Sharia succession rules

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Professional conduct

The following section of the SRA Code is relevant to this issue:

- chapter 1 on client care
- chapter 2 on equality and diversity

SRA Principles

There are ten mandatory principles which apply to all those the SRA regulates and to all aspects of practice. The principles can be found in the SRA Handbook.

The principles apply to solicitors or managers of authorised bodies who are practising from an office outside the UK. They also apply if you are a lawyer-controlled body practising from an office outside the UK.

1 Introduction

1.1 Who should read this practice note?

Solicitors dealing with clients where Sharia (Muslim) succession rules may be relevant.

1.2 What are the issues?

This practice note is intended to assist solicitors who have been instructed to prepare a valid will, which follows Sharia succession rules.

Solicitors who are dealing with clients where Sharia rules may be applicable should be aware of the following:

- determining when Sharia rules may apply
- the basics of Sharia succession rules
- Sharia compliant will drafting
- Sharia trust issues
- disputes over Sharia estates

There are specific differences between Sunni and Shia rules on succession. These differences are not covered in this practice note (see paragraph 2.4 and paragraph 5 for further information).

2 Ascertaining when Sharia rules may apply

The application of Sharia succession rules will not prevent inheritance tax applying to the estate in the usual way. There may be additional inheritance tax to pay, as explained in paragraph 3.7.

2.1 The English concept of domicile

The concept of 'domicile' determines which laws apply to the client's estate.

In English law, a child commences life with a domicile of origin, which is the jurisdiction of the father's domicile at the time of the birth (or the mother's if the parents weren't married). This domicile of origin may, until the child's 16th birthday, be changed to a domicile of dependency if the relevant parent changes domicile.

After your client's 16th birthday, they will only be able to change domicile to a domicile of choice by taking up residence in another jurisdiction and intending to make that jurisdiction their permanent or indefinite home. Unless a new domicile of choice is obtained, the client will retain their domicile of origin. If a client abandons a domicile of choice without taking up a new one, the domicile of origin will revive.

The 'adhesive' nature of a domicile of origin was demonstrated clearly in the recent cases of Holliday v Musa [2010] EWCA Civ 335 and Agulian v Cyganik [2006] EWCA Civ 129. The court held that living for decades in England was not enough, by itself, to show the acquisition of an English domicile. In each case, because the deceased had not severed his links with his country of origin, he had not lost his domicile of origin.

This means you should not assume that clients are English domiciled, just because they have lived here for many years. You should establish whether the client has abandoned his/her domicile of origin in favour of an English domicile of choice.

Some clients may be 'deemed domiciled' for UK inheritance tax purposes, under Section 267 of the Inheritance Tax Act 1984, either by being resident for 17 out of 20 tax years or by being UK domiciled within the last three years. This deemed domicile does not, however, affect which laws apply to the client's succession.

2.2 English conflict of law rules

Conflict-of-law rules apply whenever more than one law could apply to the same succession. These rules are particularly complex, not least because each country may have different conflict-of-law rules.

In England and Wales, a distinction is made between immoveable assets (land and buildings) and moveable assets (such as cash, shares and chattels).

The laws of the location of the asset (lex situs) govern the validity of dispositions of immoveable assets. The laws of the jurisdiction in which the testator was domiciled at the date of death (lex domicilii) govern the disposition of moveable assets, even if those assets are physically situated in England & Wales.

This means the English court will recognise the forced heirship requirements of a Sharia country if those apply to the moveable assets due to the deceased's domicile.

Where the client has assets outside England and Wales, local advice should be obtained to ascertain which laws will apply to those assets: whether the lex situs or the lex domicilii will apply.

2.3 Restricting the scope of the English will

Since the laws of the testator's domicile will apply to the deceased's English moveable assets, a client domiciled ir a jurisdiction where Sharia rules apply may wish to have the English law will limited to the immoveable assets situated in England and Wales. If the English law will purports to govern the English moveable assets, or any assets outside this jurisdiction, it may not be valid in respect of those assets if the testator is not English domiciled

You should include a governing law clause in the will, to remove any argument as to which law was meant to appl You may presume the choice of English law as the governing law, when drafting a will for an English domiciled client, with all their assets in England and Wales. Where the client is not originally from England or where the English will is intended to cover non-UK assets, a governing law clause may be vital.

2.4 Certificates of succession

Where Sharia rules apply, the heirs may be able to obtain a certificate of succession from the court in the jurisdiction where the deceased was domiciled. The heirs may wish to confirm the disposition of the estate under the applicable foreign law, particularly where the English law will conflicts with Sharia rules.

This is usually achieved by applying to the court in the Sharia jurisdiction for a succession order or a certificate of succession, confirming:

- that the deceased was still domiciled in that jurisdiction, not in England, at the date of his death
- that Sharia rules apply whenever the law of domicile is relevant, and
- the correct Sharia heirs and their respective entitlements.

As noted above, Sharia rules are not identical in every Muslim country. There are differences between Sunni and Shia rules, and different interpretations of Sunni law. The certificate of succession will clarify exactly which rules apply to the deceased's estate.

You should get a translation of any foreign certificate of succession, usually certified by an English-speaking notar or lawyer who is qualified in the foreign jurisdiction. The English probate courts will require such a translation if the have to apply any foreign succession rules to English moveable assets.

2.5 Religious choice

Some clients are domiciled for succession purposes in England and Wales, but still wish to pass their assets in accordance with Sharia rules for religious reasons. Such clients may prefer a Sharia compliant will, notwithstandin the freedom of disposition provided by English law.

Provided the will is signed in accordance with the requirements set out in the Wills Act 1837, there is nothing to prevent an English domiciled person choosing to dispose of their assets in accordance with Sharia succession rules (subject to any potential claim under the Inheritance (Provision for Family and Dependants) Act 1975, which only applies where the deceased died domiciled in England and Wales). You will have to obtain probate on the Sharia-compliant will, in the normal way.

3 Drafting a Sharia compliant will

In order to prepare a Sharia compliant will, you need to understand how the estate is applied under Sharia succession rules.

- First, the cost of the burial and any debts are paid.
- Secondly, a third of the estate may be given to charities or individuals who are not obligatory heirs.
- Finally, the remainder is given to a defined set of 'primary' and then 'residual' heirs.

3.1 Payment of burial expenses and debts

The estate pays the expenses of enshrouding and burial of the deceased, and then must fulfil any monetary or religious debts the deceased may have had.

Once the debts have been paid in full, the testator can distribute the balance of his estate.

3.2 The 'freely disposable third'

Up to one third of the remaining wealth may be allocated on fulfilling the legacies of the deceased. This is known as the 'freely disposable third', which can be distributed to charity or to individuals who are not heirs under the Sharia rules of succession.

Certain rules apply to this 'freely disposable third'.

First, a valid will is required if the testator wishes to make gifts to non-heirs: without this, the whole estate will be distributed according to the Sharia rules of succession. However, the testator is under no obligation to do this, and may if they wish leave their entire estate to the Sharia heirs.

Secondly, the testator cannot make bequests as part of the freely disposable third to people who will already receive a bequest as an obligatory Sharia heir. In other words, they cannot try to favour one heir by using the freel

disposable third to give them more than the amount they are entitled to under Sharia rules. However, this principle can be overridden if all the other Sharia heirs give their consent.

Finally, any bequest to non-heirs will only be valid up to a maximum of one third of the estate. If a gift exceeds one third of the estate's value, perhaps because of changes in asset values, the maximum one third will be given and the rest will fall into the residue to be distributed to the Sharia heirs. It is possible to give more than one third to non-heirs but only with the consent of the Sharia heirs or if one of the default provisions mentioned below in paragraph 3.3.2 and paragraph 3.4 applies.

3.3 The balance of the estate

The remainder of the estate (a minimum of two thirds) is divided between the Sharia heirs. As with many civil law jurisdictions, Sharia rules have a system of pre-determined heirship.

Each heir receives a predetermined proportion of the entitlement, depending on the number and nature of the heir who survive. This means it is not possible to say in advance who will inherit: it is only at the date of death that the division can be calculated.

There are two main types of Sharia heir. First, a portion of the estate will be distributed amongst the obligatory or primary heirs: those individuals whose share has been prescribed in the Sharia. Secondly, the remainder will be distributed between the residuary beneficiaries

3.3.1 Primary heirs

There are 12 primary heirs in total - four males and eight females.

The male heirs are:

1. father
2. grandfather (father's father and mother's father)
3. uterine brother (half brother on mother's side), and
4. husband.

The female heirs are:

1. wife
2. daughter
3. granddaughter
4. full sister
5. consanguine sister (half sister on father's side)
6. uterine sister (half sister on mother's side)
7. mother, and
8. grandmother (father's mother and mother's mother).

Sharia rules define exactly how much of the remaining estate each primary heir receives, depending primarily on the total number of heirs. They will not, however, receive the entire estate between them, as a portion will be reserved to the residuary beneficiaries.

3.3.2 Residuary heirs

At first glance, the list of primary heirs may seem incomplete, particularly as it does not include sons or full brothers. That is because sons and full brothers are residuary beneficiaries, who receive their entitlement after the primary heirs. There are different types of residuary beneficiaries, but the most common are those related by birth to the deceased, being male relatives whose link to the deceased is not solely via a female. As well as fathers and sons, this will include full brothers of the deceased.

If there are no residuary heirs, then the entire estate is divided between the primary heirs pro rata to their original entitlements. If there are no primary heirs and no residuary heirs, the estate goes to more distant relations: blood relatives of the deceased who are neither primary heirs nor residuary heirs.

3.4 Testators without heirs

If the testator has absolutely no family, so there are no primary or residuary heirs and no distant relatives, then it is possible to create heirs. This can be done in two ways. First, the individual can name a successor by contract to receive the inheritance. Second, it is also possible for the individual to ratify kinship with another person.

In the absence of anyone in the above categories who is able to inherit, the estate is divided between those heirs who received the freely disposable third. This is the only scenario where non-heirs can receive more than one thir of the estate without the consent of the other heirs.

3.5 Claims by 'deprived' heirs

Sharia heirs cannot be deprived of their entitlement to inherit. Any attempt to pass assets that are 'due' to a Sharia heir to someone else is invalid under Sharia rules. An heir who is deprived of their full entitlement has a claim against the estate or the person who has the assets. Lifetime gifts (other than on death bed or during a terminal illness) are an exception to this rule (see paragraph 5).

Under Sharia rules, there is no statute of limitations for this claim: it continues in perpetuity and can even be inherited. If a claim is still outstanding at the time the deprived heir dies, his or her own heirs can then make the claim. To date the enforceability of such a claim has not been tested by the English courts.

3.6 Drafting techniques and amending precedent clauses

The main difficulty with preparing a Sharia compliant will is the inability to state in advance who the Sharia heirs wi be. As noted above, the identity of the heirs and their respective entitlements can only be determined at the date o death.

Simply stating that the assets (or at least two thirds) are to pass 'according to the Sharia rules of succession' migh be too uncertain for an English court to uphold, although this has not yet been tested.

One option, frequently adopted in Canada and other common law countries, is to attach a detailed appendix to the will setting out potential Sharia inheritance scenarios. However, there is a risk of missing a crucial scenario and no covering all the potential outcomes.

The testator may put the assets into a discretionary trust, to be distributed in accordance with a letter of wishes. That letter would state the desire that the estate pass to the Sharia heirs in the correct proportions, directing the executors to obtain expert advice as needed (see paragraph 3.3 for possible precedent clauses). However, the ta consequences of setting up a fully discretionary trust should be considered.

Certain principles of Sharia are different to English succession laws. For example, it is not possible to inherit unde Sharia rules via a deceased relative. No distinction is made between children of different marriages, but illegitimat and adopted children are not Sharia heirs.

The male heirs in most cases receive double the amount inherited by a female heir of the same class. Non-Muslims may not inherit at all, and only Muslim marriages are recognised. Similarly, a divorced spouse is no longe a Sharia heir, as the entitlement depends on a valid Muslim marriage existing at the date of death.

This means you should amend or delete some standard will clauses. For example, you should consider excluding the provisions of s33 of the Wills Act 1837 because these operate to pass a gift to the children of a deceased 'descendent'. Under Sharia rules, the children of a deceased heir have no entitlement, although they can benefit from the freely disposable third.

Similarly, you should amend clauses which define the term 'children' or 'issue' to exclude those who are illegitimat or adopted. The burial clause should also specify whether the deceased wishes to be buried in accordance with Sharia rules.

Muslim clients often wish to have an expression of faith at the start of their will. They may be able to supply suitabl wording (possibly with the assistance of the local mosque).

3.7 Problems with standard estate tax planning

Sharia succession rules can affect standard estate planning. For example, if there are other heirs, it will not be possible to give all the assets to a surviving spouse, whether outright or on an immediate post-death interest trust. This will have an impact on the amount of spouse exemption that can be claimed.

Similarly, you will need to determine whether a 'nil rate band' legacy or trust is covered by the freely disposable third. If the nil rate band is greater than one third of the estate, it may not be possible to give the full tax-exempt amount away without the consent of the Sharia heirs.

Spouses in English estate planning commonly own assets jointly, either as beneficial joint tenants or tenants in common. However, Sharia rules work on the basis that spouses own assets independently of each other, so that the correct inheritance can be calculated on each spouse's death. This is because the husband's heirs may not be

the same people as the wife's heirs, so co-ownership of assets can cause problems for Muslim clients. There migh be conflicting claims between the surviving co-owner and the heirs of the deceased spouse.

Holding joint assets as tenants in common, rather than as joint tenants, may help reduce these conflicts as each spouse's heirs, rather than the surviving spouse, would then inherit.

It is possible to prepare a more tax-efficient will provided all the Sharia heirs agree. However, the difficulty will be i knowing which heirs will need to give their consent, given it is impossible to determine prior to the testator's death who will inherit. It may therefore be easier to vary the Sharia provisions post-death to maximise the availability of tax relief.

3.8 Deeds of family arrangement/deeds of variation

You may prepare a deed of family arrangement or deed of variation to vary the Sharia succession rules within two years of the testator's death. This might be useful to maximise use of the nil rate band and spouse exemption, where the strict application of Sharia succession rules would otherwise limit those exemptions and create a significant inheritance tax liability.

As usual, such a deed could only be effected without a court order where all the beneficiaries agree, are adult and are of sound mind. To date, no applications to court have been reported to vary a Sharia estate involving minor children or other beneficiaries who do not have the capacity to agree to a deed of variation.

4 Lifetime gifts and trusts

There are generally no limits on what a Muslim client can give away during his or her lifetime; however, you shoulc ascertain whether your client wishes the trust to be Sharia compliant.

4.1 Gifts on death bed or in terminal illness

The only restrictions on lifetime giving are when the individual is suffering a terminal illness or is on his or her deathbed. In this case, the individual is treated as having effectively died already, so the Sharia succession rules apply. Any attempt to undermine an heir's entitlement in these circumstances will lead to a claim by the deprived heir in paragraph 3.5.

4.2 Other lifetime gifts

In all other cases, however, the Muslim client can freely make lifetime gifts, of any amount and to any person. There are however certain religious limitations. A Muslim cannot make gifts that conflict with the rules of the Shari for example, a Muslim could not make a donation to a gambling establishment or to set up a pub, as both concern strictly-prohibited activities.

While it is generally suggested that it is not possible for a Muslim to inherit from a non-Muslim, there is no prohibition on a Muslim receiving a lifetime gift from a non-Muslim. Where solicitors are acting for clients whose relative has converted to Islam, it may be necessary to remove any provision for the Muslim relative in the will but to make a lifetime gift instead of that inheritance.

Some Muslim clients may wish to make lifetime gifts to daughters as a dowry upon marriage. In many cultures, thi dowry is an advance on the daughter's inheritance and the daughter is expected to renounce any entitlement to he parents' estates. However, under Sharia rules, it may not be possible to force the daughter to relinquish her right t inherit. As noted in paragraph 3.5, any Sharia heir who does not receive their full Sharia entitlement will have a claim without time limit under Sharia rules.

4.3 Lifetime trusts

This freedom of lifetime giving means that there is nothing preventing a Muslim client setting up a lifetime or inter vivos trust, unless the settlor is on his or her deathbed, or has a terminal illness.

However you should ascertain whether the lifetime trust is intended to be sharia compliant.

Drafting a Sharia-compliant trust deed should be relatively straightforward. The trust can be a simple discretionary trust, in favour of a wide class of potential beneficiaries, with a letter of wishes requesting that all distributions and

all trust investments be Sharia compliant. If the trustees have no personal knowledge of Sharia rules, they could obtain guidance from an appropriate protector or even a committee of Sharia experts.

Suitable trust clauses might be:

> *'Sharia Advisory Committee' means the committee of Sharia Experts who have been appointed by the Settlor or, if the Settlor has made no such appointment, by the Protector to give guidance to the Trustees on matters relating to Sharia law.*
>
> *'Sharia Expert' means any individual nominated in writing by the Settlor or, if he has made no such nomination, by the Protector as having expertise on the subject of Sharia laws and in particular Sharia laws of succession.*

The trustees might wish to include suitable indemnity provisions, for example to confirm that they are entitled to rely on the guidance of the Sharia Expert(s) without enquiry. You may need to alter the trust investment clauses to permit investment into assets that are Sharia compliant but might not produce any return of income.

The trust may also specify that on the settlor's death, the assets must be distributed in accordance with Sharia succession rules. One mechanism would be to obtain and refer to a certificate of succession, obtained from the relevant Sharia court.

For example, the trust deed could state:

After the Settlor's death, the Protector shall obtain a copy of a Sharia certificate of succession and shall, within 14 days of receipt of that certificate, deliver a copy to the Trustees together with a translation into English and a statement confirming:

i) That the certificate is valid
ii) The names of the Faraid (Sharia) heirs, and
iii) The respective entitlement of the heirs to the net trust assets.

There may however also be times when a Muslim client is attempting to use a lifetime trust to pass assets to non-heirs, or to favour some heirs over others.

Distributing the trust's assets when the settlor is alive is arguably no different to an outright gift, which is permissible (save the deathbed/terminal illness rule). However, where the distributions take place on the settlor's death, there may be disputes with the Sharia heirs.

The dispute may concern which jurisdiction the trust has been set up in and where the assets are located. Many offshore trust jurisdictions have 'anti-forced heirship' (AFH) rules to protect trusts against succession claims. Usually the local law governs the validity of the trust and the capacity of the settlor to create the trust. The courts o the AFH jurisdiction may be able to ignore any succession laws that might apply on the settlor's death, such as Sharia.

Even if these AFH rules apply, the trust assets may not all be held in the AFH jurisdiction. Claims could potentially be brought against assets in jurisdictions that do not have AFH rules (such as England) or against the beneficiarie who have received the trust assets. As mentioned in paragraph 3.5, under Sharia rules, a deprived heir's claim lasts in perpetuity and can even pass to his or her own heirs (although this has yet to be tested in the English courts).

5 Further information

5.1 Practice Advice Service

The Law Society provides support for solicitors on a wide range of areas of practice. Practice Advice can be contacted on 020 7320 5675 from 09:00 to 17:00 on weekdays or email practiceadvice@lawsociety.org.uk.

5.2 Sharia scholars

Local Sharia scholars are a useful source of information and may be contactable via the client's mosque.

5.3 Websites

There are various websites, including islamchannel.tv, inheritance.ilmsummit.org and lubnaa.com, that provide an Islamic inheritance calculator, to determine the percentage entitlements of the surviving heirs. These require detail of the heirs who have survived the deceased, in order to calculate the sharia fixed and residuary shares of the estate.

Please note: The Law Society cannot guarantee the accuracy of the entitlement calculator and it should not be substituted for expert legal advice.

5.4 Textbooks

Islamic Wills, Trusts and Estates: Planning for this World and the Next by Mufti Talha Ahmad Azami, Shahzad Siddiqui and Jo Summers, published by Euromoney Institutional Investor PLC.

Inheritance - Regulations & Exhortations (2nd edition) by Muhammad Al Jibaly, published by Al-Hidaayah Publishing & Distribution Ltd.

The Islamic Law of Succession by Dr Abid Hussain, published by Darussalam.

6 Terminology

Must - A specific requirement in legislation or of a principle, rule, outcome or other mandatory provision in the SRA Handbook. You must comply, unless there are specific exemptions or defences provided for in relevant legislation or the SRA Handbook.

Should

- Outside of a regulatory context, good practice for most situations in the Law Society's view.
- In the case of the SRA Handbook, an indicative behaviour or other non-mandatory provision (such as may be set out in notes or guidance).

These may not be the only means of complying with legislative or regulatory requirements and there may be situations where the suggested route is not the best possible route to meet the needs of your client. However, if you do not follow the suggested route, you should be able to justify to oversight bodies why the alternative approach you have taken is appropriate, either for your practice, or in the particular retainer.

May - A non-exhaustive list of options for meeting your obligations or running your practice. Which option you choose is determined by the profile of the individual practice, client or retainer. You may be required to justify why this was an appropriate option to oversight bodies.

Sharia - the code of law derived from the Quran and from the teachings and example of Mohammed. The term Sharia is used in this practice note. Solicitors may also see the terms Shari'a, shariah, shari'ah and sharia. There are many variations on the term, due to the translation from Arabic script.