In the Name of Allah, the Most Gracious, the Most Merciful

"The *Tarikah* (estate) of a deceased person in Shariah can be defined as all items in his *milkiyah* (possession) at the instance of his demise, even to the extent of a needle and the clothing on his person at the time of death." (South African scholar Mufti Bayat).

"It is important that ownership of property between spouses and family be established and clarified. For example, are household contents the property of the income earner or the property of the spouse? Kitchen utensils and appliances – which spouse do they belong to? If both spouses contributed to their purchase, who owns what? These issues must be clarified. If the household furniture and kitchen utensils belong to the husband, then they will form part of his estate for distribution to heirs. Assets can be gifted to spouses at any time whilst you are not in the throes of death sickness." (Lambat: Wills and Inheritance: An Islamic and South African Law Perspective).

Australian and Islamic Laws of Inheritance – Part II

What to include in an Estate

Written by:

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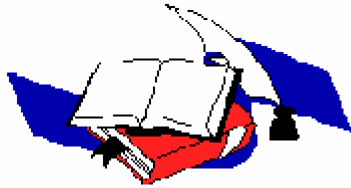
Published by: The Lambat Trust



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The Australian series comprises:
- Australian and Islamic laws of Inheritance – Part I – Drafting a Will
- Australian and Islamic laws of Inheritance – Part II – What to include in an Estate
- Australian and Islamic laws of Inheritance – Part III – Distributions in accordance with the Shariah
- Australian and Islamic laws of Inheritance – Part IV – How to Distribute an Estate

Also by the same author:
Wills and Inheritance: An Islamic and South African law perspective
Wills and Inheritance: An Islamic and Zimbabwean law perspective
Understanding Trusts – Zimbabwe edition

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About the Author

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 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.

What Constitutes An Estate?

1. INTRODUCTION

Your deceased estate consists of all the assets and liabilities which you have at the date of your death[i].

The objective of this book is to explain the composition and differences of an estate under Islamic and Australian laws. Islamic law is not recognised in Australia and you need to ensure that your will captures all your assets and liabilities. Your executor also needs to ensure that all your assets are included in your estate.

The differences between Australian and Islamic laws pertain to ownership of assets, religious liabilities and the treatment of assets that did not exist at the time of the Prophet (PBUH).

2. DEFINITION OF AN ESTATE

Generally your estate, under both Australian and Islamic laws, comprises all your assets and liabilities – whether tangible or intangible. For the purposes of this book, tangible assets refers to assets that you can see or you know definitely exists (discernible) - for example cars, furniture, property, shares in companies, etc. Intangible assets refer to assets that you cannot see and/or assets that cannot be precisely valued – for example, copyrights, goodwill in a business, brands, etc.

Under Australian law anything that you own is included in your estate when you die. A number of exceptions exist: superannuation funds may be excluded from your estate (depending upon the rules of the fund and what instructions you provided to the fund) and any property that you own under joint tenancy will be excluded in you have a surviving spouse. Also excluded are any assets owned by a trust of which you are a discretionary beneficiary of – in theory you do not own the assets and you are only entitled when the trustees make a distribution to you. These issues are discussed in more detail under the chapters tangible and intangible assets below.

From an Islamic law perspective, the Quran does not define an estate - instead reference is made to having something to beneficiate. The reference is broad and could include anything that you have to pass on to your heirs. From an Islamic law perspective, jurists are of the opinion that whatever is owned by a person at the time of his death - property, movable or immovable, cash, clothes, shares, unit trusts; virtually everything big or small, even a teaspoon is included in your estate according to the Shariah.

Note: Australia does not have death taxes and you therefore do not need to exclude assets.

<u>Why do you have to ensure all your assets are valued and included at the correct value?</u>

Under Islamic law, prior to the distribution of an estate, all debts must be paid. Once the debts are paid, up to 1/3 of the net estate can be paid to legatees if you have specified this in your will. If your estate does not include all your assets and liabilities, you will be calculating the 1/3 based on an inaccurate estate.

For example, assume that in your will you have stated that your grandchildren through a predeceased daughter should receive 1/3 of your net estate (the legacy portion). Your estate comprises the following:

Tangible assets		100,000
Goodwill in a business		50,000
Total estate		150,000
Your debts are $25,000.		
Your estate distribution would be as follows:		
	Excluding Goodwill	Including Goodwill
Total estate	100,000	150,000
Debts	(25,000)	(25,000)
Net Estate	75,000	125,000
Legacies - maximum 1/3	25,000	41,667

If the goodwill in your business is not calculated correctly or is completely ignored, then your grandchildren as receivers of the legacy will lose out on their share of the estate. Your Quranic heirs will receive more than they are entitled to as they have received assets at a discount.

The assets in your estate should be valued at market value upon your death to avoid the above from arising. Refer to the book: *Australian and Islamic laws of Inheritance – Part IV: How to Distribute an Estate*, for more information on this.

Tangible Assets

1. INTRODUCTION

From an Australian law perspective, all tangible assets that you <u>own</u> will be included in your estate, except property owned under joint tenancy.

Typically, your estate will include the following:

- All property (land, personal home, rental property, etc)
- All cars
- All your personal clothing
- All your household furniture, kitchen utensils, pictures, carpets, etc
- Stamp, coin and any other collections
- Debts owed to you by others
- Jewellery
- Personal effects, eye glasses, mobile phones, etc.
- Shares in companies
- Business assets
- Bank accounts
- Your share of joint assets/bank accounts
- Partnership capital accounts
- Stock exchange instruments (options, warrants, etc)
- Commodities

I sought the opinion of the leading South African scholar on inheritance, Mufti Bayat[ii] on what constitutes an estate under Islamic law:
"The *Tarikah* (estate) of a deceased person in Shariah can be defined as all items in his *milkiyah* (possession) at the instance of his demise, even to the extent of a needle and the clothing on his person at the time of death. Debts owed to him at the time of his demise also constitute his estate. Any item not in his possession does not constitute his estate, even though he may have enjoyed usage or control over such items for a long period of time.

"Any item taken forcibly or by means of theft is not included in the estate.

"Any item gifted by the deceased to another prior to the *marad-al-maut* (death sickness) and *qabdha* (physical possession) thereof had taken place in such a time (that is, if a person gifted an item before his death sickness but that the actual gift was only received by the recipient after the donor entered death illness) the item will not be included in the estate. If the gift was made in *marad-al-maut* (death sickness) but possession was not affected (that is, possession did not take place), then it will be regarded as part of the estate." If possession is taken during death sickness, then the gift is still included in the estate and its donation is treated as a legacy.

The Mufti's reference to possession equates to ownership.

The concept of death sickness is explained below. Actions taken during your death sickness may be ignored in both the composition and distribution of your estate.

Decisions made whilst in death sickness:
Whilst you are healthy, you may action your estate and personal affairs in whatever manner you wish. You have complete discretion over your estate and personal life. However, when you approach the last stage of your life, the Shariah curtails your former freedom of disposing of your estate. Therefore, although a dying person may be perfectly competent to engage in transactions, you are placed under restriction in order to protect the interests of your creditors and heirs - to the extent that any transactions contrary to the heirs/creditors interests will be considered invalid unless ratified (approved) by them (heirs/creditors). Whist you think you are

dying or are actually in the process of dying you may seek to circumvent the laws of succession. The restrictions do not only activate with death itself but with the advent of the immediate and effective cause of death.

What Constitutes Death Sickness

Death sickness is the illness/accident from which a person does not recover. Determining whether a person is dying is a subjective process. While a person still breathes life, it is not possible to determine whether the particular illness will be his death sickness or not. Illness and sickness are broad terms. A person may have had an accident and is trying to recover. The attempted recovery period will be his death sickness if he does not recover.

The starting point of ascertaining death sickness is the death itself. Establishing death sickness is done retrospectively by tracing events back from the time of death to the point of time in the past at which it could be established that the testator was a dying person. The onus is on the heirs and/or creditors who seek to set aside the actions of the deceased during his death sickness to prove that the deceased undertook the actions in contemplation of his impending death.

The following rules with regard to death sickness have evolved:

- the circumstances must provide sufficient evidence to establish beyond doubt that the testator was a dying person. The principle accepted by all schools of thought is that the circumstances constituting death sickness must be *mukhawwif* - that is, inducing the fear of death in the mind of a reasonable person. There is some controversy as to precisely what circumstances fall in this category. A person sentenced to death, passengers in a plane that is about to crash, persons in an area that has a plague, earthquake etc. can all be deemed to be death sickness equivalent.

- an apprehension of death is not in itself sufficient grounds for declaring death sickness. This must be followed by death itself. From a legal perspective, the heirs/creditors need to prove that the deceased's actions were motivated by the belief that his death was imminent.

- the strict doctrine of death sickness in the Shariah must be conceived as a progressive decline and steady deterioration in the dying person's physical condition. Any improvement in the condition of a sick person which is substantial enough to remove the apprehension of imminent death means that the person will not in the eyes of the law be regarded as a dying person even if a subsequent relapse results in his death. He will be regarded as a dying person only from the time the relapse began.

- the final condition is that death must result from the circumstances which created the apprehension in the first place.

With regards to what constitutes an estate the Mufti continues:
"If a person had apportioned a specific sum of money for the usage of some of his successors (such as the marriage expenses of a daughter or son) and he passed away before this, it will constitute part of his estate. The daughter (or son) would have no preferential right over such a sum of money."

Example:

At the date of your death, your estate comprises the following:	Included in your estate
House	Yes
Car	Yes
Household contents	Yes
Clothing	Yes
Shares in a mining company	Yes
Cash in bank	Yes
Cash held on behalf of someone	No
Savings for your daughter's marriage	Yes
Gift made to your brother during your death sickness	Yes
Jointly owned assets with your spouse	Yes - 50%

It is important that ownership of property between spouses and family is established and clarified. For example, are household contents the property of the income earner or the property of the spouse? Kitchen utensils and appliances – which spouse do they belong to? If both spouses contributed to their purchase, who owns what? These issues must be clarified. If the household furniture and kitchen utensils belong to the husband, then they will form part of his estate for distribution to heirs and the wife (if children exist) will inherit 1/8 of the kitchen utensils. The majority will be inherited by the other heirs to do what they wish with the household furniture, etc.

Whilst the income earner has paid for certain household contents - these may be gifted to the spouse during the lifetime of the income earner. The gift should be recorded in the will of the income earner or recorded elsewhere to avoid doubt or questions from the other heirs about whether the gift had occurred or not. A testator should be cautious when making gifts - should the couple divorce any gifts made to the spouse are his/hers.

Both Islamic and Australian law state that every item belonging to the deceased must be accounted for in his estate. Under no circumstances may any assets not be brought to account on the basis that it is largely used by another person or because it is assumed to belong to another. Under Australian law your executor is required to make an inventory of all your assets.

2. PROPERTY HELD IN JOINT TENANCY

Under Australian law, land property can either be owned under 'joint tenancy' or 'tenancy in common'. If the property is held under joint tenancy, the surviving joint holder automatically assumes the total ownership of the property. If you and your spouse own a home under joint tenancy, the surviving spouse will automatically inherit the property upon your death. It makes no difference whether you have a will or not. The property is therefore not included in your estate for the calculation of the Shariah shares. This is totally against Islamic law, and if you own property under joint tenancy you need to seek professional assistance.

Under tenancy in common, each owner has a share and that share will be included in your estate upon your death. From an Islamic perspective, this is the preferred ownership mechanism.

In Australia unless you elect to own a property under tenancy in common, it automatically assumes joint tenancy. So, many of you may own your properties under joint tenancy – this is a problem from an Islamic distribution perspective.

If you own any property under joint tenancy then you should consult settlement agents/conveyancors on what to do. A number of options exist but its best that you obtain professional advice from a person who can explain it to you. One option that requires no action now is for each spouse to undertake to the other that on inheriting the full property they would distribute the deceased's share to his/her heirs. This is reliant on the spouse actually doing what you have requested as legally he/she can retain full ownership of the property.

Example (whilst the example refers to a husband, the same principle applies to a wife):

You are survived by your wife, a son and a mother.	
Your assets comprise:	
Family home - net of mortgage	170,000
Car	15,000
Household effects	20,000
Cash and other personal property	5,000
Total assets	210,000
Your family home is owned under a joint tenancy arrangement.	
Upon your death, your assets available to your heirs comprises:	
Car	15,000
Household effects	20,000
Cash and other personal property	5,000
Total assets	40,000
Your family will receive the following:	
Wife - 1/8	5,000
Mother - 1/6	6,667
Son – residue	28,333
Total assets distributed	40,000

The family home is ignored as your wife 'inherits' your share. Assume your wife dies a number of years later – her estate will be distributed as follows, assuming she is survived by her parents and a son. Her estate comprises the family home which has now grown in value to $240,000 and other assets totaling $20,000.

Your wife's assets comprise:	
Family home	250,000
Other	20,000
	270,000
Her heirs will receive the following:	
Father - 1/6	45,000
Mother - 1/6	45,000
Son – residue	180,000
Total assets distributed	270,000

In the above example, your mother has lost a share of a larger estate whilst your wife's parents have gained. If your wife remarried, her husband would have also received a share – thereby reducing what your son receives. If your wife has other children, this will further reduce what your son receives. Note – as stated before, the same example could apply to a wife who dies before her husband and owns a property under joint tenancy.

You need to sort out your estate!!

Assume the same facts as above, but the property is owned under tenancy in common – 50% each. Your and your wife's heirs will receive the following (with a comparison to joint tenancy):

Upon your death, your assets available to your heirs comprises:	Joint Tenancy	Tenancy in common
50% of family home	0	85,000
Car	15,000	15,000
Household effects	20,000	20,000
Cash and other personal property	5,000	5,000
Total assets	40,000	125,000
Distribution to your heirs:		
Wife - 1/8	5,000	15,625
Mother - 1/6	6,667	20,833
Son - residue	28,333	88,542
Total assets distributed	40,000	125,000
Your wife's assets will comprise the following upon her death:		
Family home	250,000	156,250
Other	20,000	20,000
	270,000	176,250

Under tenants in common your wife's share would be her 50% plus the 1/8 she would have inherited from your estate.		
Your wife's heirs will receive the following:		
Father - 1/6	45,000	29,375
Mother - 1/6	45,000	29,375
Son - residue	180,000	117,500
Total assets distributed	270,000	176,250
The various parties would inherit the following:		
Your mother	6,667	20,833
Your wife	5,000	15,625
Your son	208,333	206,042
Your wife's mother	45,000	29,375
Your wife's son	45,000	29,375

Your mother would inherit more if your estate was correctly stated. Your son would also inherit more – although the figures above show that your son will be slightly worse off, the figures do not take into account the fact that your son has already inherited a share of your property and the value of that property has increased. If you factor this in, your son's effective share would be $234,375. In effect your family gains more from your estate if your assets are 'owned' correctly.

3. PROPERTY/WEALTH OWNED THROUGH A TRUST

If you own property or a business through a trust then you need to ensure that it is distributed in accordance with Islamic law. In Australia, many businesses and properties are owned in trusts and you need to ensure that your estate includes your trust assets.

Two types of interest exist in a trust:

- Fixed interest – this is like having shares in a company. You know what percentage of the trust fund and/or income you own and you need to ensure that this is included in your estate (make reference to it in your will). Australian and Islamic laws treat fixed interests the same way – these interests are included in your estate.
- Discretionary interest - in theory you are not entitled to anything until the trustees distribute either income or capital to you. From an Australian law perspective, nothing is included in your estate unless the trustees make a distribution to you before your death, and at the time of your death it was not yet paid to you.

In many instances, discretionary trust deeds are established for income tax avoidance/minimisation purposes and in reality you still own the assets/business in the trust.

From an Islamic perspective, the trust assets are yours and the trust is not a valid trust, if you still control the assets and the intention was not for the beneficiaries to have ownership. For a trust to be valid, under Islamic law, you must give up all ownership. The trust property and income is not yours, it belongs to the beneficiaries. The majority of discretionary trusts that exist today are not valid trusts under Islamic law, as the founder/"owner" still has control over

the trust assets and exercises that control for his/her benefit. You therefore need to ensure that the trust assets are distributed to your Islamic heirs upon your death.

If the assets have been genuinely given to the trust for the benefit of the beneficiaries – then the trust is valid and you need not include anything in your estate. It all boils down to intention – what was your intention when you created the trust?

The question now is how do you do so, without compromising the tax advantages you received prior to your death. You cannot include the trust assets in your will, as under Australian law, the trust is recognised and the assets do not belong to you. If you claim in your will that the trust was not a true trust then you will compromise all the tax advantages you enjoyed previously.

A number of options exist to resolve this issue:

- Your trust deed should be updated to reflect all your potential Shariah heirs. You should provide your trustees with an instruction that all assets in the trust be distributed or fixed to the beneficiaries in accordance with what they would have received under Islamic law. The disadvantage of this option is that you are not sure that your Trustees will follow your instructions.
- Convert your trust into a discretionary unit trust. Issue discretionary trusts to all potential Shariah heirs. Upon your death, the discretionary units for your heirs will be fixed in accordance with the Islamic law which needs to be incorporated into your trust deed. Non qualifying heirs would then have their discretionary units cancelled or no distributions would ever be made to them.
- Your trust deed should be updated to reflect all your potential Shariah heirs. The trust deed should also contain provisions to the effect that once the founder or the founder’s wife dies, shares should be fixed to beneficiaries in accordance with a formula that represents the Islamic law of distribution. Partial ‘distributions’ can be made.
- Your trust deed should be updated to reflect all your potential Shariah heirs. Upon your death, the trust should be dissolved and the assets in the trusts distributed to your heirs in accordance with the Islamic law of succession. The method of distribution should be included in your trust deed thereby eliminating any human fraudulent interventions.
- All trust assets can be sold to the beneficiary that will continue with the business and proceeds distributed.

You need to decide which option best suits your purposes. You should also seek advice from an appropriately qualified and experienced person as other more complex options exist.

Intangible Assets

1. INTRODUCTION

Intangible assets include rights (for example, property usage), goodwill, trade marks, brands, copyrights, etc.

A number of complex issues can arise from intangible items. The issues concern whether an intangible item should be included in an estate and if so at what value.

Under Islamic law, certain scholars are of the opinion that intangible property is not recognised by the Shariah and hence does not form part of a deceased Muslim's estate. Under Australian law, intangibles are included in your estate. If intangible property is not recognised by Islamic law, who would inherit the intangible items that a Muslim owns? For example, if a person's income is based on royalties generated by the sale of an instrument, book, etc. developed by him/her, if such income is not recognised by the Shariah, who would inherit?

Example:

An estate comprises:	
House	350,000
Car	25,000
Household effects	40,000
Cash at bank	10,000
Copyright (valued by a qualified valuer)	100,000
Mortgage	(260,000)
Net estate including copyright	265,000
Net estate excluding copyright	165,000

Who would inherit the $100,000? If the copyright is not correctly valued and included in your estate, some of your heirs will be losing out.

2. INTELLECTUAL PROPERTY

Ownership of intellectual property is increasing as the business world becomes more sophisticated. Intellectual property includes patents, copyrights, trade marks, etc. Goodwill is discussed in section 4 below.

Mufti Taqi Uthmani, a leading Islamic scholar and Justice of the Supreme Court of Pakistan analyses the issues on intellectual property with specific emphasis on copyrights[iii]:

"In previous times, the concept of ownership was confined to only tangible objects. The theory of 'intellectual property' contemplates that whoever applies his mental labour to invent something is the owner of the fruits of his labour. If a person has invented a certain instrument, he does not own the instrument only, but he also owns the formula he has used for the first time to invent it. Therefore, nobody can use that formula without his permission. Similarly, if a person has written a book, he is the exclusive owner of the right to publish it, and nobody has any right to publish that book

without his permission. This right of an author or an inventor is termed as his 'intellectual property'.

"It is obvious that the concept of intellectual property.....is a new phenomenon created by the rapid progress of industry and the means of communication, therefore, this concept is not expressly mentioned in the Holy Quran or in the Sunnah of the Holy Prophet (PBUH). The acceptability or otherwise of such new concepts which are not clearly mentioned in the original sources of Islamic jurisprudence can only be inferred from the general principles laid own by the Shariah. As the views of the jurists may differ while applying these principles to the new situations, there is always a wide scope of difference of opinion in such cases. The question of 'intellectual property' has also been a subject of discussion among contemporary Muslim scholars of Shariah whose opinions differ about its acceptability in Shariah.

"A group of contemporary scholars do not approve of 'intellectual property'. According to them the concept of ownership in Shariah is confined to tangible objects only. They contend that there is no precedent in the Holy Quran, in the Sunnah or in the juristic views of the earlier Muslim jurists where an intangible object has been subjected to private ownership or to sale and purchase. They further argue that 'knowledge' in Islam is not the property of an individual, nor can he prevent others from acquiring knowledge, whereas the concept of 'intellectual property' leads to the monopoly of some individuals' knowledge, which can never be accepted in Islam.

"On the other hand, some contemporary scholars take the concept of 'intellectual property' as acceptable in Shariah. They say that there is no express provision in the Holy Quran or in the Sunnah which restricts the ownership to the tangible objects only. There are several intangible rights accepted and maintained by the Shariah, and there are several instances where such intangible rights have been transferred to others for some monetary considerations.
"They contend that the concept of 'intellectual property' does in no way restrict the scope of knowledge, because the law of 'copyright' does not prevent a person from reading a book or from availing of a new invention for his individual benefit. On the contrary, the law of copyright prevents a person from the wide commercial use of an object on the ground that the person who invented it by his mental labour is more entitled to its commercial benefits, and any other person should not be allowed to reap the monetary fruits of the former's labour without his permission.

"Both of these views have their own arguments. I have analysed the arguments of both sides in my Arabic treatise '*Bay-ul-Huqooq*' and have preferred the second view over the first, meaning thereby that a book can be registered under the Copyright Act, and the right of its publication can also be transferred to some other person for a monetary consideration."

If intellectual property can be owned and transferred, it follows that it can be inherited.

3. RIGHTS

Rights include the use of property, grazing and water rights, etc. If these rights continue after your death, then under Australian law they will be included in your estate. Under Islamic law there are differences of opinion.

Use of property/Leases:
Property usage can arise in two circumstances:

- Commercial leases of a fixed duration – for example you have a lease for a shop at a shopping centre. Usually there is no problem from an estate perspective as your business heirs will inherit the lease. What is important is that a correct value be assigned to the lease to calculate the true worth of your estate. If a lease is in a strategic position, it may have a value higher than its lease payments. A current market valuation of your business including goodwill will address this issue and no further action is required.
- Non commercial leases for either a fixed or non fixed duration – for example a spouse may be granted a lease over the family home for the duration of their life. Alternatively, a business person can be granted a long term lease at a low rate due to his/her improvement of the property. In the case of the spouse the lease terminates upon death and no asset exists in the spouse's estate. In the case of the business person, an advantage exists and needs to be valued for the estate.
- In some cases one person can own the property whilst another can be the recipient of any income from that property.

If any of the rights above continue after death, then there is an asset that someone has to inherit. Under Australian law, such rights form part of your estate, if you have a beneficial interest/ownership. Under Islamic law, most scholars are of the view that there is no asset to inherit, therefore these rights should not be included in your estate for distribution to your Shariah heirs.

Some of these rights are similar to usufructs that exist in South Africa. In this regard I sought the opinion of the leading South African scholar, Mufti Bayat (on usufructs):
"Any item not in his possession does not constitute his estate, even though he may have enjoyed usage or control over such items for a long period of time. A usufruct, which is defined as "*the right of temporary possession* " and "*use of property belonging to another without causing damage to it"*, is excluded from the estate as the definition itself suggests that it is only a form of temporary possession - an item on loan - belonging in reality to another. Thus any item on loan in the possession of the deceased does not constitute the estate."

However, if the right continues after death and it gives rise to either income or temporary possession, someone must inherit. I recommend that you include it in the estate and seek the advice of an accountant on how to value it to ensure the estate contains the correct value for distribution to heirs.

Other rights:
Included here are rights such as grazing, water and access rights.

The schools differ as to whether rights are inheritable. The Hanafi school is of the opinion that an estate should not include rights and that the rights are not inheritable. The other schools are of the opinion that rights are inheritable[iv].

4. GOODWILL/BRANDS

Certain Islamic scholars are of the opinion that a business should be valued at the market value of its assets less liabilities. No cognisance is taken of goodwill and/or brands. Goodwill arises from the ability to attract business. If a customer selects one business over another or if a business has developed good distribution channels - these all amount to goodwill (very simplistic view). Goodwill is the surplus value of a business over the fair value of its net assets.

By not taking cognisance of goodwill the estate of the deceased is understated resulting in an incorrect distribution to heirs. The same principle applies to brands, franchises, etc. The valuation of any business should include a value for any brand/franchise that it owns. A

brand/franchise generates a value based on its market appeal, for example, "Coca-Cola", "Nandos".

The goodwill/brand needs to be valued at the date of your death. If you purchased a business and paid either goodwill or a franchise fee, the value will have changed depending upon how successful you were in managing the business. The more successful you were, the higher the value of the goodwill/brands.

Example:

Your estate comprises:	
House	350,000
Car	32,000
Household contents	56,000
Cash at bank	14,000
Mortgage	(150,000)
The following assets in a business:	
Fixed assets	150,000
Stock	45,000
Debtors	12,000
Cash at bank	20,000
Creditors	(22,000)
Net estate	507,000
The above excludes any goodwill that exists in the business should you sell it. Assume the goodwill is calculated by an accountant to be:	120,000
Your estate should comprise	627,000

If you ignore the goodwill or do not get an updated valuation of the goodwill, either your legatees or some of your heirs will lose out.

Superannuation Funds and Life Assurance

From an Australian law perspective, depending upon the rules of superannuation fund and/or life assurance policy, the proceeds may be excluded from your estate as you would have chosen your beneficiaries directly in the fund/policy.

From an Islamic law perspective, these types of contracts did not exist at the time of the Prophet (PBUH) and hence Islamic scholars differ with regards to the treatment of superannuation funds and life assurance policies.

There are broadly three schools of thought:
- The income is not acceptable as these contracts are either uncertain or have an interest element.
- The income does not belong to the deceased. The deceased contributed towards the income, but it is the trustees of the funds that make the distribution. Hence, superannuation funds and life assurance policies do not form part of the estate. The view is based on the assumption that the deceased has no access to the funds whilst alive.
- The income should be included in the estate and distributed in accordance with the Islamic law of succession.

I sought the opinions of Dr Monzer Kahf CPA, a leading Islamic commentator on inheritance issues and Mufti Bayat, a leading South African Islamic scholar and contributor on inheritance issues.

Dr. Kahf:
"Many of retirement plans pay pensions to beneficiaries upon the death of the employee/retiree. These pensions are certainly not included in the estate of the deceased because they are earned by beneficiaries after the death of the deceased and did never make a part of her/his wealth when alive.

"On the other hand, some retirement funds are based on ownership-cum-investment, although they have named beneficiaries. The example of these is the IRA and the 401K in the USA. These are not only part of the estate, with regard to distribution according to inheritance system in Islam but are also subject to the annual Zakah during the life time of the employee/retiree. Minor limitations, conditions and tax penalties on withdrawal do not hinder or contradict the ownership right because the government may put certain conditions on properties of person by law.

"The criteria hangs on whether one owns the funds in this account or not."

In theory you do not have ownership of your superannuation fund until you reach retirement age. Therefore, on the basis of the above, there is an argument that if you die before retirement age, the proceeds from a superannuation fund are made directly to the persons you nominated when you joined the fund and hence nothing should be included in your estate.

However, with Australian superannuation funds you generally have control over the type of investments you want to make and the superannuation fund is "yours" although you cannot access the funds immediately, except in limited special conditions. You can transfer the superannuation fund to other investment types at any time and you can consolidate different superannuation funds at any time. Therefore it could be argued that the fund is "yours". If this is the case it should be included in your estate.

Mufti Bayat has the following opinion:

"The present day definition of pension differs considerably from its former definition, especially as encountered in the works of *Fiqh* (Jurisprudence) and *Fatawa*. The pension fund referred to there can really be termed some form of gratuity, endowment or simply a donation by the employer to the family of their deceased employee or to a specific member of the family such as his wife, eldest son, etc. This is totally different from the prevalent (that is, today's concept) of pensions. The above mentioned gratuity or endowment (not to be confused at all with present day endowment policies) is not part of the estate because it does not come into the possession of the deceased. It will not be regarded as part of his estate, in light of the definition of *tarikah* (estate) in Islam. This sum of money could be defined as *hibah* (gratuity or gift) from the company to the family of the deceased as it is not in lieu of any compulsory dues. The company could at their discretion designate any member of the family to receive this sum. If it is granted to a particular member, he becomes the sole owner thereof. If it is granted to the family, it should be distributed according to the rules of *Mirah*, the *Shari* distribution to heirs according to their relevant shares....."(that is, distribution of such an amount will take place in accordance with the rules of inheritance as outlined in the Quran).

Some scholars are of the opinion that an agreement should be reached with the company for the distribution of the gratuity.

This traditional form of pension fund has similar features to certain types of payments made by employers today. An example is the proceeds of a group life assurance scheme. In most cases, the proceeds of such a fund does not accrue to the deceased employee but to the company. The award to be made (if any) to the deceased's family is at the company's discretion. In practice, the entire proceeds are either paid into a trust (for the benefit of the deceased's children) or invested on behalf of the family. In some cases a certain portion is paid to the family.

It is debatable whether a group life policy is an exgratia payment or a benefit of employment. However, the general opinion is that it accrues to the family after your death but its preferred method of distribution should be in accordance with the Islamic law of succession.

The Mufti continues:

"The ruling regarding present day pension funds (and provident funds) is that it falls within the definition of an estate and is to be thus distributed in accordance with Islamic rules upon the demise of its holder or possessor. Evidence of the fact that the deceased is the real owner of the sum of money can be drawn from the fact that *Zakah* is compulsory upon this money and *Zakah* is only compulsory upon items in a person's possession. And this establishes ownership for the deceased. And Allah knows best for His knowledge is most perfect."

Jurists have recently ruled that you only pay zakah on voluntary contributions to a superannuation fund. So, if you are making voluntary payments, then the superannuation fund should be included in your estate. Zakah is only paid on assets in possession and hence it is yours at the time of your death.

With regards to the zakah treatment of superannuation funds I quote the views of the following leading scholars:

Dr. Muzammil H. Siddiqi, President of the Fiqh Council of North America states: "The basic rule of Zakah is that it is due on the wealth that one owns and has the freedom to use. A committee of scholars under the leadership of Maulana Mujahidul-Islam Qasmi

discussed this issue in great detail. In the light of the discussion of the scholars the following points can be presented:

“The employee’s contribution to this fund is Zakatable if it is done by his/her own choice. There is no Zakah due on these funds if the employers due to the company or government’s policies collect them by force. Zakah will be due on these funds when they can be withdrawn.

“If these funds are withdrawn and they reach the value of *nisab* (3 ounces of gold or its cash value) and a year passes on them, then the Zakah (at the ration of 2.5 per cent) will be due.

“The Zakah must be paid for the money that one receives and then voluntarily contributes to a retirement fund, if it reaches the *nisab* and after a period of one year."

The South African scholar, Mufti Ebrahim Desai states[v]: “Zakat is applicable on all voluntary contributions you have made towards the pension scheme. However, since the money is not in your possession, Zakat will not be levied at this moment but only once you get physical possession of it. Once you get possession, Zakat will have to be paid for all the previous years as well. For purposes of easier calculation, it is better to pay the Zakat annually on the complete sum of your pension contributions. Zakat is not levied on compulsory deductions nor on the amount contributed by your employer. Zakat on these will only come into effect when you get access to these funds.”

What to do?

If you are making voluntary contributions to a superannuation fund then the proceeds need to be included in your estate. If your employer is making contributions on your behalf – then if you have reached retirement age, include the superannuation in your estate. If you have not reached retirement age, then this is a debateable issue.

Today, superannuation funds may comprise a significant portion of your estate, and it would be best if the proceeds are distributed in accordance with the Islamic law of succession. You should nominate your executor as the beneficiary of your superannuation with the specific clause that they are to distribute it in accordance with your will. You should also make mention of the superannuation fund in your will.

The note in the box below explains what happens to your superannuation, under Australian law, after you die.

“What happens to your super if you die?

If you die while a fund member, the trustee must normally pay your death benefit to one or more of your dependants or your estate.

'Dependants' means your spouse, children, people with whom you had an 'interdependent' relationship or those who depend on you financially. Ask your fund for details. If it's paid to people who are not your dependants, it may be taxed.

Most funds let you nominate who you want your death benefit paid to, either as a 'non-binding' or 'binding' nomination.

A 'non-binding nomination' just guides the trustee, who still has the final say, especially if you have dependants but you nominate someone who doesn't depend on you. The trustee is not

required to follow the instructions in your will.

A 'binding nomination' will bind the trustee, and lets you name:

- a dependant, or
- your 'legal personal representative' (executor), who must distribute your benefit according to your will or according to law if you have no will."

You should make a binding nomination to your executor who must then distribute the proceeds in accordance with your will.

2. LIFE ASSURANCE

Proceeds of any life assurance policy are only paid after you have died – therefore they do not form part of your estate. Dr Kahf: "Life insurance payment on the death of the insurer was never owned during his/her life time, it is a grant from the insurance company to beneficiaries based on the insurance contract. It therefore does not have to be given up by beneficiaries to the account of the estate.

"You should also remember that there is another opinion that argues for the distribution according to inheritance of properties earned by beneficiaries as a result of the death of a person. This is in analogy of blood money earned as a result non-intended manslaughter. I don't agree with this opinion in regard to life insurance payments and retirement plans that are not ownership based."

You can elect to distribute them in accordance with Islamic law, but you do not need to do so.

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[i] Abrie,Graham,Schoeman & Van der Spuy: *Estates: Planning and Administration*, page 170.
[ii] Mufti Bayat, Stanger, Natal: In an opinion expressed specifically for this book.
[iii] Extract from *Ar-Rasheed*, April 1997.
[iv] Doi*: Shariah: The Islamic Law*
[v] Abaligh – Mufti Desai – 17 April 2004