

Sharia Wills and English Law

As evidenced by English history during the Reformation, it has never been easy to reconcile the demands of one's faith with those of the State. Fortunately though, when it comes to making a Will and providing for family and heirs, both Sharia and English law broadly coincide, although unlike as one finds in the *Sahih al-Bukhari*, there is no similar compunction under secular legislation. That said, and so as not to fall foul of such differences as do exist, it is best to write a Will that is compliant with both jurisdictions. You should please note that this fact sheet only deals with the general precepts of Sharia compliant Wills and not differences of interpretation between the various Islamic traditions and, for more detailed instruction, you should please seek guidance from the relevant religious authority.

When it comes to making a Sharia / English compliant Will, the biggest area of potential conflict is between the basic rule that at least two thirds of a deceased Believer's Estate must be distributed amongst surviving relatives in fixed shares as prescribed by the Qur'an, and the Inheritance (Provision for Family And Dependants) Act 1975, which mandates that the spouse, or civil partner, of the deceased, is entitled to '*reasonable financial provision*' meaning such provision as would be reasonable in all the circumstances of the case for a husband or wife or a civil partner to receive, whether or not that provision is required for his or her maintenance.

That obligation can also extend to those who are ordinarily dependent upon you, even if only to a small degree; i.e. someone who lives rent-free in your home, those who you financially support or who normally live as part of your immediate family, which may include step-children, an adult child who receives a monthly stipend, an elderly parent living with you or a disabled family member or even friend for whom you care and, if you fail to make such provision, the party for whom such provision should have been made may be able to bring an action against the deceased's Estate.

In more detail, the Act makes provision for a Court to vary (and extend when appropriate) the distribution of the Estate of a deceased person to any spouse, former spouse, child, child of the family or dependant of that person in cases where the deceased person's Will or the standard rules of intestacy fail to make reasonable financial provision. Such provision can be derived not just from monetary assets but from any others forming part of the Estate or which have been disposed of in the six years prior to the death.

The categories under which someone can make an Inheritance Act 1975 claim by virtue of their relationship with the Deceased are: -

- the wife or husband of the Deceased
- an ex-wife or ex-husband of the Deceased who hasn't remarried
- a cohabitant of the Deceased, or;
- a child of the Deceased, or;
- someone treated as a child of the family of the Deceased
- someone who was being financially maintained by the Deceased immediately before the death
- a civil partner of the Deceased
- a same-sex cohabitant of the Deceased
- a former civil partner of the Deceased, who hasn't remarried or entered a later civil partnership.

However, with each of the above categories there are further criteria and requirements that must be satisfied for someone to be eligible to make a claim and the Deceased must have been domiciled in England and Wales.

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As with English Wills, Sharia ones can also: -

- appoint Executors to handle their Estate after they have died
- appoint guardians of any minor children;
- make provisions for any minor children i.e. to invest their inheritance for their maintenance, education or benefit, which can be invested in Sharia compliant Trusts
- specify to whom their 'up to one third bequests' are to go
- specify any charities they may wish to benefit; and
- specify any funeral wishes

Sharia succession rules

First, the cost of the burial and any debts are paid. Secondly, a third of the Estate may be given to charities or individuals who are not obligatory heirs. Finally, the remainder is given to a defined set of 'primary' and then 'residual' heirs.

Payment of burial expenses and debts

The Estate pays the expenses of enshrouding and burial of the deceased, and then must fulfil any monetary or religious debts the deceased may have had. Once the debts have been paid in full, the Testator/Testatrix (that is the person making the Will) can distribute the balance of his Estate.

The 'freely disposable third'

Up to one third of the remaining wealth may be allocated on fulfilling the legacies of the deceased (known as the 'freely disposable third'), which can be distributed to charity or to individuals who are not heirs under the Sharia rules of succession.

However, certain rules apply to this 'freely disposable third'. First, a valid Will is required if the Testator/Testatrix wishes to make gifts to non-heirs: without this, the whole Estate will be distributed according to the Sharia rules of succession. However, the Testator/Testatrix is under no obligation to do this, and may if they wish leave their entire Estate to the Sharia heirs.

Secondly, the Testator/Testatrix cannot make bequests as part of the freely disposable third to people who will already receive a bequest as an obligatory Sharia heir. In other words, they cannot try to favour one heir by using the freely disposable third to give them more than the amount they are entitled to under Sharia rules. However, this principle can be overridden if all the other Sharia heirs give their consent.

Finally, any bequest to non-heirs will only be valid up to a maximum of one third of the Estate. If a gift exceeds one third of the Estate's value, perhaps because of changes in asset values, the maximum one third will be given and the rest will fall into the residue to be distributed to the Sharia heirs. It is possible to give more than one third to non-heirs but only with the consent of the Sharia heirs or if one of the default provisions mentioned below.

The balance of the Estate

The remainder of the Estate (a minimum of two thirds) is divided between the Sharia heirs. As with many civil law jurisdictions, Sharia rules have a system of pre-determined heirship. Each heir receives a predetermined proportion of the entitlement, depending on the number and nature of the heirs who survive. This means it is not possible to say in advance who will inherit: it is only at the date of death that the division can be calculated.

There are two main types of Sharia heir. First, a portion of the Estate will be distributed amongst the obligatory or primary heirs: those individuals whose share has been prescribed in the Sharia. There are 12 primary heirs in total - four males and eight females. The male heirs are: - father, grandfather (father's father and mother's father) uterine brother (half brother on mother's side), and husband. The female heirs are: wife, daughter, granddaughter, full sister, consanguine sister (half sister on father's side), uterine sister (half sister on mother's side), mother, and grandmother (father's mother and mother's mother).

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Secondly, the remainder will be distributed between the residuary beneficiaries.

Sharia rules define exactly how much of the remaining Estate each primary heir receives, depending primarily on the total number of heirs. They will not, however, receive the entire Estate between them, as a portion will be reserved to the residuary beneficiaries.

No distinction is made between children of different marriages, but illegitimate and adopted children are not Sharia heirs. The male heirs in most cases receive double the amount inherited by a female heir of the same class. Non-Muslims may not inherit at all, and only Muslim marriages are recognised. Similarly, a divorced spouse is no longer a Sharia heir, as the entitlement depends on a valid Muslim marriage existing at the date of death.

Residuary heirs

At first glance, the list of primary heirs may seem incomplete, particularly as it does not include sons or full brothers. That is because sons and full brothers are residuary beneficiaries, who receive their entitlement after the primary heirs. There are different types of residuary beneficiaries, but the most common are those related by birth to the deceased, being male relatives whose link to the deceased is not solely via a female.

As well as fathers and sons, this will include full brothers of the deceased. If there are no residuary heirs, then the entire Estate is divided between the primary heirs *pro rata* to their original entitlements. If there are no primary heirs and no residuary heirs, the Estate goes to more distant relations: blood relatives of the deceased who are neither primary heirs nor residuary heirs.

Testators/Testatrixes without heirs

If the Testator/Testatrix has absolutely no family, so there are no primary or residuary heirs and no distant relatives, then it is possible to create heirs. This can be done in two ways. First, the individual can name a successor by contract to receive the inheritance. Second, it is also possible for the individual to ratify kinship with another person. In the absence of anyone in the above categories that is able to inherit, the Estate is divided between those heirs who received the freely disposable third. This is the only scenario where non-heirs can receive more than one third of the Estate without the consent of the other heirs.

Claims by 'deprived' heirs

Unlike in English where the only test of entitlement is financial dependency, Sharia heirs cannot be deprived of their entitlement to inherit. Any attempt to pass assets that are 'due' to a Sharia heir to someone else is invalid under Sharia rules. An heir who is deprived of their full entitlement has a claim against the Estate or the person who has the assets. Under Sharia rules, there is no statute of limitations for this claim: it continues in perpetuity and can even be inherited. If a claim is still outstanding at the time the deprived heir dies, his or her own heirs can then make the claim. You should please note that to date the enforceability of such a claim has not been tested by the English courts.

This fact sheet has, in large part, been drawn from the Law Society's guidance to the profession on advising upon and writing Sharia compliant Wills and, should you require more detailed information, it can be found at: <http://www.lawsociety.org.uk/advice/practice-notes/sharia-succession-rules/#sthash.cCDYf2IJ.dpuf>. Likewise, for a religious view, please visit www.shariahouncil.org/.

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