

5

WILL

A DETAIL TALK EXPOUNDING “WILLS” AND ITS PARTICULARS

Allah Ta’ala states,

(وَمَا خَلَقْتُ الْجِنَّ وَالْإِنْسَ إِلَّا لِيَعْبُدُونِ)

(And I do not create the Jinn and Mankind except for my worship)

Allah Ta’ala is our Master. We are the slaves of Allah. It is our duty and responsibility to express our submission, subjugation and slavery to Allah. The extent of our submission to Allah could be illustrated through an example of a master and a slave. A person purchased a slave. The master asked him, “What will you eat?” The slave replied, “I will eat whatever you give me to eat. I am a slave and you are my master. I have no choice in the matter.” The master then asked him, “What will you wear?” The slave replied, “I will wear what you give me to wear. I am a slave and you are my master. I have no choice in the matter.” The master asked him, “Where will you sleep?” The slave replied, “I will sleep wherever you wish I sleep. I am a slave and you are my master. I have no choice in the matter.” The slave expressed so much of submission and subjugation to his master. Allah is the Master of masters. We are His slaves. How much more submission and subjugation should we be displaying to Allah?

The Shariah laws of wills and estate are by Divine Order. We do not have any discretion in that.

Allah says,

(وَمَا كَانَ لِمُؤْمِنٍ وَلَا لِمُؤْمِنَةٍ إِذَا قَضَى اللَّهُ وَرَسُولُهُ أَمْرًا أَنْ يَكُونَ لَهُمُ الْخِيَرَةُ مِنْ أَمْرِهِمْ)

(It does not behoove a believing male and female to have a choice when Allah and His Prophet decree in a matter)

Furthermore, wills and estates are one of those issues of Shariah where a person’s Abdiyyat is really challenged and tested. It is human nature to be materialistically inclined. A person

works so hard to build his empire. He sacrifices his day and night and makes both one to earn his empire. His heart, soul and mind are in his wealth. He would want to dispense his wealth as he wants to but Shariah orders him to dispense his wealth as Shariah wants to. It is a clash between an individual's desire and the order of Shariah. The attitude of an obedient slave of Allah will be that whatever is in my possession belongs to Allah. It does not belong to me. It is only in my trust and custody. I have to dispose of it as Allah wants me to. The issue of wills and estates is such an order that it has to be done correctly in one's lifetime. If he does not do it correctly, it will be a sin that occurs after the death of a person. Now, the person cannot make Tawbah. Therefore, this is a once in a lifetime opportunity and it must be done correctly.

Rasulullah ﷺ emphasized on drawing up wills and estates correctly.

عن جابر قال : قال رسول الله صلى الله عليه وسلم

من مات على وصية مات على سبيل سنة ومات على تقى وشهادة ومات مغفورا له

It had been reported from Jabir ﷺ that Rasulullah ﷺ said, "Whoever passed away having left behind a Wasayah has passed away upon the Sunnah and the right path. He has passed away with piety as a martyr and he has passed away in whilst being forgiven."

وعن أنس قال : قال رسول الله صلى الله عليه وسلم من قطع ميراث وارثه قطع الله ميراثه من الجنة يوم
القيامة

It has been reported from Anas ﷺ that Rasulullah ﷺ said, "Whomsoever severs the inheritance of his heirs, Allah will sever his inheritance of Jannah on the Day of Judgement."

وعن أبي هريرة عن رسول الله صلى الله عليه وسلم قال :

إن الرجل ليعمل والمرأة بطاعة الله ستين سنة ثم يحضرهما الموت فيضاران في الوصية فتجب لهما النار ثم قرأ
أبو هريرة (مِنْ بَعْدِ وَصِيَّةٍ يُوصَى بِهَا أَوْ دَيْنٍ غَيْرِ مُضَارٍّ وَصِيَّةً مِنَ اللَّهِ وَاللَّهُ عَلِيمٌ حَلِيمٌ تِلْكَ حُدُودُ اللَّهِ وَمَنْ
يُطِعِ اللَّهَ وَرَسُولَهُ يُدْخِلْهُ جَنَّاتٍ تَجْرِي مِنْ تَحْتِهَا الْأَنْهَارُ خَالِدِينَ فِيهَا ذَلِكَ الْفَوْزُ الْعَظِيمُ)

Abu Hurairah ﷺ reports that Rasulullah ﷺ said, "verily a man and a woman strive in the obedience of Allah for sixty years and then death draws upon them whilst they harmed others in regards to Wasayah thus making the Hellfire binding upon themselves." Thereafter Abu Hurairah ﷺ recited the verse, (After Wasayah that is bequeathed or a debt, not

causing harm. A Wasiyah from Allah and Allah is all-Knowing, most Forbearing. These are the limits of Allah. Whosoever obeys Allah and His Messenger, he will admit him into gardens underneath which rivers flow, abiding therein forever; and that is the great success)

Sequence of dispensing the estate:

When a person passes away, his estate will be dispensed in four stages sequentially:

1. Burial expenses
2. Paying of debts
3. Executing bequests
4. Paying of heirs

What constitutes the estate?

Whatever the deceased owned in his lifetime with a valid ownership according to Shariah will form part of his estate. That includes personal clothing, watch, spectacles, ring, property, business, vehicle etc. All his possessions will form his estate on condition his wealth is recognized in Shariah. If one owns something and that is not recognized in Shariah, it will not form part of the estate. That is why Shariah emphasizes on earning Halal wealth.

Ahadith on Halal wealth:

عن عبد الله بن مسعود قال : قال رسول الله صلى الله عليه وسلم : " طلب كسب الحلال فريضة بعد الفريضة " . رواه البيهقي في شعب الإيمان

Abdullah bin Masood رضي الله عنه reports that Rasulullah صلى الله عليه وسلم said, “Seeking Halal livelihood is a compulsory duty after the fulfillment of other mandatory duties.”

وعن أبي بكر الصديق رضي الله عنه عن النبي صلى الله عليه و سلم قال لا يدخل الجنة جسد غذي بحرام رواه أبو يعلى

Abu Bakr رضي الله عنه narrates that Rasulullah صلى الله عليه وسلم said, “That body that has been nourished by Haram will not enter Jannah.”

وروي عن ابن عمر رضي الله عنهما قال من اشترى ثوبا بعشرة دراهم وفيه درهم من حرام لم يقبل الله عز و جل له صلاة ما دام عليه

Ibn Umar رضي الله عنه states, “Whoever purchased a cloth for 10 Dirhams and one was a Haram Dirham, Allah will not accept his Salah as long as it remains on him.”

It should be pointed out that that wealth which was not alienated but kept aside for a specific purpose such as Hajj, jewelry for a daughter’s wedding, etc will all form part of the estate.

What is excluded from the estate?

- Haram wealth
- Rahn or collateral. The deceased took a loan and placed an item as collateral. If there are not sufficient funds to release the collateral, that will be excluded from the estate. For example, I take a loan of ﷲ 1 million from you and place my house as collateral. If the estate cannot release the house, the house will be excluded from the estate. In this, the appropriate ruling of Shariah will be considered after observing all the laws of Rahn.
- Insurances and endowment policies are Haram. They have elements of interest and gambling in them and they are not recognized as valid ownership in Shariah. They will be excluded from the estate. The proceeds of such policies should be given in Sadaqah to the poor and needy.
- Government pension funds will be excluded from the estate if the payout was after the death of the subscriber. If the Government paid the subscriber during his lifetime, then that payout will form part of the estate.

Burial Expenses:

- All burial expenses are direct expenses of the estate. That includes bathing, shrouding, digging the grave, vehicle, timber, mat etc.
- It is not compulsory upon the trustees of the estate to accept outside assistance for burial expenses if all the heirs are adults. If some heirs are minors then too they are not bound to accept assistance if they don’t use the shares of the minors.
- The expenses must be moderate. If the trustees were excessive in the burial expenses, they will have to compensate the estate for the excess amount. Feeding the deceased’s family etc does not form part of the burial expenses. If the expense for feeding was paid from the estate, the trustees will have to pay that amount to the estate.

Feeding:

The customary practice of feeding people after three days, forty days etc. has no basis in Shariah. This is an act of Bidah and there is no reward for that. If someone wants to do good for the deceased, he should give that money in Sadaqah for Isaale-Sawab for the

deceased. On the day of the Janazah, relatives and friends of the deceased come from far and wide and they need to be fed. That should be done by someone else.

If a woman passes away, her burial expenses will be upon her husband. That cannot be taken directly from her estate. If the husband is poor, then only will the burial expenses be taken from her estate.

Paying of Debts:

Ahadith on the rights of creditors:

وعن محمد بن عبد الله بن جحش قال : كنا جلوسا بفناء المسجد حيث يوضع الجنائز ورسول الله جالس بين ظهرينا فرفع رسول الله صلى الله عليه وسلم بصره قبل السماء فنظر ثم طأطأ بصره ووضع يده على جبهته قال : " سبحان الله سبحان الله ما نزل من التشديد ؟ " قال : فسكتنا يومنا وليلتنا فلم نر إلا خيرا حتى أصبحنا قال محمد : فسألت رسول الله صلى الله عليه وسلم : ما التشديد الذي نزل ؟ قال : " في الدين والذي نفس محمد بيده لو أن رجلا قتل في سبيل الله ثم عاش ثم قتل في سبيل الله ثم عاش ثم قتل في سبيل الله ثم عاش وعليه دين ما دخل الجنة حتى يقضى دينه

It has been reported from Muhammad bin Abdillah bin Jahsh that he said, "We were sitting in the courtyard of the Musjid where the Janazas used to be placed and Rasulallah ﷺ was sitting amongst us when he suddenly lifted his gaze towards the sky staring. Thereafter, he turned his gze and placed his hand upon his forehead stating, 'Subhanallah, Subhanallah, what severity has descended!' We remained silent for that day and night but we only witnessed tranquility until the morning." Muhammad (the narrator) ﷺ then stated, "Thus I asked Rasulallah r, 'What is the severity that descended?' He ﷺ said, 'In regards to debt. By the Being in whose grasp lies the life of Muhammad r, if a person is martyred in the path of Allah and then brought back to life and martyred in the path of Allah and then brought back to life and martyred again in the path of Allah and then brought back to life and he had a debt upon him, he will not enter Jannah until he repays his debt!"

وعن أبي سعيد الخدري قال : أتى النبي صلى الله عليه وسلم بجنزة ليصلي عليها فقال : " هل على صاحبكم دين ؟ " قالوا : نعم قال : " هل ترك له من وفاء ؟ " قالوا : لا قال : " صلوا على صاحبكم " قال علي بن أبي طالب : علي دينه يا رسول الله فتقدم فصلى عليه

Abu Sa'eed Khudri ؓ reported that, "A deceased person was brought before Rasulullah ﷺ so that he may perform the Janazah Salah. He ﷺ stated, 'Is there a debt upon your companion?' They replied, 'Yes.' He ﷺ said, 'Has he left behind a means of fulfillment?' They replied, 'No.' He ﷺ then said, 'You perform Janazah Salah upon your companion.' Ali ibn Abi Talib ؓ then stated, 'Oh Rasulullah ﷺ, I undertake the responsibility of his debt.' Thereafter Rasulullah ﷺ came forward and performed the Salah."

وروي أن معاذًا كان يدين فأتى غرماؤه إلى النبي صلى الله عليه وسلم فباع النبي صلى الله عليه وسلم ماله كله في دينه حتى قام معاذ بغير شيء . مرسل هذا لفظ المصاييح

It has been reported that Muadh ؓ was indebted and his creditors came to Rasulullah r. Thereafter, Rasulullah ﷺ sold all of Muadh's wealth because of his debt until Muadh was left with nothing."

وعن سعد بن الأطول قال : مات أخي وترك ثلاثمائة دينار وترك ولدا صغارا فأردت أن أنفق عليهم فقال لي رسول الله صلى الله عليه وسلم : " إن أهلك محبوس بدينه فاقض عنه " . قال : فذهبت فقضيت عنه ولم تبق إلا امرأة تدعي دينارين وليست لها بينة قال : " أعطها فإنها صدقة

Sa'd bin Al-Atwal has stated, "My brother passed away and left behind 300 Dinars and some small children as well thus I intend to spend some of the money upon them. Rasulullah ﷺ, 'Your brother is being held back on account of his debt hence fulfill it on his behalf.' Sa'd then said, "Thus I went and fulfilled it for him and there only remained one woman who was claiming two Dinars for which she had no proof. He ﷺ, 'Give it to her for verily it is Sadaqah."

Advice to creditors:

The estate owes you money. It is your Haqq, but if the estate is experiencing some difficulty in paying the debt, if you have the capacity to forfeit the debt, do that. To forfeit one's debt is better than giving charity. The reward is greater. If you cannot forfeit the debt, forgive the person. If you don't forgive, you have a claim in the hereafter against the debtor, but the reward of forgiving is greater.

وعن أبي هريرة رضي الله عنه أن النبي صلى الله عليه وسلم قال : " كان رجل يدائن الناس فكان يقول لفتاه : إذا أتيت معسرا تجاوز عنه لعل الله أن يتجاوز عنا قال : فلقى الله فتجاوز عنه

It has been reported by Abu Hurairah رضي الله عنه that Rasulullah صلى الله عليه وسلم said, “There was a particular man who used to lend money to people. He used to tell his young worker, ‘If a poor person come to you, overlook him so that perchance Allah would overlook us.’ He then said, ‘He met Allah and he overlooked him (his faults),”

وعن عمران بن حصين قال : قال رسول الله صلى الله عليه وسلم : " من كان له على رجل حق فمن أخره كان له بكل يوم صدقة

Imran bin Hussein رضي الله عنه states that Rasulullah صلى الله عليه وسلم said, “Whosoever has any claim upon another person and he grants him some respite, everyday will be regarded as Sadaqah for him.”

If a person has left sufficient wealth after burial expenses, all his debts must be paid but if a person’s estate does not have sufficient wealth to pay the debts, then certain debts will be given priority over other debts.

The debts of the deceased will be classified into two types:

1. Acknowledgement of a debt before Marazul Maut
2. Acknowledgement of a debt during Marazul Maut.

Definition of Marazul Maut:

Marazul Maut refers to that sickness that leads to a person’s death. The reality of which sickness led to death can only be understood after the death of a person. Some broad guidelines of Marazul Maut are:

- When the sickness deteriorated and the person passed away. Marazul Maut will be from the point the sickness deteriorated.
- If the person is sick for an entire lunar year, that is not Marazul Maut. That long sickness will be regarded as part of his normal state.
- If a person is sick but not bed-ridden, that will not constitute Marazul Maut.

In principle, a person’s financial dealings before Marazul Maut are valid. His financial dealings during or after Marazul Maut are not valid.

If a person makes an acknowledgement of a debt before Marazul Wafat or there are witnesses to the debt or the debt is common knowledge, then this will be a debt of the first category.

If acknowledgement of a debt took place during Marazul Wafat, then if the estate does not have sufficient funds to pay the debts, the debts of the first category will be fulfilled. In this type of debt if there is only one creditor, then he will be paid out full of whatever remains after the burial expenses. If there is more than one creditor, then all of them will be paid in proportion to their debt.

Example: Zaid dies and he owes 4 creditors, A, B, C and D. A is owed R6,000, B is owed R3,000, C is owed R2,000 and D is owed R1,000. The full debt is R12,000. After burial expenses, the estate is left with R6,000, i.e. 50% of their debt. A's claim is R6,000, he will get R3,000. B's claim is R3,000, he'll get R1,500. C's claim is R2,000, he'll get R1,000 and D's claim is R1,000, he'll get R500.

It is not permissible to give preferential treatment to some creditors over others. The debt of the second type where the deceased acknowledged the debt during Marazul Wafat will not be paid.

If the estate has sufficient funds and the debts acknowledged by the deceased during Marazul Maut can be paid, it should be paid.

If a person acknowledges a debt during Marazul Maut and that is common knowledge or supported by witnesses, that acknowledgement will be valid for an heir or non-heir.

Talaq in Marazul Maut valid – Inheritance depends on when Iddat ends. If he passed away during the Iddat period, she will inherit as a wife. If he passed away after her Iddat, she will not inherit.

Wasiyah (Bequests):

Wasiyah is another expression of the mercy of Allah Ta'ala just before a person dies. Allah has promised a lofty position for people who give charity. Rasulullah ﷺ has stated,

إذا مات الإنسان انقطع عمله إلا من ثلاثة إلا من صدقةٍ جاريةٍ أو علمٍ يُنتَفَعُ به أو ولدٍ صالحٍ يدعو له

“When a person dies, all of his actions cease except three, namely, continuous charity, beneficial knowledge or a pious child who prays for him.”

It is possible a person did not give Sadaqah and charity in his lifetime. When death dawns upon him, he now realizes his destiny and his shortcoming and wants to give charity for his Akhirah and salvation. Allah, the Most Merciful grants this person this last chance.

There are two types of Wasiyah – Wajib (compulsory) and Mustahab (desirable)

It is compulsory to make Wasiyah if one has debts or he has an Amanat in his possession or he has a debt owed to Shariah, for example, Fidyah for unperformed Salah, unpaid Zakat, Fitra, Kafaarah for an oath. If a person does not make a Wasiyah for the obligations, he will be sinful. He should also ensure that he leaves sufficient wealth to fulfill those obligations or else his soul will be suspended from receiving the mercy of Allah after death.

It is Mustahab to make Wasiyah if one is wealthy. In that instance too, it is advisable that the Wasiyah be lesser than one third. If one is not wealthy, it is Mustahab not to make Wasiyah. Leave the wealth for the heirs.

وعن سعد بن أبي وقاص قال : مرضت عام الفتح مرضا أشفيت على الموت فأتاني رسول الله صلى الله عليه وسلم يعودني فقلت : يا رسول الله : إن لي مالا كثيرا وليس يرثني إلا ابنتي أفأوصي بمالي كله ؟ قال : " لا " قلت : فثلثي مالي ؟ قال : " لا " قلت : فالشطر ؟ قال : " لا " قلت : فالثلث ؟ قال : " الثلث والثلث كثير إنك أن تذر ورثتك أغنياء خير من أن تذرهم عالة يتكففون الناس

Sa'd ibn Abi Waqqas ؓ states, "I became so ill in the Year of Victory that I feared I would pass away. Rasulallah ﷺ came to visit me and I told him, 'I have plenty of wealth and there is no one to inherit from me except my daughter. Should I bequeath my entire estate?' He ﷺ said, 'No.' I then said, 'two-thirds of my wealth?' He ﷺ said, 'No.' Then I said, 'What about half?' He ﷺ said, 'No.' I said, 'What about one-third?' He ﷺ said, '(Yes) One-third and one-third is a lot. It is better for you to leave your heirs wealthy than to leave them in need stretching their hands before people."

Wasiyah is permissible from only 1/3 of the net estate, that is after burial expenses and paying debts. If the estate does not have sufficient funds to cover debts, the turn for Wasiyah will not come. Example, Zaid passes away and leaves R12,000. His burial expenses was R1,000 and debts R2,000. He is left with R9,000. His Wasiyah will be carried out from only R3,000. If he made Wasiyah of more than R3,000, and the adult heirs approve of it, it will be valid. The consent of minors is not valid. The excess amount will be taken from adults shares. Furthermore, the heir's consent will be valid only after death and not before. It is observed that at times, a person tells his heirs about his wish and takes their consent in his lifetime. This will not be valid. The heirs can decide after death.

Wasiyah cannot be made for an heir – Rasulallah ﷺ said,

لا وصية لوارث

"There is no Wasiyah for an heir"

Therefore, if one makes Wasiyah in favour of an heir, it will not be carried out. Generally I observed when checking wills of many people, a bequest of a house is made for the wife, or a car for the son etc. These are heirs and Wasiyah for heirs is not valid.

If a person makes many bequests and 1/3 of the net estate is not sufficient then preference will be given to that bequest which is relatively more important in Shariah. Example, One made a bequest for Fidyah of missed Salah and for building a Masjid. Both requests cannot be executed from 1/3, then the amount will be used to pay Fidyah as that is more important than building a Masjid. If all the bequests are equal in importance and the 1/3 is not sufficient, then the first bequest will be carried out. Example, a bequest was made for Fidyah of unfulfilled fasts and unfulfilled Salah and 1/3 is not sufficient. Both the Fidyas are equal in importance, therefore, since the deceased made a bequest of fast first, that will be carried out.

If one made a bequest for a specific item, it is not necessary to give that specific item. The value of the item can be given. Example, if Zaid made a bequest that his car be given to Umar. Umar is not an heir. The executor reserves the right to keep the car and give the value of the car to Umar.

If a person acknowledges a debt for an heir during Marazul Maut and that is not common knowledge or it is not supported by witnesses, then it will not be valid as that will be like a bequest for an heir and bequests for heirs are not valid.

If a person acknowledges a debt for a non-heir and this is not common knowledge or not supported by witnesses, it will be regarded as Wasiyah and the laws of Wasiyah will apply.

If a person gives a gift to an heir in Marazul Maut, it is not valid as that is Wasiyah. Again, Wasiyah for an heir is not valid. If a gift was given to a non-heir, it will be Wasiyah and the laws of Wasiyah will apply.

To absolve a debtor from his debt is Wasiyah.

Pregnancy:

If a woman is pregnant and for example her husband passes away, the child also inherits if the child is safely born. It is advisable to delay the distribution of the estate until birth because the gender of the child is not known. It could be a boy or a girl and the share of both are different.

Adoption:

Adopted children are not heirs of the adoptive parents. A Wasayah may be made for them. Adoptive children will inherit from their biological parents.

Simultaneous Deaths:

If a group of family members travel and Aliyaz Billah they meet an accident and all pass away. Then it is necessary to ascertain who died first in order to determine the heirs of each other. If that cannot be ascertained, then it will be assumed that all died at the same time and one will not inherit from the other.

The Actual Inheritance:

- a. I pointed out at the beginning, whatever belonged to the deceased from pin to property forms part of the estate. After the burial expenses, fulfilling debts and executing bequests, the remaining estate belongs to the heirs in proportion to the shares. Every heir has a share in everything of the estate. For example, if a deceased was survived by his wife and 7 sons, the estate will be divided into 8 shares. The wife will inherit 1/8 share and each son also 1/8. That 1/8 of each heir will be in everything, in the house, in the car, in the clothing, in the tea-pot, in the pin and you name it. Therefore when executing the estate, the involvement of every heir is necessary. An estate can easily be wound if all the heirs cooperate. Every item of the deceased has sentimental value and heirs are sensitive to that. Distributing items of the estate can become an emotional issue and lead to a dispute. All the heirs may want the one and the same thing. That can be problematic. Therefore, there must be a give and take attitude here to avoid disputes.
- b. It is a common a malpractice to give away the clothing of the deceased in Sadaqah. That is incorrect. The heirs have a share in every garment of the deceased. They must be consulted. If all the heirs unanimously agree to give the clothing or anything in Sadaqah, that will be permissible on condition, there are no minor heirs. If there are minor heirs, the value of their share must be kept in trust. For example, a deceased is survived by a wife and 7 sons. Each heir will inherit 1/8. One son is a minor. The clothing of the deceased in worth R800. Each heir is entitled to R100. If all the heirs give their share of clothing in charity, the minor's value of his share R100 will be kept in Amaanat for him.

The Marriage Contract:

The only marriage contract in South African law is the ante nuptial contract without the accrual system. Effectively, what belongs to each spouse remains his / her property. The spouses do not become partners in the wealth of each other as an automatic consequence of a marriage. Therefore, the COP system is against Shariah and this must be changed. (legal aspect)

*Talaq for change of marriage contract

There are two views among the Ulama regarding court divorces. According to some Ulama, if the husband initiated a divorce, it will constitute a divorce. If the husband wants to change his marriage contract and it is required of him to divorce his wife, then in order to overcome the divorce, he could make two people his witnesses that he does not intend giving his wife Talaq. He is uttering the words of divorce merely to change the marriage contract.

It is a common practice that a husband and wife pool their money and buy a house or a car or a property. Often that is on either the husband's name or the wife's name. If either spouse passes away, the other then claims 50% of the property. That leads to a dispute because the partnership is not recognized. According to Shariah, the husband and wife must clearly state that they are partners and record that. It is also important to point out that household items should also be specified, what belongs to who.

Withholding Divorce:

If a husband withholds the divorce for whatever reason, his wife will inherit from his estate upon his death.

Second Marriage:

If a person has more than one wife, they will all share from the 1/8 of the share allocated to the wife. At times a person has one wife for many years. She bears all his children and toils with him. Now, when he is in his sixties or seventies, he takes another wife. She will also be entitled to the 1/8 share of the wife. The husband may, in his lifetime, give something to the first wife in consideration of her sacrifices with him in life.

Secret Marriage:

Many people perform secret marriages. Generally, this gets exposed in the lifetime of a person and it turns out to be a nightmare for him. If by chance a marriage really remains a secret until death and this wife claims her inheritance as a wife, this will be disputed as no body knows about the marriage. It is compulsory upon the husband to record this marriage and also record that he did not divorce her so that her share as a wife is secured.

The Business of the Deceased

- a. If the deceased owned a business, upon his demise, immediately stock must be taken to ensure the exact value of the business. It is also advisable that the heirs or their representatives be present during stock taking to avoid doubts and suspicion of cheating.

- b. Once a person passes away, all his heirs have a share in the assets of the actual business.
- c. It is also not permissible for some heirs to run the business and earn profits without entering into a formal partnership with the heirs. If the heirs give them consent then they will be partners and all the laws of partnership will govern that business. The active partners will be representatives (Wakeels) of the sleeping partners. If there is a profit, they will share in it. If there is a loss, they will share in the loss as well.
- d. If the active heirs continue with the business without permission for the other heirs and the business expands, the heirs will be entitled to the share according to the expanded business. For example, the business was R100,000. After five years, the business is R1 million. The heirs will be entitled to their share from R1 million. Besides that, if there was a loss, then that will be the responsibility of only the active partner, not all the heirs. This is the consequence of not entering into a formal partnership.
- e. If some heirs want an immediate pay out from the business, that is their right. If the business has cash, that should be given. If the business does not have cash, then the heir cannot insist on a cash payout. He will be entitled to the stock of the business according to his share. I have observed that there is lots of negligence in this area of inheritance. Some heirs simply go on running the business with total disregard to the heirs' rights. Their only excuse is to apply business skills and acumen. That is important but it is important to consult a Darul Ifta and then work around the issue.
- f. Often a father owns a business and the children run the business. The children are given an allowance from the father for running the business. When the father passes away the other heirs claim a share in the business but the children who ran the business get upset as they sacrificed all their efforts and time in running and promoting the business. That then leads to family disputes and breaking family ties. What is the point of trying to secure your children when that very business will bring grief and disunity to the family? The father should pay a standard salary or sell a share to the children to secure them.

Fixed Property:

All the heirs will be owners of the fixed property according to their shares. They can retain the fixed property and receive rentals and share the rentals according to their shares. If an heir wants to sell his share of the fixed property, he has the right to do so. However, he must first offer it to the other heirs and if the heirs can pay the asking price then they have a first right. If they cannot pay the price, the heir can sell his share to an outsider. If the business or property is registered in anyone's name for legal or technical reasons, that is not ownership

in Shariah. The person must fear Allah and give all the heirs their right. He should not hold all the heirs at ransom because of legal strength in his favour.

Trust Deeds:

Generally, Trust Deeds are made for tax benefits. All the assets are placed in trust and the heirs get benefit from the trust. According to Shariah a trust is not Waqf. At most it is a legal mechanism to avoid taxation. The Shari consequence is that it amounts to delaying an heir his / her immediate right of the estate. There should be some way to overcome this. Nevertheless, if a Trust is made, it must be designed to facilitate benefits to the beneficiaries according to the Shariah laws of Inheritance and Succession.

Gifts:

It often happens that parents give their children gifts in their lifetime. Parents should maintain equality among their children. They should not favour one child over the other. If they do, that will breed animosity among the children and cause disunity. Nevertheless, if the parents favoured one child over the other and gave one child more than the other without a valid reason, that will be a sin but the gifting will be valid. It is important to understand some basic principles of gifting in Shariah. Gifting takes place with a proposal, for example, I say "I am giving you this car as a gift." You then accept that gift. Further to that, you take physical possession of the gifted item and have full ownership of the gifted item. If the item is not in your possession, the gift is incomplete. If the father claims to give his car to his son as a gift and the son does not have physical possession of the car, the car still belongs to the father. If the father passes away, the car will form part of the estate. One of the conditions for a gift to be valid is it must be completely separate and independent. If a father owns shares in a property and the shares of the property are not separated, the gifting of such a share is not valid.

Conclusion:

As Muslims we believe in death, life after death and accountability in the court of Allah. One day we will die and give account of our actions to Allah. It is mentioned in a Hadith that a person's feet will not move from the court of Allah until he answers some questions. One question will be, "How did you earn your wealth and where did you dispose of it?" This part of the Hadith also covers correctly preparing our wills and estates.

Our Akaabir (pious elders) were very conscious of the rights of heirs. Once, a very pious saint was visiting a friend whilst he was in the throes of death. As the person breathed his last, the saint immediately blew out a nearby candle that was at the bedside of the deceased. A relative of the deceased was astonished at this strange behavior. He later asked him

regarding his strange act. The saint informed him that the candle became the property of the heirs as soon as person passed away thus it was not permissible for them to benefit from the candle without the permission of the heirs.

Finally, there are two important aspects, Huququllah and Huququl Ibaad.

Wills and estates are part of Huququllah. May Allah give us the Tawfeeq to put that in order. With that, let us not forget Huququl Ibaad. The importance of fulfilling the rights of people is mentioned in the following Hadith,

عن أبي هريرة عن النبي -صلى الله عليه وسلم- قال « تدرون من المفلس ». قالوا المفلس فينا من لا درهم له ولا متاع. قال « إن المفلس من أمتي يأتي يوم القيامة بصلاة وصيام وزكاة ويأتي قد شتم هذا وقذف هذا وأكل مال هذا وسفك دم هذا وضرب هذا فيقضى هذا من حسناته وهذا من حسناته فإن فنيت حسناته قبل أن يقضى ما عليه أخذ من خطاياهم فطرحت عليه ثم طرح في النار

Abu Hurairah رضي الله عنه narrates that Rasulullah صلى الله عليه وسلم said, “Do you know who a pauper is?” The people stated, “A pauper is such a person who does not own a Dirham nor any other wealth.” He صلى الله عليه وسلم then said, “Verily the pauper of my Ummah will be one who will come on the day of Judgement will a lot of Salah and fasts and Zakah to his name. However, he swore such and such a person, slandered so and so, usurped the wealth of so and so, shed the blood of such and such person and he hit another person. Thus so and so will claim from his good deeds and the other person will also claim from his good deeds. If his good deeds come to an end before he is able to pay back all that he owes, then he will be burdened with the sins of the others which will be placed upon him and thereafter he will be hurled into the fire.”

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