

# Estate Planning for Muslim Clients Incorporating Unique Religious Preferences Into a Conventional Estate Plan

*By Yaser Ali, Esq.*

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## About the Author

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## I. Introduction

For most clients, tax planning is not the primary reason they consult with an estate planning attorney, especially in light of Congress' decision not to reduce the high estate tax exemption amounts. Rather, clients are typically motivated by a variety of considerations other than taxes, including a desire to protect their family, to provide an orderly administration of their assets, to avoid probate and interfamily disputes, and to engage in incapacity planning. Each client has unique goals that are dictated, or at least motivated in part, by the client's experiences, values, and beliefs. Being able to design a custom plan that acknowledges and addresses these experiences, values, and beliefs is a core function of an effective estate planning attorney.

Often, a client's religious faith influences many crucial estate planning choices, such as health care preferences; end-of-life care decisions; the decision about whether to leave charitable bequests and, if so, to whom; and the approach to use for the ultimate distribution of assets. While many practitioners are often reluctant to bring up issues of religion, given their sensitivity, the impact of religious views on a client's estate planning objectives makes acknowledging religion's impact inescapable for attorneys who represent clients of various faiths.

Our practice is concentrated on providing estate planning services to Muslim clients who are seeking to integrate aspects of Islamic law into their estate plans. Many of the clients who contact us do so after having a frustrating experience with another attorney who was unable or unwilling to incorporate the client's religious preferences into their documents.

This article is intended to assist the practitioner in designing an estate plan that achieves a Muslim client's wishes by

introducing readers to a Muslim client, providing an overview of the faith and the applicable components of Islamic inheritance law, and outlining specific estate planning considerations that follow from Islamic law.

## II. American Muslim Demographics

The importance of acknowledging the unique features of the Muslim client's estate plan can be demonstrated by the scope of Muslims' demographic background. Islam is currently the third largest religion in the United States, following Christianity and Judaism. There are approximately 3.45 million Muslims residing in the country, many of whom are concentrated in large urban areas.<sup>1</sup> By 2040, Islam is expected to become the second largest religion in the United States, and its following is expected to double by 2050. Although the American Muslim population is growing at a significant rate, a survey conducted in 2017 highlighted that over half of Americans report having seldom or never talked to a Muslim.<sup>2</sup> This difference between the demographic makeup of American Muslims and the lack of social interaction taking place often results in misinformation and misrepresentation of Muslims in lawmaking and media.

American Muslims are generally highly educated and racially diverse. The percentage of American Muslims with a college

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1 Besheer Mohamed, *New Estimates Show U.S. Muslim Population Continues to Grow*, Pew Research Ctr. (Jan. 3, 2018), [www.pewresearch.org/fact-tank/2018/01/03/new-estimates-show-u-s-muslim-population-continues-to-grow](http://www.pewresearch.org/fact-tank/2018/01/03/new-estimates-show-u-s-muslim-population-continues-to-grow) (accessed Jan. 15, 2022).

2 Betsy Cooper, *Americans Who Interact With Muslims Hold More Positive Views of Muslims, Refugees*, PRRI (Feb. 6, 2017), [www.prii.org/spotlight/social-contact-muslims-refugee-ban](http://www.prii.org/spotlight/social-contact-muslims-refugee-ban) (accessed Jan. 15, 2022).

degree is greater than the percentage of college degree holders in the U.S. population as a whole.<sup>3</sup> Muslim Americans have an especially large impact in medicine, where despite constituting approximately just 1% of the U.S. population, they account for more than 5% of all medical doctors in the country.<sup>4</sup> With large representations of South Asians, African Americans, and Arabs, American Muslims are very racially diverse, and no one race occupies the majority.

The American Muslim population has also accumulated a great deal of assets over the past few decades. As this population grows, so does its wealth. A 2013 study found that American Muslims had above average median household income and an aggregate disposable income of approximately \$100 billion.<sup>5</sup> Nearly a decade later, this number is likely much higher. Estate planning attorneys willing to provide faith-based plans to American Muslims would be catering to a growing population of high-income families that are seeking to protect their family members and assets in accordance with the dictates of their faith.

Even though no studies to date indicate the percentage of American Muslims who have engaged in estate planning, it is estimated that only 1 out of 3 Americans has a will — a small number especially considering the impact of the

COVID-19 pandemic.<sup>6</sup> Having traveled the United States and spoken at mosques and Muslim community centers around the country, I would estimate that the percentage of Americans in the Muslim community who have a will is likely even lower. This is possibly due to two reasons. First, American Muslims, like many minorities, are simply not well represented in the financial services or estate planning sectors. This lack of representation often leads to disparities in the creation of wills and trusts between White Americans and minorities, with the latter group often not receiving inheritances at the same rate as white families. This, in turn, perpetuates intergenerational wealth inequality.<sup>7</sup>

This lack of representation is compounded by the fact that most estate planning attorneys are unaware of Muslim clients' religious considerations, and even fewer are able to draft documents in accordance with these considerations. Attorneys are often reluctant to raise religious issues because they may see them as outside the scope of topics that are appropriate for an estate planning attorney to discuss. Other times, practitioners worry that they will offend people whose backgrounds differ from their own. This often stems from knowing little about different cultures and faiths.

Second, in many Muslim-majority countries, the distribution of a Muslim

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3 *Id.*

4 Wahiba Abu-Ras et al., *A Window Into American Muslim Physicians: Civic Engagement and Community Participation*, 9 *Islamic Med. Assn. of N. Am. Inst. for Soc. Policy and Understanding* (Oct. 2012).

5 See DinarStandard, *The Muslim Green: American Muslim Market Study 2014–15*, *Halal Focus* (Nov. 18, 2014), <https://halalfocus.net/the-muslim-green-american-muslim-market-study-2014-15> (accessed Jan. 15, 2022).

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6 See Daniel Cobb, *2021 Wills and Estate Planning Study: For the First Time, Caring.com's Wills Survey Finds That Younger Adults Are More Likely to Have a Will Than Middle-Aged Adults*, *Caring.com*, <https://www.caring.com/caregivers/estate-planning/wills-survey> (accessed Jan. 15, 2022).

7 See generally, Daniel Cobb, *2021 Wills and Estate Planning Study*, <https://www.caring.com/caregivers/estate-planning/wills-survey/#the-prevalence-of-estate-planning> (accessed Mar. 18, 2022).

decendent's estate generally is a private matter that tends to occur in accordance with Islamic law without the need for a will or trust. No probate process is required in these jurisdictions, and courts only tend to get involved in the event of a dispute among surviving heirs. Thus, at least for many Muslims, the entire estate planning process is a rather foreign concept that requires significant education — in many cases, both for the practitioner as well as for the client.

### III. Sharia and Estate Planning

Islam (pronounced *Iss-laam*) is a monotheistic faith whose followers are known as Muslims (pronounced *Mus-lims*, with an “s” sound, not a “z”). The term “Sharia” generally refers to Islamic law. Although the term is sensationalized in the media, it refers primarily to the moral, ethical, and social code by which a Muslim lives his or her life, as opposed to the term “law” in the conventional sense, the violation of which carries criminal or civil penalties. In this article we’ll use the terms interchangeably.

Islamic law is derived from four primary sources: (1) the *Quran*, the Muslim scripture; (2) the *Hadith*, the teachings of the Prophet Muhammad; (3) *Ijma*, a consensus of Muslim jurists on a matter; and (4) *qiyas*, or analytical deduction. For American Muslims, adhering to the Sharia means following the applicable Islamic rules in a broad range of activities ranging from ritual worship and dietary restrictions to marriage and divorce, financial transactions, and notably, estate planning. Do note that like many matters of law and religion, there are often multiple interpretations of an issue as well as varying levels of adherence among clients, so this article is intended to provide only a general overview of Islamic Inheritance law and does

not exhaust all possible opinions or scenarios.

This right to conduct estate planning in accordance with one’s religious faith is constitutionally protected. Nonetheless, lawmakers across the country have made numerous attempts in the past 20 years to ban the application or consideration of Sharia from U.S. courts. Most infamously, in 2010, voters in Oklahoma passed the “Save Our State Amendment,” a state constitutional amendment that prohibited Sharia law from being considered or applied in Oklahoma state courts — despite the law’s proponents inability to cite a single instance in which this had ever occurred.<sup>8</sup> A Muslim citizen filed suit arguing that the new law violated the First Amendment’s Establishment Clause and Free Exercise Clause because it would prevent him from having his will probated in accordance with Islamic law.<sup>9</sup>

A federal judge agreed, granting a permanent injunction in favor of the plaintiff. A unanimous panel of the U.S. Court of Appeals for the 10th Circuit affirmed, finding that the Oklahoma amendment clearly discriminated among religious groups by burdening Muslims only, without any compelling government interest for placing that burden.<sup>10</sup>

Despite the federal appeals court’s unequivocal decision in favor of the plaintiff by declaring the law unconstitutional, more than 200 similar copycat anti-Sharia law bills have since been proposed in 43 states, with 14 of those bills being enacted.<sup>11</sup> Given

8 *Awad v. Ziria*, 670 F.3d 1111 (10th Cir. 2012).

9 *Id.*

10 *Id.*

11 See Swathi Shanmugasundaram, *Anti-Sharia Law Bills in the United States*, S. Poverty L. Ctr. (Feb. 5, 2018), <https://www.splcenter.org/hatewatch/2018/02/05/anti-sharia-law->

the rise of this type of hostile legislation and the possibility for more of the same in other jurisdictions, it is generally advisable for attorneys to use a revocable living trust as the cornerstone of a Muslim client's estate plan rather than to rely on a will that will need to be probated — even in jurisdictions where the probate process itself is not overly cumbersome or onerous.

#### IV. Primer on Islamic Inheritance Law and Islamic Financial Ethics

Among all the religious obligations outlined in the Quran, the most explicit and unambiguous ones are the rules relating to inheritance, which are found primarily in three verses of Chapter 4, Surah Al-Nisaa, known as the Chapter of Women. The chapter discusses the rights of orphans, women, and those who have been historically oppressed in society; it establishes explicit rights of inheritance for certain blood relatives and surviving spouses. Specifically, verses 11, 12, and 176 read like a statutory intestacy scheme that provides fixed predetermined shares for specific heirs (referred to throughout this article as a decedent's "Islamic heirs").<sup>12</sup> A Muslim is expected to create an estate plan that ensures his or her assets will pass after death according to these rules, with the Prophet Muhammad famously stating, "Do not let two nights pass without writing a will."<sup>13</sup> Thus, for many Muslims, estate planning is not just viewed as a manifestation of love for one's family, but as an act of devotion to God and fulfillment of an impor-

tant religious responsibility.

Before turning to the mechanics of designing a Sharia-compliant estate plan, the practitioner also must be aware of at least two principles of Islamic financial ethics that are directly applicable in the estate planning context. The first is the prohibition on dealing with *riba*, which loosely translates to interest. The second is the prohibition on *gharar*, or excessive speculation. Together, these two restrictions often govern the types of investments in which a devout Muslim client engages and may restrict his or her participation in certain common estate planning tools, such as life insurance products and annuities. It is also useful to provide instruction to the trustee to ensure that the trustee invests the funds in a Sharia-compliant manner.

As for the priority of distribution from a Muslim's estate, the following order controls: (1) funeral, burial, and administration expenses; (2) legally enforceable debts; (3) a discretionary share of up to one-third of the remainder, known as the *wasiyah* share; and (4) the residuary estate, known as the *faraid* share, which passes in fixed shares to predetermined Islamic heirs, similar to an intestacy scheme. Each of these items is further explained below.

##### A. Funeral, Burial, and Administration Expenses

The first items to be paid from the decedent's estate are the funeral, burial, and administration expenses. Because Islamic law does not allow for cremation, the allocation of funeral and burial expenses, along with applicable instructions and procedures, should be expressly outlined and accounted for in the estate plan.<sup>14</sup>

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[bills-united-states](#) (accessed Jan. 15, 2022).

12 See Mustafa Khattab, *The Clear Quran*, 4: 11, 12, 176, Quran.com, <https://quran.com/4> (accessed Jan. 15, 2022).

13 Kitab Al-Wasiyya (The Book of Bequests), *Trans. of Sahih Muslim Book 13*, No. 3987, [www.iiium.edu.my/deed/hadith/muslim/013\\_smt.html](http://www.iiium.edu.my/deed/hadith/muslim/013_smt.html) (accessed Jan. 15, 2022).

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14 For a more detailed discussion regarding funeral and burial traditions in Islam, see *infra* Section V(B).

### B. Legally Enforceable Debts

Next, similar to an intestacy code, legally enforceable debts must be paid to the decedent's creditors. Some Islamic scholars also consider "debts owed to God," often in the form of unfulfilled religious obligations such as unpaid *zakat* obligations or missed prayers, as a part of this category (subject to the one-third limitation of the wasiyah share explained below). Other clients may choose to earmark a certain amount of money to enable someone else to perform the *hajj* pilgrimage on their behalf if they were unable to do so during their lifetime. If a client wishes to include such items in their plan, it may be useful to include a schedule that can periodically be updated by the client to reflect such updates.

### C. Wasiyah Share

The third item is an optional discretionary share of up to one-third of the decedent's residuary estate (after payment of items 1 and 2 above), known as the wasiyah share. The wasiyah share can be distributed as specific pecuniary or fractional bequests to organizations, entities, or individuals who are not already entitled to inherit from the decedent's nondiscretionary faraid share under Islamic law (as explained in Part D below). Many clients use the wasiyah share to make charitable bequests to nonprofit organizations or to family members or individuals whom they may have been supporting during their lifetime.

### D. Faraid Share

Finally, the residuary estate, known as the faraid share, must be distributed in fixed shares to predetermined family members, known herein as Islamic heirs. The residuary estate normally includes (a) the surviving spouse, if the decedent was married; (b) the decedent's parents, if ei-

ther or both of them survive the decedent; and (c) the decedent's children, who will inherit at a 2-1 ratio of male to female if the decedent is survived by multiple children. In some cases, more-distant relatives, such as siblings and grandparents, also may be entitled to inherit depending on which relatives survive the decedent.

Because it is impossible to determine in advance which family members will survive the client, in our practice, we generally empower a trust protector with the authority to determine who the decedent's rightful Islamic heirs are upon death (see Section V(F) of this article for a more detailed discussion of this topic). Several Islamic inheritance calculators are available online, which may assist with the process of determining the decedent's Islamic heirs and calculating the share of the estate to which they are entitled.

Subject to very limited exceptions, such as in cases in which an Islamic heir is responsible for the decedent's death (similar to a slayer statute) or the Islamic heir is not a Muslim (see Section V(F)), Islamic law does not allow the decedent to disinherit any of his or her Islamic heirs.

## V. Practical Planning Tips

This section addresses several practical planning considerations that often arise when drafting an estate plan for a Muslim client. This is not an exhaustive list of issues a practitioner may face; rather, it addresses some common fact patterns and scenarios we repeatedly see in our practice while representing Muslim clients or helping other attorneys to design sharia-compliant plans for their clients.

### A. Clarification of Intent to Comply With Islamic Law

When construing the language of a testamentary instrument, courts are typi-

cally deferential to the testator's or settlor's intent. As stated previously, in our practice, we generally recommend the use of revocable living trusts over wills for most clients and expressly include a clause articulating the client's intent to comply with Islamic law. A sample intent clause for an individual revocable living trust follows:

**Intent to Comply With the Islamic Law of Inheritance and Islamic Financial Ethics**

I am creating this revocable living trust and any separate trusts established under this instrument with the intent that assets transferred to the trust be held for my benefit while I am living and be distributed upon my death to my Islamic Heirs in accordance with my religion of Islam and the Islamic Law of Inheritance, as defined in Section \_\_\_\_ of this trust instrument. I understand and acknowledge that my decision to do so may result in:

- (a) distribution to relatives who are not my heirs by state law;
- (b) unequal distributions to my children on the basis of their sex;
- (c) additional federal and/or state estate taxes payable by my estate; and
- (d) liquidation and distribution of assets that may otherwise benefit a surviving grantor, causing him or her to receive a smaller share than he or she may be entitled to under the state's default community property rules or statutory elective share.

I further instruct my Trustee to invest the trust assets in a Sharia-compliant manner, as outlined below.

Islamic law requires that the acquisition of wealth be achieved through lawful means that promote mutual consent and goodwill. As such, investments in illicit industries, such as alcohol, pornography, and gambling, are deemed

impermissible. Where a company has a permissible primary income source but also has certain ancillary businesses or business units that are engaged in impermissible activities, such activities must only constitute a de minimis component of the company's overall revenue.

In addition, Islamic law requires the avoidance of *riba*, defined as the earning and paying of money at a predetermined rate on a loan, as well as *gharar*, which refers to unduly speculative transactions. While every transaction involves some amount of risk (i.e., minor *gharar*), a transaction is prohibited on the basis of *gharar* when there is significant uncertainty regarding components of the deal, such as the specific characteristics of an item, quantity of the object, price, payment period, etc.

In doing so, I expressly waive the prudent investor rule, or any other rule or law that requires the Trustee to diversify investments or restricts the Trustee's capacity to invest in a Sharia-compliant manner.

If a client is worried about the possibility of anti-Sharia legislation in his or her state, the trust instrument may also include a provision enabling the trust protector to change trust situs in order to effectuate the grantor's intent.

*B. Burial and Funeral Traditions*

Perhaps no components of estate planning are impacted more by a person's beliefs than end-of-life care preferences and the disposition of remains. Spirituality or attachment to faith are typically positively correlated with the ability to cope with pain and illness. From an Islamic perspective, sickness and trials are a means to attain closeness to God. Given the constantly changing nature of modern medicine, Islamic scholars and bioethicists hold varying opinions dealing with the ethical

dilemmas raised by advanced medical interventions and new technologies, which are beyond the scope of this article.<sup>15</sup>

With regards to funeral and burial practices, Islamic law requires that a Muslim should be washed, shrouded, and buried as soon as practicable following death, usually within 24 hours. In addition, fellow Muslims should pray over the body prior to the burial. This ritual prayer is referred to as a *Janazah*. Immediately following the *Janazah*, the decedent should be buried without a coffin, straight into the ground, if allowed in the jurisdiction. This means that cremation as a means of disposing of the body is not acceptable in Islam. This is increasingly important because the rate of individuals who are eschewing traditional burial in favor of cremation has been increasing and is projected to continue to rise.

According to the National Funeral Directors Association, approximately 36% of decedents in 2021 were projected to be buried while more than 56% were projected to be cremated.<sup>16</sup> The organization further estimates that by 2040, 16% of decedents will be buried and 78% will be cremated.<sup>17</sup> Given the dramatic cost differential between the two options, it is not surprising that surviving family members who are tasked with handling the disposition of remains in the absence of express instructions would opt for the less expensive and more expedient option.

In terms of burial location, it is preferable for a Muslim to be buried in a Muslim cemetery near the place of death. If no Muslim cemetery is nearby, it is preferable for a Muslim to be buried at a cemetery that includes an area designated for Muslims.

Any additional clauses beyond the aforementioned requirements and directions vary from community to community and depend on the client's personal situation. Clients whose families are all Muslim may not need to specify the exact method of burial because a system of burial is likely established in their local mosque or community. However, the inclusion of specific clauses regarding burial instructions is especially important for individuals who have converted to the faith and for Muslim clients living outside an established Muslim community. For clients whose families comprise individuals from different faiths or no faiths, clearly articulating specific wishes and instructions in the estate planning documents will help prevent family burial disputes that can arise from varying religious traditions and funeral rituals.

As mentioned previously, under the Islamic law of inheritance, the funeral and burial expenses are the first items to be administered from a decedent's estate, so it is useful to include an express instruction memorializing this as well.

A sample funeral and burial preference clause to include in a Muslim client's will and/or health care directive could read as follows:

I direct my personal representative/executor/trustee/agent to pay all reasonable funeral and burial expenses from my estate prior to the distribution of any assets. I direct that no autopsy or embalming be performed on my body unless required by law and that my

15 For a good introduction to the topic see Maryam Sultan, Yaqeen Institute, *Pulling the Plug: The Islamic Perspectives on End-of-Life Care*, Nov. 13, 2017, <https://yaqeeninstitute.org/read/paper/pulling-the-plug-the-islamic-perspectives-on-end-of-life-care#fnt2>.

16 Natl. Funeral Dirs. Assn. (NFDA), *Statistics* (last updated Dec. 2, 2021), <https://nfda.org/news/statistics#5> (accessed Jan. 15, 2022).

17 *Id.*



body be washed and prayed over in accordance with Islamic law and custom and be buried in a nearby cemetery that specifically accommodates Muslims who desire to be buried in accordance with Islamic law, or another cemetery of my agent's choosing, without any unjustified delay or expense.<sup>18</sup>

### *C. Joint Ownership and Rights of Survivorship*

Islamic law does not generally restrict how Muslims can own or transfer their wealth while they are alive and well. However, Islamic inheritance law does require that an individual own his or her property in a manner that makes it possible for such assets to pass to the individual's Islamic heirs upon death. This requirement means that many conventional forms of joint property ownership have different consequences for the estate plan of a Muslim client.

For instance, Muslims often have tight-knit families that consist of many generations living together under one roof. This is consistent with Islamic ethics, which strongly emphasizes the maintenance of traditional family structures and relationships. While such arrangements may be somewhat less common in the United States than in Muslim majority countries, sometimes assets may be jointly owned by many individuals in a Muslim family living in the United States. As such, estate planning attorneys sometimes find themselves representing multiple family members with potentially competing estate planning goals. In some cases, property may be legally titled in the name of one person, but the other parties have a differ-

ent unofficial understanding. In other scenarios, an individual may not have taken the time to think through these issues or to ensure that assets can pass to his or her Islamic heirs, rather than outright to the surviving co-owners.

Of course, in such situations, a lawyer must first seek to comply with the applicable laws of professional responsibility and legal ethics and determine if joint representation is feasible. Second, the attorney must consult with the client to determine who actually owns what. Under Islamic law, an estate plan for an individual holding property that belongs to someone else may need to include lifetime gift or specific allocation distributions before residuary distributions of the decedent's estate.

Regarding planning for married couples, recall that generally each spouse has different Islamic heirs. These frequently include each spouse's parents, if alive, and potentially other relatives aside from the other spouse and children. Note that these heirs may have changed by the time of death if, for instance, the heirs present when the estate plan was drafted have died or additional children have been born. In this sense, estate planning for a Muslim couple is in many respects akin to estate planning for a blended family. Thus, the conventional estate plan that relies on rights of survivorship and beneficiary designations that leave all assets outright to the surviving spouse or his or her trust on the first death and then distributed equally to the children upon the surviving spouse's death may not be well suited for married Muslim couples.

For this reason, it is crucial that a Muslim couple clearly agree on and identify who owns which assets. In community property jurisdictions such as Arizona where our office is based, each spouse is presumptively treated as owning a 50% share of all assets

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<sup>18</sup> Sample clause adapted from *Estate Planning for the Muslim Client*, by Yaser Ali & Ahmed Shaikh (ABA 2019).

that are acquired during the marriage. This notion of community property is not traditionally found in classical Islamic law; rather, Islamic law provides that each spouse retains his or her assets before, during, and after marriage as separate property and imposes an obligation on the husband to pay the household expenses. The parties may choose to jointly adopt or ratify a community property presumption or decide on a different arrangement through a well-drafted transmutation agreement or postnuptial agreement that clarifies ownership of assets and marital property.

That said, some clients may choose to treat Islamic inheritance obligations simply as ethical obligations that the surviving spouse would administer post-death in order to (a) take advantage of the ease of administration of rights of survivorship, beneficiary designations, or an all to spouse estate plan, or (b) avoid the imposition of a property tax reappraisal upon the death of one spouse. This latter point is particularly applicable for clients in California after the enactment of Prop 19, which went into effect in 2021. Similarly, other couples may wish to avail the asset protection features of property held in tenancy by the entirety and rely on the surviving spouse's ethical responsibility under Islamic law to compensate the predeceased spouse's Islamic heirs. Where estate taxes are not a consideration, such a plan might make sense. In such instances, we often draft a nonbinding side letter to the family memorializing the clients' intent to comply with Islamic law upon each spouse's death while reminding the couple that if the surviving spouse fails to make subsequent distributions — either voluntarily or involuntarily, due to incapacity or otherwise — the decedent may fail to fulfill his or her obligations under Islamic law.

#### *D. Surviving Spouse's Share Under Islamic Law*

Most married couples who create an estate plan seek to ensure that, upon the first death, the plan adequately supports the surviving spouse while minimizing applicable taxes. This, of course, is true for Muslim couples as well. However, under Islamic inheritance law, a surviving widow's share is limited to one-quarter or one-eighth of her late husband's estate, depending on whether or not he was survived by any children. This stems from the fact that traditional Islamic law presupposes a family structure in which males are primarily responsible for providing food, clothing, shelter, and maintenance for the family including dependent female relatives.<sup>19</sup> In today's modern context, this rule presents some practical challenges for the drafting attorney.

First, for a couple residing in a separate property jurisdiction, the share that a widow may be entitled to under Islamic law may be less than her entitlement under that state's elective share.<sup>20</sup> In some jurisdictions, a surviving spouse is also statutorily entitled to certain homestead benefits and protections that he or she would not have under Islamic law. Accordingly, if a couple seeks to mutually and voluntarily comply with Islamic inheritance law and waive each spouse's elective share or additional rights, the practitioner should draft an enforceable waiver of an elective share in accordance with state law. To avoid any ambiguity as to intent or enforceability, the drafting attorney should explicitly

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19 Joseph Schacht, *An Introduction to Islamic Law*, 170 (Clarendon Press 1982).

20 Comparatively, this does not typically pose an issue in a community property jurisdiction because each spouse is free to dispose of his or her share of the community property in their respective estate plans.

state the clients' objective to voluntarily waive the elective share right in accordance with their religious tradition.

Second, in the context of marital deduction planning, the commonly used qualified terminable interest property (QTIP) trust is not consistent with Sharia law. This is because QTIP trusts contain restrictive ownership provisions that limit the surviving spouse's power over trust assets while still requiring that the entirety of the trust income be distributed to the surviving spouse at least annually. Since the surviving spouse is entitled to a fixed share under Islamic law, the QTIP distribution requirement may end up exceeding that entitlement and thereby infringe upon the rights of the other Islamic heirs. If the estate's size is such that the QTIP share is unlikely to exceed the spouse's entitlement under Islamic law, the QTIP trust may still have some utility, particularly if either spouse has children who do not belong to the other spouse and the intent is for the surviving spouse to remain in the family home.

Recall that, although the surviving spouse is entitled to a predetermined share upon the death of his or her spouse, Islamic inheritance law does not restrict lifetime giving, with limited exceptions during an individual's final illness or while an individual is on his or her deathbed. Muslims are otherwise free to give away all their wealth to whomever they desire during their lifetime. For this reason, a practitioner should be mindful that lifetime gifting tools can be utilized to achieve a client's desire to support a particular heir beyond the amount that would be allocated to him or her upon the client's death.

Islamic law defines a gift, or *hiba*, as the immediate and unconditional transfer of asset ownership from one individual to

another.<sup>21</sup> While such gifts normally are subject to estate and gift tax limitations, a U.S. citizen spouse can take advantage of the unlimited marital deduction under Internal Revenue Code § 2056, which allows the taxpayer to transfer an unlimited sum of money to his or her spouse without the imposition of a gift or estate tax.

Of course, gifting during one's lifetime comes with risks. If the married couple ends up getting divorced, the donor spouse would lose access to the funds altogether. For individuals who fear that an asset may be needed in the future, gifting that asset may not be the most attractive option. In such cases, rather than making an outright gift, one option is to make gifts to a spousal lifetime access trust (SLAT) instead. The SLAT could include a provision terminating spousal rights or stipulating that the SLAT's assets pass down to the grantor's children if the couple divorces. This prevents one spouse from having unconditional control and ownership of all the assets, as would be the case with an outright gift.

Finally, when representing a client who is contemplating marriage, it is important to consider *mahr* obligations, which are a necessary part of every Islamic marriage contract. *Mahr* is a marital gift from the groom to the bride that is similar to the gift provided in a *ketubah*, a formal Jewish marriage contract that provides money to the wife in case the couple divorces or the husband dies. Often, a smaller gift is exchanged at the time of the Islamic wedding ceremony, and a later payment intended to protect the wife is made upon

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21 In some instances, gifts under Islamic law are also considered revocable, meaning that the recipient may consent to return the gift to the donor, which may not be consistent with the definition of a gift under the Internal Revenue Code or various state laws.

the husband's death or the couple's divorce. Under Islamic inheritance law, an outstanding mahr obligation is treated as debt and thus paid out as such prior to any distributions from the wasiyah (discretionary) or faraid (residuary) shares and should be memorialized in the estate plan.

#### *E. Disparate Distributions Based on Sex*

Under the Islamic law of inheritance, male children are entitled to inherit twice as much as female children. This is often one of the most sensitive discussion topics when dealing with Muslim clients and one of the most controversial for many practitioners who view Islamic inheritance law as unfair or discriminatory toward women. It is worth noting that at the time of its revelation, the Quran was considered quite radical in codifying shares of inheritance for women, who were not given such rights in many societies until much later. Depending on the situation, a Muslim woman may receive more than, less than, or equal to a similarly situated male heir of the decedent. And in some cases, a female heir would inherit, while a similarly situated male heir would not inherit at all.<sup>22</sup>

That said, a male child generally inherits double the share of a female child. As discussed in the previous section, this variation is based on classical Islamic law's recognition of the two sexes as equal but not similar in the roles they play in the household and in society. Traditionally, males bear the primary financial respon-

sibility toward their wives and close female relatives. Females, meanwhile, do not have any restrictions on their wealth or obligations to spend their inheritance on others. While the support obligations of Muslim males today may not be legally enforceable in court, most Muslim clients who are seeking to comply with the sacred law are likely to want to comply with the textual obligations of the Quran — while seeking to ensure adequate protection and security for their daughters.

This is where the importance of hiba, or lifetime gifting, comes in again. The previous discussion of hiba is highly applicable in regard to offsetting the discrepancy between heirs based on sex. Because there are generally no restrictions on giving during one's lifetime, Muslim clients can make lifetime gifts to their daughters, either outright or through a trust, to ensure that they are adequately protected in the event of a parent's untimely death. Likewise, because parents naturally may spend disparate amounts of money on their children during their lifetime depending on the children's age, it may be prudent as well to establish an inter vivos irrevocable trust in which the parents contribute money to pay for private school tuition, college tuition, or wedding expenses for younger children or to contribute money toward a down payment to enable older children to buy a house.

#### *F. Determination of Islamic Heirs and Calculation of Their Shares After a Muslim's Death*

Recall that the faraid share of a decedent's estate must be distributed in predetermined shares to the decedent's Islamic heirs. Islamic law requires that any individual who inherits from the faraid share must be a Muslim. This raises some practical challenges in determining

22 See Amir Elshamy, *The Law of Inheritance Regarding Women and Principles Concerning the Genders in Islam*, Penn St. L. Rev.: Forum Blog (Apr. 28, 2021), <https://www.pennstatelawreview.org/the-forum/the-law-of-inheritance-regarding-women-and-principles-concerning-the-genders-in-islam> (accessed Jan. 15, 2022).

who is a Muslim, which is an issue that a secular court likely would not be willing or well suited to decide.<sup>23</sup> In addition, a client may have additional children born to him or her after the estate documents were executed or certain family members named in those documents may pass away prior to the client's death. Because an individual's Islamic heirs actually cannot be determined until his or her death, it is important to build a mechanism in the estate plan for determining who those individuals are and how much each person is entitled to receive.

This is another reason that our practice generally recommends clients using living trusts over wills as their dispositive instrument: not only can a trust avoid probate and external conflicts, it is also better equipped to ensure a private, efficient trust administration. We generally identify the grantor's Islamic heirs as of the date of the trust's formation and empower a trust protector to determine a potential heir's eligibility and recalculate the shares in the event that someone is born to or predeceases the grantor, which we include as an exhibit to the trust.

Following is a sample document giving the trust protector power related to Islamic inheritance law calculations:

**Role of the Trust Protector in Modifying Islamic Inheritance Shares.** If, after the execution of this Trust, the Grantor has a child who may be entitled to inherit under the Islamic Law of Inheritance or if a relative named herein predeceases or becomes ineligible for inheritance, the Trust Protector shall re-

calculate the shares of inheritance utilizing guidelines provided herein.

- (1) **Inquiring Into Eligibility.** The Trust Protector shall gather a list of all lineal descendants and ascendants as well as any other relatives who may be eligible under the Islamic Law of Inheritance given the circumstances. The Trust Protector will then exclude from eligibility any person who (a) caused the Grantor's death unlawfully or (b) does not identify as a Muslim. The Trust Protector is not obligated to inquire as to any beneficiary's faith tradition. However, if the Trust Protector knows that a potential beneficiary has publicly left the religion of Islam or accepted another faith, the potential beneficiary should be deemed ineligible for inheritance. Determination of inheritance rights under the Islamic Law of Inheritance is in the Trust Protector's sole and unreviewable discretion.
- (2) **Calculation.** The Trust Protector shall then determine the deceased Grantor's Islamic Heirs and the shares of inheritance for each in the form of an amendment to this Trust. The determination of shares under the Islamic Law of Inheritance is made at my Trust Protector's sole and absolute discretion. The Trustee shall, from the Trust, indemnify the Trust Protector for any costs and attorneys' fees expended in defending any decision related to inheritance under the Islamic Law of Inheritance and the specific shares allotted. Any amendment made by the Trust Protector in good faith is conclusive on all persons interested in the Trust, and the Trust Protector is not liable for the consequences of making or not making any amendment. The Trust Protector shall make any amendment to this instrument in writing

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23 For a more detailed discussion of the constitutionality of such restrictions and practical planning solutions related to this issue, see Yaser Ali & Martin M. Shenkman, *Sharia Inheritance Estate Plans*, Trusts & Estates (Aug 24, 2021).

and sign the amendment. The Trust Protector must deliver a copy of the amendment to the Income Beneficiaries and the Trustee.

- (3) **Not a General Power of Appointment.** The Trust Protector may not participate in the exercise of a power or a discretion conferred under this instrument that would cause the Trust Protector to possess a general power of appointment within the meaning of I.R.C. §§ 2041 and 2514. Specifically, the Trust Protector may not use these powers for his personal benefit nor for the discharge of his financial obligations.

### *G. Alternative Dispute Resolution Mechanisms*

Finally, as explained previously, the trust protector can be empowered with the authority to resolve most questions of Islamic law, including determining the eligibility of a beneficiary to inherit and reallocating assets among the decedent's Islamic heirs. Nonetheless, to avoid the possibility of protracted litigation among potential beneficiaries, in our practice, we recommend the inclusion of a compulsory arbitration provision as well, at least with respect to any disputes involving the interpretation of Islamic law. If possible, a faith-based arbitration body that is well versed in both Islamic law and state law

— similar to the Beth Din of America, which resolves issues of Jewish law — can be identified in the trust instrument as the adjudicating body to resolve such disputes.

It is important to note that the practitioner must review applicable state law concerning this arbitration provision before including such a provision, because courts in various jurisdictions differ as to the enforceability of these provisions in trust and estate disputes and whether future beneficiaries may be bound by them. Thus, in some instances, litigation to compel arbitration may result, which could thwart the overall objectives of the estate plan.

## VI. Conclusion

Estate planning for Muslim clients raises unique legal issues and requires a practitioner to consider issues of religious law and creatively integrate them into conventional estate planning tools. Learning about American Muslims and their estate planning considerations will enable elder law attorneys to connect with an extremely diverse group of clients in a manner that allows these attorneys to grow from simply being document drafters to being trusted counselors and advisors for clients' families.