

FATAWA INHERITANCE 2016

From: Douglas

Sent: Monday, February 15, 2016

Question: Distribution of wealth of deceased leaving nephews, nieces, and uncles.

Assalamu Alaykum Dr. Monzer Kahf below is an Islamic inheritance problem from my community so with the guidance of Islamic inheritance law books I calculated it using the books my question to you Dr. Kahf is based on the statements given were my calculations on the division of the amount of the inheritance correct? And if I committed a mistake in the calculation can you please provide the correct answer to the amount that should be given, your assistance in the matter will be highly appreciated Jazaka Allahu khyran

Bismillah - A man owns (two thirds) of an estate, while the other (one third) of it is owned between his (deceased) Sister's Children (4 sons and one daughter). They are his nephews & niece.

This man died recently. He has no Parents alive, No Siblings alive and no Wife and no Children.

- He is survived by the 4 nephews and 1 niece from his (deceased) full Sister mentioned above, and also by 1 nephew from his other (deceased) full Sister. (Total of 5 nephews and 1 niece from his two deceased sisters).

- He also has two Uncles alive (they are brothers of his (deceased) Mother).

QUESTION: Is his Estate divided up by his nephews and nieces from his two deceased sisters, or are his Uncles counted heirs too? Please kindly inform us who this Man's heirs are and how it should be divided?

Jazaka Allahu Khair.

Answer: Firstly, in regards to UNCLES & AUNTS (Father's/Mother's Brothers & Sisters) Uncles and Aunts are ONLY entitled in the absence of GRANDPARENTS. This means that they will receive shares ONLY if there are NO Parents AND Grandparents because Grandparents do not inherit when the Parents are living. They will also NOT inherit if the children (or children's children) of the deceased are living. Proportions here are also in the ratio of 2:1 for Male/Female.

Secondly in regards to NEPHEWS & NIECES (Children of Brothers/Sisters) Nephews and Nieces are ONLY entitled in the absence of Brothers and Sisters. This means that they take the shares of the Brothers/Sisters of the deceased in their absence. Hence a Nephew/Niece will receive what his/her parent (Brother/Sister of the deceased) would have received if he/she was alive. They will also NOT inherit if the children (or children's children) of the deceased are living. Proportions here are also 2:1

So 5 nephews 2 uncles= 7 males in question

7 males x 2 shares each =14 +1 niece= 15 shares

2/3rds divided 15 ways is 0.04 or 1/25th. 1/25 + 1/25 is 2/25ths or you could say the males get two shares of 1/25th & females get one share of 1/25th.

In short brother the males in question would get 2/25ths

And the female in question gets 1/25th

My Answer:

Bismillah al Rahman al Rahim

Alhamdu Lillahi Rabb al Alamin, wa al Salatu wa al Salamu ala Sayyidina Muhammad, wa ala Aalihi wa Sahbihi Ajma'in

Dear Br. Douglas

Assalamu Alaykum wa Rahmatu Allahi wa Barakatuh

Kindly realize that the Qur'an mentions nothing on any inheritance distribution to Dhawi al Arham (kens though a womb other than siblings). This case is one of them.

Accordingly, the issue is highly controversial and never settled. The schools of Fiqh have a lot of variations on this. The Maliki school does not accept to give them any inheritance (we are always talking on the assumption that there is no Wasiyyah as in this case). The Hanafi gives a lot of details and assumptions by dividing them in five classes and considering existence of a higher class preventing anyone from a lower class from taking any share in the inheritance. There are also views that consider them all equal and views that give them the share of the dead person who connects them to the deceased (e.g., uncle takes share of mother and nephew takes share of sister) and views that consider the degree of relation (e.g., uncle is a ken of third degree [deceased-mother-grandparent-uncle] and nephew is also of third degree [deceased-parent-sister-nephew]). Also there are views that consider male/female double and views that take male/female equal.

My opinion about this special case is: 6 children of sisters and 2 uncles = 8. Divide the property owned by the deceased in 8 equal shares and the share of each is $1/8 \times 2/3 = 1/12$ of the total property.

My argument:

1. They all are of same relation degree to the deceased.
2. Taking share of connectors ends up giving the sole son of one sister $1/3$ alone and dividing another $1/3$ to the other 4 nephews and niece. This creates injustice among persons who are equally related to the deceased.
3. The principle of male female seems to me as follows: for very close kens the doubling principle is applied as in case of children, parents, spouses and siblings. But for farther kens equality is established by the Qur'an in case of sibling of mother side. Avoiding equality requires strong evidence for which simply analogy to children, sibling and spouses is not sufficient.
4. Applying the system of classes would give the entire bequest to the nephews and niece and leaves nothing to uncles although uncles are higher in rank (not in degree) than nephews because they are of the rank of mother while nephews are of rank of children.

I do not agree with your ruling on this matter although I am close to it.

Wa Allahu A'lam

Wa Alhamdu Lillahi Rabb al Alamin

Wassalam

Prof. Dr. Monzer Kahf

From: Rad

Sent: Monday, January 04, 2016

Location: United States

Question: Inheritance and shares

As-Salamu `Alaykum

Brother Monzer,

I have some questions regarding inheritance which I was hoping you could help me with. I am an adult male, married, with a minor son and minor daughter, and I am expecting a third child soon. I have one adult brother and a sister. Both my parents are alive however my grandparents on both my mother and fathers side are deceased. I have four questions

regarding inheritance (the first three are related):

1) My parents are planning to sell shares of their house (which they jointly own) to their children (and all children are okay with this). Each share would represent a percentage of deferred ownership in the house. It would be stipulated that only if the property is sold or both parents pass away (see point two below), then such shares would be distributed representing each child's ownership, and whatever is left over would be distributed according to Islamic Law to all three children. Is this okay?

There is no deferred ownership in Shari'ah (and I think in American laws too) as a sale contract transfers ownership immediately while delivery or payment may be deferred (not both). Delivery cannot be deferred to an undetermined date (e.g., to date of death or sale to outsiders). Keeping in mind my notes above, a better arrangement may be sale with immediate payment and delivery and rental contract for one dollar per year for 50 or 100 years (assuming it is not possible that any of the parents will survive that long) with the following two conditions in the lease contract: 1) the contract terminates at the death of last-to-die parent, and 2) if parents decide to sell their share in the house the lessor agrees to either buy it or sell own share with them so that lessor does not hinder their desire to sell. Rental contract is binding and these conditions in it are permissible. The second condition may also be in the sale of shares to children instead of the lease contract.

2) If one parent passes away, then all their children would agree (now) to forgo their inheritance and their share would go to the other parent. All children would agree (now) that once both parents pass away, only then would the inheritance be distributed to the children according to Islamic Law. Is this okay?

First this is vague: do they give away to the surviving parent their purchased shares or their potential share of inheritance of the property of the deceased parent? If their purchased shares are what goes to the surviving parent, this is then a promise from an owner to give a gift to the surviving parent at the time of the death of the other parent. It remains a promise that may or may not be fulfilled (a promise to give a gift is not binding and it is up to the promisor to fulfill it, also a gift does not become a contract unless coupled by actual delivery).

My mind goes to the second option that you are giving a promise to abandon the share deserved by inheritance from the deceased parent to the surviving one. This cannot be done it is also considered a mere non-binding promise. It cannot be binding because of the Shari'ah rule that stipulate that "One cannot dispose of a thing before one owns it." in other words; any of the three of you may back up on this promise. Of course if the three of you fulfill it then (at time of death of first parent) it becomes 'fait complis' or done deal.

3) Suppose I own 25% of shares in the house and I pass away. Since I purchased the shares with the above deferred stipulation, will my heirs be required to wait until my parents sell the house or pass away before my shares are distributed per Islamic Law or can my heirs demand immediate payment? (It is understood in this case that if my parents sell the house, then they would also be included as an heir, as they would be alive).

This point of sell the house is irrelevant because whether they decide to sell or not they have a share in your estate as the question says if you die before your parents.

The answer is: yes of course your heirs become owners immediately by the incidence of your death and each one of them have a right to immediately dispose of own property the way she/he likes, even before division and assignment of specific part to each heir. Remember also that whatever promises you make, binding or not, do not create a commitment on your heirs because one cannot commit another or force him/her to do what they do not like to do.

If you have a rental contract, it remains valid because a rental contract is binding for its period but that does not mean that the heirs cannot dispose. For instance, they can sell their share to anyone and the new owner deserves the rent (1 Dollar a year) but cannot vacate the lessee because a lease contract is binding for all its period.

4) This is not related to the previous three questions: If I purchase a property from my parents (the ownership would be transferred into my name at the time of purchase) with the stipulation that they must be allowed to live in it as long as they are alive and it cannot be sold as long as they are alive (unless they agree). If I pass away while my parents are still alive, would my heirs have the right to demand the property be sold so they can receive their share immediately? Or would they be required to wait until my parents pass away?

Is this any different from your question 3? I already answered it!

Thank you for your help!

My Answer:

Bismillah al Rahman al Rahim

Alhamdu Lillahi Rabb al Alamin, wa al Salatu wa al Salamu ala Sayyidina Muhammad, wa ala Aalihi wa Sahbihi Ajma'in

Dear Br. Rad

Assalamu Alaykum wa Rahmatu Allahi wa Barakatuh

Before asking you to see below each question for my answers I like to mention two important points, or may be three;

1. You did not make any reference to the intention of this proposed arrangement (and btw you also did not mention your name). If the intention is to avoid hassle and taxes of succession when the parents die, this may not be the best arrangement.
2. If the intention is to provide cash to the parents for their expenses, children are required to support their parents living expense as they support their own selves, spouses and children. This support the three of you are required to do without buying their property and it is awkward not to give money unless against buying their residence house. It makes avoidance of this requirement to give them money for buying their own residence which they live in. This includes the female if she has own adequate wealth or income.
3. If the intention is to avoid the inheritance rule (i.e., the purchase is for a nominal not real price) of 2 to 1 in distributing the estate between male and female children. This is Haram and sinful.

We come now to the legality from Shari'ah point of view of the proposed arrangement for it please see below each point you raised:

Wa Allahu A'lam

Wa Alhamdu Lillahi Rabb al Alamin

Wassalam

Prof. Dr. Monzer Kahf

From: Rad

Sent: Monday, January 04, 2016

As-Salamu `Alaykum

Thank you Brother Monzer for your time in providing such a detailed reply. The information is most helpful.

The intention of this arrangement is such that both parents and siblings would benefit: My parents would have their mortgage paid off faster, and their children (including myself who

lives with my parents) would be able to get ownership into the house (real estate is very expensive in Canada these days). I understand that it is my responsibility to help my parents regardless.

In your reply to point 1, you had mentioned "There is deferred ownership in Shari'ah (and I think in American laws too) as a sale contract transfers ownership immediately while delivery or payment may be deferred (not both)." I believe you meant to say "There is no deferred ownership in Shari'ah" is this correct?

You are absolutely correct; this is a gross typo. There definitely is a "no"

I was discussing this with my siblings; that there is no deferred ownership in Shari'ah and one of them asked why this is? Would you be able to advise why? Is it not possible to pay for something in full (or partially) and assume ownership of it at a later time?

Apparently this does not work in the law, any law including Shari'ah. Ownership is an exclusive authority over a thing, how can this authority be deferred? You either have it or do not have it. Of course authority also implies liability, who should be liable for the property? And what will happen if the property does not exist for any reason by the deferred date?

Also if we do purchase shares and transfer ownership of those shares immediately the same sibling mentioned we could do this privately, within our family in a private written contract and we don't have to formally transfer ownership of such shares. The idea would be that we would have a private contract listing how many shares each person owns (though formally the house ownership would remain in my parent's name). Then in their Will it will be specified how the shares are to be allocated (the house would be sold when the Will is executed and each child would receive money proportionate to the amount of shares held). Is it allowable in Shari'ah to do this (together with the rental contract you specified), or do we need to actually formally transfer ownership of such shares at the time of purchase pursuant to the law of the land (i.e. setup a Tenants-in-Common arrangement where it is formally specified how much percentage of the house each person owns, each share owner would pay the applicable land transfer taxes, the applicable capital gains taxes, etc.)?

You can do any gentleman agreement between yourselves but this will not be binding in real estate in any country, Canada and US are included, as ownership of real estate requires recording it formally, and Shari'ah has no objection to this requirement.

Paying the mortgage of the parents' house faster is a good idea, it saves on the interest and its practice as the rule is: whenever you do something under necessity you should do the least possible of it.

Also having a gentleman agreement is not bad at all provided you are sure that everybody will honor it.

Putting it in the last will of the parents is also possible and I suggest the following text for it and the last will should be witnessed by the three of you: we the parent have sold ---percent of our house (with full description) to our child and we received its price the amount of so he/she in fact owns that % of the house and we ordain and will that when it is sold this percentage of its net price after payment of expenses and any dues should be given to him/her. This should be repeated for each purchasing child and at the end of this section of the last will there must be a declaration by the parents that as of the date of signing this last will they only own ...% of this house. I do not see any Shari'ah violation in this arrangement and it seems most likely to be binding from legal point of view (check with a local lawyer on this)

(I think that it would have to be done formally, as one would not be able to do a rental contract as you suggested for the space their shares represent unless they actually own the shares

formally per Shari'ah for the rental contract to be valid and binding on all heirs (e.g. my children), correct?)

yes

I see the last will arrangement as first choice if it is fully binding according to your provincial laws, with the text of sale within it and witnessed and recognized by the three of you. Next comes formal sale (usually within family it does not need mention of a price and is not subject to tax in the US) and formal rent as suggested in my first email. This is also binding on all future comers.

Thank you again for your time and help!

My Answer:

Bismillah al Rahman al Rahim

Alhamdu Lillahi Rabb al Alamin, wa al Salatu wa al Salamu ala Sayyidina Muhammad, wa ala Aalihi wa Sahbihi Ajma'in

Dear Br.

Assalamu Alaykum wa Rahmatu Allahi wa Barakatuh

Please see below each point for my answers.

Wa Allahu A'lam

Wa Alhamdu Lillahi Rabb al Alamin

Wassalam

Prof. Dr. Monzer Kahf

From: Fazli

Sent: Thursday, April 09, 2015

Question: Heirs Exclusion

Salaams!

Does the paternal uncle's son exclude the son of the sister of the deceased person? If so, please explain why.

Regards

Fazli

My Answer:

Bismillah al Rahman al Rahim

Alhamdu Lillahi Rabb al Alamin, wa al Salatu wa al Salamu ala Sayyidina Muhammad, wa ala Aalihi wa Sahbihi Ajma'in

Dear Br. Fazli

Assalamu Alaykum wa Rahmatu Allahi wa Barakatuh

The rule is: any person who reaches the deceased through a womb is not considered an heir and he/she goes to the category of Thawi al Arham who do not inherit except when there are no male or female heirs at all.

Apply this rule: a sister's son is not an heir; a parental cousin is an heir and an Asabah who inherits all if there are no closer heirs.

Wa Allahu A'lam

Wa Alhamdu Lillahi Rabb al Alamin

Wassalam

Prof. Dr. Monzer Kahf

From: TUAHA

Sent: Tuesday, May 17, 2016

Subject: Back up on my gift giving

Assalamu O Alaykum

Dr. Monzer, I want to ask you a question regarding the matter of inheritance. We are seven brothers and sisters. When my parents were alive I told them that I will give my share of inheritance to one of my brothers. Now my father is dead for 17 years and my mother is dead for 7 years. My brother is still utilizing that property and fare from the rented shops. The brother to whom I intended to give my share is not worse off and on the other hand, I still live in a rented house. Now I want to ask you:

1- Can I still ask for my share of inheritance?

2- I have read somewhere that I can only give 1/3 of my share to my brother and rest of my share belongs to my children.

Sir, kindly gives us a solution to this problem in the light of Quran and Sunnah as soon as possible.

Thank You.

My Answer:

Bismillah al Rahman al Rahim

Alhamdu Lillahi Rabb al Alamin, wa al Salatu wa al Salamu ala Sayyidina Muhammad, wa ala Aalihi wa Sahbihi Ajma'in

Dear Br. Tuaha

Assalamu Alaykum wa Rahmatu Allahi wa Barakatuh

I believe that your silence for 17 years after the death of your father and for 7 years after the death of your mother is an apparent pointer that you really intended to give that property to brothers. I do not see any point in reversing this after all that period. A gift is confirmed by actual delivery/possession by the recipient and it becomes not reversible.

For the second point, there is no ground for it. A person can give anything while alive. And no children or others have rights to limit this right. The statement you mentioned about a third and 2/3 has no root in Shari'ah.

Wa Allahu A'lam

Wa Alhamdu Lillahi Rabb al Alamin

Wassalam

Prof. Dr. Monzer Kahf

From: TUAHA

Sent: Wednesday, May 18, 2016

Thank you so much for your precious time and quick reply. There is one other thing that the distribution of shares has not been made yet among brothers and sisters due to unavailability. Within few weeks the property will be sold and the amount will be distributed according to the rule of inheritance. When my parents were alive I told them that I don't want my share but now I want my share. So tell me is it right or wrong in the light of Quran and Sunnah.

Thank you so much for your guidance.

My Answer:

Bismillah al Rahman al Rahim

Alhamdu Lillahi Rabb al Alamin, wa al Salatu wa al Salamu ala Sayyidina Muhammad, wa ala Aalihi wa Sahbihi Ajma'in

Dear Br. Tuaha

Assalamu Alaykum wa Rahmatu Allahi wa Barakatuh

The detailed answer is a little complex: on one hand a gift before ownership is not valid; this means that the gift you made during the life of parent is not valid. But on the other hand, once you became owner (exactly at the point of death of your father 17 years ago) you remain silent on your brother taking your share and using it as an owner. This is the point at which you actually gave it as a gift... now after that long you want to take it back after it has actually be handed to him. the third point that you should remember that in Shari'ah you owned the inherited share at the point of death of the father not at the point of distribution or division of the property whether through sale and cash distribution or through physical division. The today's sale and distribution does not change the fact that you established 17 years ago by leaving the property to the brother as a de-facto gift in fulfillment of that promise.

In my opinion, you have no right now and if your brother wants to give you anything now it is of course permissible.

Wa Allahu A'lam

Wa Alhamdu Lillahi Rabb al Alamin

Wassalam

Prof. Dr. Monzer Kahf

From: Shakeel

Sent: Monday, October 17, 2016

Subject: share distribution in inheritance

Assalamu Alykum,

I'll appreciate if you could please answer this question. Recently, my cousin passed away, leaving behind mother, 2 adult brothers, a widow, one 19 years old son and one 14 years old daughter. I need to know:

-How the distribution of the deceased's assets should be done?

-Who will receive the shares of the deceased after the deceased's mother passes away?

Jazaka Allahu Khairan

My Answer:

Bismillah al Rahman al Rahim

Alhamdu Lillahi Rabb al Alamin, wa al Salatu wa al Salamu ala Sayyidina Muhammad, wa ala Aalihi wa Sahbihi Ajma'in

Dear Br. Shakeel

Assalamu Alaykum wa Rahmatu Allahi wa Barakatuh

These are two questions:

The net estate (after paying any expenses, debts or any Wasiyyah he may have left which should not exceed 13 of the remainder) of your deceased cousin shall be distributed as follows: 1/6 to mother, 1/8 to widow, (5 and 2/3)/24 to his daughter and (11 and 1/3)/ 24 to his son, nothing to brothers. This is directly mentioned in the Qur'an Verses 10 and 11 of Surah 4.

When the mother dies her net estate goes as follows: 1/3 to each of her sons, 1/9 to her granddaughter and 2/9 to her grandson. This include the mandatory Wasiyyah to grandchildren from deceased son which is a Fiqhi position adopted by all Shari'ah-derived laws of many Arab countries. Please see the schedule of Mawarith that is on my website www.kahf.net.

Wa Allahu A'lam

Wa Alhamdu Lillahi Rabb al Alamin

Wassalam

Prof. Dr. Monzer Kahf

From: Shakeel

Sent: Tuesday, October 18, 2016

Thank you. Can the deceased's mother leave her 1/6 share to benefit the widow and her two grandchildren?

My Answer:

Bismillah al Rahman al Rahim

Alhamdu Lillahi Rabb al Alamin, wa al Salatu wa al Salamu ala Sayyidina Muhammad, wa ala Aalihi wa Sahbihi Ajma'in

Dear Br. Shakeel

Assalamu Alaykum wa Rahmatu Allahi wa Barakatuh

You should not make the mistake of attempting to change the share in inheritance, please look at the warning in verses 4: 11, 12 and 13. The grand children have a share and the 1/6 becomes irrelevant.

Now the question becomes: Can the grandmother give her widowed daughter in law and her grandchildren? The answer is two ways; 1) in her life time she can give whatever she likes, the limit is all that she owns and to whom she pleases. But after death she can also give to anyone except heirs and the limit is one third of net estate. The widow is not an heir of the grandmother. The two grandchildren take by virtue of mandatory Wasiyyah not by virtue of the inheritance. Both may be included in the Wasiyyah provided the total of mandatory and non-mandatory Wasiyyah does not exceed 1/3 of the net.

If we add this to the previous question, we find the one third is exhausted by the mandatory Wasiyyah, nothing is left out of the one third maximum and no giving can be done beyond this limit after death.

Wa Allahu A'lam

Wa Alhamdu Lillahi Rabb al Alamin

Wassalam

Prof. Dr. Monzer Kahf

From: Stephanie

Sent: Tuesday, October 18, 2016

Subject: Questions about Islamic estate planning

Salaam Alaykum Dr. Kahf,

I am reaching out to you because I am interested in learning more about Islamic estate planning in the United States, and I don't know of many people working in this area. I am an attorney in Massachusetts. One of my clients recently gave me your draft will and asked me to review it to make sure it complies with Massachusetts law.

I would very much like to learn more about using Islamic principles in estate planning in the US, and I have a few questions for you. Would you have time to speak briefly on the phone? Or would it be possible for me to email you the questions?

Thank you very much!

Stephanie

My Answer:

Dear Ms. Stephanie,

Thank you for your kind email and for the interest in Islamic estate planning. It just happens that I have a public lecture tonight (my time in Qatar) on the subject, if you like to connect with us on Skype.

It is at 7:15 Makkah time (7 hours east of EST).

However, yes you may call me any day, between 7:30 and 9:30 pm Makkah time (except for today) at +974 4479 1368 but the email is always better for me.

Kindest Regards,
Prof. Dr. Monzer Kahf

From: Stephanie

Sent: Wednesday, October 19, 2016

Salaam Dr. Kahf,

I am so sorry I missed the lecture. It sounds like a great opportunity. Please let me know if you plan to give another one, InShaAllah.

Here are my questions. I realize there are a lot of them. Please only answer to the extent it is convenient for you.

- How do you deal with things that are not included in the estate under US law (real estate, accounts with beneficiaries, personal property like jewelry)? Should these also be distributed according to the fraction system?

Personal properties and real estate are subject to the inheritance distribution like any other property. Accounts with beneficiaries, if they means assigned to such beneficiaries they belong to them otherwise I need exact meaning and implication of them.

- What happens to jointly owned property? For example, let's say a husband and wife own a house together. If the husband dies first, then the house becomes the wife's property. When she dies, the house will be sold, and the money will go to the wife's relatives. Is anything owed to the husband's relatives for the share of the house he owned? When would that be due?

In the Islamic last will document there is a clear close of dealing with joint properties. WE CONSIDER THEM AS OWNED HALF/HALF UNLESS THERE IS CLEAR EVIDENCE OTHERWISE. Clear evidence here means agreement or consent from the other party that it is not owned jointly. We consider that whoever paid more to acquire the joint property gave a gift in lifetime to the other joint owner. In case of death of one spouse, under joint ownership, the surviving one owns already one half and she/he inherits a share of the remaining one half., other relatives (mostly children, parents, and sibling if there are no children and no father) of the deceased inherit immediately their shares too, they do not wait until the death of the surviving joint spouse.

- To your knowledge, has anyone ever challenged an Islamic will in a U.S. court? If so, what was the outcome?

I don't know if any challenge happens, but I doubt it may succeed because of the wide freedom in last wills and living trusts, can you make some guesses?

- What sources (preferably in English) do you recommend for me to learn more? Are there any books or articles?

Yes there are some books that are general on Islamic law, they mention inheritance.

- Do you know anyone else who is working on these issues in the US that I might be able to speak with?

There are a few who posted on the internet some forms of last wills in US and in South Africa, check them out.

Many, many thanks!

Stephanie

My Answer:

Bismillah al Rahman al Rahim

Alhamdu Lillahi Rabb al Alamin, wa al Salatu wa al Salamu ala Sayyidina Muhammad, wa ala Aalihi wa Sahbihi Ajma'in

Dear Sr. Stephanie

Assalamu Alaykum wa Rahmatu Allahi wa Barakatuh

Please see my answers below your points

Wa Allahu A'lam

Wa Alhamdu Lillahi Rabb al Alamin

Wassalam

Prof. Dr. Monzer Kahf

From: Stephanie

Sent: Monday, October 24, 2016

Wa Alaykum salaam Dr. Kahf,

Thank you again for your responses! I wrote back in blue, below.

So it seems to me like people can try their best to specify their wishes in an Islamic will. If that's their intent and they made a good effort to do it, but something different happens after their death due to state law or some other factor, isn't it the intention that counts?

I am curious to see what a court would do with a challenge. In Massachusetts, the law provides that under certain circumstances, a spouse of a decedent can petition the court for an additional amount of money. I think it's unlikely that a family member would challenge it in that way, though.

Do you suggest any close to avoid that?

For spouse the text takes consent of the other spouse that his/her extra share (that may be given by state law) is actually bought for a payment.

I don't know of any way to deal with it in the estate planning document itself. I think, but am not 100% sure, that the couple could put text in a pre-nuptial or post-nuptial agreement stating that they are waiving their right to petition for that amount of money.

Also, we have a situation that is dealt with in the document: if an heir, who would financially be responsible for the living expenses of a minor or adult (children for their widowed or divorced mother in case she needs their help) the text says that the trustee has right to withhold the share of such heir until the trustee is satisfied that the heir is fulfilling his Shari'ah responsibility toward that person.

I see what you are saying - so the mother would get money through another heir. Unfortunately, that doesn't affect the spouse's right to petition the court directly under the state law, for more money paid from the estate. The state law would also allow a husband to petition for money from his deceased wife's estate, even if no other heir was obligated to provide for him.

A court may have more trouble with the provision about non-Muslim relatives. Let's say a family considers that one of its sons is not Muslim and therefore doesn't want to distribute his share, but that son goes to court and claims that he is Muslim. I do not believe an American court would get involved in determining whether or not a person is Muslim. I think it's more

likely that they would grant the son his share, unless the will specifies his name and states he's intentionally disinherited.

Can this be solved by giving uncontestable authority to the trustee or executor?

No, the potential heirs would still have the ability to challenge the disposition of the estate.

Also, I think the provision about custody of minor children, should the father die and the mother gets remarried, is problematic under US law. Both parental rights and the right to be married are fundamental under US law. I do not think a court would honor any attempt to disavow those rights in the will of a deceased father.

The Shari'ah position here is important. It is based on the child right. A child has a right to be protected from being under a stranger man to him. Husband of mother is not a father and we know the many cases of abuse in this regard. Custody goes to her mother so that the child remains close to his mother too but not under a stranger man. Can we solve it by a prior consent from the mother taken in the document itself?

I don't think the mother could sign any document in advance that would affect custody. I think she would have to take action at the time of giving up parental rights, before she gets remarried. So that could be a legal transfer of custody to another person, or it could just be sending her child to live with someone else.

Is there any difference of opinion on this? Being a mother myself, I cannot imagine ever sending my baby away from me if anything happened to my husband! It would break my heart. Also, my mother lives far from me and she would not be able to take care of a young child. InShaAllah it will not happen.

Again, I really appreciate you sharing this knowledge. May Allah reward you and bless you and your family.

Sincerely,

Stephanie

My Answer:

Dear Sr. Stephanie

Assalamu Alaykum wa Rahmatu Allahi wa Barakatuh

It is nice chatting with you. The comments you put down are valuable, can you think of ways to solve these issues. As you notice, all of them are mandatory. Please help suggesting improvements in the text to avoid any violation of Shari'ah. Of in most cases we may rely on the religiosity of persons involved to do that but also we need air-proof texts as much as possible.

For child custody, please notice that (I repeat) it is the child care that is given priority by Shari'ah, not the parental rights. The question is that: is it fair to the child to be under a man to whom the child is, in fact not related at all, with emphasis on at all? of course there are exceptions such as when the rest of the family are not Muslim such as the case of the widow with children who became one of the Wives of the Prophet, pbuh, Umm Salamah, or when the widow (in fact same applies in case of divorce too) marries a relative of her deceased husband, as this man is likely to feel connection with the child or when a competent (in Islamic sense) court determines that this is to the the best interest of the child. (I know a case of divorce of a Muslim couple where she is assigned by an American court to his married mother under her new husband and she ended up depriving the child from seeing his father, who is a lot more moral and religious than she is, and falsely creating an environment for the child to even dislike his father). I can understand that we may sometimes tend to think from another angle, the angle of the parental rights but I believe that child's right is much more at stake here.

Best Regards,

Wassalam
Prof. Dr. Monzer Kahf
