

ASSESSING THE LAW SOCIETY PRACTICE NOTE ON DRAFTING SHARI'A COMPLIANT WILLS

Hajj Ahmad Thomson

The release of the Law Society Practice Note on drafting Shari'a compliant wills has somewhat predictably received the 'Archbishop of Canterbury treatment' from the 'liberal' secular media. How dare Muslims, both men and women, be allowed, indeed be assisted, in leaving a last will and testament in accordance with their wishes, when only secular fundamentalists should be granted such a precious freedom!

Bias in media coverage usually illustrates an underlying agenda – Islam and Muslims are regularly regarded as fair game who can all be tarred with the same brush, however inaccurately and vindictively, with virtual impunity – which means that even the reasonable accommodation of minority faiths is likely to be attacked, almost as a matter of principle.

What surprised me was that whoever drafted the Law Society Practice Note on drafting Shari'a compliant wills at times made it unnecessarily complicated – and did not appear to have consulted with the leading English practitioners in this field, including, for example, I Will Solicitors Ltd, which as well as catering for simple Islamic wills has also developed tax efficient Islamic will precedents for high net worth individuals.

For example paragraph 3.6 states, “The main difficulty with preparing a Sharia compliant will is the inability to state in advance who the Sharia heirs will be.” In fact this is not a difficulty, since there is no permutation of eligible heirs alive at the time of a testator's death whose shares cannot be calculated precisely – which means that a properly drafted Islamic will cannot fail for uncertainty.

I find that the online IRTH software – tried and tested for many years, but to which the Practice Note does not refer – is very helpful when ascertaining a client's wishes, since it is possible to ascertain in about 5 minutes who would inherit what if the testator were to die “today” – and accordingly to ascertain which more distant relatives (for example nephews, nieces and grandchildren) would in all probability not be entitled to receive a fixed share as prescribed in the Qur'an (because the closer relatives would take precedence) – and who therefore should receive specific bequests out of the third of the estate which can be left to anyone or any charity or any organisation not entitled to a fixed share as of right.

For the record, although it is correct that non-Muslim relatives are not entitled to Qur'anic fixed shares, specific bequests can be made in an Islamic will to non-Muslims – just as gifts can be made to non-Muslims during a testator's lifetime.

I was also surprised that as regards Shi'a Muslim testators, no reference was made to His Honour Judge Abbas Mithani QC's helpful book, “*Islamic Wills*” which caters for the Shi'a community and which contains helpful precedents – nor was any reference made to “*The Islamic Will*” authored by Hajj Abdalhaqq & Aisha Bewley and Ahmad Thomson, which caters for the Sunni community and which provides a simple precedent where Inheritance Tax considerations are unnecessary.

It would have been helpful to point out, so as not to create a biased impression, that although the male beneficiary is entitled to twice the share of a female beneficiary, male beneficiaries are responsible for the maintenance and wellbeing of the female relatives in the family – whereas the female beneficiaries can do whatever they want with their inheritance. In other words, a greater moral responsibility accompanies the greater share.

The same principle applies in Jewish law where (please correct me if I am wrong) the oldest son inherits everything if there is more than one son and where a daughter inherits nothing from her father if she has a brother. However, whoever does inherit is responsible for the maintenance and wellbeing of those relatives in the family who did not inherit. Again, a greater moral responsibility accompanies the greater share.

Since members of the Jewish community have been making Jewish wills in the UK for about the last nine centuries, their probate lawyers are unlikely to be in need of a Practice Note from the Law Society, but the precedent which has been set clearly confirms that members of minority faith communities, including Jews, Christians and Muslims, should be permitted in law to make provision for those who will inherit from them as they wish, provided that, as the Practice Note points out, “the will is signed in accordance with the requirements set out in the Wills Act 1837.”

No doubt Baroness Cox, unable to hold back any more, will soon be holding forth on the fact that while it is a Shari’a requirement that in certain circumstances two female witnesses are needed to witness a legal document in order to ensure certainty (for example a Shari’a compliant will), in contrast, orthodox Jewish women are not permitted to act as witnesses to similar legal documents at all. Why, I ask myself, do I never hear practising Jewish or Muslim ladies making a fuss about such requirements – but only those whose ‘liberal’ beliefs require everyone to be just like them?

After all, the English Intestacy Rules are in part derived from the Jewish, Christian and Muslim models – the only major differences being that eligibility and shares are calculated differently.

In my experience, practising Muslims are unlikely to make a claim under the Inheritance (Provision for Family and Dependants) Act 1975 in respect of a Shari’a compliant will, since it will be in harmony with the guidance in which they believe and gladly follow.

As in the case with most good guidance, it is only when people don’t follow it that problems arise.

In conclusion, although there is room for improvement, in my humble opinion the Law Society’s Practice Note is a healthy inclusive sign of the times and I am sure that it will assist competent lawyers (especially those who may not be entirely familiar with the requirements of the Shari’a) to honour the wishes of those clients who wish to have a Shari’a based division of their estate after they have left this fleeting world.

“And don't go mistaking Paradise
For that home across the road.”

Bob Dylan