



Lowenstein Sandler's Trusts & Estates Podcast: Splitting Heirs

Episode 24: Gimme That Old Time Religion—In my Will

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Warren Racusin: A very observant Jewish woman decides to marry. Her husband to be is a lawyer, a rabbi, and he's not very good at either of them, but he sure knows the rules of Jewish law. Several years and several children later, the wife decides she's had enough and begins divorce proceedings. The court grants the divorce, but there's a catch. In addition to a civil divorce, the wife needs a Jewish divorce, known as a get, if she ever wants to remarry. Her husband refuses to give it to her, so she's trapped in religious Never, Neverland. What can she do?

From the law firm Lowenstein Sandler, this is "Splitting Heirs". I'm Warren Racusin.

Estate planning is a financial and deeply personal exercise, but another way to look at it is as also a religious or a spiritual exercise. After all, it deals with what happens when, as Hamlet put it, we shuffle off this mortal coil to the undiscovered country from whose born no traveler returns.

In season one, we talked about the religious and legal rituals that come into play when someone dies, but different religions also have a lot to say about wills, trust, and inheritance, so let's take a look at God, the estate planner.

Lowenstein colleague and "Splitting Heirs" veteran, Bridget Harris, helps clients create plans that accomplish their personal and family goals, while obtaining significant estate gift generation, skipping transfer tax and income tax benefits. She works closely with clients on prenuptial agreements. I can say this from personal experience, Bridget takes a sensitive, yet a strategic approach to this often stressful process. I can say that as a colleague, not as a client, fortunately.

Stacy Singer is a national practice leader for trust and wealth advisory services at Northern Trust Company, based in Chicago. She oversees strategy and implementation of Northern's trust services across the country. Stacy's a lawyer with over 30 years' experience in trust and estates, and she's written about the role of religion and estate planning. And not for nothing, she has told me that she is a Detroit Tigers and

Chicago Cubs fan, this living in a town where a huge White Sox guy just became the Pope. Stacy, you better watch yourself. You know what I'm saying?

Stacy Singer: Very true.

Warren Racusin: Bridget, let's talk about our damsel in distress. She can just go to court and force her ex to grant her a get, right?

Bridget Harris: Probably not. On the facts you've stated, no, her chances here in court are pretty bad. The crux of the problem is that this is a religious divorce, and due to our First Amendment, courts generally will not compel someone to take a religious action that's viewed as infringement on their exercise of religion. There is some law on this in a few states. New Jersey has an old case in which the court did require the husband to grant the wife a get. Remarkably, its justification was that it was enforcing a contract, and the contract was their original religious marital contract, the ketubah. So difficult to understand that reasoning, and there is now newer case law saying "absolutely not," and at least one case in another state, Connecticut, citing this old New Jersey case and saying, "We're certainly not doing that." So not looking good, New Jersey, Connecticut.

New York has a statute aimed at this specific issue. It doesn't say anything in the text of the statute about Jewish law, or about a get, but legislative history makes it clear, they were looking to prevent this problem where a husband can vindictively refuse the get, or refuse it to exact economic concessions during the divorce. However, the statute has some real limitations. It only works if the husband is the plaintiff. The courts over time have become narrower in how they're using it, and there's a lot of commentary that it probably would be unconstitutional if challenged. Bad odds there.

Overall, it's an example of how American law, especially on an international comparative basis, is very protective of the right to be a jerk. Not good chances there, I'm afraid.

Warren Racusin: That's one of the implicit amendments to the Constitution. Even though the First Amendment was designed as a shield to protect the free exercise of religion, it can be used as a weapon in the wrong hands in a situation like this, as an example.

Bridget Harris: Correct. Now, there is a California case from 2002 in which the husband's refusal to grant a Get was found to be a form of coercive control and therefore a form of domestic violence. You can see that theoretically having some real potential, but so far, as far as we know, that case is unique.

Warren Racusin: Is there another way she could have gotten the court to force her ex to give her the Get?

Bridget Harris: So glad you asked. The way to avoid this situation is to sign a prenuptial agreement. A prenup can cover all sorts of topics; how your assets are divided on divorce, what happens on the death of one of you if you want, and it can cover this. It can say, "Look, if we get divorced, I'll grant you the Get." What this does is it turns a religious issue into a secular issue because husband has entered a legal secular contract saying he'll do this, and that makes it really clear that the court can come in and say, "You have a contractual obligation to do this. You've got to do it. Otherwise, you're looking at contempt of court, all sorts of issues."

If you're in a state that allows a postnup, I would imagine that works too. You can do this in a divorce or separation agreement, although those situations are often where the issue of using it as a control and financial abuse mechanism comes in. You want a prenup. You don't want to wait.

Warren Racusin: If you put that requirement into the prenup, now the court's enforcing a secular agreement, not enforcing some religious requirement.

Bridget Harris: Absolutely, and there are plenty of cases confirming that.

Warren Racusin: Now, Jewish women have taken this problem into their own hands in certain contexts. Give us a couple of examples of other ways to get to the result that's desired here.

Bridget Harris: Sure. At a broad level, there are some nonprofit organizations doing legal advocacy, public advocacy, on this issue, but as an individual woman facing this situation, you can't necessarily wait for policy change, and in the absence of legal recourse, the options are not fantastic. The self-help options here are a little problematic, some worse than others. On the less problematic end, there's at least one, a social media advocate... very interesting New York Times article about her recently... who has taken up this cause. She helps individual Jewish women who are in this situation. The term for that is agunah, plural agunot. She helps them, for example, via a name-and-shame approach to the husbands, giving them this notoriety online, even staging protests outside their houses depending on the situation, and this works.

She has also done broader public policy advocacy campaigns. She did one in which she asked for Orthodox women to send her photographs of various body parts, they are forbidden to show in public, and she posts those. These are eye-catching photographs of various body parts. And the name of the campaign was "Get Naked," which is just one of those puns that was simply meant to be. This campaign had its critics, even among the rest of the advocacy community, but she got a lot of engagement from the community, and that to me really says something about some pent-up opinions that are probably there.

And just moving along the scale of self-help to the really unappealing options, there is a federal criminal case out of New Jersey in 2015 where three Orthodox rabbis were convicted of conspiracy to commit kidnapping. There were some other convictions and a ton of guilty pleas

as well for a scheme in which they charged Jewish women's families up to \$100,000 to kidnap and torture the husbands until they agreed to grant their wives a Get. We're talking about cattle prods and worse here. This in a lot of cases worked. However, I'll note that the charges here are conspiracy charges, which means you as the customer, face some real legal risk. Maybe you turn state's witness, and you testify for the federal government, although you'd be testifying against guys who torture people for a living. This technique has real problems. We don't recommend it. We would direct you back to the prenup option if at all possible.

Warren Racusin: Baseball bats and knees is not an approach that we would recommend.

Bridget Harris: It's not plan A.

Warren Racusin: Let's look at another area where religion and planning sync up, or maybe not. Can a will require beneficiaries to marry inside their own faith as the price tag for receiving an inheritance?

Bridget Harris: Maybe. Several questions. Your biggest question here is whether state law is going to enforce that restriction, because you can say whatever you want in your document, but if a beneficiary can go to court and say, "No, no, this doesn't work," and the court won't enforce it, it's not worth anything.

The big reason to be concerned about this type of provision involving marriage within the faith is imagine a potential beneficiary who, when you die, has already married outside the faith. Now, they are married outside the faith, so they are disinherited. So now they have what? They have a big financial incentive to get divorced. And if there's one thing that states hate on a public policy basis, it's divorce. Any state court pretty much will say encouraging divorce is against public policy, and that really puts these provisions in jeopardy.

There are, however, some instances in which this kind of provision has been successful. There's an important Illinois case in which a restriction like this was enforced and it did inherit some of the testator's descendants. I'll say that case is narrow in some ways. The provision was, as you said, in a will, and by that I mean not in a trust. And that was crucial to the holding, and with more and more people utilizing trusts in their estate plan for very good reasons, maybe this case doesn't help you as much.

You've got practical problems as well with this approach, for example, finding a trustee. I've seen at least one institutional trustee run screaming from a matter because we have a similar kind of provision in there, and it scared them and they didn't want any part of it.

You've also got, depending on what you say, do you say you have to marry a Jewish person? Well, what definition of Jewish person are you using? Who's going to decide that? Maybe a secular court doesn't want to decide that. You sometimes see instruments say, "If there is any doubt

about the interpretation of this provision, you go to X, Y, Z religious authority, Beit Din of America," whoever, and it's difficult to think of a better approach. I haven't seen it play out in practice. I wonder if it would look messy in practice even so.

Warren Racusin: A Beit Din being a Jewish religious court. The other practical problem is that you're kind of ruling from the grave at that point in ways that may create more problems than they solve. If a client insisted on having a provision like that, we wouldn't tell them that you can't do it, because the law is a little unclear. I think you and I probably try to talk them out of it, right? Creates more problems than it solves.

Stacy, religion has some interesting things to say about inheritance, and some of them go a long way back, at least all the way back to the Book of Numbers in the Old Testament. I always say one way to look at the Old Testament is that in one way, it's a story about a family in the real estate business and how they slice up the pie. There's some pie slicing that doesn't go over big with some of the slicees.

Stacy, tell us the story of the daughters of Zelophehad.

Stacy Singer: Yeah, this is a great story. So Zelophehad was killed in a battle, and he left only daughters, and his daughters wanted to inherit. The tribe was not thrilled with this idea, so the daughters went to Moses, who it seems to me should have had more important things to do at the time, but went to Moses and said, "Moses, we really think that we should inherit."

Warren Racusin: Because the rules of the road back then were that only sons could inherit, right?

Stacy Singer: Correct. Only sons could inherit. Moses went and asked God, who I really think had better things to do than figure out this dispute, went and asked God, and God said, "You know, they have a good point. I think they're right. They should be able to inherit. There's no sons, only daughters." Moses says to them, "Yep, you can inherit." Then the tribe that they belong to says, "Wait a minute, these daughters, if they inherit, can then marry outside of the tribe, and our tribe then loses real estate. That doesn't seem fair to our community." So amazingly, Moses goes back to God and says, "Okay, now what am I supposed to do?" And God says, "Another good point. The daughters, if they want to inherit, have to marry within the tribe."

The idea of sons having priority, but daughters being able to inherit in Judaism goes way back, and there is a lot of history behind that. There is also a longstanding tradition that the oldest son gets a double portion. I learned about this when my oldest brother informed me of it at a very young age. I'm not sure what he thought he was going to get, but he's always held over my head that he would get twice as much as I did.

Warren Racusin: Wait, your brother has brought up to you the double-portion rule?

Stacy Singer: Honest to God.

Warren Racusin: What impact has this had on your relationship with him?

Stacy Singer: None, because I know my parents and it didn't work. But it was an amusing thing that I have no memory of not knowing that rule because my oldest brother would tease me about it.

Warren Racusin: You got to give the daughters of Zelophehad a fair amount of credit. It must have taken a certain amount of guts to go to Moses, who was the man, and say, "Hey, this just doesn't seem right." And you got to give Moses some credit too because, again, he probably did have some more important things to do, but maybe he didn't. Maybe this is so important that he said, "Listen, I got to go talk to the big guy and get a ruling on this." You have to give everybody a little bit of credit for it.

Stacy Singer: I think that the most important thing to take from this is how much people have always cared about what they're going to inherit or not inherit. It really shows that this is such a deep-seated concept for us of what we're going to take from our parents and what we're allowed to take, and can someone stop us from taking something? That's really the power of the story is this idea that going all the way back, people have really cared about what it was they could inherit.

Warren Racusin: This comes up in other areas of Jewish law and laws of other religions that we're going to talk about. Let's talk about this double portion rule and the rules of Jewish inheritance because they're really interesting and there are some interesting workarounds that people have developed to deal with them. Talk to us about that a little bit.

Stacy Singer: Yeah. The Jewish way of inheritance actually goes solely on down the father's line. It's first sons, and as I said, the oldest gets a double portion. There are no sons; it's daughters, and then it goes to their father, then a brother, then a sister, then a grandfather, an uncle. It goes all the way down the line, mostly male.

If you notice, I never mentioned the wife, which seems like a glaring omission. Husband dies; there's nothing in Jewish law that says leave to the wife, but there is a reason for that. What the rabbis have said is that the wife is entitled to either a fixed amount under a prenuptial agreement. I'd like to add that means that under Judaism, there were prenuptial agreements going way, way back. Or, she's entitled to support for the rest of her life. That can be interpreted very broadly to essentially mean all of the assets should be available for whatever it is she might need.

Now, that's not as good as owning it. She can't decide where it goes at her death. She can't give gifts, but in theory, she can live a pretty nice life while she's alive and still have a right to all of that money and maybe keep her kids or others from getting that money while she's around, depending upon how active she wants to be in making that argument.

Warren Racusin: So even though she can be relatively well taken care of, those set of rules are very different than the typical estate plan, if there is such a thing as a typical estate plan, the typical estate plan that all assets go to or for the benefit of the surviving spouse, and then at the surviving spouse's death onto children. Doesn't matter whether they're sons or daughters, right? If you prepare a typical secular estate plan, you are technically running afoul of the religious rules about how you're supposed to design your estate, and that might give some observant people pause as they think about what's going to happen in the world beyond. What are the workarounds?

Stacy Singer: There are two workarounds. There's the easy one and there's the more interesting one. The easy one is that most rabbis would tell you that a living trust is not subject to these rules, that it's only a will. Oftentimes you'll see very observant Jews put their assets largely into a living trust and not worrying about it. However, even very observant Jews generally would want something to pass under their will that complies with very strict Jewish law and follows all the very strict rules; nothing for the wife, a double portion for the oldest son, and it might just be a thousand dollars.

The other option is what's known as a conditional shtar chov. Essentially, think of this as kind of like an in terrorem clause, in other words a clause that says, "If you dispute my estate plan, I'm cutting you off." This is kind of a Jewish version of that and here's how it works. Husband creates an estate plan, a secular estate plan, just like you mentioned, and at the same time creates a debt. That debt is equal to more than all of the assets in his estate, and that debt is due a second before he dies, and it leaves everything to his wife, or some other individual, not his heirs under Jewish law. Then his heirs have a choice. Either they can demand that it go according to Jewish law, and then the debt has to be paid first and they get nothing, or they can allow it to pass under the estate plan and end up with whatever they get under the secular documents.

Now, just like an in terrorem clause, that only works if they're inheriting something under the secular will. If you're cutting them out under both, then you're just asking for a fight. If they're getting something under that secular document, then it's to their advantage to let that secular document go into force, as opposed to having this debt paid off a second before death. That means there's nothing left to pass according to Jewish law.

Warren Racusin: You're worth \$10 million. You create an IOU to the people whom you want to have inherit your assets in secular land, an IOU for 10 million and 1 dollar. And that debt, that IOU is payable a second before our hero dies. The assets as a matter of the IOU belong to your intended beneficiaries, and then your religious beneficiaries have a choice. They either take under the laws of inheritance, which means they don't get anything because it's a debt that wipes out the inheritance, or they got to live with the estate plan.

Stacy Singer: Exactly.

Warren Racusin: It's very Talmudic, isn't it?

Stacy Singer: It really is. There's an old saying, "Two Jews, three opinions." I feel like this is a solution absolutely created in that kind of environment.

Warren Racusin: The rabbis are okay with this?

Stacy Singer: The rabbis are okay with it, but they would generally tell you that you should still leave something according to Jewish law. Actually, the documents for this can be found on the website for the Beit Din of New York, which is kind of the group of very Orthodox rabbis in New York. This is absolutely something that the rabbis are comfortable with as sort of a workaround for people who don't want to have all their assets go according to the traditional Jewish laws.

Warren Racusin: These laws, which are thousands of years old, you can now access on a website.

Stacy Singer: You absolutely can.

Warren Racusin: Remarkable. There are other religions who have interesting rules about inheritance also. Tell us about those a little bit.

Stacy Singer: Yeah, so the one that I want to really spotlight is Islam, and Islam is very interesting. There's a lot of echoes of what we just talked about with Judaism in Islam. It's kind of a layer on top, without being disrespectful, but they still honor the Old Testament and the New Testament, as well as the Quran.

One thing that's unique about it is that the first third for a Muslim is called the wasiyyah bequest, and that's an amount of money that a Muslim can give to anyone. It doesn't have to be a family member. It can be a charity. It can be a friend. It can be their spouse. It can be anyone they want. Then the next set of money has to go in specific proportions. The next set of assets has to go to the Quranic heirs, and that's people like the spouse and the children and parents and siblings, in a very complicated way that you should just look online to get all the details of it. Then the balance, whatever is left after this very specific calculation goes to what they call the nearest male agnate. What that means is the son gets the residue. All of the other relatives get specific proportions, and the sons get the residue. It's a really interesting way to break out who gets what, because the Quran only details what happens and how much people should get for everyone other than the sons or the nearest male agnate. It's a fascinating way of thinking about it.

Now, I want to point out one other thing I think is really interesting. When you look at how Islam treats spouses compared to, for example, what we just talked about with Judaism, Islam was actually a step forward because the wife is entitled to either a quarter if there's no children or an eighth if there are children, and in addition to that, she keeps all her own property. She keeps the mahr, which is like a dowry. The husband has to pay all

the expenses no matter how wealthy the wife is. The wife keeps income she earns from a job and any interest or other income that her assets earn. If she gets divorced, she gets the rest of her marriage gift, and if she gets divorced, she has to be supported until she remarries. She actually does pretty well because she gets a proportion during life, she keeps all of her own stuff, and husband has to pay all the expenses. Now, it's not as good as a bigger proportion, but it's certainly, I would say, a step forward from what the traditional Jewish rules would say.

Warren Racusin: There's more protection for the wife in Islamic law than there is in very observant Jewish law.

Stacy Singer: Yes. Very observant Jews would say the wife is entitled to support.

Warren Racusin: Sure. Okay.

Stacy Singer: But in terms of having the ability to have her own money and control over her money, absolutely Islam gives much more control because there's an outright gift and she gets to keep everything she has, plus some.

Warren Racusin: It's an interesting combination of Western concepts that you can leave assets to whoever you want and a certain amount of forced heirship and a certain amount of son primogeniture. It's kind of a mix of all the three.

Stacy Singer: It absolutely is. Based on what I've said, you can also see why if you are a Muslim, you want to make sure that you have an estate plan that doesn't rely on secular law, because the way secular law would pass in no way fits with what I just explained. You really want to be sure, and this is really true for Jewish law as well, that you have a good estate plan that lays out how this should be done, in particular if you want to be very strictly in accordance with religious law.

Warren Racusin: And are the rules the same under both Islamic and Jewish law if it's the wife who is the decedent?

Stacy Singer: Jewish law actually says nothing about if the wife is the decedent other than if the husband allows her to, she can create an estate plan, and he has to consent to what she does. The presumption is that there is no assets that are going to be in the wife's name because she couldn't inherit anything. For Muslims, and I want to just say this is only based on my understanding, but a Muslim woman can also create an estate plan because she's presumed to have assets. She got the marriage gift. She can keep her own assets if she earns money. There is an expectation, to an extent, that she's going to have some money that she can also distribute, again, this one-third to whoever she wants, and then according to Sharia Law, and then finally to the nearest male agnate.

Warren Racusin: Well, hopefully people feel a bit more blessed after listening to this. Certainly, everybody's more knowledgeable. Thank you, Bridget. Thank you, Stacy for all of your thoughts. I think we've learned a lot today. Thanks to everybody at Lowenstein and at Good2bSocial who make

these podcasts possible and help so much with putting them together. Most of all, thanks to all of you for listening. We'll see you next time. Till then, as we say in these parts, have a good one.