

Writing an Islamic Will

1. Is it necessary?

Although the law (Canadian as well as Islamic) does not say that making of the will is a must, but by looking at the consequences of not having a will, it is necessary – both from legal aspect as well from the shari’ah aspect.

Firstly, if a person dies without a will, the government appoints an executor who will divide the estate among the heirs as he/she seems fit. The pay of the executor for this job will come out of your estate, and the government system takes it time in getting jobs done!

Secondly, from the shari’ah point of view, your heirs may get more or less than the shares specified for them in Islam. By not writing a will, you are leaving the door open for a non-Islamic authority to distribute your estate according to its own views.

So not having a will is costly as well as problematic from both Canadian and Islamic points of view. Considering the consequences, I think it is wajib for a Muslim in Canada to have an Islamic will; more so when you realize that the law of the land allows you to do so.

2. The One-Third Option

After a person dies, what is the relationship between him and his estate? There are three possibilities:

- He has full control over it through a will.
- He has partial control over it through a will.
- He has absolutely no control over it.

Islam has taken the middle position. It says that when a person dies, he still retains the right to decide about up to one-third of his entire estate. But as far as the two-third is concerned, the deceased person loses the right to dispose according to his wish.

The two-third must be divided according to the shares specified by the shari'ah. (Most of these shares have been specified in the Quran itself.) This law is part of the over-all system which Islam has introduced for the distribution of wealth in society.

This right of disposing the one-third according to your own wish can be exercised only by making a will. You can do whatever you like with the one-third: give to a family-member, a relative, a friend, a charitable cause or organization, etc.

For example, you can use the 1/3 or a part of it to make –if you like– the shares of your wife or your daughter equal to those of your other children.

When the Qur'an talks about *wasiyyat* which is normally translated as “will”, it refers to the will covering the one-third only. For example, it says,

"It is prescribed upon you, when death approaches (any) one of you – if he leaves behind wealth – then he should make a will (wasiyyah) for his parents and near relatives in a fair manner [in the one-third]. This is a duty upon the pious people. (2: 180)

Writing more than one-third to a person or a cause means depriving the potential heirs of their rightful share in the estate; and, therefore, it is considered unjust and wrong. The Quran says,

If a person fears that the testator is [wrongfully] inclined [to one party] or is sinning [by depriving the rightful heir in the will, and so that person intervenes between the testator and the potential heirs] and makes peace between them – then there is no sin on him. Allah is Forgiving, Merciful. (2: 182)

What has been described in this verse as wrongfully “inclining to one party” and “sinning by depriving the rightful heir” is related to the two-third of the estate.

3. What is the "estate"?

An "estate" is the collective name for everything that you own. The estate consists of the followings:

- all properties, goods and investments that are in your name.
- half of the specified portion of the goods and investments in which you are a co-owner.

The first type of property is very straight-forward. But there are certain cases in the second type which need explanation:

Joint Account: According to Canadian laws, with death of one spouse, the money becomes the property of the surviving spouse. Such a transfer of money is not valid in Islam: Islamically, half of the money in that account becomes part of the surviving spouse and the other half will become part of the

deceased estate.

House: Houses are normally in the name of the couple. Such ownership can be of two types: common ownership and tenants in common. "Tenants in common" is also without any problem because when one spouse dies, his/her share becomes part of the estate.

But in "common ownership", there is a problem because with the death of one spouse, according to Canadian laws, the entire property becomes that of the surviving spouse. This is contrary to Islamic laws, which says that the surviving spouse gets his or her 50% and the remaining 50% becomes part of the estate of the deceased.

We will talk more about this below.

4. Wife's Share

Firstly, as the definition of the "estate" shows, a house jointly-owned by a couple is divided – according to the shari'ah – into two: half becomes part of the estate of the deceased, and the other half was from before the property of the surviving spouse.

Secondly, according to the shari'ah, the wife is not entitled to land of her husband (whether an agriculture land or a residential lot): she only inherits the house on the land according to her proportional shares in inheritance.

In common ownership case, the wife is the owner of 50% of the house and the land; the other 50% becomes part of her husband's estate from which she will inherit 6.25% of the house. So in the end, the wife becomes the owner of 56.25% of the house and 50% of the land.

Both the above rules (# 3 & 4) create practical problems in this part of the world; therefore, I suggest the following:

- Either give the house to your wife during your life-time
- Or, if the value of the 50% of the land is within the one-third of your entire estate, then you can write that land to your wife in your will. In this way, half of the land is her property from before and the other half will go to her on strength of the 1/3 option in your will. Actually you can do this for the entire 50% of your residential property (house and land together) if it falls within the 1/3 of your estate. In theory it will work out like this:
 - 50% of the land and house belongs to your wife
 - 6.25% of the house is your wife's share of inheritance
 - 50% of the land + 43.75% of the house goes to her by using the 1/3 option

- Or, if the value of the 50% of the land is more than the one-third of your estate and your children are mature (baligh), then discuss it with them and ask for their consent to write the entire house for your wife in the will. If they give the consent (which is irrevocable), then you can write the house to your wife in the will even if it is more than her proportional share of inheritance.

5. Executor or Executrix

(A) It is a normal practice to appoint your spouse or another family member as the executor of your will. There is nothing wrong with this. The only conditions which are necessary for an executor/executrix is he or she should be baligh, sane, and Muslim. It is not necessary for him/her to be `adil; trustworthiness would be a sufficient quality for an executor.

(B) I am told that by making your children the heirs of their shares, your children will end up paying tax on that; whereas if your wife becomes the heir of everything than no tax is applied. If this is true, than you can do the following:

You can make your wife the executrix of your will and also leave everything to her – BUT she must know (through a supplementary private will or a letter) that she owns only her specified share according to the shari'ah and she has to hand over the shares of her children when they become mature enough (not just baligh) to handle their own finances.

(C) If you accept to be an executor for someone's will, then it becomes wajib for you to fulfill your duty. You can only reject this responsibility while the testator is alive; you cannot reject this role after his/her death.

6. Guardian of Children

In this part of the world, it is very important to write in your will about the guardian and custodian of your children. Under normal circumstances, the surviving spouse is made the guardian, and this is indeed the best decision.

Here, for the sake of record, I would like to mention the conditions which must be found in the guardian of your children. The guardian must be a Muslim, sane, and trustworthy. Those who have the right of custody of children (in order of preference) are: father, mother; paternal grandfather; and then anyone specifically appointed as the guardian of the children.

However, the duty of maintenance for the children falls upon the following (in order of preference): father; paternal grandfather; mother; other grandparents collectively.

The last person in this list can be from outside the family, but one must be very careful in selecting such a person. The most important condition is that he/she besides being trustworthy must also be a Muslim who will raise the children according to the teachings of Islam.

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