

Shariah-Compliant Wills

An Overview

By Omar T. Mohammedi

Remembrance of death and expectation of the afterlife are cornerstones of the Islamic ethos. Planning for death by ensuring a distribution of one's estate in accordance with Islamic Shariah law is obligatory on all Muslims wishing to comply with their religious obligations. As the Muslim population continues to expand, the area of Shariah-compliant wills offers practitioners a new and interesting field to explore. Because of its complexity and its differences with the established legal theories of intestacy law in the United States, Islamic inheritance law can prove to be an engaging and important subject.

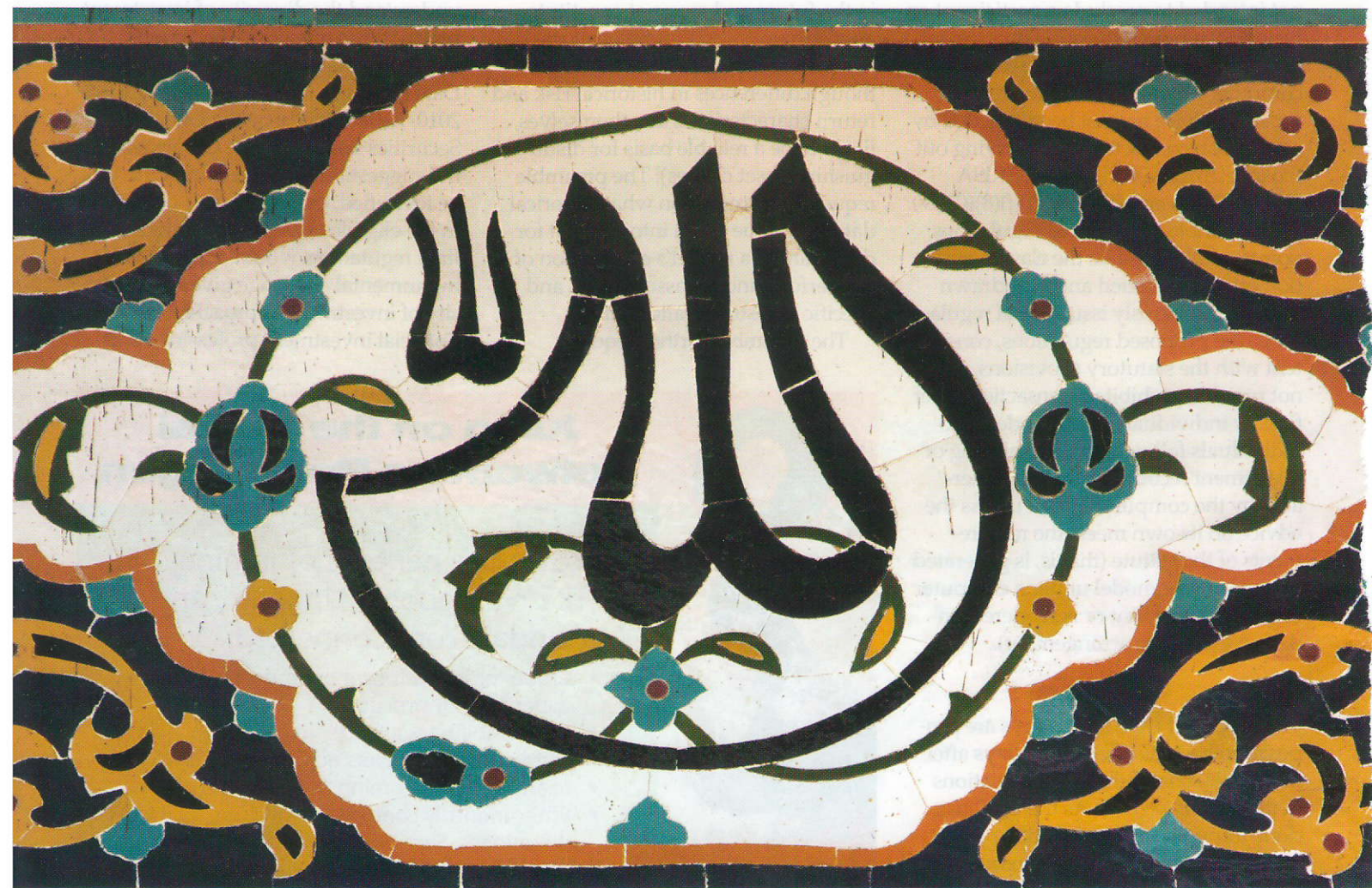
The Basic Structure of Shariah-Compliant Wills

Sources of Shariah Law

Shariah law is a function of four components that together create what faithful Muslims believe to be a system governing all aspects of life, including the spiritual as well as the temporal. The first and foremost source is the Qur'an itself, the Muslim holy book. The Qur'an is followed by what is called the *Sunnah*, or the sayings and practices of the Prophet Muhammad, the recorded elements of which are referred to as *Hadith*. The third source of law, *ijma*, refers to a consensus of opinion,

Omar T. Mohammedi is the managing partner for the Law Firm of Omar T. Mohammedi, LLC, in New York City.

iStockphoto



signifying an “agreement of jurists on a rule of law.” Finally, *qiyas*, or analogical reasoning, “is used to apply the textual rule provided for a specific situation to another situation not specified, by identifying a common underlying cause for the law between them.” Abdur Rahman I. Doi, *Shari’ah: The Islamic Law* 7–8 (1984).

Shariah Laws Governing Inheritance

The rules governing inheritance form an extensive and complicated part of Shariah law that sets out a strict formulation on how property is to be divided among heirs, one that is a religious obligation for devout Muslims. The Qur’an does not permit individuals to inherit or disinherit family members as they see fit so as to avoid potential conflicts within the family unit. The family unit is of central importance in the Islamic context and the Qur’an limits actions that can potentially lead to its disintegration.

Several verses within the Qur’an address the Islamic inheritance scheme directly. For example, verse seven of the fourth chapter (*Surat An-Nisaa’*) states: “From what is left by parents and those nearest related there is a share for men and a share for women, whether the property be small or large, a determinate share.” Further along, the Qur’an presents the laws of inheritance shares in greater detail in verses 11 and 12 of the same chapter.

The Qur’an provides a general outline concerning how wealth and property are to be distributed, but some important details remain unclear from these passages. Several *Hadith*, or recorded sayings of the Prophet Muhammad, also touch on the laws of inheritance, providing further instructions and clarification on inheritance and distribution.

The two sources of law—Qur’an and *Hadith*—first demonstrate clearly and emphatically the importance of having a will that conforms to these meticulous sets of rules. Second, the two sources allow scholars to divide a structured, rule-based system of inheritance that devout Muslims observe.

The duty to have a written will

in one’s possession is of significance within Shariah law. In a highly relied-on collection of *Hadith*, the Prophet Muhammad says: “It is the duty of every Muslim who has something which is to be given as a bequest not to have it for two nights without having his will written down regarding it.” Verses in the Qur’an also emphasize this point, sending a clear message of immediacy. Every single practicing Muslim must ensure that his or her estate is distributed in a fashion dictated by Shariah law. Failure to do so would be considered a significant dereliction in fulfilling one’s religious duties. Knowing and complying with Shariah inheritance law is a primary concern for practicing Muslims—in particular for the practicing Muslim living in a country where Shariah law is not automatically enforced.

Specific Process of Shariah Inheritance

The Qur’an sets out specific mandates for how an estate should be distributed. These mandates are further clarified and expanded in the *Hadith*. The following sections provide a brief look at the specific rules of inheritance under Shariah law.

Payment of Debts and Expenses.

First, heirs’ rights to inheritance do not vest until the decedent’s death. Once the death of the decedent has been confirmed, Shariah law, much like typical American estates, requires that all of the decedent’s debts and expenses be settled before any of the estate is distributed among his or her heirs. The first expenses to be settled are for the funeral accommodations of the decedent. Next, all debt obligations to individuals or organizations need to be settled. For married males, the deferred portion of his wife’s marriage gift (referred to as the *mahr*) is considered a debt against his estate.

After all debts and expenses have been settled and before the estate can be distributed according to the mandates of Shariah law, an intermediary step provides the testator flexibility in controlling a portion of his bequests.

The Wasiyya Bequest. Principally, the *wasiyya* allows a testator to give

away up to one-third of his or her property in a manner unencumbered by the dictates of Shariah law, so long as the bequest is not made to individuals who can already inherit under the normal inheritance laws. The source of the *wasiyya* bequest comes not from the Qur’an, but rather from *Hadith*, where the Prophet Muhammad allowed a companion to give away a third of his estate as he wished but no more.

The incorporation of the *wasiyya* proves to be a valuable tool in the



The rules governing inheritance form an extensive and complicated part of Shariah law that sets out a strict formulation on how property is to be divided among heirs, one that is a religious obligation for devout Muslims.

Shariah inheritance process. It affords the testator flexibility to bequeath assets to those he or she deems deserving, so long as they do not previously inherit under Shariah law. At the same time, it safeguards close kin who are entitled to their share under Shariah law from being disinherited. Where the *wasiyya* proves most useful is in situations in which a testator has an adopted child, a step or adoptive parent, or a close relative that is not Muslim.

Under Shariah law a nonbiological parent or child cannot be an Islamic heir. Therefore, an adopted child has no share in Islamic inheritance from the adoptive parent. Under Shariah law, the adopted-out child *always* keeps a right of inheritance from the birth

parents but cannot inherit from the adoptive parent. In this scenario, the *wasiyya* bequest allows the adoptive parent to ensure that the adopted child will receive a share of up to one-third of the estate.

The testator also has the ability to use the *wasiyya* to leave bequests to friends, distant family members, and charitable organizations.

In sum, the *wasiyya* bequest provides more flexibility for the testator to accommodate people or charitable organizations. At the same time, the *wasiyya* is limited to one-third so that the testator cannot completely disinherit relatives that have a rightful share of his or her estate. This way, a balance

is struck between personal preferences and religious mandate.

Shariah Inheritance. The final step in the process is to distribute the remaining estate to the appropriate heirs in accordance with the strict guidelines established under Shariah law. Combining the mandates and injunctions from the verses of *Surat An-Nisaa'* as well as the numerous *Hadith* that comment on those verses, Shariah scholars have developed a formulaic methodology for determining Islamic heirs and their shares. The rules of inheritance are complex, involving 15 classes of inheritors and four methods of inheritance. The final distributions cannot be summed up in a few formulas; rather

they are listed at length and are contingent on several factors, including the number and sex of children as well as the number of other surviving heirs.

For example, if a decedent is survived by his wife, his father, and two sons, his wife is entitled to a one-eighth share, his father will receive one-sixth, and his two sons will share equally in the remainder. But this distribution would change dramatically if the decedent were survived by only his wife and his father. In that case, his wife would inherit a one-fourth share while his father would inherit the remainder.

As the two examples illustrate, some inheritors receive fixed shares (such as the spouse), others only inherit

Common Shariah Inheritance Distributions

Survivors: Offspring

No other relatives.	Children get remainder, with sons receiving twice the shares of daughters.
Wife.	One-eighth to wife, remainder goes to children, with sons receiving twice the shares of daughters.
Husband.	One-fourth to husband, remainder goes to children, with sons receiving twice the shares of daughters.
Parents only.	One-sixth to each parent, remainder goes to children, with sons receiving twice the shares of daughters.
Wife and parents.	One-sixth to each parent, one-eighth to wife, remainder goes to children, with sons receiving twice the shares of daughters.
Husband and parents.	One-sixth to each parent, one-fourth to husband, remainder goes to children, with sons receiving twice the shares of daughters.

Survivors: No Offspring

Father and any number of siblings.	Father takes entire remainder.
Wife and father.	One-fourth to wife, remainder goes to father.
Husband and father.	One-half to husband, remainder goes to father.
Father and mother.	One-third to mother, remainder goes to father.
Husband, father, and mother.	One-half to husband, one-sixth to mother, remainder to father.
Wife, father, and mother.	One-fourth to wife, one-sixth to mother, remainder to father.
Mother only.	Mother takes entire remainder.
Mother, full brothers, and full sisters.	One-sixth to mother, remainder to brothers and sisters, with brothers getting twice the share of sisters.
Siblings only.	Brothers and sisters take remainder, with brothers getting twice the shares of sisters.

remainders after everyone else has taken their share (such as the children), and some, such as the father in the example above, inherit either a fixed share or a remainder depending on the other survivors. These complex methods of inheritance become more complex as different family members are added to the equation.

In the example above, the family members mentioned (the wife, father, and children) are the only individuals to inherit, even if other family members, such as siblings, are present. That is, the existence of certain heirs cuts off a potential inheritance by other heirs. For example, if no children and no parents survive the decedent, the decedent's spouse would share the inheritance with the decedent's siblings and possibly more distant relatives. The existence of just one child will cut off all siblings and other distant relatives from receiving a share.

Health-care Proxies and Funeral Rites. In addition to distribution of assets, Shariah law also dictates specific laws related to terminal health conditions and burial and funeral rites for Muslim decedents. Under the Shariah, a brain-dead person is not considered dead and a machine can be used to keep the person artificially alive. It is highly recommended for every Muslim to draft a health-care proxy to make his or her own decision about the extent to which one should be kept alive artificially. If a brain-dead person has chosen to remain alive, then it is unlawful to cut off his life supply. If there is no health-care proxy in existence, then only a unanimous decision of the closely related adults can determine the brain-dead person's fate. Frequently, arriving at such a consensus is difficult, if not impossible, which, in turn, makes the situation more complex for close family members. Thus, having a written health-care proxy is invaluable.

After death there are specific instructions for how the body should be washed and dressed and for where the body should be buried. Next, a funeral procession needs to be carried out that includes a funeral prayer. It is important to have these instructions clearly

explained in advance of death, because Shariah law also mandates a quick burial after death. In several states, the personal choice of the decedent determines the burial rites to be followed. If the personal choice of the decedent is expressed in a will, it can be used to carry out those burial rites even before it enters probate. *Feller v. Universal Funeral Chapel, Inc.*, 124 N.Y.S.2d 546 (Sup. Ct. 1953). It is therefore important to have a provision that leaves burial instructions both in the will and in the possession of the person who will likely carry out the burial.



Spousal shares under a Shariah will are frequently less than one-third of the estate, which contradicts the spousal right of election that most states have adopted.

Shariah-Compliant Wills and Conflicts with U.S. Laws

For those wishing to comply with Shariah law when drafting a will, several conflicts with U.S. law are important to keep in mind. This section aims to elaborate on those issues and suggest solutions to these potential conflicts when possible.

Although statutory and legal conflicts can be smoothly reconciled with proper drafting, broader public policy concerns may be more difficult to tackle. U.S. courts have long grappled with conflicts between religion and the state generally, as well as conflicts emerging out of the enforcement of religious clauses in wills more specifically. As the use of Shariah-compliant wills becomes more popular,

it is likely that judges will be faced with new and unique issues previously unseen in U.S. courts. But as will be demonstrated below, similar conflicts have been addressed before as previous waves of immigrants and observant individuals of different faiths drafted wills and entered probate. Thus, reconciliation between Shariah law and U.S. public policy considerations can be accomplished through a study of similar case law and analogizing the resolutions in those cases to the issues that can emerge out of Shariah-compliant wills.

One particular aspect of the Shariah law may raise a public policy issue. Spousal shares under a Shariah will are frequently less than one-third of the estate, which contradicts the spousal right of election that most states have adopted. The lack of a spousal right of election in Islamic wills clashes directly with this well-settled principle under most state laws. The spousal right of election (or elective share) is essentially a safety net to protect a spouse that has been cut out of a will. Historically, the right of election was adopted into law to protect the surviving spouse from disinheritance and becoming a public charge. *Spencer v. Williams*, 569 A.2d 1194, 1198 (D.C. 1990). In the modern sense, the right of election recognizes the surviving spouse's role in the accumulation of the assets by the deceased spouse. The right of election can be exercised even when the surviving spouse is well off and not likely to become a public charge. *Id.* In this sense, there may not be a substantial policy reasoning behind the modern use of the elective share.

Shariah principles protect all heirs that are entitled to the bequest from the disinheritance, including the spouse. Under New York law the right of election is applied as follows: he or she will receive \$50,000 or one-third of the decedent's estate (whichever is greater). Under Shariah law, a wife receives one-eighth share when there are children and a one-fourth share when there are no children. A husband receives a one-fourth share when there are children.

The elective share is a statutory mechanism established to prevent one

spouse from depriving the other spouse of property that the two acquired during the marriage. This falls generally within the American principle that marriage is an equal partnership, whereby both spouses contribute equally and should therefore receive equal benefit. *LaMere v. LaMere*, 663 N.W.2d 789, 797 (Wis. 2003). In the Islamic context, however, a wife's property belongs to her alone, while the husband's property is communal, to be used for the benefit of the family as a whole. In this spirit, Shariah law entitles women to a lesser share because no financial burden is placed on the wife. This echoes the principle concerning the husband's obligations under Shariah law to provide for the family, obligations by which a wife is not traditionally bound. As a testament to this, one author concluded that the amount each spouse is set to inherit under Shariah law is determined not by their sex, but rather by their financial obligations.

The female spouse also receives an additional two-part marriage gift—the *mahr*. Under the Shariah rules of marriage, one part is termed the *muqaddam*—meaning immediate—and the other the *muakhhkar*—meaning deferred. These gifts become the independently owned property of the wife, and the latter gift is a debt against the husband's estate.

When a husband spouse is concerned about the assets his wife will receive on his death, he can simply transfer additional property to her *inter vivos*, which would be in accord with the Shariah law. He also can leave her a *wasiyya* bequest. That bequest, however, would be subject to unanimous consent of the remaining heirs (usually the children and parents of the husband) under Shariah law. Therefore, although Shariah law results in a smaller portion of the inheritance for a wife when compared to the spousal right of election, this difference is offset by other rules and requirements under the Shariah that provide sufficient protection for female relatives.

Under the laws of most U.S. state jurisdictions, if a couple wishes to comply with Shariah law on inheritance of the surviving spouse, the surviving spouse

will need to renounce his or her right of election to do so. In the event that a waiver cannot be obtained, whether a court will enforce a Shariah-based will that eliminates the spousal right of election remains to be seen. Nonetheless, in this instance, the Establishment Clause will not be an issue either way because the statute allowing a right of election is religion neutral and does not involve an excessive government entanglement with religion. *Jones v. Wolf*, 443 U.S. 595, 602 (1979). If the court chooses to accommodate Shariah law by not granting the surviving spouse the right of election under most U.S. state laws, this would not be court entanglement in



Under the laws of most U.S. state jurisdictions, if a couple wishes to comply with Shariah law on inheritance of the surviving spouse, the surviving spouse will need to renounce his or her right of election to do so.

religion but merely an accommodation of a religious practice. *Sherbert v. Verner*, 374 U.S. 398, 409 (1963).

Although courts have not dealt directly with the issue of challenging the right of election on religious grounds, they have previously addressed the issue of freedom of religion versus state regulations in other cases.

In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), Amish parents challenged Wisconsin's state law requiring mandatory school attendance. The Supreme Court

held that "a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment." *Id.* at 214. In carrying out that balancing process, the Court found that the state law violated the Amish right to free exercise of religion because their religious beliefs would not pose a threat to public safety or welfare. *Id.* at 230.

An argument can be made that under the totality of Shariah law, the surviving spouse is unlikely to become a public charge absent a right of election. As mentioned above, in addition to her one-eighth inheritance share the female spouse also would receive a payment owed to her from the husband's estate in the form of the *muakhhkar*. She would also maintain possession of her own personal assets, which were free of financial obligations during the marriage. In that regard, the female spouse is unlikely to become a public charge. The state may not have a compelling interest to prevent the deceased testator from exercising his final religious duty—especially in the modern application of the right of election when a spouse can exercise her right "for any reason, or for no reason, and need not get approval for the action." See *Spencer*, 569 A.2d at 1198.

Shariah Wills and Arbitration

Once a Shariah-compliant will is carefully drafted and executed, the next test occurs when the will enters probate. If the will was properly drafted and executed, the probate process should not present any additional challenges. Certain aspects, however, can give rise to additional conflicts of law and possibly will contests from heirs or potential heirs.

If the court does entertain the contest, then it may be required to consider the Shariah law—a practice that is replete with controversy. See *In re Dajani*, 251 Cal. Rptr. 871 (Ct. App. 1988) (in which a California court had to interpret a Shariah *mahr* agreement). Court interpretations of religious clauses can often lead to results that hurt rather

than help the affected party. The best solution is for parties to arbitrate all disputes concerning Shariah law with a qualified Islamic arbitration body because most U.S. judges would like to avoid making decisions based on religious law.

To ensure the enforcement of the testator's intent in case of a dispute arising out of religious interpretation, it is advisable to have an arbitration clause in a Shariah-compliant will. Arbitration decisions—even religiously based ones—are usually upheld in court. By including an arbitration clause, testators can assure that, should disputes arise, they will be handled by a body of experts that analyzes and rules on those disputes through the prism of Shariah law, thereby ensuring Shariah compliance.

Jewish Arbitration Under the *Beth Din* System

Faith-based arbitration forums have already been employed and found successful in the United States in the form of the Jewish *beth din* system. A *beth din* generally consists of a panel of three rabbis who preside over religious matters including divorce, conversion, and general commercial or business matters involving Jews. Caryn Litt Wolfe, Note, *Faith-Based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and Their Interaction with Secular Courts*, 75 Fordham L. Rev. 427, at nn.59–60 (2006). They apply principles of Jewish law, or *halakhah*, to settle disputes and make decisions, and turning to these arbitration bodies is purely voluntary, initiated by the agreement and ascent of the parties involved. The procedures are compliant to secular arbitration laws. Therefore, "their awards are usually binding and courts will usually enforce them." *Id.* at 439.

Arbitration Clauses in Shariah-Compliant Cases

To date, Islamic arbitration panels in the United States have been slow to develop and are rarely used.

The benefits of religious arbitrations for the Islamic community in the United States are numerous. Arbitration allows observant individuals the opportunity to settle disputes in a manner

consistent with their religious beliefs while maintaining the advantages of court protection and enforcement.

First, should a dispute arise, these contracts receive the benefit of being analyzed by an Islamic arbitration body most certainly comprised of Shariah experts. Second, parties have the advantage of choosing a school of jurisprudence for the interpretation of the contract or dispute in question. Without an arbitration clause, conflicts would be resolved in U.S. courts where judges can be unfamiliar with the complexities and nuances of the different schools of jurisprudence and may therefore apply



Arbitration allows observant individuals the opportunity to settle disputes in a manner consistent with their religious beliefs while maintaining the advantages of court protection and enforcement.

an interpretation not supported by the parties. Misapplication of Shariah law will more likely be avoided with the inclusion of a panel of Shariah law experts who can make more sound decisions on disputes over such issues as will contests or *mahr* agreements. If parties wish to comply with Shariah law in any sort of interaction, then arbitration will enforce and ensure compliance with this intent,

since [Shariah], and not the parties themselves, determines their contractual rights and obligations, the parties depend on religious scholars

to define these terms and identify these rights if a dispute arises. Such a determination can only be made by an Islamic scholar trained in Islamic jurisprudence. Thus, ordering the parties to seek arbitration is necessary to give effect to the parties' original intention to abide by [Shariah] in the performance of their contract.

Charles P. Trumbull, Notes, *Islamic Arbitration: A New Path for Interpreting Islamic Legal Contracts*, 59 Vand. L. Rev. 609, 643, n.94 (2006). The inclusion of an arbitration clause would avoid conflicts with the Establishment Clause because the arbitration tribunal would tackle the religious matters while a U.S. court would enforce the decision addressing only the secular issues of the law.

Conclusion

Although this article does not aim to brush aside various concerns with Shariah inheritance laws, it does seek to highlight the theological and social underpinnings of those laws so that readers may gain a better sense of why certain laws operate the way they do. With a more thorough understanding of these laws and their operational functions, practitioners may have an easier time drafting Shariah-compliant wills and arguing for their enforceability.

Certainly, in some instances Shariah inheritance laws are not in line with those of the United States, be it on a purely legalistic level or a public policy level. But, because of the emphasis on an individual's right to freedom of contract in the United States, observant Muslims wishing to exercise their right to live in accordance with their religious obligations can do so without falling afoul of U.S. laws. And should disputes arise, religious arbitration offers the best way to ensure that those disputes are resolved in line with the intent of the parties. The use of religious arbitration allows U.S. courts to avoid making decisions in areas outside of their expertise, while maintaining oversight and ensuring enforcement should problems with the religious arbitral decision occur. ■