

# The Islamic Law Of Wills

by Dr. Abid Hussain

Courtesy Of: Islaam.com

Source: Tibyan.com

This article is a very brief overview of the traditional Sunni Islamic law pertaining to the Islamic will. The aim of this article is to arouse awareness amongst Muslims particularly those living in the West regarding this important aspect of Islamic law. It should be stressed that when writing a will one should consult an Islamic scholar/legal expert to ensure that the will complies with Islamic law as well as the law of the country of residence.

When a Muslim dies there are four duties which need to be performed. These are:

1. payment of funeral expenses
2. payment of his/her debts
3. execution his/her will
4. distribution of the remaining estate amongst the heirs according to Sharia

The Islamic will is called *al-wasiyya*. A will is a transaction which comes into operation after the testator's death. The will is executed after payment of funeral expenses and any outstanding debts. The one who makes a will (*wasiyya*) is called a testator (*al-musi*). The one on whose behalf a will is made is generally referred to as a legatee (*al-musa lahu*). Technically speaking the term "testatee" is perhaps a more accurate translation of *al-musa lahu*.

## The importance of the Islamic will

The importance of the Islamic will (*wasiyya*) is clear from the following two *hadith*:

"It is the duty of a Muslim who has anything to bequest not to let two nights pass without writing a will about it." (Sahih al-Bukhari)

"A man may do good deeds for seventy years but if he acts unjustly when he leaves his last testament, the wickedness of his deed will be sealed upon him, and he will enter the Fire. If, (on the other hand), a man acts wickedly for seventy years but is just in his last will and testament, the goodness of his deed will be sealed upon him, and he will enter the Garden." (Ahmad and Ibn Majah)

The will gives the testator an opportunity to help someone (e.g. a relative need such as an orphaned grandchild or a Christian widow) who is not entitled to inherit from him. The will can be used to clarify the nature of joint accounts, those living in commensality, appointment of guardian for one's children and so on. In countries where the intestate succession law is different from Islamic law it becomes absolutely necessary to write a will.

## The Will (*Al-wasiyya*)

The Islamic will includes both bequests and legacies, instructions and admonishments, and assignments of rights.

No specific wording is necessary for making a will. In Islamic law the will (*wasiyya*) can be oral or written, and the intention of the testator must be clear that the *wasiyya* is to be executed after his

death. Any expression which signifies the intention of the testator is sufficient for the purpose of constituting a bequest.

There should be two witnesses to the declaration of the *wasiyya*. A written *wasiyya* where there are no witnesses to an oral declaration is valid if it is written in the known handwriting/signature of the testator according to Maliki and Hanbali *fiqh*.

The *wasiyya* is executed after payment of debts and funeral expenses. The majority view is that debts to Allah (SWT) such as zakah, obligatory expiation etc. should be paid whether mentioned in the will or not. However, there is difference of opinion on this matter amongst the Muslim jurists.

### The Testator (*Al-musi*)

Every adult Muslim with reasoning ability has the legal capacity to make a will. An adult for this purpose is someone who has reached puberty. Evidence of puberty is menstruation in girls and night pollution (wet dreams) in boys. In the absence of evidence, puberty is presumed at the completion of the age of fifteen years. The Maliki and Hanbali *fiqh* also consider the will of a discerning (*tamyiz*) child as valid.

Under English Law you must be at least 18 years of age to make a valid will (similarly in most of the United States of America) unless you are a military personnel in which case you may make a valid will at the age of 17.

The testator must have the legal capacity to dispose of whatever he bequeaths in his will. When making a will the testator must be of sane mind, he must not be under any compulsion and he must understand the nature and effect of his testamentary act. The testator must of course own whatever he bequeaths.

The testator has the right to revoke his will by a subsequent will, actually or by implication.

In traditional Sunni Islamic law the power of the testator is limited in two ways:

1. Firstly, he cannot bequest more than 1/3 of his net estate unless the other heirs consent to the bequest or there are no legal heirs at all or the only legal heir is the spouse who gets his/her legal share and the residue can be bequeathed.

Narrated Sa'd ibn Abi Waqqas (RA): "I was stricken by an ailment that led me to the verge of death. The Prophet came to pay me a visit. I said, "O Allah's Apostle! I have much property and no heir except my single daughter. Shall I give two-thirds of my property in charity?" He said, "No." I said, "Half of it?" He said, "No." I said, "One-third of it?" He said, "You may do so, though one-third is also too much, for it is better for you to leave your offspring wealthy than to leave them poor, asking others for help..." (Sahih al-Bukhari, Sahih Muslim, Muwatta, Tirmidhi, Abu Dawud and Ibn Majah.)

2. Secondly, the testator cannot make a bequest in favour of a legal heir under traditional Sunni Muslim law. However, some Islamic countries do allow a bequest in favour of a legal heir providing the bequest does not exceed the bequeathable one-third.

Legal heir in this context is one who is a legal heir at the time of death of the testator.

Narrated Abu Hurayrah (RA): Allah's Prophet (SAWS) said, "Allah has appointed for

everyone who has a right what is due to him, and no bequest must be made to an heir. (Abu Dawud). Similar *hadith* narrated by Abu Umamah (RA) and reported by Ibn Majah, Ahmad and others.

### The Legatee (*Al-musa lahu*)

Generally speaking, for a bequest to be valid, a legatee must be in existence at the time of death of the testator except in the case of a general and continuing legatee such as the poor, orphans etc.

The legatee must be capable of owning the bequest. Any bequest made in favour of any legal heir already entitled to a share is invalid under traditional Sunni Muslim law unless consented to by other legal heirs. An acknowledgement of debt in favour of a legal heir is valid.

Acceptance or rejection of a bequest by the legatee is only relevant after the death of the testator and not before. Generally speaking once a legatee has accepted or rejected a bequest he cannot change his mind subsequently.

If the legatee dies without accepting or rejecting the bequest, the bequest becomes part of the legatee's estate according to the Hanafi *fiqh* because non-rejection is regarded as acceptance. According to the other three main Sunni *madhahib*, the right to accept or reject the bequest passes onto the heirs of the legatee.

There is difference of opinion as to the time at which ownership of a bequest is transferred from the testator (or his heirs) to the legatee. According to the Hanafi and Shafii *fiqh* the transfer of ownership is at the time of death of the testator, according to the Maliki and Hanbali *fiqh* the transfer of ownership is at the time of accepting the bequest.

All the Sunni *madhahib* agree that if the legatee dies before the testator, the bequest is invalid since a bequest can only be accepted after the death of the testator.

If there is uncertainty as to whether or not the legatee survived the testator, such as a missing legatee, the bequest is invalid because the legatee must be alive at the time of death of the testator for the will to be valid.

If the testator and legatee die together, such as in an air crash, and it is not certain who died first, the bequest is invalid according to the Hanafi, Maliki and Shafii *fiqh*. But according to the Hanbali *fiqh*, the bequest devolves upon the legatee's heirs who may accept or reject it.

### Executor of the will (*Al-wasi Al-mukhtar*)

The executor (*al-wasi*) of the will is the manager of the estate appointed by the testator. The executor has to carry out the wishes of the testator according to Islamic law, to watch the interests of the children and of the estate. The authority of the executor should be specified. Hanafi and Maliki *fiqh* state that the executor should be trustworthy and truthful; the Shafii *fiqh* state that the executor must be just. The Hanafi *fiqh* considers the appointment of a non-Muslim executor to be valid. The testator may appoint more than one executor, male or female. The testator should state if each executor can act independently of the other executor(s).

If one starts acting as an executor, one will be regarded as having accepted the appointment, both in Islamic and in English law.