

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

عن عبد الله بن عمر رضي الله عنهما أن رسوله الله ﷺ قال:

"ما حق امرئ مسلم له شيء يوصي فيه
يبيت ليلتين إلا ووصيته مكتوبة عنده"

رواه البخاري

Narrated by Abdullah bin 'Umar, radi Allah Anhu: Allah's Messenger, salla Allah Alayhi wa sallam, said,

"It is not permissible for any Muslim who has something to will, to stay for two nights

without having his last will and testament written and kept ready with him. "

[4:1- O.B]

إِعْمَلْ لِدُنْيَاكَ كَأَنَّكَ تَعِيشُ أَبَدًا،
وَأَعْمَلْ لآخِرَتِكَ كَأَنَّكَ تَمُوتُ غَدًا.

Plan for your worldly life as if you are going to live forever,
and plan for your life after life as if you are going to die tomorrow

HANDBOOK OF LAST WILL & TESTAMENT

(Part I: Guidelines)

The Islamic Society of North America Canada

&

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PART I GUIDELINES

1. LAST WILL IN ISLAM

The 'Will' is mentioned in the Qur'an eight times. Let us mention one example:

كُتِبَ عَلَيْكُمْ
إِذَا حَضَرَ أَحَدَكُمُ الْمَوْتُ أَنْ تَرَكَ خَيْرًا لَوَصِيَّتَهُ لِلْوَالِدَيْنِ
وَالْأَقْرَبِينَ بِالْمَعْرُوفِ حَقًّا عَلَى الْمُتَّقِينَ

"It is prescribed, when death approaches any of you, if he leaves any goods, that he makes bequest to parents and next of kin, according to reasonable usage; this is due from those mindful of God." Qur'an 2: 80.

In this verse, writing a last Will before death was made obligatory on all Muslims. This was, of course, before the details of the inheritance system were sent down to the messenger of Allah, Muhammad (*salla Allahu alayhi wa sallam*) in Sura 4. However, the Prophet (*salla Allahu alayhi wa sallam*) is reported by Ibn Umar to have said: "It is not right for any Muslim person who has anything to bequeath that he may pass even two nights without having his Will written" (Bukhari and Muslim). Thus, according to the great majority of Muslim scholars (including Shafi'i, Hanafi, Maliki, Hanbali and Zaidi), writing a Will is highly recommended. It becomes obligatory if there is a danger that any dues to others or to Allah (*Subhanahu wa Taala*) may not be fulfilled without a Will. However, it is forbidden to write a Will that excludes any rightful heir of his/her share stated in Shari'ah.

2. WILLS AND MUSLIMS IN NORTH AMERICA

As for Muslims living in North America who own any property that is subject to inheritance, the significance of having a Will becomes apparent. The Islamic law of inheritance is yet to be recognized by the courts in the U.S. and Canada.

In various countries including Pakistan, Morocco and Kuwait, for example, the only law applied by the courts on all Muslims in matters of inheritance is that derived from Shari'ah. On the other hand, when some one dies intestate (with out a Will) in North America the legal system that distributes his/her property is the state law of inheritance. These laws are in no way derived from Islamic Shari'ah.

Consequently, and while it is not essential for Muslims in such countries to make Wills, it becomes religiously mandatory for Muslims living in North America to write their own Wills in which the desire to implement the Islamic Shari'ah is clearly expressed.

3. WHAT IS A WILL?

A Will is a document which proves that the Testator or the maker of such document intends to distribute his or her property upon his/her death to certain other persons named in the Will. Following are a few requirements to make a valid will:

- The testator must be an adult and sound mind and memory.
- The testator must be fully aware of the consequences of his/her Will.
 - He/she must be acting voluntarily.
- At least two witnesses must observe the testator signing the Will and then put their own signatures on each original.

4. FEATURES OF AN ISLAMIC WILL IN NORTH AMERICA

In North America, an Islamic Will may contain the following:

- A preamble in which the testator declares his faith and calls upon all his/her surviving relatives and friends to fear Allah and accept Islam in their sayings and doings. Abdul Razzaq reported Anas (through an authentic chain) to have said: "They (the Companions) used to write at the beginning of their Wills: In the name of Allah, the Beneficent, the Merciful. This is what son of (so and so) testated, that he testifies that there is no god but Allah, the One, Who has no partner. He also testifies that Muhammad (*salla Allahu alayhi wa sallam*) is Allah's servant and messenger, that the Last Hour will no doubt come, that Allah resurrects

those in the graves. Then he (the testator) advises the survivors of his clan to fear Allah and reconcile (any differences among themselves, to obey Allah and His apostle if they are true believers, that he advises them the same as Ibrahim and Yaqub advised, "That Allah has chosen the faith for you; then die not except in the faith of Islam"

- Direction and instructions to the executor and all surviving relatives and friends concerning the Islamic funeral and burial. This must include the washing (ghusl), the prayer on the deceased (janazah), and the burial (dafn) as prescribed in Shari' ah.
- Directions and instructions to the executor, heirs, and authority, to pay all debts to other people as well as debts to Allah (*Subhanahu wa Taala*) such as due Zakah. The same applies to last illness expenses and funeral and burial expenses
- Directions and instructions to the executor, heirs, courts and other authorities as to the part of the estate that the testator desires to give away for charity, contribution to Islamic activities, i.e. mosques, da'wah defense of Muslims, etc. This portion may include distribution to relatives who do not receive any thing because Shari'ah does not consider them heirs (for example cousins who do not inherit because the deceased has a son, or grand parents who do not inherit because the deceased's parents are still alive). It may also include bequeathing to friend and neighbors. This portion must not exceed one-third of the total estate after payment of debts, and last illness and funeral expenses. Sa'ad Ibn Abi Waqqas reported: The Prophet (*salla Allahu alayhi wa sallam*) came to visit me in Makkah (I was ill and I hated to die in the land migrated from) and said: ' **May Allah have mercy on Ibn Afra** (meaning Sa'ad).' 'I said: Messenger of Allah, shall I testate all my estate? He said: ' **No**'. I said: Then one-half? He said: ' **No**'. I said, one-third? He said ' **Yes, one third, and even a third is plenty**'.
- The last Will in North America is the specific and unequivocal determination of the testator to implement the Islamic rules of the inheritance in the distribution of his/her estate . This must be put in a manner that makes it uncontested by any court and or other person. It also should be sufficiently explicit to the extent that it does not require any interpretation by a non-Islamic court.

5. WHAT CAN ISNA DO FOR YOU?

The Islamic Society of North America (ISNA) has prepared this instruction booklet and the Will forms as a basic format for use by Muslims in North America in the realization of their faith. A great deal of effort has been put into making this form a very good document from legal point and Shari'ah point of view. However, in presenting this booklet and attached forms, ISNA assumes no legal responsibility and carries no liability whatsoever in relation to the use of this booklet and the attached form of Last Will and Testament.

We do recommend that every adult Muslim living on this continent to have his/her Last Will written and kept in a secured place. Send a copy of your Last Will to

ISNA/CIT for safe storage. It is important that you mention ISNA/CIT to receive charitable contributions.

ISNA Canada, being a religious organization, can not be an executor or a guardian in any Will and will not be able to accept any such delegation. However, ISNA/CIT may be a beneficiary and any contribution granted to ISNA in any Will is deductible from the taxable amount of the estate. We encourage every Muslim writing a Will to make special contribution to ISNA/CIT since it is devoted to advancement of the Islamic da'wah in North America. Making such contributions to support the cause of Allah (Subhanahu wa Taala) is highly recommended in Islam.

6. WHERE THERE'S A WILL, THERE'S A WAY

DR. MUZAMMIL H. SIDDIQI

It is very important for Muslims who are living in North America to write their wills before their death. Since one does not know when death may come, one should have a will ready at all times. Periodically one should also update the will to reflect any changes in the family circumstances and/or in one's financial assets.

A Muslim's wealth must be distributed among his/hers heirs according to the laws of Allah. It is obligatory on every Muslim to follow the laws of inheritance (*irth* or *wirathah*) unless the heirs themselves by their own choice give up their rights in the inheritance. Allah has mentioned the rules of inheritance in several places in the Qur'an. In Sura 4 (al-Nisa) after mentioning these rules Allah says,

وَصِيَّةٌ مِّنَ اللَّهِ وَاللَّهُ عَلِيمٌ حَلِيمٌ
تِلْكَ حُدُودُ اللَّهِ وَمَن يُطِيعِ اللَّهَ وَرَسُولَهُ
يُدْخِلْهُ جَنَّاتٍ تَجْرِي مِن تَحْتِهَا الْأَنْهَارُ
خَالِدِينَ فِيهَا وَذَلِكَ الْفَوْزُ الْعَظِيمُ
وَمَن يَعْصِ اللَّهَ وَرَسُولَهُ وَيَتَعَدَّ حُدُودَهُ يُدْخِلْهُ
نَارًا خَالِدًا فِيهَا وَلَهُ عَذَابٌ مُّهِينٌ

"... an obligation (*faridah*) from Allah and Allah knows everything and is most Wise. These are the limits of Allah and he who obeys Allah and his Messenger, He will enter him in heaven beneath which rivers flow, abiding therein forever and that is a great success. But he who disobeys Allah and his Messenger and transgresses His limits, He will enter him in

hell to live there forever and for him is a humiliating punishment." *Qur 'an*
4: 11-14.

In a Hadith that is reported by Ahmad, al-Tirmidhi, Ibn Majah and Abu Da'ud, the Prophet (*salla Allahu alayhi wa sallam*) is reported to have said, " A man or woman may worship Allah for sixty years, but when their death comes they hurt someone in the will and thus entitle themselves for the punishment in hell." Islam has special laws of inheritance. The Qur'an and Sunnah have specified the relatives who may inherit and have also specified their shares in the inheritance. A person is free to give whomsoever he/she wills during his or her life but after death everything has to be distributed according to the laws of Allah. One can consult books on Islamic laws on inheritance to learn more details, but basic principles are as follows: 1) All outstanding loans or debts should be paid before the distribution of one's wealth. The will of the deceased should be followed very strictly unless it is against the laws of Allah. 2) A person has a right to donate up to one third of his or her wealth to someone or some institution according to his/her choice, however a person cannot give more to someone who is supposed to inherit under the laws of inheritance. The rest of the inheritance must be distributed according to the rules of the Shari'ah. 3) Only a Muslim can inherit a Muslim. Non-Muslim relatives cannot inherit from Muslims, nor Muslims can inherit from their non-Muslim relatives. If a Muslim has a non-Muslim spouse or some other relatives and wants to give something to that person then he must make a special will for that person and it should not be more than one third of his/her wealth. If a non-Muslim relative includes a Muslim's name among his/her heirs and leaves something for a Muslim, a Muslim may take it as a gift, but should not claim it as a right in inheritance. 4) Only legitimate children can inherit from a person. Illegitimate or adopted children cannot inherit under the Islamic law of inheritance. 5) A murderer or a person accessory to murder cannot be a beneficiary of person whom he/she murdered. 6) Among the surviving relatives, spouses, parents, and children always inherit. If any of them is predeceased then other relatives receive their shares, but the rule is that the near relatives exclude those who are a step distant from their relation to the deceased.

All shares must be according to the designated and specified percentage. It is very important that Muslims in North America prepare their wills before their death. The reason is that in North America, the Islamic laws of inheritance are not recognized. If a Muslim dies intestate, without having a will, then his/her wealth most probably will be distributed according to the province or state laws where he or she lived, not according to Allah's laws. A Muslim in this case may be held responsible on the Day of Judgment because of his/her negligence in a very important matter.

There are other disadvantages in not writing the will. The province or state may impose some taxes that could be avoided by writing a will. In some cases these taxes can claim 70-80 percent of one's assets. The probate courts often take a long time to make decision, the heirs may have to wait and may face hardship. The court appointed executor may be a non-Muslim and the inventorying and appraisal of assets may involve a lot of unnecessary expenses. Also if the deceased leaves minor children, the court may appoint a non-Muslim guardian for his/her Muslim children. In case a Muslim dies without any heirs or relatives his/her wealth may not go to Islamic causes but may go to state and non-Islamic institutions. To avoid such pitfalls it is necessary that Muslims, living in North America or any other country where Islamic laws of inheritance are not recognized, should have their wills prepared.

ISNA has developed easy to fill will forms which include guidelines for preparing a will. Those who have substantial assets should consult a will attorney to make their will properly legal in the province state of their residence. Nowadays many people make a "Living Trust" instead of a will. Such trusts offer greater flexibility of change as well as tax advantages. Legal advice on forming these trusts can be obtained for a nominal fee from most attorneys.

Allah says in the Qur' an:

كُتِبَ عَلَيْكُمْ
إِذَا حَضَرَ أَحَدَكُمُ الْمَوْتُ أَنْ تَرِكَ خَيْرًا الْوَصِيَّةَ لِلْوَالِدَيْنِ
وَالْأَقْرَبِينَ بِالْمَعْرُوفِ حَقًّا عَلَى الْمُتَّقِينَ

"It is prescribed for you that when any of you approaches death, if he leaves any good, let him make a will for the parents and other relatives. This is a duty for those who are mindful of God." (2:180).

7. NOTES ON MAKING YOUR WILL

The following notes and instructions are important to make a legally acceptable document as a Last Will and Testament:

NOTES:

1. Attention is drawn to the fact that certain provinces require that the name of the province and county should be mentioned at the beginning of the Will.
2. Identify testator in a consistent way and use his name as written on the title to properties. Write the middle name clearly and consistently on all documents and throughout the Will. Married women may use maiden and marriage names but must be consistent in writing the name on all documents.
3. Select witnesses who are young and who are unlikely to move far away, so that they may be around if needed at the time of the execution of the Will, the same applies to Notary Publics.
4. If your estate is substantial, consulting a lawyer and/or tax specialist on ways and means to save on estate taxes, both federal and provincial, becomes mandatory. There are many ways of saving On estate taxes with out violating the Islamic rules of inheritance. Selection of valuation date of the property of the estate, differences between simple Will and Wills with trust, etc.
5. The Will should be signed in the presence of at least two witnesses and the Notary Public. You should initial each page of each copy of Will in the designated place at the bottom of each page.
6. You should keep an original copy with you in a safe place, and send a copy to ISNA. Also make another copy to be on the safe side, and keep it in a safe place.

7. In some provinces the spouse is given a minimum legal right to the estate such as one-third, or one-half. Also in the states that apply the community property rule, one-half of the property is considered a property of the surviving spouse. In these cases, the spouse may challenge the Last Will and testament in court. To avoid such a challenge, you may have to consult with your lawyer to write an agreement between you and your spouse to consent to your Last Will and accept the share assigned to him/her in your Will and expressly waive the right to challenge the Will by all means for certain considerable compensation. Such a contract should be attached to the documents of your Last Will and testament. Without such agreement, your Muslim or non-Muslim spouse may be able to challenge your Last Will and testament.
8. Periodical reviewing of the Will is always recommended, especially for the purposes of tax savings. However, each time you review your Will, be sure to implement all the Shari'ah and legal requirement
9. Select an executor who is a young, practicing Muslim, preferably your adult son or daughter. You may appoint your spouse or a friend.

8. INSTRUCTIONS AND EXPLANATIONS

These instructions and explanations are numbered according to the articles of the will form enclosed with this handbook.

PREAMBLE: The preamble is a general advice of Muslims to his/her surviving relatives and friends. Writing a preamble was the practice of the Companions of the Messenger of Allah (*salla Allah Alayhi wa Sallam*).

ARTICLE I: in this article, only the authentic rites of funeral and burial are mentioned. Most minor points are left to the discretion of the person who will execute this Article. A booklet is available at ISNA on the funeral and burial rites in Islam.

ARTICLE II: In appointing the executor, select a capable, trustworthy, God fearing Muslim. However, for guardianship of your minors you must appoint a Muslim guardian (male or female) since it is prohibited that Muslim minor be under custody of a non-Muslim in order to preserve and enhance their faith in Islam.

ARTICLE III: This deals with debts, expenses and taxes. The expenses of due (but not done) obligation to Allah (huquq Allah) are not required to be paid from the estate according to the Hanafi School of Jurisprudence. But if the testator includes these in the Will they must be paid. However, not paying such dues to Allah during one's lifetime is a sinful act. Due obligations to Allah do not include any act of worship that was not done because of One's inability to do it, such as not going on pilgrimage due to ill health.

As far as obligations and debts to others are concerned, they must be paid in all cases, even without a Will because they are not in reality part of the estate. They constitute a liability on estate. The same applies to any item of value which has been deposited with or assigned to the deceased in a form of trust whereby

he/she is the trustee. All such items should also be returned to their owners and may not be considered part of the estate.

ARTICLE IV: This article is very important. It deals with two areas-- charitable contributions and testamentary transfers. Testamentary transfers are different from gifts given by father, for example, to one or more children. This occurs in such cases when a father gives one of his children a valuable gift, such as a dowry or wedding expenses. His other children may be still too young to marry, so he assigns to each, out of his wealth, an equal amount, to that he gave to his married child This practice is permissible and must not be confused with testamentary transfers.

A few points should be clarified:

1. The total value of contributions and transfers in this Article must not exceed one-third of the net value of the estate, i.e. the value of the estate after the deduction of expenses and taxes. If the testator assigned more than one-third, his/her assignment is considered valid to the maximum of one-third only. In this case one-third will be prorated among the assignees. This is according to Shari'ah wherever it is applicable. Since in North America the operative law is not that of Shari'ah, the testator should be very careful not to exceed one-third of his/her net estate.
2. Testamentary transfers to anyone who receives any share (large or small) is not allowed in Shari'ah. Consequently, in this Article, the name of any person received any part of the estate must not appear. These include parents, husband, wife, sons and daughters because whenever testator is survived by any of these heirs, they have certain shares in the net estate. It must be noted that this does not mean that all relatives mentioned in the attached schedule may not be included in the Article IV, since many relatives may not be the recipients simply because the testator is survived by other relatives who are closer to him/her. A typical example is that where the testator is survived by sons and grandsons. The grandsons are disqualified by the survival of deceased's sons. In such a case, the testator decides to include the grandsons in Article IV and they receive shares in the form of testamentary transfers.
3. Charitable contribution is a very good type of sadaqah and is highly rewarded; (Allah willing). It is recommended that ISNA Canada be made the beneficiary of such charitable contributions. Such contributions will help ISNA Canada to support Islamic activities and propagate Islamic Da'wah in North America. (Note: The contribution to ISNA Canada is deductible for purposes of taxes). However, if the value of net estate is small, it is recommended to reduce or eliminate such contribution in order to leave the heirs more (or all) of that small estate.
4. The testator may like to accommodate what is known in some schools of Jurisprudence as the obligatory testamentary transfer. Obligatory testamentary transfers are shares in the estate assigned to sons and daughters of the testator's children who died in the lifetime of the testator. These grandchildren are given, according to some schools of Jurisprudence, the share their parents would have received had they survived the testator, provided that this share together with other contributions and transfers do not exceed one-third of the net estate. This case applies when a person is survived by sons or daughters, and grandchildren whose deceased parent was the testator's own son/daughter. Without the obligatory testamentary transfers such grandchildren are excluded because the testator is survived by his own

children. Thus, if the testator likes to include such grandchildren, following should be added to Article IV.

This paragraph should read as follows:

"I ordain/direct that if; at the time of my death, I am survived by son(s) and/or daughter(s) and son(s) and/or daughter(s) whose father(s) i.e. my son(s), or mother(s), i.e. my daughter(s) died before me, these grandchildren shall inherit from me according to the following:

- Their share shall be equal to the share that accrues to their father(s) and/or mother (s) if they were alive at the time of my death , provided that the total share of such grandchildren added to other transfers and contributions in Article IV do not exceed one-third of net estate after implementation of Article III.
- The said share shall be divided among them so that all male grandchildren are equal in their class and all female grandchildren are equal in their class and each grandson receive twice as much as each granddaughter.
- The testator may like to assign a certain amount or proportion of his/her estate to persons who are not heirs such as a Non-Muslim spouse, a Non-Muslim parent(s) and foster and adopted children(though adoption in the strict legal sense is prohibited in Islam). This testamentary transfer must also stay within the limit of one-third for the total of Article IV.

ARTICLE V: Article V and the attached schedules embody the core of the Islamic inheritance system. The following principles were observed in this article:

1. In section 'a' the remainder of estate is granted to Muslim heirs only according to the schedule derived from Shari'ah.
2. Non-Muslim relatives may not inherit from a Muslim because of the several authentic traditions of the Prophet (*salla Allahu alayhi wa sallam*) to this effect.
3. In Shari'ah a murderer or an accessory in the murder of a person, may not inherit from him/her at all whether by virtue of relationship (kin or in-law) or by virtue of testamentary transfer.
4. Illegitimacy is considered a break in the line of relationship. However, since there exists in North America Islamic marriages that may not always be registered in the civil records. There should be recognition of such marriages even for purposes of Islamic Inheritance.
5. Also any fetus conceived before the death of the testator is recognized in Shari'ah as a full-fledged heir if born alive within the normal (Islamically acceptable) period of pregnancy.
6. In the Islamic system, the treasury of an Islamic state is the heir of those who have no heirs. But since an estate of a Muslim may not be inherited by a non-Muslim, it becomes very important to name an Islamic organization that shall receive any residue after the distribution of all shares. This clause is of special significance for Muslims who are not survived by Muslim relatives.

ARTICLE: VI: The objective of this Article is to help preserve as much as can be preserved of Islamic Will in case some portion of it is challenged and revoked by court.

**Ensure that your estate is distributed in the best Islamic Way,
insha' Allah.**

9. (For WILL DOCUMENTS AND FORMS, access LAST WILL & TESTAMENT, Part II)