

The Omitted Spouse: New Estate Planning Techniques for Jewish Clients

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INTRODUCTION

There are approximately six million people in the United States who consider themselves Jewish or affiliated with Judaism.¹ Therefore, an estate planner—especially one in a major urban city—may encounter a client who wants her will to comply with Jewish law.² Several Rabbis have claimed that failure to ensure that heirs comply with the *halakha* of inheritance is itself a violation.³ Correspondingly, a lawyer should become informed so that she does not herself violate Jewish law in preparing a Jewish client’s estate.⁴ Alternatively, a Jewish client may consult an attorney to make sure that her acceptance of a gift or bequest does not violate Jewish law.⁵ But unfortunately,

as this Article will demonstrate, the mandates of Jewish inheritance law do not always fit neatly within the modern requirements of wills and estates law. Virtually every state provides some form of protection for the inheritance expectations of surviving spouses in the form of either an elective share or a vested interest in community property. These protections may override a testator's express intent and thwart his or her *halakhic* estate plan.

Scholars have discussed what Jewish inheritance law requires from a testator and how it can be accomplished in the modern U.S. legal context.⁶ However, there has not yet been an inquiry into how surviving spouse statutes can invalidate a Jewish testator's will and what can be done to prevent it. Although traditional Jewish wives who strive to live by *halakha* are unlikely to attempt to upset their husband's estate plans, there is no guarantee that a modern Jewish wife will do so.⁷ This Article explores options that comply with both secular and Jewish law, with the goal of creating a estate plan that cannot be disturbed by a surviving spouse.

There are three major themes this Article does not attempt to address. First, this Article does not question the validity or prudence of Jewish inheritance law. This Article is not intended for those who dispute the underlying logic, philosophy, or *halakha* itself, regardless of the merits of their contentions. Second, and closely related to the first point, this Article is not a defense of the Jewish law of inheritance. Much of the way Jewish inheritance is currently formulated is anachronistic in our modern society—especially with regards to women,⁸ equality,⁹ and same-sex marriage. Discussing how Jewish law fits within a modern society is vitally important, but it is not within the scope of this Article. Third, this Article does not discuss the tax implications that may arise from these estate planning arrangements—and the implications can be dramatic. As always, consultation with a qualified tax professional is the best practice.

Part I briefly introduces the history and background that sets the stage for the issues that are addressed in this Article. Section I.A explains the evolution of Jewish inheritance law from biblical origins through Talmudic developments. Section I.A.3 examines women in Jewish inheritance law and the important protections of the Jewish marriage contract. Section I.B discusses how states have viewed family protections in estate law, tracing the evolution from dower and coverture, to the traditional elective share, and finally to the modern augmented elective share. This Section also covers the alternative development of the community property states. Next, Part II determines how the requirements of Jewish inheritance law interact and conflict with secular inheritance law. Part II examines the traditional estate planning strategies employed to comply with both secular law and *halakha*. This Part also features an explanation for why these strategies are vulnerable to surviving spouse statutes. Lastly, Part III explores new estate planning strategies that are less susceptible and can be used on their own or in combination with the traditional strategies.

I. BRIEF SUMMARY OF THE RELEVANT HISTORY AND BACKGROUND

A. THE EVOLUTION OF JEWISH INHERITANCE LAW

1. Biblical Origins

The intricacies of Jewish inheritance can only be understood through the lens of the family. Within the creation story of Genesis it is stated that “a man shall leave his father and his mother, and cleave to his wife, and they shall become one flesh.”¹⁰ Rabbi Shlomo Yitzchaki’s¹¹ (1040–1105 CE) comment for the phrase “they shall become one flesh” explains that “[in children, both parents] flesh becomes one.”¹² Dayan Isidor Grunfeld¹³ (1900–1975 CE) considered this family-centric perspective to be fundamental:

The right to inheritance as well as the order of succession flow from the concept of the unity of the family. The family as a religious, moral and sociological unit is concerned not only with the relationship of husband and wife, parents and children and the latter's education, but with the acquisition of financial means to create the where-withal for life's physical sustenance which is necessary for the achievement of life's spiritual aims. When the father and bread-winner dies, it is therefore essential and considered a natural law that the worldly goods he has acquired in his lifetime should be passed on to the members of the family who continue his life's purpose.¹⁴

The laws of succession in ancient Babylon and Assyria were distinctly patrilineal.¹⁵ The evidence also suggests that inheritance in that region generally favored males and gave the firstborn son a larger share.¹⁶ Since Abraham and his family left Ur in Babylon approximately around this time,¹⁷ it is not so surprising that they may have carried this patrilineal quasi-primogeniture approach with them.¹⁸ Indeed, Jewish law still commands a male testator to offer his firstborn son a double share (*i.e.*, double the share that each brother will take),¹⁹ but the firstborn may disclaim this.²⁰

One of the first explicit reference to succession in the Tanakh is in the story of the daughters of Zelophehad.²¹ After the death of their father Zelophehad, with no male to take the estate, his five daughters gathered before Moses and asked "Why should our father's name be eliminated from his family because he had no son? Give us a portion along with our father's brothers."²² Although the law intuitively "ought to have been written through Moses," Rashi writes that "[t]he law eluded him"²³ and so Moses "brought their case before the Lord."²⁴ The response, perhaps startlingly, was: "Zelophehad's daughters speak justly. You shall certainly give them a portion of inheritance along with their father's brothers, and you shall transfer their father's inheritance to them."²⁵ It was as if "[the daughters'] eye perceived what Moses' eye did not."²⁶

Immediately after this announcement, the Lord clarifies the general laws of succession:

If a man dies and has no son, you shall transfer his inheritance to his daughter. If he has no daughter, you shall give over his inheritance to his brothers. If he has no brothers, you shall give over his inheritance to his father's brothers. If his father has no brothers, you shall give over his inheritance to the kinsman closest to him in his family, who shall inherit it.²⁷

The Mishnah further clarifies that

the son has preference before the daughter, and the same is the case with all the descendants of the son, who also have preference before the daughter. The daughter has preference over the brothers of her father, and the same is the case with her descendants. The brothers of the deceased have preference over the father's brothers, and the same is the case with their descendants.²⁸

A few observations and issues are readily apparent. This appears to be a parentelic system; that is, closer ancestors and their descendants take priority over more remote ancestors and their descendants, regardless of the degree of relationship.²⁹ One initial question was over cases when the decedent has both a daughter and a granddaughter of a predeceased son.³⁰ The Talmud definitively concluded that the daughter of the predeceased son has priority over a daughter.³¹ Another major dispute was that female descendants of the decedent's brothers or uncles are not mentioned at all.³² Is it implied that they inherit or are only male descendants of these relatives intended to take the estate? Rabbi Shmuel Shilo³³ (b. 1936 CE) claims that it *is* a pure parentelic system after the decedent's descendants, "conferring the right of inheritance on *all* the kin of the deceased in the [paternal] line...."³⁴ On the other hand, Dayan Grunfeld claims that the *halakha* has a patriarchal priority: (1) the decedent's sons and their descendants; (2) the decedent's daughters and their descendants; (3) the decedent's father; (4) the decedent's brothers and their descendants; (5) the decedent's sisters and their descendants; (6) the decedent's grandfather; (7) the decedent's uncles and their descendants; (8) the decedent's aunts and their descendants; *etc.*³⁵

Grunfeld's claim is supported by the Talmud. Permitting female ancestors and female descendants of ancestors to inherit equally with their male counterparts would be inconsistent with the Talmudic conclusion that a mother's relatives are not regarded as "family" for purposes of inheritance.³⁶ As introduced above, *Num. 27:11* states that "[if a man's] father has no brothers, you shall give over his inheritance to the kinsman closest to him in his family, who shall inherit it." But the original Hebrew word אָרָם in that verse can be translated neutrally as "relatives" rather than "kinsman,"³⁷ so one might logically argue that a decedent's uncles *and* aunts should take equally.³⁸ The Mishnah rejects this proposition, providing that "the family of the mother is not regarded [as the proper] family...."³⁹ Rabbi Moses ben Maimon⁴⁰ (c. 1135–1204 CE) puts it simply: "With regard to the concept of inheritance, the family of a person's mother is not considered family. Inheritance is relevant only with regard to one's father's family."⁴¹

However, it must be noted that a female descendant has a right to maintenance from the estate and a right to inheritance in the absence of a male descendant. For further discussion, see Section I.A.3 below.

2. The Talmudic Development of *Inter Vivos* Gifts

With certain types of testamentary dispositions prohibited (*i.e.*, to wives, to daughters if there were also sons), Jewish testators quickly turned to *inter vivos* gifts to accomplish their dispositive plans:

"Gift" was an excellent means of disposition in contemplation of death without, formally, infringing the Pentateuchal law of succession. Once family property had given way to individual property (and this stage had been reached in Jewish law fairly early), nobody was bound to leave any inheritance to his descendants. On the contrary, although popular opinion might be opposed to such transactions, an owner of property could freely alienate, whether by sale or by gift. He would presumably make use of the freedom to

dispose by gift where he thought that the law of succession was causing hardship (*e.g.* by depriving the daughter of any share in the inheritance), or where he did not want the inheritance to fall to a son whose behavior was not to his liking (שלא היה נוהג כשורה). In this manner he avoided the odium—and the legal consequences—of having acted in contravention of the Law (מתנה על מה שכתוב בתורה).⁴²

This concept of donative disposition did not originate in the Bible, but was taken from the legal systems of neighboring (and sometimes invading) nations.⁴³ It is important to be clear about the term “gift” in Jewish law because it is something of a misnomer. Jewish law does not recognize any kind of unilateral disposition.⁴⁴ Rather, a “gift” is a bilateral, cooperative action between a donor and a donee.⁴⁵ The donee must acquire the gift through a *kinyan* (קניין),⁴⁶ or no valid gift has occurred.⁴⁷ If the donee must acquire the gift, it follows that the donor must actually own the gift. In Jewish law, conveyances in contemplation of death are limited to things “in the... donor’s ownership at the time of the transaction.”⁴⁸ In general, in Jewish law there are two types of gifts in contemplation of death: the *mattanah* (מתנה) and the *deyathiki* (דייתיקי).⁴⁹

A *mattanah* is an irrevocable gift in which the donor retains an interest akin to a life estate.⁵⁰ This means that “ownership is immediately transferred to the donee, [while] use and management are retained by the donor.”⁵¹ Note that the irrevocability of a *mattanah* does not mean that the interest conveyed cannot be conditioned.⁵² But to the contrary, Dayan Grunfeld claims that a *mattanah* may be made revocable by one of four ways:

- (1) [The donor] expressly mentions such a condition in the written deed.
- (2) [The donor] writes in the Hebrew deed the following words:
אם לא אהדרי בי במשך כל ימי חיי תהיה המתנה מעתה ומעכשיו,
“Provided I do not revoke this gift during my lifetime, it shall be operative from now.”
- (3) [The donor] inserts in the Hebrew deed the following words:
אם לא תמצא אח"כ שטר מתנה אחר, יהא שטר זו כחו יפה,

“If there is no later deed of gift in this respect, the present one is to be considered valid.”

(4) [The donor] writes:

הקנין יחול מעתה ועד שעה אחת קורם פטירתו,

“The form of acquisition is to apply from now until one hour prior to my death.” In such case, the *kinyan* becomes finally operative according to Jewish law during the last hour of the donor’s life, which means that he no longer has the right to revoke his gift.⁵³

Although Dayan Grunfeld provides no citations to support his suggested methods, there appears to be substantial support for methods (1) and (4).⁵⁴ Litman and Resnicoff approve of using methods (2) and (4), and suggest the phrasing “This transfer is from now and until one moment before I die” for method (4).⁵⁵

A *deyathiki* originates from the Greek word *diathiki* (διαθήκη), meaning a “disposition in contemplation of death.”⁵⁶ The original Greek formulation of *diathiki* was a revocable written document expressing the donor’s desire for continued life and health and then providing a disposition to take effect in the event of the donor’s death.⁵⁷ Thus, at first, a *diathiki* was merely a revocable gift conditioned upon the donor’s death and granting the donee a mere inchoate expectation until that time.⁵⁸ However, when the Tannaim⁵⁹ borrowed the concept from the Greeks, they restricted its use solely to dangerously ill persons who are *shekhiv mera* (שכיב מרע).⁶⁰ The Tannaim also limited revocability after delivery of the *deyathiki* to cases where the *shekhiv mera* donor recovers.⁶¹

What qualifies as *shekhiv mera*? It literally means “lying ill,” which conveys its meaning well because it requires a person to be bedridden.⁶² The length of time a person must be bedridden before attaining the status of *shekhiv mera* is not clear, but it appears to vary with the seriousness of the illness.⁶³ As a guideline-cum-rule, it is after 3 days.⁶⁴ Anyone who is not *shekhiv mera* is *bari* (בריא).⁶⁵

The early Amoraim⁶⁶ relaxed the structure and formalities of the *deyathiki*. First, they began to permit oral *deyathiki*.⁶⁷ Second, there was no insistence on actual delivery in completing the *kinyan* acquisition requirements.⁶⁸ Instead, as long the *deyathiki* is observed by witnesses who deliver a written copy to the donee, then it will be treated as if there has been proper delivery and acquisition.⁶⁹ Third, the Amoraim changed revocability rules. Under the Tannaitic interpretation, a gift made by a *shekhiv mera* was valid so long the donor retained at least *some* of his property.⁷⁰ But the Amoraim interpreted the same provisions to mean that a *deyathiki* gifting some (but not all) property was irrevocable, even if the donor recovered.⁷¹ Further, in another departure from the previous views of the Tannaim, the Amoraim eventually concluded that a *deyathiki* was freely revocable by the donor, even if the donor never recovered.⁷² Fourth, since the distinctions between *deyathiki* and *mattanah* had been substantially reduced and replaced by the distinction between *bari* and *shekhiv mera*, the Amoraim began referring to the gifts as *mattanah shekhiv mera* and *mattanah bari* respectively.⁷³

3. Women and Jewish Inheritance

Since a Jewish wife cannot inherit from her husband, it may seem at first glance that a widow is destined to be destitute. Nothing could be further from the truth. Although ancient Jewish traditions may have treated wives with more equality in regards to inheritance,⁷⁴ a gradual evolution took place and the husband become the sole heir.⁷⁵ However, merely because a wife cannot inherit does not mean that she is unprotected.

This Article would be incomplete without a review of marriage, because the institution dramatically changes the perception of Jewish inheritance law. Most Jewish couples enter into a marriage contract called a *ketubah* (כתובה).⁷⁶ Although historically the *ketubah* was a complicated and unique document,

[t]he function of the *ketubah* in our day is practically no other than to perpetuate an ancient tradition. Its effectiveness in actual questions of law, even Jewish law, is very slight, since it is stereotyped and reduced to the very minimum of specifications. Every *ketubah* is exactly like every other *ketubah*.⁷⁷

The main component of the *ketubah* is the *mohar* (מֹהָר), which is a man's promise to pay his wife upon divorce or his death.⁷⁸ Another is the *mattan* (מַתָּן), which are voluntary gifts to the bride.⁷⁹ Like *mohar*, the *mattan* have become inchoate promises that are effective upon divorce or the husband's death.⁸⁰ If the husband chose to pay the *mattan* immediately, it became part of the dowry that was shared between the couple.⁸¹ He could make the *mattan* the bride's sole property under a special deed called a *shetar mattanah lehud* (שֵׁטֶר מַתָּנָה לְחֹדֵד).⁸² These two clauses became regarded as "providing for the bride against the eventuality of being widowed or divorced."⁸³

Biblically, after the husband's death, the wife's right to maintenance from the estate depends on if there were children to the marriage: "if there is no issue, she is completely excluded from her husband's family, without claim upon his estate for her maintenance; if there is issue, she is supported by the heirs."⁸⁴ But fortunately, this has been avoided in Talmudic Jewish law through a clause in the *ketubah*.⁸⁵ Unless she has waived her claim to support, a widow is entitled to the family homestead and the same standard of living as she enjoyed during her husband's life.⁸⁶

Another *ketubah* provision called the *ketubat benan nukban* (כְּתוּבַת בְּנֵי נֹקְבֵינָן), provides that "female children which thou shalt beget by me shall dwell in my house and be supported out of my estate (and be clothed at my expense) until they are married."⁸⁷ This clause only applies where the daughters do not inherit the estate.⁸⁸ But even absent this clause, a father is obligated to maintain his daughters until they reaches the age of majority or become married.⁸⁹ In fact, the Mishnah states: "If a man dies and leaves sons and daughters, if the estate is large, the sons inherit

it and the daughters are maintained [from it,] and if the estate is small, the daughters are maintained from it, and the sons can go begging.”⁹⁰

These benefits are not insubstantial; one scholar argued that “the benefits the *ketubah* provides the wife and daughter after the husband’s death ‘far exceed the wildest imagination of anyone who has ever dealt with dower or its Anglo-American equivalents.’”⁹¹ In summary, although the strategies discussed in Part II and Part III can be used by husbands to leave their wives with very little, to do so would be a gross violation of Jewish law.

4. Modern Jewish Inheritance

As Jews were dispersed throughout the world they often became assimilated into the societies around them. But with this assimilation came some abandonment of Jewish law and culture, including Jewish inheritance law.⁹² While some Jewish scholars have attempted to use *Dina d’Malkhuta Dina* and other doctrines to catalyze the evolution of Jewish inheritance law, this has not always been universally approved or appreciated.⁹³

So, although a testator’s will must comply with his or her applicable state statute, “[m]ost Jewish law authorities do not regard a secular will, or secular intestate law [for that matter], as binding under Jewish law....”⁹⁴ A person who takes under a secular statute or secular will “may, under Jewish law, be guilty of theft.”⁹⁵

At some point in this maze of obscurity, a drafter is likely to wonder how an estate plan that simply ignores *halakha* will be treated in Jewish law. The general rule is that a stipulation is void if it is made contrary to what is prohibited in the Torah: “[If] any one said, ‘my firstborn son, shall not receive a double portion,’ [or] ‘x, my son, shall not be heir with his brothers,’ his instructions are disregarded, because he made a stipulation [which is] contrary to what is written in the Torah.”⁹⁶

Maimonides also writes:

Although all that is involved is money, a person may not give property as an inheritance to a person who is not fit to inherit, nor may he exclude a rightful heir from inheriting. This is derived from the verse in the passage concerning inheritance, *Numbers 27:11*: “And it shall be for the children of Israel as a statute of judgment.”...

Therefore, if a person states: “So-and-so is my firstborn son, he should not receive a double portion,” or “My son so-and-so should not inherit my estate together with his brothers,” his statements are of no consequences. Similarly, if he says: “Let so-and-so inherit my estate” when [he] has a daughter, or “Let my daughter inherit my estate” when he has a son, his statements are of no consequences. Similar laws apply in all analogous situations.⁹⁷

This means that a testator cannot merely use a secular will to alter the order of succession in the Torah.⁹⁸

B. THE EVOLUTION OF SURVIVING SPOUSE PROTECTIONS

1. Common Law Dower and Curtesy

With one exception, every state provides a surviving spouse some form of protection against disinheritance.⁹⁹ For most states, this protection was historically contained in the form of common law dower and curtesy.¹⁰⁰ Under dower, which traces its roots back through English common law to Germanic antiquity,¹⁰¹ a widow was generally entitled to a life estate in one-third of her deceased husband’s real property that he owned in fee at any time during the marriage.¹⁰² Subject to a few exceptions, the widow could not be deprived of this interest¹⁰³ and her claim to the estate took priority over almost all others.¹⁰⁴ Similarly, under curtesy, a widower was generally entitled to a life estate in all of his deceased wife’s real property that she owned during the marriage, provided that the couple bore a child.¹⁰⁵ The usage of curtesy in the United States also arrived through English common law, but origins beyond that are harder to identify.¹⁰⁶

Although dower and curtesy provided some protection for surviving spouses against disinheritance, it was also a deeply flawed system:

First, a life estate in one-third (or even one-half) of the decedent's property may be woefully inadequate to support a surviving spouse, especially if the estate is small and the spouse has little property of his or her own.

Second, since dower traditionally attaches only to land owned by the decedent, it offers no protection to the extent the decedent's accumulated wealth takes the form of intangible personal property. Even with respect to land, dower can be circumvented fairly easily by acquiring the land indirectly through a real estate holding company

Third, dower makes it necessary for a prospective purchaser of land to ascertain the seller's marital status. This creates additional expense and uncertainty in title searches, and ultimately impairs the value and marketability of land.¹⁰⁷

Further, land shackled by surviving spouses with life estates was a significant burden on transferability. Since dower and curtesy interests remained attached even if the property was transferred or mortgaged during the owner's life, this could be quite a severe limitation indeed.¹⁰⁸

2. The Elective Share

Today, common law dower and curtesy have been abolished, with the exception of a few states that have adopted statutory versions of dower that disregard the gender of the surviving spouse.¹⁰⁹ Most states adopted (and still have) the elective share system, in which a surviving spouse may elect to disclaim any testate interest he or she may have and instead take a statutorily set portion of the decedent's estate.¹¹⁰ The exact share differs, but is typically one-third.¹¹¹

As any student of an introductory physics course will tell you, for every action there is an equal and opposite reaction.¹¹² Once states began demanding a share from decedents' estates for surviving spouses, testators turned to *inter vivos* gifts and non-probate assets to accomplish their testamentary goals. Apparently, "legislatures... [believed] that a man's hesitancy to impoverish

himself during his lifetime [would] overcome any desire he might have to impoverish his widow after his death.”¹¹³ Sadly, this belief was misplaced—between 1900 and 1958, the number of cases involving evasion of the statutory inheritance protections more than quadrupled.¹¹⁴

Courts reacted almost immediately, sniffing for any hint of “fraud on the marital right.”¹¹⁵ Three approaches emerged to deal with the issue, each separate but conceptually rather messy: the illusory transfer doctrine; the fraudulent transfer test; and the retained control test.¹¹⁶ These doctrines are important for our purposes because they are still in effect in many states and are a trap for the unwary testator looking to draft a *halakhic* will.

The illusory transfer doctrine was a landmark attempt to counter decedents’ evasions, arising in infamous case of *Newman v. Dore*.¹¹⁷ The testator left a pour-over will¹¹⁸ purporting to fund a trust for his wife with an amount equal to the amount she would have received in intestacy.¹¹⁹ Since on the face of the documents the wife was receiving the same as she would receive in intestacy, the wife was unable to take the elective share under New York law at the time.¹²⁰ However, the wife’s ability to elect was irrelevant because three days before the testator’s death, he transferred essentially all of his property to various revocable trusts.¹²¹ Thus, his estate and the wife’s pour-over trust were empty upon his death.

The wife brought suit, challenging the transfers as contrary to public policy.¹²² In its search for a workable test to assess the validity of transfers, the court rejected any inquiry into motive or intent.¹²³ The court held that “the only sound test of the validity of a challenged transfer is whether it is real or illusory.... The test... is essentially... whether the husband has in good faith divested himself of ownership of his property or has made an illusory transfer.”¹²⁴

Some states rejected the *Newman* approach and adopted the fraudulent transfer test, expressly focusing on the decedent's intent to determine whether a transfer amounted to a "fraud."¹²⁵

A few states rejected both the illusory transfer doctrine and the fraudulent transfer test and adopted the retained controlled test. They focus entirely on the objective facts and circumstances regarding how much control the decedent retained over the transferred property.¹²⁶ Generally, these courts will not invalidate a transfer where the donor retains only the income or the beneficial use.¹²⁷

Although these tests may have been necessary in the silence of legislative inaction, these judicial approaches were often confusing and ill-defined.¹²⁸ In 1966, New York became dissatisfied with the vagueness of the illusory transfer doctrine and enacted a statute that included various "testamentary substitutes"—*e.g.*, transfers, trusts, joint bank accounts, joint tenancies—within the scope of the "estate" when calculating the elective share.¹²⁹ Following New York's lead, the Uniform Law Commission introduced the "augmented estate" in its 1969 version of the Uniform Probate Code (UPC).¹³⁰ In calculating the surviving spouse's elective share, the 1969 UPC essentially looks beyond estate assets and testamentary transfers and includes the following transfers made to anyone other than the surviving spouse during the marriage (other than *bona fide* sales):

- (1) transfers under which the decedent, at the time of his or her death, retained possession or enjoyment of (or the right to income from) the property;
- (2) transfers under which the decedent, at the time of his or her death, retained the right to revoke the transfer or the right to consume, invade, or dispose of the principal;
- (3) transfers under which the decedent, at the time of his or her death, held title in joint tenancy with another;
- (4) transfers exceeding \$3,000 made within 2 years of the decedent's death.¹³¹

3. Community Property

At the same time that the elective share was developing in most of the nation, an alternate system of spousal inheritance rights called community property existed in a small number of states.¹³² Under this system, the surviving spouse takes no elective share “because each spouse acquires an undivided ownership interest in half of the property that the couple acquired during the marriage other than by gift, devise, or inheritance.”¹³³ Unlike the English origins of dower and curtesy, community property is traceable to French and Spanish law, with some influences from Roman law.¹³⁴

The community property regime is seemingly simpler than the elective share and perhaps better tracks the modern conception of marriage as a partnership.¹³⁵

II. TRADITIONAL ESTATE PLANNING STRATEGIES COMPLYING WITH SECULAR AND JEWISH LAW

A. INFORMAL ARRANGEMENTS

It is important to remember that clients can always structure their estate plans informally. There are a number of informal arrangements a person can make that are legal and *halakhic*. However, these arrangements are risky *because* they are informal; that is, they rely on the unenforceable promises of others and there is chance they could fail. The upside is that these arrangements are relatively inexpensive and simple.

A husband may always choose to trust his wife to transfer any property she receives under statutory dower or community property to the parties prescribed by Jewish law. Similarly, he may trust his wife not to take her elective share. This type of arrangement might work for clients who are both fully committed to living in accordance with *halakha* and trust each other completely.

Other clients who want to use *inter vivos* gifts may “trust their... beneficiaries completely and believe that should they need additional resources, those beneficiaries will return some or all

of the property conveyed to them.”¹³⁶ Yet, as always, “advisors . . . must make sure that these clients fully appreciate the serious risks they run that those beneficiaries will be unable or unwilling to reciprocate their generosity.”¹³⁷

B. TESTAMENTARY DISPOSITIONS AND *INTER VIVOS* GIFTS

Many scholars recommend that a Jewish client execute both a secular will and an “ethical will.”¹³⁸ Note that testators must be careful to refer to the dispositions as “gifts” in the Jewish ethical will, unless the local statute requires otherwise, to ensure validity in Jewish law.¹³⁹ Unfortunately, as discussed in Section I.B, surviving spouse statutes easily frustrate this arrangement by including both probate and non-probate assets in the augmented estate.

As we have seen in Section I.A.2, *inter vivos* gifts are the predominant method by which Jewish testators simultaneously achieve their dispositive goals and comply with *halakha*. But there are substantial drawbacks to using either *mattanah* or *deyathiki*. As a general matter, gifts are a relatively inefficient and inflexible way to manage an entire estate.¹⁴⁰ Additionally, *inter vivos* gifts are generally irrevocable, even if the donor retains a life interest, which makes them difficult as planning vehicles.¹⁴¹

From a *halakhic* perspective, a *mattanah* is concerning because it is traditionally irrevocable. Even if drafters use the method recommended by Dayan Grunfeld, Litman, and Resnicoff to create a revocable *mattanah*, it will still fall under the elective share statute. Turning to *deyathiki* is not a practical solution for most clients because the doctrine only applies to dangerously ill persons. Additionally, a *deyathiki* “is not easily done in the tense and emotional atmosphere surrounding a dangerously ill man unless a *halakhic* expert is called in, for which there is not always time.”¹⁴²

From a secular perspective, neither type of gift escapes the modern elective share statute. Under 1969 UPC § 2-202(1)(i), the surviving spouse will be able to include *mattanah* gifts in the augmented estate because by definition the decedent enjoyed possession and use of those gifts until death. And under 1969 UPC § 2-202(1)(ii), the surviving spouse will be able to include *deyathiki* gifts because they are revocable. (*Deyathiki* are only irrevocable when the donor survives, which is counterfactual to our current analysis.) Furthermore, a person who has become *shekhiv mera* could very well lack testamentary or donative capacity.¹⁴³ Lastly, the oral statements of a *shekhiv mera* may be sufficient for Jewish law, but they are insufficient to overcome the Statute of Frauds in conveying any real property.¹⁴⁴

One arrangement that has been proposed is for the client to transfer assets to a revocable trust.¹⁴⁵ The client would be the current beneficiary and the intended recipient would be the trustee and remainder beneficiary. Thus, the legal title would pass to the recipient as a *mattanah* and the client would enjoy the lifetime possession and use of the asset. When the client dies, the recipient would hold both legal and equitable title and the trust would merge.¹⁴⁶ Although this arrangement is valid under Jewish law, it will fall under the augmented estate because it is revocable and reserves a life interest for the client.

III. NEW ESTATE PLANNING STRATEGIES TO ADDRESS THE OMITTED SPOUSE

The following strategies are all novel and promising because they have not been expressly discussed in the literature exploring estate planning for Jewish clients.

A. THE DOCTRINES OF ADVANCEMENT AND SATISFACTION

“An advancement is a gift made by a decedent during life to a family member that reduces the share of the probate estate that the family member receives under the intestate succession

statute upon the decedent's death."¹⁴⁷ Every state advancement statute is formulated to apply to parents and children, although some apply to others, such as grandparents and grandchildren, husbands and wives, and other collateral relatives.¹⁴⁸ The doctrine of advancement very likely traces its origins to Roman law and the Roman doctrine of *collatio bonorum*.¹⁴⁹

Forty-nine states have statutes covering advancement.¹⁵⁰ Although every state has a different formulation, in most states the sole focus is on the intent of the donor and the intent of the donee is irrelevant.¹⁵¹ The donor's intent that a gift be an advancement must exist (and be proved by evidence existing) at the time of the transfer.¹⁵² Jurisdictions differ on whether they apply advancement to decedents who die only partially intestate.¹⁵³ Many statutes demand purported advancements to be charged in writing.¹⁵⁴ Additionally, some states maintain a distinction between real and personal property, applying advancement only to personal property.¹⁵⁵ Despite a plethora statutory variations, "the statutes and definitions agree [on] two particulars: (1) all advancements must be gifts and (2) all advancements must be accounted for on the settlement of the [donor's] estate."¹⁵⁶

Courts, legislatures, and scholars routinely confuse and mischaracterize advancements in at least two ways. First, courts frequently state that they are irrevocable gifts but this is not necessarily true.¹⁵⁷ "For instance, a settlor may create a revocable trust, and if he dies without exercising the power of revocation, the courts [may] hold that even though the gift was not irrevocable until his death the amount received by the beneficiary is an advancement."¹⁵⁸ Second, an advancement is not an advance:

It is true that the words 'advances' and 'advancements' are sometimes improperly considered as interchangeable. But there is a clear distinction between them. To advance money is to pay it before it is due, or to furnish it for a certain specified purpose with the understanding that it, or some equivalent, is to be returned. An

advancement is an irrevocable gift by a parent to a child, in anticipation of such child's future share in the parent's estate....¹⁵⁹

Closely related is the doctrine of satisfaction. It is "where the testator, subsequent to the date of the will and during his lifetime, gives property or money to the [beneficiary] with the intention that it is to be in lieu of the legacy or devise."¹⁶⁰ It is similar to the doctrine of advancement; advancement is to intestacy as satisfaction is to testacy. As with advancement, the focus is solely on the testator's intent¹⁶¹ and most statutes require that intent to be expressed contemporaneously in a writing.¹⁶²

As discussed in Section II.B.1, pure gifts are not an ideal way to structure an entire estate plan. However, they take on significantly more force when combined with advancement or satisfaction. The client can establish an irrevocable trust, either at the time of marriage or afterwards, naming his wife as the primary beneficiary. He can then fund this trust over the course of his life and treat the payments as an advancement on his intestate estate or as satisfaction of a bequest to his wife under the will. As a practical matter, the client will need to draft two documents every time he makes a gift to the trust: (1) the legal deed of gift, expressly acknowledging the client's intent to treat it as an advancement or satisfaction of a bequest; and (2) the Jewish *mattanah* document.

This arrangement complies with *halakha* and secular law. The gifts can be categorized as *mattanah*. The husband has an *halakhic* obligation to maintain the wife after his death,¹⁶³ so the trust will serve this purpose in addition to ensuring that the surviving spouse does not inherit in violation of the Jewish order of succession. Alternatively, the *mattanah* may be permitted to extinguish the widow's *halakhic* right to maintenance.¹⁶⁴ This arrangement also avoids statutory dower and elective share statutes. These gifts will not fall into the augmented estate because they are irrevocable and the husband retains no lifetime use or possession of them. However, this

arrangement cannot escape community property laws because the wife would still have a vested interest in the remaining estate assets.

B. RELEASES OF EXPECTANCY

Potential heirs or beneficiaries to a decedent's estate may contractually release their intestate or testate expectancy back to the source (that is, the future decedent) in exchange for consideration.¹⁶⁵ The consideration need not be of equal value to the expectancy released, so long as it is not grossly inadequate.¹⁶⁶ A husband who is planning carefully prior to marriage may treat a *mattan* in the *ketubah* as the consideration for a release of expectancy, so long as the *mattan* is actually paid. Of course, a husband may also execute a postnuptial release of expectancy in exchange for an irrevocable *mattannah* gift.

A release is perhaps even more advantageous than advancement or satisfaction. Advancement is a fixed sum that reduces the donee's claim to the donor's intestate estate. If the estate grows after the advancement, the donee can still take the difference between what he or she has received and what he or she is entitled to take under the intestacy statute. Likewise, satisfaction may provide a surviving spouse with an amount greater than the elective share. But if the donor's estate appreciates significantly, the elective share percentage could grow larger than the bequest under the will.¹⁶⁷ Conversely, a "release foregoes all claims to the source's estate.... [It] is, therefore, unconcerned with subsequent fluctuation in the decedent's estate."¹⁶⁸ However, like advancement or satisfaction, a release of expectancy cannot avoid community property systems; releases only apply to inchoate interests and community property interests are vested in the spouses immediately.

C. WAIVERS IN NUPTIAL AGREEMENTS

Perhaps the most stable strategy is for a wife to waive her marital property rights (or community property rights).¹⁶⁹ These voluntary waivers have become increasingly common with the rise of nuptial agreements.¹⁷⁰ Many states have adopted the Uniform Premarital Agreement Act (UPAA), which has also been incorporated in the UPC.¹⁷¹ Under both regimes—and many states' regimes—there is an emphasis on both parties disclosing finances and property.¹⁷² However, this disclosure may itself be waived.¹⁷³ Some states mandate disclosure universally, while others only demand it if the nuptial agreement is unfair.¹⁷⁴

Attorneys must approach these waivers with heightened care; some jurisdictions require both parties to be advised by independent counsel.¹⁷⁵ A cavalier attitude toward drafting a waiver of surviving spouse protections can be an express ticket to an ethics sanction or malpractice suit. Nevertheless, when properly prepared, they remain a powerful estate planning tool.¹⁷⁶

A waiver for a Jewish client could be contracted in a premarital agreement along with the *ketubah*, or in postnuptial agreement.¹⁷⁷ The agreement could easily be drafted with the husband's promise of the *mohar* and *mattan* along with an express promise to maintain the wife after his death. If the couple lives in a community property state, they can contract around the community property statute.

CONCLUSION

Jewish clients are entitled to competent representation and estate planners should familiarize themselves with the law of Jewish inheritance to adequately serve them. As discussed above, a Jewish husband has a *halakhic* duty to provide for and maintain his wife and any daughters, which takes priority over other claims to the estate. Although *halakha* does not permit altering the Jewish order of succession through testamentary dispositions, gifts—both *mattanah*

and *deyathiki*—remain available to achieve dispositive goals. However, traditional secular estate planning devices are now susceptible to failure because of surviving spouse protections in the form of the elective share and community property. I have suggested a few new techniques in this Article to protect a Jewish client’s estate plan, although they are not completely invulnerable either. As with every client, the estate plan must be prepared according to individualized needs and circumstances.

¹ See PEW RESEARCH CENTER, A PORTRAIT OF JEWISH AMERICANS: FINDINGS FROM A PEW RESEARCH CENTER SURVEY OF U.S. JEWS 23 (2013) (estimating 5.3 million total Jews in the U.S.); ELIZABETH TIGHE ET AL., AMERICAN JEWISH POPULATION ESTIMATES: 2012, at 22 (2013) (estimating 6.814 million total Jews in the U.S.).

For this Article, the total estimate of Jews is more important than the number of Jews who self-identify as religiously active. Although only a subset of religious Jews are likely to attempt to comply with the requirements of Jewish inheritance law, many non-religious Jews will have religious family members. Thus, even non-religious Jewish beneficiaries have reason to consider what Jewish law requires in order to properly take their bequest in compliance with their religious relative’s desires.

² See Donna C. Litman & Steven H. Resnicoff, *Jewish and American Inheritance Law: Commonalities, Clashes, and Estate Planning Consequences*, 22 JEWISH L. ASS’N STUD. 166, 167, 191 (2012).

Jewish law is also generally referred to as *halakha*, meaning “[the way] which one walks by.” See *Halachah*, OXFORD ENGLISH DICTIONARY (2d ed. 1989). I use both terms interchangeably.

³ See Litman & Resnicoff, *supra* note 2, at 167 n.3 (2012) (citing CHAIM JACHTER, GRAY MATTER VOL. III: EXPLORING CONTEMPORARY HALAKHIC CHALLENGES 276 (2008)) (“[Rabbi] Yitshak Elhann 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.... [Rabbi] 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* [לפני עור], i.e., enabling another to violate the law against stealing.”).

⁴ See generally Steven H. Resnicoff, *Helping a Client Violate Jewish Law: A Jewish Lawyer’s Dilemma*, 10 JEWISH L. ASS’N STUD. 191 (1998).

⁵ See Litman & Resnicoff, *supra* note 2, at 167 n.4 (citing FEIVEL COHEN, KUNTRES MIDOR LEDOR 2 (1987)) (“[U]nder Jewish law, [if] the estate belongs to someone else, a secular ‘heir’ who takes a bequest may be guilty of stealing.”).

⁶ See, e.g., ISIDOR GRUNFELD, THE JEWISH LAW OF INHERITANCE: PROBLEMS & SOLUTIONS IN MAKING A JEWISH WILL (1987); Litman & Resnicoff, *supra* note 2; A. Yehuda Warburg, *Drafting a Halakhic Will*, 10 HAKIRA 73 (2010); A. Yehuda Warburg, *The Propriety of a Civil Will*, 15 HAKIRA 165 (2013).

⁷ See PEW RESEARCH CTR., *supra* note 1, at 35.

⁸ See, e.g., S. Joy Osgood, *Women and the Inheritance of Land in Early Israel*, in WOMEN IN THE BIBLICAL TRADITION (George J. Brooke ed., 1992); Zafira Ben-Barak, *Inheritance by Daughters in the Ancient Near East*, 25 J. SEMITIC STUD. 22 (1980); Mary F. Radford, *The Inheritance Rights of Women Under Jewish and Islamic Law*, 23 B.C. INT’L & COMP. L. REV. 135 (2000).

⁹ See, e.g., MICHAEL KAUFMAN, THE WOMAN IN JEWISH LAW AND TRADITION (1993).

¹⁰ *Genesis* 2:24 (Judaica Press).

¹¹ Commonly known by the acronym Rashi; a medieval French rabbi who authored a comprehensive commentary on the Tanakh.

¹² Rashi, *Genesis* 2:24 (starting with “one flesh”) (citing BABYLONIAN TALMUD, *Sanhedrin* 58a).

¹³ A prominent rabbi, legal scholar, and Dayan [judge] on the London *beth din*.

¹⁴ GRUNFELD, *supra* note 6, at 10. Cf. Radford, *supra* note 8, at 155–58.

¹⁵ See Ben-Barak, *supra* note 8, at 22; Eryl W. Davies, *The Inheritance of the First-Born in Israel and the Ancient Near East*, 38 J. SEMITIC STUD. 175, 179–91 (1993).

¹⁶ See Arthur Mason Brown, *The Concept of Inheritance in the Old Testament* xxi–xxii (1965) (Ph.D. thesis, Columbia University) (“[I]n the Babylonian order of succession sons inherited, and the eldest son received a preferential share, unless he was formally disinherited.”); Davies, *supra* note 15, at 179–91; Richard H. Hiers, *Transfer of Property by Inheritance and Bequest in Biblical Law and Tradition*, 10 J. L. & RELIGION 121, 124 (1994) (“Apart from [a few] instances, there seem to be no other biblical texts reporting daughters inheriting or expecting to inherit from their parents.”). *But see* Davis, *supra* note 15, at 179 (noting that the general principle in the Code of Hammurabi was to divide the estate between sons in equal parts); *Job* 42:15 (“[Job] gave [his daughters] an inheritance among their brothers.”).

¹⁷ See *Genesis* 12:1–6. Scholars place Abraham as a near-contemporary of King Hammurabi in estimating his family’s migration from Ur. See W. M. FLINDERS PETRIE, *EGYPT AND ISRAEL* 17 (1911) (estimating 2300–2250 BCE, probably c. 2270 BCE); see also, e.g., MORRIS JASTROW, *THE CIVILIZATION OF BABYLONIA AND ASSYRIA: ITS REMAINS, LANGUAGE, HISTORY, RELIGION, COMMERCE, LAW, ART, AND LITERATURE* 146, 149 (1915) (c. 2123–2081 BCE); LEONARD W. KING, *A HISTORY OF BABYLON: FROM THE FOUNDATION OF THE MONARCHY TO THE PERSIAN CONQUEST* 319–20 (1915) (c. 2123–2081 BCE); A. H. SAYCE, *A PRIMER OF ASSYRIOLOGY* 120 (1894) (c. 2356–2301 BCE); HUGO WINCKLER, *THE HISTORY OF BABYLONIA AND ASSYRIA* 59 (1907) (c. 2267–2213 BCE).

¹⁸ For instance, the story of Isaac’s sons Esau and Jacob implicitly recognizes the priority of Esau’s claim as first-born, even though his birthright and blessing were ultimately taken by Jacob. See *Genesis* 25:29–34; *id.* 27:1–41.

¹⁹ See *Deuteronomy* 21:16–17 (“[O]n the day [the husband] bequeaths his property to his sons, that he will not be able to give the son of the beloved [wife] birthright preference over the son of the despised [wife]—the [real] firstborn son. Rather, he much acknowledge the firstborn, ... and give him a double share in all that he possesses....”); Rashi, *Deuteronomy* 21:17 (starting with “a double share”) (citing MIDRASH SIFREI 21:28) (explaining that “double share” means that the firstborn son takes a share “equal to that of two brothers [together].”); see generally JONATHAN S. MILGRAM, *FROM MESOPOTAMIA TO THE MISHNAH: TANNAITIC INHERITANCE LAW IN ITS LEGAL AND SOCIAL CONTEXTS* 67–81 (2016).

²⁰ See Hiers, *supra* note 16, at 142–47.

²¹ See *Numbers* 27:1–11.

²² *Numbers* 27:4.

²³ Rashi, *Numbers* 27:5 (starting with “So Moses”) (citing BABYLONIAN TALMUD, *Sanhedrin* 8a).

²⁴ *Numbers* 27:5.

²⁵ *Numbers* 27:6–7.

²⁶ Rashi, *Numbers* 27:7 (starting with “Zelophehad’s daughters”) (citing MIDRASH TANCHUMA, *Pinchas* 8).

²⁷ *Numbers* 27:8–11. This is perhaps the seminal source of Jewish inheritance law in the *Tanakh*. See, e.g., Radford, *supra* note 8, at 160.

²⁸ BABYLONIAN TALMUD, *Bava Batra* 8:2 (Michael L. Rodkinson trans. 1918); see also JOSEPH BEN EPHRAIM KARO, SHULCHAN ARUCH, *Choshen Mishpat* 276:1–2 (Torat Emet ed.). Thus, it appears that the preference for male inheritance would continue for the entire order of succession. See BABYLONIAN TALMUD, *Bava Batra* 8:2 (Michael L. Rodkinson trans. 1918) (“This is the rule: After every one who has the preference concerning an inheritance, his descendants have, in order, a like preference.”).

²⁹ See Radford, *supra* note 8, at 159–163; see generally W.D. Rollison, *Principles of the Law of Succession to Intestate Property*, 11 NOTRE DAME L. REV. 14, 25–26 (1935) (“By a person’s *parentela* is meant the sum of those persons who trace their blood from him.... [In a *parentelic* scheme,] the various *parentelae* are successively called into inheritance in the order of their proximity to the dead man. The rule then becomes this: Exhaust the dead man’s *parentela*; next exhaust his father’s *parentela*; next his grandfather’s; next his great-grandfather’s.”).

³⁰ See Radford, *supra* note 8, at 161.

³¹ See SONCINO BABYLONIAN TALMUD, *Bava Batra* 115b–116a (Isidore Epstein ed., A. Cohen, Salis Daiches, Samuel Daiches, H. Freedman, E. W. Kirzner, B. D. Klein, A. Mishcon, Jacob Shachter, Maurice Simon, & Israel W. Slotki trans.) [hereinafter SONCINO BABYLONIAN TALMUD].

³² See Radford, *supra* note 8, at 162.

³³ A professor of Jewish law and inheritance law at the Hebrew University of Jerusalem.

³⁴ THE PRINCIPLES OF JEWISH LAW 466 (Menachem Elon ed., 1975) (emphasis added).

³⁵ See GRUNFELD, *supra* note 6, at 10–11; see also SONCINO BABYLONIAN TALMUD, *Bava Batra* 115a (“This is the general rule: The lineal descendants of any one with a priority to succession take precedence. A father takes precedence over all his descendants.”).

³⁶ See ARNOLD BLOCH & HYMAN KLEIN, *MAIMONIDES’ LAWS OF INHERITANCE* ix (1950) (“Finally, with a single exception (the husband who survives his wife) every heir must be related *agnatically*, that is through the male line... to the deceased himself....”).

³⁷ See SONCINO BABYLONIAN TALMUD, *Bava Batra* 109b n.15. The root of the word, שָׂרָר, is literally translated as “flesh” or “blood.” See שָׂרָר, A HEBREW AND ENGLISH LEXICON OF THE OLD TESTAMENT (Francis Brown, S. R. Driver, & Charles A. Briggs, eds., 1962).

³⁸ Moreover, based on the translation of that word (שָׂרָר), one tractate of the Mishnah also questions the limiting of inheritance to patrilineal relatives in general. See SONCINO BABYLONIAN TALMUD, *Bava Batra* 109b (“What [reason] is there for deducing that *she’ero* [שָׂרָר] refers to the father near kinsman: Why not [rather] say [that] *she’ero* refers to the mother since it is written, ‘She is thy mother’s near kinswoman?’”)

³⁹ SONCINO BABYLONIAN TALMUD, *Bava Batra* 109b (basing this conclusion on *Numbers* 1:22).

⁴⁰ Commonly known as Maimonides or by the acronym Rambam; a medieval Sephardic rabbi who became one of the most famous Jewish scholars of all time for his magnum opus, the MISHNEH TORAH, a groundbreaking codification of *halakha*.

⁴¹ MAIMONIDES, MISHNEH TORAH, *Hilchot Nahalot* 1:6 (Eliyahu Touger trans.) [hereinafter MISHNEH TORAH]; see KARO, *supra* note 28, at *Chosen Mishpat* 276:4; see generally MILGRAM, *supra* note 19, at 105–44.

⁴² REUVEN YARON, GIFTS IN CONTEMPLATION OF DEATH IN JEWISH AND ROMAN LAW 32–33 (1960); see also *id.* 18–19 (describing the historical increase in the Jewish use of testamentary gifts).

⁴³ See MILGRAM, *supra* note 19, at 39–43, 52–60, 64–65, 84–85, 89–91, 94–103, 145–46 (2016).

⁴⁴ YARON, *supra* note 42, at 32–33.

⁴⁵ *Id.*

⁴⁶ A *kinyan* is “a formal act... that evidence the donor’s intention to make the gift and the donee’s intention to accept it.” Litman & Resnicoff, *supra* note 2, at 174; see also Shalom Albeck & Menachem Elon, *Acquisition, in* 1 ENCYCLOPAEDIA JUDAICA 359, 360 (Michael Berenbaum & Fred Skolnik eds., 2007) (“[T]he function of *kinyan* is... to demonstrate... that the alienator and the acquirer had determined to conclude the transaction.”).

There are numerous *kinyanim* in Jewish law intended for different types of property, but the one that is most relevant for this Article is *kinyan sudar* (קניין סודר), or “acquisition by scarf.” A *kinyan sudar* is a legal fiction: Under Jewish law, giving over any object—no matter how little its value—makes the transaction a valid exchange, albeit a symbolic one. See YARON, *supra* note 42, at 34–36, 90; Albeck & Elon, *supra*. Therefore, once again, the term “gift” in Jewish law is misleading because technically *mattanah* arrangements are trades. There is a practical exception to the acquisition requirement for *deyathiki*, which will be introduced and discussed shortly. See sources cited *infra* notes 67–69.

⁴⁷ See YARON, *supra* note 42, at 32–33. Interestingly, Jewish law permits third parties to accept on behalf of the donee, even without the donee’s authorization or awareness.

⁴⁸ *Id.* at 55; see *id.* (citing TOSEFTA, *Ketubot* 8:5) (“Whoever assigns his goods to his son and then acquires other goods:—anything not included in the [original] gift belongs to the heirs....”). After all, “one cannot cause [anyone] to acquire anything which is not existent” (אין אדם מקנה דבר שלא בא לעולם). See also KARO, *supra* note 28, at *Choshen Mishpat*, 211.

⁴⁹ See, e.g., MILGRAM, *supra* note 19, at 39–48; YARON, *supra* note 42, at 18–31.

⁵⁰ YARON, *supra* note 42, at 20–21, 49; see MILGRAM, *supra* note 19, at 163 (“[A] *diathēkē* may be revoked, a *mattanah* may not....”); SONCINO BABYLONIAN TALMUD, *Bava Batra* 136a (“If a person assigned his estate, in writing, to his son [to be his] after his death, the father may not sell [it] because it is assigned in writing to the son, and the son may not sell [it] because it is in the possession of the father. If the father sold [the estate], the sale is valid until his death. If the son sold [it], the buyer has no claim whatsoever upon it until the father’s death.”); YARON, *supra* note 42, at 64–65 (citing TOSEFTA, *Bava Batra* 10–11) (“[Whoever writes] a [*mattanah*] cannot revoke.”).

⁵¹ See YARON, *supra* note 42, at 49.

⁵² See *id.* at 52–53 (“I assign to you my good from today and after death, the gift to be void if X...’ ... would be a good gift.... Similarly, ‘I give this to you as a gift, on condition that you return it after a certain time or after a certain event’ is a good gift in Jewish law.”).

⁵³ GRUNFELD, *supra* note 6, at 103.

⁵⁴ See, e.g., Litman & Resnicoff, *supra* note 2, at 175 (quoting EZRA BASRI, I, HEREBY, BEQUEATH: A COMPREHENSIVE GUIDE TO JEWISH WILLS 7 (1984) (Heb.)) (“This [method (4)] is the most commonly used and least problematic legal format for allocating one’s estate.”); *id.* (quoting MOSHE STERNBURCH, 2 TESHUVOT UMINHAGIN 718) (stating that all authorities agree that method (4) works). *But see, e.g.,* sources cited *supra* note 50 (support for the historical claim that *mattanah* are irrevocable).

⁵⁵ Litman & Resnicoff, *supra* note 2, at 175.

⁵⁶ JOSEPH HENRY THAYER, GREEK–ENGLISH LEXICON OF THE NEW TESTAMENT 136–37 (1889); YARON, *supra* note 42, at 19; see MILGRAM, *supra* note 19, at 44–45.

⁵⁷ See YARON, *supra* note 42, at 22–29 (“[Greek and Greco–Egyptian *diathiki*] usually start with an expression of desire for the continued life (or health) of the testator; this having been done, the document comes down to business, ‘but if I should suffer the fate of man, I bequeath, &c.’”).

⁵⁸ See WILLIAM DAVIDSON BABYLONIAN TALMUD, *Bava Metzia* 19a (Adin Steinsaltz trans.) (“The Sages taught in a *Baraita*: What is considered a [*deyathiki*] and is collected by the designated recipient after the death of the giver? It is a deed that states: This deed will be to stand and exist as proof that if this person dies, his property is to be given to so-and-son. An ordinary deed of gift [*mattanah*], by contrast, is any deed in which it is written: This gift is given from today and after the death of the giver.”); YARON, *supra* note 42, at 22 (citing TOSEFTA, *Bava Batra* 8:10 and PALESTINIAN TALMUD, *Peah* 3:9) (“Which is a [*diatiki*]—Be it to me to stand and to be...., but if I shall die my goods shall be given to X. Which is a [*mattanah*]—As from today my goods shall be given to X.”).

⁵⁹ An era of Rabbinic sages from c. 0–200 CE whose scholarly discussions and interpretations of the Torah were recorded in the Mishnah.

⁶⁰ See YARON, *supra* note 42, at 24–25, 46–49; see *id.* at 48 (citing TOSEFTA, *Bava Batra* 8:9) (“One in good health [*bari*], who wrote a *deyathiki*, one lying ill [*shekhiv mera*], who assigned his goods in a [*mattanah*]...—has done nothing.”); see generally GRUNFELD, *supra* note 6, at 47–53.

One potential explanation is that the word *zin* (זִין) that was used in the provision wishing for health in Greek *diathiki* is best translated as “to live,” but can also be translated as “to recover” or “to survive (an illness).” YARON, *supra* note 42, at 25. Thus, the Tannaim may have mistranslated when they were adapting the concept.

⁶¹ See *id.* at 64–66 (citing TOSEFTA, *Bava Batra* 8:10–11) (“Whoever writes a *deyathiki* can revoke, as long as neither he [the donee] nor another [third party for him] has acquired. From the moment that he [the donee] or another has acquired, he [the donor] cannot revoke.”); *id.* at 81–84.

⁶² See *id.* at 29–31.

⁶³ See *id.* at 30 (citing PALESTINIAN TALMUD, *Peah* 3:9) (“[Who is a *shekhiv mera*?] Everyone who has not been severely attacked by the illness....—it is usual for the relatives to visit him immediately; strangers visit him after three days. If he has been severely attacked, [strangers] as well as [relatives] visit him immediately.”).

⁶⁴ See *id.*

⁶⁵ See *id.* at 31.

⁶⁶ An era of Rabbinic sages from c. 200–500 CE whose analyses and discussions of the Torah and Mishnah were recorded in the Gemara.

⁶⁷ See *id.* at 61–64; BABYLONIAN TALMUD, *Bava Batra* 9:7 (Michael L. Rodkinson trans. 1918) (“The words of a dying person [*shekhiv mera*] are considered as if written and delivered.”). However, the donor must be careful in making an oral gift. A *deyathiki* is invalid if the donor refers to the transfer only as an inheritance. See WILLIAM DAVIDSON BABYLONIAN TALMUD, *Bava Batra* 126b (Adin Steinsaltz trans.) (“With regard to one on his deathbed who apportions his property orally, granting it to his sons as a gift, ... his statement stands. But if he said that they will receive the property not as a gift but as inheritance, he has said nothing. If he wrote in his will, whether at the beginning, or in the middle, or at the end, that he is granted them the property as a gift, his statement stands.”).

⁶⁸ See YARON, *supra* note 42, at 32, 61–64.

⁶⁹ See *id.*; BABYLONIAN TALMUD, *Bava Batra* 9:7 (Michael L. Rodkinson trans. 1918) (“If one dies, and a [*deyathiki*] was tied to his body, it is not to be considered at all. If, however, while sick he had submitted it to some one, be he his direct heir or not, it must be listened to.”)

⁷⁰ See *id.* at 67–68, 85–89; SONCINO BABYLONIAN TALMUD, *Pe’ah* 3:7 (“If a man on the point of dying [*shekhiv mera*] assigned his property in writing [to another], and he retained any land, however small, he renders his gift valid; but if he retains no land whatsoever, his gift is not valid.”); *id.*, *Bava Batra* 146b.

The Amoraim also took the position that if partial revocation of a *deyathiki* enacted a complete revocation of the *deyathiki*. See YARON, *supra* note 42, at 75.

⁷¹ See YARON, *supra* note 42, at 68 (citing PALESTINIAN TALMUD, *Peah* 3:9) (“[If] he kept back some land, his gift stands, even if he recovered. [If] he did not keep back any land, his gift does not stand—in case he recovered.”). The basis for this interpretation is that the donor “would not have left himself penniless” if he knew that he would recover. See SONCINO BABYLONIAN TALMUD, *Pe’ah* 3:7 n.34; *id.*, *Bava Batra* 146b nn.11–13; YARON, *supra* note 42, at 67–68, 85.

⁷² See SONCINO BABYLONIAN TALMUD, *Bava Batra* 148b (“Is partial withdrawal [considered complete withdrawal or not? ... [T]he law [is that] partial withdrawal is [considered] complete withdrawal.”); Ernst Bammel, *Any Deyathiqi Partially Cancelled is Completely Cancelled*, 5 J. SEMITIC STUD. 355 (1960); YARON, *supra* note 42, at 69–75.

⁷³ See YARON, *supra* note 42, at 26. The term *deyathiki* is found almost entirely in Tannaitic literature, while the term *mattanah shekhiv mera* was preferred by the Amoraim. I will continue to use the term *deyathiki*.

⁷⁴ See LOUIS M. EPSTEIN, *THE JEWISH MARRIAGE CONTRACT: A STUDY IN THE STATUS OF THE WOMAN IN JEWISH LAW* 121 n.1, 125–26 (1927) (“In Babylonian law, [the husband] is never given the right of succession to his wife. He is only the keeper of his wife’s marriage portion as long as he lives. This was probably the original Jewish law also.”)

⁷⁵ See *id.* at 126–27 (“Then the law elevated the husband to the position of heir of the third order, preceding the father but following the daughter and the son.... Then the husband moved up one step further; he became heir of the second order, ahead of the father and daughter but still preceded by the son. It was the task of the final *halakah* to declare the husband the first heir, prior even to son.”).

⁷⁶ See *id.* at 1–16.

⁷⁷ *Id.* at 5.

⁷⁸ See *id.* at 58–77, 79; KAUFMAN, *supra* note 9, at 116–17.

Originally [the *mohar*] was paid to the father of the bride, who kept it for himself; then it was given to the father as trustee for the bride; then the husband as trustee was permitted to use it for the purchase of household articles; and finally [Jewish law] permitted a note of indebtedness to be given to the bride instead of the cash *mohar*.

EPSTEIN, *supra* note 74, at 70.

⁷⁹ See *id.* at 78–79; see generally *id.* at 78–88.

⁸⁰ See *id.* at 80; KAUFMAN, *supra* note 9, at 116–17.

⁸¹ See EPSTEIN, *supra* note 74, at 85.

⁸² *Id.*

⁸³ *Id.* at 88.

⁸⁴ *Id.* at 175–76.

⁸⁵ See *id.* at 176.

⁸⁶ See *id.* at 181–82; KAUFMAN, *supra* note 9, at 202–04.

⁸⁷ EPSTEIN, *supra* note 74, at 186.

⁸⁸ See Shmuel Shilo & Menachem Elon, *Succession*, in 19 ENCYCLOPAEDIA JUDAICA 284, 286 (Michael Berenbaum & Fred Skolnik eds., 2007); EPSTEIN, *supra* note 74, at 188; JOSEPH BEN EPHRAIM KARO, SHULCHAN ARUCH, *Even HaEzer*, 112:18 (Torat Emet ed.).

⁸⁹ See SONCINO BABYLONIAN TALMUD, *Kethuboth* 53b.

⁹⁰ See *id.*, *Kethuboth* 108b.

⁹¹ KAUFMAN, *supra* note 9, at 202 (quoting MOSHE MEISELMAN, *JEWISH WOMAN IN JEWISH LAW* 88 (1978)).

⁹² See GRUNFELD, *supra* note 6, at 100 (“[W]e see that even in otherwise strictly observant orthodox circles the Jewish Law of Inheritance is completely neglected, and almost forgotten. Orthodox Jews make their wills through solicitors—often orthodox ones—in a manner that contradicts the laws of the Torah (מתנה על מה שכתוב בתורה). Hardly anyone seems to shy away from what is considered in Jewish law an improper transfer of inheritance (העברת נחלה)...”); YECHIEL MICHEL TUCAZINSKY, *GESHER HACHAIM: THE BRIDGE OF LIFE* (1983) (“[T]hese days we see that solicitors compose wills... and there is no [compliance with Jewish law regarding gifts]; similarly, persons who witness the will and sign it as witnesses [also fail to comply with Jewish law]. Such a will has no validity whatsoever as far as Torah law is concerned.”)

⁹³ See GRUNFELD, *supra* note 6, at 100 (“[A]ttempts have been made to vindicate in Jewish law... testaments made in accordance with the law of the land. But these attempts... were not intended by their authors to be taken as guidelines *ab initio* (לכתחילה), but as an endeavor to find a possible justification in *halakhah* for a practice that, regrettably, already exists (בדיעבד)... [S]uch attempts only prevent the orthodox Jewish population from returning to a proper observance of the Jewish Laws of Inheritance....”).

⁹⁴ Litman & Resnicoff, *supra* note 2, at 191.

⁹⁵ *Id.*; see sources cited *supra* note 3 and note 5.

⁹⁶ SONCINO BABYLONIAN TALMUD, *Bava Batra* 126b.

⁹⁷ MAIMONIDES, *MISHNEH TORAH*, *Hilchot Nahalot* 6:1–2; see also *id.* at 12:9.

⁹⁸ See, e.g., *id.*; Warburg, *The Propriety of a Civil Will*, *supra* note 6, at 166.

⁹⁹ The odd exception is Georgia, which is not a community property state and has no statutory form of dower or elective share. See GA. CODE ANN. § 53-4-1 (“A testator... may give all the property to strangers, to the exclusion of the testator’s spouse and descendants.”); Kristi L. Barbre, *Death and Disinheritance in Georgia: Reconciling Year’s Support and the Elective Share*, 4 J. MARSHALL L.J. 139, 140 (2011) (“Georgia is the only state in the nation that condones spousal disinheritance.”).

¹⁰⁰ See generally 28 C.J.S. Dower and Curtesy (2017).

¹⁰¹ See WILLIAM SEARLE HOLDSWORTH, 3 HISTORY OF ENGLISH LAW 185–97 (5th ed. 1942); George L. Haskins, *The Development of Common Law Dower*, 62 HARV. L. REV. 42, 42 (1948).

¹⁰² See *Dower*, BLACK'S LAW DICTIONARY (10th ed. 2014); George L. Haskins, *The Defeasibility of Dower*, 98 U. PA. L. REV. 826, 826 (1950).

¹⁰³ See 28 C.J.S. Dower and Curtesy §§ 63–96; Haskins, *supra* note 102, at 826–27.

¹⁰⁴ See 28 C.J.S. Dower and Curtesy §§ 40–53.

¹⁰⁵ See *Curtesy*, BLACK'S LAW DICTIONARY (10th ed. 2014).

¹⁰⁶ See 28 C.J.S. Dower and Curtesy § 241; HOLDSWORTH, *supra* note 101, at 185–97; George L. Haskins, *The Estate by the Marital Right*, 97 U. PA. L. REV. 345, 345–48 (1949).

¹⁰⁷ MARK L. ASCHER ET AL., CASES AND MATERIALS ON GRATUITOUS TRANSFERS: WILLS, INTESTATE SUCCESSION, TRUSTS, GIFTS, FUTURE INTERESTS, AND ESTATE AND GIFT TAXATION 159 (6th ed. 2013).

¹⁰⁸ See *id.* at 158; WILLIAM M. MCGOVERN, SHELDON F. KURTZ, & DAVID M. ENGLISH, WILLS, TRUSTS AND ESTATES, INCLUDING TAXATION AND FUTURE INTERESTS 50 (4th ed. 2010). Apparently this was a problem as early as the 18th century, when Blackstone observed that “dower at the common law... became a great clog to alienations, and otherwise inconvenient to families.” WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND 136 (1775).

¹⁰⁹ See ARK. CODE § 28-11-301 et seq. (one-third life estate in real property); KAN. STAT. § 59-505 (one-half fee simple interest in real property); KY. REV. STAT. § 392.020 et seq. (one-half fee simple interest in real property owned at death, plus one-third life estate in real property owned during the marriage but not owned at death, plus one-half fee simple interest in personal property); MICH. COMP. LAWS § 558.1 et seq. (one-third life estate in real property). Interestingly, Michigan is the only state that still maintains a gender-based dower system. See MICH. COMP. LAWS § 700.2202(2)(c) (only permitting a widow to take the statutory dower). But the decedents in Michigan had better act fast!—or rather, their executors. Michigan's dower statute is only available for decedents who died before April 6, 2017, because the State legislature is abolishing it. See S. 558, 98th Leg., Reg. Sess. (Mich. 2016).

¹¹⁰ See RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 9.1 (AM. LAW. INST. 1999) [hereinafter REST. (3RD) PROP.: WILLS & DON. TRANSFERS]; MCGOVERN ET AL., *supra* note 108, at 50 (4th ed. 2010); see generally 26B C.J.S. Descent and Distribution §§ 67–74 (2017).

¹¹¹ See REST. (3RD) PROP.: WILLS & DON. TRANSFERS § 9.1(a).

¹¹² See ISAAC NEWTON, PHILOSOPHIÆ NATURALIS PRINCIPIA MATHEMATICA 13 (1687) (Newton's Third Law of Motion).

¹¹³ Edward A. Smith, *The Present Status of “Illusory” Trusts: The Doctrine on Newman v. Dore Brought Down to Date*, 44 MICH. L. REV. 151 (1945).

¹¹⁴ See W. D. MACDONALD, FRAUD ON THE WIDOW'S SHARE 6–9 (1960).

¹¹⁵ See Smith, *supra* note 113, at 152; see generally MACDONALD, *supra* note 114.

¹¹⁶ See ASCHER ET AL., *supra* note 107, at 167–69.

¹¹⁷ 275 N.Y. 371 (1937); see generally MACDONALD, *supra* note 114, at 74–76. Of course, *Newman* was not the first case that invalidated an evasive transfer. However, it was one of the first courts to carefully establish a judicial doctrine to address these types of cases and it has been frequently cited by many subsequent courts.

¹¹⁸ See *Pourover Will*, BLACK'S LAW DICTIONARY (10th ed. 2014); *Pourover Trust*, BLACK'S LAW DICTIONARY (10th ed. 2014) (“An *inter vivos* trust that receives property (usually the residual estate) from a will upon the testator's death.”).

¹¹⁹ See *Newman*, 275 N.Y. at 375.

¹²⁰ See *id.*; see also N.Y. DECEDENT ESTATE LAW § 18 (1930).

¹²¹ See *Newman*, 275 N.Y. at 375.

¹²² See *id.*

¹²³ See *id.* at 379 (“Motive or intent is an unsatisfactory test of the validity of a transfer of property. In most jurisdictions it has been rejected, sometimes for the reason that it would cast doubt upon the validity of all transfers made by married man...; sometimes because it is difficult to find a satisfactory logical foundation for it.... [T]here can be no fraud where no right of any person is invaded. ‘The great weight of authority is that the intent to defeat a claim which otherwise a wife might have is not enough to defeat the deed.’”) (citations omitted).

¹²⁴ See *id.* (The court further clarified: “The good faith required of the donor... in making a valid disposition of his property during life does not refer to the [intent] to affect his wife but to the intent to divest himself of the ownership of the property. It is, therefore, apparent, that the fraudulent interest which will defeat the gift *inter vivos* cannot be predicated [on] the husband's intent to deprive the wife of her distribute share as widow.”) (citations omitted).

¹²⁵ See Smith, *supra* note 113, at 159–61; see generally MACDONALD, *supra* note 114, at 98–119.

To be precise, the fraudulent transfer test predates *Newman*. In fact, prior to *Neman*, it appears that lower New York courts were focusing on the testator's intent to evade the elective share. See, e.g., *Brodner v. Feit*, 286 N.Y.S. 814 (N.Y. App. Div. 1936) (“[Husbands] may not... strip themselves of their property for the sole purpose of depriving those that the statute intended to protect of their right to inherit.”).

Factors considered may include: (1) motive of the transferor; (2) presence or absence of consideration; (3) whether the amount of the transfer was disproportionate compared to the value of the decedent's total estate; (4) the degree of control retained over the transferred property; (5) whether the transfer was made openly and with frank disclosure or was made surreptitiously and without the candor expected between husband and wife; (6) proximity in time between the transfer and death; and (7) the extent to which the surviving spouse is left without means of support. See Ascher et al., *supra* note 107, at 168 (citing *Nelson v. Nelson*, 512 S.W.2d 455, 459–61 (Mo. App. 1974)).

¹²⁶ One court held that

the estate of a decedent, for the purposes of [the elective share statute], shall include the value of assets held in an *inter vivos* trust created by the deceased spouse as to which the deceased spouse alone retained the power during his or her life to direct the disposition of those trust assets for his or her benefit, as, for example, by the exercise of a power of appointment or by revocation of the trust.

Sullivan v. Burkin, 390 Mass. 864, 867 (1984).

¹²⁷ See Smith, *supra* note 113, at 155.

¹²⁸ See MACDONALD, *supra* note 114, at 3–5 (describing the case law as “cluttered with meaningless doctrine. There is talk of ‘illusory’ transfers, ... ‘fraudulent’ transfers, ‘colorable’ transfers, of ‘good faith,’ ... —a host of baffling criteria. There is uncertainty as to whether the widow may set aside *inter vivos* transfers, and there is uncertainty as to rationale.”).

¹²⁹ See N.Y. EPTL § 5-1.1 (McKinney 1967); see also REST. (3RD) PROP.: WILLS & DON. TRANSFERS § 9.1(b)–(c). The New York statute was superseded in 1992 to further protect the surviving spouse against other *inter vivos* transfers and evasive techniques. See N.Y. EPTL § 5-1.1-A (McKinney 1992).

¹³⁰ See UNIF. PROBATE CODE § 2-201 (UNIF. LAW COMM’N 1969) [hereinafter 1969 UPC].

¹³¹ See 1969 UPC §§ 2-201 and 2-202; ASCHER ET AL., *supra* note 107, at 177–79.

¹³² See ALASKA STAT. § 34.77 (an elective version of community property); ARIZ. REV. STAT. § 25-211 et seq.; CAL. FAM. CODE § 750 et seq.; IDAHO CODE § 32-903 et seq.; LA. CIV. CODE § 2334 et seq.; NEV. REV. STAT. § 123.130 et seq.; N.M. STAT. § 40-3-1 et seq.; TEX. FAMILY CODE § 3.001 et seq.; WASH. REV. CODE § 26.16; WIS. STAT. § 766; see generally 15B AM. JUR. 2D *Community Property* (2017).

¹³³ REST. (3RD) PROP.: WILLS & DON. TRANSFERS Chapter 9, Part A, Introductory Note; see generally 15B AM. JUR. 2D *Community Property* §§ 111–113 (2017).

¹³⁴ See Earl C. Arnold, *The Law of Community Property*, 12 ILL. L. REV. 528, 529–30 (1918).

¹³⁵ See Marjorie E. Kornhauser, *Theory Versus Reality: The Partnership Model of Marriage in Family and Income Tax Law*, 69 TEMP. L. REV. 1413, 1415–1417 (1996).

¹³⁶ Litman & Resnicoff, *supra* note 2, at 173.

¹³⁷ *Id.*

¹³⁸ See, e.g., GRUNFELD, *supra* note 6, at 101–03; Chaim Jachter, *Introduction to the Laws of Yerushah and the Ethics of Jewish Estate Planning*, KOL TORAH (Oct. 28, 2006), http://www.koltorah.org/ravj/Introduction_to_the_Laws_of_Yerushah_and_the_Ethics_of_Jewish_Estate_Planning_1.html; Litman & Resnicoff, *supra* note 2, at 192.

¹³⁹ See Litman & Resnicoff, *supra* note 2, at 192; Warburg, *Drafting a Halakhic Will*, *supra* note 6, at 82–84.

¹⁴⁰ See Litman & Resnicoff, *supra* note 2, at 173–74 (“[T]ypical *inter vivos* transfers do not appear to be an effective estate planning answer as to the bulk of a person's assets.”).

¹⁴¹ See *id.*; BLOCH & KLEIN, *supra* note 36, at ix (“There [is] no... legal restriction on a person's wide powers of disposal of his property at death as long as he [makes] it clear that bequests to non-heirs [are] gifts....”).

¹⁴² GRUNFELD, *supra* note 6, at 104.

¹⁴³ See *id.* at 180 (“[E]ven where a dangerously ill person's declaration is theoretically possible, a person whose condition qualifies him or her for such a declaration is unlikely to be thinking clearly. The person may forget both important property and prospective beneficiaries.”).

¹⁴⁴ See *id.* at 188

¹⁴⁵ See, e.g., Litman & Resnicoff, *supra* note 2, at 175–76; Jonathan Porat, *Koser Revocable Trusts: The Jerusalem Trust Form*, JLaw (1998), <https://www.jlaw.com/Articles/revocable.html>

¹⁴⁶ See MARY F. RADFORD, GEORGE GLEASON BOGERT, & GEORGE TAYLOR BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 1003 (2016).

¹⁴⁷ Mary Louise Fellows, *Concealing Legislative Reform in the Common-Law Tradition: The Advancements Doctrine and the Uniform Probate Code*, 37 VAND. L. REV. 671, 672 (1984); *see, e.g.*, REST. (3RD) PROP.: WILLS & DON. TRANSFERS § 2.6 (“An *inter vivos* gift made by an intestate decedent to an individual who, at the decedent’s death, is an heir is treated as an advancement against the heir’s intestate share if the decedent indicated in a contemporaneous writing, or if the heir acknowledge in writing, that the gift was so to operate.”); *see generally* 3 AM. JUR. 2D *Advancements* §§ 9–11 (2017); Harold I. Elbert, *Advancements: I*, 51 MICH. L. REV. 665 (1953); Harold I. Elbert, *Advancements: II*, 52 MICH. L. REV. 231 (1953); Harold I. Elbert, *Advancements: III*, 52 MICH. L. REV. 535 (1954).

¹⁴⁸ *See* Elbert, *Advancements: I*, *supra* note 147, at 687–94.

¹⁴⁹ *See id.* at 666–73; WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND 517 (1775) (“This just and equitable [doctrine of advancement] hath been also said to be derived from the *collatio bonorum* of the imperial law: which it certainly resembles in some points, though it differs widely in others.”); *see also* *Collatio Bonorum*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“The bringing into hotchpot of goods or money advanced by a parent to a child, so that the parent’s personal estate will be equally distributed among the parent’s children.”).

¹⁵⁰ Elbert, *Advancements: I*, *supra* note 147, at 674; *see* REST. (3RD) PROP.: WILLS & DON. TRANSFERS § 2.6 Statutory Note. New Mexico is the odd state out. However, since the courts in New Mexico hold that English statutes passed prior to the Declaration of Independence are a part of the common law, the advancement provision in the English Statute of Distributions (1670) would likely be held to be part of the State’s common law. *See* Elbert, *Advancements: I*, *supra* note 147, at 674–75.

¹⁵¹ *See id.* at 665. Furthermore, “[s]ince evidence of the [donor’s] intent is often lacking, the courts, of necessity, have worked out a series of presumptions which serve as a basis for determining the transferor’s intent.”). *See id.* However, a very small handful of states consider the intent of the donee *and* donor to be irrelevant. *See id.* at 665, 675–76.

¹⁵² *See* MCGOVERN ET AL., *supra* note 108, at 76.

¹⁵³ *See* MCGOVERN ET AL., *supra* note 108, at 77; Elbert, *Advancements: I*, *supra* note 147, at 665–66.

¹⁵⁴ Elbert, *Advancements: I*, *supra* note 147, at 676; *see, e.g.*, REST. (3RD) PROP.: WILLS & DON. TRANSFERS § 2.6; UPC § 2–109 (transfer treated as an advancement only if “the decedent declared in a contemporaneous writing or the heir acknowledged in writing that the gift is an advancement.”). *But see* MCGOVERN ET AL., *supra* note 108, at 76 (“Many states do not require a writing to prove that a gift was intended as an advancement.”).

¹⁵⁵ *See* Elbert, *Advancements: I*, *supra* note 147, at 696–97.

¹⁵⁶ *Id.* at 677–78.

¹⁵⁷ *Id.* at 679.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 682 (quoting *Ebling v. Ebling*, 115 N.Y.S. 894, 895 (Sup. Ct. 1908)).

¹⁶⁰ Barney Barstow, *Ademption by Satisfaction*, 6 WIS. L. REV. 217, 217 (1931); *see, e.g.*, REST. (3RD) PROP.: WILLS & DON. TRANSFERS § 5.4 (“An *inter vivos* gift made by a testator to a devisee or to a member of the devisee’s family adeems the devise by satisfaction, in whole or in part, if the testator indicated in a contemporaneous writing, or if the devisee acknowledged in writing, that the gift was so to operate.”); UPC § 2–609.

¹⁶¹ Barstow, *supra* note 160, at 218; *see* MCGOVERN ET AL., *supra* note 108, at 78–79.

¹⁶² *See, e.g.*, REST. (3RD) PROP.: WILLS & DON. TRANSFERS § 5.4; UPC § 2–609.

¹⁶³ *See* Section I.A.3 *supra*.

¹⁶⁴ *See* YARON, *supra* note 42, at 174–75.

¹⁶⁵ REST. (3RD) PROP.: WILLS & DON. TRANSFERS § 2.6 cmt. j; Katherine R. Guzman, *Releasing the Expectancy*, 34 ARIZ. ST. L.J. 775, 779 (2002); *see generally* 23 AM. JUR. 2D *Descent and Distribution* §§ 136–138 (2017). *But see* 23 AM. JUR. 2D *Descent and Distribution* § 140 (2017) (a few jurisdictions—Kentucky and Vermont—hold that these contracts are not binding).

¹⁶⁶ 23 AM. JUR. 2D *Descent and Distribution* § 139 (2017).

¹⁶⁷ *See* Guzman, *supra* note 165, at 779–80.

¹⁶⁸ *Id.* at 779.

¹⁶⁹ *See, e.g.*, REST. (3RD) PROP.: WILLS & DON. TRANSFERS § 9.4(a); UNIF. PREMARITAL AGREEMENT ACT §§ 2–3, 6 (UNIF. LAW COMM’N 1983)[hereinafter UPAA]; UPC § 2–213(a).

¹⁷⁰ *See* MCGOVERN ET AL., *supra* note 108, at 183.

¹⁷¹ *See* MCGOVERN ET AL., *supra* note 108, at 184–90; Dennis I. Belcher & Laura O. Pomeroy, *A Practitioner’s Guide for Negotiating, Drafting and Enforcing Premarital Agreements*, 37 REAL PROP. PROB. & TR. J. 1, 5–6 (2002).

¹⁷² *See* REST. (3RD) PROP.: WILLS & DON. TRANSFERS § 9.4(b)–(c); UPAA § 6(a)(2)(i); UPC § 2–213(b)(2)(A).

¹⁷³ *See* UPAA § 6(a)(2)(ii); UPC § 2–213(b)(2)(B).

¹⁷⁴ See UPAA § 6(a)(2); UPC § 2-213(b); MCGOVERN ET AL., *supra* note 108, at 186. *But see* REST. (3RD) PROP.: WILLS & DON. TRANSFERS § 9.4 Cmt. *k* (stating that an unconscionable nuptial agreement is *per se* unenforceable, regardless of whether there was adequate disclosure).

¹⁷⁵ See, e.g., REST. (3RD) PROP.: WILLS & DON. TRANSFERS § 9.4(c)(2) (requiring independent counsel for the surviving spouse unless he or she waived the opportunity after being offered); Nancy R. Schembri, *Prenuptial Agreements and the Significance of Independent Counsel*, 17 J.C.R. & ECON. DEV. 313 (2003); *cf.* UPAA § 6 Cmt. (stating that lack of independent counsel is a factor in assessing whether an agreement is unconscionable).

¹⁷⁶ See generally Belcher & Pomeroy, *supra* note 171.

¹⁷⁷ Note that ERISA mandates specific benefits for the surviving spouse of a participant in a pension plan. See ERISA § 205, 29 U.S.C. § 1055. These benefits are much more difficult to waive. See *id.* at § 205(c)(2)(A), 29 U.S.C. § 1055(c)(2)(A). “[At least] one court has held that an antenuptial waiver of ERISA rights is ineffectual because a fiancée is not a spouse.” MCGOVERN ET AL., *supra* note 108, at 183 (citing *Hurwitz v. Sher*, 789 F.Supp. 134 (S.D.N.Y. 1992)). *But see id.* (citing *In re Estate of Hopkins*, 574 N.E.2d 230 (Ill. App. 1991) (upholding a prenuptial waiver of ERISA rights)).