

CULTURAL CONSIDERATIONS IN WILL-MAKING IN AUSTRALIA

A case study of Islamic or Sharia-compliant wills

JILL WILSON, LINDA ROSENMAN, BEN WHITE,
CHERYL TILSE and RACHEL FEENEY

There are major legal and cultural differences across countries in principles guiding intergenerational transmission of wealth, and individual differences in views on inheritance.¹ Australian succession law is based upon English common law, starting with the presumption of testamentary freedom, which allows a testator to dispose of their estate as they see fit. However, this freedom can be limited by family provision laws that allow 'eligible applicants' to contest distributions on the basis of insufficient provision in accordance with legislation of the particular State or Territory. Hence, the legal framework represents a balance between testamentary freedom and familial obligation. Internationally there are significant cultural and legal differences in the degree of will-makers' testamentary freedom.

Australia is an increasingly diverse and multicultural society. The 2011 Census found more than a quarter (26 per cent) of Australians were overseas-born, and an additional 20 per cent had at least one parent born overseas.² Many immigrants now do not come from countries with English common law systems, and have different legal and cultural traditions around will-making. For example, both patrilineal primogeniture and patrilineal ultimogeniture (involving inheritance by oldest and youngest sons respectively) have been favoured by Chinese,³ and Hindu Indians have traditionally regarded a daughter's marriage dowry as an 'advance legacy' with estates going to the eldest son.⁴ Among migrant communities, factors such as cultural background, English competence, religious identification, and time/generations since immigration likely impact on attitudes about will-making and inheritance.⁵ Children raised in Australia may be less accepting of parents' customary inheritance arrangements, creating different expectations and perhaps tensions within families.⁶

The extent to which people from different cultural and legal traditions face specific challenges when drafting wills in Australia is unclear and requires further investigation. This research was concerned with the influence of cultural and religious beliefs and laws on how individuals make decisions about asset distribution through wills. Islamic will-makers were selected as a case study to explore this issue, as Sharia-compliant wills are increasingly relevant in Australia given growth in Islamic communities,⁷ and the importance placed on will-making within Islam.⁸ There are differences between asset distribution in Sharia-compliant wills and cultural norms underpinning

Australian intestacy and succession legislation,⁹ and divergences in the degree of testamentary freedom. People from different cultural backgrounds (such as those from Islamic communities) must attempt to balance their cultural and religious values against the requirements of Australian law and the sociocultural norms of the dominant Western culture.¹⁰

Interest in Sharia-compliant wills in Australia was recently stimulated by the high-profile case *Omari and Omari v Omari* [2012] ACTSC 33. The ACT Supreme Court overturned the will of Mariem Omari, which had been drafted in accordance with Sharia law. The will was contested by the testator's daughter, Fatma Omari, who had been left half the share of her brothers. The will was ruled invalid on the basis that Mariem Omari, having advanced dementia, lacked capacity at the time of signing her will, *not* because her will followed Sharia distribution principles. Nevertheless, this case prompted a wider public discussion about issues raised by Sharia-compliant wills.¹¹

Sharia-compliant wills are those following inheritance rules set out in Sharia law. Sharia is the broad-ranging Islamic system of law based upon the Koran and hadiths, encompassing politics, economics and criminal proceedings, as well as personal and family matters (eg, marriage, divorce and inheritance). Sharia designates duties, recommended actions, and prohibitions for Muslims.¹² Sharia is extremely complex with variances between Shi'a and Sunni Muslims (and to a lesser extent various Sunni schools), as well as across countries and depending on local laws and customs.¹³ In Australia, people from Islamic communities are heterogeneous, representing 183 countries of origin and including both Sunni and Shi'a Muslims.¹⁴

While it is not within the scope of this article to provide an extensive description of Sharia-compliant wills (see, instead, Hussain & Ahad),¹⁵ a brief summary follows. Islamic law states the need for a will and stipulates who inherits based upon blood relationship and gender.¹⁶ Two-thirds of an estate is distributed according to Islamic laws of succession; testators are able to distribute the remaining third to an individual or charity not already given a share.¹⁷ Generally, closer relatives are favoured over more distant ones, and males typically receive a share twice that of their female counterparts.¹⁸ However, this is not always the case. For example, parents inherit equally where the deceased has surviving children, and more female than male relatives are eligible to inherit.¹⁹ While Islamic succession law favours sons, brothers, and husbands,

REFERENCES

1. Jacqueline Goodnow and Jeanette Lawrence, 'Inheritance Norms for Distributions of Money, Land and Things in Families' (2010) 1 *Family Science* 73.
2. Australian Bureau of Statistics, *Cultural Diversity in Australia – Reflecting a Nation: Stories from the 2011 Census, 2012–2013* (21 June 2012) <<http://www.abs.gov.au/ausstats/abs@nsf/Lookup/2071.0main+features902012-2013>>.
3. Jonathan Unger, 'Family Customs and Farmland Reallocations in Contemporary Chinese Villages' (2006) 1 *Social Transformations in Chinese Societies* 113.
4. Srimati Basu, *She Comes to Take Her Rights: Indian Women, Property, and Propriety* (Kali for Women, 2005).
5. Richard Radcliffe, 'What Will Be the Impact on Future Legacy Campaigns of Changing Demographic, Economic, Cultural and Religious Trends?' (2000) 5 *International Journal of Nonprofit and Voluntary Sector Marketing* 260.
6. Misa Izuwara, 'Care and Inheritance: Japanese and English Perspectives on the "Generational Contract"' (2002) 22 *Ageing and Society* 61.
7. *Ibid.* 2.
8. Omar T Mohammedi, 'Sharia-compliant Wills: An Overview' (2011) 25 *Probate and Property* 58.
9. Prue Vines, 'Cultural Conflict or Enriching Dialogue? Cross-Cultural Issues in Will-Drafting' (2002) 81 *Reform* 34.
10. *Ibid.*
11. See, eg, Caroline Overington, 'Daughter Disputes Muslim Will that Gave Brothers Twice as Much', *The Australian* (online), 14 March 2012 <<http://www.theaustralian.com.au/business/legal-affairs/daughter-disputes-muslim-will-that-gave-brothers-twice-as-much/story-e6frg97x-1226298689720>>; David Penberthy, '1400 Years of Tradition No Excuse for Sexism', *Perth Now* (online), 15 March 2012.
12. Corrina Standke, *Sharia: The Islamic Law* (GRIN Verlag, 2008).
13. Aryn B Sajoo, *A Companion to Muslim Cultures* (IB Tauris, 2011).

they are also obliged to protect, care for and look after their sisters and wives financially, and husbands must also pay a dowry.²⁰

Methods

This article derives from a four-year Australian Research Council-funded project examining the prevalence of will-making and dynamics of making, changing and contesting wills. The mixed methods research involved five inter-related studies:

- A national prevalence survey of will-making ($N = 2405$);²¹
- A review of all judicially resolved Australian succession law cases in 2011 ($N = 215$ claims from 196 estates);²²
- A document analysis of contested wills in Public Trustee offices ($N = 139$);
- A national online survey of will drafters ($N = 257$); and
- In-depth interviews with will-makers and non will-makers with complex families, complex assets and diverse cultural practices ($N = 68$).

This article reports on interviews conducted with members of Islamic communities who had given consideration to Sharia law in making or contemplating making a will. Interviews sought to gain information on the basis of bequests, allocation principles, and will-making processes. The sample included 16 self-identified members of Islamic communities in Sydney and Melbourne, including will-makers ($n = 11$) and non-will-makers ($n = 5$). Interview participants were both Sunni and Shi'a Muslims born in various countries (Cyprus, Somalia, Turkey, Australia, Eritrea, Lebanon, Sri Lanka, and Egypt) and most were overseas-born ($n = 15$). There were equal numbers of men and women aged 45 to 81 years.

Interviews were conducted using a semi-structured open-ended interview guide developed by the researchers. Questions were based on the literature and earlier research findings. The researchers engaged specialists at the Australian Multicultural Foundation for participant recruitment, interviewing, and transcription. Processes were undertaken in accordance with ethical clearance requirements of The University of Queensland and Victoria University. Face-to-face interviews were carried out by trained interviewers with an understanding of Islam and Islamic culture, traditions, and practices. Interviews were carried out in English. An interpreter was present to facilitate or clarify issues only (ie, not to undertake entire interviews). Participants were not asked specific questions about details of their will or assets, but rather principles underlying distribution. Interviews were digitally recorded with participant consent and content transcribed verbatim. They were 1 to 1.5 hours in duration. NVivo qualitative data analysis software was used for data management and coding. Qualitative thematic coding involved an iterative process whereby new themes were added, other themes and sub-themes were collapsed into broader higher order

themes, and coding consistency was reviewed by three researchers. Participants were assigned a code number and all data reported was de-identified. Digital recordings were erased once transcripts were typed and checked.

Results

Four major themes were identified regarding the influence of religious and cultural beliefs on will-making intentions and distribution principles: (1) views on inheritance and reasons for making and updating wills, (2) sources of advice, (3) asset distribution approaches and underlying principles, and (4) perceived 'fit' between participants' beliefs and Australian law and community values.

'It is wiser to make a will before your Lord takes you...'

All five non-will-makers intended to make a will and simply had not yet done so. Reasons for wanting to make a will included getting older, wishing to formalise asset distribution intentions, preventing family conflict, and experiencing health problems. One participant stated: 'if there is no will then your beneficiaries will have a hard time getting what's rightfully theirs' (Female 4). Common triggers for making and changing wills included marriage, having children and obtaining assets. This is typical of national prevalence survey respondents.²³ A small number of people stated that making a will is a religious requirement: 'it's a duty in Islam to actually have a will' (Male 15).

Great importance was placed on leaving an inheritance to the next generation, although meeting current and future health and care needs was also essential: 'I don't feel like I have to sort of have this big amount set aside for my children but I think spending responsibly and planning for the future is good' (Female 6). For some, providing for children was of greater importance than their own needs, because 'I live for my children, and I want to give them everything' (Female 10).

'I will go to a lawyer who also understands Sharia law...'

Many participants required specialist legal advice when thinking about or drafting their will. Such advice could prove difficult to obtain. Participants sought advice from the Koran, religious figures, the internet, and will templates designed to comply with Australian and Islamic law. One participant remarked: 'I would go by my Koran ... I will go to a lawyer to write my will but I will advise him what I want' (Female 8). Another sought advice from 'specialist people ... overseas, on how we can distribute our assets so that we're not doing anything against our Islamic principles' (Female 12). Some participants were vigilant about keeping their will compliant: 'we ask scholars around the world if certain things don't match or if someone raises an issue in my family ... we actually tweak it' (Female 12). Changes to charitable bequests were also discussed as triggering will revision: 'maybe if a new Islamic cause came into existence' (Female 10).

14. International Centre for Muslim and non-Muslim Understanding, 'Australian Muslims: A Demographic, Social and Economic Profile of Muslims in Australia' (Research Report, University of South Australia, 25 June 2015).

15. A Hussain, *The Islamic Law of Succession* (Darussalam, 2005).

16. Abdulmajeed Hassan Bello, 'Islamic Law of Inheritance: Ultimate Solution to Social Inequality against Women' (2015) 29 *Arab Law Quarterly* 261.

17. Abdul Ghafar Ismail, Bayu Taufiq Possumah and Mohd Najib Abdul Kadir, 'Inter-Generational Transfer under Islamic Perspective' (2014) 30 *Humanomics* 95.

18. Ebrahim Iqbal Lambat, *Australian and Islamic Laws of Inheritance – Part 1: Drafting a Will* (The Lambat Trust, 2005).

19. *Ibid* 16.

20. Mohamed Keshavjee, *Islam, Sharia and Alternative Dispute Resolution: Mechanisms for Legal Redress in the Muslim Community* (IB Tauris, 2013).

21. Cheryl Tilse, et al, 'Families and Generational Asset Transfers: Making and Challenging Wills in Contemporary Australia. Outcomes from a National Prevalence Survey of Will Making, Research Report to Industry Partners' (School of Social Work and Human Services, The University of Queensland, 2013).

22. Ben White et al, 'Estate Contestation in Australia: An Empirical Study of a Year of Case Law' (2015) 38(3) *UNSW Law Journal* 880.

23. Cheryl Tilse et al, 'Making and Changing Wills: Prevalence, Predictors, and Triggers', SAGE Open Feb 2016, 6 (1).

The legal framework represents a balance between testamentary freedom and familial obligation. Internationally there are significant cultural and legal differences in the degree of will-makers' testamentary freedom.

A small number who perceived a conflict between their cultural and religious beliefs and Australian law sought advice from lawyers and financial planners specialising in Sharia-compliant wills. A couple of testators had not sought any advice or information.

'I have distributed my assets based on what I believe is consistent with the teachings of Islam...'

Beneficiaries were primarily spouses and children. Unlike participants from other groups interviewed, those from Islamic communities usually made bequests to both their spouse and children directly, rather than relying on the surviving spouse to provide for children and including children only as alternative beneficiaries. Children often received the bulk of estates.

Most asset distribution either followed prescribed Islamic distribution guidelines (leading to unequal distribution to children based on gender) or reflected broader principles of 'fairness' seen as the underlying intent of Sharia-compliant wills. Use of prescribed Islamic distribution principles was slightly more common. As one participant stated: 'it's clearly explained in the Koran ... there are no two ways about it. This is the law of Allah. We have to follow it' (Male 11). However some participants distributed assets to reflect their personal views of fairness (eg, equal allocation regardless of gender, unequal distribution based on need). One participant described their approach: 'I have a slightly disabled young girl. Where would she be on the will list? ... I think in Islam, fairness is the fundamental core process of judgment. The judgment depends on the environment, the circumstances' (Male 5). In three instances religion reportedly had little or no impact on asset distribution: 'we follow the Australian way to make the will and didn't follow other culture [sic]' (Female 2).

For those who had children and followed prescribed Sharia law distribution, sons were to receive twice the shares of daughters. This was seen as reasonable because 'the male gets twice ... if this girl follows the religious way she would be married to someone who would have had that bigger share from his parents and ... would also be reliant upon him' (Male 15). Numerous participants felt that following prescribed Sharia law distribution helped them make and communicate will-making decisions. One commented that 'having a Sharia law system has made it easier for me to decide how I allocate my assets and will make it easier for my children to understand how and why my assets will be distributed' (Female 10). Others found it

restrictive: 'I have to do it according to the Sharia, even though I am not happy with that. I would like to give the boy 50% and the girl 50%' (Male 13).

Participants reported distribution to beneficiaries other than their spouse and children. Some included their parents as beneficiaries. Almost all respondents reported charitable bequests: 'you're allowed to give them up to one-third of your assets in your will to a charity' (Male 11). Some stated that charitable giving was obligatory: 'in the Sharia it says that you need to give money to charity so I have a religious mosque in my will' (Male 16).

A few participants stated that following their death all funeral expenses were to be paid first, followed by settlement of all debts: 'I owe my brother some money so in Islam it says that you have to give that back so if I don't pay that back when I am alive it will settle my debt after I am gone' (Male 16). One participant spoke of settling outstanding religious liabilities or obligations, stating: 'I would like to put in my will a certain amount of money to be paid on behalf of me for Al Salat (Prayer) and Fasting which I didn't do while I was alive' (Female 8). Funeral and burial rites were often important considerations: 'I did mention my burial of course ... under the Islamic culture, the Islamic ways' (Male 9).

Inter vivos transfers were commonly reported and based on need rather than equality. In common with non-Muslim respondents, few testators had accounted for such gifts when drafting their will: 'I didn't because in the Sharia these things don't matter' (Male 16). A small number of participants did consider prior inter vivos transfers when making allocation decisions. Issues of reciprocity arose, with some discussing expectations regarding care and support provided by children, saying: 'a son should receive a percentage more than the daughters. My son, when I get old will look after me' (Female 10).

'I am an Australian Muslim for far too long to remember...'

Many respondents discussed needing to accommodate both Australian law and religious and cultural values when making their will. A few perceived a conflict between their beliefs and those of the broader Australian community, noting that 'some people might think it is a little unfair that a son would be given more than daughters' (Female 10). A minority who allocated assets according to prescribed Islamic distribution guidelines had concerns about possible contestation by

their children. There was some discussion of potential issues with Australian-born children whose values may not exactly match their parents: 'if my kids they want to be nasty to each other and they go by the Australian law they can contest my will, why I gave my son more than the girls' (Female 8).

Other participants did not perceive any conflict with broader Australian values or laws, usually because they favoured equal distribution: 'I believe that all my children, boys and girl, are the same and so my beliefs match the laws here' (Female 2). Yet other respondents conveyed having limited knowledge of Australian and/or Islamic succession law: 'apart from local laws, I also plead ignorance with regards to Islamic obligations' (Male 7).

One participant highlighted that decisions about asset distribution are rarely made based on the law:

Writing a western will ... how much really is it influenced by law? Probably nil. When someone writes a will they don't say oh I got to give 'A' and not give 'B'... Every individual is different. Who is around you ... how do you feel? What do you believe in? ... Some people leave their assets to the dog foundation ... It has nothing to do with law, it's how they felt. It's personal ... (Male 9).

Conclusion

These interviews provide an example of will-making in a particular cultural group. Findings highlight diversity in inheritance beliefs and practices within Australian Islamic communities. This variation suggests factors aside from religious beliefs likely impact on inheritance decisions. There was no evidence that attitudes varied by country of origin, however the sample was too small to explore this issue. Interview participants were not representative of wider Islamic communities; the intention was to give insight into the range of experiences within these communities and how they might approach and manage potentially complex will-making decisions.

An overriding theme was participants' need to accommodate their religious and cultural values and local law. As Australian succession law gives testators freedom in deciding how to make testamentary distributions, it is possible to make a Sharia-compliant will within this context. Indeed, the starting point of Australian law is testamentary freedom. However, Australian law also allows for family provision claims, and allocations departing from cultural norms or wider notions of fairness may potentially be challenged. Sharia-compliant wills may be at risk of contestation by wives and daughters with a high likelihood of successful claims. Contestation risk may be higher where values of Australian-born children regarding inheritance and family support do not match those of their parents. Sharia-compliant wills illustrate the conflict between testamentary freedom and perceptions of fairness, potentially leading to family provision claims.

There are implications of this research for legal policy and practice in Australia regarding wills based on non-Western traditions or values. First, this research reinforces the importance of making a will for those

in Islamic communities, given the mismatch between religious inheritance laws and intestacy legislation. Second, there should be greater awareness amongst testators and will-drafters of how allocation according to Sharia law may be viewed in the setting of a family provision claim. It may be possible to make provisions outside the purview of a Sharia-compliant will (eg, trusts, life interest, etc) to increase provision for wives or daughters, thus moderating perceptions of unfair distributions. Further, fixed shares to relatives distributed according to Islamic succession laws may be increased using assets from the remaining third of estates with permission of other beneficiaries. This could be a further avenue for increasing distribution to female relatives.

Lawyers who are undertaking estate planning (even if not specialising in it) need to ensure they can properly advise Muslims on how to make a Sharia-compliant will. Where client intentions present a contestation risk, it is vital lawyers understand various strategies to minimise these risks (eg, changes to distribution within or outside of the will, family discussion or additional advice). Provision of accessible and affordable specialised legal advice that is culturally appropriate for different groups is also imperative to avoid potential family discord and will challenges.

JILL WILSON, CHERYL TILSE and RACHEL FEENEY are all from the School of Nursing, Midwifery and Social Work, The University of Queensland. **LINDA ROSENMAN** is from the School of Nursing, Midwifery and Social Work, The University of Queensland and Victoria University, Melbourne. **BEN WHITE** is from the Australian Centre for Health Law Research, Faculty of Law at the Queensland University of Technology.

© 2016 Jill Wilson, Linda Rosenman, Ben White, Cheryl Tilse and Rachel Feeney

This research was supported under the Australian Research Council's Linkage Projects Funding scheme (project number: LPI 10200891) and contributions from our Industry Partners the Public Trustees of Queensland, Tasmania, South Australia, Western Australia and the Australia Capital Territory, State Trustees of Victoria and New South Wales Trustee and Guardian. The authors would like to thank staff at the Australian Multicultural Foundation for their assistance with recruiting participants, conducting and transcribing interviews.