

The Quran states:

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).

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

**How to Distribute an Estate**

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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 Australia, South Africa and Zimbabwe.

## **Introduction**

Immediately after a person dies, under both Australian and Islamic laws, the will becomes operative and the executor appointed in the deceased's will takes control of all the deceased's assets and liabilities and manages these until he/she pays all the debts due by the deceased and distributes the remainder of the estate to the heirs appointed in the will.

Should the will not appoint an executor; under Australian law one of the beneficiaries can apply to the court to be granted a letter of administration to manage the estate. A letter of administration is a court order that allows an estate to be administered. The recipient of a letter of administration is referred to as an Administrator.

### Estate

Under both Australian and Islamic law, the assets and liabilities of the deceased are referred to as the deceased's estate. Under Australian law the deceased estate assumes a legal persona, separate from the executor and the heirs/beneficiaries. The executor does not own the estate – he/she merely manages it and distributes it in accordance with the will. However, in terms of the powers the executor has, he is regarded as the 'owner' until the estate is distributed. The heirs/beneficiaries have no say until an actual distribution has been made to them. If the heirs/beneficiaries are not satisfied with the performance of the executor, they can petition the Court for his/her removal, but they themselves cannot remove him/her.

Under Islamic law, the estate is not a separate legal persona – immediately a person dies, the estate becomes the combined ownership of the heirs. The executor is accountable to the heirs for his/her actions.

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# Executor

## 1. INTRODUCTION

As Executor, you are responsible for the administration of the estate of the deceased, should you have been appointed in the will of the deceased. As stated previously, if the will does not appoint an executor, any heir (or other person) can apply to become an administrator of the estate. Once appointed, the duties and responsibilities of an administrator are the same as that of an executor.

The Arabic term for executor is *Wisayah*.

## 2. WHO CAN BE AN EXECUTOR?

State and Territory laws outline persons who can act as executors and you may, due legal requirements, be prohibited from acting as an executor.

## 3. REQUIREMENTS OF AN EXECUTOR

Under Australian law, the power and requirements of an executor are detailed in various State/Territory laws and the will of the deceased. Under Islamic law, the power and requirements of an executor are determined by Islamic law and the will of the deceased.

Typically, the requirements of executors are as follows:

- Under Australian law, the executor must be an adult. The same applies under Islamic law. Attaining adulthood in Islam is a lower age (usually 15 years) than Australia (18 years) and as such, the Islamic legal position will be ignored.
- The executor must act honestly and can be personally liable for dishonest acts.

Under Islamic law, the Shafi school are of the opinion that it is *wajib* (obligatory) for an executor to be a just person. The Maliki and Hanafi schools are of the opinion that it is sufficient that an executor be trustworthy and truthful, as being just is a means and not an end, and when the executor strives to fulfil the provisions of the will - as is obligatory for the executor - the purpose is achieved.

The Quran warns executors to act honestly:

**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).**

The Quran also states:

**And do not eat up your wealth (property) among yourselves unjustly, nor use it as bait for the judges, with intent that ye may eat up wrongfully the property of others while you know what you do is wrong. (2:188).**

- Under Australian law any person can be appointed an executor. However, the appointment of persons who have been declared insolvent, who have been convicted in a court of law for a crime, amongst others, can be set aside. Importantly, under Australian law, there is no requirement for an executor (appointed in a will) to be knowledgeable or have any experience in administering estates.

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If you have been appointed an executor, it is advisable to research your duties as under certain circumstances, executors can be sued for negligence.

Under Islamic law, the executor must be capable of executing his duties. The Hanafi, Maliki and Shafi schools require that the executor be capable of administering the will. An incompetent person should not be appointed to such an important post.

- Executors can only exercise the powers awarded in the will and under State/Territory laws. The position is the same under Islamic law, however, under Islamic law, the deceased must state in his will who the executor is and over what portion of his estate he has power. According to the Hanafi, Hanbali and Shafi schools of thought, if the appointment is not clear as to authority, then the appointment is void. Imam Malik was of the opinion that the executor by default has authority to administer the entire estate.
- Under Islamic law, the executor must be a Muslim. This is the view of all schools of thought. The Hanafi school are of the opinion that if a non-Muslim is appointed then a judge should replace him (applies to Muslim countries only - although if a testator (deceased) states that his will shall be administered in accordance with the Islamic law of succession then the Court may be petitioned to replace a non-Muslim). If the non-Muslim is not removed, then his actions in administering the will are valid (Hanafi law only).
- Under Islamic law an executor must have empathy for the deceased's family. The Quran states: *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).

#### **4. APPOINTING MORE THAN ONE EXECUTOR**

Under Islamic law there is consensus among the schools that a testator can appoint two or more executors. The testator must indicate whether the executors act on their own, independent of each other or whether they should act in unison. If they are to act independently, the testator should indicate which part of the will they are to administrate, failing which there will be chaos as executors could duplicate certain acts and not perform others. Under Australian law, certain States and Territories limit the number of executors to four by limiting the granting of probate to 4 persons.

The schools differ with regards to the approach to be taken where the testator does not indicate whether the executors are to act independently of each other or in unison. The Shafi, Maliki and Hanbali schools are of the opinion that the executors have no power to act on their own. If they quarrel and disagree then the court will compel them to agree. In Australia, the law is similar, with the court either making the deadlock decisions or appointing an independent chairperson. The Hanafi school are of the opinion that each of the executors is free to act individually concerning seven things:

- shrouding of the deceased;
- payment of debt;
- recovering of the will;
- returning articles held by the deceased;
- purchasing necessary food and clothing for the minor heirs;
- acceptance of gifts on behalf of minor heirs;
- perusal of legal proceedings initiated for or against the deceased;

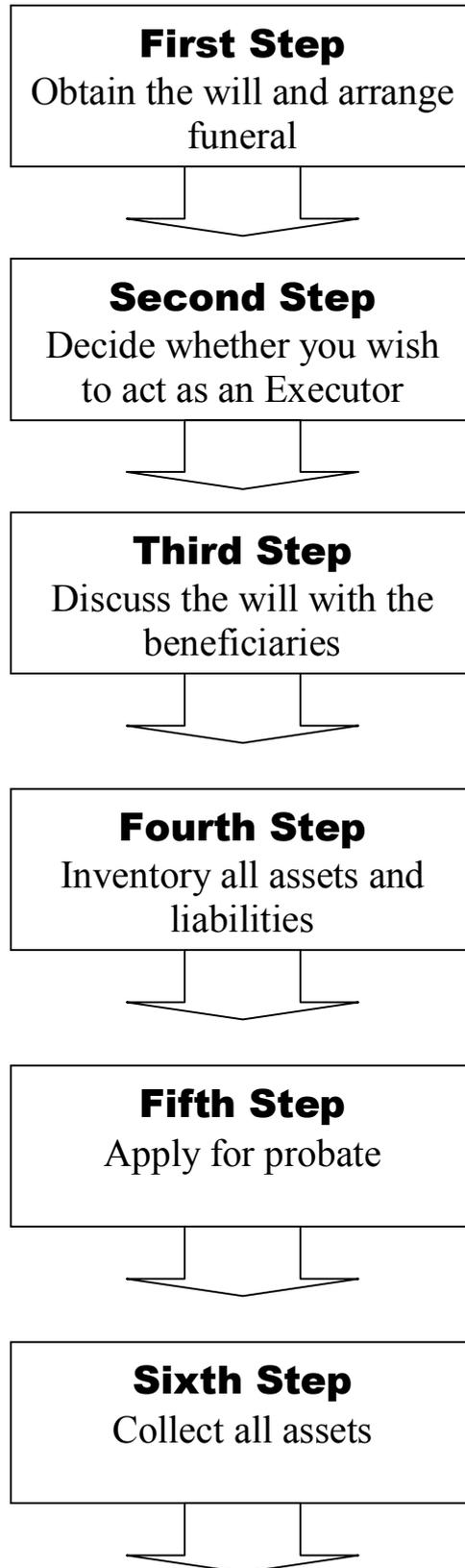
The executors must act jointly in all other matters.

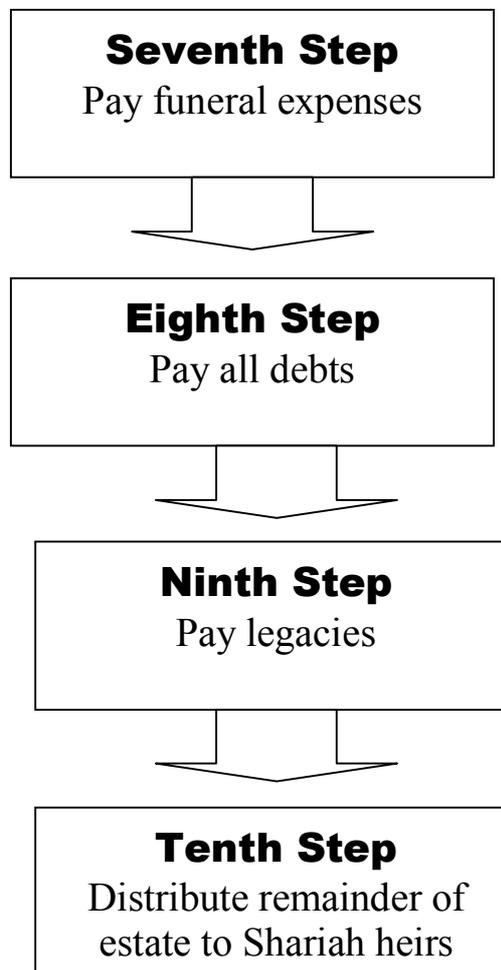
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# Administering the Estate

## STEPS IN THE ADMINISTRATION OF AN ESTATE

The steps in the administration of an estate are as follows:





From an Islamic law perspective, the sooner the above is completed the better. The assets belong to the heirs immediately upon the death of the testator and should be distributed to them as soon as possible.

From an Australian law perspective, estates can be held open for years.

Where there is no will

Should a will not exist then the laws in the State/Territory that the deceased lived in will determine the persons who will inherit from the deceased estate – the concept is the same as Islamic law, but the shares that family members receive are different.

Where no will exists, the same steps apply except that no legacies will be payable as without a will the deceased has no way of communicating his/her desire to pay legacies. The final step – that of distributing the remainder of the estate to Shariah heirs is replaced by a distribution made in accordance with State/Territory laws (which differ from Islamic law). The heirs can agree to redistribute in accordance with Islamic law.

**1. FIRST STEP: OBTAIN A COPY OF THE WILL AND ENSURE FUNERAL REQUESTS HAVE BEEN ADHERED TO**

Immediately after death, as Executor, you need to obtain the deceased's will and ensure that the will is the final will.

Before you do anything else, read the will and make sure that the deceased's funeral requests are being adhered to. As Executor you have control and should the family of the deceased wish to

bury the deceased in a manner different from what the deceased requested, you need to step in and override the family.

Should the deceased's request for burial not comply with Islamic law, it is your duty to ensure that the deceased is buried in accordance with Islamic law and not his/her wishes (for example of the deceased states that his/her body must be cremated – as executor you have a duty to uphold Islamic law and ignore the deceased's request).

Under Islamic law, burials take place within a day or two of the death occurring. As Executor, you should first focus on the burial arrangements as these are immediate and then focus on whether you wish to act as an Executor.

## **2. SECOND STEP: DECIDE WHETHER YOU WISH TO ACT AS EXECUTOR**

Once the funeral arrangements have been seen to, you need to decide whether you wish to accept your appointment as the Executor. You need to consider the time you have available to do the various tasks required, your understanding of the requirements and any commitments you had made to the deceased prior to his/her death.

Under Australian law, you can reject the appointment and if the will appoints an alternative then that person will be approached. If no alternative exists, then a beneficiary (usually the largest beneficiary) can apply to the Court to be issued with letters of Administration.

The position under Islamic law is the same if the deceased did not seek your agreement to be an executor during the his/her lifetime. However, if the deceased obtained your approval, then the schools differ regarding the validity of a rejection to act as an Executor. The Hanafi school are of the opinion that a rejection is not valid after the death of the deceased or during the lifetime of the deceased without informing him. The Shafi and Hanbali schools are of the opinion that it is valid for you to reject your nomination at any time - that is during the life of the testator and after his/her death.

## **3. THIRD STEP: DISCUSS THE WILL WITH THE BENEFICIARIES**

As soon as possible after the funeral, gather all the family members and other beneficiaries and discuss with them the contents of the will.

Under Australian law, as Executor you have total control over the estate and you do not need the approval of the beneficiaries for any of your actions provided you have been granted such powers by the will of the deceased.

Under Islamic law, the heirs are the owners of the estate – you are acting as their and the deceased's agent to administer the estate. In this situation it is advisable to constantly consult with the beneficiaries and to seek their approval for your actions.

Should the will not distribute the estate in accordance with Islamic law, then you need to discuss this with the beneficiaries and agree on whether the will should be amended to reflect Islamic law or left as is. If the beneficiaries are of the view that the will be left as it is, then you need to decide whether you wish to proceed as Executor.

Amendments to a will are permitted. The Quran states:

But if anyone fears partiality or wrong-doing on the part of the testator, and brings a settlement (among the parties concerned), then there is no wrong in him. For Allah is Oft Forgiving, Most Merciful. (2:182).

#### **4. FOURTH STEP: INVENTORY ASSETS AND LIABILITIES**

You must, as soon as possible, compile an inventory of all assets and liabilities of the estate. You need to do this with family members and business partners/associates of the deceased to ensure that you have a complete inventory.

You also need to obtain a death certificate and inform the Australian Taxation Office of the death and the formation of a deceased estate.

You should also obtain a market value of all assets in the estate. You need this to ensure that the distributions to heirs is fair.

#### **5. FIFTH STEP: APPLYING FOR PROBATE**

Once you have the final will, under Australian law, you need to apply for a grant of probate from the Probate Office of the Supreme Court. Applying for a grant of probate only applies for Executors appointed in a will. Administrators have already been through a similar procedure for their appointment.

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. Grants of probate are required to prove that the executor has the power to act for the deceased's estate.

The grant of probate can be awarded without contest, or a person can contest it.

You can apply for a grant of probate through:

- a solicitor; or
- a trustee company; or
- the Public Trustee

At least 14 days before applying for probate you must insert an advertisement in a newspaper stating that probate is being applied for. This gives anyone who knows of another will to bring it forward. It also allows creditors or others with an interest in the estate to submit their claims<sup>1</sup>.

The probate application requires two documents to be filed with the Probate Office of the Supreme Court:

- a summons of probate; and
- an affidavit of executor

In the affidavit you need to swear that you will administer the estate according to the law and you know of no reason why you should not be granted probate of the will. The affidavit must be accompanied by:

- the will;
- the death certificate;
- a copy of the newspaper advertisement; and
- an inventory of the deceased's assets and a list of their liabilities<sup>2</sup>.

You should seek legal assistance for this process. A filing fee is payable.

The list of liabilities should include funeral costs and any tax due by the deceased on income earned up to the period of death. A tax return should be filed with the Australian Tax Office for income earned by the deceased to the date of his/her death.

## **6. SIXTH STEP: COLLECT ALL ASSETS**

You need to collect all assets and begin the process of paying debts. You will most likely be requested to produce the probate document when requesting access to the assets.

If you have not already done so, open a separate trust bank account for the deceased estate.

Always ensure the deceased's family have access to funds to maintain themselves – do not exacerbate their grief with concerns over income.

## **7. SEVENTH STEP: PAYMENT OF FUNERAL EXPENSES**

Under both Australian and Islamic laws, if the estate has sufficient funds and assets, then your next step is to pay the deceased's debts. No payments should be made to legatees or heirs until all debts have been settled. The Prophet (PBUH) stated: that debts should be paid before legacies. 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 Ali, is reported by Tirmithiy. Bukhari reports in volume four, page 9 of his works: "The Prophet (PBUH) is reported to have judged that the debt should be paid before the execution of the will."

The payment of debt before a legacy is self explanatory as a debt is owed to another whilst a legacy/bequest is merely a gift.

### Funeral expenses

Under both Australian and Islamic laws, funeral expenses should be paid first, provided the estate is not insolvent. Under Australian law if the estate is insolvent, secured debts are paid first and funeral expenses then rank after these for payment. Secured debts comprise debts where the deceased provided an asset as security, for example a mortgage bond will have a home as security.

Under Islamic law, The Hanafi, Maliki and Shafi schools state that debts where the deceased provided guarantees should be paid before funeral expenses<sup>3</sup>. The Hanbali school are of the opinion that funeral expenses will always rank before debt as the first liability is to bury the deceased person.

**Sheikh `Abdul-Bari Az-Zamzami**, a member of the Moroccan Scholars' Association, states: "There is a consensus among scholars that the wealth left behind by the deceased should not be distributed among his heirs before paying for the funeral and all outstanding loans or debts. The will of the deceased should be followed very strictly unless it is against the laws of Allah."<sup>4</sup>

An Islamic burial is simple and hence funeral expenses should be low and reasonable.

Under Islamic law (all schools concur), only the amount required for the *Kafan* (cloth) and other associated burial costs (cost of grave, timber, transportation of body to graveyard, etc.) are deductible from the estate of the deceased. Many scholars are of the opinion that the burial of a person should be performed in a manner suitable to the deceased's position socially and financially.

Other expenditure incurred (for example, feeding family and friends attending the funeral) are not permitted deductions from the deceased estate. Sheikh `Abdul-Bari Az-Zamzami, a member of the Moroccan Scholars' Association<sup>5</sup> states: "As for the limits that should be considered while preparing a funeral, this should include washing, shrouding the deceased and burying him. Any extra ceremonies should not be paid for from the wealth of the deceased."

Charity and gifts (including the personal clothing of the deceased) cannot be given prior to the distribution of the estate. Charity and gifts may only be distributed from the one-third legacy portion of the estate, if the deceased has indicated in his will that gifts should be made.

Under Islamic law, if the estate of the deceased is insolvent then the creditors have the right to limit the funeral expense further<sup>6</sup>.

#### Wife's funeral costs

Some schools of thought are of the opinion that the husband is responsible for the funeral cost of his wife and hence these costs should not be deducted from the wife's estate. If the husband has pre-deceased the wife then the costs can be borne by her estate. In the Shafi school of thought, the wife only bears the cost of her burial if she can afford it.

The leading South African scholar Mufti Bayat states the following with regards to payment of wife's funeral costs<sup>7</sup>: "The funeral expenses of any deceased person is to be deducted from the estate of the deceased before any other deductions such as payment of debts or disbursement of *Wasiyah* (legacy). If the deceased does not possess sufficient means to cover the funeral expenses, then it will become compulsory upon the person responsible for his/her maintenance in life to bear this expense. In view of the above principle, it would be compulsory upon the husband to bear the expenses of the deceased wife as he was responsible for her maintenance in her life. This is the viewpoint of the Hanafi school of thought as well as the more correct view of the Shafi school of thought. However, according to the Maliki and Hanbali schools of thought, it would not be compulsory upon the husband to bear the funeral costs of his deceased wife as she resembles *ajnabiyyah* ("strange" woman) in relation to him after her demise. The former view seems to be more correct as there is no basis for distinction between life and death of the spouse in the matter of bearing her costs. Allah knows best."

## **8. EIGHTH STEP: PAYMENT OF DEBTS**

The next step in the administration of the estate is to pay all debts. If the estate has sufficient assets then the payment of debts is a simple exercise. You must ensure that the debt is valid and you must maintain records of the payment of the debt.

Secured creditors will be paid before unsecured creditors. With regards to mortgages an heir can inherit the asset with the liability and continue to pay the debt.

If the estate has insufficient funds to pay its debts then the estate is insolvent, just as an individual who cannot pay his/her debts becomes insolvent. If this arises, I suggest that you obtain legal assistance as a number of options exist and you need to ensure that you choose the most beneficial option.

The payment of debt is a fundamental principle of Islam. The Prophet (PBUH) has stated: Narrated Abu Hurraira: The Prophet (PBUH) said: "The soul of a deceased believer is held back on account of his debt till the debt is discharged." (Mishkat).

Narrated Sai'd ibn al-Atwal: My brother died leaving three hundred dinars and some young children, and I wanted to use them (dinars) for their maintenance, but Allah's Messenger (PBUH) said to me: "Your brother is imprisoned by his debt, so pay it on his behalf." (Mishkat).

Narrated Abu Hurraira: Allah's Messenger (PBUH) said: "A believer's soul is attached to his debt till it is paid." (Mishkat).

Payment of debts is therefore critical. As Executor, you should not try to avoid the payment of debts. If there is sufficient evidence that a debt exists, pay it.

Under Islamic law, the schools differ with regards to the order in which debts should be paid (secured debt versus religious debt versus other debt).

### **Secured debt:**

All schools with the exception of the Hanbali school are of the opinion that any debt where the deceased issued guarantees should be settled before any other debt/liabilities are paid - including funeral expenses (this is the same as Australian law). It is common practice that the person who inherits the secured property takes over the secured loan. However, under Islamic law, the debt should be paid and the legatees and heirs should inherit free of any encumbrances. A number of scholars are of the opinion that an encumbered asset can be inherited if the net value is calculated and assigned as part of the estate. The debt of a deceased person may be transferred: "If the debts due on a dead person are transferred to somebody, the transference is valid and legal." (Bukhari, volume 3, page 270).

### **Religious debt:**

The Hanafi school are of the opinion that religious debts cease at the time of death. The debts can be paid by the heirs on behalf of the deceased (as gifts) or if the deceased made a legacy for religious debts (that is, the debts are paid from the one-third portion of the estate). If the deceased has indicated in his will that religious liabilities must be fulfilled - these will automatically be deducted as a bequest/legacy under the Hanafi law of succession.

The Maliki school are of the opinion that debts due to man (interpreted to include corporate entities) must be paid first.

The Shafi school are of the opinion that religious debts should be settled before other debts. This view is based on the following hadiths of the Prophet (PBUH):  
"The debt belonging to Allah is more worthy to be settled." (Bukhari<sup>8</sup>)  
"Settle the debts of Allah for it is more worthy that it be carried out." (Muslim).

The issue of which debt takes priority has major implications when the deceased's estate does not have sufficient assets to settle all the debts. Under Australian law, the concept of religious debt has not been tested in court, but it is doubtful whether the law relating to insolvent estates will recognise religious debt. If they are recognised, the debt will rank with other creditors for a pro-rata distribution of assets. However, in accordance with the Shafi school of thought, the religious debt should be paid first and if there are any remaining assets then these will be applied to the other creditors - this will be a problem under Australian law if the estate is insolvent.

The Hanafi and Shafi school differentiate creditors between specific debts and general debts. The distinction between the two is debatable.

The Hanafi school further differentiates between debts acknowledged prior to, and during death sickness. If the assets in the estate are insufficient to settle the first kind of debt, all the assets

will be divided among the creditors of the first kind proportionately. The creditors of the second category will not receive anything.

The Maliki school do not differentiate between creditors. All are equal (excluding creditors to whom the deceased issued guarantees). The Hanbali school classify all liabilities (religious or other) equally.

The table below summarises the sequence in which debt is to be settled according to the various schools:

<b>Hanafi School</b>	<b>Shafi School</b>	<b>Maliki School</b>	<b>Hanbali School</b>
Debts for which guarantees were issued.	Debts for which guarantees were issued.	Funeral expenses.	Debts for which guarantees were issued.
Funeral expenses.	Funeral expenses.	Secured debt.	Funeral expenses.
Specific debts acknowledged before death sickness.	Religious debts.	All other debts (including religious).	All debts.
General debts acknowledged before death sickness.	Specific debts.		Religious debts - although the view is that the debts cease upon death.
Specific debts acknowledged during death sickness.	General debts.		
General debts acknowledged during death sickness.			
Religious liabilities paid from the one-third legacy portion if so willed.			

Australian law does not recognise the above differentiation nor does it recognise the sequence of payments. At present, Islamic law of succession has no legal backing in Australia - hence the law of the land will be applied to the payment of debts in a deceased estate.

Debts incurred by the estate after death must be paid under Australian law before the estate can be finalised. Examples of such debts/costs are: probate fees, executor's fees, and other costs of finalising an estate. No mention is made of debts/costs of this nature by the Islamic jurists - they will, nevertheless rank with other third party debts.

It is reported by Bukhari, that the Prophet (PBUH) when requested to perform funeral prayers would ask whether the person was in debt and if so whether he left funds for the settlement of the debt. He would not perform the funeral prayer of a Muslim who was in debt and did not leave sufficient assets, requesting other members of the congregation to perform the prayer instead.

Narrated Salama bin Al-Akwa: Once, while we were sitting in the company of the Prophet (PBUH), a dead person was brought. The Prophet (PBUH) was requested to lead the funeral prayer for the deceased. He said, "Is he in debt?" The people replied in the negative. He said, "Has he left any wealth?" They said, "No." So, he led his funeral prayer. Another dead person was brought and the people said, "O Allah's

Apostle! Lead his funeral prayer." The Prophet (PBUH) asked, "Is he in debt?" They said, "Yes." He asked, "Has he left any wealth?" They replied, "Three Dinars." So, he led the prayer. Then a third dead person was brought and the people said (to the Prophet (PBUH), "Please lead his funeral prayer." He asked, "Has he left any wealth?" They replied, "No." He asked, "Is he in debt?" They said, "Yes! He has to pay three Dinars." He (refused to pray and) said, "Then pray for your (dead) companion." Abu Qatada said, "O Allah's Apostle! Lead his funeral prayer, and I will pay his debt." So, he led the prayer. (Bukhari, volume three, hadith 488).

Narrated Abu Musa: The Prophet (PBUH) said, "Verily the greatest of sins to Allah with which a man shall meet Him after the greatest sins which Allah prohibited is a man's dying with debt outstanding but leaving nothing for its payment." (Abu Dawud<sup>9</sup>).

**It is obvious that an insolvent deceased estate is not acceptable. A Muslim should ensure that he/she leaves sufficient assets to pay debts or pay them whilst still alive.**

## **9. NINTH STEP: PAYMENT OF LEGACIES**

A legacy is an amount/asset set aside for a specific person. It is a gift from the deceased. The person who receives a legacy is referred to as a legatee. Any person, natural or juristic (company, trust, charity, etc.) can be a legatee.

Under Islamic law, the terms legacy and bequest are used interchangeably.

### Portion of the estate subject to a legacy

Under Australian law, there is no limit on the amount of the deceased estate that can be given as legacies. Under Islamic law, the deceased only had discretionary power over one-third of his/her net estate (after paying debts and expenses). The remainder is distributed in accordance with the rules of the Holy Quran (Quranic heirs). Hence, only up to one-third of the deceased's net estate can be distributed as legacies.

The Holy Quran makes mention of legacies but does not state what portion of an estate can be distributed by way of legacies/bequests. The one-third maximum (of net estate) was the practice of our 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 that morsel of food you put in your wife's mouth....." At that time Sa'd had only one daughter. (Bukhari: volume 4, hadith 5).

The Prophet (PBUH) said, "Truly Allah has given you a charity of one-third of your entire wealth that serve as an increment to your deeds. Place it wherever you want to or (give it) to whomsoever you like." (Bukhari<sup>10</sup>).

The limitation on the quantum of the legacy/bequest applies regardless of the affluence of the heirs - their inheritance is a matter of right and not of circumstance.

### Should the will make provision for more than 1/3:

- If the will does not state that it is to be distributed in accordance with the Islamic law of succession then it is your duty to distribute the legacies as specified by the deceased. As Executor you need to decide whether you wish to distribute an estate that is clearly in breach of Islamic law.

- If the will states that the assets are to be distributed in accordance with Islamic law then you should approach all the adult heirs and enquire if they are in agreement with the legacies in excess of 1/3 being paid. The reason you have to approach the heirs is that the additional payments need to be made from their inheritance. Minor heirs will still receive their share as determined by the Quran and their agreement to any other distribution is not valid under Islamic law. If the heirs do not agree then I suggest that you seek legal opinion, although under Islamic law you could pro-rata the legacies.

The Hanafi school are of the view that if a testator has no heirs (as defined in the Shariah) then he may make a legacy of his entire estate.

#### When to calculate the 1/3

The schools differ concerning the time at which the one-third is determined. The Hanafi school and certain Hanbali and Maliki scholars are of the opinion that the one-third is calculated when the estate is being distributed. Hence any increase or decrease in the testator's estate since death is included. The Shafi school are of the view that the one-third should be calculated at death.

#### Who can receive a legacy?

Under Australian law, any person can receive a legacy. The deceased's spouse, children, charitable organisations etc. all qualify.

Under Islamic law any person other than a Quranic/Shariah heir can receive a legacy. Non Muslims can receive legacies.

The schools differ with regards to Quranic heirs receiving a legacy. The Shafi and Hanbali school are of the view that a bequest for an heir is acceptable provided all the other heirs approve of the bequest. They base their opinion on the following hadith of the Prophet (PBUH): "There is no legacy for an heir except where the heirs give their approval." (Reported by Al-Baihaqi).

The Hanafi school are of the opinion that a legacy to an heir is not permissible. However, if the deceased made such a legacy then it is acceptable if all the adult heirs uphold the legacy. Imam Hanifa based his opinion on the following hadith of the Prophet (PBUH): "Truly Allah has given unto each person his rights that is due to him, so remember there is no legacy for an heir." (Abu Dawud)<sup>11</sup>.

If the deceased's will includes heirs as legatees you should follow the principle outlined in the section on what happens if the will includes legacies in excess of 1/3.

#### Legacies subject to debt:

Under Australian law any asset whether movable or immovable, corporeal or incorporeal may form a legacy. If the subject matter of a legacy is burdened (debt or mortgage) then unless the testator indicates otherwise, the implication is that the legatee receives the property free of its burden. A testator must therefore be very careful when drafting his will.

Under Islamic law, all the schools concur that it is necessary that a bequest be capable of being owned (property, benefits, etc.). If an item bequeathed is burdened then Islamic law is the same as Australian law - that is, unless the will indicates otherwise, the Shariah determines that all debt should be settled before any legacies are paid.

#### Insufficient funds to pay legacies

What happens when the estate has insufficient funds to pay the legacies? Under Australian law, the legacies will be proportionally reduced so that all legatees receive something. The heirs will not receive anything.

Under Islamic law the legacy payments are restricted to 1/3 of the net estate and hence the beneficiaries will still receive 2/3.

Invalid legacy:

Under Australian law, a legacy is invalid if the asset specified is either destroyed or sold by the testator during his life-time. Under Islamic law, a legacy is revoked if the testator consumes, sells or donates/gifts the article bequeathed. The Hanafi school are of the opinion that selling the subject matter is not considered a revocation, and the legatee is entitled to receive its price<sup>12</sup>.

Under Australian law a legacy is also invalid if the legatee pre-deceases the deceased, if he repudiates the legacy or if the deceased's estate is insolvent.

Under Islamic law, the Hanafi school are of the opinion that the legatee must be alive at the time the deceased makes the bequest (for example, a legacy cannot be made to an unborn child)<sup>13</sup>. The Hanafi school are also of the opinion that should the legatee predecease the testator, the legacy is still valid and the legatee's beneficiaries will receive the legacy. The other schools are of the view that the legatee must be in existence at the time of the testator's death. They are of the view that it is a fundamental condition of the validity of a bequest that the legatee must be in existence at the time of the testator's death. "Basically this rule rests upon the ground that the transaction of bequest is a transfer of property from the dead to the living which requires acceptance by the legatee for its completion."<sup>14</sup>

## **10. FINAL STEP: DISTRIBUTION TO HEIRS**

The final stage in the administration of an estate under Islamic law is the distribution of the remainder of the estate after paying funeral costs, debt and legacies.

The final distribution should only be made to the heirs identified by Islamic law and in shares determined by Islamic law.

If you encounter any problems with the beneficiaries seek the opinion of an Islamic scholar or an Islamic text that can be defended in Court.

For the final distribution:

- You should first identify which family members qualify for inheritance under Islamic law.
- Ensure that the family members are blood relations or a spouse.
- Identify who the residuary heir is.
- Calculate the shares to be distributed to family members as specified in the Quran.
- Distribute the remainder to the residuary heirs

The book: *Australian and Islamic Laws of Inheritance – Part III – Distributions in accordance with the Shariah* explains the various shares of family members and explains how to identify Quranic and residuary heirs.

Transfer of real property

If the deceased was the sole owner of a property or an owner under tenants in common, the following documents may need to be lodged to transfer the property to the beneficiaries:

- A notice of death;
- An original or certified copy of the death certificate;
- The certificate of title of the property (if mortgaged, then you need to approach the mortgagee to present it);
- A notice of sale to enable the change of the name at various local councils; and

- A lodgement fee.

## 11. BENEFICIARIES CHALLENGING THE WILL

Circumstances may arise where one or more beneficiaries may challenge the will on the basis that they do not believe that the will adequately provides for them.

Australian law 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.

Where a challenge is being made to a will that has adopted the Islamic law of succession, then the first step is to explain to the beneficiary the Islamic law of succession and the reason why it is important for the will to proceed without amendments. If this does not change the mind of the beneficiary, then attempt to implement alternative dispute resolution techniques rather than having the will debated in an Australian court. An Australian court may not understand the Islamic law of inheritance.

Alternative dispute resolution techniques involve non binding mediation between the disputing parties – in this case between you as the Executor and the beneficiary. Alternatively, suggest binding arbitration where the matter is referred to a person whose decision will be binding upon both parties. Such a person should have a good understanding of the Islamic law of inheritance.

If the beneficiary is disputing his/her share under Islamic law, then you may have no choice but to hear the matter in court and let a non-Muslim judge rule on a matter that has been determined by Allah.

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<sup>1</sup> Long & Coffey: *Rest Assured*, 4<sup>th</sup> Edition, Redfern Legal Centre Publishing.

<sup>2</sup> Long & Coffey: *Rest Assured*, 4<sup>th</sup> Edition, Redfern Legal Centre Publishing.

<sup>3</sup> Al Fadl: *A Comparative Study on Inheritance*, page 73, translated by A.H. Sallie.

<sup>4</sup> Islamonline fatwa: "Paing Funeral Expenses from the Wealth of the Deceased" – April 2004

<sup>5</sup> Islamonline fatwa: "Paing Funeral Expenses from the Wealth of the Deceased" – April 2004

<sup>6</sup> Majlisul Ulama (Port Elizabeth): *Kitaabul-Meerath*, page 24.

<sup>7</sup> Mufti Bayat: In an opinion expressed specifically for this book.

<sup>8</sup> Al Fadl: *A Comparative Study on Inheritance*, page 74, translated by A.H. Sallie.

<sup>9</sup> Source: Mishkat, volume 2, page 211.

<sup>10</sup> As reported by: Al Fadl: *A Comparative Study on Inheritance*, page 77, translated by A.H. Sallie.

<sup>11</sup> Al Fadl: *A Comparative Study on Inheritance*, page 90, translated by A.H. Sallie.

<sup>12</sup> Bakhtiar L: *Encyclopedia of Islamic Law*, pages 362.

<sup>13</sup> Majlisul Ulama (Port Elizabeth): *Kitaabul-Meerath*, page 42, point 10.

<sup>14</sup> Moosagie MA: Lecture notes - Islamic College of South Africa (ICOSA).

Other references:

The Holy Quran.

Hadith: Bukhari; Mishkat; Abu Dawud; Muslim.

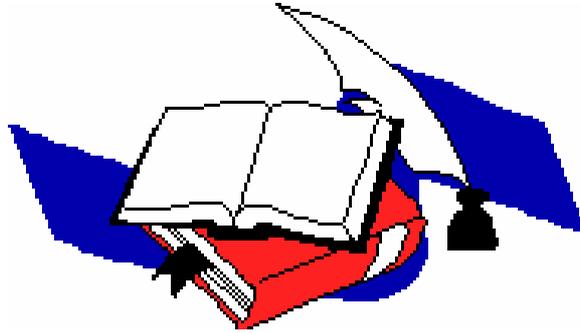
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### **A Focus on Islamic Education**

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This book explains:

- What a deceased estate is;
- What an executor is;
- The powers and requirements of an executor under both Australian and Islamic law;
- Steps in the administration of an estate:
  - Obtaining the will and arranging the funeral
  - Deciding on whether you wish to act as an Executor
  - Discussing the will with the beneficiaries
  - Taking control of assets
  - Applying for probate
  - Paying funeral expenses
  - Paying debts
  - Paying legacies
  - Distributing the remainder of the estate to Shariah heirs
- What to do should a beneficiary challenge the will