

## **Last Will and Testament**

This is the last will and testament of me, Muhammed Suleman, born on 21 December 1968 and married to Farida Dawud.

1. I hereby revoke all my previous wills and codicils.
2. I hereby appoint XXXXXX and XXXXX as the executors to this my last will and administrators of my estate....

# **Australian and Islamic Laws of Inheritance – Part I**

## **Drafting a Will**

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*Allah knows best.*

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**The Australian series comprises:**

- Australian and Islamic laws of Inheritance – Part I – Drafting a Will
- Australian and Islamic laws of Inheritance – Part II – What to include in an Estate
- Australian and Islamic laws of Inheritance – Part III – Distributions in accordance with the Shariah
- Australian and Islamic laws of Inheritance – Part IV – How to Distribute an Estate

Also by the same author:

Wills and Inheritance: An Islamic and South African law perspective

Wills and Inheritance: An Islamic and Zimbabwean law perspective

Understanding Trusts – Zimbabwe edition

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## Chapter Summary

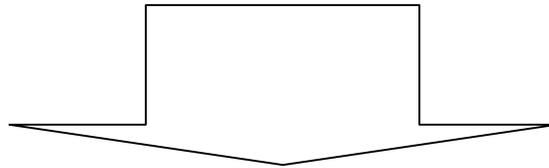
### Chapter 1: Introduction

**Under Australian law** you can do what you want with your assets - you have total freedom.

You can, for example, donate your assets to a charity, you can give them all to one child, or you can distribute them equally between all the surviving members of your family. **The choice is entirely yours.** However, should you ignore a dependant - the dependant can request the Court to have your will adjusted.

**Under Islamic law**, the Quran and hadith of the Prophet (Peace and Blessings be Upon Him) clearly state who can inherit. **You do not have a choice** – you need to follow the distribution outlined by the Almighty.

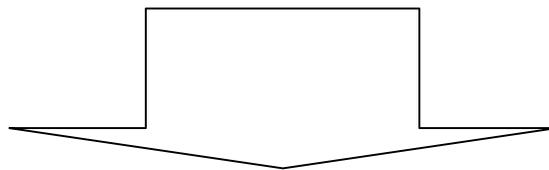
This chapter explains the key differences between Australian and Islamic laws. It contains extensive quotations from the Holy Quran.



### Chapter 2 – The Need for a Will

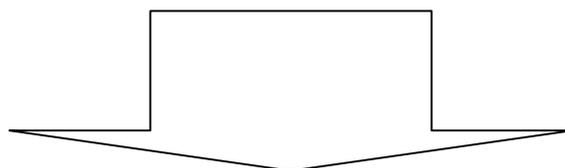
As the Islamic law of inheritance is not recognised in Australia, it is imperative or obligatory for you, as a Muslim, to make a last will in which you clearly state that your assets/wealth must be distributed in accordance with the Islamic law of succession/inheritance.

There are certain clauses that you need to add to your will to ensure that assets are distributed in accordance with Islamic law. This chapter discusses why you need a will and provides information on the clauses that could be included in your will.



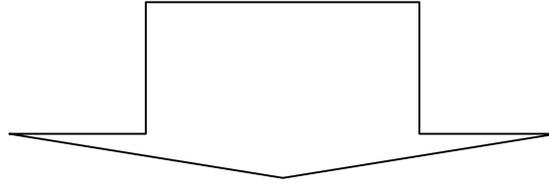
### Chapter 3 - Persons Who May Not Benefit Under A Will – Islamic Law

Certain persons cannot inherit under Islamic law – this chapter outlines who cannot inherit from your will (largely non-Muslims and adopted and illegitimate children).



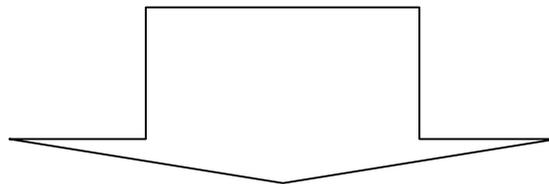
### **Chapter 4 - How To Prepare A Will**

For a will to be valid in Australia it must comply with the rules on the preparation of wills applicable in the State/Territory you live in. This chapter contains information on the preparation of wills and the alteration and cancelling of wills.



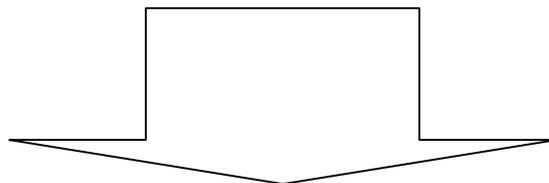
### **Chapter 5 - People You Need to Appoint in Your Will**

In your will you need to appoint persons to do certain things for you. You need to appoint witnesses to witness your will, executors and trustees to manage your estate after you die and guardians to look after your minor children. This chapter provides information about the role that these appointments will play after your death. The chapter also raises issues for you to consider about the qualities of the persons you need to appoint.



### **Chapter 6 - Issues to Consider**

This chapter, the largest in the book, contains extensive information on a number of issues to consider in preparing your will: The need to avoid family conflict, business succession planning, what to do with assets in a trust, taxation, conditions in a will, the need to update a will, challenging a will, overseas assets, superannuation and life assurance, property jointly owned, debts, gifts during your lifetime and organ donation.



### **Chapter 7 - Planning Ahead**

Should you be incapacitated, you need someone to make financial, health and lifestyle decisions for you. You need to take steps to ensure your assets continue to be managed and decisions are being made about your health by competent persons should you be unable to make them yourself. This would arise, for example if you are seriously ill or injured or in a coma. There are Islamic rules as to when life support should be stopped.

## **Acknowledgements**

Numerous people have contributed to bringing this series of books and my previous publications on inheritance to press. Some have contributed ideas, some encouragement, some effort and others patience and understanding. Special thanks go to the following:

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  - **Imam Uzair Akbar and Mufti J Akbar**, Holland Park Mosque, Brisbane, Australia, for their review and comments on the draft version of this book.
  - **Doctor Monzer Khaf CPA**, United States of America, author of the “*Last Will and Testament for Muslims in North America*” and a number of publications on Economic issues in Islam for his review and detailed critique of chapters 1 – 2.
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  - **Doctor Mohammed Moosagie**, then lecturer at the Islamic College of South Africa, for the use of his lecture notes and his review of an earlier manuscript.
  - **Farida Lambat**, my wife, for the critical reviews of the various manuscripts.
  - My late father, my mother and sisters, for their support and encouragement.
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## **About the Author**

Ebrahim Iqbal Lambat was born and raised in Bulawayo, Zimbabwe, where he qualified as a chartered accountant. He migrated to South Africa in 1989 and to Australia in 2000.

During Iqbal’s residence in South Africa he was engaged with a number of Islamic organisations that focused on Islamic education.

The laws of inheritance and trusts have been a focus of Iqbal’s for a number of years. Under the tutelage of the Late Professor Doi and Imam Yusuf Patel, Iqbal authored his first book titled: ***Wills and Inheritance: An Islamic and South African Law Perspective***. He has since authored a number of publications on Islamic law, largely published in South Africa and Zimbabwe.

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# Introduction

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## 1. INTRODUCTION

A will is one of the most important documents that you will prepare (or have prepared for you). A will details how you want your assets/wealth to be distributed after your death. Get it wrong and you could have assets being distributed incorrectly with resultant family conflicts and/or hardships.

For a Muslim living in Australia you need to comply with both the Islamic and Australian laws of succession/inheritance. Islamic law is not recognised in Australia. Your will, therefore, needs to comply with Australian law for it to be acceptable, whilst incorporating the required clauses to ensure that your assets are distributed in accordance with the rules contained in the Quran as these rules are mandatory in Islam.

## 2. COMPARING AUSTRALIAN AND ISLAMIC LAWS OF SUCCESSION

Australian and Islamic laws of inheritance differ in a number of instances. The most fundamental difference relates to your freedom to distribute your assets/wealth to who you wish.

### **Australian law:**

Under Australian law you can do what you want with your assets - you have total freedom. You can, for example, donate your assets to a charity, you can give them all to one child, or you can distribute them equally between all the surviving members of your family. **The choice is entirely yours.** You can also give your assets to a person provided that person fulfils certain conditions made by you in your will (for example, the person will only inherit if they reach a certain age, obtain a university qualification, marry a specific person, etc.). You can also place an inheritance in trust and dictate how the trust is to be managed and when distributions are to be made.

However, this total freedom has led to problems in the past where certain family members have been either excluded from a will or they have received too little to maintain themselves. Australian law now allows a spouse/child/dependant to challenge a will in the Courts if insufficient assets have been left for them to maintain themselves. For example, if you have a child that is dependant upon you, but you do not leave anything for that child or you leave too little (in the opinion of the child), the child can challenge your will in Court to have it adjusted so that he/she can receive more. The Court will only amend your will if it believes that your will does not properly look after the needs of the child. In doing so, the Court will consider a number of issues (size of your estate, your relationship with the child, the financial needs of the child, etc) before actually adjusting your will.

Should you die without leaving a will, your assets/wealth will be distributed by your State or Territory Government to your relatives in shares determined by the law in the State/Territory that you are living in (which differ from Islamic law). This means that your assets may not end

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up with the heirs specified in the Quran or to persons you would have chosen. Not having a will also has other implications which are discussed in the next Chapter: *The need for a will*.

In Australia, each State/Territory has its own laws on inheritance (including drafting wills). The principle of freedom of choice applies in each State/Territory and the laws themselves are similar.

### **Islamic law:**

Under Islamic law, the Quran and hadith of the Prophet (Peace and Blessings be Upon Him (“PBUH”)) clearly state who can inherit. You only have freedom to distribute a maximum of 1/3 (one-third) of your net assets/estate. The remainder must be distributed in accordance with the rules outlined in the Shariah (Islamic law) - essentially to persons the Quran nominates (referred to as Shariah heirs).

The Quran states:

*There is a share for men from what parents and near relatives have left, and a share for women, whether the property be small or large, - a determinate share.* (4:7).

*To (benefit) everyone, We have appointed shares and heirs to property left by parents and relatives.....* (4:33).

The Quran is clear – each ‘near’ relative will receive a share that has been determined by Allah. You do not have a choice – you need to follow the distribution outlined by the Almighty.

“On the death of a Muslim how his or her property is to be distributed among the surviving heirs is elaborately provided in the Holy Quran itself. The provisions the Holy Quran make are both fundamental and comprehensive. Their correct interpretation, proper explanation and practical demonstration by the Prophet (PBUH) and systematic exposition and development by his illustrious companions have made them most practical and precise.” (Khan<sup>1</sup>).

The book: *Australian and Islamic Laws of Inheritance – Part III: Distributions in accordance with the Shariah*, explains the shares that your family survivors will inherit.

### **3. IGNORING THE RULES LAID OUT IN THE QURAN**

Living in Australia, you have 3 options:

- (a) Not have a will – in that case your estate will be distributed to family/dependants in shares determined by State/Territory laws (which differ from Islamic laws);
- (b) Have a will in which you decide who you want to distribute your property to (this is against what the Quran requires); or
- (c) Have a will that applies Islamic law.

Under Australian law you have the freedom to do any of the above. A number of Muslims ignore Islamic laws and instead prepare wills where they state who is to receive their assets/wealth upon their death. This is done either in ignorance of Islamic laws or on the basis that the Islamic law of inheritance is archaic (old) and has no relevance in today’s world. The latter argument is nonsensical and calls into question the very essence of the Quran.

The Almighty outlines, in the Quran, the benefits for those who obey His rulings on the distribution of assets/wealth:

**Those are limits set by Allah: those who obey Allah and His Apostle will be admitted to Gardens with rivers flowing beneath, to abide therein (for ever) and that will be the Supreme achievement. (4:13).**

For those who obey, the Almighty promises eternal bliss ..... but the Almighty warns those who do not comply:

**But those who disobey Allah and His Apostle and transgress His limits will be admitted to a Fire, to abide therein: and they shall have a humiliating punishment. (4:14).**

In this verse, the Quran clearly warns of a punishment for those who do not obey. Therefore, from a Shariah perspective, any different distribution to that outlined in the Quran is a major sin to the deceased and to any heir who accepts either more or less than what the Shariah entitles him/her to. As stated previously, you do not have a choice – the Quran and ahadith of the Prophet (PBUH) command you on how to distribute your assets/wealth.

The Quran states:

**It is not [permissible/appropriate] to a believing male or female - when Allah and his Prophet has decreed a matter - that they have any choice from their side. (33:36).**

The Prophet (PBUH) stated the following with regards to people who did not distribute their wealth in accordance with the Quranic stipulations:

Narrated Abu Huraira: The Prophet (PBUH) said: “A male or female may devoutly worship Allah for sixty years, yet when death approaches (one) of them they act unjustly (by allocating shares contrary to the stipulation of the Quran) hence the fire becomes binding upon them.” (Abu Dawud)<sup>2</sup>.

Narrated Anas ibn Malik & Abu Huraira: The Prophet (PBUH) said, “If anyone deprives an heir of his inheritance, Allah will deprive him of his inheritance in Paradise on the Day of Resurrection.” (Mishkat).

The Quran also states:

**Every soul shall have a taste of death and on the Day of Judgement shall you be paid your full recompense; only the one who is saved from the Fire and admitted to the Garden would have succeeded; for the life of this world is but of goods and chattels of deception. (3: 185).**

But why does Allah seek to impose a distribution upon you? There are three reasons for this:

1. Mankind is inherently weak and based on bias can disinherit family members. There are many examples of this occurring in non-Muslim societies, hence the introduction in the “Western” world of laws to safeguard family members that are ignored by a will.
2. Your wealth has been given to you as a trust by the Almighty. Upon your death your trusteeship over your wealth expires and that wealth must be redistributed in accordance with the directives of the absolute owner – the Almighty. If you accept that whatever you own in this world has been pre-ordained for you, then this is not a difficult concept to understand.
3. God has a grand master plan and who survives you and their needs are unknown to us at any time.

“Islam is a comprehensive religion that regulates all the affairs of its adherents during their lives and even after their death. The Islamic law of inheritance recognises man as a trustee of the wealth he owns for the duration of his wealth. When his term of life expires, his trusteeship over his wealth and property expires. It has then to be distributed according to the directives of Almighty Allah.” Dr.Muzammil H. Siddiqi, former President of the Islamic Society of North America.

As to the logic for the various shares that family members receive, the Quran states: **[Between] your father and sons, you do not know who is nearer to you in benefit. Allah is Most knowledgeable and Most wise.** (4:11).

#### 4. DIFFERENCES IN OPINION

The Islamic law of succession/inheritance is not an easy subject to understand and differences are emerging in the interpretation of the various Quranic and ahadith statements. The Prophet (PBUH) said:

“Acquire the knowledge and impart it to the people. Acquire the knowledge of Fara’id (laws of inheritance) and teach it to the people, learn the Quran and teach it to the people; for I am a person who has to depart this world and the knowledge will be taken away and turmoil will appear to such an extent that two people will not agree in regard to a case of inheritance distribution and find none who would decide between them.” (Mishkat).

In my view clear guidance is provided in the Quran and ahadith of the Prophet (PBUH) for the majority of circumstances. There have only been a few cases that have differed significantly from the normal - these have been discussed by Scholars since the time of the Companions (Sahabah) and determined according to the rules and principles of Ijtihad.

All the major schools of thought (for example, Hanafi, Shafi, Maliki, Hanbali, etc) are in agreement over the need to distribute your estate according to the Shariah and there is also agreement on the various shares a person receives (these shares are outlined in the Quran).

#### 5. LOSS OF KNOWLEDGE

The Prophet (PBUH) said: "The first branch of knowledge which will be taken away from my Ummah will be *Ilmul Faraidh* [knowledge pertaining to inheritance].<sup>3</sup>" This is prevalent today as many Muslims are unaware of or do not understand that the Almighty has mandated a sophisticated inheritance system.

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<sup>1</sup> Khan: *Islamic Law of Inheritance: A New Approach*, page 15.

<sup>2</sup> This hadith is quoted extensively by a number of publications on inheritance. In a fatwa carried on Islamonline, Dr.Muzammil H. Siddiqi, former President of the Islamic Society of North America states that the hadith is also quoted in the following hadith compilations: Ahmad, At-Tirmidhi, Ibn Majah. (Fatwa on inheritance and wills, dated June 2002).

<sup>3</sup> From the Jamiat-ul-Ulama, Natal, website.

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## **The Need For A Will**

### **1. AS A MUSLIM YOU NEED TO HAVE A WILL IN AUSTRALIA**

Every Muslim, male or female, should have a will. It is the only way you can tell others that you want your assets/estate to be distributed according to the Shariah. Even if you do not want to distribute your assets according to the Shariah (in Islam this is recognised by all schools of thought as a major sin), you still need a will to indicate who is to inherit your assets/wealth.

Almighty Allah instructs us to make a will in the Quran:

Surah II : Baqara

**180. It is prescribed, when death approaches any of you, if he leave any goods, that he make a bequest.....**

**181. If anyone changes the bequest after hearing it, the guilt shall be on those who make the change, for Allah hears and knows (all things).**

The Prophet (PBUH) stated that it was not permissible for any Muslim to spend two nights without making a will if he has possessions:

Narrated Abdullah bin Umar: Allah's Apostle said, "it is not permissible for any Muslim who has something to will to stay for two nights without having his last will written and kept ready with him." (Bukhari, Abu Dawud and Muslim) <sup>1</sup>.

If you are living in a Muslim country or a country in which the Islamic law of succession applies (for example, India) you do not need to worry about the distribution of your estate to your heirs – you will only need a will if you wish to give one-third of your estate as a gift to any person or organisation (legacy) and to confirm your debts.

As the Islamic law of inheritance is not recognised in Australia, it becomes imperative or obligatory for you, as a Muslim, to make a last will in which you clearly state that your assets/wealth must be distributed in accordance with the Islamic law of succession/inheritance.

"Muslims, who are living in countries where the Islamic Law of inheritance is not applied, are in a dilemma because their wealth will most likely not be distributed according to the Islamic Law. From here it becomes important that they make a will in which they should stipulate that their wealth is to be distributed according to the Islamic teaching." Dr.Muzammil H. Siddiqi, former President of the Islamic Society of North America.

Under Islamic law you have a choice in the distribution of up to a maximum of 1/3 (one-third) of your property/wealth to whoever you wish – therefore your last will should indicate who you wish to distribute this one-third to. You do not need to distribute the one-third – you can choose to have the entire amount distributed to your Shariah heirs.

The one-third that you have freedom over is referred to as a legacy or a bequest. The one-third concept and its limit arose from statements made by the Prophet (PBUH):

Narrated Sa'd bin Abu Waqqas: The Prophet came visiting me while I was (sick) in Mecca, .... I said, "O Allah's Apostle! May I will all my property (in charity)?" He said, " No." I said, "Then may I will half of it?" He said, "No." I said, "one third?" He said: "Yes, one-third, yet even one-third is too much. It is better for you to leave your inheritors wealthy than to leave them poor begging others, and whatever you spend for

Allah's sake will be considered as a charitable deed, even the morsel of food you put in your wife's mouth....." At that time Sa'd had only one daughter. (Bukhari and Muslim)<sup>2</sup>.

Should your will attempt to distribute more than one-third, under Islamic law, the remaining heirs may elect to ignore the additional bequest or the adult sane heirs may elect to pay the additional bequest out of their portion. For example, if your will distributes 43% of your assets as legacies (instead of the allowed 1/3, that is, 33%), the extra 10% will be ignored and the Shariah heirs will still receive 67% of your net estate. However, the adult heirs can elect to pay the extra 10% out of their own inheritance. How they elect to do it and whether all the heirs contribute is their choice. If they do it, they are giving a gift from their own inheritance – there is no need for them to do so under Islamic law.

Note, under the Australian legal system, the additional bequest is legal and the remaining heirs cannot ignore the additional bequest unless your will specifies the Shariah distribution.

Other than the one-third legacy, you have no other choice with regards to your heirs and you cannot vary the rights of any of your heirs.

Sheikh Yusuf Al-Qaradawi<sup>3</sup> states in this regard: "After the revelation of the verse of *Surat An-Nisaa* (i.e. the Verse of Inheritance), the Prophet (PBUH), commented: **"With this verse, Allah has clarified the right of every heir, so a will should not be made for any of one's heirs."**

"If it happens that a man has made a will for one of his heirs, this will should be executed if endorsed by the rest of the heirs. This opinion is held by the majority of `Ulama (Muslim scholars). But if any of the heirs objects to that will, the will should be executed without tampering with the right of the dissenting heir."

The reference to making a will for heirs is an attempt to vary the rights of your heirs in your will. For example, if your daughter is entitled to half of your son's share - you may wish to equalise this through giving your daughter a legacy out of the one-third that you have a choice over or you may state that your daughter and son should receive equal shares. Both are not permitted under Islamic law. However, as Sheikh Yusuf states above, such a variation is acceptable if all the heirs agree. If they do not, then your heirs will receive their Shariah allocations and some of your heirs may voluntarily decide to give your daughter a higher share.

In addition to being able to specify that your assets should be distributed in accordance with the Shariah, the other advantages of having a will are:

- A will allows you to choose a person to manage the distribution of your assets after you die (executor). It also allows you to appoint a guardian for your minor children. These are crucial appointments. Refer to the Chapter: *People you need to appoint in your will* for more detail. If you do not have a will, your assets will be managed by a person called an administrator, who may have to be appointed by a court. This person does not have all the powers that an executor has, and may not be a Muslim.
- Most wills require a 'grant of probate'. A grant of probate confirms that the author of the will has died, the will is authentic and the executor is who they say they are. If a deceased person does not have a will, validation of their estate and benefactors is not done with a grant of probate, but with a similar document known as 'letters of administration'. This can be time consuming.

## **2. THE IMPACT OF YOUR WILL**

Under Australian law, in your will you can:

- transfer or dispose of the whole or any part of your assets (property, shares in companies, paintings, cars, furniture, books, etc);
- provide for the custody or guardianship of any of your minor children; and
- specify how you wish to be buried.

Benefits under life insurance policies and superannuation are usually paid to the beneficiaries nominated by you in your life assurance/superannuation beneficiary form or by the trustees of the respective fund. Refer to the Chapter: *Issues to Consider* for more detail.

## **3. YOUR SPOUSE'S ASSETS ARE NOT YOURS**

Under Islamic and Australian law, each person is the owner of their own property with the result that each member of the family must prepare/make their own will. A husband has no right to dictate to his wife how to distribute her assets and similarly a wife cannot dictate to her husband on the distribution of his estate.

Dr. Muzammil H. Siddiqi, former President of the Islamic Society of North America, states: "In Islam men and women both have the right of ownership. Allah says in the Qur'an, **'To men belong what they earn, and to women what they earn.'** (an-Nisa': 32).

After marriage the property of a man or woman does not automatically become the property of his/her spouse, unless they both want and decide to have joint ownership. Just as a man is allowed to handle his property according to his judgment, so also a woman is allowed to handle her property according to her judgment. [Refer to the Chapter: *Issues to Consider*, for discussion on the implications of joint bank accounts, family furniture, and property acquired under joint tenancy, etc.].

In a wife's property, her will is honoured and in a husband's property, his will is honoured<sup>4</sup>."

## **4. IMPORTANT CONTENTS OF AN ISLAMIC WILL**

The following should be included in your Islamic will:

- a) The fact that the will is to be administered in accordance with the Islamic law of succession. It is advisable to name a controlling body which can be referred to for interpretation in the event of a dispute. For example, you can indicate that if problems arise with the interpretation of Islamic law, the Australian Federation of Islamic Councils (AFIC), the XYZ Mosque, etc. be consulted and a certificate/letter obtained from the body that the final proposed distribution is in accordance with the Shariah (Islamic law). A specific person can also be named.

You could also indicate in your will that you desire the estate to be administered in accordance with the Sunni or Shia school and should preferably indicate which school (For example, Sunni: Hanafi, Hanbali, Maliki or Shafi), as each school has different laws on the order of administration of an estate and there are other minor differences in the laws of inheritance pertaining to each school.

The disadvantage of mentioning a school/madhab is that interpretation differences can arise and should the will be contested, a non-Muslim judge could interfere in the distribution. A better option would be to append to your will Shariah regulations for the distribution of an estate.

**Example of a clause that could be added to your will<sup>5</sup>:**

I direct, devise, and bequeath all the residue and remainder of, my estate (after the payment of debts and legacies) only to my Muslim heirs whose relation to me, whether ascending or descending, has occurred through Islamic or lawful marriage at each and every point. The distribution of the residue and remainder of my estate shall be made strictly in accordance with Appendix A to this will.

- b) Nomination of executors. All schools/madhab state that only Muslim executors should be appointed.

**Example of a clause that could be added to your will:**

I direct that only a Muslim shall be an executor of this will.

I nominate as executors of this my last will and administrators of my estate, the following:

\_\_\_\_\_

Should any person be unable or unwilling to assume office as executor or administrator, then I appoint the following:

- c) Instructions on how you wish to be buried. Living in a non-Muslim country, your will should contain instructions on how you wish to be buried.

**Example of clauses that could be added to your will:**

- I direct that no autopsy or embalming be done on my body unless required by law, that without unjustified delay my body be washed, wrapped with cloth free of any ornaments and other articles, prayed for, then buried, which all should be done by Muslims in complete accordance with Islamic tenets.
- I direct that absolutely no non-Islamic religious service or observance shall be conducted upon my death, or on my body.
- I direct that my body shall not be transported over any unreasonable distance from locality of my death, particularly when such transportation would necessitate embalming, unless when long distance transportation is required to reach the nearest Muslim cemetery, or any other cemetery selected by my Executor.
- I direct that my grave be dug deep into the ground in complete accordance with the specifications of Islamic practice, that it faces the direction of Qiblah (the direction of the City of Mecca in the Arabian Peninsula towards which Muslims face during prayers).
- I direct that my body shall be buried without a casket or any encasement that separates the wrapped body from the surrounding soil. In the event local laws require casket encasement I ordain that such encasement be of the simplest, the most modest, and the least expensive type possible. I further ordain that the encasement be left open during burial and filled with dirt unless prohibited by law.
- In the event of any legal difficulties in the execution of my burial request, I direct my Executor to seek counsel from the Australian Federation of Islamic Councils (AFIC).

- d) Instructions for the deduction of any personal and religious liabilities.

Under Islamic law, personal debts are to be paid before any legacies are paid or distributions are made to heirs. Narrated Ali ibn Abu Talib: Allah's Messenger (PBUH) decided

that a debt should be discharged before a legacy. (Mishkat). The same hadith, narrated by Sayaduna Ali, is reported by Tirmithy. Bukhari reports in volume four, page 9 of his works: "The Prophet is reported to have judged that the debt should be paid before the execution of the will."

Certain schools (madhabs) are of the view that religious debts should also be deducted prior to paying legacies. You therefore need to indicate in your will whether you have any unpaid religious debts (zakaah, charity for fasts not kept, performance of hajj on deputation, etc). One way of doing this is to have a clause stating that all your religious liabilities not yet paid should be deducted and paid to an institution that you should name in the will, or leave it to the discretion of your Executor. Your family should know what liabilities are outstanding.

Some Hanafi scholars are of the view that religious debts cease upon death and can therefore only be paid out of the one-third that you have choice over (legacies). All other schools are of the opinion that religious debts must be deducted before legacies, based on the following statements by the Prophet (PBUH):

"The debt belonging to Allah is more worthy to be settled." (Bukhari<sup>6</sup>)

"Settle the debts of Allah for it is more worthy that it be carried out." (Muslim).

**Example of a clause that could be added to your will:**

I direct that my Executor apply first, the assets of my estate to the payment of all my legal debts - including such expenses incurred by my last illness and burial as well as the expenses of administrating my estate. I direct the said Executor to pay any "obligations to Allah" (Huquq Allah) that are binding on me according to the tenets of Islam such as, but not limited to, any unpaid Zakah, Kaffarat or unperformed pilgrimage (Hajj).

Debts from an Islamic perspective are discussed in detail in the book: *Australian and Islamic Laws of Inheritance Part IV – How to Distribute an Estate*.

- e) Instructions for the distribution of special bequests/legacies. The Prophet (PBUH) placed an upper limit of not more than one-third of the net estate (after paying funeral costs and debt) being distributed as legacies/bequests. Special bequests can be made to charities, friends and family. Legacies/bequests can be made to non-Muslims.

Your will should include a list of person(s) receiving a legacy and what they will receive. Where the legacy constitutes assets, you need to describe the asset in sufficient detail to ensure that there can be no doubt about which asset you are referring to.

**Example of a clause that could be added to your will:**

I direct my executor to pay the following amount from the remainder of my estate after paying all the expenses mentioned above, to the person/s or organization/s named below. The total must not exceed 33 percent (one third) of the remainder of my estate.

1. \_\_\_\_\_ % of the total remainder
2. \_\_\_\_\_ % of the total remainder

- f) Specify that the balance is to be distributed in accordance with the Islamic law of succession.

**Example of a clause that could be added to your will:**

I direct, devise, and bequest all the residue and remainder of my estate of every component, nature and kind and wherever it may be located after making provisions for payments of my debts, obligations and distribution be distributed to my heirs in accordance with the Hanafi School of Islamic law of succession.

Preferably, your will should include as an appendix the distributions according to the Shariah and your will should then state that the residue be distributed in accordance with the Appendix. Alternatively, your will could make reference to the booklet: *Australian and Islamic laws of inheritance – Part III: Distributions in accordance with the Shariah*.

**Example of a clause that could be added to your will:**

I direct, devise, and bequest all the residue and remainder of my estate of every component, nature and kind and wherever it may be located to be distributed in accordance with Appendix A to this will.

- g) Your will needs to comply with the legal requirements in the State/Territory you are residing in - these are discussed in the Chapter: *How to prepare a will*. As a Muslim resident in Australia you must comply with the requirements of the Australian law of succession to ensure that your will is a valid document.

An Islamic will is referred to as **wasiyya**.

<sup>1</sup> Bukhari – volume 4, book 51, number 1; Muslim - book 13, hadith number 3987

<sup>2</sup> Bukhari – volume 4, book 51, hadith number 5; Muslim - book 13, hadith number 3997.

<sup>3</sup> Sheikh Yusuf Al-Qaradawi, Fatwa: Making a Will for One’s Heirs” Islamonline fatwa section.

<sup>4</sup> Islamonline – fatwa section

<sup>5</sup> All examples used in this publication have been sourced and adapted from a will developed for North America by Dr Monzer Kahf.

<sup>6</sup> Al Fadl: *A Comparative Study on Inheritance*, page 74, translated by A.H. Sallie.

## **Persons Who May Not Benefit Under A Will – Islamic Law**

The following persons are disqualified from benefiting from a deceased estate in terms of the Shariah:

### **1. A PERSON WHO IS NOT A MUSLIM**

The Prophet (PBUH) stated:

Narrated Usamah ibn Zayd: Allah's Messenger (PBUH) said, "A Muslim is not entitled to inherit from a non-Muslim, and a non-Muslim is not entitled to inherit from a Muslim." (Bukhari, Abu Dawud and Muslim)<sup>1</sup>.

There is consensus amongst the schools (based on the above hadith) that a non-Muslim will not inherit from a Muslim and that a Muslim may not inherit from a non-Muslim.

"It is well established in Islam that difference in religion between a Muslim and his relatives or spouse makes inheritance inhibited among them. Thus, a Muslim neither inherits from nor bequeaths to non-Muslims, whether Christians, Jews or polytheists. This is the opinion agreed upon among the majority of Muslim scholars of the Companions and their successors up to contemporary ones." Sheikh Ahmad Haridi, former Mufti of Egypt<sup>2</sup>.

If you have a family member (example a son) who is a non-Muslim, the Quranic shares will be calculated as if he did not exist. Under Australian law the son, if he is a dependant, can request the Supreme Court to have your will altered.

If the person disinherited becomes a Muslim after the distribution of the estate (that is after your death), the disinherited person has no claim on the estate (all schools concur). There is a difference of opinion if the person disinherited becomes a Muslim before the distribution of the estate. The Hanbali school are of the opinion that the person can inherit. The Shafi, Maliki and Hanafi schools are of the opinion that the person cannot inherit.

You can distribute/benefit your non-Muslim relatives from the one-third of your net estate that you have total discretion with (legacy).

#### **Example of a clause that could be included in your will:**

I also direct and ordain that no part of the residue and remainder of my estate shall be inherited by, or distributed to any non-Muslim relative whether he/she is a kin or in-law, spouse, parent, or child, etc., except for those I personally named in the section on legacies.

A person who changes his religion from Islam to that of another cannot inherit (all schools of thought concur).

The schools concur that the person may inherit if he/she returns to Islam and repents. If he/she does not, then the estate is distributed as if the person did not exist.

### **2. ADOPTED AND ILLEGITIMATE CHILDREN**

#### **Adopted children:**

Under Australian law, an adopted child is regarded as a natural child once all the formalities of adoption have been finalised – the child then qualifies as a natural child for inheritance. Under Islamic law an adopted child does not qualify as a Shariah heir. An adopted child may receive benefits from the one-third of the net estate (after payment of funeral expenses and debt) that

you have freedom of choice over (legacies). This is a fundamental difference that can cause complications in the structure of a will.

The Quran states:

Allah has not made your adopted sons your sons. Such is only your manner of speech by your mouths but Allah tells you the Truth and He shows you the right way. (33:4).

Call them by their names as well as by the names after their fathers, that is justice in the sight of Allah. But if you know not their father's name, then they are your brothers in faith. Or they are your friends, but there is no blame if you make a mistake therein. What counts is your intentions of your hearts and Allah is forever Merciful all Forgiving. (33:5).

“Adoption (*tabanni*) in the sense of changing the name of a child’s biological parents is not permissible in Islam. However, if one takes care of a child as a custodian or guardian and wants to write something for that child in his/her will, then one is allowed to do that within one third of his/her estate. One is allowed to give up to one third of one’s wealth to any charity or to any one who would not receive any share of the inheritance otherwise.” Dr. Muzammil H. Siddiqi, former President of the Islamic Society of North America<sup>3</sup>.

The position is very different from Australian law - a difference that you need to be aware of when wording your will. A very common term used in wills is “issue” or “children” which will automatically include adopted children under Australian law.

### **Illegitimate children:**

Under Islamic law the children of an adulterous affair are deemed to be the legitimate children of the mother’s legal husband<sup>4</sup>. If the husband makes an oath of condemnation that the child is not his then the child will have no family ties with his/her “father” and as such cannot inherit from him. All the schools of thought are in agreement that the child can inherit from it’s mother and it’s mother’s family.

The same rule applies to a child born out of wedlock. The child will never have any religious ties with his biological father even though the father subsequently marries his mother. Any brothers and sisters from the subsequent marriage are not regarded as real brothers and sisters but as uterine (maternal half) brothers and sisters. Islamic law takes away all the rights of the father<sup>5</sup>.

The Prophet (PBUH) said:

Narrated Abdullah ibn Abbas: The Prophet (PBUH) said: “He who claims his child without a valid marriage will neither inherit or be inherited.” (Abu Dawud).

Narrated Abdullah ibn Amr ibn al-As: The Prophet (PBUH) said: “.....but if the father to whom he was attributed had disowned him, he was not joined to the heirs (of that father). If he was a child of a slave woman whom the father did not possess or of a free woman with whom he had illicit intercourse, he was not joined to the heirs and did not inherit even if the one to whom he was attributed is the one who claimed paternity, since he was a child of fornication whether his mother was free or a slave.” (Abu Dawud). This hadith is clear: even if a father acknowledges his paternity, he may not inherit his illegitimate child. The law is different from that applicable in Australia and if you are affected you should seek legal advice when drafting your will.

A mother will inherit from her illegitimate child in the same manner as she would inherit from her other children.

**Example of a clause that could be added to your will:**

I direct that no part of my estate shall be given to relatives whose relationship to me, ascending, descending or sibling has occurred outside an Islamic or lawful marriage, or through adoption, step or foster relation at any link of such relationship. I further direct and ordain that out-of-Islamic-or-legal-marriage, adopted, step and foster children, and all relatives through them be disregarded and disqualified, as if they do not exist, with regard to the distribution of the remainder of my estate, except for the following:

1- Legatees I specifically named.

2- A person whose relation to me goes through his/her biological mother, even if it is out of wedlock.

**3. IF A PERSON CAUSES THE DEATH OF ANOTHER INTENTIONALLY HE CANNOT INHERIT FROM THE DECEASED**

Your murderer cannot inherit from your estate:

The Prophet (PBUH) stated:

Narrated Abu Hurraira: The Prophet (PBUH) said, "One who kills a man cannot inherit from him." (Mishkat).

The four schools differ with regards to unintentional (accidental) killings/death. Broadly, the Shafi school are of the opinion that whether intentional or unintentional, the murderer cannot inherit. The Hanafi school is of the view that if the accidental killing warrants compensation or atonement, the 'murderer' cannot inherit. Under the Maliki school, an accidental killing is ignored and the 'murderer' can inherit from the deceased's estate. According to the Hanbali school, if the act requires punishment, then the 'murderer' cannot inherit.

**4. GIVING PERSONS, WHO DO NOT BENEFIT, A LEGACY**

As stated previously, whilst non-Muslim relatives and adopted and illegitimate children do not qualify as Shariah heirs, you can still give them assets/money from your estate from the 1/3 legacy section that you have discretion over. The 1/3 legacy section is a significant gift and depending upon the number of persons that you share the 1/3 with, these persons could be major inheritors from your estate. Therefore, the fact that they do not qualify as Shariah heirs, does not preclude them from inheriting a significant amount of your estate.

<sup>1</sup> Bukhari – volume 8, book 80, hadith number 756; Abu Dawud, book 18, hadith number 2905; Muslim – book 11, hadith number 3928.

<sup>2</sup> Source: Islamonline.

<sup>3</sup> Islamonline

<sup>4</sup> Majlisul Ulama (Port Elizabeth): *Kitaabul-Meerath*, page 65.

<sup>5</sup> Al Fadl: *A Comparative Study on Inheritance*, page 357, translated by A.H. Sallie.

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## How To Prepare A Will

### 1. HOW TO PREPARE A WILL

For a will to be valid in Australia it must comply with the rules on the preparation of wills applicable to the State/Territory you live in. As mentioned previously, each State/Territory in Australia has its own laws for the preparation of wills and broadly, the laws are very similar. Islamic law is not recognised in Australia and therefore your will must be prepared in accordance with the State/Territory rules. These rules (with a comparison to Islamic law) are:

(a) **The will must be in writing.**

All States and Territories require the will to be in writing. Your will does not have to contain any particular words other than to state that it is to take effect only after your death and that you want your estate to be distributed in a certain way.

The will can be either typed or hand-written – if it is hand written use the same pen for the entire will, if possible.

Your will does not have to be in English. As the will maker, you are legally referred to as the ‘testator’.

(b) **You must sign the will with the intention that your signature gives effect to the will.**

You should sign each page of the will. Your signature should be your full signature, but if you cannot manage to do that then your initials will suffice. Your signature on each page should be as close to the concluding words as is reasonably possible to reduce the risk of fraudulent alterations. The last page of the will should contain your full signature and the date of the will.

The requirements for signing a will differ slightly between the States and Territories. If you sign each page of the will (preferably your full signature), you will have complied with the requirements of most States and Territories.

You should only sign the will after you have dated it.

You may request another person to sign your will on your behalf (this would arise if you are ill, etc.) but you must be present when the other person is signing.

(c) **You must sign the will in the presence of two or more witnesses.**

When you sign the will, you must be in the presence of two or more witnesses. If you have already signed the will (that is, before the witnesses have arrived), then you must show the witnesses that you have already signed and you need to acknowledge to them that it is your signature. If you have requested another person to sign the will on your behalf, then you should give that person the instruction to sign the will for you in the presence of the witnesses.

The Quran also states that a will should be witnessed by two persons:

*O ye who believe! when death approaches any of you, (take) witnesses among yourselves when making bequests, - two just men of your own*

(brotherhood) or others from outside if ye are journeying through the earth, and the chance of death befalls you (thus). (5:109).

- (d) **The witnesses must sign the will in your presence and the presence of any person who has signed the will on your behalf.**

Ideally, you and your witnesses should all remain together during the signing of the will. However, in certain States, the witnesses need not be together when they are signing the will, provided they are both together when you sign the will. It is advisable that you sign the will in front of the witnesses and they immediately sign the will in front of you and in front of each other. The witnesses should not sign the will until they have seen you sign it. If possible, use the same pen to sign the will.

The witnesses should sign each page of the will. Whilst not a legal requirement, the witnesses should write their full names, date of birth and contact telephone numbers below their signature on the last page.

It is advisable that your will includes a statement at the end stating that you signed the will in the presence of the witnesses and that they signed the will in your presence and in the presence of each other. This is referred to as an attestation clause.

Example of an attestation clause:

*Signed by me at South Bank, Brisbane, this the 15th day of August 2005; in the presence of the undersigned witnesses who signed in my presence and in the presence of each other, all being present at the same time.*

**In summary, for your will to be valid:**

- the will must be in writing;
- each page of the will must be signed by you;
- in the presence of two witnesses;
- and the witnesses themselves must sign the will in your presence.

In most States and Territories, the Supreme Court will validate a will if you do not comply with each of the above requirements, provided that there is substantial compliance with certain formalities and the court is satisfied that the will expresses your intention.

A will that is prepared in another country is acceptable in most States and Territories, provided that the will complies with the laws of the country in which it was prepared.

Under Islamic law, a will can be made either orally or in writing. If the will is in writing it need not be signed (by you - but it must be witnessed). However, unless the will conforms with Australian legal requirements it may not be accepted.

## **2. PERSONS QUALIFYING TO MAKE A WILL**

In most States and Territories, you need to be 18 years or more to make a will. In certain States and Territories the age is lower if you are married, or you seek the approval of the Court to have a will at a younger age.

In addition to being 18 years of age, you must be mentally capable of understanding what you are doing. Issues such as advanced age, ill health, delusions, drugs, etc will all be considered should a claim be made that you were mentally incapable.

Under Islamic law, you qualify to make a will on the attainment of puberty. The age of fifteen is the limit between childhood and manhood (Hadith 832, Bukhari volume III). As Australian law requires you to be 18 years or older (unless you are married or have obtained the Court's permission), a will of a person below the age of 18 may not be accepted.

Under Islamic law, all schools of thought are of the opinion that a person must be sane to make a will. The Maliki and Hanbali schools regard the will of an intoxicated person as invalid. The Shafi school are of the opinion that the will of a person who has intoxicated himself voluntarily is valid<sup>1</sup>.

### **3. AMENDMENTS TO WILLS**

#### **Australian law:**

You may amend your will at any time provided that you sign the alteration and your signature is witnessed by at least two persons. The witnesses need not be the same witnesses who signed the original will.

The rules for amending wills are the same as those for the preparation of the will itself. The comments above on how to prepare a will apply here as well.

#### **Islamic law:**

Islamic law is similar to Australian law in this respect. The only restriction imposed concerns decisions made under death sickness.

### **4. REVOCATION OF A WILL**

Under Australian law, you may at any time revoke your will. Revoking a will is either cancelling or destroying the will. Under Islamic law, you may also revoke your will at any time. The only portion of the will that you may revoke, under Islamic law, is the section containing specific bequests (the one-third portion). You have no power to revoke or vary the Shariah distributions. However, under State/Territory laws you have the power to revoke your entire will and change the heirs to whoever you please.

In most States and Territories, a will is revoked when:

1. You marry (if you have intentions of marrying, it is advisable to include a statement in your will stating that the will has been prepared "in contemplation of marriage"). Under Islamic law, a wife is a Shariah heir and will automatically qualify to receive benefits under your will.
2. You divorce – a divorce will revoke any gifts made to a former spouse and it will also revoke the appointment of the former spouse as an executor, trustee or guardian. Under Islamic law, a divorcee also receives nothing as a valid marriage must exist to qualify as a Shariah heir.
3. You prepare a new will which either states or implies that an earlier will is revoked.
4. You make a written declaration (in the same way as preparing a will) revoking the will.
5. You or someone under your direction burns, tears or otherwise destroys the will.

If your new will does not state that your earlier will is revoked, the two wills may be read together (provided both wills are submitted for probate) and where the new will indicates

revised inheritors for a specific item, the earlier will may be considered to be revoked for the distribution of that item. For example, if in an earlier will you distribute your car to your son, but in the new will to your daughter, the new will revokes the earlier will and your daughter will inherit.

Unlike Australian law, Islamic law does not subscribe to the principle that the latest will revokes an earlier will on the same subject matter. All four schools are of the opinion that if you bequeath a specific item in favour of a person and then bequeath the same item in favour of another, the item will be equally distributed between the two persons. Therefore under Islamic law, you must revoke all earlier wills.

**Example of a clause that could be included in your will:**

I revoke all wills, codicils and other testamentary writings previously made by me.

If you will a certain asset to a person (as a legacy) and you subsequently sell that asset, then, according to the Hanbali, Maliki and Shafi schools, your will is considered to be revoked with regards to that particular asset. The Hanafi school are of the view that the proceeds of the sale should be distributed instead.

A revoked will can be revived (made valid again) if certain procedures are followed.

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<sup>1</sup> Bakhtiar L: Encyclopedia of Islamic Law, page 353.

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## **People You Need to Appoint in Your Will**

In your will you need to appoint persons to do certain things for you. You need to appoint witnesses to witness your will, executors and trustees to manage your estate after you die, heirs and beneficiaries to receive your assets after your death and guardians to look after your minor children.

### **1. WITNESSES**

For a will to be valid, under Australian law, it must be witnessed by at least two persons.

Under Australian State and Territory laws, any person can be a witness provided they are over 18 years of age and sighted, since blind people cannot see you sign, and this is essential. In certain States/Territories, to qualify as a witness, the person must be capable of being a witness in a civil proceeding in Court.

The witnesses do not need to read the will. Their function is merely to witness it. The witnesses must be mentally aware of what you are doing and must be physically present and see you either sign the will or confirm your signature (if the will was already signed).

You should select persons that are neither heirs (beneficiaries) nor executors to your will or spouses of heirs or executors to your will. In certain States/Territories beneficiaries can be witnesses, but only under certain conditions. To be safe, rather choose independent witnesses.

Under Islamic law, only sane adults can be witnesses. The Quran provides the following guidance on the number of witnesses where a debt needs to be proved (witnessed):

**And call in two witnesses, out of your own men, and if there are not two men, then a man and two women such as ye choose.....(2:282).**

Many scholars apply the same principle for wills. The issue of why two women and one male is a controversial one. Dr Jamal Badawi, professor at Saint Mary's University, Canada, explains it as follows:

“One possible interpretation of the requirements related to this particular type of testimony is that in numerous societies, past and present, women generally may not be heavily involved with and experienced in business transactions. As such, they may not be completely cognisant of what is involved. Therefore, corroboration of a woman's testimony by another woman who may be present ascertains accuracy and, hence, justice. It would be unreasonable to interpret this requirement as a reflection on the worth of women's testimony, as it is the only exception discerned from the text of the Qur'an. This may be one reason why a great scholar like At-Tabari could not find any evidence from any primary text (Qur'an or hadith) to exclude women from something more important than testimony: being herself a judge who hears and evaluates the testimony of others<sup>1</sup>.”

Sheikh Yusuf Al-Qaradawi states<sup>2</sup> “Yet the distinction is far from being due to any belief in a deficiency of the woman's humanity and integrity. It is rather due to her natural disposition and her special inclinations which may exclude her involvement in such matters while being focused on motherhood or the household. Hence, it is most likely to be a kind of characteristic inattention on her part when it comes to handling these matters. For this reason, Allah commands creditors if they want to verify the value of debt to seek the testimony of two men or one man and two women. The Qur'an puts it

unambiguously: **(so that if one of them errs, the other can remind her.)** (Al-Baqarah 2:282)".

The witnesses must be "just" persons. One of the pre-requisites of being just is honesty. The Quran states:

O ye who believe! when death approaches any of you, (take) witnesses among yourselves when making bequests, - two just men of your own (brotherhood) or others from outside if ye are journeying through the earth, and the chance of death befalls you (thus). If ye doubt (their truth), detain them both after prayer, and let them both swear by Allah: "We wish not in this for any worldly gain, even though the (beneficiary) be our near relation : we shall hide not the evidence before Allah; if we do, then behold! the sin be upon us!" (5:109).

But if it gets known that these two were guilty of the sin (of perjury), let two others stand forth in their places, - nearest in kin from amongst those who claim a lawful right; let them swear by Allah : "We affirm that our witness is truer than that of those two, and that we have not trespassed (beyond) the truth: if we did, behold! the wrong be upon us!" (5:110).

All schools (madhabs) are of the opinion that only Muslims can be witnesses.

The schools differ on the acceptability of witnesses from "People of the Book". The Hanbali school are of the opinion that the witness of People of the Book is permitted only during a journey when no Muslims are available in accordance with the following verse in the Quran:

**two just men of your own (brotherhood) or others from outside if ye are journeying through the earth.....(5:109).**

The Hanafi, Maliki and Shafi schools are of the opinion that non-Muslims cannot witness a will<sup>3</sup>. A number of contemporary scholars permit non-Muslims to witness wills.

In summary, to comply with both Islamic and Australian laws, you should preferably request two Muslims from within your circle of family/friends to witness your will. Bear in mind my earlier suggestion of avoiding executors and beneficiaries from witnessing the will.

## **2. LEGATEES**

Under Islamic law, a legatee is a person who inherits from the 1/3 that you have discretion over. Such a bequest is referred to as a legacy. Any person, natural or juristic (company, charity, etc.) can be a legatee. Under Australian law, any person who receives a specific benefit is a legatee.

Under Islamic law, the terms legacy and bequest are the same.

You can gift anything as part of the 1/3 that you have discretion over - your car, money, a painting, property, etc to a specific person as a legacy.

**If you have included legacies in your will, you need to ensure that you keep your will up to date for any change to the person/charity/entity receiving the legacy or to the asset you are gifting (for example, if you sell the asset).**

Legacies are explained in detail in the book: *Australian and Islamic Laws of Inheritance Part IV: How to Distribute an Estate*.

### **3. HEIR**

Heirs are persons who are entitled to the residue (remainder) of the estate after paying all the debts, administration costs, taxes and legacies.

Under Islamic law, heirs are recipients of the Shariah shares. Therefore in a will that states that assets must be distributed in accordance with Islamic law, heirs need not be detailed.

### **4. GUARDIANS**

In many cases couples with young children name a guardian for their minor children should they both die before the children reach the age of 18. Both you and your spouse need to ensure that you name the same person to be the guardian of your children.

Choosing a guardian is a major decision. You should consult with the person that you want to appoint and ensure that he/she is willing to be a guardian (even if its your parents, brother or sister). Do not take anything for granted!

The guardian will be your substitute and hence will be making and assisting your children in some of their major life decisions. Therefore select with care. Ensure that your selected guardian shares your values, morals, ethics, etc.

Normally family members are appointed as guardians, but you may not have family in Australia. The Courts in Australia have an overriding discretion to appoint or remove a guardian.

You can appoint a separate guardian and financial manager.

Under Islamic law, minors have a right to be provided guardianship/custody. If one parent dies, minor children have the right to be with a caring blood-related female under a blood-related male as head of the family. The list of relatives with custodial priority is given by the Prophet (PBUH) as follows:

- a) The mother if not married, or married to a brother of the deceased;
- b) The mother's mother, provided she is not married to a man not related by blood to the children;
- c) The father's mother, provided she is not married to a man not related by blood to the children;
- d) The children's mother's sister, then their father's sister, with the same condition.
- e) If none of the above are available (they do not exist or are mentally or behaviourally unqualified), an Islamic court (in Australia, the Imam or community grouping) should assign foster parents by returning to this same list of priorities and using the first one available even if they are married to an unrelated man, then going to others on the ground of what is best for the minors<sup>4</sup>.

In selecting your guardian you should comply with the Shariah provided that you are satisfied that the person is capable and accepts the responsibilities. Should both you and your spouse die without appointing a guardian, the courts will appoint one.

The Shariah also differentiates between financial custody and care-providing custody or guardianship. A father or mother can be both. Where the mother is the survivor and is not the financial custodian, the paternal grandfather should be appointed financial custodian.

Note under Australian law the surviving parent has full custody. Under Islamic law, if the husband has died, the mother only has full custody if she has not remarried or marries her late husband's brother.

The Holy Quran places a trust on guardians: (Sura Nisaa):

**Make trial of orphans until they reach the age of marriage; if then ye find sound judgement in them, release their property to them; but consume it not wastefully, nor in haste against their growing up. If the guardian is well-off, let him claim no remuneration, but if he is poor, let him have for himself what is just and reasonable. When ye release their property to them, take witness in their presence: but all-sufficient is Allah in taking account. (4:6).**

Persons that are not wealthy are entitled to remuneration for acting as guardians, under Islamic law.

## **5. EXECUTORS**

The executor is the person who is responsible for the administration of your estate after you die.

Basically, an executor takes control of all your assets, pays all your funeral expenses and debts and distributes your estate in accordance with what you have stated in your will. It is advisable that an executor has business knowledge and experience as he/she may be managing your assets for a period of time. The Arabic term for executor is *Wisayah*.

This is one position you need to make sure you select with care. You need to appoint a person that you can TRUST. Before you nominate your Executor you should discuss it with them and obtain their agreement for the big responsibility they will be taking on.

All schools/madhabs are of the opinion that only Muslim executors should be appointed to ensure that you are buried correctly and that your assets are distributed in accordance with Islamic law.

You should appoint someone who will probably survive you and who will have the time and concern to take care of your affairs. You should appoint substitute Executors in case your first choice is not available (for whatever reason). The person you appoint must have the personality and character to remain neutral in the event of any disputes that may arise on your death.

You may appoint as many executors as you please. If you appoint more than one, then unless the will requires a quorum, the executors remaining from time to time are entitled to act.

In many cases, the surviving spouse is appointed as one of the executors.

One of the big pitfalls of estate administration is to have executors that are unlikely to cooperate with each other. You should avoid this even if it entails appointing a neutral person – however, that neutral person should be a Muslim.

You can appoint a trustee company or a professional advisor to be your executor. These people/entities usually charge a fee and you should ask them what their charges are before appointing them.

The Quran provides the following guidance to executors (and by inference, trustees):

Let those (disposing of an estate) have the same fear in their minds as they would for their own if they had left a helpless family behind: let them fear Allah, and speak words of appropriate (comfort). (4:9).

Those who unjustly eat up the property of orphans, eat up a fire into their own bodies: they will soon be enduring a blazing Fire. (4:10).

Executors: their role, their duties, their accountabilities, etc are discussed in more detail in the book: *Australian and Islamic Laws of Inheritance Part IV: How to Distribute an Estate*. It is advisable to read this prior to appointing your executor or prior to being appointed an executor yourself.

## **6. TRUSTEES**

This is another critical appointment. It follows the same principle as executors and guardians. There is no reason why one person cannot be all those roles – although some independence in financial matters is advisable.

Under Australian laws, if your child is not yet 18 years of age, his/her inheritance will be placed in trust until they attain the age of 18. Your will needs to establish a trust for your minor children and you need to appoint a trustee to manage the inheritance for your minor children.

Generally you would create a trust in your will:

- to look after assets left behind for minor children;
- to provide the surviving spouse with occupancy rights whilst a child becomes a beneficiary of the trust;
- to incorporate conditions which must be fulfilled before the beneficiary receives any assets. Alternatively, a condition can be imposed which requires that the beneficiary not do a certain act (for example, leave Australia);
- to safeguard assets; or
- to provide for future generations (not yet born).

Where trusts are created for minor children, separate trusts can be created for each minor child or a ‘common-pool’ trust can be created which is shared by all the children. Your will should outline the powers of the trustees.

You need to ensure that you appoint trustees that will invest your funds wisely and distribute to your minor children or whatever cause the trust has been set up for, with empathy and wisdom. Get this appointment wrong and you can cause hardships for your children.

From an Islamic law perspective, the preferred trustee should be the surviving parent, or if the father has died then the paternal grandfather. However, since the appointment is purely to manage financial affairs, any adequately qualified person can be appointed.

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<sup>1</sup> Islamonline

<sup>2</sup> Sheikh Yusuf Al-Qaradawi: *Markaz Al-Mar'ah fi Al-Hayaah Al-Islamiyyah (The Status of Women in Islam)*

<sup>3</sup> Bakhtiar L: *Encyclopedia of Islamic Law*, page 374.

<sup>4</sup> Dr Monzer Kahf – fatwa – [www.kahf.com](http://www.kahf.com)

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## **Issues to Consider**

### **1. TAKING TIME TO DRAFT A WILL**

It is important that you take time to draft your will. In many instances wills are prepared or updated just prior to embarking on a journey or prior to some form of medical treatment. In such circumstances it is unlikely that you will be totally focused on your will and it is under these circumstances that you will make errors or rash decisions. You need to consider all your family and relatives as well as tax implications.

**Many legal documents can be amended if an error is discovered – you do not have such a luxury with a will. Once you die, the will is final – it can only be amended by your heirs through costly court action.**

### **2. FLEXIBILITY**

It is essential that you draft your will to be flexible to take account of any changes that may arise. For example, you may wish to place the inheritance of a child that is insolvent in a trust thereby restricting his creditors' access to it.

### **3. ENSURE THAT YOU UNDERSTAND YOUR WILL**

You should draft your will (or preferably get a professional to do it for you) using language that you understand. There should be no clauses in the will that you do not fully understand. I have encountered a number of cases where the will does not reflect what a person wanted – but the person did not know this as they did not understand their will due to the legal language used in the will. In many instances people are too embarrassed to ask their advisor to explain the will fearing that they will be seen to be 'ignorant'. I have also come across a number of situations where a person has not even read the will – in their opinion the person drafting the will was a qualified person so they must have got it right. Wrong!

### **4. BE CAREFUL OF STANDARD WILLS (OR ONE SIZE FITS ALL)**

A will is a personal document that should be tailor-made to fit individual (family and financial) circumstances. I am not a supporter of will forms (well marketed in Australia) that provide a one-size-fits-all solution to a person's estate. You need to ensure that your will includes all your assets. You also need to include clauses as to what age your children will receive their inheritance, who manages it in the interim, etc.

A badly prepared will could result in:

- assets not being distributed in the way you wanted;
- property not being controlled in the way you wanted;
- tax advantages being lost; or
- assets being left exposed to creditors, etc.

There are many issues to decide and plan for. I suggest that you consult a professional advisor prior to finalising your will.

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## **5. KEEPING YOUR WILL SAFE AFTER IT HAS BEEN SIGNED**

Keep your will in a safe place where someone other than you knows where it is. It is a good idea to keep a signed copy with a friend, solicitor, bank, executor (in a sealed envelope if you like) so that if the original is missing, the signed copy can be admitted to probate.

Copies of the will should be clearly marked “Copy”. The copy should indicate where the master will is kept.

## **6. KEEP YOUR WILL UP TO DATE**

You need to keep your will up to date, especially with regards to the appointment of executors, guardians and trustees. You also need to ensure that you update the section on legacies – you can adjust the recipients of legacies as you wish. Circumstances in which you may wish to add or change a legacy are:

- you no longer support the charity you had included in your legacies
- your daughter predeceases you and you wish to give a legacy to her children
- you wish to give legacies to family members who do not qualify for inheritance from your will
- you wish to add an additional charity or Islamic Association

I suggest that you update your will as soon as your circumstances change as postponing it may result in the change not occurring before your death.

## **7. THE NEED TO AVOID FAMILY CONFLICT**

Numerous examples exist of how close families split/divide through arguing after the death of a family member. It’s easy to say this will not happen to me. But it does – I have come across very close families where brothers/sisters were inseparable, but they now do not talk to each other due to fighting over the distribution of a deceased estate.

You need to make sure you plan your will and that you factor in the various relationships. More importantly, you need to ensure that all legal issues have been attended to whilst you are still alive. For example, if you and your spouse are paying off an asset from joint income, then you need to ensure that your spouse/partner has a share in that asset. I include below two examples.

### ***Example One:***

Muhammed, a computer analyst, earns \$4,000 per month. His wife, Fatima, earns \$1,000 a month as an assistant at a clothing store. Both incomes are deposited into a joint account and expenses are paid from this account. Where there is a surplus, the funds are transferred to a joint savings account. Muhammed uses the money from the savings account to purchase a car and household furniture.

Muhammed suddenly passes away leaving his wife, two young children (son and daughter) and parents. His assets upon his death comprise the car and household effects. In accordance with Islamic law Muhammed’s parents jointly claim 2/6 of his estate, but his wife Fatima is of the view that she contributed to the assets and hence they were not Muhammed’s only, but combined assets.

Fatima now only receives one-eighth (1/8) and is of the view that Islamic law is unfair to the wife. However, if the car was registered as jointly owned by Muhammed and Fatima or owned

in pro rata to their salaries and the same applied to the furniture then there would be no problem.

***Example Two:***

Ismail is the sole owner of a business which he manages with his wife, Sajida. Both husband and wife tend to the business on a daily basis. Ismail suddenly passes away and is survived by two sons, a mother and his wife. According to Islamic law, his mother inherits 1/6<sup>th</sup> of the estate and his wife inherits one-eighth (1/8). The sons will inherit the residue. Sajida is upset as she worked hard in the business and now only receives 1/8<sup>th</sup>.

This should have been resolved from the start. Either Sajida was a partner in the business in which case Ismail's estate would only include 50% of the business or she was an employee and should have earned a salary.

It is arrangements like these that cause problems. In the above circumstance, it is the arrangement and not Islamic law that has been unfair to Sajida.

You also need to sort out during your lifetime who owns the various assets in your house – the furniture, the kitchen utensils, etc. Are these joint assets? Are they only the assets of the income earner? I have come across cases where wives are said to own nothing except their clothing, yet they contributed to capital accumulation. It is not Islamic law that is unjust, but rather your own dealings!

At times it may be easier to request the Executor to sell the assets and distribute the cash instead. As stated, you need to study the dynamics of your family and be honest with yourself when you do that. Who is likely to cause a problem? What will the problem be over? Will anyone be aggrieved as I have not done the right thing and given them shares as they are in effect a partner? Am I favouring one over another?

## **8. SPECIFYING THE DISTRIBUTION OF SPECIFIC ASSETS**

Your will could specify which asset is to be distributed to specific beneficiaries as part of their share. Situations may arise where one asset is inherited by more than one person - this could cause complications and in many instances, conflict. What if two beneficiaries want the same asset? – this creates more conflict. You could structure your will in such a way that indications are given as to who should receive what.

Islamic scholars are of the opinion that you should not indicate the inheritance of certain assets by specific heirs. This is based on the principle of universal ownership, that is, all the heirs have a proportionate ownership in the deceased's assets.

This could give rise to family conflict. Take the case of the family home. As the family home is inherited jointly by all, some heirs may feel that it should be sold whilst others may want to retain it for sentimental reasons. What happens to the occupancy rights of the surviving spouse or an unmarried child? Another example is the family business - who gets the family business? What value do the heirs who do not want the business place on their share to sell it to the heir(s) who want it?

The resultant conflict could either split the family (exactly the opposite of what Islam upholds) and/or result in legal proceedings. The possibility of conflict increases when the deceased is survived by married children as each child has his own family unit and objectives in life.

I therefore recommend that your will indicate preferences as to who receives a particular asset as part of their Shariah share. Rather do it in the will then leave it to the executor who will have the problem of managing conflict. Imam Yusuf Patel, is of the opinion (after consultation), that identifying specific assets for heirs is acceptable provided all the surviving heirs (at the time of drafting the will) approve of the allocations.<sup>1</sup> If you wish to take this course of action, you should discuss it with your heirs and obtain their approval to you specifying which asset each heir will receive. It is important to note that distributions in accordance with the Shariah depend upon who survives you - this complicates specific distributions but the complication can be overcome by the wording of the will and **regular** updates.

Alternatively you could specify that all assets be sold and the proceeds distributed to the heirs.

## **9. PROPERTY HELD IN JOINT TENANCY**

Under Australian law, land property can either be owned under 'joint tenancy' or 'tenancy in common'. If the property is held under joint tenancy, the surviving joint holder automatically assumes the total ownership of the property. If you and your spouse own a home under joint tenancy, the surviving spouse will automatically inherit the property upon your death. It makes no difference whether you have a will or not. The property is therefore not included in your estate for the calculation of the Shariah shares. This is totally against Islamic law, and if you own property under joint tenancy you need to seek professional assistance.

Under tenancy in common, each owner has a share and that share will be included in your estate upon your death. From an Islamic perspective, this is the preferred ownership mechanism.

In Australia unless you elect to own a property under tenancy in common, it automatically assumes joint tenancy. So, many of you may own your properties under joint tenancy – this is a problem from an Islamic distribution perspective.

In the example on Muhammed above (example one), assume that he had placed a deposit on a home with the combined savings. Three possibilities exist:

- If the property was owned by Muhammed in his name only – then his wife will only receive 1/8 even though she contributed to the deposit and mortgage repayments.
- If the property was owned jointly – under joint tenancy – Fatima will inherit the entire property and Muhammed's parents will not inherit any share of the property – (this is contrary to Islamic law).
- If the property was owned jointly – under tenancy in common – then Fatima retains her 50% share and Muhammed's parents will receive 2/6 of Muhammed's 50% share.

The third possibility is the best option under Islamic law.

## **10. BUSINESS SUCCESSION PLANNING**

Irrespective of the size of your business, you need to establish a clear-cut succession plan to avoid problems between your children later. Ideally you should sort out succession before you pass on, but if you cannot for whatever reason, your will should contain clauses for succession.

I include below an example on this aspect:

Yusuf commenced a business in South Bank some years ago. His wife Khadija has assisted him in the business in addition to managing the family home and raising three sons and a daughter. All the children assist in the business during school holidays and the weekends. Yusuf's eldest son, Cassim, joins the business full time on completing his schooling. Yusuf's second son,

Yaseen, also joins the business and the two sons basically take over the management of the business and grow it into a large business. Yusuf's youngest son, Zahed and daughter, Amina, elect to go to university. The fees and living allowances for the two are paid for from the business. Cassim and Yaseen marry and earn a basic salary for the upkeep of their respective homes. The furniture in the two homes is purchased by Yusuf.

Yusuf passes away, and his estate is distributed in accordance with Islamic law. His wife who has been his partner in marriage and in establishing the business receives one-eighth whilst the sons receive double Amina's shares, but equal shares (Cassim, Yaseen and Zahed receive the same amount of shares).

Cassim's wife objects on the basis that her husband grew the business from a small retail outlet to a major business with two branches – why should he receive the same share as Zahed who has not been involved in the business at all?

This is a problem area and one that could tear the family apart.

From the above example you can appreciate the types of problems that can arise. Had Yusuf issued a shareholding to each of his sons and paid for the education of his younger children from his own profit share – there would be no problem with the estate. Similarly, the two older brothers should have purchased their household furniture from their own profit share. Any shares that Yusuf held at the time of his death would be divided to the four children in accordance with Islamic law. The older brothers would as a result have a higher shareholding compared to Zahed and Amina.

## **11. TAXATION**

Australian taxation laws are complex and these need to be borne in mind when planning your will. You need to plan your distributions so as to minimise the tax effects on your beneficiaries.

There are generally no tax implications for cash distributions.

Assets, depending upon their use by you will attract differing taxation treatments in the hands of your heirs/beneficiaries. For example, if you own two homes, one that you are living in and the other an investment property, the two properties will have differing Capital Gains Tax ("CGT") implications for whoever inherits them. Hence, the net proceeds after sale by your heirs will be different resulting in them not having inherited what you thought you were giving them.

Shares may also attract CGT if your beneficiary sells them.

Superannuation receipts by dependants and non dependants also attracts differing tax.

A person's social security payments may also be affected by receiving an inheritance that may overall be disadvantageous to them.

I strongly recommend that you seek the advice of an appropriately qualified and experienced consultant prior to finalising your will.

## **12. CONDITIONS STIPULATED IN A WILL**

It is common practice to impose conditions upon your beneficiaries that have to be fulfilled prior to them inheriting. A common condition is age, whereby children must reach a certain age, 18, 21, etc before they have full access to their inheritance. Another common condition is to have a child live with their mother until the mother's death, after which the child inherits the home.

If there is no condition or limitation, your beneficiary will receive whatever you left them shortly after your death. They then have total control and can do what they wish with what they have inherited.

I have over the years come across some very interesting conditions and you can impose any condition on your beneficiary provided the condition can be done. Some people try to influence the lives of their family from the “grave” – but it is important that you realise that such a stance can backfire - and indeed cause hardships.

A condition can either be positive (that is, you must do something) or negative (you must avoid doing something). Both legacies and inheritances can be subject to conditions.

Under Islamic law, you cannot impose any conditions on heirs receiving their shares as stipulated by the Shariah. If you impose conditions, then Islamic law states that the heir receives his/her benefit as if the condition did not exist (although conditions relating to age are permissible). If you include a condition in your will, under Australian law it is binding. It is debateable whether the fact that you have stated that your will is to be administered under Islamic law will invalidate the condition. Under Islamic law your ownership of the property/wealth ceases upon your death. The Shariah heirs are now the owners and you cannot impose a condition on their inheritance – this is sanctioned and governed by the Almighty.

Under Islamic law a legacy can be bequeathed with conditions. However, the conditions cannot be based on performance criteria. The opinion of Islamic scholars is that a legacy can be made subject to (for example) an institution remaining Islamic in the first five years after your death.

Any condition imposed by you may be challenged in Court. There are many cases where beneficiaries have requested the Court to set aside a condition.

Should you place a condition in the will, you need to outline an alternative distribution in the event that the condition is not fulfilled. For example, if you impose a condition on a person to reach a certain age prior to them inheriting, what happens to the property should the child die prior to reaching that age?

It is important that any conditions in a will be drafted clearly to avoid interpretation problems and possible court action. If you wish to impose a condition you should state clearly what the condition is and the performance required to satisfy the condition.

**Examples of conditions:**

I bequeath to my grandson, Adam Ebrahim, the sum of \$20 000 in the event of him graduating with a degree from either University of New South Wales, Queensland University of Technology or Curtin University. Should he not obtain a degree, the aforesaid legacy is to be paid to the Indonesian Tsunami Reconstruction Fund established by XXX.

I bequeath to my wife, Farida, the family home subject to the condition that she not remarry prior to my youngest child attaining the age of majority. Should she remarry, the family home is to be transferred into trust the conditions of which are outlined in clause XXX.

I bequeath to my eldest son, Yusuf, my ranch, being Lot 5 of Swan Valley subject to the condition that he continues to personally farm and reside thereon. Should he no longer farm and reside thereon the said farm is to be transferred to my wife, Fatimah.

You should not include prejudices as conditions in your will. Should a condition be considered impossible, illegal or immoral; the beneficiary may receive the legacy/inheritance free of the condition.

### **13. GIFTS DURING YOUR LIFETIME**

Under Islamic law, as the owner, you have total discretion over your assets whilst you are alive. You can gift those assets to whoever you choose and the potential heirs have no say at all – they cannot restrict your freedom of disposition<sup>2</sup>. Under Islamic law this freedom of disposition is only lost while you are dying or in the final stages of terminal illness to protect the rights of your heirs (death sickness).

However, you have a duty to be just to your children by treating them equally.

“The Prophet (PBUH) gives a general order to all Muslims: **“Fear Allah and treat your children fairly.”** In other words, he makes fair treatment of children part of being conscious of one's duty toward Allah and fearing Him. In another hadith, it is related that the father of An-Nu`man ibn Bashir, a young Companion of the Prophet (PBUH) came to the Prophet (PBUH) and said: “I have given a slave as a gift to this son of mine and I would like you to bear witness to that.” The Prophet (PBUH) asked: “Have you given all your children similar gifts?” When the father answered in the negative, the Prophet (PBUH) said: “Seek some other witness for your deed, because I do not witness injustice.”

Based on this hadith, many scholars have ruled that it is forbidden for a father to give a gift to some of his children in a way that makes him prejudicial against others.” El-Sayed Ameen, fatwa editor, Islamonline.

### **14. PROPERTY NOT SUBJECT TO A WILL**

Depending upon the rules of superannuation fund and/or life assurance policy, the proceeds may be excluded from your estate as you would have chosen your beneficiaries directly in the fund/policy.

From an Islamic law perspective, these types of contracts did not exist at the time of the Prophet (PBUH) and hence Islamic scholars differ with regards to the treatment of superannuation funds and life assurance policies.

There are broadly three schools of thought:

- The income is not acceptable as these contracts are either uncertain or have an interest element.
- The income does not belong to the deceased. The deceased contributed towards the income, but it is the trustees of the funds that make the distribution. Hence, superannuation funds and life assurance policies do not form part of the estate. The view is based on the assumption that the deceased has no access to the funds whilst alive.
- The income should be included in the estate and distributed in accordance with the Islamic law of succession.

It is beyond the scope of this publication to debate the merits of the above. If you have superannuation funds and/or life assurance policies, I suggest that you research the issue, discuss it with Islamic scholars and take a personal stance.

### **15. PROPERTY/WEALTH OWNED THROUGH A TRUST**

If you own property or a business through a trust then you need to ensure that it is distributed in accordance with Islamic law.

If you have a fixed interest in the trust (either unit trusts or ordinary non discretionary trusts), there is no problem – your interest in the trust will be included in your estate for distribution to your Shariah heirs. However, if you have a discretionary interest, then in theory you are not entitled to anything until the trustees distribute something. Refer to the book: *Australian and Islamic Laws of Inheritance Part II - What to include in your Estate* for detail on how to overcome this.

From an Islamic perspective, if you have placed a property/income in a trust for taxation purposes but with no intention of the beneficiaries obtaining immediate ownership of the property, then the trust is not recognised under Islamic law and the property is still yours and must be included in your estate.

One way of addressing the issue is to include an Islamic distribution as part of the trust deed. This distribution will apply upon your death.

## **16. WILLS AND OVERSEAS ASSETS**

Do not assume that your Australian will covers any assets you have overseas. You need to check whether any will you sign under Australian law is valid in any country or countries that you have assets.

You can overcome this by preparing a will specifically for the country(ies) that you have assets in. The same principles need to be applied from an Islamic perspective. You need to ensure that all the wills are dated the same date as a revocation clause in one may accidentally revoke other wills. Alternatively you can state specifically that you are only revoking your previous Australian/South African/Fijian/Lebanese/Turkish, etc wills.

## **17. USE YOUR WILL AS A FINAL OPPORTUNITY TO GET A MESSAGE ACROSS TO YOUR FAMILY**

I have encountered cases where a will is used to impart your feelings/desires to your family. It is a powerful medium, as the message rings from the grave.

You can use your will to impart:

- Values;
- Wisdom;
- Love;
- Inspiration; or
- Messages to your children to do certain things or to avoid doing certain things.

From an Islamic perspective it is permissible to include advice in a will. Some Islamic scholars encourage the practice on the basis that it is a very sobering moment and advice relayed at the time tends to carry more significance.

Caliph Ali (PBUH) stated the following in his will to his sons Imam Hassan and Imam Hussein: “My advice to you is to be conscious of Allah and steadfast in your religion. Do not yearn for the world, and do not be seduced by it. Do not resent anything you have missed in it. Proclaim the truth; work for the next world. Oppose the oppressor and support the oppressed.

I advise you, and all my children, my relatives, and whosoever receives this message, to be conscious of Allah, to remove your differences, and to strengthen your ties. I heard your grandfather, peace be upon him, say: "Reconciliation of your differences is more worthy than all prayers and all fasting."

Fear Allah in matters concerning orphans. Attend to their nutrition and do not forget their interests in the middle of yours.

Fear Allah in your relations with your neighbours. Your Prophet (PBUH) often recommended them to you, so much so that we thought he would give them a share in inheritance.

Remain attached to the Quran. Nobody should surpass you in being intent on it, or more sincere in implementing it.

Fear Allah in relation to your prayers. It is the pillar of your religion.

Fear Allah in relation to His House; do not abandon it as long as you live. If you should do that you would abandon your dignity.

Maintain communication and exchange of opinion among yourselves. Beware of disunity and enmity. Do not desist from promoting good deeds and cautioning against bad ones. Should you do that, the worst among you would be your leaders, and you will call upon Allah without response.<sup>3</sup>

## **18. TESTAMENTARY TRUSTS**

You can establish a trust in your will to manage assets for your minor children, to manage assets on behalf of a child that you believe is financially irresponsible, to safeguard your spouse, etc. Trusts are a powerful tool that can be adapted and used in a number of circumstances. From an Islamic law perspective there are restrictions on the use of trusts as the heirs own the estate from the moment you die.

The trust may contain any assets (movable, immovable, cash, etc.). The trust will be administered by the trustees you have appointed in your will (refer to the chapter: *Persons you need to appoint in your will*).

## **19. DEBTS**

Any debts that you have while you are alive remain as debts upon your death. If you have specific assets with debts (for example, a house with a mortgage, a car on hire purchase, furniture on credit, etc) you need to state in your will whether you want the debts paid out of your estate prior to their distribution. If you do not state that the debts must be paid from your estate, the beneficiary (person inheriting) may receive the asset with the debt and will have to pay the debt.

## **20. CHALLENGING A WILL**

As stated previously State and Territory laws permit a spouse/child/dependant to request the Supreme Court to change your will on the basis that adequate provision has not been made for them in your will (you have not left them sufficient property/cash to maintain themselves). You need to bear this in mind when preparing your will.

Your spouse can easily claim that his/her Islamic allocation is not sufficient (especially in the case of a wife) and hence claim against your estate. This is a very costly exercise. The Supreme Court will consider a range of issues before deciding whether to alter your will and if so, by how much.

Such a challenge has the potential to change the Shariah distribution. You need to ensure that you sort out your affairs before you die. If your wife or child has an interest in any of your assets, ensure that they receive their due share before you die so that they do not feel that they have been let down by their Quranic allocation.

Note: the Court will not change a will unless it is satisfied that the person claiming is in need for continued assistance.

Should a challenge against the will be made, this can take a number of years to sort out and in the interim the property cannot be distributed to the heirs/beneficiaries. In many cases this can cause hardships. It could also cost your estate thousands of dollars in legal fees. This is yet another reason for ensuring that you plan your will well.

**Example of a clause that can be included in your will:**

I ask all my relatives, friends, and all others, whether you choose to believe as I believed or not - to honour my Rights to these beliefs. I ask you to honour this document which I have made, and not to try to obstruct it or change it in any way. Rather, see that I am buried as I have asked to be buried and let my properties be divided as I wanted them to be divided. I urge all my dependants to recognise and accept my distribution and not challenge this will.

**How to avoid a challenge**

One way to avoid a challenge is to transfer your assets to a trust and then in the trust state how you want the assets distributed upon your death. Your will in effect will then have very few assets to distribute. You will still need a will for burial, etc. The trust option is gaining in popularity in North America.

Challenges to wills could come from a wife, a daughter, non-Muslim relatives, adopted and step-children. In the current environment, these family members may feel aggrieved by the share that they have received and hence make a challenge. The Court can amend your will with the result that your estate is no longer distributed in accordance with the Shariah. The view of Islamic scholars is that the sin would be on the person challenging the will, provided you have been fair and equitable in your dealings and assets ownerships prior to your death – that is, your wife is not challenging the will because she contributed towards the purchase of an asset but you did not legally recognise her part ownership during your lifetime.

**21. DYING TOGETHER OR WITHIN 30 DAYS OF EACH OTHER**

In certain States/Territories if one of your heirs dies within 30 days of your death, that beneficiary will not receive anything from your will (the beneficiary will be considered to have died before you).

From an Islamic law perspective, anyone who survives you, inherits from your estate, irrespective of when the heir subsequently dies.

Your will therefore needs to include a clause that all that survive you inherit irrespective of the date of the heir's subsequent death (such a clause will need to be tested in the Courts).

Under Islamic law if two heirs die at the same time and it is not known who died first, they are both treated as having died at the same time.

“One of the conditions of inheritance is that the heir must be alive at the time of the death of the person from whom he will inherit. Therefore, if both passed away and it is not known who died first, neither inherits from the other.

It is clearly stated in Islamic Shari`ah that in order to be liable to receive a share in inheritance, the heir must be alive at the time the person he will inherit from dies, or at the time the court considers him to be dead. So if a husband and wife died together or separately without it being known who died first, neither inherits from the other. Each one is treated separately and his or her wealth only goes to his or her heirs.” Dr. Mahmoud `Akkam, Professor of Islamic Shari`ah, Syria<sup>4</sup>.

## 22. CHILD IN WOMB

For an unborn child to inherit under Islamic law, the mother must be pregnant with the child at the time of death of the deceased. A child could inherit under a number of circumstances – for example, an unborn child could be your child, a sibling, etc. A number of other permutations may arise. The method of calculating the share of an unborn child is explained in the booklet on distributions in accordance with the Shariah.

### **Example of a clause that could be added to your will:**

I direct and devise that any foetus, conceived before my death, whose relationship to me qualifies it to be an heir according to the Islamic law of succession shall be considered as an heir if the following two conditions are fulfilled: the foetus must be born alive within no more than 46 weeks from the day of my death; and, it is not proven illegitimate by a DNA test. I further direct and devise that, whenever there exist a foetus that may become an heir according to this section, the largest potential share of the foetus out of the residue and remainder of my estate after the payment of debts and legacies, must be set aside until the said conditions are satisfied. Furthermore, I direct and devise that any other heir whose share may be affected should the foetus be born alive before my death, must be given the lesser of the two potential shares and the difference should be set aside too.

Should the foetus be born, but qualifies for a lesser share, or should it not be born alive within the 46 weeks or should it be proven illegitimate, any surplus of the set aside amounts/property must be returned to the estate and distributed according to the Islamic law of succession as if the foetus never existed at all.

## 23. DONATING ORGANS

The issue of donating organs is controversial. Some Islamic scholars state that it is acceptable whilst others state that it is not. **Sheikh Ahmad Kutty**, a senior lecturer at the Islamic Institute of Toronto, Ontario, Canada states the following with regards to organ donation: “Ideally, after death, a person’s body must be washed, shrouded and buried as intact as possible after saying the prescribed Prayers; we are not allowed to dissect, mutilate or tamper with the body in any way. The reason for this is that the dead person enjoys a certain amount of sanctity which cannot be violated. The Prophet (PBUH) is reported to have said, **“Cutting up a dead person’s bones is akin to cutting him up while he is alive!”**

“There are, however, certain exceptions made to the above strict rule in order to address certain specific exigencies or unusual circumstances. In other words, the

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rigors of the law have been relaxed in some cases, for things that are otherwise deemed as impermissible shall be deemed permissible or even recommended in such cases depending on the severity or extreme necessity. An example of this is when it has been determined that a certain organ or body part of a dead person can be used to save a living person. In such case, we are certainly allowed to harvest a specific organ or body part of a dead person—provided that he has already left specific instructions before his death in his will to that effect or provided his legal heirs have authorized the same. This is based on a ruling of the majority of Muslim jurists who have deliberated on this issue.<sup>5</sup>

Once again this is one of those issues that you need to research, consult your Imam/Islamic scholar and take a stance on what you wish to do. Your will should contain appropriate clauses should you wish to donate organs.

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<sup>1</sup> Imam Yusuf Patel's comments recorded in discussion on various earlier manuscripts.

<sup>2</sup> Dr Monzer Kahf – fatwa – [www.kahf.com](http://www.kahf.com)

<sup>3</sup> Source: Nahjul Balagha.

<sup>4</sup> Source: Fatwa issued on 6 May 2004 - Inheritance between Spouses When Times of Deaths Are Unknown.

<sup>5</sup> Source: Donating an organ – Islamonline – 3 September 2003.

## Planning Ahead

### 1. INTRODUCTION

Should you be incapacitated, you need someone to make financial, health and lifestyle decisions for you. You need to take steps to ensure your assets continue to be managed and decisions are being made about your health by competent persons should you be unable to make them yourself. This would arise, for example, if you are seriously ill, injured or in a coma.

You need to plan now so that in the event that you are unable to make decisions, you have appointed someone to make those decisions for you. Like a will, the reason you need to act now is that you do not know when an event/mishap/illness could happen to you that will necessitate someone to act on your behalf.

With regards to financial decision making you need to grant a power of attorney that gives authority to the person you appoint to make decisions regarding financial issues on your behalf.

For health and lifestyle decisions, you need to appoint an enduring guardian who will be able to make decisions for you regarding your health (for example, to operate or not), lifestyle (for example, private or public hospital care, nursing home, etc) and/or continuation of life decisions. There are certain rules about continuation of life decisions.

The two appointments referred to are critical appointments and you need to ensure that you appoint competent persons that you TRUST. The comments that I have made about executors in the chapter: *Persons you need to appoint in your will* apply to these appointments as well.

### 2. ENDURING POWER OF ATTORNEY

A power of attorney is a document that you can sign to appoint someone (called your attorney) to act on your behalf to manage your assets, make financial decisions or to perform a certain act on your behalf.

An enduring power of attorney will continue to be effective to the date you have stated in the document – in most cases until your death or if you cancel it and appoint another person. You can appoint two powers of attorney and require that they must jointly decide on issues.

You need to sign an enduring power of attorney and your signature needs to be witnessed by certain people.

The power of attorney can be as general or as specific as you want it. You can also state that the power of attorney only applies if a doctor certifies that you are unable to make decisions and will end as soon as a doctor states that you are now capable.

Power of attorney forms are available at a number of newsagents, but I recommend that you seek the advice of a professional person.

### 3. GUARDIANSHIP

If you are 18 years or older you can appoint an enduring guardian to make certain lifestyle decisions on your behalf if you are unable to make them yourself. You can appoint one or a number of guardians.

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An enduring guardian cannot manage your finances, vote on your behalf or make a will on your behalf.

This is an important appointment and one that should be made so as to avoid conflict amongst your family members should you not be capable of making those decisions yourself. It is also a way of ensuring that someone you trust will be making the decisions for you.

An important decision that you can request your guardian to make is whether to stop any life support. Under Islamic law life support systems can only be stopped if you are brain dead. Sheikh Muhammad Iqbal Nadvi, director and Imam of Al-Falah Islamic Center, Oakville, Ontario, Canada, states:

“Death, as determined by the International Council of Muslim Doctors, is only determined by complete brain death. As for heart cessation, it is not an exact definition of death. So, only in the case of brain death can we switch off the life support. But in no case is it allowed to resort to euthanasia to terminate the life of someone.”

There are certain formalities that need to be complied with to appoint a Guardian and standard forms are available for the appointment of a Guardian. Both you and your prospective Guardian must sign the form in front of a solicitor, barrister or clerk of the Local Court – but you do not need to sign at the same time.

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## Questions

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### **A Focus on Islamic Education**

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This book explains:

- the key differences between Australian and Islamic laws;
- why, as a Muslim, you need a will in Australia;
- the clauses you need to include in your will to give effect to an Islamic distribution;
- the persons who cannot inherit under Islamic law and what alternative actions you can take to benefit them;
- Australian legal requirements for preparing a will;
- the role and responsibilities of witnesses, executors, guardians and trustees and the issues you need to consider when choosing people for these roles;
- what to include in a will, estate planning, how to avoid family conflict, taxation impacts on asset distributions, conditions in wills, family business succession planning, gifting assets during your lifetime and organ donation; and
- the need to plan ahead to ensure that your assets continue to be managed and certain lifestyle decisions can be made on your behalf by people you trust should you become incapacitated.