1. General Laws In Respect To Wills In India.

A “Will” is the legal declaration of the intention of the Testator [N.B: A ‘Testator’ is a person who makes a Will] with respect to his property which he desires to be carried into effect after his death. As per the Indian Succession Act, 1925, very person of sound mind, not being a minor can dispose of his property by Will.

To prove a Will, it has to be shown that – (1) The Will is the legal declaration of testator’s intention (2) The testator was of sound, disposing mind during execution (3) The testator executed it of his own free will.

Two essential characteristics of a Will are: (1) It takes effect after the death of the testator; and (2) It is revocable during the life time of the Testator.

The law of inheritance in relation to Christians, Parsis and Jews in India is primarily governed by the Indian Succession Act, 1925. The law of inheritance in relation to Hindus, Buddhists, Sikhs and Jains is governed by the Hindu Succession Act, 1956. The Hindu Succession Act, 1956 also allows Hindus, Buddhists, Sikhs and Jains to execute a Will as per the Indian Succession Act, 1925. Thus the Indian Succession Act, 1925 is the major legislation in India concerning Wills made by persons other than Muslims. The provisions of the Indian Succession Act, 1925 also do not apply where customary law is applicable. Wills made by Muslims are governed by Muhammad Law. However, certain provisions relating to probate and ‘Letters of Administration’ [N.B: A ‘Letter of Administration’ is a formal document appointing and authorizing a specified person/s to take over, administer and dispose off an estate where there is no executor to carry out the testator’s will]

All properties – movable and immovable – of which the testator is the owner and which are transferrable can be disposed of by Will. The aggregate of assets and liabilities is referred to as the ‘estate’ of the deceased. Apart from Wills made by Muslims, all Wills must be made in writing and duly executed. Registration of a Will is not compulsory; it is optional but desirable. No stamp duty is chargeable on a Will. It can be registered by testator during his lifetime or by the executor [N.B: An ‘executor’ is an individual appointed to administrate the estate of a deceased person and who’s duty it is to carry out the instructions and wishes of the deceased] or legatee after the testator’s death. Amendments, Revocations and Subsequent Wills also be got registered.

‘Probate’ is the act or process of proving a Will, where a copy of the Will is certified under the seal of a Court of competent jurisdiction which is conclusive proof of its authenticity and validity. It can be granted only to the Executor appointed by the Will

expressly, impliedly or by necessary implication. When the testator has made an incomplete Will without naming any executors or had named incapable persons, or where the executors named refuse to act, the Court will appoint an 'Administrator' to complete the duties of the executor.

2. Laws Applicable To Wills By Muslims

There is no codified law for Wills by Muslims. It can be made as per their religious texts. Further the Muslim law of Wills is not uniform for all of the sections. There are many differences amongst the Shias and the Sunnis. The Muslim law of succession is a codification of the four sources of Islamic law, which are (1) The Koran, (2) The Sunna or Tradition, (3) Ijmaa or consensus of opinion, and (4) Qiyas or analogical deductions.

The leading authority on the subject of Wills is the Hedaya (principally containing Hanafi doctrines), the Fatwa Alamgiri (which has been accepted by the Courts in India as well as by the Privy Council as of greater authority than the Hedaya and again propounding primarily Hanafi law) and Baillie's Digest of Mahomedan law. The leading work on Shia law is Sharaya-ul-Islam. Muslim testamentary succession is entirely governed by the Muslim Personal Law which covers the powers to make the Will, the nature of the Will, the execution procedure, conditions of validity etc. The term 'Wasiyat' means an endowment with the property of anything after death. The document containing the Will is the 'Wasiyat-Nama'. The making of a Wasiyat is not subject to any formalities. A Wasiyat can be made orally and no writing is required under law.[1] When this is the case, the beneficiary is required to prove beyond doubt the intention to make the Will by the testator,[2] and the terms of the Will,[3] and to prove the same with utmost precision.[4] If the Will is a written one, the writing need not be described as a Will but the intention should be decisive,[5] and it need not be formally signed by the testator,[6] and further it is not required to be attested[7] or registered.[8] The provisions of Hanafi[9] or Shia[10] laws as

[1] Khairunnissa v. Karamatullah, A.I.R 1933 Oudh 99 at p. 100: 142 I.C. 42;
Mayadad Khan v. Hazari Lal, A.I.R. 1928 Nag. 275 at p. 276: 108 I.C. 435;
Kulsum Bibi V. Shiam Sunder, A.I.R. 1936 All. 600 at p. 605: 164 I.C. 515
[2] Izhar Fatima v. Ansar Bibi, A.I.R. 1939 All. 348
[3] Mahabir v. Mustafa, A.I.R. 1937 P.C. 1974
[4] Venkatrao v. Nandev, A.I.R. 1931 P.C. 283
[5] Abdul Hameed v Mohammed Yoonus A.I.R. 1940 Mad. 153
[6] Aulia Bibi v. Allaudin, I.L.R. 28 All. 715
[7] Ramji Lal v. Ahmed Ali, A.I.R. 1952 M.B. 56;
Karam Ilahi v. Sharfuddin, I.L.R. 38 All. 212;
Abdul Hamid v. Abdul Ghani, A.I.R. 1934 Oudh 163 at p. 165: 148 I.C. 801

to the testimony of witnesses for proving a Will are rules relating only to evidence which now stand superseded by the Indian Evidence Act.

If the intention is clearly expressed, a Will takes effect as a Will even if it is described as a 'Tamliknama' (i.e. Gift Deed transferring right of ownership of a property)[11] or is in another form.[12] The term 'Tamlik' may be applied to a gift, to a sale or to a Will.[13] Where a man leaves a testamentary writing or several testamentary writings, it is the aggregate or the net result that constitutes his Will. The legal declaration of the intention of the testator must be gathered not from one document but by reading all the documents together.[14] A document in the nature of instructions by the deceased to his legal advisors or relatives containing instructions to be given to the legal advisor regarding disposition of his property would operate as a valid Will and may be admitted to probate.[15]

A Will in order to be valid must be made with free consent. A Will made under compulsion or mistake is invalid.[16] The provisions of the Contract Act may be applied for determining whether the consent if free. The testator must be sane at the time of making the Will. A Will made by an insane person would not become valid even if the testator recovers after that.

The estate of the deceased Mohammedan is to be applied successively in payment of (1) His funeral expenses and deathbed charges; (2) expenses of obtaining probate, letters of administration or succession certificate; (3) Wages due for services rendered to the deceased within three months preceding his death by any labourer, artisan or domestic servant; (4) Other debts of the deceased according to their respective priorities (if any); and (5) legacies not exceeding one-third of what remains after all the above payments have been made. The residue is to be distributed among the heirs of the deceased according to the law of the sect to which he belonged at the time of his

[8] Khalil Ullah v. Ewaz Ali, A.I.R. 1923 Oudh 214 at p. 215: 64 I.C. 390
[9] Hedaya (Hed). 703-4
[10] Baillie's Digest of Mahomedan Law. (Bail.) II, 242
[11] Ishri Singh v. Baldeo, I.L.R. 10 Cal. 792
Saiad Kasum v. Shaista Bibi (1975) 7 N.W.P 313
[12] Mazhar Husein v. Bodha Bibi, I.L.R. 43 Bom. 641;
Abdul Husein v. Sugranbai, A.I.R. 1939 Sind 322 at p. 328, wakf construed as Will
[13] Macnaughten, 242, Case I;
Baillie's Digest of Mahomedan Law. (Bail.) I 633;
Baillie's Digest of Mahomedan Law. (Bail.) II, 229 where different forms are suggested
[14] Ahoronee Shemail v. Ahmad Omer, A.I.R. 1931 Bom. 533 at p. 536: 33 Bom. L.R. 1056
[15] Sarabai Amibai v. Mohd. Cassum, I.L.R. 43 Bom. 641
[16] Baillie's Digest of Mahomedan Law. (Bail.) I, 627

death[17], and the heir has a right of contribution against his co-heirs, if by the action of the judgment creditor under a decree under s.52 of the Civil procedure Code against all the heirs, he was left with less than his proper share of the net estate of the deceased.[18] The payment of debts of the deceased takes precedence over the legacies.[19] If a testator is in debt to the full amount of his property, the bequest would not be lawful unless the creditors relinquish their claims.[20] Succession to the estate of a deceased Mohammedan is governed by the law of the sect he belonged to at the time of his death, and not by the law of the sect to which the persons claiming the estate as his heirs belong.[21] A deceased Mohammedan is presumed to have been a Sunni and the onus is on the person alleging him to have been a Shia.[22]

Mohammedan law does not make any exception as to the competency to receive a bequest except in the case of an apostate (a former Muslim who has renounced Islam) and a murderer of the testator. Any person who is capable of holding property may be made a beneficiary. A bequest may be made for the benefit of an institution or of a pious or charitable object.[23]

An executor under the Mohammedan law is called a 'Wasi'. The powers of the executor of a Mohammedan under a Will which is not probated are subject to the provisions of the Act and without probate he is an executor within the meaning of the Probate and Administration Act except where the contrary appears from the context.[24] Under the Mohammedan Law, in the absence of Letters of Administration being granted, the estate vests in the heirs. But the statutory vesting under the probate and Administration Act must take effect in substitution for the vesting in the heirs which exists between the death of the deceased and the grant of Letters. So by a grant of Letters of Administration, an estate already vested in the heirs is divested.[25] Under this, the executor of a Mohammedan Will is placed in possession of the entire property belonging to the deceased testator and not merely of a third of the properties over which alone he had a power of disposition[26] The statutory provisions of the Probate and

[17] Hayat-un-Nissa v. Mohammad (1890) 12 All. 290, 17 I.A. 73
[18] Mahomed Kazim Ali Khan v. Sadiq Ali Khan (1938) (65) I.A. 218, 13 Luck. 494, 174 I.C. 977 (38) A.P.C. 169
[19] Abdul Aziz v. Dharamsey Jetha & Co. (40) A.L. 348
[20] Baillie's Digest of Mahomedan Law. (Bail.), Hedaya (Hed). 673
[21] Hayat-un-Nissa v. Mohammad (1890) 12 All. 290, 17 I.A. 73
[22] Mt. Iqbal Begum v. Mt. Syed Begum (1933) 140 I.C. 829 (33) A.L. 80
[23] Bail. I, 635
[24] Shaik Moosa v. Shaik Essa, 8 Bom 241;
Sakhina v. Mahomed, 37 Cal 839;
Mahomed Yusuff v. Hargobindas, 24 Bom LR 753
[25] Laxmidas v. Ismail, A.I.R 1927 Bom 17
[26] Azimunnisa v. Ali Khan, 29 Bom. LR 434: 102 Ind Cas 129: A.I.R 1927 Bom 387

Administration Act apply to Mohammedan estates overriding any rules of Mohammedan Law that are inconsistent with them.[27] It is unquestionable that the estate of a Mohammedan testator vests in the executor from the time of the testator's death and the former has the power to alienate the estate for the purposes of administering it and he also has all the powers of the executor under the provisions contained in this section. This however, is to be read subject to the provisions contained in the Mohammedan Law limiting the powers of disposition of the Mohammedan testator.[28] An administrator, appointed to manage the estate of the deceased Mohammedan, is the only person who has the authority to act as a representative of the estate, who can charge the estate for the debt of the deceased so as to bind the heirs but this cannot be done unless he complies with the provisions of this section.[29] The Will may provide for remuneration of the executor, but if the executor is an heir the provision is not valid unless the other heirs consent.[30]

The option of revocation or modification of the Will is available to the testator at any point during his lifetime. The essential condition for a valid Will in Muslim law is that only property with absolute ownership of the testator can be bequeathed. A bequest which is contingent, or conditional or in the future or is alternative to another, pre-existing one, would be void. There are certain restrictions imposed on the testamentary capacity of Muslims.

The whole estate of a deceased Mohammedan if he has died intestate, or so much of it as has not been disposed off by Will, if he has left a Will, devolves on his heirs at the moment of his death, and the devolution is not suspended by reason merely of debts being due from the deceased.[31] Also as the right of an heir-apparent or presumptive comes into existence for the first time on the death of the Mohammedan ancestor, he is not entitled until then to any interest in the property to which he would succeed as an heir if he survived the Mohammedan ancestor. The heirs succeed to the estate as tenants-in-common in specified shares.[32] Under Mohammedan law birth right is not

[27] Ramdhon v. Sharfuddin, 34 Ind Cas 128: 9 Bom LT 236;
Ahronee v. Ahmed, 33 Bom LR 1506: A.I.R. 1931 Bom 533
[28] Anarali v. Omar Ali, A.I.R. 1951 Cal 1
[29] Ramdhon v. Sharfuddin, 34 Ind Cas 128: 9 Bur LT 233;
Chaudri v. Abdul, A.I.R. 1927 Bom 49: 98 Ind Cas 915
[30] Mahomed Hussain v. Aishabai 91934) 36 Bom. L.R. 1155, 155 I.C. 334 (35) A.B. 84
[31] Jafri Begum v. Amir Muhammad (1885) 7 All. 822;
Muhammad Awais v, Har Sahai (1885) 7 All. 716;
Ebrahim Aboobaker v. Tek Chanf (53) A.S.C. 298
[32] Abul Khader v. Chidabaram (1909) 32 Mad. 276, 278, 3 I.C. 876;
Abdul Majeeth v. Krishnamchariar (1917) 40 Mad. 243, 245, 40 I.C. 210;
Khatun Bai v. Adbul Wahab Sahib (1939) M.W.N. 346, 184 I.C. 778 (39) A.M. 306;

recognised. The right of an heir apparent or presumptive comes into existence for the first time on the death of the ancestor, and he is not entitled until then to any interest in the property to which he succeed as an heir if he survived the ancestor.[33] There is no joint tenancy in Mohammedan law and the heirs are only tenants-in-common. Therefore an heir can claim partition in respect of one of the properties held in common without seeking partition of all the properties.[34]

It is not necessary that the executor of the Will of a Mohammedan should be a Mohammedan. A Mohammedan may appoint a Christian, a Hindu or any non-Mohammedan to be his executor.[35]
If the marriage between Muslims is registered under the Special Marriage Act, 1954 then the provisions of Indian Succession Act would apply and they may make a Will bequeathing their property to any person in any manner and absolutely no restrictions are placed. Section 59 of the Indian Succession Act provides that any sane person (not a minor) may dispose of his properties by Will. Thus, the one third rule shall not apply and the persons shall continue to be governed by the Muslim law in respect of all other matters except succession or Wills. While he continues to be a Muslim governed by his personal law yet for the limited purpose of preparation of Will the provisions of the Indian Succession Act would apply.

3. Persons Entitled To Make Wills.

Under Muslim Law, every adult Muslim of sound mind can make a will. A minor or a lunatic is not competent to make a Will. Though under Muslim Law, a person gets the majority at the age of 15 years, but in India, section 3 of the Indian Majority Act, 1875 overrides that and provides that 'minority' terminates at the age of 18 years, but if the guardian has been appointed by the Court for the minor, the minority will terminate at the age of 21 years. Hence minority in the case of Mohammedans for purposes of Wills, gifts, Wakfs etc. terminate not on the completion of the fifteenth year, but on the completion of the eighteenth year. The beneficiary [N.B: A 'beneficiary' is the person who receives a bequest under the Will] can be any person capable of holding property and bequest can be made to non-Muslim, institution, and for charitable purposes. A bequest can be made to an unborn person and a Will in favour of a child who is born

Mahomedally Tyebally v. Safiabai (1940) 67 I.A. 406, 191 I.C. 113, (40) A.P.C. 215

[33] Imamul Hassan v. State of Bihar A.I.R. 1982 Patna 89

[34] Mt. Haluman v. Md Manir (1971) A. Pat. 386 (D.B.)

[35] Moohummud Ameemoodeen v. Moohummud Kubeeroodeen (1825) 4 S.D.A. [Beng.] 49, 55; Henry Imlach v. Zuhooroonisa (1828) 4 S.D.A. [Beng.] 301, 303

within six months of the date of making the Will can be a beneficiary. But according to Shia Law, a bequest to a child in the womb is valid, even if the child is in the longest period of gestation i.e., ten lunar months.

Wills may be made by both males and females. Wills made by 'Pardanashin' women would be valid; but much stronger evidence is needed.

4. Who Can Be Termed As Legal Heirs In Shia Law?

The Shias divide heirs into two groups - heirs by consanguinity, that is, blood relations, and heirs by marriage, that is, husband and wife.

Heirs by consanguinity are divided into three classes, and each class is subdivided into two sections. Of these three classes of heirs, the first excludes the second from inheritance, and the second excludes the third. But the heirs of the two sections of each class succeed together, the nearer degree in each section excluding the more remote in that section.[36] These classes of heirs by consanguinity are respectively composed as follows:

I. (i) Parents;
(ii) Children and other lineal descendants h.l.s. (how low so ever)
II. (i) Grandparents h.h.s. (how high so ever)
(ii) Brothers and sisters and their descendants h.l.s.
III. (i) Paternal, and (ii) maternal, uncles and aunts, of the deceased, and of his parents
and grandparents h.h.s. and their descendants h.l.s.

The husband or wife is never excluded from succession, but inherits together with the nearest heirs by consanguinity; The husband takes ¼ when there is a lineal descendent or ½ when there are no such descendants, and the wife takes 1/8 when there is a lineal descendant and ¼ when there is no lineal descendant.[37]

For the purpose of determining the share of heirs into two classes, namely Sharers and Residuaries. Sharers consist of the husband, wife, father, mother, daughter, the uterine brother, the uterine sister, the full sister and the consanguine sister. Of all these Sharers, there are four who inherit sometimes as sharers and sometimes as Residuaries. These are the father, the daughter, the full sister and the consanguine sister. Apart from the father, if the other three would have, if living, inherited as a

[36] Bail. II, 276, 280, 285
[37] Bail. II, 271-276, 381

Sharer, her descendants would inherit as Sharers, and if she would have inherited as a Residuary, her descendants would inherit as Residuaries. On failure of all natural heirs, the estate of the deceased Shia Mohammedan escheats to the Government.[38] The eldest son, if of sound mind, is exclusively entitled to wearing apparel of the father, and to his Koran, sword and ring, provided the deceased has left property besides those articles.

5. Law Regarding Consent Of Heirs.

A Muslim cannot by Will, dispose off more than a third of the surplus of his estate after payment of funeral expenses and debts.[39] Mohammedan law does not allow him to show any undue preference towards any particular heirs and a bequest to some of his heirs without the consent of the other heirs will be altogether invalid.[40] The policy of the law requiring consent of other heirs, when a bequest to an heir is made, is to prevent the testator from interfering by Will with the course of devolution of property according to law among his heirs, although he may give a specified portion, as much as a third to a stranger. The reason is that a bequest in favour of an heir would be an injury to the other heirs, as it would reduce their share, and would consequently induce a breach of the ties of kindred. A bequest to an heir is not valid unless the other heirs consent to the bequest after the death of the testator.[41] Also bequests in excess of the legal third cannot take effect, unless the heirs consent thereto after the death of the testator.[42] Bequeaths in excess of the bequeathable one-third and/or in favour of any heir, are validated and will be given effect to, if after the death of the testator, the heirs whose rights are affected by such dispositions consent thereto expressly or impliedly.[43] The consent of other heirs would validate a Will.[44] The entire Will would be binding if all heirs

[38] Mussammat Khursaidi v. Secretary of State (1926) 5 Pat. 539, 94 I.C. 433, (26) A.P. 321

[39] Article 118 of Mulla's Principles of Mohammedan Law

[40] Bail. I, 625;
Hed. 621 ,671, 672;
Hayatuddin v. Rahman A.I.R. 1935 Sind 73 at p. 74;
Bafatan v. Bilait, I.L.R. 30 Cal. 683;
Ghulam Mohd. V. Ghulam Hussain; A.I.R 1932 P.C. 81; I.L.R. 54 All. 93;
Ahmad v. Bai Bibi, I.L.R. 41 Bom. 377; 39 I.C. 83;
Matlab Hasan v. Kalawati, A.I.R 1933 All. 934;
Chutta Veetil v. Ponamunichand, A.I.R 1945 Mad. 81: I.L.R. (1945) Mad. 476;
Subhanullah v. Mohammad Junaid, 1980 All. C.J. 482 at p. 484

[41] Article 117 of Mulla's Principles of Mohammedan Law

[42] Article 118 of Mulla's Principles of Mohammedan Law

[43] Furkan v. Mumtaz Begum, A.I.R. 1971 Raj. 149 at p. 150

[44] Anar Ali v. Omar Ali A.I.R. 1951 Cal. 7 at p. 10: 55 C.W.N. 33;
Bayabai v. Bayabai A.I.R. 1942 Bom. 328 at p.330: 44 Bom. L.R. 792;
Abdul Latif v. Abadi Begum A.I.R 1934 P.C. 188: I.L.R. 9 Luck 421

agree to the bequest but if only some of them agree to it, their shares would be bound by it.[45] A single heir may consent so as to bind his own share.[46] The consent of all heirs would ensure that the beneficiary can take the property absolutely even if the Will is made subject to a condition which is void e.g., that the beneficiary shall not alienate the property[47] or that in the event of the death of the death of the beneficiary, the property shall go to some other person.[48]

The consent is necessary even when the inheritance is governed by any custom.[49] The consenting heirs must be major and sane otherwise their consent will not be valid.[50] The insolvency of the consenting heir is immaterial.[51] The voluntary assent given by the heirs during the death-illness of the testator cannot validate a Will in favour of an heir or in excess of one-third.[52] If the heirs are minors at the time of the testator's death, consent must be given by them after attaining majority. A consent given by a guardian is not valid.[53]

The heirs who are disqualified from being beneficiaries and also those whose consent is material are those who happen to be heirs at the time of the testator's death and not those who were heirs at the time of the Will.[54] If a person is an heir at the time of the Will but is excluded previous to the testator's death, he can take the legacy.[55] The heirs, a legacy in whose favour would be invalid, are all heirs even under the customary law.[56]

In Shia law, a bequest is valid to the extent of one-third not only to a stranger but also the heir even without the consent of other heirs.[57] A bequest in excess of one-third will,

[45] Hed. 683;
Bail. II. 232;
Salayjee v. Fatima A.I.R. 1922 P.C. 391 at p. 392
[46] Article 117 of Mulla's Principles of Mohammedan Law
[47] Abdul Karim v. Abdul Qayum I.L.R. 28 All. 342
[48] Nasir Ali v. Sughra Bibi 54 I.C. 583: I.L.R. 1 Lah. 302
[49] Irshad Ullah v. Fakira, A.I.R. 1937 Oudh 4 at p. 8: I.L.R. 12 Luck. 592
[50] Bail. I, 625-26
[51] Imdadul Rahman v. Puyobi Din, A.I.R. 1937 Oudh 239 at p. 240: 166 I.C. 940: 1937 C.W.N. 201: 1937 O.L.R. 85
[52] Bee Jan v. Fatima Beebee 8 I.C. 431;
Gulam Qadir v. Sardoze 9 I.C. 721: 4 S.L.R. 216
[53] Ghulam Mohd. V. Ghulam Hussain A.I.R. 1932 P.C. 81 at p. 84: I.L.R. 54 All. 93: 136 I.C. 454: 1932 A.L.J. 245: 36 C.W.N 310: 62 M.L.J 371
[54] Bail. I, 625;
Hed 672
[55] Macnaughten 54
[56] Irshadullah Khan v. Fakira Begum A.I.R 1937 Oudh at p. 8; 165 I.C. 322: 1936 O.W.N. 1123: I.L.R. 12 Luck 592;
Mohd. Hussain v. Aishabai A.I.R. 1933 Oudh 142 at p. 145: 150 I.C. 330
[57] Bail. II, 244;
Qasim Ali v. Ahmad Shah, 32 I.C. 516: 20 O.L.J. 758;

of course, not be valid without the consent of heirs. If, however, a testator so makes a bequest to some of the heirs as to exclude others entirely from succession, the bequest would, according to better opinion, be altogether invalid and the property would devolve on all the heirs. Such a bequest to some of the heirs will not be valid even to the extent of one-third. The heirs may give consent either before or after the death of the testator.[58]

6. Who Can Be A Beneficiary Under A Muslim Will?

Mohammedan law does not make any exception as to the competency to receive a bequest except in the case of an apostate and a murderer of the testator. Any person who is capable of holding property may be made a beneficiary. A bequest may be made for the benefit of an institution or of a pious or charitable object.[59] A bequest to an heir is not valid unless the other heirs consent to the bequest after the death of the testator.[60] Any single heir may consent so as to bind his own share.[61]

The beneficiary must be in existence at the time of the testator's death. A bequest in favour of an unborn person is void[62] unless such person was a child 'en ventre sa mere' [N.B: a child 'en ventre sa mere' refers to the fetus in the womb] at the time of the Will and is actually born within six months of that date.[63] Under the Shia law also a bequest in favour of an unborn child is invalid but if the legatee was in the womb at the time of the Will, the bequest will be valid (that is, if he is born more than six months after the date of the Will but within the longest period of gestation from the date of the Will but

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Mohd. Ata Husain v. Husain Ali, A.I.R. 1944 Oudh 139 at pp. 145,146;
Hayatuddin v. Mst. Rahiman, A.I.R. 1935 Sind 73: 159 I.C. 427;
Fahmida v. Jafri, I.L.R. 30 All. 153;
Amit Bibi v. Mustafa, A.I.R. 1924 All. 20 at p. 23: I.L.R. 46 All. 28;
Husaini Begum v. Mohd. Mehdi, A.I.R. 1927 All. 340 at p. 340: I.L.R. 49 All. 547;
Mahabir Prasad v. Mustafa, A.I.R. 1927 P.C. 174 at p. 177: 168 I.C. 418;
Ali Raza v. Nawazish Ali, A.I.R. 1943 Oudh 243 at p. 249

[58] Husaini Begam v. Muhammad Mehdi (1927) 49 All. 547, 100 I.C. 673 (27) A.A. 340
[59] Bail. I, 635
[60] Valanhiyil Kunhi Avulla v. Eengayil Peetika Yail Kunhi Avulla, A.I.R. 1964 Ker. 200 at p. 202
[61] Naziruddin v. Hajirambee, 2004 (1) K.L.T. 896 at p. 901
[62] Bail. I 624;
Hed. 674;
Abdul Cadur v. Turner, I.L.R. 9 Bom. 158.
[63] Bail. I, 624;
Bail. II, 244-46

within the longest period of gestation from the date of the bequest.)[64] A bequest to a Non-Muslim, an infidel or refugee, is valid according to all schools of Muslim law. There is no consensus as to whether a bequest to an apostate is valid or invalid.[65]

In cases where a joint legacy is made in favour of two or more persons, the question would be as to who would be entitled to the legacy if it fails in respect of any of them. In such cases, if the beneficiary was not competent to be beneficiary from the very beginning the entire legacy would go to the remaining beneficiary (ies). But if the beneficiary was originally a competent beneficiary but became disqualified later on by failure of a condition, the remaining beneficiaries would be entitled only to their share in the legacy and the rest would lapse and it would not occasion any accession to the right of others.[66]

A bequest may be made to a class of persons (e.g. to the poor generally) who would jointly, rank as a single beneficiary. A bequest may be made to any special classes.[67] But if the bequest is made to several persons, it will be divided equally among the beneficiaries irrespective of gender unless a contrary intention clearly appears.[68]

7. Law Regarding Consent Of Beneficiaries.

A Will becomes effective and the title of the property bequeathed is completed only with the Beneficiary's acceptance, express or implied, after the death of the testator.[69] Acceptance or rejection during the life time has no effect. The facts at the time of the execution of the Will may also be relevant for determining the question in regard to the consent after the death of the testator.[70] If a beneficiary accepts a bequest after the death of a testator, it is valid notwithstanding he may have rejected it during his lifetime.[71] If however, the beneficiary survives the testator and dies without assenting to

[64] Bail. II, 246-47
[65] Bail. II 625-27
Bail. II 244;
Minhaj. 260
[66] Bail. I, 642-43
[67] For interpretation of such classes, see Bail. I, 655-62;
Bail. II 247-48
[68] Ghulam Mohammed v. Sheik Ghulam Hussain (1932) Bail. I, 647
[69] Bail. 624;
Hed. 672, 673;
Durr al-Mukhtar (Durr.) 404
[70] Subhan Ullah v. Mohammad Junaid, 1980 All. C.J. 482 at p. 484
[71] Hed. 672-73;

the Will, the assent is presumed.[72] If the beneficiary derives any benefit from the Will, he will not be allowed to reprobate (renounce) it.[73] Acceptance will be presumed in the case of an infant or a child in the womb, unless it would cause injury to the beneficiary.[74] A bequest in favour of a category of persons as 'the poor' does not, however, require acceptance but becomes irrevocable by the death of the testator.[75] A Will may be accepted in part. A bequest may be accepted or rejected during the lifetime of the testator. If it is rejected during the lifetime, it may be accepted after his death. If, however, it is rejected after his death without having been accepted, the legacy would stand cancelled even though possession has been taken by the beneficiary. But if the legacy is rejected after death and acceptance, it would not stand cancelled according to better opinion even though possession has not been taken.

The acceptance of the Will may, in the event of the legatee's death without expressing assent, be made by his heirs.[76] If the beneficiary dies after the testator but before accepting the bequest, the right of acceptance passes to his heirs.[77]

8. Which Properties And To What Extend Can A Muslim Testator Bequeath.

There is no distinction in Mohammedan law of inheritance between movable and immovable property or between ancestral and self-acquired property. Muslim testator can only bequeath one-third of the properties held by him by Will.[78] Even a bequest for a pious purpose is not allowed beyond one-third.[79]

It is open to a testator to make a bequest of the substance of any property which can be lawfully possessed, or of its usufruct [N.B: A 'usufruct' is a legal right of using and enjoying the profits or benefits of property belonging to another] or profit.[80] Where the corpus of the property is being bequeathed, it cannot be the subject of any conditions. It

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Bail. I, 624;
Durr al-Mukhtar (Durr.) 405

[72] Bail. I, 624

[73] Wali Mohd. V. Daulatunnissa, 37 I.C. 921

[74] Durr al-Mukhtar (Durr.) 409

[75] Al-Minhaj us-Sawi (Minhaj.) 263

[76] Bail. II, 229-30

[77] Al-Minhaj us-Sawi (Minhaj.) 263

[78] Mohammed Ali Nayyar v. Ahraz Hussain, 2004 (6) A.L.D. 845 at pp. 848, 849 (A.P.)

[79] Khajoorunnissa v. Rowshan Jahan I.L.R. 2 Cal. 184;
EC Jewa v. Yacoob Ally A.I.R. 1928 Rang. 307 at p. 308: I.L.R. 6 Rang. 542: 114 I.C. 403

[80] Bail. I, 623;
Bail. II, 233

is necessary that the Will of the corpus should relate to a property which is in existence at the time of the testator's death. It is however, not necessary that it should also exist at the time of the Will.[81] The reason is that a Will takes effect from the moment of the testator's death and not earlier.[82] A Will in respect of the corpus of the property which will come into existence after the death of the testator, that is, a bequest in future is void.

It is open to the testator to make a bequest of limited rights dealing only with the usufruct of the property without bequeathing the corpus. The intention of the testator must be gathered from the terms of the bequest.[83] The bequest of usufruct of some property which is in existence at the time of the testator's death is valid. If the bequest is indefinite as to the terms or is forever, the beneficiary will be entitled to get it till his death.[84] The Muslim law makes a clear distinction between property and its usufruct and it is well settled that life estate with vested remainders is not recognized under the Mohammedan law and such an estate, if attempted to be created whether by Will or by gift, is invalid. Authorities are all one way that when a Mohammedan has made a gift and has stipulated an invalid condition, the gift is valid and the condition is void.[85]

Creation of a 'Life Interest' or of an estate of limited duration is not possible under the Mohammedan law. Such an estate not being known to that system of law cannot be created whether by a gift or by a Will. Where a person has been given a property for life with absolute restraint on the power of alienation and with no right of succession in favour of the legal representatives and with directions that on his death the property shall come into the possession of his own heirs or their legal representative, there is very little difference in fact between such a transfer and a transfer of the usufruct of the property for the lifetime of the transferee, though Mohammedan law has made a clear distinction between transfer of the usufruct and transfer of the property.

There is a distinction in Indian law between the gift of the corpus and the profit or usufruct and life interest conferred by the donor can take effect as a gift of the use of the property and not as part of the property itself.[86] It should be taken to be settled law that

[81] Bail. I, 624, 665-66
[82] Bail. II, 238
[83] Bail. I, 665-66
[84] Bail. I, 663;
Hed. 692
[85] Abdul Gafur v. Nizamuddin, 19 I.A 170;
Babu Lal v. Ghanshiam Das, I.L.R. 44 All. 633
[86] Amjad Khan v. Ashraf Khan, A.I.R. 1929 Oudh 568 at p. 573

if in a Mohammedan gift, life-estate is created; it would take effect out of the usufruct.[87] It is permissible to make a bequest of the thing itself in favour of one person and of its produce or use to another.[88] In these cases the beneficiaries of the usufruct will be exclusively entitled to the use during his term.[89] The bequest of a property which does not belong to the testator would not be valid unless the person to whom the property belongs gives his consent after the death of the testator. The consent being, however, purely voluntary and gratuitous, the owner of the property may refuse to give the property to the beneficiary.[90]

The beneficiary is entitled to take the property in the form in which it exists at the time of the death of the testator. He is therefore entitled to all accessions [N.B: An 'accession' is addition to or increase in value of property through labor or the addition of new materials] to the subject of the bequest before partition or distribution of the estate. This is so even if the accession is made after the death of the testator. The bequest would continue to be valid unless the change or the improvement is so substantial as to imply revocation of the bequests. The accession is also subject to the testamentary limits of one-third. If the property deteriorates or any encumbrance is created on the property or if any structure standing on the land is pulled down, the beneficiary would be entitled to get the property as it stands.[91]

Bequests for all purposes are valid except where they are made for purposes which are considered to be unlawful according to the Mohammedan religion.[92] A bequest may be made generally in the way of God for charitable purposes. The benefit would, in such a case, be valid and the legacy must be spent for pious purposes and for the benefit of the poor. Thus, a Will authorizing the executor to dispose off the legacy for such charitable purposes as he may deem proper would be valid.[93] But if a bequest to charity is made with the object of giving the property personally to the executor who is also an heir, the bequest will be invalid without the consent of the other heirs.[94]

9. Bequests For Charities And Religious Purpose

[87] Hayara Bai v. Mohd. Adami Sait, A.I.R 1977 Mad. 374 at p. 377
[88] Mehraj Begum v. Din Mohammad, A.I.R. 1937 Lah. 669 at p. 671: 39 Punj. L.R. 279
[89] Hed. 694
[90] Hed. 683
[91] Ameer Ali, I 631
[92] See Bail. I, 633, 635 and Bail. II, 230 and Durr. 413-16 for different kinds of lawful and unlawful bequests.
[93] Gangabai v. Thavar Mulla, (1803) 1 B.H.C.R 70
[94] Khajooroonissa v. Rowshan Jahan, I.L.R. 2 Cal. 184

Bequests for pious purposes fall under three classes according to the purpose for which they are made, namely:

a. Bequests for 'Fariaz', that is, purposes expressly ordained in the Koran, namely, (i) Haj (Pilgrimage), (ii) Zakat (Tithe or Poor's rate), and (iii) Expiation, e.g. for prayers missed by a Mohammedan.

b. Bequests for 'Wajibat', that is, purposes not expressly ordained, but which are in themselves necessary and proper, namely 'Sadaka Fitrat' (charity given on the day of breaking fast), and sacrifices.

c. Bequests for 'Nawafil', that is, bequest of a purely voluntary nature e.g. bequests to the poor, or for building a mosque, or a bridge, or an inn for travelers.

Of these three classes, bequests of the first class take precedence over bequests of the second and third class, and bequests of the second class take precedence over bequests of the third class. In the first class again, bequests for Haj must be paid before a bequest for 'Zakat' or Tithe, and a bequest for 'Zakat' must be paid before a bequest by way of expiation.[95]

10. Revocation

A Muslim will or any part thereof may be revoked by the testator at any time before his death. The revocation may be express (oral or in writing) or implied.[96] A will may be expressly revoked by tearing it off or by burning it. Any act, which results in the extinction of the subject matter or proprietary rights of the testator, will impliedly revoke the will. For instance, if the testator transfers the same property by sale or gift subsequently to another, it amounts to implied revocation.

11. Lapse Of Legacy

[95] Hedaya, 688;
Baillie, 653-654
[96] Baillie, 628

Under Shia law, in case the beneficiary does not survive the testator, the bequest would pass to the heirs of the beneficiary unless it is revoked by the testator. If the beneficiary dies without leaving any heirs, the bequest ill pass to the heirs of the testator.[97]

12. Formation Of Wakf Under Wills.

The term 'Wakf' literaaly means detention or stoppage. It is defined in the Wakf Act, 1995 as the permanent dedication by a person professing Islam of any movable or immovable property for any purpose recognised by the Muslim law as pious, religious or charitable. A 'Wakif' is the dedicator of the property. A 'Mutawalli' is the manager of the Wakf, but the property does not vest in him, as it would in a trustee in English law.[98]

A Wakf may be made in writing or the dedication may be oral. There must, however, be appropriate words to show an intention to dedicate the property. The use of the word 'Wakf' is neither necessary nor conclusive. There is a extinction of proprietor's ownership and detention in the implied ownership of God.[99] The dedicator or donor may name any meritorious object as the recipient of the benefit.[100] To constitute a valid Wakf, whether religious or charitable, except in the case of donations to neighbors or charitable public utilities, the beneficiaries should be Muslims.[101]

The dedication must be permanent. A Wakf, therefore, for a limited period, e.g. twenty years, is not valid. Further, the purpose for which a Wakf is created must be of permanent character. Once a Wakf is created relating to any property, it remains a Wakf property forever.[102]

The subject of the Wakf under the Wakf Act may be 'any property'. The property dedicated by way of Wakf must belong to the Wakif (dedicator) at the time of dedication.[103] The dedicator must have a power of disposition over the property in

[97] Husaini Begum V. Muhammad Mehdi (1927) A.L.J. 504, 192 I.C. 410 (40) A.A. 462;
Baillie. II, 247
[98] Muhammad Rustom Ali v. Mustaq Husain (1920) 47 I.A. 224, 42 All. 609, 57 I.C. 329
[99] Mariam Bai v. Jaffar Abdul Rahiman Sait (73) A. Mad. 191
[100] Vidyavaruthi v. Balusami 48 I.A. 302 (22) A.P.C. 123
[101] Kassimiah Charities v. M.S.W. Board (64) A.M. 18
[102] Sayyed Ali v. A.P. Wakf Board, Hyderabad A.I.R. 1998 SC 972
[103] Musihuddin v. Ballabh Das (1912) 35 All. 68 17 I.C. 471;
Ehsan Beg v. Rahmat Ali (1934) 10 Luck. 547, 152 I.C. 798 (35) A.O. 47;
Mahomed Ali v. Dinesh Chandra Roy (1940) 2 Cal. 189, 44 C.W.N. 718 (40) A.C. 417;
Commissioner of Wakfs v. Mohammad Mohsin (54) A.C. 463, 48 C.W.N. 252

question.[104] A valid Wakf may be made of property subject to a mortgage[105] or a lease.[106] A usufructuary mortgagee cannot make a valid Wakf of his rights, for he is not the owner and the mortgage is an evasion of the Mohammedan law against usury (unlawful interest).[107] A 'Mushaa' or an undivided share in property may form the subject of a Wakf, whether the property is capable of division or not.[108] However, the Wakf of a Mushaa for a mosque or burial ground is not valid, whether the property is capable of devision or not.

The purpose for which a Wakf is created must be religious or pious or charitable.[109] A Wakf may also be created in favour of the settlor's family, children and descendants.[110] Where the deed is not clear, previous and subsequent conduct and attendant circumstances may be called in aid to clear the ambiguity. But this is only permissible to remove the ambiguity.[111] The objects of a Wakf must be indicated with reasonabvle certainty; if they are not, the Wakf will be void for uncertainity. But it is not necessary that the objects should be named.[112] Nor is it necessary, where the objects are specified, to name the sum to be spent on each object.[113] Where a Wakf is created for mixed purposes, some of which are lawful and some are not, it is valid as to the mixed purposes, but invalid as to the rest, and so much of the property as is dedicated for invalid purposes will revert to the Wakif (dedicator).[114] Where the property is not specifically dedicated to an object which fails, the whole amount will be devolved to the valid object of charity.[115] Where a clear charitable intention is expressed in the instrument of Wakf, it will not be permitted to fail because the objects, if specified,

[104] Haider Husain v. Sudama Prasad (1940) 15 Luck. 30, (1939) O.W.N. 858, (40) A.O. 18
[105] Shahazadee v. Khaja Hossein (1869) 12 W.R. 498;
Jinjira v. Mohammad (1922) 49 Cal. 477, 483, 67 I.C. 77, (22) A.C. 429
[106] Hashim Ali v. Iffat Ara Hamidi Begum (1942) 46 C.W.N. 561, 74 Cal. L.J. 261, (42) A.C. 180
[107] Rahiman v. Bagridan (1936) 11 Luck. 735, 160 I.C. 495, (36) A.O. 213;
Abdul Qavi v. Asaf Ali (62) A. All. 364
[108] Mohammad Badrul v. Shah Hason (1935) All. L.J. 400, 159 I.C. 37. (35) A.A. 278;
Mohamed Ayub Ali v. Amir Khan (1939) 43 C.W.N. 118, 181 I.C. 76, (39) A.C. 268
[109] Section 2, Wakf Act
[110] Section 3, Wakf Act
[111] Mahomed Khan Rowther v. A. Rahman (1968) Ker. L.T. 564
[112] Sheikh Ramzan v. Mussamat Rehmani (1932) 7 Luck. 300, 135 I.C. 372 (32) A.O. 71;
Gangabai v. Thavar (1863) 1 Bom. H.C.O.C. 71
[113] Mutu Ramanadan v. Vava Levvai (1916) 44 I.A. 21, 28-29, 40 Mad. 116, 39 I.C. 235, (16) A.P.C. 86;
Syed Shah v. Syed Abi (1932) 11 Pat. 288, 325-326, 136 I.C. 417, (32) A.P. 33
[114] Mazhar Husain v. Abdul (1911) 33 All. 400, 406. 9 I.C. 753;
Abdul Husain Moosaji v. Sugranbai (39) A.S. 322
[115] Mt. Ruqia Begum v. Sarajmal (1936) All. L.J. 231, 163 I.C. 344 (36) A.A. 404;
Sattar Ismail v. Hamid Sait (1944) 2 M.L.J. 92, (44) A.M. 504

happen to fail, but the income will be applied for the benefit of the poor or to objects as near as possible to the objects which failed.[116]

Every Mohammedan of sound mind and not a minor may dedicate his property by way of Wakf. A Wakf may be made either verbally or in writing. It is not necessary in order to constitute a Wakf, that the term 'Wakf' should be used in the grant, if from the general nature of the grant itself such a dedication can be inferred.[117]

A wakf may be created by act inter vivos or by Will, even by a Shia testator.[118] He may dedicate the whole of his property by Wakf. But a Wakf made by Will or during Marz-ul-Maut (death illness) cannot operate upon more than one-third of the net assets without the consent of the heirs.[119] A testamentary Wakf is no more than a bequest to charity, and it is subject to the same restrictions as a bequest to an individual. A testamentary Wakf is no more than a bequest to charity, and it is subject to the same restrictions as a bequest to an individual.[120]

13. Muslim Gifts Through the Medium of a Trust

A gift may be made through the medium of a Trust. In order for such a gift to be valid it must be – (1) A declaration of gift by the Settlor/Donor, 92) An express or implied acceptance of the gift by or on behalf of the Trustees, and (3) Delivery of possession of the subject matter of the gift by the Settlor/ Donor to the Trustee.

A Mohammedan cannot through the medium of a Trust settle property for the benefit of persons who are incapable of taking under a gift, nor can he through the medium of a Trust create an estate not recognised by the law of gifts governing the sect to which he belongs. Neither a Sunni nor a Shia can make a gift in favour of an unborn person; so he cannot through the medium of a Trust settle property in favour of an unborn person. Life estates and vested remainders are unknown to Muslim Law, but life estates may be construed as an interest in the usufruct. Successive life interests may be created under the Sunni and Shia law in favour of unborn persons by means of a Wakf.

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[116] Kulsom Bibee v. Golam Hossein (1905) 10 C.W.N. 449, 484-485;
Salebhai v. Safiabu (1912) 36 Bom. 111, 12 I.C. 702;
Hashim Ali v. Iffat Ara Hamidi Begum (1942) 46 C.W.N. 561, 74 Cal. L.J. 261 (42) A.C. 180

[117] Saliq-un-Nissa v. Mali Ahmad (1903) 25 All. 418;
Ram Rup v. Saran Dayal (1936) 160 I.C. 289, 936) A.L. 283

[118] Baqar Ali Khan v. Anjuman Ara Begum (1902) 25 All. 236, 30 I.A. 94

[119] Ali Husain v. Fazal (1914) 36 All. 431, 23 I.C. 291;
Badrul Islam Ali Khan v. Mt. Ali Begum (1935) 16 Lah. 782, 158 I.C. 465 (35) A.L. 251

[120] Nanhoobeg v. Ghulam Husain (1950) Nag. 633, (51) A.N. 327

The introduction of Trustees is merely the employment of machinery whereby the gift is carried into effect.[121] Acceptance of a Trust by Trustees is indicated by their executing the Deed of Trust.[122] The Donor should not divest himself of all control over the corpus of the property. If he does not do so, the gift is invalid.[123]

14. Conclusion

A Shia Muslim is regulated by his/her sect's personal laws, and the power to bequeath by Will have certain restrictions. He/she, being 18 years or over in age, after payment of funeral expenses and debts, can bequeath up to one-third of his/her assets by Will to any person (being an heir or a stranger) capable of holding property and bequests can be made to a non-Muslim, an institution, and for charitable purposes. A bequest can even be made in favour of a child in the womb, even if the child is in the longest period of gestation i.e., ten lunar months. The remaining two-thirds will be divided to the heirs of the deceased, which comprise of blood relations and spouses. The heirs have to impliedly or expressly indicate acceptance of their shares or bequests. A bequest by Will, in excess of one-third will not be valid without the heirs consenting to such a bequest. If, however, a testator makes a bequest to some of the heirs so as to exclude others entirely from succession, the bequest would be altogether invalid and the property would devolve on all the heirs. Such a bequest to some of the heirs will not be valid even to the extent of one-third. The heirs may give consent either before or after the death of the testator.

Thus a Shia Muslim can bequeath one-third of their property to whomsoever they choose, without needing the consent of their heirs (provided their Will doesn't try to exclude any of their heirs completely from receiving any of his property). The remaining two-thirds can be bequeathed through Will provided it can be proven that all heirs have given consent to such bequest(s) after the death of the testator/testatrix. However, as an heir is allowed to withdraw their consent at any time, the testator/testatrix must be fully aware of the danger of the heir (s) taking back a consent given during the lifetime of the testator/testatrix, after their death.

As an alternative to bequeathing the two-thirds, a testator/testatrix can give the property through gift deed during their life-time or through a Trust in favour of the beneficiaries or as gifts through the medium of a Trust (as given above). A private Trust can be made

[121] Ram Charan v. Fatima Begam (1915) 42 Cal. 933, 938, 30 I.C. 686
[122] Sadik Husain v. Hashim Ali (1916) 43 I.A. 212, 218-224, 38 All. 627, 642-648, 36 I.C. 104
[123] Mirza Hashim v. Bindaneem (1928) 6 Rang. 343, 113 I.C. 255 (28) A.R. 323

under the Indian Trusts Act which allows every person competent to contract to make a Trust under it. When the trust is created by a Will it has to be made by writing irrespective of whether the trust is public or private or it relates to movable or immovable property as per Indian Succession Act.