



Islamic Wills and Conflicts with U.S. Laws

Principles, public policy and enforcement in the US

BY OMAR T. MOHAMMEDI

MUSLIMS WHO WISH TO ABIDE BY the Islamic law of inheritance when drafting a will must keep in mind that they will encounter several conflicts with U.S. law while doing so. While various statutory and legal conflicts may 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 state generally, as well as, more specifically, those that arise when enforcing a will's religious clauses. As the use of Islamic wills becomes more popular, judges will likely be faced with issues previously unseen in U.S. courts.

One particular aspect may raise a public policy issue, namely, the fact that spousal shares are frequently less than one-third of the estate, which contradicts the spousal right of election adopted by most states. The lack of this right in Islamic wills clashes directly with this well-settled principle under most state laws.

Also known as an “elective share,” it essentially seeks to protect a spouse who has been cut out of a will. Historically, this right was adopted into law so that the surviving spouse wouldn't become a public charge (*Spencer v. Williams*, 569 A.2d 1194, 1198 (D.C. Ct. of Appeals [1990])). It may be exercised even for a well-off surviving spouse

who isn't likely to become a public charge. In this sense, there may not be a substantial policy reasoning behind the modern usage of the elective share.

For instance, under New York law the surviving spouse will receive \$50,000 or one-third of the deceased's estate (whichever is greater). Under Islamic law, the wife receives a 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 and a one-half share when there are no children.

The elective share is a statutory mechanism established to prevent one spouse from depriving the other spouse of property

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*, 262 Wis.2d 426, 444 [Wis. 2003]). However, in the Islamic context a wife's property belongs to her, while the husband's property is to be used to benefit the family

no excessive government entanglement with religion (*Jones v. Wolf*, 443 U.S. 595, 602 [1979]). If the court chooses to accommodate Islamic law by denying this right to the surviving spouse, this wouldn't be seen as a court's entanglement with religion, but merely an accommodation of a religious practice (*Sherbert v. Verner*, 374 U.S. 398, 409 [1963]).

UNDER THE LAWS OF MOST STATE JURISDICTIONS, COMPLYING WITH ISLAMIC LAW WITH REGARD TO THE SURVIVING SPOUSE'S INHERITANCE MEANS RENOUNCING HIS OR HER RIGHT OF ELECTION. IF A WAIVER CANNOT BE OBTAINED, IT REMAINS TO BE SEEN WHETHER A COURT WILL ENFORCE AN ISLAMIC WILL THAT ELIMINATES THAT PARTICULAR RIGHT.

as a whole. In this spirit, she is entitled to a lesser share because no financial burden is placed upon her. This echoes the principle concerning the husband's obligations to provide for the family, obligations by which a wife is not traditionally bound.

The wife also receives the *mahr*, an additional two-part marriage gift comprised of the *muqaddam* (immediate) and the *muakh-khar* (deferred). These gifts become her independently owned property, and the latter gift is a debt against the husband's estate. If he is concerned about what assets his surviving wife will receive, he can transfer additional property to her while both spouses are still alive (*inter vivos*).


Under the laws of most state jurisdictions, complying with Islamic law with regard to the surviving spouse's inheritance means renouncing his or her right of election. If a waiver cannot be obtained, it remains to be seen whether a court will enforce an Islamic will that eliminates that particular right. Nonetheless, in this instance the Establishment Clause cannot be invoked because the statute allowing this right is religion-neutral and involves

Although courts have yet to challenge the right of election on religious grounds, they have 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 the 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). The court found that the state law violated the Amish community's right to their free exercise of religion because their religious beliefs posed no threat to public safety or welfare (Id. at 230).

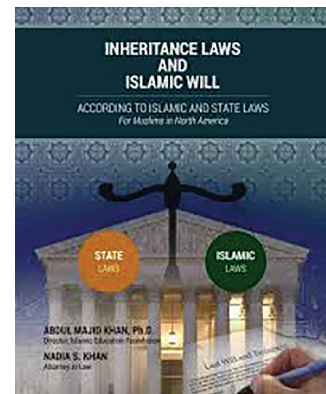
While this article doesn't seek to brush aside various concerns with Islamic inheritance laws, it does seek to highlight their theological and social underpinnings so that readers can gain a better sense of why certain laws operate the way they do. With a more thorough understanding of these laws and their operational function, Muslims may

find it easier to draft Islamic-style wills and argue for their enforceability.

In some instances, however, Islamic inheritance laws differ from those of the U.S., be it on a purely legalistic level or a public policy level. But due to this country's emphasis on an individual's right to freedom of contract, Muslims who want to live in accord with their religious obligations can do so without running afoul of U.S. laws. 

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