

ISLAMIC WILLS – PRACTICAL ADVICE

It is some ten years since I co-authored with Hajj Abdal-Haqq and Aisha Bewley a simple guide entitled *The Islamic Will*.¹ Its purpose is to assist Muslims to ensure that after their deaths their wealth is distributed in accordance with the Shari‘a of Islam by means of a Will which complies with all the formal requirements of English law and is therefore a valid Will. The book contains a basic precedent which can be used as a basis for most straight forward Islamic Wills.

Rather than simply repeating what I have already written in the past (these articles are posted on the Wynne Chambers website²), this article concentrates on issues which have more recently been drawn to my attention, mainly by non-Muslim solicitors whose Muslim clients have unexpectedly requested them to draft Islamic Wills, for which there is currently little guidance and no precedents in the main legal text books.

Inheritance Tax

As house prices continue to rise (indicating the loss of purchasing power of modern paper and digital currencies which have no intrinsic value), an increasing number of estates will be liable to Inheritance Tax (“IHT”) unless prudent steps are taken.

The basic precedent in *The Islamic Will* is not designed to cater for anyone whose estate’s value is likely to be in excess of the nil rate band (“the NRB”) – in which case, a discretionary trust and a letter of wishes are necessary, the letter of wishes being the means whereby the estate will in fact be distributed in accordance with the Shari‘a.

As regards borderline cases, where both spouses are alive and co-owners of the matrimonial home, it is sometimes sufficient to sever the joint tenancy and make them tenants in common, since this will be enough to ensure that the value of their respective estates will be below the NRB, which means in turn that a straight forward Islamic Will will suffice. Of course after the first spouse has died, if not before, IHT planning will become necessary.

Balancing Practical Drafting Techniques with Shari‘a Requirements

Since bequests between spouses are exempt from IHT, and where both spouses are still alive, it often appears sensible to prepare mirror Wills in which each spouse leaves everything to the surviving spouse. However for Muslim clients this distribution will not be in accordance with the Shari‘a unless and until the survivor subsequently makes a voluntary re-distribution in accordance with the Shari‘a. Not all surviving spouses are prepared to do this, especially if they are only Muslim in name but not in practice.

A practitioner is therefore sometimes faced with a Muslim client who wishes to make an Islamic Will which on the face of it will not be cost effective: It may be that if the whole estate is left to the surviving spouse, no IHT will be payable, whereas if it is divided between surviving relatives in accordance with Shari‘a, then IHT will be payable on at least a percentage of the shares which do not go to the surviving spouse.

Some solicitors are reluctant to draft an Islamic Will in these circumstances for fear that once it becomes apparent how much IHT is payable, surviving relatives may sue them for negligence for not having advised the deceased better.

A sincere Muslim testator, however, will always wish to have his or her estate distributed in accordance with the Shari'a, even if this means that full advantage will not have been taken of the limited dispensations which the law governing IHT provides. As far as a sincere Muslim is concerned, the reward for following the Shari'a in this world is the Garden in the next world – whose rewards far exceed whatever perks this life has to offer.

A competent solicitor, however, will know how to fulfill the client's wishes as well as minimizing IHT liability. Since prudent IHT planning is important and relatively complex, this will be dealt with in a future article.

It is because of the relative disadvantages that religious minorities suffer under the current IHT regime (not only Muslims, but also members of other religious minorities, including Jews), that the National Audit Office has been requested to consider ways of lessening the disproportionate impact of IHT on them.

Although in the eyes of the Shari'a IHT is an unjust tax which should be abolished, I have recommended as an interim measure (bearing in mind that the burgeoning national debt has to be serviced until written off) that bequests to immediate family members (parents, brothers, sisters, spouses, sons and daughters) should all be exempt from IHT – and that this should apply to everyone in the UK.³

Shares prescribed by the Shari'a

As regards what is prescribed by the Shari'a, a Muslim may leave up to *one third* of his or her estate to whomever he or she wishes, but the remaining *two thirds* must be divided amongst surviving relatives in the shares prescribed by the Qur'an. If a surviving relative is entitled to a fixed share, then the testator may not also make a bequest out of the *one third* in addition to that fixed share. Any such bequest would be automatically void and therefore ignored by the executors.

If a testator does not wish to make any bequests out of the *one third*, then the whole estate is divided amongst surviving relatives in the shares prescribed by the Qur'an. It is always possible to calculate who is entitled to what, whatever the permutation of surviving relatives – which means that a well drafted Islamic Will should never fail for lack of certainty.

It is very important, however, to appreciate that *not all* of the deceased's surviving relatives will necessarily be entitled to a fixed share. The closer relatives exclude the more distant relatives – who will only be entitled to shares if the closer relatives have predeceased the testator. A competent solicitor should therefore be in a position to assess who is likely to be excluded by the closer relatives – and accordingly to advise the client to make bequests to them out of the *one third* if he or she so wishes.

Although it is preferable to know how to calculate these shares – or someone who does, there is a reliable software at <http://members.aol.com/IslamicSoftware/irthie.html>.

Take, for example, a Muslim who comes to you wishing to make an Islamic Will. The following relatives are still alive: his father, three brothers, two sisters, two wives, four sons, four daughters, two grandsons and three granddaughters. If he were to die tomorrow, who would inherit what?

Using the software, we find that his father would receive 1/6 of the estate, his wives 1/16 each, his sons 17/144 each and his daughters 17/288 each. His brothers, sisters and grandchildren would receive nothing. Having swiftly done this calculation, you are now in a position to advise your client that if he wants his brothers, sisters and grandchildren to inherit something, then he should make bequests to them out of the *one third*.

It should also be pointed out that where there is more than one wife, under the Shari'a each wife is entitled to and receives her share. In contrast, if the husband in our example were to die intestate, the second wife and her children might not be entitled to anything when the laws of intestacy were applied. This is one of several reasons why Muslims in the UK have been campaigning to have Muslim personal law (including marriage, divorce and inheritance) and the decisions of Islamic Shari'a courts recognised by English civil law.

One aspect of the Qur'anic shares that non-Muslims tend not to understand is why the share of a male is twice the share of the female. On the face of it, this apparent inequality is grist to the women's liberation mill – until that is, it is pointed out, that amongst Muslims it is the duty of the menfolk to look after the needs of the womenfolk, which means that much of the men's "double" share will in fact be spent on the ladies in the family.

In contrast, the share which a female inherits is hers to deal with as she pleases and she is under no duty to maintain anyone with it. This means that amongst practising Muslims, the womenfolk will in fact often end up "better off" than the menfolk.

Unfortunately those who are only Muslim in name but not in practice do not always honour their duties under the Shari'a which results in injustice and hardship. This is their fault – not the Shari'a's which, being of divine origin, is flawless unless and until ignorant people re-define it, or misinterpret it, or ignore it.

To conclude, although this article seeks to draw attention to possible problem areas so that they can be avoided, unless you are specifically catering for higher income clients, you will find that many Muslim clients just want straightforward Islamic Wills which are relatively easy to draft, especially where the value of their estates will clearly fall below the NRB.

(Endnotes)

¹ Dar Al-Taqwa, London, 1995. Dar Al-Taqwa has a bookshop at 7A Melcombe Street, Baker Street, London NW1 6AE, Tel: 020-7935-6385.

² See : <http://www.wynnechambers.co.uk/specialisations.php?page=specialisation>, at the end of the page.

³ See Sunday Times, 26th December 2004,
or <http://www.timesonline.co.uk/article/0,,2087-1415741,00.html>