

Daughter Contests Islamic Will in Australian Courts

Iqbal Lambat – 15 March 2012.

A daughter (Fatma) contested an Islamic will in the Supreme Court in Canberra last week. The basis of her claim was that Australian law and not Islamic law should apply to the distribution of her mother's estate. She objected to receiving half a share compared to each of her brothers. Two of Fatma's brothers had obtained an Islamic will template which their mother (Mrs Omari) signed at a time when she was suffering from dementia.

At the time of signing her will, the late Mrs Omari was asked by one of the witnesses to the will if she knew why she was there. She replied: "Yes, I am coming here for my will, but please, sons, I fear God, I am a Muslim woman, make sure you do the right thing here." The witness asked if she understood that the will divided the property "in accordance with the Islamic faith". Mrs Omari replied: "I understand but I don't read or write."

In Court, Fatma asked one of her brothers why he had arranged for their mother to draw up such a will (that is, an Islamic will). He replied that "it was the obligation and responsibility of children to remind parents of their obligation to make a will", while her other brother said his mother had told him that she wanted "the laws of the creator, Allah, God, to be applied in the division of my wealth".

Under Australian law, Fatma had two potential claims:

- Have the will adjusted. A spouse (husband/wife), children and dependants of the deceased can apply to the Courts to have a will adjusted if they can prove that 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.

Under Islamic law a daughter receives half the share of a son, so a daughter can apply to the Australian Courts to have a will amended. The Court will only amend a will if it believes that the will does not properly look after the needs of the child. In doing so, the Court will consider a number of issues (size of the estate, the relationship between the deceased and the child, the financial needs of the child, the logic for allocating a specific share to the child, etc) before actually adjusting the will.

There is no guarantee that a daughter that receives half the share of a son will always win such a case. She will need to prove that she is reliant on the funding for her upkeep and that what was left to her in the will is not sufficient.

- Have the will completely set aside on the basis that her mother did not have the mental capacity to make a will. She was not of sound mind, memory and understanding as a result of her dementia.

The Court did not rule on the application of Islamic law. The Master said he believed the sons were trying to do the right thing by ensuring that their mother did her "duty under Islam to make a will leaving full shares to her sons and half shares to her daughters". But he said the evidence suggested that Mrs Omari was suffering dementia, and therefore the will was

not valid, despite the fact that "she might well have decided to make a will in the same or similar terms".

Maybe I am reading too much into this, but an encouraging outcome from this case is that the Master acknowledged an Islamic distribution and commented that the sons were trying to do the right thing.

The effect of an invalid will is that Mrs Omari's estate will now be distributed in accordance with intestate laws that apply in the ACT as Islamic law does not apply in Australia. This means that each child will inherit equal shares. The Omari brothers claimed that this was not their mother's intent. They are seeking legal opinion as to whether to appeal.

Under Australian law you have the freedom to decide to distribute your estate in accordance with Islamic law. The only way this can occur is if you have a will. If you do not have a will or your will is declared invalid as it was in this court case, Australian intestate law will apply to the distribution of your assets. Effectively State and Territory governments (depending on where you stay) decide how your estate will be distributed.

In Court the Imam of the Canberra Islamic Centre said that the "standard expectation is that a Muslim will leave full shares to sons and half-shares to daughters" because "one boy is equal to two girls". The Imam's statement has subsequently been taken out of context by selected media. The reason Islam awards a son a higher share is:

"Islam gives the girl half of her brother's share in inheritance because Islamic Law doesn't oblige her to spend any money on anybody other than herself. On the other hand, Muslim man, who is usually the bread-winner of the family, is obliged to spend on his wife, his children, his brothers, his sisters, and his mother and father. Therefore, since the financial burden is much higher on the male than the female, Islam gave the male double of his sister's share, and in this way, Islam has given the woman a just proportion." www.islamicity.com.

Under Islamic law, if Fatma required funds for her upkeep it is the duty of her brothers to provide for her. Alternatively, the brothers could give Fatma a larger inheritance out of their shares.

I am currently in the process of updating my book on the Islamic law of inheritance as it pertains to Australian Muslims. In this book I will discuss what options Muslims have to address this issue. A number of Muslims today have concerns that their sons may not support/maintain their sisters, despite Islamic law stating that it is their duty. There are options available which are acceptable in Islamic law.

Over the many centuries that Islamic law of inheritance has been applied, Muslim jurists and scholars have been unanimous in their verdicts, it is regarded a major sin if heirs to an estate attempt to obtain a larger share than they are entitled (other than through an acceptable manner in Islamic law). The Almighty Knows Best.

The facts of the case are outlined below:

(The extract below has been adapted from an article in *The Australian*, by Caroline Overington – 14 March 2012.).

Master David Harper heard a contest against an Islamic will in the Supreme Court in Canberra last week.

The facts of the case were:

- The deceased, Mrs Omari was born in Turkey but had resided in Australia for approximately 30 years.
- Mrs Omari could hardly speak English and had not learned to read or write in any language.
- She had 8 children – 5 daughters and 3 sons.
- Mrs Omari showed signs of dementia in the late 1990s.
- In 2002, 2 of her sons realised she had no will and obtained an Islamic will template from the Canberra Islamic Centre. The brothers then drove their mother to a Muslim businessperson who had agreed to be a witness to the will. A justice of the peace was also present. The businessperson asked Mrs Omari if she knew why she was there. She replied: "Yes, I am coming here for my will, but please, sons, I fear God, I am a Muslim woman, make sure you do the right thing here." The businessperson asked if she understood that the will divided the property "in accordance with the Islamic faith" (whole shares to the boys, and half-shares to the daughters). Mrs Omari replied: "I understand but I don't read or write."
- The businessperson then read out each paragraph in Arabic (it's not clear that Mrs Omari spoke much Arabic; her first language was Kurdish) but she nodded, and executed the will by making a thumbprint in ink on the bottom of each page. Six weeks after the will was signed, Mrs Omari went into a nursing home; seven years later, she died.
- Fatma Omari contested her mother's will and asked one of her brothers in Court why he had arranged for their mother to draw up such a will. He replied that "it was the obligation and responsibility of children to remind parents of their obligation to make a will", while the second brother said his mother had told him that she wanted "the laws of the creator, Allah, God, to be applied in the division of my wealth".
- Fatma objected stating that it was Australian law, not Islamic law, that must apply, meaning all the children would get the same amount from their mother's estate regardless of gender.
- She then claimed that the will was not valid as her mother had dementia.

Court Ruling

Master Harper said he believed the sons were trying to do the right thing by ensuring that their mother did her "duty under Islam to make a will leaving full shares to her sons and half shares to her daughters". But he said the evidence suggested that Mrs Omari was suffering dementia, and therefore the will was not valid, despite the fact that "she might well have decided to make a will in the same or similar terms".

As a result, Australian intestate laws apply and each child will receive an equal share.