Al-Islam.org
Ahlul Bayt Digital Islamic Library Project
Published on *Al-Islam.org* (https://www.al-islam.org)

8. Wasaya, Will and Endowments

Will and Bequest (Wasaya)

The five schools concur regarding the legality of making a will (*wasiyyah*) and its permissibility in the Islamic Shari'ah. *Wasiyyah* is a gift of property or its benefit subject to the death of the testator. A will is valid irrespective of its being made in a state of health or during the last illness, and in both cases the rules applicable are the same according to all the schools.

A will requires a testator (*musi*), a legatee (*musa lahu*), the bequeathed property (*musa bihi*), and the pronouncement (*sighah*) of bequest.

The Pronouncement

No specific wording is essential for making a will. Hence any statement conveying the intention of gratuitous transfer (of property or its benefit) after the death of the testator is valid. Thus if a testator says: "I make a will in favour of so and so," the words indicate testamentary intention, without needing the condition 'after death' to be specified. But if he says (addressing the executor): "Give it" or "Hand it over to so and so", or when he says, "I make so and so the owner of such and such a thing" it is necessary to specify the condition, 'after death', because without this consideration his words do not prove the intention of making a will.

The Imami, the Shafi'i and the Maliki schools observe: It is valid for a sick person who cannot speak to make a will by comprehensible gestures. Al-Shi'rani, in *al-Mizan*, narrates from Abu Hanifah and Ahmad the invalidity of making a will in this condition. In *al-Fiqh 'ala al-madhahib al-'arba'ah* (vol. 3, 'bab al-wasiyyah') this opinion is ascribed to Hanafis and Hanbalis: If a person suffers loss of speech due to illness, it is not valid for him to make a will (by gestures), unless it continues for a long period of time and he becomes dumb, settling down to communicating in familiar gestures. In that case, his gestures and writing will be considered equivalent to his speech.

Al-Shi'rani ascribes this opinion to Abu Hanifah, al-Shafi'i and Malik: If a person writes his own will and it is known that it is in his hand, it will not be acted upon unless he has it attested. This implies that if a will written in his hand is found which he neither got attested nor made known its contents to people, the will will not be probated even if it is known to have been made by him.

Ahmad says: It will be acted upon, unless he is known to have revoked it. Researchers among the Imami legists observe: Writing proves a will, because the apparent import of a person's acts is similar to the import of his spoken statements, and writing is the sister of speech in the sense that both make known his intent; rather, writing is the superior of the two in this regard, and is preferable to all other evidence that proves intent.[1]

The Testator

There is consensus among all the schools that the will of a lunatic in the state of insanity and the will of an undiscerning child (*ghayr mumayyiz*) are not valid.

The schools differ regarding the will of a discerning child; the Malikis, the Hanbalis, and al-Shafi'i in one of his two opinions, observe: The will of a child of ten complete years is valid because the Caliph 'Umar probated it. The Hanafis say: It is not valid except where the will concerns his funeral arrangements and burial. And it is well-known that these things do not require a will. The Imamiyyah are of the opinion that the will of a discerning child is valid if it is for a good and benevolent cause and not otherwise, because al-Imam al-Sadiq considered it executable only in such cases. (*al-Jawahir* and Abu Zuhrah's *al-Ahwal al-shakhsiyyah*)

According to the Hanafis, if a sane adult makes a will and then turns insane, his will is void if his insanity is complete and continues for six months; otherwise, it is valid. If he makes a will in sound mind and then develops a condition of delusion leading to mental derangement lasting until death, his will will be void (*al-Fiqh 'ala al-madhahib al-'arba'ah*, vol.3, 'bab al-wasiyyah'). The Imami, the Maliki and the Hanbali schools are of the opinion that subsequent insanity does not nullify a will even if it continues till death, because subsequent factors do not nullify preceding decisions.

The Hanafis, the Shafi'is and the Malikis consider the will of an idiot as valid. The Hanbalis observe: It is valid in regard to his property and invalid regarding his children. Therefore, if he appoints an executor over them, his will will not be acted upon (*al-Ahwal al-shakhsiyyah* of Abu Zuhrah and *al-Fiqh 'ala al-madhahib al-'arba'ah*). The Imamiyyah state: The will of an idiot is not valid concerning his property and valid in other matters. Thus if he appoints an executor over his children, his will is valid, but if he wills the bequest of something from his property, it is void.

The Imamiyyah are unique in their opinion that if a person inflicts injury upon himself with an intention of suicide and then makes a will and dies, his will is void. But if he first makes a will and then commits suicide, his will is valid.

The Maliki and the Hanbali schools regard the will of an intoxicated person as invalid. The Shafi'is say: The will of a person in a swoon is not valid. But the will of a person who has intoxicated himself voluntarily is valid.

The Hanafi school is of the opinion that a will made in jest or by mistake or under coercion is not valid (*al-Fiqh 'ala al-madhahib al-'arba'ah*, vol. 3, 'bab al-wasiyyah')

The Imamiyyah observe: A will is not valid if made in a state of intoxication or stupor, in jest, by mistake, or under coercion.

The Legatee

The four Sunni schools concur that a will in favour of an heir is not valid unless permitted by other heirs.

The Imamiyyah observe: It is valid in favour of an heir as well as a non-heir, and its validity does not depend upon the permission of the heirs as long as it does not exceed a third of the estate. The courts in Egypt earlier used to apply the opinion of the Sunni schools, but then switched over to the Imami view. The Lebanese Sunni Shari'ah courts continue to consider a will in favour of an heir as invalid. But since some years their judges have inclined towards the other view and have brought a bill to the government authorizing wills in favour of heirs.

All the schools concur that it is valid for a *dhimmi* (a non-Muslim living under the protection of an Islamic State) to make a will in favour of another *dhimmi* or a Muslim, and for a Muslim to make a will in favour of a *dhimmi* or another Muslim, in consonance with the verse:

لاَ يَنْهَاكُمْ اللَّهُ عَنْ الَّذِينَ لَمْ يُقَاتِلُوكُمْ فِي الدِّينِ وَلَمْ يُخْرِجُوكُمْ مِنْ دِيَارِكُمْ أَنْ تَبَرُّوهُمْ وَتُقْسِطُوا إِلَيْهِمْ إِنَّ اللَّهَ يُحِبُّ الْمُقْسِطِينَ * إِنَّمَا يَنْهَاكُمْ اللَّهُ عَنْ الَّذِينَ قَاتَلُوكُمْ فِي الدِّينِ وَأَخْرَجُوكُمْ مِنْ دِيَارِكُمْ وَظَاهَرُوا عَلَى إِخْرَاجِكُمْ أَنْ تَوَلَّوْهُمْ وَمَنْ يَتَوَلَّهُمْ فَأُوْلَئِكَ هُمْ الظَّالِمُونَ

God does not forbid you respecting those who have not made war against you on account of your religion, and have not expelled you from your homes, that you show kindness to them and deal with them justly; surely God loves the just. God only forbids you respecting those who made war with you on account of your religion, and expelled you from your homes and assisted in your expulsion, that you befriend them. And whosoever takes them for friends - they are the evildoers. (***60: 8--9***)

The schools differ regarding the validity of a will made by a Muslim in favour of a *harbi*.[2] The Malikis, the Hanbalis and most of the Shafi'is consider it valid.

According to the Hanafi and most Imami legists, it is not valid. (*al-Mughni*, vol.6, *al-Jawahir*, vol. 5, 'bab al-wasiyyah')

The schools concur regarding the validity of a will made in favour of a foetus, provided it is born alive. Bequest is similar to inheritance, and there is *ijma'* that afterbom children inherit; hence their capacity to own bequests as well.

The schools differ as to whether it is necessary for the foetus to exist at the time of making the will. The Imami, the Hanafi and the Hanbali schools, as well as al-Shafi'i in the more authentic of his two opinions, say: It is necessary, and a foetus will not inherit unless it is known to exist at the time of making the will. The knowledge of its existence is acquired if its mother has a husband capable of intercourse with her and it is born alive within a period of less than six months from the date of the bequest. But it it is born after six months or more it will not receive anything from the legacy, because of the possibility of its being conceived after the time of the bequest. This opinion is based on the invalidity of a bequest in favour of one not in existence.

The Malikis state that bequest in favour of existing foetus as well as one to be conceived in the future is valid, for that they regard a bequest in favour of someone non-existent as valid.[3] (al-'Allamah al-Hilli's *Tadhkirah*; *al-Fiqh 'ala al-madhahib al-'arba'ah*; *al-'Uddah fi fiqh al-Hanabilah*, 'bab al-wasiyyah')

If a person makes a will in favour of a foetus and then twins, a boy and a girl, are born, the legacy will be distributed among them equally because a bequest is a gift, not an inheritance: thus it resembles his giving them a gift after their birth.

The schools concur that it is valid to make a will for public benefit, such as for the poor and destitute, for students, for mosques and schools. Abu Hanifah excludes bequest in favour of a mosque or something of the kind because a mosque does not have the capacity to transfer ownership. Muhammad ibn al-Hasan, his pupil, considers it valid, the income of the legacy being spent for the mosque. This has been the custom among the Muslims in the east and the west, in the past and at the present.[4]

The schools differ where the legatee is a specific person, as to whether his acceptance is necessary or if the absence of rejection on his part is sufficient.

The Imami and the Hanafi schools observe: His not rejecting the bequest is sufficient. Therefore, if the legatee is silent and does not decline the bequest, he will become the owner of the legacy after the testator's death.

The Imamiyyah are of the opinion that if a legatee accepts the bequest during the life of the testator, he is entitled to decline it after his death; also if he refuses the bequest during the testator's life, he is entitled to accept it after his death, because his acceptance and refusal have no effect during the life of the testator, for ownership does not materialize during such time. According to the Hanafi school, if he refuses during the testator's life, he is entitled to accept after his death; but if he accepts during his life, he cannot reject it thereafter.

The Shafi'i and the Maliki schools state: It is necessary that the legatee accept the bequest after the

death of the testator, and his silence and non-refusal do not suffice. (al-'Allamah al-Hilli's *Tadhkirah*, *al-Fiqh 'ala al-madhahib al-'arba'ah*)

The four Sunni schools observe: If the legatee dies before the testator, the will becomes void because the bequest then becomes a gift to a dead person, and this causes it to become void. (*al-Mughni*, vol.6, 'bab al-wasiyyah')

The Imamiyyah say: If the legatee dies before the testator and the testator does not revoke the will, the heirs of the legatee will take his place and play his role in accepting or rejecting the bequest. Thus if they do not reject the bequest, the legacy will be solely their property, which they will distribute between themselves in the form of an inheritance, without it being incumbent upon them to pay from this bequest the debts of the decedent or to comply with his will in regard to the bequest. They argue that acceptance of the bequest was the decedent's right, which is transferred to his heirs, like the option to reject (*khayar al-radd*). They also cite the traditions of the Ahl al-Bayt[5] as another basis for their argument.

According to Malik, and al-Shafi'i in one of his two opinions, a bequest in favour of the murderer (of the testator) is valid regardless of its being an intentional or unintentional homicide. The Hanafis validate the bequest if permitted by the testator's heirs.

The Hanbalis observe: The bequest is valid if it is made after the injury causing death, and is void if murder takes place after the bequest. (Abu Zuhrah's *al-Ahwal al-shakhsiyyah*, 'bab al-wasiyyah')

The Imamiyyah say: A bequest is valid in favour of a murderer, because the proofs regarding the validity of a will are general. The verse:

مِنْ بَعْدِ وَصِيَّةٍ يُوصَى بِهَا أَوْ دَيْنٍ

includes a murderer as well as others, and to limit it to a non-murderer requires proof.

The Legacy

The schools concur that it is necessary that the bequest be capable of being owned, such as property, house and the benefits ensuing from them. Therefore, the bequest of a thing which cannot be owned customarily (e.g. insects) or legally (e.g. wine, where the testator is a Muslim) is not valid, because transfer of ownership is implicit in the concept of bequest and when it is not present there remains no subject for the bequest.

There is consensus among the schools regarding the validity of the bequest of the produce of a garden, perpetually or for a specific number of years.

The Imamiyyah extend the meaning of bequest to its utmost limit, permitting therein that which they don't

permit in a sale and other transactions. They consider as valid a bequest of something non-existent with a probability of future existence, or something which the testator is incapable of delivering (e.g. a bird in the sky or a straying animal), or something which is indeterminate (e.g. the bequest of a dress or animal without mentioning what dress and which animal). They further observe: It is valid for the testator to be vague to the utmost extent (he may say: 'I promise to give something', 'a little', or 'a large quantity', ' a part', or 'a share', or 'a portion',6 to a certain person).

None of these forms is valid in a transaction of sale, though valid in a bequest. The author of *al-Jawahir* says: "Perhaps the validity of all these forms is due to the general nature of the proofs validating wills, which include all these forms and all interests that are capable of being transferred.... Perhaps the rule in bequests is that all things can be bequeathed except those that are known to be nonbequeathable, "i.e. those which have been excluded by a canonical proof (e.g. wine, swine, *waqf*, the right to *qisas*, the punishment for *qadhf*, etc.). Some of them have stated that it is not valid to sell an elephant, though it can be validly bequeathed.

Al-Shaykh Muhammad Abu Zuhrah, in *al-Ahwal al-shakhsiyyah*, 'bab al-wasiyyah', says: The fuqaha' have extended the scope of the rules of bequest and have permitted in it that which they don't permit in other forms of transfer, e.g. the bequest of something indeterminate. Thus if you make a will using the words, 'a share', 'a piece', 'something', 'a little', etc., the will will be valid .... and the heirs will have to give any quantity they desire from among the prohable quantities understood from that word.

This observation is in concurrence with the view of the Imamiyyah, and, accordingly, there is an agreement concerning this issue.

The Extent of Testamentary Rights

A gratuitous bequest is operative only up to one-third of the testator's estate in the event of having heir, irrespective of the bequest being made in illness or good health. As per consensus, any excess over one-third requires the permission of the heirs. Therefore, if all of them permit it, the will is valid, and if they refuse permission, it becomes void. If some heirs give permission and others refuse, the will will be executed by disposition of the excess over one-third from the share of the willing heirs. The permission of an heir will not be effective unless he be a sane and mature adult.

The Imamiyyah observe: Once the heirs give permission, they are not entitled to withdraw it, regardless of whether the permission was given during the life of the testator or later.

The Hanafi, the Shafi'i and the Hanbali schools say: The permission given by the heirs or their refusal to do so will have no consequences except after the testator's death. Thus if they give permission during his lifetime and then change their minds and decline permission after his death, it is valid, irrespective of the permission having been given during the health of the testator or during his illness. (*al-Mughni*)

The Malikis are of the opinion that if the heirs give permission during the illness of the testator, they are entitled to withdraw it, and if they permit while he is healthy, the will will be executed from their share of the legacy, without their having a right to revoke the permission.

The Imami, the Hanafi and the Maliki schools state: When permission is granted by the heir for that which exceeds one-third of the legacy, it is considered approval of the testator's act and the operationality of the bequest, not as a gift from the heir to the legatee. Accordingly, it neither requires possession, nor other rules applicable to a gift apply to it.

The schools differ concerning a testator who has bequeathed all his wealth and does not have any specific heir. Malik observes: The bequest is only valid up to one-third of the legacy. Abu Hanifah states: It is permissible for the whole legacy. Al-Shafi'i and Ahmad have two opinions, and so do the Imamiyyah, the more reliable of them being the one declaring its validity. (*al-Bidayah wa al-nihayah*; *al-Tadhkirah*, 'bab al-wasiyyah')

There is consensus among the schools that inheritance and bequest are operational only after the payment of the debt of the decedent or his release from it. Therefore, the one-third from which the will is executed is a third of what remains after the payment of debt. They differ concerning the time at which the one-third will be determined: Is it a third at the time of death or at the time of the distribution of the estate?

The Hanafis say: The one-third will be determined at the time of distributing the estate. Any increase or decrease in the estate will be shared by the heirs and the legatees. Some Hanbali and Maliki legists concur with this opinion.

The Shafi'is observe: The one-third will be determined at the time of the testator's death. (Abu Zuhrah)

The Imamiyyah state: That which the decedent comes to own after his death will be included in his estate (e.g. the reparation for unintentional homicide and for intentional murder, where the heirs compromise over reparation, and as when the decedent had during his life set up a net and birds or fish are trapped in it after his death; all these will be included in the estate and from it a third will be excluded). This observation of the Imamiyyah is close to the Hanafi view.

The Imami, the Shafi'i and the Hanbali schools state: If the decedent is liable for payment of *zakat* or any *wajib* expiation (*kaffarah*) or to perform the compulsory *hajj* or other *wajib* duties of monetary nature, these will be taken from his whole estate, not from a third of it, irrespective of his having willed to this effect or not, because these duties are related directly to God (*haqq Allah*), and as mentioned in the traditions have a greater right to be fulfilled. If the decedent has made a provision for their fulfilment in his will and has determined their expenses from a third of his estate, his word will be acted upon, in consideration of the heirs.

The Hanafis and the Malikis observe: If he has provided for his unfulfilled duties in the will, their

expenses will be taken from a third of his estate and not the whole, and if he makes no provision for them in his will they will annul on his death (*al-Mughni*, *al-Tadhkirah, al-Bidayah wa al-nihayah*)

The schools concur that a will for performing *mustahabb* acts of worship will be executed from a third of the estate.

Clashing Wills

If the bequeathable third is insufficient for meeting all the provisions of a will (such as where the testator has made a bequest of one thousand for Zayd, two thousand for the poor, and three thousand for a mosque, while his bequeathable third is five thousand, and the heirs do not permit the excess to be met from their share), what is the rule here?

The Maliki, the Hanbali and the Shafi'i schools say: The bequeathable third will be distributed among them in proportion to their amounts; i.e. the deficit will affect every legatee in proportion to his share in the will. (*al-Mughni*)

The Imamiyyah state: If the testator makes many wills exceeding his bequeathable third, and the heirs do not permit the excess on the wills being conflicting to one another (such as when he says: "One-third of my estate is for Zayd," and says later,"One-third is for Khalid") the later will will be acted upon, and the former ignored. And if the wills include *wajib* and non-*wajib* provisions, the *wajib* provisions will be given precedence. If the wills are of equal weight, then if the testator has included them in a single statement and said: "Give Jamal and Ahmad 1000," while his bequeathable third is 500, this amount will be distributed among the two, each receiving 250. But if the testator gives precedence to one of them and says: "Give Jamal 500. and Ahmad 500", the whole amount will be given to the first and the second will will be considered void because the first will has completely exhausted the bequeathable third and no subject remains for the second.

The four Sunni schools observe: If a testator bequeaths a specific thing in favour of a person, and then bequeaths the same thing in favour of another, that thing will be equally distributed between them (thus, if he says: "Give this car to Zayd after my death," and says later: "Give it to Khalid," it will become the joint property of both).

The Imamiyyah say: It belongs to the second, because the second will implies abandonment of the earlier one.

According to the Imamiyyah, if a testator bequeaths a specific thing to every heir equal to each heir's share of the legacy, the will is valid (e.g. if he says: "The garden is for my son Ibrahim, and the house is for his brother, Hasan"), and the will will be executed if there is no favouritism involved, because there is no clash of interests of the heirs. Some Shafi'i legists and some Hanbalis concur with this view.

There is consensus among the schools that the thing bequeathed, regardless of its being an

undifferentiated part (e.g. one-third or one-fourth of the whole estate) or something specific, the legatee will become its owner on the testator's death, regardless of the legacy's presence. Thus he takes his share along with the heirs if the subject of legacy is present, and similarly when the subject of legacy, not present earlier, appears.

When the subject of legacy is something distinct, independent and determinate, the Imami and the Hanafi schools say: The legatee will not become its owner unless the heirs possess twice its value (as their share of the testator's estate). But if the testator has assets not present or debts (receivable), and the subject of bequest is more than one-third in value of what the heirs possess, the heirs are entitled to resist the legatee and stop him from taking more than a third of the total estate into possession, especially where the assets not present are in danger of perishing or when it is infeasible to reclaim them. When the thing not present earlier turns up, the legatee is entitled to the remaining part of the bequest to the extent of a third of the entire present assets. But if nothing turns up, the rest of the legacy is for the heirs.

Revocation of Will

There is consensus among the schools that a will is not binding on the testator or the legatee. Thus it is valid for the former to revoke it, regardless of its being the bequest of an asset, or benefit (*manfa'ah*) or guardianship (*wilayah*). Discussion regarding the second point will follow shortly.

A revocation by the testator may take place by word or deed (e.g. his bequeathing an article and then consuming, gifting or selling it). The Hanafis are said to hold that selling is not considered a revocation, and the legatee is entitled to receive its price.

Bequest of Benefits

The schools concur regarding the validity of a bequest of benefit (e.g. the lease of a house, the right to reside in it, an orchard's produce, a goat's milk, and other such benefits which accrue in course of time) irrespective of the testator's restricting the benefit to a specific period or his bequeathing it perpetually.

The schools differ concerning the method of deriving the benefit from the bequeathable third. The Hanafis observe: The value of the bequeathed benefit will be estimated from the subject of the benefit, irrespective of whether the bequest of the benefit is temporary or perpetual. Thus, if a testator bequeaths the right to reside in a house for a year or more, the value of the whole house will be estimated, and if its value covers a third of the legacy, the will will be operational; otherwise it will be inoperational and void.

The Shafi'i and the Hanbali schools say: The value of the benefits will be estimated in separation from the property. If a third of the property covers the value of the benefit, the bequest will be fully operational, if not, to the extent covered by a third of the property. (Abu Zuhrah)

Researchers among the Imamiyyah state: If the bequest of the benefit is not perpetual, the calculation of

its value is easy because the article or property will retain its own value after subtracting the value of the benefit. Therefore, if a testator bequeaths the benefit of an orchard for a period of five years, the value of the whole orchard will be initially estimated. Supposing its estimate is 10,000, it will be re-estimated after deducting from it the benefit of five years. Supposing the re-estimated value is 5000, the difference of 5000 will be deducted from a third of the estate if it can bear it; otherwise, the legatee will be entitled to the benefit to the extent of a third of the legacy, be it the benefit of a year or more.

But if the bequest of the benefit is perpetual, the value of the orchard along with its benefit will be estimated initially, and then the procedure followed in a temporary bequest will follow. If one asks: "How and in what way can we estimate the value of a property devoid of benefit, for that which has no benefit has no value?" The reply is that there are some benefits that have value even if little. Thus, in an orchard, the broken branches and dry wood can be utilized by the heir; if a tree dries up due to some reason, the land it covered can be of use; if a house falls into ruins and the legatee undertakes no repairs, the heirs may benefit from its stones and land; the meat and hide of a goat can be used after it is slaughtered; and in all situations a property is not devoid of benefits apart from the bequeathed benefit.

The Dispositional Rights of an Ailing Person

Here, by an 'ailing person' is meant one whose death follows his illness, in a manner that the illness creates apprehensions in the minds of people that his life is at an end. Therefore, a toothache, eye pain, a slight headache, and the like are not considered alarming forms of illness. Thus, gifts made by a person suffering from an alarming sickness, who may recover from it and die after his recovery, will be considered valid.

Powers of Disposition of a Healthy Person

There is no doubt nor disagreement between the schools that when a healthy person disposes of his wealth, completely and unconditionally – i.e. without making it contingent upon his death – his disposition is operative from his property, irrespective of the disposition being *wajib* (e.g. the payment of a debt) or an act of favour (e.g. giving a gift, or creating a *waqf*).

But if a healthy person makes the disposition of his property contingent upon his death, it becomes a bequest, as mentioned. Therefore, if it is a non-monetary *wajib* (e.g. prayer, Hajj, etc.), it will be executed from a third of his legacy, and if it is a debt, it will be paid from the undivided estate, according to the Imami, the Shafi'i and the Hanbali schools, and from a third, according to the Hanafi and the Maliki schools.

The Powers of Disposition of an Ill Person

Those dipositions of an ill person that are contingent upon his death are bequests, and the rules

applicable to them are those mentioned above concerning valid wills, because there is no difference between a will made during a state of health or illness, provided the ill person is mentally sound and completely conscious and aware.

If an ill person disposes his wealth without making it contingent upon his death, it will be seen whether his disposition is for his own use, such as his buying an expensive dress, enjoying food and drink, spending on medicine and for improving his health, travelling for comfort and enjoyment, etc. All these dispositions are valid and no one, including heirs, may object.

And if he disposes it impartially, such as when he sells, rents or exchanges his possessions for a real consideration, these transactions of his are enforceable from his estate and the heirs are not entitled to dispute it, because they don't lose anything as its consequence.

If he disposes in a complete form without making it contingent upon his death, and his dispositions include acts of favour (such as when he gives a gift or alms, or relinquishes a debt, or pardons a crime entailing damages, or sells for less than its actual price or buys at a higher price, or makes other such dispositions which entail a financial loss for the heirs), such dispositions will be operational from a third of his estate.[7] The meaning of its being from a third of his estate is that its enforcement is delayed until his death. Thus if he dies in his illness and a third of his estate covers his completed gratuitous acts, it is clear that they are enforceable from the very beginning, and if the third falls short of them, such dispositions in excess of the third are invalid without the heirs' permission.

Wills and 'Completed Dispositions' During Illness

The difference between a will and dispositions (*munjazat*) during illness is that the will is made contingent upon death, whereas dispositions during illness are not made contingent upon death, irrespective of their being incontingent perpetually or being contingent upon some event capable of conditionality (such as when he makes a vow during illness to sacrifice a particulat ram if he is granted a son and then a son is born to him posthumously; such an act will be considered among dispositions during disease).

According to *al-Mughni* (a Hanbali legal text) and *al-Tadhkirah* (a book on Imami fiqh), there are five similarities and six differences between dispositions during illness and a will, and the similar wording of the two texts shows that al-'Allamah al-Hilli, the author of *al-Tadhkirah* (d.726/1326), has taken it from Ibn Qudamah, the author of *al-Mughni* (d.620/1223).[8] It is useful to give a summary here of their views.

The five similarities between dispositions during illness and a will are the following:

1. Both depend for their execution on a third of the estate, or the consent of the heirs.
2. Dispositions during illness are valid in favour of an heir, exactly like a will, according to the Imamiyyah; according to the other four schools, they are not valid in favour of an heir, as in the case of a will.
3. Both of them have a lesser reward with God compared to charity given during health.

4. Dispositions contest with wills, within the one-third of the estate (from which both are to be enforced).
5. Both will be enforced from the one-third of the estate only at the time of death, neither before nor after it.

The six differences between a will and dispositions during illness are:

1. It is valid for a testator to revoke his will, while it is not valid for a donor during ailment to revoke his gift after its acceptance by the donee and his taking its possession. The secret here is that a will is a bequest conditional to death, and, consequently, as long as the condition is not fulfilled, it is valid to recant it, whereas a gift during illness is unrestricted and unconditional.

2. Dispositions are required to be accepted or rejected immediately and during the life of the donor, whereas a will is not required to be accepted or rejected until the death of the testator.

3. Dispositions require the fulfilment of certain conditions, such as knowledge of the gift and absence of harm: a will is not bound by these conditions.

4. Dispositions enjoy precedence over a will if one-third of the estate falls short of meeting both of them together, except when the will involves the setting free of a slave, in which case a will takes precedence over completed gifts. This is the view of the Imami, the Hanafi and the Shafi'i schools (*al-Tadhkirah*, 'bab al-wasiyyah').

5. If one-third of the estate is not sufficient to enforce all the dispositions, then, according to the Shafi'is and Hanbalis, the first among them will be enforced first, and so on. But if the one-third is not sufficient to fulfil several wills, the deficit will affect all of them, as pointed out while discussing clashing wills. The Imamiyyah enforce both wills and dispositions on a first-come-first basis.

6. If a donor during his last illness dies before the donee has taken possession of the gift, the option lies with the heirs: if they desire they may grant it. But a will has to be compulsorily acccepted after the death of the testator, without requiring the consent of the heirs.

The sixth difference has been mentioned by the author of *al-Mughni*, while the author of *al-Tadhkirah* does not mention it. It is better not to mention this difference, as done by al-'Allamah al-Hilli, because dispositions during sickness have many forms such as gift (*hibah*), the relinquishing of a debt, favouritism in sale or purchase, etc. Hence, when dispositions are not limited to gifts, it is not appropriate, firstly, to say "If a donor during his last illness dies before the donee has taken possession ....".

Secondly, if a donor during his last illness makes a gift and dies before the donee has taken its possession, according to the Hanbali, the Shafi'i, the Imami and the Hanafi schools, the gift is void because taking possession is a condition for its completion, and if the donee takes possession before the death of the donor the gift is concluded and will be accounted for in the third of the estate, like a will,

and will not depend for its execution on the consent of the heirs, provided it does not exceed a third of the estate.

Hence it is not in fact a disposition without taking possession and after the death of the donor, for it to be said that it differs from or is similar to a will. After taking possession, the rules concerning wills will apply to it. From this it is clear that the mention of the sixth difference is out of place.

Acknowledgment during Sickness

The four Sunni schools concur that if during last illness a person acknowledges the debt of a non-heir, his acknowledgment is enforceable from the undivided estate, exactly like his acknowledgment during health. They differ where he acknowledges the debt of an heir; the Hanafi and the Hanbali schools observe: The other heirs are not bound by this acknowledgment and it will be considered void unless that heir brings a valid proof to establish his claim.

The Malikis say: The acknowledgment is valid if the decedent is not accused of partiality, and is void if so accused (e.g. when a person having a daughter and a cousin brother acknowledges a debt of his daughter, it will not be accepted, and if he acknowledges in favour of his cousin, it will be accepted, because he cannot be accused here of depriving his daughter and transferring the wealth to his cousin). The reason for rejecting the acknowledgment is accusation, and therefore it is limited to those instances where there is an accusation. (*al-Mughni*, vol.5, 'bab al-iqrar')

The Imamiyyah state: If he makes an acknowledgment during last illness (*marad al-mawt*) for an heir or a stranger, concerning a property or a debt claim, it will be seen: If there are any indications raising the suspicion that he is not sincere in his acknowledgment, so that it seems, going by ordinary factors, far-fetched that the thing acknowledged should belong to the person to whom it has been acknowledged to belong and that the sick person intends to impress this on others for some reason, the rule applicable to such an acknowledgment is the one applicable to a will: It will be executed from a third. But if the ill person is secure from suspicion in his acknowledgment, so that there is no indication to prove that he has lied (such as when there has been between him and the person in whose favour he has made the acknowledgment, earlier dealings which ordinarily explain such an acknowledgment), the acknowledgment will be enforced from the original estate, whatever its value.

This is when the condition of the person acknowledging is known; what if it is not known?

If the heir says that the decedent was not honest in his acknowledgment, then the burden of proof rests on the person in whose favour the acknowledgment has been made, to prove that he owns the thing which the decedent acknowledged as his during his last illness. If he proves this by bringing two just witnesses (*al-bayyinah*), the acknowledgment will be enforced from the original estate; otherwise, the heir will take an oath that he does not know that the thing acknowledged by the decedent belongs to that person; then the acknowledgment will be enforced from a third of the estate. The Imamiyyah have based

their argument on traditions narrated from the Ahl al-Bayt ('a) such as the tradition narrated by Abu Basir:

إذا كان مصدقاً يجوز

(When his verity is established, it is valid) and other traditions; and as اذا is used in a conditional clause, it implies that the enforcement is made conditional to his trustworthiness and the establishment of his verity. 9

Appointment of Executor (al-Wisayah)

Al-wisayah is an undertaking by a person to execute the will of another after his death, such as clearing his debts, pursuing his debtors, the care and maintenance of his children, and other such functions. Responsibility for these functions is called *al-wilayah* or *al-wasiyyat al-ahdiyyah*, and the person charged with performing it called *al-wasi al-mukhtar* (an authorized executor).

Requirements for a Wasi

1. He should be a *mukallaf*, i.e. a sane adult, because a lunatic and a minor do not have authority over themselves; so there is no question of their exercising authority over the affairs of others. However, the Imamiyyah observe in this regard: It is not valid for a child to act as an executor individually, though valid if he acts together with an adult. Then the adult will execute the will individually till the minor attains majority, and then he will join him in its execution.

The Hanafis state: If a minor is appointed as *wasi* (executor), the judge will replace him with another, and if the minor has executed the will before being removed by the judge, his acts of execution of the will are valid and enforceable. Similarly, if he attains majority before being removed, he will continue with the execution of the will (*al-Fiqh 'ala al-madhahib al-'arba'ah* and al-'Allamah al-Hilli's *al-Tadhkirah*).

2. The *wasi's* nomination must be determinate; thus if the testator appoints one of two persons without determining which one of them is to be the executor, the appointment of both is void.

3. The specification of the subject of will (*musa bihi*). Thus if the testator makes a will without specifying it (as when he says: "So and so is my *wasi*", and does not mention the thing over which he is to exercise this authority), the appointment is void according to the Imami, the Hanafi, the Shafi'i and the Hanbali schools. It has been narrated from Malik that such a *wasi* will have authority over the whole estate.

4. That the *wasi* be a Muslim: Thus it is not valid, as per consensus, for a Muslim to appoint a non-Muslim executor. But the Hanafis state: If a Muslim appoints a non-Muslim, it is for the judge to replace him with a Muslim, though the appointment itself will be considered valid. Hence if the non-Muslim *wasi* executes the will before his removal by the judge, or becomes a Muslim, he will remain a *wasi*, as in the

case of a minor.

5. The Shafi'i school observes: It is *wajib* that the *wasi* be an *'adil* person.
The Maliki, the Hanafi and researchers among the Imamiyyah state: It is sufficient that he be trustworthy and truthful, because *'adalah* is a means here and not an end, and when the *wasi* strives to fulfil the provisions of the will – as is *wajib* for him – the purpose is achieved. [10]

The Hanbalis say: If the *wasi* is dishonest, the judge will appoint a trustworthy person as a co-executor. This opinion is in consonance with the opinion of al-Sayyid al-Hakim in *Minhaj al-salihin* (vol.2) where he observes: If a dishonest act is committed by the *wasi*, a trustworthy person will be appointed alongside him to stop him from doing so. If this is not possible, he will be replaced by another.

6. As reported in the third volume of *al-Fiqh 'ala al-madhahib al-'arba'ah*, 'bab al-wasiyyah', the Hanafi, the Maliki and the Shafi'i schools require the *wasi* to be capable of executing the provisions of the will.

Al-'Allamah al-Hilli has stated in *al-Tadhkirah*: Apparently, the view taken by our 'ulama', i.e. the Imamiyyah, is that it is valid to appoint an executor incapable of executing the will, and his incapacity will be compensated by the supervision of the *hakim*; i.e. the judge himself will supervise his dispositions, or appoint a capable, trustworthy person to cooperate with the executor.

Refusal to Act as Executor

The testator is entitled to revoke the appointment of an executor, and the executor is entitled to reject his appointment by announcing his refusal, because *al-wasiyyat al-ahdiyyah* in this situation is not binding, as per consensus.

The schools differ regarding the validity of a rejection to act as executor by an executor without informing the testator. The Imami and the Hanafi schools say: It is not valid in any situation for an executor to reject his appointment after the death of the testator, and it is not valid during his life without informing him.

The Shafi'i and the Hanbali schools observe: It is valid for a *wasi* to reject his appointment at the beginning as well as during its course, without any restraint or condition. Therefore, he can reject before acceptance and after it, during the testator's life, by announcing it or without doing so, as well as after his death (*al-Mughni*, vol.6, 'bab al-wasiyyah')

Appointment of Two Executors

There is consensus among the schools that a testator is entitled to appoint two or more executors. If he categorically mentions that each one of them is independent in his dispositions, his word will be acted upon. Similarly, if he categorically mentions that both should act together, then neither of them will have independence of individual action. The schools differ where the testator does not specify anything

concerning their acting individually or jointly. The Imami, the Shafi'i, the Maliki, and the Hanbali schools observe: Both have no power to act individually. So if they quarrel and disagree, the judge will compel them to agreement, and if he is unable to do so, he will replace both of them.

The Hanafis say: Each of the two executors is free to act individually concerning seven things: Shrouding of the deceased, payment of his debt, recovering of his will, returning of articles held in trust by the decedent, buying necessary food and clothing for the minor heirs, acceptance of a gift on their behalf, and pursual of legal proceedings initiated for or against the decedent. This is because agreement in such things is difficult and delays are harmful. Therefore, to act individually is valid in them. (al-Sayyid Abu al-Hasan's *Wasilat al-najat* on Imami fiqh, and *al-Mughni*, vol.6, 'bab al-wasiyyah')

Al-Sayyid Abu al-Hasan has remarked in *al-Wasilah*: If one of the two executors dies or turns insane or anything occurs to him which annuls his appointment as an executor, the second will become independent in the execution of the will, and there is no need to appoint a new co-executor.

Ibn Qudamah states in *al-Mughni*: The *qadi* will appoint a trustworthy person as his counterpart, because the testator was not satisfied with the individual supervision of the surviving executor, and no difference of opinion has been narrated in this issue except from the Shafi'is.

If both the executors die or their condition changes in a manner annulling their appointment, should the judge appoint two new executors or one will suffice? Here the schools differ. The correct view is that the judge will pay attention to expediency. Consequently, if it is expedient to appoint two executors, he will do so; otherwise it will be adequate to appoint one, because what is important is the will's execution, and the reason for the multiplicity of executors is usually the concern and affection of the executor for the legally disable heir or his friendship with the testator. In any case, there is no doubt that when one or more executors (as the case may be) die, it is as if there was no executor from the very beginning.

The Imamiyyah, the Shafi'is, and the Hanbalis in the more preponderant of the two narrations from Ahmad, state: An executor is not entitled to hand over the job of executing the will to another without the prior permission of the testator.

The Hanafi and the Maliki schools observe: It is valid for an executor to appoint by will another person to fulfil the duties for which he was appointed executor.

Appointing an Executor for Marriage

The schools differ as to whether anyone having authority (*wilayah*) concerning marriage (of a ward) is entitled to transfer it to another through a will (for instance, when a father authorizes the executor of his will concerning the marriage of his daughter or son).

Malik considers if valid. Ahmad observes: if the father mentioned the name of the specific person to whom his child should be married, it is valid to appoint an executor for marriage, not otherwise.

Al-Shaykh Abu Zuhrah in *al-Ahwal al-shakhsiyyah*, 'bab al-wilayah', narrates from a multitude of *fuqaha'* that it is not valid to appoint an executor for marriage; the Imamiyyah hold the same opinion.

A Wasi's Acknowledgment

If a *wasi* makes an acknowledgment of the decedent's liability regarding some property or debt, his acknowledgment is not executable against the heirs, minor or major, because it is an acknowledgment regarding another's dues. If the issue is raised in the court, the *wasi* will be considered a witness, provided he is not himself a party to the case.

If an executor gives evidence in favour of minor heirs or the decedent, his testimony will not be accepted because his testimony affirms his own right of disposal in regard to the subject of his evidence.

Liability of a Wasi

If anything suffers damage at the hands of the *wasi*, he is not liable for it unless he has violated or neglected his duty. If a minor heir on attaining majority accuses the *wasi* of breach of trust or negligence, the burden of proof will rest on the heir, and the *wasi* shall take an oath, because the *wasi* is a trustee, and in accordance with the hadith:

> ليس على الأمين إلاّ اليمين

A trustee is liable for nothing except an oath.

Anyone accusing a *wasi* of breach of trust or negligence is entitled to proceed against him legally, provided that he is sincere in his intent and by doing so seeks the pleasure of God. But if it is known that he has no aim except harassment and defamation of the *wasi*, due to some enmity between them, then his plea will not be heard.

If a person dies intestate, and it is not possible to refer to a *qadi*, a reliable and trustworthy person from among Muslims may take charge of the affairs of his estate, taking care to do what is good and beneficial, especially in matters which may not be delayed. It is the judge's duty to later on endorse these dispositions, and he may not invalidate them.

Probating a Will

The schools concur that a will concerning property or its benefit is proved by the testimony of two males, or a male along with two female, witnesses from among '*adil* Muslims, in accordance with the verse:

> وَاسْتَشْهِدُوا شَهِيدَيْنِ مِنْ رِجَالِكُمْ فَإِنْ لَمْ يَكُونَا رَجُلَيْنِ فَرَجُلٌ وَامْرَأَتَانِ مِمَّنْ تَرْضَوْنَ مِنْ الشُّهَدَاءِ

And call in to two witnesses from among your men, or if they are not two men, then one man and two women, such witnesses as you approve of... (***2:282***)

The schools differ concerning the acceptability of the testimony of '*adil* witness from Ahl al-Kitab in the particular case of proving a will. The Imamiyyah and the Hanbalis observe: The testimony of Ahl al-Kitab is valid in the case of will, only during a journey when none else is available, in accordance with the verse:

يَا أَيُّهَا الَّذِينَ آمَنُوا شَهَادَةُ بَيْنِكُمْ إِذَا حَضَرَ أَحَدَكُمُ الْمَوْتُ حِينَ الْوَصِيَّةِ اثْنَانِ ذَوَا عَدْلٍ مِنْكُمْ أَوْ آخَرَانِ مِنْ غَيْرِكُمْ إِنْ أَنْتُمْ ضَرَبْتُمْ فِي الأَرْضِ فَأَصَابَتْكُمْ مُصِيبَةُ الْمَوْتِ

O believers, the testimony between you when any of you is visited by death, at the time of making a will, shall be two 'adil men from among you, or two others from another folk, if you are journeying in the land and the affliction of death befalls you. (***5:106***)

The Hanafi, the Shafi'i and the Maliki schools observe: The testimony of a non-Muslim will not be accepted in any condition. neither in case of a will nor in anything else. They add: The meaning of the words: **مِنْ غَيْرِكُمْ** in the verse is, 'from among those who are not your relatives', and not 'from those who do not belong to your religion'. (*al-Mughni*, vol.9, 'bab al-shahadah')

The Imami, the Hanbali and the Shafi'i schools say: Ownership of a property is proved by the evidence of one witness along with an oath. The Hanafis observe: A judgment will not be given on the basis of a single witness and an oath. (*al-Mughni,* vol.9, 'bab al-shahadah', and *al-Jawahir*, 'bab al-shahadah')

The Imamiyyah state: The right to one-fourth of a bequeathed property is proved by the evidence of a single woman; to a half by the evidence of two women: to three-fourths by the evidence of three women, and to the whole property by four women witnesses, *'adalah* being essential in all the cases. This opinion is particular to the Imamiyyah to the exclusion of other schools, because of authentic traditions from the Ahl al-Bayt ('a) in this regard.

This was as regards the bequest of property or its benefit. Concerning the nomination of an executor, it is not proved except by the evidence of two male '*adil* Muslims. Hence, as per consensus, the evidence of Ahl al-Kitab or women, both individually and jointly with men, or a single male witness along with an oath, will not be accepted.

1. Al-Jawahir, 'bab al-wasiyyah'.
2. A dhimmi is a person who pays jizyah to Muslims, while a harbi, according to the Imamiyyah, is one who does not pay jizyah although he may not be at war with them. According to the other schools, harbi is one who takes up arms and attacks travellers on public highways (Ibn Rushd's al-Bidayah wa al-nihayah, vol.2, 'bab al-harabah'). Al-Shahid al-Thani in his book al-Masalik, 'bab al-wasiyyah', has said: A bequest in favour of anyone who does not fight us due to our religion, irrespective of his being dhimmi or harbi, is valid, in accordance with the verse: 60:8,9) لاَ يَنْهَاكُمْ اللَّهُ), as well as the tradition from al-Imam al-Sadiq (A): Give the bequest to the legatee even if he is a Jew or Christian, for surely God has said:

فَمَنْ بَدَّلَهُ بَعْدَمَا سَمِعَهُ فَإِنَّمَا إِثْمُهُ عَلَى الَّذِينَ يُبَدِّلُونَهُ

Then he who alters after having heard it, its sin is on those who have altered it. (2:181)
Here no difference has been made between a harbi and others.

3. From among the Imami fuqaha', al-Shaykh Ahmad Kashif al-Ghita' favours the Maliki view that it is valid to bequeath in favour of a person not in existence; he remarks in Wasilat al-najat, 'bab al-wasiyyah': "There is no hindrance in a testator's making the ownership of a bequest conditional to the coming into existence of the legatee. Thus the legatee will not own it unless after his coming into being, as is the rule in waqf." But the author has given this view on the condition that there be no ijma' opposing it.
4. The meaning of the word 'property' (al-milk) differs in relation to the owner. Thus, in relation to a person, it means the power and right of disposal over it in any manner the owner desires; in relation to a mosque, it implies the allocation of its income to its use. Consequently, the observation that 'a mosque or something similar has a legal personality capable of holding property and transferring it,' is meaningless.
5. The Imamiyyah consider it necessary that if the legatee rejects the bequest during the life of the testator and dies later, and after him the testator also dies, the right of accepting the will is transferred to the heirs of the legatee, because, they say: Accepting or rejecting a will has no effect during the life of the testator.
6. It is stated in al-Shara'i', al-Masalik and al-Jawahir that if a testator uses vague words in his will for which the law has no interpretation, his heirs will be referred to to determine their meaning. Thus, if he says: "Give him a share from my property," or "a part" or "a portion of it," or "a little of it", or "much of it," or similar terms which do not denote any fixed quantity either lexically, or legally or customarily, the heirs will give anything considered as having value.
7. The four Sunni schools concur on these dispositions being enforceable from a third of the estate, and the Imamiyyah differ among themselves. Most of their earlier fuqaha' considered it enforceable from the original estate, while most of the latter legists from a third. Those among them who favour its enforceability from a third are al-'Allamah al-Hilli, al-Shahid al-Awwal, al-Shahid al-Thani and the authors of al-Jawahir and al-Shara'i, in accordance with the tradition narrated by Abu Basir from Imam al-Sadiq (A):

للرجل عند موته ثلث ماله

A person is entitled to a third of his wealth at the time of his death,
as well as an authentic tradition narrated by Ibn Yaqtin:

للرجل عند موته الثلث والثلث كثير

A person is entitled to a third at the time of his death, and a third is a lot.
These traditions do not differentiate between a bequest and dispositions. According to a tradition narrated by 'Ali ibn 'Uqabah concerning a person freeing his slave, the slave will be freed to the extent of one-third.
Had the Imam said: بعد موته (after his death) instead of عند موته (at the time of his death), it would have been appropriate to take his words to mean a will.

8. Often al-'Allamah al-Hilli quotes al-Mughni verbatim et literatim, and relies on it to explain the views of the schools. It has become clear to me as a result of enquiry and research that scientific cooperation between Sunnis and Shi'is was much greater in the past than it is today. Al-'Allamah al-Hilli quotes in al-Tadhkirah the opinions of the four schools, the Zahiriyyah, as well as other Sunni schools, and Zayn al-Din al-'Amili, known as al-Shahid al-Thani, used to teach fiqh in accordance with five schools in Ba'labak (Lebanon) in 953/1546, apart from teaching in Damascus and at al-Azhar. Similarly, al-Shaykh 'Ali ibn 'Abd al-Al, known as al-Muhaqqiq al-Thani (d. 940/1533), taught in Syria and al-Azhar. If this proves anything, it proves the unbiased nature of the Imami 'ulama' and their pursuit of knowledge for knowledge's sake, in accordance with the tradition:

الحكمة ضالة المؤمن يأخذها أنّى وجدها

Wisdom is the lost property of a believer; he acquires it from wherever he finds it.

Similarly, it proves at the same time the unity of Islamic jurisprudence (usul al-fiqh) and its sources amongst all the schools.

9. Al-Sayyid Kazim al-Yazdi, Mulhaq Hashiyat al-Makasib.
10. The Imamiyyah legists differ as to whether 'adalah is a condition for a wasi. The prevalent (mashhur) view among them is that 'adalah is necessary, while researchers consider his being trustworthy and reliable as sufficient. There is a third opinion which says that he should not be a known fasiq. The second view is correct, keeping in mind the general nature of the proofs, which include 'adil and non-'adil persons, as well as the exclusion by these proofs of an untrustworthy person because his dispositions do not fulfill the testator's purpose and harm the legally disable beneficiaries.

Source URL:
https://www.al-islam.org/five-schools-islamic-law-muhammad-jawad-mughniyya/8-wasaya-will-and-endowments#comment-0