


January 2013

## Sharia-Compliant Wills: Principles, Recognition, and Enforcement

Omar T. Mohammedi  
*Fordham University School of Law*

Follow this and additional works at: [https://digitalcommons.nyls.edu/nyls\\_law\\_review](https://digitalcommons.nyls.edu/nyls_law_review)

 Part of the [Comparative and Foreign Law Commons](#), [Estates and Trusts Commons](#), and the [International Law Commons](#)

---

### Recommended Citation

Omar T. Mohammedi, *Sharia-Compliant Wills: Principles, Recognition, and Enforcement*, 57 N.Y.L. Sch. L. Rev. (2012-2013).

This Article is brought to you for free and open access by DigitalCommons@NYLS. It has been accepted for inclusion in NYLS Law Review by an authorized editor of DigitalCommons@NYLS.

OMAR T. MOHAMMEDI

## Sharia-Compliant Wills: Principles, Recognition, and Enforcement

57 N.Y.L. SCH. L. REV. 259 (2012–2013)

ABOUT THE AUTHOR: Omar T. Mohammedi is an Adjunct Professor of Islamic Law at Fordham University School of Law. He is also the founder and managing partner of the Law Firm of Omar T. Mohammedi, LLC. His recent publications include Omar T. Mohammedi, *International Trade and Investment in Algeria: An Overview*, 18 MICH. J. INT'L L. 376 (2010) and Omar T. Mohammedi, *Shariah-Compliant Wills: An Overview*, 25 PROB. & PROP. 58 (2011). The author would like to thank Tariq Hussain and Salah Husseini for their assistance.

## I. INTRODUCTION

Remembrance of death and the afterlife is a cornerstone of the Islamic ethos. Planning for death by ensuring a distribution of one's estate in accordance with Islamic Sharia law is obligatory upon all Muslims wishing to comply with their religious obligations. Thus, when it comes to inheritance, many Muslims living in the United States must make the necessary arrangements to ensure that their legacy will pass under the precepts of Sharia law while also maintaining compliance with state law. As Muslim populations across the United States continue to expand, practitioners in the field will face new, interesting dilemmas and challenges. Due to its complexity and differences with the established legal theories of intestacy laws in the United States, Islamic inheritance law proves to be an engaging and important subject.

In ensuring that Sharia-compliant wills that are also in line with state law, practitioners will likely face certain challenges. This article seeks to identify and address such challenges. There are three major areas where these challenges come to the forefront: basic conflicts between U.S. intestacy laws and Islamic inheritance laws; conflicts with the Establishment Clause of the First Amendment of the U.S. Constitution;<sup>1</sup> and potential public policy conflicts arising from the enforcement of certain interpretations of Sharia law.

First, this article will provide an overview of Islamic inheritance laws. It will then compare such laws with U.S. intestacy laws and subsequently discuss how the two might be synthesized and reconciled to satisfy both bodies of law. This article then presents recommendations on how the aforementioned conflicts may be addressed to comply with both Sharia and U.S. law while avoiding Establishment Clause issues. Finally, this article hopes to demonstrate the extent to which a Sharia-compliant may be enforceable in U.S. courts.

## II. THE BASIC STRUCTURE OF SHARIA-COMPLIANT WILLS

Sharia law, or Islamic law, remains an oft-cited but occasionally misunderstood area of law.<sup>2</sup> Due to misinterpretations and conflicting accounts of Sharia law, it is important to begin with a brief explanation of what Sharia law is comprised of and what its sources are, followed by a discussion of the structure of inheritance laws within Sharia law.

### A. Sources of Sharia Law

Sharia law is a function of four components that together create what faithful Muslims believe to be a system governing all aspects of life: both the spiritual and the temporal.<sup>3</sup> The foremost source of Sharia law is the *Qur'an* itself, which is the

- 
1. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . .").
  2. Sharia, which roughly translates to "the path to be followed," is the code of law followed by Muslims. This article will use the term "Sharia law" to refer to Islamic law, the law that governs faithful Muslims.
  3. See 'ABDUR RAHMĀN I. DOI, SHARĪ'AH: THE ISLAMIC LAW 7-8 (1984); see also IMRAN AHSAN KHAN NYAZEE, THEORIES OF ISLAMIC LAW 194 (1994) ("Strictly speaking, when all human activity is to be regulated by the dictates of the *shari'ah*, there is no reason why even the rules of traffic should not be derived from its principles.").

holy book of Muslims.<sup>4</sup> The second primary source of Sharia law is called the *Sunnah*,<sup>5</sup> or the sayings and practices of the Prophet Muhammad, the recorded element of which are referred to as *Hadith*.<sup>6</sup> The third source of law, *ijma'*, refers to a consensus of opinion, signifying an “agreement of jurists on a rule of law.”<sup>7</sup> Finally, *qiyas*, or analogical reasoning,<sup>8</sup> “is used to apply the textual rule provided for a specific situation to another situation not specified, by identifying a common underlying cause (*'illah*) for the law between them.”<sup>9</sup> The latter two, *ijma'* and *qiyas*, are tools of interpretation as applied to the two textual sources, the *Qur'an* and *Sunnah*. Together, these four elements constitute Sharia law and are the basis of the rules governing wills, which are addressed further below.

Having established the four sources of Sharia law, it is important to highlight another layer of interpretation that characterizes the application of law among Muslims, namely, the four schools of Islamic jurisprudence. Within the Sunni branch of Islam, four schools of thought exist: *Shafi'i*, *Hanbali*, *Maliki*, and *Hanafi*.<sup>10</sup> While these schools have reached consensus on most of the core principles of Islamic law, they reach different conclusions on a number of lesser issues through varying styles of interpretation and jurisprudence.<sup>11</sup> These distinctions are important to highlight, as often times when disputes over religious issues occur, judges or arbitrators must first choose a school of thought through which to settle the dispute at hand. Choosing

- 
4. See DOI, *supra* note 3, at 7.
  5. *Id.* at 48 (“Whilst the Qur’an gives the Muslims a primary rule of life, there are many matters where guidance for practical living is necessary but about which the Qur’an says nothing. In such cases the obvious thing was to follow the custom or usage of the Prophet (i.e. Sunnah).”).
  6. The recording and validation of *Hadith* developed its own science within the Muslim world in order to establish the validity of these sayings and practices. See, e.g., *id.* at 53–57.
  7. NYAZEE, *supra* note 3, at 183.
  8. DOI, *supra* note 3, at 7–8 (“Qiyās or analogical deduction is also recognized as the source of Islamic legal system since it gives an instrument to cope with the growing needs and requirements of society. But such analogical deduction is based on very strict, logical and systematic principles and is not to be misconstrued as mere fancies and imaginations of men.”).
  9. Zainab Chaudhry, Comment, *The Myth of Misogyny: A Reanalysis of Women’s Inheritance in Islamic Law*, 61 ALB. L. REV. 511, 519 n.59 (1997) (“[T]he validity of such analogy depends mostly on the discovery of the correct underlying cause in the text.”) (citing IMRAN AHSAN KHAN NYAZEE, THEORIES OF ISLAMIC LAW (1994)).
  10. See *id.* at 518 n. 50; see also Charles P. Trumbull, Note, *Islamic Arbitration: A New Path for Interpreting Islamic Legal Contracts*, 59 VAND. L. REV. 609, 627 n.94 (2006) (“These schools exert influence over separate regions of the world, although Muslims are free to subscribe to any one of the schools. The Maliki school, predominant in northwestern Africa, adopts a strict reliance on the Sunna of the prophet, but also regards the public interest in decisionmaking. The Hanbali school, predominant in the Gulf states, is known for a strict interpretation of the Qur’an. The Al-Shafi school, predominant in Egypt, is famous for limiting the scope of the Sunna to the practice of the Prophet himself. Al-Shafi, however, was also famous for adopting analogical reasoning and restricting the use of independent reasoning. The Hanafi school also predominant in Egypt and relies on analogical reasoning as well as istihsan where strict application of analogy would yield harsh results.”) (citations omitted).
  11. Trumbull, *supra* note 10, at 627–28 (citing JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW (1982)); see also SCHACHT, *supra* note 11, at 211.

a school of thought would demonstrate the unique theory of a particular school the arbitrator and the judge follow to issue their opinion. The choosing of the School of thought is similar to the choice of law under the U.S. legal system.

### B. Sharia Laws Governing Inheritance

The rules governing inheritance form an extensive and complicated portion of Sharia law, earning this area of the law the name “the science of shares,” or *‘ilm al-fara’id* in Arabic.<sup>12</sup> Generally, *miraath*, the *Qur’anic* term, means inheritance to be divided from the property among a decedent’s successors along those lines dictated in Sharia law.<sup>13</sup> Sharia law sets out a strict formulation on how property is to be divided amongst those heirs, one that devout Muslims are expected to follow in order to comply with their religious obligations.<sup>14</sup>

The principle source of law for Islamic inheritance comes from *Surat An-Nisaa’*,<sup>15</sup> which is the fourth chapter of the *Qur’an* and lays out many of the laws governing familial relations.<sup>16</sup> This chapter addresses such issues as relations between husbands and wives,<sup>17</sup> the treatment of orphans,<sup>18</sup> and a specific and detailed scheme concerning how inheritance should be distributed.<sup>19</sup> The purpose behind establishing fixed distribution requirements can be found in a verse within this chapter that states: “Ye know not whether your parents or your children are nearest to you in benefit. These are settled portions ordained by Allah; and Allah is All-knowing, All-wise.”<sup>20</sup> The implication here is that the *Qur’an* aims to protect family bonds and relationships and to prevent individuals from making rash decisions concerning the distributions of their wealth in a way that would harm family unity.<sup>21</sup> 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. Because the family unit is of central importance in the Islamic context, the *Qur’an* limits actions that can potentially lead to its disintegration.

---

12. Chaudhry, *supra* note 9, at 527.

13. DOI, *supra* note 3, at 271.

14. *See id.* at 272 (“The rules regulating inheritance in Shari’ah are based on the principle that property which belonged to the deceased should devolve on those who by reason of consanguinity or marital relations have the strongest claim to be benefited by it and in proportion to the strength of such claim.”).

15. MUHAMMAD SAED ABDUL-RAHMAN, TAFSIR IBN KATHIR JUZ’ 5 (PART 5): AN-NISAA 24 TO AN-NISSA 147, 23 (2009).

16. THE HOLY QUR’AN 4:1–176 (Abdullah Yusuf Ali trans., Wordsworth Ed. Ltd. 2000) [hereinafter QUR’AN].

17. QUR’AN 4:4.

18. QUR’AN 4:6.

19. QUR’AN 4:11–12.

20. QUR’AN 4:11.

21. DOI, *supra* note 3, at 272 (stating that Sharia law “distributes the estate among the claimants in such order and proportions as are most in harmony with the natural strength of their claims”).

Several verses within *Surat An-Nisaa'* address the Islamic inheritance scheme directly. Verse seven of *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."<sup>22</sup> Further along, in verses eleven and twelve of *Surat An-Nisaa'*, the *Qur'an* presents the laws of inheritance shares in greater detail.<sup>23</sup>

The *Qur'an* provides a general outline concerning how wealth and property should be distributed. However, it is not simply that which is written in the *Qur'an* only, but rather it is a function of reading both the *Qur'an* and *Hadith* (or, more broadly, *Sunnah*) together, followed by their interpretation through *ijma'* and *qiyas*.<sup>24</sup> The sources of Sharia law were discussed above in Section II.A. For details relating to how this principle emanated from the *Hadith*, see Section II.C.2 below.

Several *Hadith*, or recorded sayings of the Prophet Muhammad, also touch upon the laws of inheritance, providing further instructions and clarification on inheritance and distribution. One such *Hadith* expands upon the injunctions contained in *Surat An-Nisaa'* of the *Qur'an*, providing further guidance on how inheritance is to be distributed.<sup>25</sup>

Both of these sources of law—*Qur'an* and *Hadith*—first demonstrate clearly and emphatically the importance of having a will that conforms to this meticulous set of rules. Secondly, the two sources allow scholars to create a structured, rule-based

22. QUR'AN 4:7.

23. See discussion of the laws of inheritance in QUR'AN 4:11–12:

Allah (thus) directs you as regards your children's (Inheritance): to the male, a portion equal to that of two females: if only daughters, two or more, their share is two-thirds of the inheritance; if only one, her share is a half. For parents, a sixth share of the inheritance to each, if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased Left brothers (or sisters) the mother has a sixth. (The distribution in all cases is) after the payment of legacies and debts. Ye know not whether your parents or your children are nearest to you in benefit. These are settled portions ordained by Allah; and Allah is All-knowing, Al-wise. In what your wives leave, your share is a half, if they leave no child; but if they leave a child, ye get a fourth; after payment of legacies and debts. In what ye leave, their share is a fourth, if ye leave no child; but if ye leave a child, they get an eighth; after payment of legacies and debts. If the man or woman whose inheritance is in question, has left neither ascendants nor descendants, but has left a brother or a sister, each one of the two gets a sixth; but if more than two, they share in a third; after payment of legacies and debts; so that no loss is caused (to any one). Thus is it ordained by Allah; and Allah is All-knowing, Most Forbearing.

*Id.* (citations omitted).

24. See *supra* notes 3–9 and accompanying text.

25. SAHIH BUKHARI, vol. 4, bk. 51, no. 10 (M. Muhsin Khan trans., Imam Buhkari ed.), available at <http://theonlyquran.com/hadith/Sahih-Bukhari/?chapter=51&hadith=1&pagesize=10> ("Narrated Ibn 'Abbas: The custom (in old days) was that the property of the deceased would be inherited by his offspring; as for the parents (of the deceased), they would inherit by the will of the deceased. Then Allah cancelled from that custom whatever He wished and fixed for the male double the amount inherited by the female, and for each parent a sixth (of the whole legacy) and for the wife an eighth or a fourth and for the husband a half or a fourth.").

system of inheritance that devout Muslims observe, whereby “Islamic jurists have meticulously set forth all the details.”<sup>26</sup>

The duty of having a written will in one’s possession is no insignificant matter within Sharia law. In a highly relied upon collection of *Hadith*, the Prophet Muhammad says, “[i]t 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.”<sup>27</sup> Verses in the *Qur’an* also emphasize that it is the duty of every Muslim to carry out proper inheritance of his or her property.<sup>28</sup> For the practicing believer, the strong imagery of this verse captures the emphasis on the duty to distribute one’s assets according to Sharia law. In conjunction with the previous saying of the Prophet, the message is one of immediacy.

The primary sources of Sharia law are very clear on the significance of inheritance law, and secondary texts also reaffirm this theme. In the treatise *The Guiding Helper*, an important work within the *Maliki* school of jurisprudence, knowledge of inheritance law is referred to as half the knowledge of religion.<sup>29</sup>

Thus, every single practicing Muslim must ensure that his or her estate is distributed in a fashion dictated by Sharia law. Failure to do so would be considered a significant dereliction in fulfilling one’s religious duties—something that many Muslims are not willing to allow. Knowing and complying with Sharia inheritance law is a primary concern for practicing Muslims—in particular for the practicing Muslim living in a country where Sharia law is not automatically enforced.

---

26. Chaudhry, *supra* note 9, at 527; *see also* HAMID KHAN, ISLAMIC LAW OF INHERITANCE: A COMPARATIVE STUDY WITH EMPHASIS ON CONTEMPORARY PROBLEMS 1 (1980) [*hereinafter* KHAN] (“It [i.e., the Sharia inheritance scheme] is exhaustive enough to meet most of the situations that have arisen and that may arise.”).

27. *See* SAHIH MUSLIM, bk. 13, no. 3987 (Imam Muslim ed.), *available at* <http://www.hadithcollection.com/sahihmuslim/141-Sahih%20Muslim%20Book%2013.%20Bequests/12217-sahih-muslim-book-013-hadith-number-3987.html>.

28. QUR’AN 4:11–12:

These are the limits (set by) Allah, and whosoever obeys Allah and His Messenger, will be admitted to Gardens under which rivers flow (in Paradise), to abide therein, and is the great success. And whosoever disobeys Allah and His Messenger, and transgresses His (set) limits, He will cast him into the Fire, to abide therein; and he shall suffer a disgraceful torment.

*Id.*

29. ABU QANIT AL-SHARIF AL-HASANI, THE GUIDING HELPER: MAIN TEXT AND EXPLANATORY NOTES 275 (2002), *available at* <http://www.scribd.com/doc/17213909/Guiding-Helper-Maliki-Fiqh>. For information on *Hanafi* jurisprudence on the matter, *see generally* BURHĀN AL-DĪN AL-FARGHĀNĪ AL-MARGHĪNĀNĪ, AL-HIDĀYAH: THE GUIDANCE (Imran Ahsan Khan Nyazee trans. 2006). For *Shafi’i* jurisprudence, *see generally* AL-IMĀM MUHAMMAD IBN IDRĪS AL-SHĀFI’Ī, AL-RISĀLA (Majid Khadduri trans., 2d ed. 1997); For *Hanbali* jurisprudence, *see generally* IBN QUDAMA, AL-MUGHNI (Muhammad Sharaf al-Din Khattab, Muhammad al-Sayyid & Ibrahim Sadiq eds., 1996).

### C. *The Specific Process of Sharia Inheritance*

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

#### 1. *Payment of Debts and Expenses*

First, heirs' rights to inheritance do not vest until the decedent's death.<sup>30</sup> Once death of the decedent has been confirmed, Sharia law, much like New York intestacy laws,<sup>31</sup> requires that all of the decedent's debts and expenses be settled before any of the estate is distributed amongst his or her heirs.<sup>32</sup> The first expenses to be settled are for the funeral accommodations of the decedent.<sup>33</sup> Next, all debt obligations to individuals or organizations need to be settled.<sup>34</sup> "If the deceased is a married male, the deferred portion of his wife's marriage gift [referred to as the *mahr*<sup>35</sup>] is considered a debt against his estate."<sup>36</sup>

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

---

30. See Chaudhry, *supra* note 9, at 528; see also KHAN, *supra* note 26, at 12 ("This right is not lost by the death of any heir before the actual distribution of the property and passes to his own heirs at the time of [his] death.").

31. N.Y. EST. POWERS & TRUSTS LAW § 4-1.1 (McKinney 1998).

32. QUR'AN, 4:11-12; see also DOI, *supra* note 3 at 292 ("[A]ll the Companions and Muslim Jurists agree on the view that the debts attached to the specific property or to a specific part of the estate like mortgage (*rahn*), *zakāt* of crops and the *zakāt* on animals should be settled first."). But see AHMAD IBN NAQIB AL-MISRI, RELIANCE OF THE TRAVELLER AND TOOLS FOR THE WORSHIPPER, bk. L § 3.1 (Sheik Nuh Ha Mim Keller ed. & trans. 1991), available at <http://www.scribd.com/doc/14131457/Reliance-of-the-Traveller> (stating that under the *Shafi'i* school of jurisprudence, debts and expenses are taken either from the one-third *wasiyya* or the residuary depending on intent of testator).

33. AL-HASANI, *supra* note 29, at 275.

34. *Id.*; see also DOI, *supra* note 3, at 292.

35. See, e.g., Ghada G. Qaisi, Note, *Religious Marriage Contracts: Judicial Enforcement of Mahr Agreements in American Courts*, 15 J.L. & RELIGION 67, 70-71 (2001) ("The [marriage] contract almost always designates an agreed-upon mahr (dower) or 'sum of money or other property which becomes payable by the husband to the wife as an effect of marriage.' Muslim jurists adhere to the principle that mahr is not a voluntary gift, but rather a financial obligation imposed by Islamic law on the husband. The mahr is an 'effect' of the contract and it becomes exclusively the wife's property."); see also Tracie Rogalin Siddiqui, *Interpretation of Islamic Marriage Contracts by American Courts*, 41 FAM. L.Q. 639, 644 (2007) ("[U]pon the husband's death the payment of the delayed mahr is the superior debt as against all his other debts. This requirement suggests that, similarly, the delayed mahr should be the senior debt against the husband's nonmarital property when the couple is divorcing. In addition, the delayed mahr is considered so much the wife's right that under some Islamic laws her heirs may claim it from her husband upon her death. Courts should therefore bear in mind the intention of the parties in creating the mahr and the priority the mahr is given when evaluating its effect on the financial settlement during divorce.") (citations omitted).

36. Chaudhry, *supra* note 9, at 528.



step, known as the *wasiyya* bequest, can be up to one-third of the testator's assets and is distributed before the Sharia inheritance formulas are applied.<sup>37</sup>

## 2. *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 the *Qur'an* or *Hadith*, so long as the bequest is not made to individuals who can already inherit under the normal inheritance laws (i.e., children, spouses, parents, siblings).<sup>38</sup> 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.<sup>39</sup>

The incorporation of the *wasiyya* proves to be a valuable tool in the 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 Sharia law.<sup>40</sup> At the same time, it safeguards close kin who are entitled to their share under Sharia law from being disinherited.<sup>41</sup> Where the *wasiyya* proves most useful is in situations where a testator has an adopted child, a step or adoptive parent, or a close relative that is not Muslim.

Under Sharia law, a non-biological parent or child cannot be an Islamic heir.<sup>42</sup> Therefore, an adopted child has no share in Islamic inheritance from the adoptive parent. Both New York and Sharia law are similar in this regard as they both have laws which prevent the adopted child from inheriting from two sources.<sup>43</sup> However, the choice of source differs. Unlike New York law, where the adopted-out child loses inheritance rights from the birth parents, under Sharia law, the adopted-out child *always* keeps a right of inheritance from the birth parents, but cannot inherit from

---

37. See AL-HASANI, *supra* note 29, at 275–76.

38. Chaudhry, *supra* note 9, at 528–29.

39. SAHIH BUKHARI, *supra* note 25, at vol. 4, bk. 51, no. 5 (“Narrated by Sad bin Abu Waqqas: The Prophet came visiting me while I was (sick) in Mecca, (‘Amir the sub-narrator said, and he disliked to die in the land, whence he had already migrated). He (i.e. the Prophet) said, “May Allah bestow His Mercy on Ibn Afra (Sad bin Khaula).” I said, “O Allah’s Apostle! May I will all my property (in charity)?” He said, “No.” I said, “Then may I will half of it?” He said, “No.” I said, “One third?” He said: “Yes, one third, yet even one third is too much. It is better for you to leave your inheritors wealthy than to leave them poor begging others, and whatever you spend for Allah’s sake will be considered as a charitable deed even the handful of food you put in your wife’s mouth. Allah may lengthen your age so that some people may benefit by you, and some others be harmed by you.” At that time Sad had only one daughter.”).

40. AL-MISRI, *supra* note 32, at bk. L §§ 3.0–3.13.

41. SUNAN ABU DAWOOD, bk. 17, no. 2864 (Ahmad Hasan trans.) (“Narrated by Abu Huraira: ‘I heard the Apostle of Allah say: Allah has appointed for everyone who has a right due to him, and no bequest must be made to an heir.’”).

42. AL-HASANI, *supra* note 29, at 277–78.

43. N.Y. DOM. REL. LAW § 117 (McKinney 2012); AL-HASANI, *supra* note 29, at 276.

adoptive parent.<sup>44</sup> 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.

Similarly, a relative who is non-Muslim is not considered an Islamic heir<sup>45</sup>—an issue that will be further explored in Section III, specifically as it relates to public policy.<sup>46</sup> Since such a relative may be a particularly close relative, such as a parent, a spouse or a child, or one who deserves a share in the estate, the testator may use the *wasiyya* to leave a bequest for such a relative. Under Sharia law, the adoptive child can still benefit from a *wasiyya* from the adoptive parent if the natural parents are not known or do not have any assets to distribute.<sup>47</sup>

Finally, the testator has the ability to use the *wasiyya* to leave bequests for friends, distant family members, and charitable organizations.<sup>48</sup> In fact, under the *Shafi'i* school of jurisprudence, a testator may even leave a *wasiyya* bequest to his or her murderer<sup>49</sup>—someone who is otherwise disqualified from inheriting both under Sharia inheritance and New York State laws.<sup>50</sup>

In sum, the *wasiyya* bequest provides more flexibility for the testator to accommodate the people or organizations that are close to him or her in a manner he or she deems more equitable. At the same time, the *wasiyya* is limited to one-third, ensuring that the testator cannot completely disinherit relatives that have a rightful share in his or her estate. This way, a balance is struck between personal preferences and religious mandates.

### 3. *Sharia 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 Sharia law.<sup>51</sup> Combining the mandates and injunctions from the verses of *Surat An-Nisaa'* and the numerous *Hadith* that comment on those verses, Sharia scholars have developed a formulaic methodology for determining Islamic heirs and their shares.<sup>52</sup> The rules of inheritance are complex, involving fifteen classes of inheritors<sup>53</sup> and four methods of

---

44. For New York's rule on the adopted child's inheritance, see N.Y. DOM. REL. LAW § 117 (McKinney 2012). For the Islamic rule, see AL-HASANI, *supra* note 29, at 276.

45. AL-MISRI, *supra* note 32, at bk. L § 5.2; *see also* AL-HASANI, *supra* note 29, at 276.

46. *See infra* Part III.B.1.

47. *See supra* notes 40–41 and accompanying text.

48. AL-MISRI, *supra* note 32, at bk. L §§ 3.1–3.3.

49. *Id.* at bk. L § 3.13.

50. *See* AL-HASANI, *supra* note 29, at 276; *see also* Riggs v. Palmer, 115 N.Y. 506, 506 (1889) (“It was not the intention of the legislature, in the general laws passed for the devolution of property by will or descent, that they should, and they do not, operate in favor of one who has murdered his ancestor or benefactor . . .”).

51. AL-HASANI, *supra* note 29, at 275–76.

52. *See* Chaudhry, *supra* note 9, at 527.

53. The fifteen classes include: 1) father, 2) husband, 3) paternal grandfather, 4) son, 5) son's son, 6) brother or half-brother, 7) son of brother or paternal half-brother, 8) paternal uncle, 9) male paternal first

inheritance.<sup>54</sup> The final distributions cannot be summed up into a few formulas; rather they are listed at length and are contingent upon several factors, including the number and gender of children as well as the number of other surviving heirs.<sup>55</sup>

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.<sup>56</sup> However, 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.<sup>57</sup>

As the two examples illustrate, some inheritors receive fixed shares (such as the spouse), others only inherit 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.<sup>58</sup> These complex methods of inheritance become more complex as different family members are added into the equation.

In the examples 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 preempts the potential inheritance by other heirs.<sup>59</sup> For example, if neither children nor 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.<sup>60</sup>

To best illustrate the rules of *wasiyya* and Sharia inheritance, let us use the basic example of Husband *H*, the decedent, who has drafted a Sharia-compliant will during his lifetime:

H dies intestate survived by his wife, *W*, one son, *A*, one daughter, *B*, and his three sisters, *S1*, *S2*, and *S3*. *H* had an estate of \$240,000 with no outstanding debts. According to Sharia law, *W* is entitled to one-eighth, or \$30,000, and *A* and *B* share the remaining \$210,000.<sup>61</sup> Because *A* is male, he receives a share twice that of *B*. So *A* is entitled to \$140,000 and *B* is entitled to \$70,000. The sisters receive nothing.<sup>62</sup>

In this example, if *H* chose to exercise the *wasiyya* option during his lifetime, it would be permissible for *H* to bequeath up to \$80,000 of the original \$240,000

---

cousin, 10) mother, 11) grandmother, 12) daughter, 13) son's daughters, 14) wife, and 15) sister or half-sister. See AL-HASANI, *supra* note 29, at 277–78.

54. AL-HASANI, *supra* note 29, at 278.

55. AL-MISRI, *supra* note 32, at bk. L §§ 6.0–6.22; see also AL-HASANI, *supra* note 29, at 280.

56. AL-MISRI, *supra* note 32, at bk. L §§ 6.4–6.5; see also AL-HASANI, *supra* note 29, at 281.

57. AL-MISRI, *supra* note 32, at bk. L § 6.5; see also AL-HASANI, *supra* note 29, at 279.

58. AL-HASANI, *supra* note 29, at 278.

59. *Id.* at 285.

60. *Id.* at 285–86.

61. See *supra* note 23 and accompanying text.

62. See *supra* note 23 and accompanying text.

estate, or one-third, to any individual or charitable institution of his choosing, so long as the individuals do not inherit under Sharia inheritance law. Therefore, *H* would be able to bequeath \$80,000 to a friend, leaving \$160,000 to be distributed to his wife, *W*, and two children, *A* and *B*. But, under *wasiyya* rules, *H* would not be able to bequeath that same \$80,000 to, for example, his wife and children, since they are already set to inherit under the rules set forth above unless they obtain unanimous consent for the excess from all living heirs.<sup>63</sup>

But what of *H*'s sisters? Let us assume that his sisters have been very instrumental in *H*'s life and he wants to ensure that they will inherit something. *H* may use the *wasiyya* to leave them up to \$80,000, or one-third of his estate. However, if neither *A* nor *B* survive *H*, then his sisters would become Islamic heirs. In that scenario, *W* would receive one-fourth, or \$60,000, and his sisters would receive \$60,000 each. The *wasiyya* bequest to his sisters would be ignored, since in such a situation they have become Islamic heirs. In either scenario, *H* has the flexibility to leave a bequest to his sisters and still remain within the confines of the Sharia law.

#### 4. *Healthcare Proxies and Funeral Rites*

In addition to distribution of assets, Sharia law also dictates specific laws related to terminal health conditions and burial and funeral rites for Muslim decedents. Under the Sharia, a brain-dead individual is not considered dead, and a machine may be used to keep the person artificially alive.<sup>64</sup> It is highly recommended for every Muslim to draft a healthcare proxy to make his or her own decision about the extent to which one should be kept artificially alive.<sup>65</sup> If a brain-dead individual has chosen to remain alive, then it is unlawful to cut off his life support.<sup>66</sup> If there is no healthcare proxy in existence, then only a unanimous decision of the closely related adults can determine the brain-dead individual's fate.<sup>67</sup> Frequently, arriving at such a consensus is difficult, if not impossible. In turn, the situation becomes more complex for close family members. Thus, having a written healthcare proxy is invaluable.

With respect to burial requirements, Sharia mandates specific instructions for how a decedent's body should be washed and dressed, and where the body should be buried.<sup>68</sup> Next, a funeral procession needs to be carried out and must include a funeral prayer.<sup>69</sup> It is important to have these instructions clearly explained in the will, as Sharia law also mandates a quick burial after death.<sup>70</sup> In several states, the personal

---

63. AL-MISRI, *supra* note 32, at bk. L § 3.3; *see also* AL-HASANI, *supra* note 29, at 276.

64. AL-HASANI, *supra* note 29, at 156.

65. *Id.* at 156–57.

66. *Id.* at 157.

67. *Id.*

68. *Id.* at 157–58 (explaining that the body must be washed thoroughly, dressed in a white shroud, and buried at a cemetery with other Muslims).

69. *Id.* at 160.

70. AL-MISRI, *supra* note 32, at bk. G § 1.7.

## SHARIA-COMPLIANT WILLS: PRINCIPLES, RECOGNITION, AND ENFORCEMENT

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.<sup>71</sup> It is therefore important to have a provision in the will that leaves burial instructions both in the will and in the possession of the person who will likely carry out the burial.

### III. SHARIA-COMPLIANT WILLS AND U.S. LAWS

For those wishing to comply with Sharia law when drafting a will, there are several potential conflicts with U.S. law. Some can be resolved through proper drafting; other conflicts emerge out of First Amendment and public policy issues, which can be addressed through U.S. precedent pertaining to religious freedom. This section aims to elaborate upon those issues highlighted in Section II above, both statutorily as well as philosophically, and suggests solutions to these potential conflicts where possible.

#### *A. Intestacy Laws*

In order to best illustrate how the laws of intestacy may cause conflict for those wishing to comply with Sharia inheritance laws, it is best to continue with the example of Husband *H*, the decedent, who died intestate:

*H* dies intestate survived by his wife, *W*, one son, *A*, and one daughter, *B*. *H* had an estate of \$240,000 with no outstanding debts. As outlined above, according to Sharia law *W* is entitled to one-eighth, or \$30,000, and *A* and *B* share the remaining \$210,000.<sup>72</sup> Since *A* is male, he receives a share twice that of *B*. So *A* is entitled to \$140,000 and *B* is entitled to \$70,000.<sup>73</sup>

If *H* died in New York, for example, then the above distribution would be dramatically different under that state's intestacy laws, whereby *W* would be entitled to \$50,000 plus one-half of the remainder, for a total of \$145,000.<sup>74</sup> *A* and *B* would share equally in the remainder, getting \$47,500 each.<sup>75</sup>

Clearly, the two distributions conflict with each other, and therefore those wishing to comply with their religious requirements must ensure that they draft a will that is validly executed and complies with Sharia law in order to achieve a successful probate.

The laws of all U.S. states, including New York, allow near-total flexibility and freedom in how an individual wishes to distribute his or her property.<sup>76</sup> Therefore, Muslim-Americans are free to craft a will in the United States that accommodates the mandates of Sharia law. There are, however, some instances in which the

---

71. *Feller v. Universal Funeral Chapel, Inc.*, 124 N.Y.S.2d 546 (Sup. Ct. N.Y. Cnty. 1953).

72. *See supra* notes 13–26 and accompanying text (outlining Sharia inheritance rules).

73. *See supra* notes 13–26 and accompanying text (outlining Sharia inheritance rules).

74. N.Y. EST. POWERS & TRUSTS LAW § 4-1.1(a)(1) (McKinney 1998).

75. *Id.*

76. *See id.* § 3-1.1 (McKinney 1998).

mandates of Sharia law may conflict with public policy or even with the statutory confines of U.S. state laws due to different societal nuances. In those circumstances, practitioners need to exercise caution in drafting such wills. Practitioners may also need to draft ancillary documents to bypass such conflicts, should they emerge. However, as this article will explore, courts may uphold clauses within a will that comply with Sharia law even where a conflict with public policy does exist.

*B. Conflicts with Public Policy*

Some principles under Sharia-compliant estate planning may clash with public policy matters pursuant to the U.S. intestacy laws, such as the spousal right of election. The Sharia principles may also raise constitutional issues when the distribution to the beneficiaries is conditioned on their religious beliefs. While statutory and legal conflicts may be smoothly reconciled with proper drafting, broader public policy concerns may be more difficult to tackle.<sup>77</sup> A properly drafted will would ensure that the correct heir receives the proper share according to a detailed distribution pursuant to the Sharia inheritance, rather than merely stating that the will is to be interpreted by Sharia law.<sup>78</sup> If the former approach may face obstacles when public policy issues and statutory matters are involved, the latter approach would probably be even more difficult to probate due to the lack of courts' understanding of Sharia wills.

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.<sup>79</sup> As the use of Sharia-compliant wills increases, judges will likely 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 have drafted wills and entered probate. Thus reconciliation of Sharia 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 may emerge out of Sharia-compliant wills.

Since this will raise the issue of religious clauses in U.S. courts, the courts must be careful to stay clear of the Establishment Clause, which prohibits federal and state governments from the "establishment" or promotion of religion. In *Lemon v. Kurtzman*, the U.S. Supreme Court articulated a three-pronged test to determine when government actions constitute "establishment" of a religion and therefore

---

77. See, e.g., *Shapira v. Union Nat'l Bank*, 39 Ohio Misc. 28, 33 (Ct. Com. Pl. Prob. Div. 1974) ("In Ohio, as elsewhere, a testator may not attach a condition to a gift which is in violation of public policy.") (citations omitted).

78. See *In re Swan's Will*, 218 N.Y.S.2d 117, 120 (Sur. Ct. Orleans Cnty. 1961) ("In the event the language is ambiguous or unclear, then the canons or rules of construction will be resorted to in ascertaining the intent of the testator at the time he made the will."). But see *In re Smith's Will*, 131 N.Y.S.2d 390, 392 (Sur. Ct. Kings Cnty. 1954) ("Canons of construction are indeed to be utilized to determine the intent of a testator, in the light of the presumption against intestacy, but are disregarded where, as here, there are no words or 'tokens' in the will to be considered.").

79. *Shapira*, 39 Ohio Misc. at 28.

## SHARIA-COMPLIANT WILLS: PRINCIPLES, RECOGNITION, AND ENFORCEMENT

violate the First Amendment.<sup>80</sup> The Court held that, in order to pass constitutional muster, “[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’”<sup>81</sup> In addition to the three-pronged *Lemon* test, the “neutral principles” approach applied by the Supreme Court in *Jones v. Wolf* prohibits courts from becoming involved in disagreements over religious doctrine, but allows courts to examine undisputed points of religious doctrine.<sup>82</sup>

### 1. *No Distributions to Non-Muslims under Sharia Inheritance Law beyond the Wasiyya*

Under Sharia law, a rule of exclusion which may likely lead to conflicts with U.S. public policy is the prohibition on non-Muslims inheriting from Muslims<sup>83</sup> under the interpretation followed by some schools of thought.<sup>84</sup> While testators are free to disinherit whomever they please (with the exception of spouses) under all U.S. state laws, disinheriting a child on the condition that he or she is not Muslim may create some conflict.<sup>85</sup> For example, some wills drafted by Muslims in the United States contain the following clause:

I direct my Personal Representative that no part of my residuary estate shall be inherited by or distributed to any non-Muslim relative whether he/she is an in-law, spouse, sibling, parent or child. A non-Muslim relative may inherit from me only pursuant to the *wasiyya*. Any non-Muslim relatives contained within Schedule A<sup>86</sup> shall be treated as if they predeceased me.

Such a clause is a result of the Sharia rule banning the distribution of wealth through Islamic inheritance distributions to non-Muslim individuals.<sup>87</sup> If, for example, the son of a decedent changes his religion to one other than Islam, he would be barred from inheriting from the decedent even though under regular Sharia laws he would

---

80. 403 U.S. 602 (1971).

81. *Id.* at 612–13 (citations omitted).

82. 443 U.S. 595, 602 (1979).

83. *DOI*, *supra* note 3, at 319.

84. *Id.* at 289 (citing SAHIH BUKHARI, vol. 8, bk. 80, no. 756 (M. Muhsin Khan trans., Imam Bukhari ed.) (“Narrated Usama bin Zaid: the Prophet said, ‘A Muslim cannot be the heir of a disbeliever, nor can a disbeliever be the heir of a Muslim.’”). *But see DOI*, *supra* note 3, at 290 (“But Imām Abū Hanīfah [referring to the Hanifi school of jurisprudence], Imām Shāfi’i [referring to the Shafi’i school of jurisprudence] and Sufyān al-Thaurī say that they will not look into the difference of their religions and will consider them as one nations [sic]. Thus a Jew will be able to inherit a Pagan and so on.”).

85. *See, e.g.*, N.J. STAT. ANN. § 3B:1–3 (West 2012) (“Upon the death of an individual, his real and personal property devolves to the persons to whom it is devised by his will . . .”).

86. Schedule A refers to the table of *marwarith*, or the Islamic distributions of the estate among the heirs.

87. *See DOI*, *supra* note 3, at 319.

be required to inherit a certain portion.<sup>88</sup> Some U.S. courts have previously held such clauses to be unenforceable.<sup>89</sup>

Likewise, a Muslim individual may not inherit from a non-Muslim decedent except through a very specific bequest that does not exceed one-third of the decedent's estate—an equivalent of the *wasiyya* bequest.<sup>90</sup> For example, a Muslim child, *M*, of a non-Muslim parent may not inherit from the parent's will if it states only "I leave the remainder of my estate to all my children in equal shares." However, *M* could inherit from the non-Muslim parent if the language of the bequest was more specific, as follows: "I bequest one-third of my total estate to *M*."<sup>91</sup>

If, for example, the son of a decedent is accused by his fellow siblings of being a lapsed Muslim,<sup>92</sup> even though he is identified in the will itself, would a judge, or more appropriately, *should* a judge, enforce the clause above? This question raises two issues: First, is there a First Amendment Entanglement Clause concern with the enforcement of such a clause? Second, would enforcement be against public policy? Courts have previously addressed similar situations involving the exclusion of inheritance for individuals of other religions. In *Drace v. Klinedinst*, the Supreme Court of Pennsylvania held a clause in a life estate to be unenforceable because it conditioned the bequest to grandchildren on their belief in a religion.<sup>93</sup> The court held that such clauses unreasonably encumber a title, as the property would revert if the grandchildren ever ceased to be faithful to the religion.<sup>94</sup>

However in *Shapira v. Union National Bank*,<sup>95</sup> the Court of Common Pleas of Ohio considered a clause in a will which required that each of the testator's sons "should receive his share of the bequest only, if he is married at the time of my death to a Jewish girl whose both parents were Jewish." If the sons were out of compliance with this clause at the time of their father's death, then their share of the property was to be held in trust for seven years, at which time "if he is married to a non Jewish girl, then his share of my estate, as provided in item 8 above should go to the State of Israel, absolutely."<sup>96</sup>

---

88. *See id.*

89. *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 was not enforceable).

90. Faraz Rabbani, *Inheriting from a Non-Muslim: Taking a Bequest Is Allowed, Though Inheritance is Not*, SUNNIPATH.ORG, [http://qa.sunnipath.com/issue\\_view.asp?HD=1&ID=464&CATE=9](http://qa.sunnipath.com/issue_view.asp?HD=1&ID=464&CATE=9) (last visited Oct. 12, 2012).

91. *Id.* A specific bequest is considered a gift and not an inheritance and may be accepted from non-Muslim decedents.

92. The issue of who is or is not Muslim is beyond the scope of this article, but, needless to say, such a challenging question could result in a whole new set of controversies for the court.

93. *See Drace*, 118 A. at 909.

94. *Id.*

95. 39 Ohio Misc. 28, 29 (Ct. Com. Pl. Prob. Div. 1974).

96. *Id.*



## SHARIA-COMPLIANT WILLS: PRINCIPLES, RECOGNITION, AND ENFORCEMENT

In challenging the will, one of the decedent's sons made a two-pronged argument against its validity. First, the challenger argued that the clause was unconstitutional because it violated his right to marry as protected by the Equal Protection Clause of the Fourteenth Amendment.<sup>97</sup> Second, the challenger argued that the clause was void as against public policy because the "free choice of religious practice cannot be circumscribed or controlled by contract."<sup>98</sup> In upholding the clause, the Ohio court distinguished the case from the challenger's arguments by holding that "this court is not being asked to enforce any restriction upon [the challenger's] constitutional right to marry.<sup>99</sup> Rather, this court is being asked to enforce the testator's restriction upon his son's inheritance."<sup>100</sup> Therefore, the court reasoned, "[t]his would seem to demonstrate that, from a constitutional standpoint, a testator may restrict a child's inheritance"<sup>101</sup> because "the right to receive property by will is a creature of the law, and is not a natural right or one guaranteed or protected by either the Ohio or the U.S. constitution."<sup>102</sup>

In *U.S. National Bank of Portland v. Snodgrass*,<sup>103</sup> the testator created a trust for his daughter, who would receive the benefits of said trust "provided she shall have proved conclusively to my trustee and to its entire satisfaction that she has not embraced, nor become a member of, the Catholic faith nor ever married to a man of such faith."<sup>104</sup> In upholding this clause, the Supreme Court of Oregon wrote that "[t]he right to espouse any religious faith or any political cause short of one dedicated to the overthrow of the government by force carries with it the cognate right to engage as its champion in the proselytization of followers or converts to the favored cause or faith."<sup>105</sup> The court further reasoned that there were two justifications for such a conclusion:

Two general and cardinal propositions give direction and limitation to our consideration. One is the traditionally great freedom that the law confers on the individual with respect to the disposition of his property, both before and after death. The other is that greater freedom, the freedom of opinion and right to expression in political and religious matters, together with the incidental and corollary right to implement the attainment of the ultimate and favored objectives of the religious teaching and social or political philosophy to which an individual subscribes. We do not intend to imply

---

97. *Id.* at 29–30.

98. *Id.* at 34.

99. *Id.* at 31.

100. *Id.*

101. *Id.* at 32.

102. *Id.* (citing *Patton v. Patton*, 39 Ohio St. 590 (1883); *Hagerty v. Ohio*, 45 N.E. 1046 (Ohio 1897); *Ex rel. Taylor v. Guilbert*, 71 N.E. 636 (Ohio 1904); *Magoun v. Ill. Trust & Sav. Bank*, 170 U.S. 283 (1898); 55 OHIO JUR. 2d 535, *Wills* § 64; 57 AM. JUR. 138, *Wills* § 153).

103. 275 P.2d 860 (Or. 1954).

104. *Id.* at 862.

105. *Id.* at 863–64.

hereby that the right to devise or bequeath property is in any way dependent upon or related to the constitutional guarantees of freedom of speech.<sup>106</sup>

The court cites the case of *In re Lesser's Estate*, in which a testator's will bestowed a sum of money upon his grandchildren, "provided these children are given a normal Jewish, liberal education including an ability to read Hebrew, up to and including at least their fourteenth year; and, further, provided that the Jewish dietary laws are observed by their parents up to and including the confirmation of these my present grandchildren."<sup>107</sup> In upholding that clause, the *In re Lesser's Estate* court applied the following logic:

Conditions involving the personal habits and traits of character of a potential recipient of a testator's bounty have frequently been sustained . . . . It follows that strict adherence by these children, during their formative years, to the teachings and observances of one of the greatest of present-day religions which had its beginnings before the dawn of secular history, cannot reasonably be considered other than as beneficial to the individuals themselves, and thus, indirectly, to the state.<sup>108</sup>

While a modern court may scoff at the second clause in this quotation, it is likely that similar logic will be followed in determining whether a clause in a will requiring the beneficiaries to be of a certain faith will be upheld.

In applying these cases to the exclusionary rule under Sharia law, it is possible to conclude that a U.S. court may uphold a clause in a will such as one stating that "a non-Muslim relative may inherit from me only pursuant to the *wasiyya*. Any non-Muslim relatives contained within Schedule A<sup>109</sup> shall be treated as if they predeceased me." Such a clause appears to be an exercise of an individual's right to determine who the recipients of his or her bequest will be, an exercise upheld by the courts on several occasions even if the clause favors one religion over the other. As the *Shapira* court stated, "the right to receive property by will is a creature of the law, and is not a natural right or one guaranteed or protected by . . . the United States constitution."<sup>110</sup> As in *Snodgrass*, *Shapira*, and *In re Lesser's Estate*, it is unlikely that a successful Establishment Clause challenge could be made since it is not the court or the state that is favoring or promoting a particular religion, but rather it is the testator who is doing so, with the court simply upholding that desire.<sup>111</sup> It is fundamental in all U.S. state jurisdictions that a testator may disinherit a child without justifying the decision to do so.<sup>112</sup> Thus, the testator's intention to disinherit a child or other relative because

---

106. *Id.* at 864.

107. *Id.* at 869 (citing *In re Lesser's Estate*, 287 N.Y.S. 209, 211–12 (Sur. Ct. Kings Cnty. 1936)).

108. *In re Lesser's Estate*, 287 N.Y.S. at 216.

109. *See supra* note 86.

110. *Shapira v. Union Nat'l Bank*, 39 Ohio Misc. 28 (Ct. Com. Pl. Prob. Div. 1974).

111. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971) (overturning two state statutes, which provided aid to religious schools, as a violation of the First Amendment establishment clause).

112. *See, e.g., Matter of Eckhart*, 39 N.Y.2d 493 (1976) (recognizing that children may be disinherited provided there is a clear intention to do so).

they have left the Islamic faith becomes irrelevant. Under U.S. law, such an action is entirely enforceable and not void against public policy.

While resolution of the issue concerning the disinheritance of a child is easily addressed, more complex issues may emerge after the death of a testator. Assume that a testator created an Islamic will requiring his children to be Muslim in order to inherit. What happens if the testator dies assuming one of his children is Muslim, when he or she in fact is not? If, for example, one sibling's religious credentials are challenged by his or her brothers and sisters, will a court make a determination as to whether that individual is indeed Muslim or not? Such a determination could potentially result in Establishment Clause issues since it would require a court to entangle itself in making a determination on purely religious grounds.<sup>113</sup>

However, a court need not unnecessarily entangle itself in religion to make this determination.<sup>114</sup> In this situation, the courts are required to “give effect to plain mandate of will, regardless of circumstances or effect of testamentary provision.”<sup>115</sup> If the child outwardly renounces the religion of Islam, then clearly the intent of the decedent is to disinherit such a child. However, if there is a contest as to this fact, then the court may require extrinsic evidence to determine the testator's intent at the time of his death.<sup>116</sup> A carefully drafted will may also include a method to determine the religious membership of a particular legatee.<sup>117</sup> For example, an Islamic will can require a certification or testimony by a local Imam if there is a dispute as to religious affiliation.<sup>118</sup> Such recourse is acceptable to the courts and not unduly burdensome for the legatee.

## *2. Spousal Right of Election Often Greater than Sharia Spousal Distribution (One-Eighth or One-Fourth)*

The second major distinction between Sharia law and U.S. intestacy laws that may result in challenges to a Sharia-compliant will is the lack of a spousal right of election in Islamic wills. The spousal right of election (or elective share) is essentially a safety net to protect a spouse who has been cut out of a will.<sup>119</sup> Historically, the right

113. *See Lemon*, 403 U.S. at 612–13.

114. *In re Laning's Estate*, 339 A.2d 520, 525–26 (Pa. 1975) (“[T]he courts stand ready to effectuate the testator's intention without regard to what religious or irreligious doctrine he wishes to advance. Nor does this entail expenditure of public resources in a manner which advances or inhibits religion but rather the disposition by a private individual of her own property.”) (citations omitted).

115. *In re Reben's Will*, 115 N.Y.S.2d 228, 230 (Sur. Ct. Westchester Cnty. 1952).

116. *In re Gardiner's Will*, 191 N.Y.S.2d 520, 528–29 (Sur. Ct. Kings Cnty. 1959) (“The particular provisions of the gift in question may be compared with similar provisions found in the will and interpreted in line with the general testamentary plan, if any, and in view of the relevant conditions as they existed when he drew the will and sometimes until the time of his death. To this and extrinsic evidence may be resorted to if the intent is not clear and is otherwise not ascertainable.”).

117. *See In re Devlin's Trust Estate*, 130 A. 238 (Pa. 1925) (holding that the religious clause was void for other reasons, e.g., because it required that a child be raised in a religion different from that of his parents).

118. *Id.*; *see also In re Kempf's Will*, 297 N.Y.S. 307, 310 (4th Dep't 1937) (accepting expert testimony from a Catholic priest to determine that petitioner was not a member of the Catholic Church).

119. N.Y. EST. POWERS & TRUSTS LAW § 5-1.1-A (McKinney 1999).

of election was adopted into law to protect the surviving spouse from disinheritance and becoming a public charge.<sup>120</sup> In the modern sense, the right of election recognizes the surviving spouse's role in the accumulation of the assets by the deceased spouse.<sup>121</sup> The right of election may be exercised even where the surviving spouse is well-off and not likely to become a public charge.<sup>122</sup> In this sense, there is no substantial policy reasoning behind the modern usage of the elective share.

Sharia principles protect the inheritance of all heirs who are entitled to the bequest, including the spouse. Under New York law, the right of election is applied as follows: if the testator dies without a will, the spouse will receive \$50,000 or one-third of the decedent's estate (whichever is greater).<sup>123</sup> Islamic Sharia distributions conflict with the right of election because the spousal shares are frequently less than one-third of the estate. Under Sharia law, a wife receives a one-eighth share when there are children and a one-fourth share when there no children.<sup>124</sup> A husband receives a one-fourth share when there are children.<sup>125</sup>

To better illustrate the distinction, assume that the following:

*H*, a New York resident, dies and is survived by his wife and two children. *H* has an estate of \$80,000. In his will, he left his wife with \$10,000 and each of his children with \$35,000. In court, his wife may exercise her right of election and collect her elective share, which is one-third of the estate or \$50,000, whichever is greater—in this case \$50,000 is greater.<sup>126</sup> Since she has already received \$10,000, she is entitled to an additional \$40,000. The court will reduce each child's bequest by \$20,000. In the end, the wife will receive \$50,000 and each child will be left with \$15,000.

In the example above, if *H* and his wife had children, his wife would receive \$10,000, or one-eighth of the estate, under Sharia law, and would receive \$20,000, or one-fourth of the estate, if they had no children.<sup>127</sup>

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.<sup>128</sup> This falls generally within the Western principle that marriage is an equal partnership, whereby both spouses contribute equally and should therefore

---

120. *Spencer v. Williams*, 569 A.2d 1194, 1197 (D.C. 1990).

121. *Id.*

122. *Id.*

123. Certain properties of decedent spouse are exempt from the right of election by surviving spouse. Examples include gifts made by one spouse to a third party before marriage and the tenancies held by decedent spouse in his/her name only. N.Y. EST. POWERS & TRUSTS LAW § 5-1.1-A (McKinney 2012).

124. *See supra* note 23 and accompanying text.

125. *See supra* note 23 and accompanying text.

126. N.Y. EST. POWERS & TRUSTS LAW § 4-1.1(a)(1) (McKinney 2012).

127. *Id.*

128. Assets which are included in the calculation of the right of election are those which are considered "marital" property, or assets accumulated or held by both spouses during the marriage. For a list of those assets under New York law, see N.Y. EST. POWERS & TRUSTS LAW § 5-1.1-A(b) (McKinney 2012).

receive equal benefit.<sup>129</sup> However, in the Islamic context, a wife's property belongs to her alone, while the husband's property is communal and is to be used for the benefit of the family as a whole.<sup>130</sup> Therefore, Sharia 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 Sharia law to provide for the family—obligations to 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 Sharia law is determined not by their gender, but rather by their financial obligations.<sup>131</sup>

To better illustrate this point, let us again take the above example of Husband *H* and Wife *W*. Under the Sharia, *H* was responsible for providing for *W* financially, including, but not limited to, housing, clothing, and food.<sup>132</sup> Any assets that *W* gained on her own, through employment or through gifts directly to her, belong to her and she need not spend them on *H* or on the household.<sup>133</sup> Meanwhile all property that *H* owns is communal and co-owned by *H* and *W* during *H*'s lifetime. When *H* passes away, in this example, *W* keeps all of the assets that she owned herself<sup>134</sup> and she inherits a one-eighth share from *H*'s assets as in the example above.<sup>135</sup>

The female spouse also receives an additional two-part marriage gift—the *mahr*.<sup>136</sup> Under the Sharia rules of marriage, one part is termed the *muqaddam*<sup>137</sup> and the other the *muakkkhar*.<sup>138</sup> These gifts become the independently owned property of the wife, and the latter gift “is a debt against [the estate of the husband] and must be paid before any other estate distribution takes place.”<sup>139</sup>

---

129. *LaMere v. LaMere*, 663 N.W.2d 789 (Wis. 2003) (recognizing that marriage is an “equal partnership, in which the contributions of the spouse who is primarily engaged in child-rearing and homemaking are presumptively valued equally with those of the income-earning spouse”).

130. *Doi*, *supra* note 3, at 159.

131. *See* Chaudhry, *supra* note 9, at 540–41 (“In Islamic society, although men and women are created equal, this ‘equal importance does not substantiate a claim for their . . . perfect identity.’ In such a dual-sex society, each sex maintains its own complementary duties and responsibilities in order to assure a healthy family and society. In such an Islamic society, women are free from any economic responsibilities to the family; this burden is solely imposed on the men.”) (citation omitted).

132. *See id.*

133. *See id.* at 541; *see also* *Doi*, *supra* note 3, at 159.

134. *Doi*, *supra* note 3, at 159.

135. *See supra* note 23 and accompanying text.

136. *See Aziz v. Aziz*, 488 N.Y.S.2d 123, 124 (Sup. Ct. Queens Cnty. 1985) (referring to the marriage gift as a *mahr*, made up of a “prompt payment” and “deferred payment”).

137. Chaudhry, *supra* note 9, at 549 (meaning “the prompt portion” of the marriage gift, which is to be bestowed upon the wife before the wedding).

138. *Id.* (meaning “the deferred portion” of the marriage gift, which is to be bestowed upon the wife “upon divorce or death of the husband”).

139. *Id.* at 549.

Where a husband spouse is concerned about the assets his wife will receive upon his death, he may simply transfer additional property to her *inter vivos*,<sup>140</sup> which would be in accord with the Sharia law.<sup>141</sup> He may also leave her a *wasiyya* bequest. However, that bequest would be subject to unanimous consent of the remaining heirs (usually the children and parents of the husband).<sup>142</sup> Therefore, while Sharia 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 Sharia, which provides sufficient protection for female relatives.<sup>143</sup>

Under the laws of most U.S. state jurisdictions, if a couple wishes to comply with Sharia law with regard to inheritance of the surviving spouse, in most cases the surviving spouse will need to renounce his or her right of election.<sup>144</sup> This may be more problematic where the spouse is also non-Muslim and unable to inherit at all under the Sharia law (aside from the *wasiyya* bequest). In the event that a waiver cannot be obtained,<sup>145</sup> it remains to be seen whether courts will enforce a Sharia-based will that eliminates the spousal right of election. It is clear, however, that courts will not face an Establishment Clause issue. This is because the statute allowing a right of election is religiously neutral and therefore does not involve excessive government entanglement with religion.<sup>146</sup> Additionally, should a court choose to accommodate Sharia law by not granting the surviving spouse the right of election under most U.S. state laws, such actions could be seen simply as an accommodation of a religious practice.<sup>147</sup>

---

140. *See* *Shybunko v. Geodesic Homes, Inc.*, 883 N.Y.S.2d 596, 598 (2d Dep't 2009) (describing an *inter vivos* gift as a present transfer of ownership that the donor delivers to the donee and the donee accepts).

141. In Sharia law, it is permissible to give away as much of one's wealth as one wants during one's lifetime as understood by the following *hadith*. Narrated 'Umar ibn Al-Khattab: "The Apostle of Allah commanded us one day to give [charity] . . . Abu Bakr brought all that he had with him. The Apostle of Allah asked him: What did you leave for your family? He replied: I left Allah and his Apostle for them." *SUNAN ABU DAWOOD*, bk. 9, no. 1674 (Ahmad Hasan trans.).

142. *AL-MISRI*, *supra* note 32, at bk. L § 3.3; *see also AL-HASANI*, *supra* note 29, at 276.

143. Muhammad ibn Adam al-Kawthari, *Fiqh of financially supporting one's parents and other relatives*, *SUNNIPATH.ORG*, [http://qa.sunnipath.com/issue\\_view.asp?HD=12&ID=3458&CATE=212](http://qa.sunnipath.com/issue_view.asp?HD=12&ID=3458&CATE=212) (last visited Oct. 12, 2012). According to Shaykh al-Kawthari, it is necessary for both male and female children to financially support poor parents even if the parents are capable of earning. In this scenario, if the inheritance leaves the female spouse financially worse off than the children, it is a shared responsibility of all the children to financially provide for their mother. However, there is no guarantee that this may happen, so the testator needs to offer something in his will.

144. *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 5-1.1-A(e) (McKinney 2012).

145. Speaking purely based on anecdotal evidence, obtaining such a waiver of the elective share from a female spouse is not an obstacle that is difficult to overcome. In practice, the female spouse has more commonly been the vocal advocate of following the Sharia in its entirety when it comes to estate planning. Although there is no empirical data to this effect, most clients for Sharia-compliant wills tend to be couples, led by the female spouse, who are generally aware of the distributions under the Sharia and are more than willing to ensure compliance through documents such as waivers.

146. *See* *Jones v. Wolf*, 443 U.S. 595, 602 (1979).

147. *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*,<sup>148</sup> Amish parents challenged Wisconsin's state law requiring mandatory school attendance.<sup>149</sup> The U.S. Supreme Court stated 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."<sup>150</sup> In carrying out that balancing process, the Court found that the state law violated the right to the parents' free exercise of religion. The Amish parents were able to establish, to the Court's satisfaction, that their religious beliefs would not harm the physical or mental health of the child nor that they would pose a threat to "public safety, peace, order or welfare."<sup>151</sup>

However, in *Employment Division, Department of Human Resources of Oregon v. Smith*,<sup>152</sup> the U.S. Supreme Court upheld an Oregon state statute that denied unemployment benefits to users of illegal drugs even though consumption of the drug at issue—peyote—was part of a religious practice. The Court held that the state law was generally applicable and that smoking peyote was a socially harmful conduct.<sup>153</sup>

In analyzing both cases, it seems likely that the Court would uphold a religious practice that is contradictory to a state statute if the statute is an undue burden on the free exercise of religion and the religious practice is not harmful to others.<sup>154</sup> As applied to the issue of Islamic inheritance versus spousal right of election, the issue is whether to honor the testator's right to exercise his religious mandate to distribute his own assets or allow the state's interest in protecting the surviving spouse to trump the testator's right to do so.

In keeping with the reasoning in *Yoder*, an argument can be made that under the totality of Sharia 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 would also receive a payment owed to her from the husband's estate in the form of the *muakhhbar*.<sup>155</sup> She would also maintain possession of her own personal assets, which were free of financial obligations during the marriage.<sup>156</sup> In a scenario where these safeguards are not enough, as previously mentioned, she may also

---

148. 406 U.S. 205 (1972) (holding that the First and Fourteenth Amendments prevent a state from compelling Amish parents to cause their children to attend formal high school).

149. *Id.* at 207.

150. *Id.* at 214.

151. *Id.* at 230.

152. 494 U.S. 872 (1990).

153. *Id.* at 884.

154. *See Yoder*, 406 U.S. at 230.

155. *See Chaudry, supra* note 9, at 549.

156. *See supra* notes 135–38 and accompanying text.

receive an inter vivos gift from her husband to protect her in the future (for example, the husband may transfer ownership of the house to his wife).<sup>157</sup>

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 where a spouse may exercise her right “for any reason, or for no reason, and need not get approval for the action.”<sup>158</sup> As mentioned, the religious duty of carrying out a Sharia-compliant will is highly important, if not absolutely crucial, within the Islamic religion. Unlike the facts in *Smith*, where the use of an illegal drug was involved, a failure to conform with the right of election is not a criminal activity and does not cause any socially harmful effects.<sup>159</sup>

#### IV. WILL CONTESTS, LITIGATION, AND ARBITRATION

Once a Sharia-compliant will is carefully drafted and executed, the next issue occurs when the will enters probate. If the will was properly drafted and executed, the probate process should not present any additional challenges. However, there are certain circumstances that may give rise to additional conflicts of law and, possibly, will contests from heirs or potential heirs.

##### A. Will Contests

A Sharia-compliant will, as with all wills, is subject to potential will contests from family members.<sup>160</sup> However, due to the religious nature of the will bequests, Sharia-compliant wills are often more likely to be challenged. Bequests under the Sharia law tend to distribute the wealth to a larger number of individuals, forcing several family members to receive a lesser share than they would otherwise receive under state intestacy laws.<sup>161</sup> Thus, certain family members have a greater incentive to contest the will.

Under New York law, standing to contest a will has two requirements: (1) the individual must be an interested party; and (2) the individual must demonstrate that his or her interests will be adversely affected if the will enters probate.<sup>162</sup> A will may be contested on several grounds, including: (1) invalid execution; (2) valid revocation; (3) a lack of testamentary capacity; (4) undue influence; (5) fraud; and (6) mistake.<sup>163</sup> The first two grounds for a will to be rejected from probate provide an emphasis on the need for the testator and the attorney to ensure that the Sharia-compliant will is

---

157. See Chaudry, *supra* note 9, at 599; see also *Shybunko*, 883 N.Y.S.2d at 598.

158. *Spencer v. Williams*, 569 A.2d 1194, 1197 (D.C. 1990).

159. See *Smith*, 494 U.S. at 884.

160. See, e.g., *Tilimbo v. Posimato*, 867 N.Y.S.2d 378 (Sur. Ct. Bronx Cnty. 2008).

161. See, e.g., *Feller v. Universal Funeral Chapel, Inc.*, 124 N.Y.S.2d 546 (Sup. Ct. N.Y. Cnty. 1953); see also *supra* Part II.B.

162. N.Y. Surr. Ct. Proc. Act § 1410 (McKinney 2012).

163. *Id.* at § 1408.



## SHARIA-COMPLIANT WILLS: PRINCIPLES, RECOGNITION, AND ENFORCEMENT

drafted in strict conformity to state laws. A basic failure to meet certain formalities, such as lack of adequate witnesses, failure to announce that the document is a will, or a failure to complete the formalities in a timely fashion, can render the will void,<sup>164</sup> thus leaving the decedent Muslim unable to comply with his or her Sharia obligations.

Sharia-compliant wills can also be challenged on the ground that there was undue influence on the testator at the time of drafting or that the testator lacked capacity to fully understand the extent of Sharia laws. Challenges are likely to be entertained by courts and perhaps even succeed due to the unfamiliar nature of Sharia-compliant wills. For example, under Sharia law, a daughter gets half the share of a son.<sup>165</sup> While the Sharia has legitimate reasons for this type of distribution,<sup>166</sup> it appears to be unfair to the daughters on the surface. A U.S. court may infer that, since the will is so favorable to the son, the son may have exercised an undue influence on the testator.<sup>167</sup> Alternatively, the court may find that the testator lacked the capacity to fully understand the nature of his bequests because the distribution under a will pursuant to Sharia laws may seem unfair.

Since a Sharia-compliant will can be subject to a contest and may be unfairly disadvantaged in a U.S. court, it is important to emphasize the use of an *in terrorem* or a no-contest clause. Where a no-contest clause exists, a legatee of the will is subject to forfeiture of his or her share if he loses the contest.<sup>168</sup> In the majority of states, the contesting legatee only forfeits his or her share if there was no probable cause to bring the contest.<sup>169</sup> However, in some states, including New York, the no-contest clause is given full effect regardless of whether probable cause existed or not.<sup>170</sup> Strict enforcement of the no-contest clauses exists to avoid needless contests and reduce delays in the probate process.<sup>171</sup> The no-contest clause in a Sharia-compliant will is necessary to protect the will from contests that would alter its Sharia-compliant nature in bad faith.

If the court does entertain the contest, then it may be required to consider Sharia law—a practice that is replete with controversy.<sup>172</sup> Since court interpretations of religious clauses can often lead to results that hurt rather than help the affected party, religious arbitration may be the better course of action.

---

164. See N.Y. EST. POWERS & TRUSTS LAW § 3-2.1 (McKinney 2012).

165. See *supra* note 23 and accompanying text.

166. See generally DOI, *supra* note 3.

167. See *In re Kaufman's Will*, 247 N.Y.S.2d 664, 682 (Sur. Ct. N.Y. Cnty. 1964), *aff'd* 15 N.Y.2d 825 (1st Dep't 1965) ("The other class [of undue influence] is the insidious, subtle and impalpable kind which subverts the intent or will of the testator, internalizes within the mind of the testator the desire to do that which is not his intent but the intent and end of another.").

168. UNIF. PROB. CODE § 2-517.

169. *Id.*

170. N.Y. EST. POWERS & TRUSTS LAW § 3-3.5 (McKinney 2012).

171. *In re Estate of Marshall*, 811 N.Y.S.2d 552 (Sur. Ct. Suffolk Cnty. 2005).

172. See *In re Marriage of Dajani*, 251 Cal. Rptr. 871, 871 (Cal. Ct. App. 1988) (holding that a wife did not qualify for the *mahr* due to her initiation of the divorce in a ruling contrary to Sharia law).

*B. Use of Arbitration in U.S. Courts*

Disputes arising out of religious contracts, such as *mahr* agreements, *ketubah* agreements, and disputes over Sharia-compliant wills, are best settled through the use of religious arbitration bodies. Such bodies provide the religious training and sensitivity necessary to make informed and thoughtful decisions about disputes arising out of religious law, allowing U.S. courts and judges to focus on areas of the law they are more familiar with. Religious arbitration panels eliminate Establishment Clause concerns by ensuring that any disputes over religious interpretation are settled before reaching U.S. courts, allowing those courts to decide purely secular disputes which may emerge. Furthermore, the decisions of religious arbitrators are enforceable in U.S. courts and carry with them force of law, an important aspect of arbitration that should not be overlooked.<sup>173</sup> Courts can enforce contracts or agreements even if the parties disagree on the meaning of religious terms or on the application of religious law. To do so, the parties must agree to adopt the meaning supplied by a religious authority or arbitrator.<sup>174</sup> In faith-based arbitration, as in any form of arbitration, the parties agree upon the arbitrator and also upon the rules and procedures of arbitration.<sup>175</sup> Arbitration organizations such as the American Arbitration Association (AAA) or Judicial Arbitration and Mediation Services (JAMS) provide both arbitrators and rules that parties can adopt if they choose.<sup>176</sup>

Because such disputes are likely to arise in the enforcement of Sharia-compliant wills, it is essential that when parties disagree over the meaning of a religious term they seek clarification from an expert in that area. The best solution is for parties to arbitrate all disputes concerning Sharia law with a qualified Islamic arbitration body because, as discussed, most U.S. judges would likely avoid making determinations based on religious legal theory. To ensure the enforcement of the testator's intent in case of a dispute arising out of religious interpretation, it is therefore advisable to have an arbitration clause in a Sharia-compliant will. Arbitration decisions—even religiously based ones—are usually upheld in court.<sup>177</sup> By including an arbitration

---

173. Those secular laws which ensure the enforcement of religious arbitration decisions include the Federal Arbitration Act (FAA), passed by Congress in 1925, which provided that an agreement to arbitrate “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” Federal Arbitration Act, 9 U.S.C. §§ 1–14 (1990). This was followed in 1956 with the Uniform Arbitration Act (UAA), Uniform Arbitration Act (UAA) §§1–25 (1956), which was revised and updated with the Revised Uniform Arbitration Act (RUAA) of 2000. *See* Uniform Arbitration Act (RUAA) §§1–33 (2000). Laws based on the UAA have been drafted and implemented in most states, thereby ensuring the enforceability of arbitral agreements across the United States, and laws based on the RUAA are slowly being implemented. 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, 435 nn. 59–60 (2006).

174. Trumbull, *supra* note 10, at 621–22.

175. *See* Wolfe, *supra* note 173, at 431.

176. *See* Wolfe, *supra* note 173, at 436–37.

177. *See* Trumbull, *supra* note 10, at 623 (“A civil court must enforce the award unless a party presents grounds to vacate the award, such as evidence that the parties did not intend the dispute to go to

clause, testators can assure that, should disputes arise, those disputes will be handled by a body of experts that will analyze and rule upon the disputes through the prism of Sharia law, thereby ensuring Sharia compliance.

### 1. *Jewish Arbitration under the Beth Din System*

As several cases discussed above show, religious arbitration of Jewish law issues has a long history in the United States under the *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.<sup>178</sup> They apply principles of Jewish law, or *halakhab*, 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.<sup>179</sup> The procedures comply with secular arbitration laws. Therefore, “their awards are usually binding and courts will usually enforce them.”<sup>180</sup>

### 2. *Arbitration Clauses in Sharia-Compliant Cases*

To date, Islamic arbitration panels in the United States have been slow to develop and are rarely utilized,<sup>181</sup> despite the fact that Islam has a lengthy history of mediation and alternative dispute resolution (ADR).<sup>182</sup> In Islamic mediation, for instance, “the two disputing parties will either each choose someone he or she is comfortable with or they will choose one person acceptable to both to be the sole mediator.”<sup>183</sup> But relying on mediation or other less formal forms of dispute resolution is not sufficient. This is because mediation decisions, unlike arbitration decisions, are non-binding and unenforceable in civil court.<sup>184</sup>

There are numerous benefits to holding religious arbitrations for the Islamic community in the United States. Arbitration provides observant individuals with 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 will receive the benefit of being analyzed by an arbitration body comprised of Islamic legal scholars. Second, parties have the advantage of choosing a school of jurisprudence for the interpretation of the

---

arbitration, evidence of a procedural defect in the arbitration process, evidence that the award violates state or federal law, or evidence that the award is unconscionable or against public policy.”).

178. Wolfe, *supra* note 173, at 438.

179. *See id.*

180. *Id.* at 439.

181. *See* R. Seth Shippee, Note, “Blessed Are the Peacemakers”: Faith-Based Approaches to Dispute Resolution, 9 ILSA J. INT’L & COMP. L. 237, 248 (2002); *see also* Wolfe, *supra* note 173, at 440.

182. *See, e.g.*, Shippee, *supra* note 181, at 246–47 (“Both mediation and conciliation are the preferred dispute resolution approaches of the Prophet Mohammed. In disputes between American Muslims, mediation is most often used to address marital disputes.”) (citations omitted).

183. Wolfe, *supra* note 173, at 440.

184. *See* Shippee, *supra* note 181, at 238.

contract or dispute in question. Without an arbitration clause, conflicts would be resolved in U.S. courts where judges may be unfamiliar with the complexities and nuances of the different schools of Islamic jurisprudence and might therefore apply an interpretation not supported by the parties. Misapplication of Sharia law would more likely be avoided with the inclusion of an Islamic arbitration clause, for allowing those who are most qualified to rule on disputes—namely Sharia law experts—will lead to more sound decisions on disputes over such issues as will contests or *mahr* agreements. If parties wish to comply with Sharia law in any sort of interaction, then arbitration will enforce and ensure compliance with this intent:

Since [Sharia], 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 [Sharia] in the performance of their contract.<sup>185</sup>

The inclusion of an arbitration clause would also avoid the 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.

## V. CONCLUSION

While this article does not aim to discount various concerns with Sharia 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 function, practitioners may have an easier time drafting Sharia-compliant wills and arguing for their enforceability.

Certainly, in some instances, Sharia inheritance laws are not in line with those of the United States, whether on purely legal or public policy grounds. But due to 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 running 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.

---

185. Trumbull, *supra* note 10, at 643.