



# Recognising Religious Customs within Estate Planning

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Subject to the provisions of the various State Succession and Family Maintenance Acts, each State jurisdiction and Territory of Australia allows freedom to distribute ones assets on death. Furthermore in the event of there being no valid or partially valid Will each State and Territory has statutory rules for distribution of property where total or partial intestacy occurs. Therefore unlike other jurisdictions such as Singapore, Australia state jurisdictions do not recognise religious rules and customs.

As such should anyone wishing to have certain religious rites or customs conferred in a certain manner in respect to the funeral service or the cremation or burial or their body as well as distribution and administration of Assets should have a valid Will.

What follows is an overview of the issues concerning funeral and burial services as well as the distribution and management of assets in the context of certain religious practices and in particular the Muslim Faith.

## **Inheritance in the Context of the Muslim Faith**

Inheritance Law in Islam is referred to as irth. This means that a predetermined right is due to an established heir from the Estate of a deceased.

The Islamic system of inheritance and Estate

distribution is based on a contingency method of determining the eligible heirs of the deceased.

There are several different schools under Muslim law and each school may have different rules. This overview is based on the Hanafi school of Sunnite law as described in Outlines of Muhammadan Law. The Shafi school is generally in accord with the Hanafi school on broad principles, although there maybe some points of divergence with regard to distribution to agnatic heirs.

According to the Hanafi school of Sunnite law, the Muslim faith divides heirs into three principal classes and four subsidiary classes. The three principal classes are:

Class I: Koranic heirs

Class II: Agnatic heirs (also called tribal heirs)

Class III: Uterine heirs (also called distant kindred)

These three classes together comprise all the blood relations of the deceased and one by marriage (i.e., husband or wife). The subsidiary classes only take (from the deceased's estate) in default of the principal classes.

### **(i) Koranic Heirs**

The Koranic heirs are given specific shares as set out in the Koran. The residue, which is usually the bulk of a Muslim's estate, is kept for



the agnatic heirs, the persons whose rights were always recognised by tribal laws

The Koran can be seen to have introduced reforms to the tribal laws in existence in historical times, by naming as heirs persons (such as spouses and females) who were not entitled to inherit under tribal laws. A person can be both a Koranic heir and an agnatic heir but may or may not take from the deceased's estate under both categories.

### **(iii) Agnatic Heirs**

An agnate is a person related to the deceased through male links only. This class is also divided into three groups:

- The first group comprises all male agnates such as the son, father, grandfather, brother, paternal uncle and nephew
- The second group consists of only four female agnates when they coexist with males in the same degree (I.e., in the same generation), namely the daughter, son's daughter, full sister and consanguine Sister.
- The third group consists of the full sister and, the consanguine sister when they coexist with daughters and there are no other nearer heirs.

### **(ii) Uterine Heirs**

Uterine heirs are relations who are neither Koranic heirs nor agnatic heirs. They are the female agnates and the cognates (persons related to the deceased through the female line). Examples of people falling under this category are the daughter's children, false grandfathers, brother's (full and consanguine) daughters, uterine brother's children, full paternal aunt and uterine paternal uncle and aunts.

Where there are no Koranic or agnatic heirs, the estate is divided among the uterine heirs. Where there is a husband or wife and uterine heirs, the husband or wife will take his or her Koranic share and the balance will be divided among the uterine heirs.

### **Exclusions**

The primary heirs who are never excluded are the father, mother, husband or wife and sons and daughters. All other heirs may be excluded by the existence of someone else.

Muslim law does not recognise the right of representation, i.e., the nearer in degree excludes the more remote. So if a father dies leaving a son and the son of a predeceased son, then the son of the predeceased son takes nothing from the deceased's estate.

The existence of a father would exclude agnatic ascendants like the grandfather and all the male branches like the uncle, brother and nephew. The existence of the father would also exclude the sisters (full, consanguine and uterine). The nearer grandfather (i.e., nearer by being just one generation removed) would exclude the more remote grandfather.

The existence of the mother would exclude the grand other and the nearer grandmother would exclude the more remote grandmother. Full blood is to be preferred over half-blood. Therefore a full brother excludes a consanguine brother but the consanguine brother would exclude the full brother's son.

### **Non-Muslims**

A non-Muslim cannot inherit from a Muslim. Therefore, if there is a family member who converted to Islam, then the rest of the family who did not convert is excluded from



inheriting from the converted family member's estate upon his death.

### **Illegitimate Children**

Illegitimate children cannot inherit from the father, but may inherit from the mother. Illegitimate children may also not inherit from their legitimate siblings. Illegitimate children do not inherit even if legitimated.

### **Burial Rites**

By executing a valid Will according to the Muslim Faith, a Muslim can give directions to the Executor to prepare for washing and shrouding of the body according to the Muslim faith. In addition, directions can be included in respect to all funeral arrangements including, Salat ul Janazah (funeral prayer) and the burial. This allows a person of the Muslim faith to protect their rights and have an Islamic funeral. These are particularly relevant for a new/convert Muslims because the next of kin will essentially become the legal owners of the body. This means they can decide to bury or cremate the body as they please.

### **Autopsy**

A Will in accordance with the Muslim faith, containing directions for the prevention of an autopsy, is vital evidence in stopping an autopsy if it is ordered by the Coroner. In addition, an Islamic Will can contain

provisions for preventing removal and donation of organs and other internal body parts.

### **Guardianship of Minors (Children)**

A Will can also provide Guardians for any children under the age of 18 and directions given to the guardians to express the wishes of parents that their children be brought up in the Muslim faith.

### **Choosing an Executor**

The choice of an Executor who understands the Muslim faith will administer Estate and distribute the assets to Beneficiaries as they have directed in the Will. It is also the Executor's role to carry out all the directions and orders you have made in a Will regarding your funeral and other important matters.

From the above it would appear the Muslim law of inheritance is very complex. Hence unless a Will is prepared in accordance with the rules of inheritance of the Muslim Faith, distribution in the event of Intestacy may differ to that of the Muslim Faith, Body embalmment (including no autopsy requests, funeral burial rites as well as parents guardianship wishes may not be followed .

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