

Chapter 3

Estate of Muslims

Chapter Objectives

On completion of this chapter you should have a basic knowledge on:

- Islamic Law Principles Applicable to Estate Planning
- Wills as Applicable to Muslims
- The Distribution of Estates of Muslims
- Estate Planning Processes for Muslims

Chapter 3

Estate of Muslims

Introduction

Islamic law principles govern the distribution of the estate of a Muslim upon his death. These principles are generally universal in nature but their application may vary in different countries. In Malaysia too, the rules that regulate estate distribution are governed by laws applicable in the respective states and are also influenced by local customs. For the purpose of this course, we shall focus on the main common principles practiced so that we may understand them for the purposes of advising Muslims on estate planning.

It has been stated earlier and it must be emphasised again, that the probate and administration process in this country is common to both non-muslims and Muslims. (Remember the first step, when someone “takes charge” – see Chapter One). It is only in the distribution of the estate (the “second step”) that the rules differ between non-Muslims and Muslims. Thus, the Probate and Administration Act 1959, The Small Estate (Distribution) Act 1955 and the relevant provisions of the Public Trust Corporation Act 1995 apply to Muslims as well. For example, if a Muslim person passes away intestate, an application for Letters of Administration to the High Court must be made before the estate can be administered and eventually distributed to the beneficiaries. Let us now understand the main principles that regulate the distribution of the estate of a Muslims.

Distribution of Estate of Muslims – the Basic Principles

- i) In Malaysia, the Islamic law principles that govern the distribution of a deceased's estate are those that are in accordance with the **Shafi** school. The **hukum Faraid** refers to the rules that govern the Islamic law of inheritance.
- ii) Only the assets owned by a Muslim **at the time** of his **death** are subject to the hukum Faraid. Therefore outright-gifts made by a Muslim during his life-time whereby he no longer retains any legal or beneficial interest, are not subject these rules.
- iii) **Only Muslims** are entitled to inherit from the estate of a Muslim. Thus, the legal heirs must be Muslims at the time of the death of the deceased to have the right to benefit from the estate.
- iv) The **order of priority** of payments out of the estate of the deceased must be as follows:

- 1) All reasonable expenses incurred for the deceased, including funeral and burial expenses.
 - 2) All debts owed by the deceased.
 - 3) "Valid dispositions" which are within limits.
 - 4) Distribution to "legal heirs" (after the payment of 'common assets' or harta sepencarian to spouses).
- v) In some states of Malaysia, **Malay Customary** or **Adat Laws** are the source of rules that influence the inheritance of Ancestral assets. In the state of Negeri Sembilan, for example, immoveable assets are subject to the **Adat Pepatih** rules and female members of the clan inherit the ancestral assets and hold it in trust for the tribe.

Wills for Muslims

We have seen earlier that Muslims may give away one-third or less of the estate to "outsiders" or non legal heirs. What do they have to do to give away this portion of their estate? A Muslim person must have made some form of declaration for the purpose of disposing off his estate to "outsiders". This may be done orally or in writing. If the declaration is in writing, it need not be signed, and if signed it need not be attested by witnesses. What is essential is that the intention of the individual must be clear and unambiguous. Thus, even a mute can make such on declaration through gestures! These are the accepted principles in Islamic law as applicable to the distribution of the assets of Muslims upon death.

We can see from these principles, and we have learnt earlier that the Wills Act 1959 and the formalities required for a Will therein, do not apply to Muslims. We however are aware by now that the Probate and Administration Act 1959 applies to Muslims as well. Thus, to administer the estate of a Muslim, the Grant of Probate or Letter of Administration is still required. We thus come to realise that the most effective way to administer the estate is to advise a Muslim to write a Will, one that does comply with the requirements of the Wills Act 1959 as closely as possible so that there is no difficulty in obtaining the Grant of Probate from the courts.

A Muslim Will is also called a **Wasiyah** and traditionally, the main purpose was to leave a gift or bequest up to one-third, of the testator's estate and may only be given to non- legal heirs. Such bequests can be made to adopted children, non-muslim parents or also for charitable or religious purposes.

If a Muslim person wishes not to dispose off up to one-third of his estate, which also means that his intention is for all his assets to be distributed according to the hukum Faraid, we should still advise him to write a Will. Why is this so? The importance of this is that he must be advised to appoint an executor in the Will. The naming of the executor in the Will would definitely make the obtaining

of the Grant of Probate an easier process, as we are already aware of the various difficulties in applying for Letters of Administration! To comply with the Islamic principles however, it is required that Wills made by Muslims must include a valid disposition of less than one-third of the estate, even if it is a nominal sum.

When the executor of the estate of a Muslim applies for Grant of Probate, he must also make an application to obtain the **Sijil Faraid** or **Letter of Distribution** from the Shariah Court or Islamic Department. The **Sijil Faraid** is a document which will specify the portion of the estate which is to be given to the various beneficiaries.

There are no federal laws that regulate the distribution of the estate of a Muslim as these rules are governed by each state in the country. However to-date, the following **legislations** are those available in the respective states and they govern Wills made by Muslims. They are:

- i) The Muslim Wills (Selangor) Enactment 1999
- ii) The Muslim Wills (Negeri Sembilan) Enactment 2004
- iii) Muslim Wills Ordinance (Sarawak) 1967
- iv) Administration of Muslim Law Enactment (Sabah) 1977

In the other states, the Wills of Muslims are enforced and accepted, in so far as it does not contravene the Islamic law principles.

Distribution of the Estate to Legal Heirs

As stated above, the assets of the deceased are applied first to pay the funeral costs and secondly to pay the deceased's debts. Out of the remainder, are deducted the bequests (i.e. up to one third of the estate) if any. Only then can the legal heirs take the distribution of the shares as provided for under the hukum Faraid. Islamic law provides that only the legal heirs can inherit the property of a deceased Muslim. An adopted child for example, is not recognized as a legal heir according to the hukum Faraid. If the testator intends to provide for such a child, he should make a bequest in his Will and this would be valid, as long as the gift is less than one-third of the value of the estate.

The rules of Islamic Law of inheritance are extremely complicated and a detailed discussion would not be necessary for the purposes of this course. We will however, discuss a few basic features of these rules and the two tables given at the end of this section will be sufficient to broadly understand the basis of inheritance.

There are two classes of legal heirs i.e. the Quranic heirs and the Agnatic heirs. The Quranic heirs are allotted fixed shares and in some cases they can be entirely excluded or their shares reduced

by the presence of Agnatic heirs. The first table given at the end of this session indicates how the presence of Agnatic heirs can either excluded or affect the inheritance of the Quranic heirs.

An Agnatic heir (or an agnate) is a person related to the deceased through the male side of the family. In the absence of the Quranic heirs and the Agnatic heirs, the estate goes to the Bait-ul-mal which is effectively a community fund.

The following twelve relations constitute the Quranic heirs:

- 1) Husband
- 2) Wife
- 3) Father
- 4) True grandfather (this means a male ancestor between whom and the deceased no female intervenes, e.g. the father's father)
- 5) Mother
- 6) True grandmother (this means a female ancestor between whom and the deceased no false grandfather intervenes e.g. the father's mother and the mother's mother. A false grandfather means a male ancestor between whom and the deceased a female intervenes e.g. the mother's father)
- 7) Daughter
- 8) Son's daughter
- 9) Full sister
- 10) Consanguine sister (half sister on the father's side)
- 11) Uterine brother (half brother on the mother's side)
- 12) Uterine sister (half sister on the mother's side)

The Agnatic heirs comprise of two groups: the males and the females. The male group is the largest and most important class. It includes the son, the son's son, the father, the brother, the paternal uncle and his son and so forth. The second group consists of four specified females as follows:

- 1) daughter
- 2) son's daughter
- 3) full sister
- 4) consanguine sister

Common Examples of Distribution***If a Person Dies Leaving a Wife***

- i) No Children
 - The wife is entitled to $\frac{1}{4}$ of the estate and the balance to Bait-ul-mal.
- ii) With Son(s) only
 - The wife is entitled to $\frac{1}{8}$ of the estate and the balance to son(s) equally.
- iii) With a Son and a Daughter
 - The wife is entitled to $\frac{1}{8}$ of the estate, $\frac{7}{12}$ to son and $\frac{7}{24}$ to daughter.
- iv) With One Daughter
 - The wife is entitled to $\frac{1}{8}$ of the estate, $\frac{1}{2}$ to daughter and the balance to the brothers and sisters of the deceased, failing which to the uncles and aunts of the deceased, and failing, all to Bait-ul-mal.
- v) With Two Daughters
 - The wife is entitled to $\frac{1}{8}$ of the estate, $\frac{2}{3}$ to daughters and the balance to the brothers and sisters of the deceased, failing which to the uncles and aunts of the deceased, and failing, all to Bait-ul-mal.
- vi) With Son and Father
 - The wife is entitled to $\frac{1}{8}$ of the estate, $\frac{1}{6}$ to father and the balance to son.
- vii) With One Daughter and Mother
 - The wife is entitled to $\frac{1}{8}$ of the estate, $\frac{1}{6}$ to mother and $\frac{1}{2}$ to daughter and the balance to the brothers and sisters of the deceased, failing which to the uncles and aunts of the deceased, and failing, all to Bait-ul-mal.
- viii) With Father and Mother
 - The wife is entitled to $\frac{1}{4}$ of the estate, $\frac{1}{2}$ to father and the balance to mother.

If a Person Dies Leaving a Husband

- i) No Children
 - The husband is entitled to $\frac{1}{2}$ of the estate and the balance to the brothers and sisters of the deceased, failing which to the uncles and aunts of the deceased, and failing, all to Bait-ul-mal.
- ii) With Son(s) only
 - The husband is entitled to $\frac{1}{4}$ of the estate and the balance to son(s) equally.
- lii) With son and Daughter
 - The husband is entitled to $\frac{1}{4}$ of the estate, $\frac{1}{2}$ to son and $\frac{1}{4}$ to the daughter.

iv) With One Daughter

- The husband is entitled to $\frac{1}{4}$ of the estate, $\frac{1}{2}$ to daughter and the balance to the brothers and sisters of the deceased, failing which to the uncles and aunts of the deceased, and failing, all to Bait-ul-mal.

v) With Two Daughters

- The husband is entitled to $\frac{1}{4}$ of the estate, $\frac{2}{3}$ to daughters and the balance to the brothers and sisters of the deceased, failing which to the uncles and aunts of the deceased, and failing, all to Bait-ul-mal.

vi) With Son and Father

- The husband is entitled to $\frac{1}{4}$ of the estate, $\frac{1}{6}$ to father and the balance to son.

vii) With Daughter and Father

- The husband is entitled to $\frac{1}{4}$ of the estate, $\frac{1}{2}$ to daughter and the balance to father.

viii) With Father and Mother

- The husband is entitled to $\frac{1}{2}$ of the estate, $\frac{1}{3}$ to father and $\frac{1}{6}$ to mother.

EPF and Insurance Moneys

The provisions of the EPF Act 1991 and the Financial Services Act 2013 (the Insurance Act 1996 was incorporated into FSA), as to moneys payable upon the death of a Muslim contributor or policy owner, to a named nominee, are very similar. In both cases, the relevant sections clearly declare that moneys payable to the nominee must be distributed in accordance to the Islamic law principles. Thus the nominees, do not receive it as beneficiaries but effectively as “executors” of the estate of the deceased.

With reference to the Financial Services Act 2013 (the Insurance Act 1996 was incorporated into FSA), the moneys referred to in these circumstances, are death claim proceeds of Life and Personal Accident insurance policies. Paragraph 6 of Schedule 10 (Section 130) of Financial Services Act 2013 states as follows:

Paragraph 6 Subparagraph (1)

(1) A nominee, other than a nominee under subsection 166(1), shall receive the policy moneys payable on the death of the policy owner as an executor and not solely as a beneficiary and any payment to the nominee shall form part of the estate of the deceased policy owner and be subject to his debts and the licensed insurer shall be discharged from liability in respect of the policy moneys paid.

Paragraph 6 Subparagraph (2)

(2) The nominee referred to in subparagraph (1) shall distribute the policy moneys in due course of administration of the estate of the deceased policy owner in accordance with the will of that policy owner or the law relating to the distribution of the estate of deceased persons as applicable to that policy owner.

Paragraph 6 Subparagraph (3)

(3) Notwithstanding subparagraph (1), a nominee to whom policy moneys have been assigned under subparagraph 2 (4)(a) shall receive the policy moneys solely as a beneficiary and not as an executor.

In the service of advising clients for estate planning purposes, the question that is often asked is “How do I go about it if I want to give the entire proceeds of my life insurance policy to my wife (or any other specific individual)?” The most suitable answer to this question is to execute a deed of an “absolute assignment” of the policy to the wife. The effect of such an assignment is that, there is an immediate transfer of ownership of policy to the wife. She is the assignee and the new owner of the policy and should the husband pass away, she will receive the death claim proceeds as owner of the policy and not as a nominee. Thus, the moneys need not be distributed in accordance with the Islamic law principles. If this advice is to be given by the planner, he must also caution the client on the consequences of these assignments. Once the ownership is transferred to the wife, he no longer has any control on the policy as he has transferred the ownership rights of the policy. He cannot unilaterally revoke the wife’s ownership in case of disputes arising between them or should they divorce at a later date. Furthermore, if she should predecease him, the ownership of the policy goes to her estate and does not revert to him alone.

Trusts for Muslims

We have learnt about the basic principles of trusts and shall get to know more in the next chapter. How are trusts useful in the estate planning process for Muslims? The creation of an irrevocable trust during one’s lifetime, completely transferring both the legal and beneficial interest from the settlor, is equivalent to a “gift” made during his lifetime. Assets of such a trust arrangement will no longer be deemed part of the estate of a Muslim upon his subsequent death. If a Muslim chooses to create such a trust the beneficiaries may be anyone or organisation of his choice. Being an outright gift made during his lifetime, the portions given to the beneficiaries, which is declared in the trust deed, need not be in accordance with the hukum Faraid.

A Muslim client may however, create a trust for purposes of professional management of his assets and choose to distribute the various portions according to the hukum Faraid. This of course, is acceptable as it does not contravene Islamic law principles.

We must also at this point, be reminded of the statutory trusts created by **Paragraph 5 of Schedule 10 (Section 130) of Financial Services Act 2013**. This trust is applicable only to non-Muslims and thereby Muslims cannot benefit from the “creditor protection” benefit that it offers.

Conclusion

Estate planning for Muslims is indeed an interesting process. This is because in Malaysia, we are governed both by the civil law process as well as Islamic law principles and sometimes influenced by local customs. This is a subject in which we have seen much interest and development over the

recent years, and estate planners need to keep abreast of the core basic rules and administrative practices involved, to be able to give competent advice to their clients. Students will be pleased to know that estate planning for Muslims will be discussed in greater detail in the Shariah RFP course by the Malaysian Financial Planning Council.

Case Study

En Mustapha 46, is a businessman, operating a successful mini market in which he is the registered owner as a sole proprietor. He is married to Khatijah 42, and they have two children, a son aged 16 and a daughter who is 14 years. Both his parents have passed away. His current assets include

Assets	Remarks
1. RM 350,000 of stock in the mini market	This is the estimated gross value of which there are moneys owing to his suppliers.
2. Family home worth RM 500,000	He is currently paying monthly instalments to the bank towards repayment of the housing loan.
3. A Car-Proton Perdana worth RM 70,000	Currently he is paying monthly instalments by virtue of the Hire Purchase agreement.
4. Fixed deposit account in the bank of RM 150,000	This is held in joint names with his wife.
5. E.P.F Moneys worth RM 120,000	He continues to make voluntary contributions of RM 500 per month as a sole proprietor.
6. Family Takaful plan of RM 200,000	
7. Others – including ASN shares etc worth RM 60,000	

En Mustapha is reasonably contented with the growth of his business over the years but is concerned about his family's future should he pass away suddenly. He seeks your advice as to estate planning matter and the financial security of his family.

Recommendation and Advice

The following are the suggestions and advice that maybe given to En. Mustapha. Of course, details of the information above must be further analysed and evaluated before definite recommendations can be made.

1. Will

En Mustapha should be advised to write a Will, appointing his wife and another adult (above 18 years of age) who he can rely on, to be joint executors of the estate. If he wishes his estate to be distributed in accordance to the hukum faraid principles, he may dispose off a nominal sum to a non legal heir.

2. E.P.F and Family Takaful Plan

In dealing with these two assets, En Mustapha may appoint his wife as a nominee. Her responsibility would be to distribute the moneys in accordance with the hukum faraid principles, should her husband predecease her.

3. Fixed Deposit Account

If En Mustapha predecease his wife, she may be able to deal with these moneys before obtaining the probate of the Will. If the bank freezes the account, then she has to obtain the Probate before being able to utilise these moneys as executor of the estate.

4. Creditors and outstanding loans

Trade creditors, outstanding house and car loans as well as any other liabilities of the estate must be paid off from the available assets.

5. Family home

En Mustapha has expressed his wish that upon his death, he would like to have the family home be given to his wife. This would only be possible, if the 2 children give their consent, for which they must attain 18 years of age. If En Mustapha passes away before his children attain 18 years, their portion will be held on trust for them.

General

After all the outstanding business and personal debts as well as other liabilities are settled, the balance of the estate will be divided amongst his wife, son and daughter in the following fractions respectively : $1/8$: $7/12$: $7/24$