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# ISLAMIC WILLS: WHERE THERE'S A WILL, THERE'S A WAY...

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## INTRODUCTION

**Islamic personal law is part of the Sharia which is derived from the Qur'an and the Hadith (the recorded actions and sayings of the Prophet Muhammad during his lifetime).**

Unlike testamentary freedom afforded to individuals under English law, Islam has specific laws for the disposal of property after death. The laws of inheritance have their source in the Qur'an and are derived from the interpretation of various schools of jurisprudence of the Qur'anic verses that relate to inheritance. Using the information in the Qur'anic verses, together with the traditions of the Prophet Muhammad, as well as methods of juristic reasoning, Muslim jurists have fleshed out the laws of inheritance in such detail that many works have been produced on the subject.

Since the advent of Islam fourteen centuries ago, different schools of Islamic jurisprudence (known as "fiqh") have developed. These schools are known as "madhhabs." One of the main differences is between two groups: the Sunni and the Shi'a.

The division of the Muslims arose out of a difference of opinion as to who should have become the leader of the Muslim community after the death of the Prophet Muhammad. There are also different madhhabs within these two main groups. The main Sunni schools which have survived are the Maliki, Hanafi, Shafi'i and Hanbali schools. The main Shi'a school is the Ja'fari school, although the Zaidi, Ismaili and Abadi schools have significant followings.

One must realise that Islam revolutionised the ability of women to inherit. Prior to the Qur'anic injunctions, women could not inherit from their relatives, and in the case of pre-Islamic Arabia, were themselves bequeathed as if they were property to be distributed at the death of a husband, father or brother.

**This article concentrates only on general principles of drafting Islamic wills and Islamic inheritance law and does not dwell on the differences of opinion between the different madhhabs.**

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## IMPORTANCE OF MAKING A WILL IN ISLAM

- From a Sharia perspective, the correct distribution of assets is a compulsory obligation on the deceased. The implications of dying without a will, particularly in England, are aggravated by the English intestacy rules which govern the distribution of assets in a way which is at odds with the principles laid down through the Qur'anic injunctions.
- The heirs entitled to inherit under Sharia law may mutually agree to vary the statutory entitlements due to them under the intestacy rules and distribute the assets in accordance with the Qur'anic injunctions without the Court's involvement. This would not be possible however, where there are minor beneficiaries (for the purposes of English law, these are persons under the age of 18). However, mutual agreement is something which cannot be guaranteed, especially where assets are considerable, hence the importance of making a will.

## SEQUENCE OF DISTRIBUTION UNDER THE SHARIA

Wealth distribution by inheritance must follow a prescribed sequence of steps:

- Any outstanding debts of the deceased should be repaid;
- The funeral expenses must be paid from the assets of the deceased, unless the expenses are met voluntarily by family members;
- Any legacies stipulated in the will must be paid (there are certain constraints on the testator regarding the inclusion of legacies and these are mentioned briefly below);
- The remaining assets are to be distributed in accordance with the Qur'anic injunctions (see "Distribution of the estate" below).

## MAKING AN ISLAMIC WILL

An individual Muslim has a right of disposal as to  $\frac{1}{3}$  of his net estate. This may be bequeathed to anyone **not** entitled to a fixed share under Sharia principles (surviving spouses, parents or children are all entitled to fixed shares – they are generally known as the "main beneficiaries").

In the absence of any bequests up to  $\frac{1}{3}$ , the entire estate will be distributed amongst the surviving relatives in the manner stipulated by Sharia.

- With regards to the remaining  $\frac{2}{3}$ , this can be distributed in one of three ways:
  - in accordance with the strict rules prescribed by the Qur'anic injunctions (see "Distribution of the estate" below); or
  - a testator can suggest that instead of following the strict rules of distribution, the assets are to be distributed according to his/her wishes. However, this is subject to the agreement of the main beneficiaries after the death of the testator; or
  - the main beneficiaries may agree to divide the assets according to their common agreement rather than following the Qur'anic injunctions.
- No specific wording is essential for making a will in Islam. However, a legally valid will which simply states that Sharia should be enforced is insufficient as the English courts are unable to enforce a different system with which they are unfamiliar.
- Ideally, the will should stipulate the exact percentages due to the beneficiaries in accordance with the Qur'anic verses. However, this is impossible to do as the shares received by each family member depend on who survives the deceased – an unknown at the date the will is drafted.
- This can be resolved by placing the assets under trust. An obligation can be placed upon the trustees to follow Sharia principles. A discretionary will trust is the best method of trying to ensure that the testator's property devolves in accordance with Islamic law, as it provides for the greatest flexibility.
- The will should also contain a residuary clause dealing with what should happen to the estate if there are no surviving relatives, e.g that it should go to a named charity.
- A clause dealing with practical considerations concerning Islamic rites of burial such as **janazah** (the funeral prayer), **ghusl** (ritual washing), **kafan** (burial shroud) and **dafan** (burial not cremation) should also be included.

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- As with English law, the Qur'an dictates that the will be witnessed by two witnesses and sets out the qualifications of those witnesses.
- In relation to the appointment of executors ("the *wasi*"), the principles of Sharia law are similar to English Law. However, fundamentally, the *wasi*(s) must be Muslims. If a discretionary will trust is prepared, the testator should leave his executors/trustees a letter of wishes requesting them to distribute the estate in accordance with Sharia law. They in turn may seek the advice of a religious scholar known as an "*alim*."

## DISTRIBUTION OF THE ESTATE

The Qur'anic verses contain entrenched rights for spouses, parents and children. These are as follows:

### • Surviving Spouses

- A surviving husband is entitled to  $\frac{1}{4}$  of the estate where there are descendants and  $\frac{1}{2}$  where there are none.
- A surviving wife is entitled to  $\frac{1}{8}$  where there are descendants and  $\frac{1}{4}$  where there are none.
- Widows/widowers cannot be disqualified from the inheritance of their deceased spouse if they choose to remarry.

It is appropriate to note here that Sharia law does not recognise the concept of a joint tenancy, where any jointly owned property passes to the other joint owner(s) by survivorship, outside of the will. Under Sharia law, properties should be held as beneficial tenants in common. This is because it is against Sharia principles to allow a surviving spouse to inherit more than their share.

### • Surviving Mother

Subject to the spouses' interest:

- If the deceased has surviving children or remoter issue, the mother inherits  $\frac{1}{6}$ .
- If the deceased has no children, the mother inherits  $\frac{1}{3}$ .

- Where the deceased's father and surviving spouse survive, but there are no children, the mother receives  $\frac{1}{4}$  after the spouses' share has been deducted.
- Where the deceased has no children, no spouse, no father and no more than one brother or sister, the mother receives  $\frac{1}{2}$ .

### • Surviving Father

- Where the deceased is survived by daughter(s), the father receives  $\frac{1}{6}$ . He also receives the remainder after deducting the daughter(s) and any other immediate relatives' shares (i.e spouse or mother).
- Where the deceased is survived by at least one son, the father receives  $\frac{1}{6}$ , but no share in the remainder.
- Where the deceased has no children, the father receives whatever is left over after distributing the shares of the immediate relatives (such as a surviving spouse or mother).

### • Surviving Children and remoter issue

- Children are entitled to whatever remains of their deceased parent's estate after the surviving spouse and parents of the deceased have taken their shares.
- Male children or remoter issue receive twice the share of female children or remoter issue. The rationale for this is based on the Islamic legal presumption that a brother has an obligation to provide for his sister's support.
- Where there is only one daughter, she receives  $\frac{1}{2}$  of the net estate. If there is no other relative present, she inherits the remaining  $\frac{1}{2}$  as well.
- If there are two or more daughters and no son, then they will share  $\frac{2}{3}$  of the estate.
- If there is also a son present, the daughters do not have any fixed share. They will share the remainder with the sons - their share will be half of the son's share.

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## BY WAY OF ILLUSTRATION:

The deceased husband is survived by a wife, daughter, a mother and a brother. We will assume that  $\frac{1}{3}$  has been distributed as legacies in accordance with his will. The example therefore, deals with the remaining  $\frac{2}{3}$  of the net estate.

### Step 1 – Make a list of the surviving relatives and their shares

**Wife** – The wife is entitled to  $\frac{1}{8}$  of the estate due to the presence of the daughter (as the surviving child of the deceased);

**Daughter** – As there is only one daughter, she will receive  $\frac{1}{2}$  of the estate;

**Mother** – The mother will inherit  $\frac{1}{6}$  of the estate due to the presence of the daughter (as the surviving child of the deceased);

**Brother** – The brother will receive the remainder.

### Step 2 – Calculate the individual shares

The common multiple of 2, 6 and 8 is 24.

Therefore, each beneficiary will receive the following shares:

**Wife** – 3 shares

**Daughter** – 12 shares

**Mother** – 4 shares

So far, 19 shares out of 24 have been distributed. The surviving brother will take the remaining 5 shares.

## IN SUMMARY:

The closest surviving relatives (spouse, parents and children) will always inherit a share. They will take precedence over and exclude more distant relatives;

In the absence of the main beneficiaries, more distant relatives such as grandparents and grandchildren will then be entitled to inherit fixed shares.

## PRACTICALITIES

Be aware of the **madhhab** your client and their family belong to and ensure that the will is drafted in accordance with the principles approved by that **madhhab**. As mentioned above, this article only concentrates on the general principles.

The testator may want to make bequests out of the  $\frac{1}{3}$  of his estate which he is able to dispose of to distant relatives who may not otherwise inherit, as they may be excluded by the presence of closer relatives. Alternatively,  $\frac{1}{3}$  can be left to charity. This may be an option if it is likely there will be a significant inheritance tax liability.

This briefing offers general guidance on Islamic wills & inheritance law. It reflects the law as at March 2009. The circumstances of each case vary and this note should not be relied upon in place of specific legal advice.

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