

ISLAMIC WILLS

NOTES AND GUIDELINES

ISLAMIC PRINCIPLES RELATING TO INHERITANCE

“There is a share for men and a share for women from what is left by parents and those nearest related, whether the property be small or large - a legal share.”

(an-Nisaa 4:7)

This verse lays down the general principles of the Islamic Law of Succession and makes mention of three pertinent facts.

1) *“Those nearest related”*

The criterion for determining the legal heirs and their proportionate shares is based on the law of “proximity of relation” to the deceased. This proximity is also determined by Allah and is not left to the fallible and subjective discretion of man. The Noble Quran states: “...You know not which of them, whether your parents or your children, are nearest to you in benefit, (these fixed shares) are ordained by Allah. And Allah is Ever All-Knower, All-Wise.” (an-Nisaa 4:11)

Allah has accordingly specified the shares of beneficiaries based on the law of proximity of relationship and not on the material needs of the beneficiaries. Financial needs are relative. A rich person may become poor, he could become incapacitated or terminally ill and likewise a poor person may become rich overnight.

2) *“A share for men and a share for women”*

During the days of “Jahilliyah” (pre-Islamic ignorance) only those who could fight and defend the family name were entitled to inherit. Women and children were thus naturally excluded from the estate. Even in contemporary law the “freedom of testation” allows an individual to bequeath to whoever he so wishes. Women are therefore not guaranteed a share from the estate. Islam, however guarantees the right of both women and children to inherit from the estate.

The protagonists of “reform” claim that Islam denies women their fair share of inheritance. They say that since she generally inherits less than her male counterpart she is denied equitable and fair treatment. This call for “abstract” justice may seem justified if the laws of inheritance are not studied within the broader context of the social value system of Islam. In Islam, a woman retains total ownership of her property after marriage. Any income derived from her assets remains exclusively hers. She is not obliged to maintain herself or her family even if she is wealthy. In contrast to these privileges a male has to maintain:

- a) Himself
- b) His parents
- c) His wife and children
- d) His poor relatives

Considering these social responsibilities, it could be said that in real terms, a female, in fact, inherits more than a male, e.g. a hundred rands that a male inherits may have to be spent on five members of the family whilst the fifty rands a female inherits is over and above the maintenance she receives from her male guardian.

3) "A share made compulsory"

The Noble Quran has fixed the shares of each individual. These cannot be altered or changed by man. The shares of the heirs as determined by the Noble Quran are binding just as the number of rakaats are binding in salaah.

Some Common Errors

- a) A daughter is given a substantial gift at the time of nikah and is then excluded from the estate.
- b) A testator sometimes stipulates that all his assets go to his wife and after her demise to their children.
- c) A father may leave his business to a particular son who works with him in the business and thereby excludes the others.
- d) Parents for various reasons disown a particular son or daughter and thus exclude him/her from the Will.
- e) A testator determines his heirs and their respective shares according to his discretion and not in accordance with the injunctions of the Quran.

A Gift During your Lifetime

A parent may for a valid reason (e.g. service to parents) during his lifetime donate a particular asset to one of his children provided that the purpose of the gift is not to cause harm to the remaining heirs. Observing equality in parental gifts or grants to children is preferable but not binding.

If the parent elects to divide his estate in his lifetime solely to avoid a dispute between his heirs after his death, then the lifetime transfers, will be regarded as gifts or grants, in which case he should preferably observe equality.

The Administration of the Estate

The estate of the deceased must be strictly administered in the following order:

- a) Payment of burial expenses.
- b) Payment of debts.
- c) Payment of legacies, bequests and religious obligations up to a maximum of one third of the remaining estate.
- d) Distribution to legal heirs according to the laws of the Shari'ah.

FUNERAL EXPENSES AND BURIAL RIGHTS

Funeral expenses include cost of kafn, grave and all expenses directly related to the burial. It excludes feeding guests attending the funeral.

PAYMENT OF DEBTS AND RELIGIOUS OBLIGATIONS

Hadhrat Abdullah bin Umar (Radhiallaahu Anhu) reports that Rasulullah (Sallallaahu Alayhi Wasallam) said, "It is not permissible for any Muslim who has something to will, to stay for two nights without having his last will and testament written and kept ready with him." (Mishkat page 265)

A Muslim is obliged to keep a record of, and declare the following:

- a) Creditors.
- b) Amanah (items entrusted to him for safe keeping).
- c) Unfulfilled religious obligations.
- d) Debtors.

NOTE. This is a day to day document that has to be updated on a regular basis and does not form part of the Will.

Legacies

A Testator / Testatrix also has the option of bequeathing a maximum of one third of his / her estate to persons who are not his / her heirs. However, if a bequest is made to an heir, it will be subject to the approval of the remaining heirs. Islamic marriages are governed by an antenuptial contract excluding the accrual system. Marriage in community of property is not consistent with the Islamic Law of Inheritance. Those married in community of property will have to change their matrimonial regime to facilitate an Islamic distribution of their estates.

Annuities and Life Policies

The aggregate amount of premiums paid will form part of the estate. The balance represented by the difference between the proceeds of the policies and the total premium paid must be given to charity, without the intention of reward as a compulsory distribution of an unlawful gain.

The consequences of a wrong Will

Rasulullah (Sallallaahu Alayhi Wasallam) said, "A man or woman may devoutly obey Allah for sixty years. Yet when death approaches them, they act wrongfully (when making) their Will; as a result the fire becomes binding for them." (Ahmad)

May Allah grant us the strength and courage to be submissive to His Word at all times.

Legal Requirements of Execution of Wills

The execution of Wills is governed by the Wills Act 7 of 1953, as amended.

- It must be signed by the testator/testatrix.
- The testator/testatrix should sign the Will with his/her usual signature.
- Such signature must be made by the testator/testatrix in the presence of two or more competent witnesses present at the same time.
- Such witnesses must attest and sign the Will in the presence of the testator/testatrix and of each other.
- If the Will consists of more than one page, each page other than the page on which it ends, must also be SIGNED by the testator/testatrix and by such witnesses.
- Every page of the Will must be signed by the testator/testatrix as well as the same witnesses who attest at the end of the Will, all being present.
- If the Will is signed by the testator/testatrix by the making of a mark, a magistrate, justice of the peace, commissioner of oaths or notary public must certify at the end thereof that he/she has satisfied himself/herself as to the identity of the testator/testatrix and that the Will so signed is the Will of the testator/testatrix; if the Will consists of more than one page, each page other than the page on which it ends must also be signed by the magistrate, justice of peace, commissioner of oaths or notary public who so certifies it.
- The Act does, however, prescribe that the certificate is to be at the end of the Will. It is suggested that the certificate be placed as close as possible to the testator's/testatrix's mark on the last page.

Capacity to make a Will

Any person of the age of 16 years or over may make a Will.

Witnessing a Will

Every person who is over the age of 14 years is competent to witness a Will.

A witness cannot sign by making a mark. NO BENEFICIARY MAY SIGN AS A WITNESS.

Capacity to benefit under a Will

All persons including corporate bodies may benefit under a Will. The following persons are, however, disqualified from taking benefits:

- A person who has unduly influenced the testator/testatrix to give him/her a benefit under the Will.
- A person who has written the Will on behalf of the testator/testatrix cannot take a benefit under such a Will. Such a person cannot be appointed as Executor under the Will written by him/her.
- A person who witnesses a Will or a person who was his/her spouse at the time of attestation cannot take a benefit under such a Will.