halacha Files* (6 Cheshvan 5767; October 28, 2006), Vol. 16 No. 6, online:
    - <http://www.koltorah.org/ravj/Introduction_to_the_Laws_of_Yerushah_and_the_Ethics_of_Jewish_Estate_Planning_1.html>

[15] At page 16 of his text, Grunfeld refers to a rabbinic phrase

א ' ן ר ו ח ח כ מ ' ם נ ו ח ה ה ' מ נ ו

The phrase translates as: "The Sages have no Pleasure in him," meaning that this person is not acting in a manner consistent with wisdom. Essentially, Grunfeld refers to a *Mishna* to underscore that while an end-run around of the *Halachic* forced heirship regime is technically allowed through *inter vivos* gifts and the acknowledgment of a debt, etc., the Sages have no pleasure in he who does so because the testator has disinherited the rightful heirs. In his text at pp. 112-115, Grunfeld writes that there are rabbinic authorities who maintain that it is forbidden to circumvent the *halachic* forced heirship regime without ensuring that the *halachic* heirs receive something. See also Rabbi Ari Marburger, 'Estate Planning, Wills, And Halacha: A Practical Guide to Hilchos Yerusha', online: <http://businesshalacha.com/en/publication/estate-planning-wills-and-halacha>.

[16] Rabbi Avraham Yeshayah Karelitz, Kovetz Igrot Chazon Ish.

[17] *Supra,* Grunfeld at p. 113.

[18] "*Hareidi*" in this context, refers to ultra-orthodox Jews. "*Poskim*" refers to those Rabbis who are asked to review the body of Jewish law and determine how to apply it to certain situations.

[19] See Grunfeld at p. 76, where Rabbi Joseph Trans is quoted as saying: "It is clear that all those who take property on the basis of non-Jewish law, although according to the law of the Torah it does not belong to them, are called wicked men in Israel." Also, see Grunfeld at p. 72 where he questions Rabbi Feinstein who takes a somewhat different view. For an analysis of Rabbi Feinstein's position see Charles Wagner, "Rabbi Moshe Feinstein and Halachic Wills" (2013), available online: <https://www.wagnersidlofsky.com/rabbi-moshe-feinstein-and-halachic-wills>. For an in-depth scholarly review of this topic, I refer the reader to Litman & Resnicoff.

Even amongst those who believe that Orthodox Jews must have *Halachic* wills, there are also those who believe that secular wills may be necessary under certain circumstances. For example, when there is a concern over who will become the legal guardians of one's minor children, then some rabbis would recommend a secular will. We invite the reader to access a presentation by Rabbi Moshe Taub on YouTube. Rabbi Taub speaks of an incident where a woman converted to Judaism. She had children. Her Jewish husband predeceased her and she did not have a will. Upon her demise, the woman's Christian family sought custody of her children and wanted to raise them as Catholics. Had she executed a will and indicated her preference as to the guardian of her children the ensuing court case may have been avoided. Even if the matter went to court, the mother's wishes would have been given great weight by the court in determining custody of the children. You can access the presentation by Rabbi Moshe Taub on "Halachik Wills Part 1" online: <https://www.youtube.com/watch?v=WwGOwM9nyNI>.

[20] At page 16 of his text, Grunfeld writes:

> In the Jerusalem Talmud, the solemn warning of the prophet Ezekiel 'Their iniquities are on their bones' is applied to those who infringe the biblical Law of Inheritance. When the saintly R. Moses Sofer (1762-1839) knows in the whole rabbinical world as Hatam Sofer […] was asked for his opinion in such a case, he replied: 'I can see that the whole aim of that man is to make sons and daughters equal with regard to the Law of Inheritance; I will therefore have nothing to do with this matter and will certainly not help in drafting such a testament …'

In their article, Litman & Resnicoff write:

> R. Yitshak Elhanan Spektor wrote that a person must take appropriate steps to ensure that his heirs comply with the requirements of Jewish law regarding distribution of his estate and therefore avoid the sin of stealing. See C. Jachter, *Gray Matter III* (New Jersey: Kol Torah Publications 2008), p. 276. Jachter reports that R. Feivel Cohen has been quoted as stating that a person who fails to take steps to avoid contradictions between the applicable secular and Jewish law provisions regarding his estate violates the biblical prohibition against *lifnei iver, i.e*., enabling another to violate the law against stealing. Similarly, failing to write a will that is compatible with Jewish law might encourage secular law heirs to litigate rights to the estate in secular courts. Initiating such litigation in secular courts is itself a Biblical prohibition. See also M. Willig, "Inheritance Without a Fight: Writing a Will in Modern Times", online: <http://www.torahweb.org/torah/special/2007/rwil_will.html> ("according to most authorities, a typical last will and testament is halakhically ineffective"). The parameters of *lifnei iver*, however, are the subject of considerable debate, and it seems more likely that such inaction would, at most, involve a rabbinic prohibition against facilitating the commission of a sin. See, generally, S. Resnicoff, "Helping A Client Violate Jewish Law: A Jewish Lawyer's Dilemma," in H.G. Sprecher (ed.), *Jewish Law Association Studies* X (New York: Global Publications 2000) pp. 191-227.

[21] *The Talmud, The Steinsaltz Edition: A Reference Guide* defines "kinyan" as follows:

> Acquisition, mode of acquisition. A formal procedure to render an agreement legally binding. Unusually kinyan refers to mode of acquisition. After the act of kinyan has taken place, the object is legally the property of the buyer. Neither party can go back on the agreement, regardless of any change in market values, or any unanticipated change in the article itself. Even if the object were to be destroyed while still in the physical possession of the seller, the buyer would not be entitled to get his money back. Various modes of acquisition confer ownership, depending on the nature of the object such as Meshicha – pulling the article, mesirah – transfer,

> Chazaka – performing the act of taking possession hagbaha – lifting up the article, Haliphfin – exchange or barter. The word kinyan when used alone without further definition usually refers to kinyan sudar. On occasion, more than one action may be involved in the acquisition of an object. For example, money may be paid and the object may be physically picked up. The Sages discussed the question of which act is the legal kinyan. In general, money is not a valid kinyan for acquiring movable property. The word kinyan may also refer to taking possession of abandoned property or to the precise moment where a forbidden action, such as theft or robbery is said to have taken place. The term kinyan also applies to the conclusion and ratification of an action not directly connect to purchase and sale, such as performing a kinyan to confirm one's acceptance of responsibility with regard to a future action or actions.

[22] See Charles Wagner, "Rabbi Moshe Feinstein and Halachic Wills" (2013), available online: <https://www.wagnersidlofsky.com/rabbi-moshe-feinstein-and-halachic-wills>. In his Responsa Iggerot Moshe, Even Haʿezer 104, Rabbi Feinstein wrote as follows,

> Although we are dealing here with a gift to be made after the death of the donor, and there is no such thing as a kinyan after death, as the object no longer belongs to the donor and such a gift is therefore not valid in Jewish law, nevertheless, according to the law of the land a person can legally transfer with effect after death money or any other object which at that time obviously no longer belongs to him or her […] but in essence it is clear, according to my humble opinion, that a testament of this kind, the dispositions of which will certainly be put into effect by the authorities of the country, does not need a kinyan as one could not imagine a more effective kinyan than this. Hence, since a kinyan is not necessary, the legatees can uphold their right also against those persons who are the proper heirs by Torah law, although there is no such thing in Jewish law as a gift after the death of the donor.

The Talmud, The Steinsaltz Edition: A Reference Guide is very useful with respect to finding precise definitions of *Halachic* terms. It defines *Dina de malchuta Dina* –as follows, "lit., the law of the kingdom is the law. The *Halachic* principle that Jews must obey the laws of the state in which they live. The laws and regulations of the state are considered valid in Jewish law as well. This obligation applies mainly in civil law, and not in matters of ritual law." For an online explanation, we refer the reader to *The Jewish Virtual Library* which can be found online at: <http://www.jewishvirtuallibrary.org/jsource/judaica/ejud_0002_0005_0_05228.htm>.

For a review of the *Halachic* authorities who take issue with Rabbi Moshe Feinstein's position, we refer the reader to Rabbi Chaim Jachter's article entitled, "Yerushah and Dina DeMalchuta Dina - Part 1 of 1" found online at:
<http://www.koltorah.org/ravj/Yerushah_and_Dina_DeMalchuta_Dina_1.html>.

There is a concept in *Halacha of Dina D'Malchuta Dina*, which stands for the proposition that Jewish law recognizes the validity of the secular law as it relates to financial matters. Applied to estate planning it would mean that a testamentary document recognized by Ontario as being valid would also be valid under Ontario law. There were rabbinic authorities who advocated this position and we would refer the reader to the Rivash p. 352 and the Maharitaz Hachachdashos 32 and the Rama Choshen Mishpat 248.

[23] See Kimberly Whaley, "Attacking and Defending Gifts" *STEP Toronto* (June 18-19, 2015) at pp. 3-4.

[24] Shulchan Aruch Choshen Mishpat 201.

[25] Rabbi Ari Marburger, 'Estate Planning, Wills, And Halacha: A Practical Guide to Hilchos Yerusha' online at: <http://businesshalacha.com/en/publication/estate-planning-wills-and-halacha> at p. 15. Rabbi Marburger refers to Bris Avraham Choshen Mishpat 20, Lvush (Sefer Haorah Parshas Chayeh Sarah 24:10), Prisha Choshen Mishpat 99:20, Kneses Hagedolah 282:10, Erech Shay Even Haezer 50:6, Machaneh Yehuda Choshen Mishpat 282, Sdei Chemed 2 page 667, Kinyan Torah 2:77. See also Teshuvas Harosh 85:3 in support of the proposition that "Some *poskim* maintain that the restriction against redistributing one's estate applies only to testamentary transfers. However, a lifetime – or *inter vivos* gift (a gift that takes effect while the donor is living) – would not be subject to such restrictions." Note that according to Jewish law gifts to married women might be problematic because while the gift does not become property of the husband, he receives the right to make use of the gift, where it is a physical item, and to benefit in certain ways from its proceeds. See Shulchan Aruch Even ha'Ezer 85:7-8, Mishneh Torah Hilchot Zechiyah uMatanah 3:13, Ketzot haChoshen 249:1.

[26] A slightly different alternative to consider is the transfer of ownership of an asset from the testator himself to the testator and the proposed beneficiary in joint tenancy with a right of survivorship. That means that both joint owners can access this asset during their lifetimes and sole ownership passes to the survivor upon death of one of them. *Supra*, Rabbi Marburger; see also *Chidushay Rav Shlomo Teshuva* 8.

[27] *Supra*, Grunfeld at pp. 104-105.

[28] See Donovan Waters et al., *Waters' Law of Trusts in Canada*, 4th Ed (Toronto: Carswell, 2012) at Chapter 11. In summary, Canadian courts will impose a constructive trust to prevent unjust enrichment. Courts will do this when property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest. In such cases, equity converts the legal owner into a trustee.

[29] See Donovan Waters et al., *Waters' Law of Trusts in Canada*, 4th Ed (Toronto: Carswell, 2012) at Chapter 10. A resulting trust is a legal doctrine that is imposed to return property to the transferor who is entitled to it beneficially, from the transferee who has title to it. The beneficial interest 'results' back to the true owner.

[30] Carmen S. Thériault, ed., *Widdifield on Executors and Trustees*, 6th Ed. (Toronto: Carswell, looseleaf) at chapter 18 "Words and Phrases."

[31] See Rabbi Ari Marburger, 'Estate Planning, Wills, and Halacha: A Practical Guide to Hilchos Yerusha,' at para. 35, online: <http://businesshalacha.com/en/publication/estate-planning-wills-and-halacha>.

[32] *Supra*, Blumenfeld.

[33] *Re Marshall's Will Trusts*, [1945] 1 Ch. 217, *per* Cohen, J.

[34] This article was reproduced in Lindsay Ann Histrop, *Estate Planning Precedents*, 6.1 — Commentary: Estate Planning Issues.

[35] *Supra*, Blumenfeld.

[36] He uses attorney in the context of a lawyer – not attorney for property.

[37] *Supra*, Litman & Resnicoff, where the authors note: "One such suggestion is made by J. Porat, 'Kosher Revocable Trusts: The Jerusalem Trust Form,' on <www.jlaw.com/Articles/revocable.html>. A careful evaluation of the arguments made in that paper is beyond the scope of this article.

[38] Donovan Waters et al., *Waters' Law of Trusts in Canada*, 4th Ed (Toronto: Carswell, 2012) at Chapter 13: Trusts and Tax Planning – Revocable Trusts."

[39] Donovan Waters et al., *Waters' Law of Trusts in Canada*, 4th Ed (Toronto: Carswell, 2012) at Chapter 14 "Trusts and Tax Planning – Irrevocable Trusts - Discretionary Trusts."

[40] S*upra*, Litman & Resnicoff at p. 174.

[41] *Supra*, Litman & Resnicoff at p. 169.

[42] Mark S. Weintraub, 'Pre-Emptive Strike Restricting Attacks on the Trust' (2011), online: <https://www.cwilson.com/app/uploads/2011/09/pre-emptive-strike-restricting-attacks-on-the-trust.pdf>

[43] *Supra*, Schnurr:

> Certainty of intention will exist where the transferor of the property intended to create a trust. For certainty of subject matter to exist, the property which is subject to the trust must be clearly identifiable. Certainty of objects exists where the intended beneficiaries of the trust are ascertainable. See Donovan Waters et al., *Waters' Law of Trusts in Canada*, 2nd Ed. (Toronto: Carswell, 1984) at 108-27; *Bassano Growers Ltd. v. Diamond S Produce Ltd. (Bankrupt)* (1997), 214 A.R. 380, 6 C.B.R. (4th) 188, 1997 CarswellAlta 1182 (Q.B.); affirmed (1998), 66 Alta. L.R. (3d) 296, 6 C.B.R. (4th) 199, 216 A.R. 328, 175 W.A.C. 328, 1998 CarswellAlta 555 (C.A.).

[44] Charles B. Wagner and Adam Hummel, "Spence v. BMO Trust Co. - Should the Decision be Overturned at the Court of Appeal?" (2015) 9 *Estates and Trusts Reports* 34.

[45] The obligation to comply with the instructions of a healthy person who subsequently died is found at Shulchan 'Arukh, -Hoshen Mishpat 252:2: Regarding a declaration of a dangerously ill person, see Shulchan 'Arukh, -Choshen Mishpat 250:5; and Arieh Bloom, "Is He Dead Yet? The Laws of *Matanah Shechiv Meira* and *Donatio Mortis Causa*" *B'nai Brith Estates and Trusts Seminar* (June 21, 2016)

Supra, Litman & Resnicoff at p. 181. Also note that the authors explain that this *Halachic* provision for dangerously ill persons included "… oral statements of certain persons who were not dangerously ill as if they were made by dangerously ill persons. These included persons who were ill (but not dangerously ill) who expressly stated that their instructions were made in contemplation of death and people who spoke because of "actual or prospective danger, such as persons going out to battle, setting out on a dangerous journey, or awaiting execution."

[46] *Supra*, Litman & Resnicoff at p. 180 and their footnote 66, which refers to Grunfeld at pp. 103-105 in support of the proposition that a declaration of a dangerously ill person is effective without a *kinyan*. Grunfeld in his footnote 11 refers to the Talmud Gittin 13a, 15 a Baba Bathra 151a, 156b; and the works of certain rabbis who were the leading *halachic* decisors who lived during the 11th to 15th centuries, those being Maimonides Hil. Zekhiyah uMatanah 10:1; Sulhan Arukh, Hoshen Mispat 250:1

[47] The verbal declaration of a dangerously ill person resembles a legally enforceable concept called a gift *mortis causa*. As explained by Professor Waters: "For a gift *mortis causa* to arise there are three

requirements: 1. an intention to give immediately, but subject to the condition that absolute title shall vest in the donee only on the donor's death; 2. Delivery in the appropriate form, though in this case a chose in action can be given by delivery of the document by which it is represented, and; 3. a contemplation of death at the time of the intent and delivery." Donovan Waters et al., *Waters' Law of Trusts in Canada*, 3rd Ed. (Toronto: Thomson Carswell, 2005) at chapter 6 –"Constituting or Setting up the Trust, 6.XI — Exceptional Modes whereby the Trust Becomes Completely Constituted." While similar, there are a number of key distinctions between the concepts. Specifically, the *halachic* concepts contemplate an *inter vivos* transfer.

[48] *Supra*, Litman & Resicoff at p. 81.

[49] *Kirkham* v. *Kirkham Estate*, 1996 CarswellBC 1410.

[50] *Elcano Acceptance Ltd*. v. *Richmond, Richmond, Stambler & Mills*, 1989 CarswellOnt 742 at para. 4.

[51] *Braiden* v. *La-Z-Boy Canada Ltd*., 2008 CarswellOnt 3442 (Ont. C.A.) at para. 47. Gillese J.A. (Cronk and Sharpe JJ.A. concurring).

[52] *Supra*, Litman & Resnicoff at p. 176.

[53] See Andre Isaacson et al., *Halachic Implications of Death Wills & Inheritances* (Response Dynamic, 1991). This book is a compendium of articles on the topic of *Halachic* Wills. On page 6 of Rabbi Judah Dick's article, he references the Shulchan Arukh, Hoshen Mishpat, 252 and Kesubos 69b for this proposition.

[54] Assuming the property is treated as capital property.
[55] The transfer to certain types of trusts such as an *alter ego* trust or a spousal trust will avoid tax on the disposition.

[56] All of the statements above assume that all persons involved are residents of Canada for income tax purposes.
[57] See Charles Wagner, "Rabbi Moshe Feinstein and Halachic Wills" (2013), available online: <https://www.wagnersidlofsky.com/rabbi-moshe-feinstein-and-halachic-wills>.