

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

# Australian and Islamic Laws of Succession

Wills under Islamic Law

- A brief outline



- **Freedom** to distribute assets to whomever
- **HOWEVER:** Due to abuse of freedom – Aus law now allows a spouse/child/dependant to **challenge a will** in court if insufficient assets left for them to maintain themselves
- Court will consider size of estate, relationship and financial needs of claimant, etc
- Can set conditions for inheritance – example marriage
- Where there is no will: Each State and Territory has a formula (similar to each other) for the distribution of estate – in most cases spouses and children benefit

# Islamic Law



- The Almighty, in the Quran, clearly articulates who can inherit

The Quran states:

- "There is a share for men from what parents and near relatives have left, and a share for women, whether the property be small or large, - a determinate share." (4:7).
- "To (benefit) everyone, We have appointed shares and heirs to property left by parents and relatives....." (4:33).
- The Prophet (PBUH) decreed that a person has freedom to distribute a maximum of 1/3 of his/her net estate
- Therefore **limited freedom**
- Importance: Quran stipulates shares for each heir.  
No reference to number of rakaats or zakat % in Quran

# As an Australian Muslim

- You have a choice:
  - **Not have a will** – estate distributed in accordance with State and Territory laws which determine who will inherit (does not comply with Islamic law); or
  - **Have a will & exercise your freedom** under Australian law to distribute to whomever you please (subject to possible litigation should spouse/child/dependant be left out); or
  - **Have a will that applies Islamic law**
- The Quran promises a reward for those who obey.
- The Quran and the Prophet (PBUH) warn of the implications of not distributing your estate correctly

# Under Islamic law you need a will



- Both the Quran and the Prophet (PBUH) state that a person should have a will:

*"It is prescribed, when death approaches any of you, if he leaves any goods, that he make a bequest...." (2:180).*

The Prophet (PBUH) is reported to have said, "it is not permissible for any Muslim who has something to will to stay for two nights without having his last will written and kept ready with him." (Bukhari, Abu Dawud and Muslim)

- In a country that applies Islamic law:  
A will contains details of off-balance sheet debts and any distributions you choose to make up to the 1/3 you have freedom over

# As an Australian Muslim



- As an Australian Muslim you need a will:
  - To outline any off balance sheet debts due by or to you
  - To outline any legacies you choose to pay (up to 1/3 maximum of net estate)
  - To communicate that the remainder of your estate will be distributed in accordance with Islamic law of succession
- By doing the above you exercise your freedom under Australian law to chose how your estate will be distributed

# Your Will needs to be correct



- Your will is the most important document you will write – you cannot change it after death
- Get it wrong = Potential: family conflict, liquidity crises, loss of property through executor negligence, inefficient taxation, litigation
- Most cases: wills prepared prior to a journey or prior to medical procedure. Not the time to do it – Rational thought low
- Make sure you understand your will – too much legal jargon = ditch it! You need to be certain that your wishes are correctly captured in the document

# Distribution

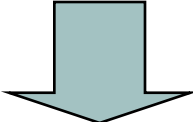
Pay Funeral Costs (these should not be 'excessive')



Pay all debts (fundamental in Islamic law)



Pay Legacies – up to maximum of 1/3 of estate after paying all debts



Residue distributed in accordance with Islamic law

Can include unpaid zakat, fidya, etc under either debts or legacies (only difference between schools)



# Legacies



- Prophet (PBUH) decreed that a person has freedom to distribute a maximum of  $\frac{1}{3}$  of his/her net estate
- Commonly referred to as a legacy
- You cannot distribute more than  $\frac{1}{3}$
- If you do, the adult 'sane' heirs can elect to carry out your wishes – but out of their share of the inheritance
- You should not use the  $\frac{1}{3}$  to beneficiate your heirs
- If you do, it is only valid if all the heirs agree to it (some scholars are of the opinion that it is not valid)

# Shares (Simple)

- Quran stipulates who will inherit.

"[Between] your father and sons, you do not know who is nearer to you in benefit. Allah is Most knowledgeable and Most wise." (4:11).

- Basic principle: A person qualifies through a blood link or marriage

Children Exist		No Children	
Parents	1/6 each	Mother	1/6 *
Husband	1/4	Husband	1/2
Wife	1/8	Wife	1/4
Son	2 x daughter	If no Father then Grandfather or Brother	
Only daughters	2/3	the residuary heir	

\* Mother receives 1/3 if less than two brothers or sisters. Does not mean brothers & sisters inherit – a father will exclude.

# Persons you need to appoint in your will

## Witnesses:

Ideally, two Muslims. People of the Book can witness under some circumstances. Preferably not a person who is benefiting under the will.

## Executors:

- Muslim
- Be careful – this is a major role – appoint a competent person – not just your friends
- Person you TRUST (business and ethics)
- Takes control of assets and distributes them
- Can have more than one person

# What your estate comprises

- All tangible assets – property, furniture, jewellery, personal effects, bank accounts, shares, business assets, clothing, etc
- Intangible assets – goodwill, rights
- Superannuation
- Insurance (some of the view accrues after death)
- Assets held in a trust (gets complex)
- Joint tenancy assets
- Debts
- Spouse's assets do not belong to you

# Assets

- Make sure each spouse has correct ownership in assets
- Is your spouse effectively your partner?  
Does the ownership of assets reflect this?
- Clearly specify who has ownership over common family property – example furniture, kitchen utensils
- Need to sort out the above to avoid potential costly litigation if will is challenged
- Assets need to be valued at market value
- Assets need to include fair value of intangibles:  
goodwill/brands



Type of ownership	On Death	Islamic Law
<b>Joint Tenants</b> Default position on purchasing property jointly with spouse	Surviving spouse inherits – by-pass will. Good estate planning tool if used correctly	Not permitted. Deceased spouse's beneficiaries must inherit
<b>Tenants in Common</b> Need to elect this option	Deceased's share included in estate	OK. Complies

Joint Tenants similar to SA Community of Property

# Superannuation

Beneficiary

On Death

Islamic Law

Surviving  
spouse/children

By-passes will

Problem

Who have you  
nominated?

Deceased estate

Controlled by will

OK.  
Complies

# Trust Assets

- In Australia trusts are a great tax mechanism
- Also a good generation skipping device
- Under Australian law trust assets do not form part of your estate (unless you are a fixed beneficiary)
- If fixed interest trust – can be argued that property distributed during lifetime
- If discretionary trust – who determines ownership/distribution?
- A number of options available to ensure distributed in accordance with Islamic law and still protect estate plan



# Will Templates

- Will template designed to comply with Australian and Islamic laws
- Template includes arbitration clause
- Template affirms belief in Islam and request for beneficiaries to respect choice and not challenge will
- Executor and Trustee powers
- Two versions exist – simple and complex
- Copies available for free
- Do not support use of such forms as it detracts from planning and consideration of family dynamics

# Challenging a Will

- Usually for a challenge to be successful the person challenging your will must have been reliant on you for financial support and in the opinion of the Court, is still in need of financial support over and above what you have provided for them in your will.
- Option – transfer assets to a trust and distribute from trust. Popular in North America
- Template contains specification that will must comply with Islamic law and that will should not be contested.
- Judge's perspective of Islamic law contained in Quran?

# More Information

In an Australian context:

- Australian and Islamic Laws of Inheritance:
  - Part 1 – Drafting a will and estate planning tips
  - Part 2 – What should be included in your estate. How to deal with trust assets, superannuation, insurance, etc.
  - Part 3 – Shares stipulated in the Quran
  - Part 4 – How to wind up an estate
  - Books available free
  - Contact me at: [lambat.trust@bigpond.com](mailto:lambat.trust@bigpond.com) (info only)
  - Will templates available free of charge