

Drafting Islamic Wills

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The fact that CLT has doubled the number of its back-to-back seminars on Islamic Wills and Islamic Mortgages for 2006 (<http://www.clt.co.uk/doc.asp?catid=853&docid=8423>) reflects a steady growth in these related emerging niche markets. Practising Jews, Christians and Muslims who wish to comply with the divine command in their respective revelations not to indulge in usury prefer interest free mortgages. One of the inevitable consequences of creating money out of nothing through usury (legalised in Britain by King Henry VIII as part of his reformation of the Church) is that electronic monopoly money steadily loses purchasing power, which means that house prices steadily rise, so that many residential properties are already 'valued' above £285,000, the nil rate band for 2006/07. This in turn means that even the buyer who has invested in an interest free mortgage will still probably have to grapple with inheritance tax planning sooner or later, which means drafting an appropriate Will – and for a practising Muslim this means an Islamic Will.

Even in the absence of inheritance tax considerations, most Muslims will be aware that the Prophet Muhammad, may Allah bless him and grant him peace, said, "It is the duty of a Muslim who has anything to bequeath not to let two nights pass without writing a Will about it." (*Al-Muwatta'* of Imam Malik: 37.1.1)

Since there are some 2.5 million Muslims in Britain today, all of whom will inevitably die, this means that probably most of them will want their estates to be divided in accordance with the Shari'a of Islam. Unless and until Muslim personal law has been accommodated by the legal system (by means of civil Shari'a Courts whose decisions are recognised as binding and enforceable in the County and High Courts, in the same way as arbitration and employment tribunal awards), this can only be achieved by drafting a valid Islamic Will which not only satisfies the legal requirements of English law, but also ensures a distribution of the estate in accordance with the Shari'a.

The Shari'a, meaning Road, is the legal modality of the Muslims which derives from the Qur'an – revealed to the Prophet Muhammad (who could neither read nor write) through the Angel Gabriel, and the Hadith – the recorded actions and sayings of the Prophet Muhammad and his Companions and their immediate Followers.

Although the English rules of intestacy have to some extent been influenced by Shari'a principles – which, whilst recognising that testators should be permitted to make some bequests as they please, stipulate that surviving relatives must inherit fixed shares whether testators want it or not – the intestacy rules do not prescribe the same shares as the Shari'a. This gives your Muslim client an added incentive to have an Islamic Will, since without it the Shari'a principles will not be applied – unless whoever inherits under the intestacy rules then carries out a voluntary re-distribution in accordance with the Shari'a.

The basic principles of the Shari‘a therefore are that after all funeral expenses, debts, taxes and professional and testamentary expenses have been paid out of the deceased’s estate, at least two thirds of what remains must go to surviving relatives in fixed shares prescribed by the Qur’an and up to one third can go to anyone else. The testator may decide to have all of the net estate divided up amongst the surviving relatives – but may not allocate an extra portion from the one third to a relative who is already going to receive a fixed share out of the two thirds.

Since testators do not know when they will die and which relatives will survive them, a straightforward Islamic Will does not specify either the relatives or their shares. This calculation is left to the executors after the testator’s death. As regards Sunni jurisprudence, the principles of Shari‘a are such that whatever the permutation of surviving relatives, it is possible to calculate the shares to which they are entitled. This means that as far as the surviving relatives are concerned, an Islamic Will can never be void for uncertainty, even though the beneficiaries are not named in the Will.

As regards bequests from the one third, these must of course be certain, possible and legally permitted. A residuary clause should always be included in the Will to act as a safety net for any bequests which may fail for uncertainty, impossibility or illegality.

It is important for practitioners to remember that not *all* surviving relatives will automatically inherit a fixed share from the estate. There is a pecking order. The closer relatives (parents, siblings, husband or wife, children) exclude the more distant relatives (grandparents, grandchildren, uncles, nephews, nieces). It is therefore necessary when drafting an Islamic Will to ascertain what is likely to happen on the testator’s death, so that if, for example, in all likelihood the grandchildren will not be entitled to fixed shares because they will be excluded by the testator’s surviving closer relatives, bequests can be made to the grandchildren out of the one third.

How can a practitioner advise on this? If you do not know this science, or someone who knows it, the next best way is to access the Islamic Inheritance Programme (<http://members.aol.com/IslamicSoftware/irthie.html>), key in your client’s current relatives’ details and press the calculate button. You will then see who would be entitled to what share if your client had just died - and who in all likelihood will *not* be entitled to a share when your client does die, which means that bequests out of the third may need to be included in the Will. If, as it happens, a distant relative who has been allocated a bequest out of the one third turns out to be entitled to a fixed share out of the two thirds, the bequest is automatically nullified and the fixed share is given instead.

You will also see from the Islamic Inheritance Programme that you have a choice of which madhhab (Sunni school of jurisprudence) to follow. Since there are a few minor variations between madhhabs (there being more than one way to cook a goose), it is always prudent, in accordance with your client’s instructions, to stipulate in the Will which madhhab the executors should apply so as to avoid any doubt and nip any bramble of contention in the bud.

Since there are distinct differences between Sunni and Shi‘a jurisprudence, the Islamic Inheritance Programme is at present unsuitable for a Shi‘a client.

If your client is a Shi'a, *Islamic Wills* by Abbas Mithani (published by The World Federation of Khoja Shia Ithna-Asheri Muslim Communities, ISBN 0 9509879 3 X) is helpful. This has several precedents.

If your client is a Sunni, *The Islamic Will* by Hajj Abdalhaqq & Aisha Bewley and Ahmad Thomson (published by Dar Al-Taqwa, ISBN 1 870582 35 7) is helpful. This has one simple precedent which can be adapted as the particular circumstances of your client require – but it is unsuitable for a testator whose estate is likely to be worth more than the nil rate band.

Although from a Shari'a perspective Inheritance Tax is an unjust tax and should be abolished (or at the very least redefined so as to allow all relatives to be tax exempt and not just the spouse), this is unlikely to happen, especially since the national debt (initiated by King William of Orange who was definitely not an 'Islamic Will' and structured so that it could never be repaid) has almost doubled during the current government's tenure and has to be serviced unless and until it is finally written off.

This means that a more complicated form of Islamic Will is required which will usually involve our familiar friends, a nil rate band discretionary trust, perhaps a flexible life interest trust and of course an independent letter of wishes – the latter being the means by which distribution in accordance with the Shari'a can be highly recommended to the trustees. Although his book has not yet been published, Haroon Rashid of IWill Limited (haroon@iwilllimited.com) remains the most experienced Muslim practitioner in this field.

To conclude, this article is concerned with outlining and contextualising basic principles and giving practical advice. More detailed information can be found in the articles listed in the Islamic Wills section of the specialisations page of the Wynne Chambers website (<http://www.wynnechambers.co.uk>) and in the two publications mentioned above.

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