By **Yaser Ali** & **Martin M. Shenkman**

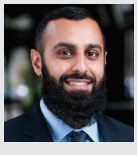
Sharia Inheritance Estate Plan

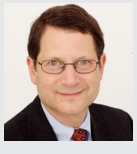
Unique use of limited power of appointment may help address risk of conflict and controversy

As advisors, it's important to be sensitive to our clients' unique values and objectives. In many cases, a client's planning considerations are motivated by their religious beliefs. In fact, there's perhaps no area of law in which such beliefs are more relevant and applicable than estate planning, in which foundational decisions such as guardianship selection, health care preferences, end-of-life care choices, charitable giving and disposition of assets on death are often impacted by religious considerations.

Many practitioners are reluctant, however, to address religious issues, viewing them as outside of the purview of matters appropriate for an attorney or estate planner. Sometimes, planners may be uncomfortable engaging individuals of other backgrounds or faiths out of concern of offending them, which usually stems from not knowing enough about them. But the tremendous impact that religious rituals and traditions can have on each estate-planning document, for example, wills, revocable living trusts and health care directives and on many of the common estate-planning techniques, practically ensures that important personal goals of a religious client may be violated if the planner doesn't address them. Particularly in today's high estate tax exemption environment, where tax planning isn't necessarily the primary motivator for many clients, developing a better understanding of a client's religious and personal wishes can enable a practitioner to transition from the role of a scrivener to a trusted family advisor and a counselor. On a personal level, the more you learn about another individual's religious and/or philosophical beliefs, the richer your life becomes and the deeper you may find your understanding of your own beliefs and philosophies. It also tends to create a more significant relationship with the client and the client's family.

(From left to right) **Yaser Ali** is a wealth planning attorney in Tempe, Ariz. and **Martin M. Shenkman** is an attorney in private practice in Fort Lee, N.J. and New York City





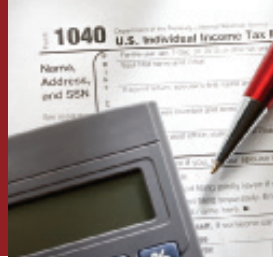
Most firms have made efforts to address diversity in their practices. These efforts should include developing knowledge and sensitivity to the attributes that make clients diverse. This may include addressing health issues, lifestyle decisions, religion and more.

Let's look specifically at the intersection of Islamic Law and estate planning and consider some novel solutions for how to use conventional estate-planning tools in a new context to design a Sharia-compliant estate plan for Muslim clients. We'll also address legal challenges facing the Muslim client in the current environment.

Muslim Americans

Some demographic background may offer insight into the significance and growth of the Muslim American community. Islam is now the third largest religion in the United States, after Christianity and Judaism. As of 2017, there are more than 3.45 million Muslims living in the United States.[1] Muslims are projected to become the second largest religious group in the United States after Christians by 2040 and to nearly double in population size by 2050.[2] Yet according to a 2017 study, more than half of Americans surveyed stated they've never or seldom interacted with a Muslim individual.[3]

Primarily a mix of African-Americans, Arabs and South Asians, Muslim Americans are one of the most racially diverse religious group in the United States, having no majority race.[4] The percentage of



Muslims enrolled in college is larger than the share of the general public. An estimated 30% of Muslim Americans are professionals with a noticeable presence in professional fields like medicine, where they account for up to 5% of all American physicians.[5]

In terms of beliefs, Islam is a monotheistic religion with a legal system known as "Sharia." Modern use of this term has become sensationalized, but the term "Sharia" loosely translates to Islamic law. Sharia is derived from four primary sources: (1) the Quran, the Muslim scripture; (2) the Hadith, the teachings of the Prophet Muhammad; (3) Ijma, or scholarly consensus; and (4) Qiyas, or analytical deduction.

Sharia for American Muslims isn't really "law" in the conventional sense, meaning violations that bear criminal or civil penalties. Rather, it's better understood as a moral, ethical and social code of conduct for how a practicing Muslim should live their life. In many respects, it's similar to Jewish law (Halakha). Sharia governs acts of ritual worship, domestic relations, private contracts, dietary restrictions, financial transactions, interpersonal relationships and, notably, inheritance obligations. Incorporating these requirements into an estate plan can be quite complex, and we'll only address some of them here in a limited, but important, manner.[6]

Islamic Inheritance Law

Many Muslim clients view estate planning not just as an expression of love but also as an act of religious devotion. In a famous hadith (statement of the Prophet Muhammad), he said "Do not let two nights pass without writing a will."[7]

The laws of inheritance in Islam function in many ways like a traditional intestacy statute. After payment of funeral and burial costs and legally enforceable debts, up to one-third of a decedent's estate (the wasiyah share) may be distributed as specific bequests to any individuals or organizations that aren't already entitled to inherit from the decedent under Islamic law. The wasiyah share is optional and is often used to make charitable gifts on death. The remaining balance of the estate must be distributed in predetermined proportions to the decedent's Muslim heirs (faraid share), which are derived primarily from Chapter 4 of the Quran.

In most cases, the decedent's Islamic heirs will include their spouse, if married, parents and children. Siblings, grandparents, grandchildren and more distant relatives may be entitled to inherit in certain situations as well.

Chapter 4 Verse 11 of the Quran outlines the shares for surviving children and parents:

> Allah commands you regarding your children: the share of the male will be twice that of the female. If you leave only two or more females, their share is two-thirds of the estate. But if there is only one female, her share will be one-half. Each parent is entitled to one-sixth if you leave offspring. But if you are childless and your parents are the only heirs, then your mother will receive one-third. But if you leave siblings, then your mother will receive one-sixth—after the fulfilment of bequests and debts. Be fair to your parents and children, as you do not fully know who is more beneficial to you. This is an obligation from Allah. Surely Allah is All-Knowing, All-Wise.[8]

Islamic financial ethics also significantly impact estate planning and may restrict what conventional tools a devout Muslim may use.

Chapter 4 Verse 12 of the Quran describes the shares for a surviving spouse and an individual who is neither survived by ascendants nor descendants:

> You will inherit half of what your wives leave if they are childless. But if they have children, then your share is one-fourth of the estate—after the fulfilment of bequests and debts. And your wives will inherit one-fourth of what you leave if you are childless. But if you have children, then your wives will receive one-eighth of your estate—after the fulfilment of bequests

> and debts. And if a man or a woman leaves neither parents nor children but only a brother or a sister from their mother's side, they will each inherit one-sixth, but if they are more than one, they all will share one-third of the estate—after the fulfilment of bequests and debts without harm to the heirs. This is a commandment from Allah. And Allah is All-Knowing, Most Forbearing.[9]

Financial Ethics and Estate Planning

Islamic financial ethics also significantly impact estate planning and may restrict what conventional tools a devout Muslim may use. One is the prohibition on "riba," which loosely translates to interest. This includes the charging of interest on cash loans and hence the reason why many Muslims will avoid interest-bearing banking practices to the extent feasible. In a financial system that's heavily dependent on the exchange of money with interest, and a tax legislature that incentivizes interest payments, it's often difficult for clients and practitioners to reconcile the prohibition on riba. This prohibition will impact a Muslim client's ability to use various financial and estate-planning tools such as life insurance and annuities.

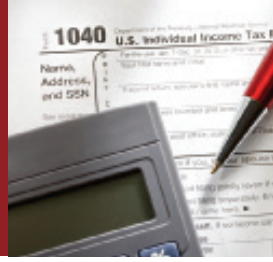
The prohibition on riba will impact a Muslim client's ability to use various estate-planning tools such as life insurance and annuities.

Another prohibition is "gharar" or excessive speculation. Although some risk is involved in every investment or business transaction, gharar involves a situation in which there's significant uncertainty on crucial aspects of a deal. For example, a transaction in which the identifying characteristics of the item or the price of the item are arbitrary or unknown would be classified as gharar, as would investing in various derivate markets. This is another reason why Muslim clients often avoid purchasing many life insurance products—though like all matters of faith, there are various interpretations and opinions among different jurists and legal scholars. When drafting a Muslims client's documents, the drafting attorney should be aware of the effects the prohibitions have on different estate-planning tools. Despite the distinctive financial rules and regulations of Sharia, exact practices are likely to differ from client to client. It's also important to confirm that other advisors on the client's team are aware of these matters as well.

Islamic Dispositive Plan

Islamic law's forced heirship or non-discretionary inheritance regime requires the drafting attorney to consider several complex issues. First, recall that the residuary inheritance shares (faraid) are restricted to Muslim heirs.[10] This raises questions as to both the constitutionality of such a clause and the interpretation and application of such a restriction. With regard to the residual heir restriction, courts have held clauses that determine if potential beneficiaries qualify for distributions based on religious criteria enforceable if the potential beneficiaries have no vested interest in the assets.[11] The courts' opinions in such cases are narrowly tailored to the specific facts. Because individuals are generally allowed to disinherit an heir in most jurisdictions (with the exception of a spousal elective share or a community property interest), it's likely such a clause would be enforceable.[12] Some courts, however, have held clauses that limit inheritance based on the religion of an individual to be void against public policy.[13] Some attorneys therefore recommend avoiding a religious-based reason for the disinheritance clause to minimize the likelihood of courts interpreting the clause against public policy.

Assuming a court upholds such a clause, the problem of how to define the term "Muslim," and who makes such determination, still arises. If a dispute regarding an heir's eligibility to inherit on the basis of being a Muslim arises, a secular court may be ill prepared or unwilling to handle the matter altogether on the basis that the first amendment prohibits resolving disputes over religious doctrine and practice.[14] Because the court will employ "neutral principles of law" to determine the beneficia-



ries in a contested will or trust, it may not consider any religious principles.[15] Accordingly, the interpretation of religious directives would be better left to an appropriate individual or religious body that's well-versed in the rules of that faith and empowered with binding conclusive authority on the matter. Some practitioners have endeavored to direct such religious determinations to a religious body, such as a religious arbitration tribunal. Another more modern approach might be to incorporate an independent trust protector in the governing instrument[16] who has the authority to make a final determination regarding the religious status of potential heirs. Practitioners should also include an indemnification provision for the trust protector to deter future challenges to the determination. Perhaps an even more concerning issue when drafting an Islamic estate plan is the potential for legislation specifically designed to impede the application of Islamic or Sharia law in any context, as explained further below.

Finally, another important issue that arises in this planning context is that Sharia law prescribes precise fractions of the estate be distributed to specified heirs. But the fractional formulas change depending on which heirs are alive at the moment of the decedent's death. So while a will for a Muslim client can specify that the dispositive provisions shall adhere to Sharia law (perhaps with the exception of the discretionary one-third wasiyah share noted above) and even specify who those heirs may be at the date of execution, that may change before death or in the case of a simultaneous or concurrent death. Thus, to implement a Sharia compliant dispositive scheme, the plan may need to be amended or re-interpreted on death to determine exactly who's entitled to inherit and in what fraction.

We propose a novel means of addressing these issues that reduces the risks of conflict or controversy and safeguards the Muslim client's dispositive wishes: Use a special or limited power of appointment (LPOA) clause designed to address these concerns. An LPOA is a flexible planning tool that can be used in a creative way to accomplish a surprising variety of outcomes. This mechanism could also be essential because of the legal environment discussed below.

Anti-Sharia Law Developments

As explained above, secular courts are unlikely to have the specialized knowledge required to properly address issues of religious interpretation. To further exacerbate the issue, various states have introduced anti-Sharia legislation. The anti-Muslim nature of these proposals raises a host of concerns, but more specific to the topic of this article, may undermine the ability to enforce a Sharia-compliant estate plan. If the jurisdiction where a decedent was domiciled became involved in interpreting or enforcing a Sharia-compliant will, the presence of such legislation could make that impossible. One group has described these efforts in this way: "Although these bills may appear innocuous on their face, their real purpose is to stoke anti-Islamic rhetoric and exploit the unfounded fear that Sharia law is taking over US courts."[17]

> The proliferation of anti-Sharia legislation proposals makes it imperative that estate planners expressly address a Muslim client's wishes in their estate-planning documents.

For example, in 2010, voters in Oklahoma passed a constitutional amendment banning Sharia law from being applied in state courts as part of the Save Our State Amendment. The innocuous title of this legislation belies the hostile nature of its objective. A Muslim resident of Oklahoma filed suit arguing that the amendment would prevent him from having his will probated in accordance with his faith in violation of the Establishment Clause and Free Exercise Clause of the First Amendment. A federal judge granted a permanent injunction that was affirmed unanimously by the U.S. Court of Appeals for the 10th Circuit Court, which held that the legislation "specifically names the target of its discrimination"

and that no legitimate purpose could be identified.[18]

Nonetheless, in the past 10 years, more than 200 similar anti-Sharia law bills have been proposed in 43 states, with 14 bills being enacted.[19] In the past few years, at least 23 anti-Sharia bills were introduced in state legislatures with two becoming law in Texas and Tennessee.[20] The proliferation of anti-Sharia legislation proposals makes it imperative that estate planners expressly address a Muslim client's wishes in their estate-planning documents. But further steps are advisable, as merely incorporating provisions that properly carry out the Sharia-compliant wishes of the Muslim client may not suffice.

It might even be feasible to draft a provision in a revocable trust stating that if the client's home state enacts anti-Sharia legislation, the governing law and situs shall automatically be changed.

Revocable Living Trust

Instead of relying solely on a will, which may ultimately be subject to probate in a jurisdiction that's antagonistic to the application of Sharia law, or worse, one that may have enacted anti-Sharia legislation (which may have occurred subsequent to the execution of the will), a better approach to uphold a Sharia-compliant estate plan is to use a pour-over will and rely on a funded revocable trust as the primary dispositive document, even in jurisdictions where probate typically isn't overly cumbersome or inefficient.

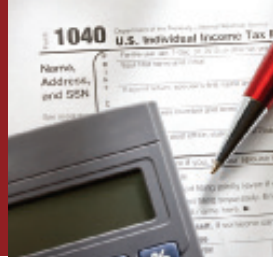
Further, while a will is governed by the law of the client's domicile and subject to the probate or surrogate courts in that state, a revocable living trust may and should include a mechanism to effectuate a change in both situs and governing law to a jurisdiction with more favorable law. That way, a trust can readily be moved from a state that has or may enact legislation that thwarts the Muslim client's wishes to a state that will respect them. It might even be feasible to draft a provision in the revocable trust stating that if the client's home state enacts anti-Sharia legislation, the governing law and situs shall automatically be changed to the nearest state without such a law. A trust protector could be given the express right to remove and replace trustees and change governing law and situs. In that way, a new trustee in a state without anti-Sharia legislation can be named, and the ties to the old state with the offending legislation lessened.

The trust should stipulate who the grantor's living Muslim heirs are at the time of creation and include a mechanism for recalculating or reapportioning the shares on death in the event that such individuals aren't alive, additional Muslim heirs are born to the grantor or there's a dispute relating to the eligibility of an heir to inherit. Further preparing supplemental documents, such as letters of instruction or family inheritance agreements, may help to uphold the religious and customary wishes, as well as to bolster the record in case of a dispute or legal challenge.

Trust Protector With a LPOA

The use of a revocable trust can help ensure the application of a religiously compliant estate plan for a Muslim client. As explained above, incorporating change of governing law and situs provisions may help avoid anti-Sharia legislation and protect the intended Sharia dispositive plan. Furthermore, appointing a trust advisor or trust protector[21] who's authorized to interpret questions of religious law, resolve disputes pertaining to the eligibility of a beneficiary to inherit, or add or remove a beneficiary can provide a private and efficient means of addressing some of the issues that may arise without court intervention.

Trust protectors historically were used to provide for flexibility and oversight over a trustee in irrevocable offshore trusts but have since expanded to cover many broad roles and are now ubiquitously used in both revocable and irrevocable trusts. Common powers of a trust protector include the ability to remove and replace a trustee, add or remove beneficiaries, terminate a trust, change the trust situs and amend the trust instrument for scrivener's errors or



due to changes in tax laws or to obtain a more favorable tax result. Some states like South Dakota have gone further and expressly codified trust protector powers in statute.[22]

When planning for a Muslim client, the grantor of a trust may consider granting certain additional powers to the trust protector or even appoint a separate unique individual—perhaps a Muslim attorney, Imam or a panel of trusted advisors—to serve as a Sharia trust protector who would be empowered to interpret provisions that are related to Sharia and its application rather than having a secular court resolve such disputes. The trust instrument should expressly provide that the trust protector shall serve in a non-fiduciary capacity, thereby ensuring that the decisions are binding and enforceable, provided that the trust protector acts in "good faith and in accordance with the terms and purposes of the trust"[23] and doesn't act in a way that constitutes a fraud on the power.

It should be noted that state laws vary on the point of whether a trust protector must act in a fiduciary capacity. Some state laws provide that a trust protector must act in a fiduciary capacity, absent a direction to the contrary in the governing instrument. Others have expressly declared that trust protectors are to be treated as fiduciaries. Others have adopted Section 808 of the Uniform Trust Code (or a variation thereof), which states that a person who holds a power to direct is presumptively a fiduciary.[24] As such, it may be possible to establish the revocable trust under the laws of a jurisdiction that permits trust protectors to act in a non-fiduciary capacity or to at least consider allowing flexibility to move the trust to a jurisdiction that permits such appointment.[25]

It may also be advisable to go a step further and consider granting to the trust protector a LPOA to reallocate assets among the decedent's Muslim heirs. This measure of flexibility can be particular important to carrying out a Sharia-compliant estate plan. The determination of whether a particular heir is a "Muslim" and hence to benefit under Sharia law is complicated and should be determined preferably by someone with the appropriate knowledge and expertise in this area of Sharia law, not by a secular court.

Moreover, Islamic law's predetermined inheritance regime may change in the event of a birth, death or simultaneous death situation, thus, even when the client's revocable trust depicts the current fractional distribution of the estate under Sharia law, that distribution schedule may change prior to the individual's death. If there's an issue as to how the estate should be fractionalized among Sharia heirs at death, it may be simpler and less prone to challenge if a Sharia trust protector has the power to recalculate the allocation and division of shares, as well as the determination as to whether that particular individual is a Muslim. Because this determination can negatively impact or eliminate a potential beneficiary's inheritance share, granting an LPOA to a named Sharia trust protector should probably be expressly granted in a non-fiduciary capacity to avoid issues as to fiduciary duties owed to any named beneficiaries.

Pre-mortem Probate

Finally, another option available to practitioners in certain jurisdictions might be to have a pre-mortem probate of a will that expresses a Sharia-compliant dispositive scheme, in addition to the revocable trust. While rare, this procedure effectively allows the testator or grantor to obtain a declaratory judgment or judicial approval of a will or trust and may be particularly useful when a client anticipates that there's likely to be a contest after their passing.

Endnotes

1. *www.pewresearch.org/fact-tank/2018/01/03/new-estimates-show-u-s-muslim-population-continues-to-grow/.*
2. *Ibid.*
3. *www.prri.org/spotlight/social-contact-muslims-refugee-ban/.*
4. *https://news.gallup.com/poll/116260/Muslim-Americans-Exemplify-Diversity-Potential.aspx.*
5. Wahiba Abu-Ras, Lance C. Laird and Farid Senzai, "A Window Into American Muslim Physicians: Civic Engagement and Community Participation," Islamic Medical Association of North America (IMANA). Institute for Social Policy and Understanding (ISPU) (October 2012), at p. 9.
6. This article doesn't address estate tax planning considerations for taxable estates; for a detailed discussion of a Sharia-compliant estate planning, *see* Yaser Ali and Ahmed Shaikh, *Estate Planning for the Muslim Client,* American Bar Association (2019).
7. Sahih Muslim Book 13 Number 3987, *www.iium.edu.my/deed/hadith/muslim/013_smt.html.*
8. Dr. Mustafa Khattab, the Clear Quran, *https://quran.com/4.*

9. *Ibid.*
10. But note a non-Muslim may receive a specific bequest from the discretionary or wasiyah share.
11. *Feinberg v. Feinberg (In re Estate of Feinberg),* 235 Ill.2d 256 (2009).
12. *See* Professor James Sonne, "Domestic Applications of Sharia and Exercise of Ordered Liberty," *45 Seton Hall L. Rev.* 725, at p. 737, stating that a "difference of religion" disqualifier would be upheld under the free exercise clause or under the general right to dispose property as one see's fit.
13. For example, *see Drace v. Klinedinst,* 118 A. 907 (Pa. 1922)) (holding that a life estate willed to grandchildren on the condition that they remain faithful to a religion wasn't enforceable).
14. *See ibid,* at p. 726.
15. *Jones v. Wolf,* 443 U.S. 595 (1979).
16. Analogous "protectors" could be named in other contexts, such as an "estate protector" for an estate, etc.
17. *www.au.org/content/anti-sharia-legislation.*
18. *Awad v. Ziria,x* (10th Cir. Okla. 2012).
19. *See www.splcenter.org/hatewatch/2018/02/05/anti-sharia-law-bills-united-states.*
20. *www.tennessean.com/story/news/2019/07/19/tennessee-bill-ketron-copycat-anti-sharia-law/1767805001/.*
21. While practitioners differ as to the preferred nomenclature and whether there's a meaningful difference between the two roles, we've adopted the term "trust protector" given the more significant involvement and role that this individual or individuals may play in this context. *See www.americanbar.org/groups/real_property_trust_estate/publications/probate-property-magazine/2017/january_february_2017/2017_aba_rpte_pp_v31_1_article_huber_trust_protectors/.*
22. S.D. Codified Laws 55.1b-6 (2013) (outlining 12 powers of a trust protector).
23. Uniform Trust Code (UTC) Section105(b)(2).
24. UTC Section 808 cmt at 142 (2000) (Comments to Section 808 indicate that it's intended to cover trust protectors).
25. *See, e.g.,* 12 Del. C. Section 3313(a).