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Guidelines on Preparing a will and testament Islamically

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Answered by Shaykh Muhammad ibn Adam al-Kawthari

Can you please provide me with general guidelines that would help me prepare my last Will and testament according to Islamic law?

Answer:

In the name of Allah, Most Compassionate, Most Merciful,

Writing and preparing a Will is undoubtedly very important, especially in non-Muslim countries, insuring that upon death, one's wealth and assets are distributed according to Shariah.

There are a number of Islamic texts, both in the Qur'an and Sunnah, which point to the importance of Will-making, for example:

Sayyiduna Abd Allah ibn Umar (Allah be pleased with them both) narrates that the Messenger of Allah (Allah bless him & give him peace) said: "It is not befitting for a Muslim who has something to make a Will of, to remain for two nights without having one's last Will and testament written and kept ready with one." (Sahih al-Bukhari, no: 2587)

The narrator of this Hadith (Abd Allah ibn Umar ibn al-Khattab) stated after hearing this from the Messenger of Allah (Allah bless him & give him peace):

"I did not let even one night pass by except that my Will would be kept by me." (Musnad Ahmad, 2/4)

Making a Will becomes even more important in non-Muslim countries, such as the United Kingdom and US. The reason being is that, failing to leave a valid written Will can result in the law of the land deciding on how your estate is to be distributed, which obviously will not be in accordance with Shariah (Islamic law).

Therefore, it is essential that all Muslims leave a valid written Will. Those who have, as yet, not made a Will should haste and prepare a Will. Writing a Will is not only for old people, rather all those who have reached puberty should quickly get their Will prepared, for there is no guarantee of when one will die

Below are simple and brief guidelines with regards to preparing and writing a Will in the West:

The first and foremost aspect worth noticing here is that many Muslims are mistaken in believing that, writing a Will means distributing one's wealth and estate amongst the inheritors during one's lifetime.

This is incorrect, as making a Will does not mean one must divide one's wealth amongst the various inheritors in one's life; rather, one must merely stipulate in the Will that "upon my death, my executors will distribute my wealth according to Shariah." One may also state that this will be determined by a local Muslim scholar or Mufti, who will be contacted and appointed by my executors upon my death.

The reason behind this is that the inheritance portions have been determined and allotted by Allah Most High in the Qur'an. These portions vary according to who is alive at the time of one's death. Death with leaving parents behind will differ from passing away after the parents have passed away, in that the inheritance portions will be different in both cases.

As such, one cannot determine in one's lifetime as to how much percentage of one's wealth will be exactly allocated to each individual, for one is unaware who will be alive at the time of one's death. Even the death of one person can make a big difference in the division and distribution of the estate.

The beauty of Shariah is its simplicity and certainty. When you are writing your Islamic Will, you do not have to try and figure out which of your relatives will still be alive when you die in order to make sure that they will receive something. Whoever administers your estate will ascertain (in collaboration with a knowledgeable scholar) which of your relatives are still alive and what fixed shares they are automatically entitled to inherit by applying the criteria of Shariah.

Moreover, it is unlawful and invalid to make a bequest (Wasiyya) in favour of an individual who automatically is entitled to receiving a share of the estate, such as one's spouse, children and parents, etc. The Messenger of Allah (Allah bless him & give him peace) said in his historic sermon (khutba) of his farewell hajj (hajj al-Wada'): "Verily Allah has given each rightful person their right, thus there is no bequest in favour of an inheritor." (Sunan Tirmidhi, no: 2120, narrated by Sayyiduna Abu Umama al-Bahili)

The meaning of this Hadith is that Allah Almighty has already fixed and allotted the shares of those who are entitled to inherit from one's estate. As such, if one was to make a Will in their favour, one will be going against the shares fixed for them in the Qur'an and Sunnah.

However, if one wished to make a bequest/Will for a non-relative, or for a charity, then this would be allowed (and rewarded), but only up to a third of one's total wealth. The remaining two thirds will be left to be distributed amongst the relatives according to the fixed shares prescribed by Allah Most High. If one does not make a bequest of up to one third of the estate, then all of the estate will be divided between the surviving relatives. The Messenger of Allah (Allah bless him & give him peace) forbade from making a bequest of giving one's wealth in charity which is more than one third, and regarding a third also, he stated: "And a third is also more (although permissible)". (Sunan Tirmidhi, no: 2116)

The second point to remember here, which is very important, is that one must distinguish between a bequest/Will (wasiyya) and a gift (hiba). Many people fail to differentiate between the two, thus a grave error is committed.

What a person gives to another in one's lifetime is considered a "gift" whilst attributing the giving of something after one's death is a "bequest or Will (Wasiyya)". For example, if I give my house to a friend whilst I am alive, then that will be a gift, but if I was to say that my friend will take ownership of my house after I pass away, then that is a bequest.

At times, one would like to distribute one's estate amongst the children whilst one is alive. This will be valid provided it is given as a gift and not a bequest, because to make a bequest (or Will) for a relative who already qualifies to inherit is invalid, as mentioned previously. As such, if one desires to distribute the estate amongst the children whilst one is alive, then it does not have to be in accordance with the Shariah laws of inheritance, for it is merely a gift.

However, the question arises as to whether it is necessary to distribute the estate equally between the children? The answer to this is that it is permissible to give the male children twofold of that given to the female children, as it would have been distributed as inheritance. It is also permissible to give all the children, male and female, equal shares. However, to give less than this to the daughters or to completely deprive them of any share, or to be unjust in the distribution of the wealth among the sons, without a valid Shar'i reason, is considered to be blameworthy and sinful. One will be sinful for favouring one child over the other, although the gift will stand as valid.

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Yes, if there is an Islamically valid reason, such as one child being extremely disobedient or involved in open sinning, it would be permitted to give him/her less. (See: Radd al-Muhtar)

A point worth noting here is that Islamically a gift is fully valid and complete when the one to whom the gift is given, takes full ownership and possession of the item. Merely registering it on one's name is of no consequence in Shariah, hence the gift will be considered invalid.

The possession in houses and properties will be established by the giving of keys, removing of furniture, and leaving no obstacles for the one whom the gift is given to come and reside in the property. Many times it is observed that the father only verbally says that this is your house, but he himself resides in the house and it is considered to be his. This will not be a valid gift. A gift is such that if the son was to say to the father: you must move out, he moves out without any hesitation, and it is completely understood to be the son's house.

Thirdly, there is the issue of the husband and wife. If the house is solely owned by the husband, then upon his death, it would be distributed among all the inheritors. Many times it is observed that years pass by after the husband's death and the inheritance is not distributed. The deceased's wife and some children keep residing in the house without even thinking about distributing it. This is a grave sin committed by all those who overlook this great injunction of Shariah.

If the house was jointly owned by the couple, then in the event of one of the spouse's death, half of the house will remain in the ownership of the other spouse, and the remaining half will be distributed. Thus, it would be wise for the couple to have joint ownership of the house. This also should be made clear to all the children, for being negligent in this regard brings about disputes and problems.

Note that if the inheritors give their consent in their mother or father residing in the house, then this is permissible. However, what is necessary is that the shares are distributed, and then they may give their consent in allowing their mother or father to reside. However, one must be extremely cautious here, for all the inheritors must consent to this from their heart and must not be pressurised into it. If even one inheritor disagrees, his/her share will have to be given to him/her.

The fourth point to note with regards to inheritance is that at times the deceased makes a unlawful and invalid bequest, such as saying that, my eldest son will take such and such property, the other such and such, my daughter will take the house, etc.

In this case, it will be unlawful (Haram) and a grave sin for the relatives to distribute the inheritance according to the bequest made by the deceased. The estate must be distributed in accordance with the Qur'an and Sunnah.

Finally, one must make sure that one's Will meets the requirements of the law of the land, for failing to do this may well render one's Will invalid. So in order to ensure that one's assets are distributed in accordance with the Shariah after one's death, one must write a Will, and that "Will" must comply with the requirements of the country one is residing in. Therefore, it is advisable that one seeks the advice of an expert practicing Muslim solicitor.

Having understood the above general guidelines regarding Will-making, let us now look at how an Islamic Will is written. Normally when making a Will, one would stipulate the following:

- Revoking of all previous Wills.
- Naming the executors of the Will.
- Payment of funeral and burial expenses.
- Payment of all debts connected to the servants of Allah: After one's death, paying off one's debts is given primary consideration. Thus, one's leftover wealth will first be utilized in repaying the debts, and then the remainder, if any, will be distributed amongst the inheritors according to the Shariah. Note that this is with regards to debts payable to the servants of Allah (and not with regards to liabilities due by Shariah, such as unpaid Zakat, etc). Also, there is no condition here of it being from only one third of one's wealth.
- Payment of any bequest (Wasiyyah): This refers to any religious liabilities, such as unpaid Zakat, Fidyah for Salat, etc, and also anything that one would like to give in charity. However, the condition here is that this is only permissible from one third of one's wealth.

It is worth remembering here that along with one's written Will, one should have a separate document stipulating the number of unperformed prayers, missed fasts, unpaid Zakat, unperformed Hajj, any other religious obligations and debts payable to the servants of Allah.

One must strive in accomplishing these obligations in one's life, and make the necessary amendments to the document whenever an obligation is fulfilled. For example: One had 500 unperformed prayers. In such a case one should stipulate this in the document. Thereafter, whenever, a prayer is made up, it should be deducted from the total of 500. This "important" document should be attached with the Will in order to let the relatives know of one's obligations and liabilities after one's death.

- Distribution of the remaining two thirds of one's estate (or full, if one does not include no. 5) among the inheritors in accordance with Sunni Islamic law, and in consultation with a qualified local scholar or Mufti.
- Signing of the document by both the Will-maker and the relevant witnesses.

Finally, the responsibility of the relatives is that they haste in distributing the estate of the deceased as quick as humanely possible. Being negligent in this regard will be highly sinful. All the inheritors will be jointly responsible for this distribution.

Also, when totalling the deceased's assets, the inheritors must include every big and small item left behind by the deceased at the time he/she passed away, which includes Properties, house, car, financial instruments, cash, gold, silver, clothes, furniture, etc.

At times, people overlook small items and give them away in charity without the prior consent of all the inheritors, which is unlawful (haram). The permission and full consent of all the inheritors must be sought before giving away any item to anybody.

I hope the above has been helpful in simplifying the laws governing the great responsibility of Will-making and inheritance. May Allah Almighty forgive our shortcomings and keep us steadfast on his Deen, Ameen.

And Allah knows best.

Muhammad ibn Adam al-Kawthari
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