

# Lesson 14

## Some special cases

- **Disappearance**
- **Accidents**
- **Dual relationships**
- **Illegitimate child**
- **Unborn child**
- **Hermaphrodite**

## Waseeyat or Will

# Islamic Laws of Inheritance

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# Disappearance

A person has disappeared and his whereabouts are not known is considered alive till he is declared dead by a court or confirmed death

# Disappearance

- When to pronounce a person dead : There is difference of opinion.
- Some feel it is 4 years for some occasions like war, calamities, etc.
- Others feel it should be till the life expectancy of an equal aged person in the locality. It is regarded as 70 by some (Maliki) and 90 by others (Hanafi)
- It is left to the Islamic court to decide as to when to pronounce a person dead (Shafi and Hanbali)
- All the above is only for inheritance. If a husband disappears then the waiting period is short. E.g. 4 years or 7 years

# Disappearance

There can be 2 situations.

1. Property of the disappeared person
2. He becomes a heir after some of his relatives death

# Disappearance

- So his property is not be inherited, Set aside
- He is considered alive till the confirmation of death or declared dead by court
- If any relative dies before this confirmation, the relative does not inherit.
- His property is not divided.

# Disappearance

- If confirmed death or declared death by court property is to be divided.
- Inheritance starts from the date death or date of court decree.
- Only the heirs who are alive at the time of death or court decree are eligible.
- If a person declared dead by court returns then he is eligible for his estate which has gone to his heirs
- If he is a heir his share is kept separate.

# Disappearance

Person has disappeared

1. His property is kept aside till he returns or declared dead or confirmed death.
2. If he is heir - his share is kept separate and for others minimum share is given.

# Disappearance

If he is a heir. There are 2 possibilities:

1. He excludes all others - property is kept separate. E.g. S, Bf, Sf - S disappeared
2. Inherits with others. His share is kept separate. Others share is calculated as if he is alive, and dead and whichever is lowest for others that is given. E.g. M, W, Bf, Bc - Bf disappeared.

M =  $1/6$  given (2 brothers), W =  $1/4$  given, Bf = balance (is kept separate), Bc = nil.

If Bf is pronounced dead then M will get extra  $1/6$  and the balance goes to Bc.



# Disappearance

Once the share is kept separate 3 things can happen

1. He returns alive- his share is given to him
2. He is declared dead -If it is confirmed that disappeared person was alive at the time of death of the propositus his share is given to his heirs.
3. If it is confirmed that he was dead before the death of the propositus then his share kept aside is given to the heirs of the deceased person and the heirs of missing person do not inherit

# Disappearance

For other heirs calculations are made as if the disappeared person is dead and alive both. Whichever is lowest share that is given.

E.g.; H, 2Sf, Bf – Bf disappeared.

1. Bf as alive:  $H = 1/2$ ,  $2Sf+Bf = bal = 1/2$ ,  $Bf = 2/8$ ,  $2Sf = 2/8$

2. Bf dead:  $H = 1/2$ ,  $2Sf = 2/3$ ,  $H = 3/6$ ,  $2Sf = 4/6$ , Awl  $H = 3/7$ ,  $2Sf = 4/7$

H share is lowest when Bf is dead, Sf is lowest when Bf is alive, Both these lowest shares are given to them

$H = 3/7$ ,  $2Sf = 2/8$ ,  $Bal = 18/56$  is kept separate.

If Bf is confirmed dead then  $18/56$  goes to Sf

If Bf returns then  $4/56$  to H and balance  $14/56$  to Bf

# Disappearance

<p><b>W, M, Bf,SS</b> <b>(SS disappeared)</b></p>	<p>W = <math>1/8</math>, M = <math>1/6</math>, Bf = nil, SS = bal = <math>17/24</math> Kept aside. If pronounced dead out of <math>17/24</math>, <math>3/24</math> to wife, <math>4/24</math> to M, Bf gets <math>10/24</math></p>
<p><b>D, W, F, M, S</b> <b>(S disappeared)</b></p>	<p>W = <math>1/8</math>, F = <math>1/6</math>, M = <math>1/6</math>, S&amp;D = bal = <math>13/24</math>, D = <math>13/72</math>, S = <math>26/72</math> kept aside. If S pronounced dead, out of <math>26/72</math>, <math>23/72</math> to D and <math>3/72</math> to F</p>

More than 1 death

- If the sequence of death as to who died is not known, then people who died do not inherit each other.
- If a person's death is known to be preceded by another then second person is considered as heir to the first person

Eg.: H & W1 die together leaving W2, one son from each.

W1 property will go to S1

H's property will go to S1, S2, and W2

# Dual relationship

- A heir may be related to the deceased through more than one relationship. In such a case he may act as a fixed heir as well as balance heir.
- In such cases he will inherit as both fixed heir and balance heir separately calculated.
- This happens if there is consanguinity in the family

# Dual relationship

Example.

Wife dies leaving heirs H, D, and Husband as the Paternal Uncle's Son. Here the lady has married her cousin Paternal uncles son. He is her Husband as well as Puf S

So the calculation becomes

$$H = 1/4$$

$$D = 1/2$$

Balance =  $1/4$ . Here Husband is the PufS takes the balance

$$H = 1/4 + 1/4 = 1/2$$

# Dual relationship

- This can happen if there is consanguineous marriages in the family.
- In such occasions an heir may inherit in dual capacity.

# Illegitimate child

- A **child born out of marriage** wedlock is an illegitimate child.
- Similarly if a man brings an **allegation of adultery on his wife** and they are separated by Liyan then the child born out of their relationship is also included as an illegitimate child.



# Illegitimate child

- An illegitimate child **does not inherit from Father** and the father does not inherit from the child even if the identity of father is known.
- The **child inherits from Mother** and vice versa.

# Illegitimate child

- Children of an illegitimate person will inherit from him/her as per the normal rules of inheritance
- But he/she will not have agnatic ascendants or agnatic collaterals.
- Only heirs inheriting from him/her are Mother, Brother/Sister Uterine, True grand mother as sharers.
- This is accepted by all schools of thought Shafei, Hanafi, Maliki, Hanbali.

# Illegitimate child

If there are no agnatic descendants then there arises a problem in distribution of balance share.

**Hanafi** - Sharers act as balance heirs by way of Radd

**Hanbali** - If Mother is alive she acts as balance heir. A person who is born after Liyan will be inherited by his mother and if mother is not there her balance share goes to his relatives. This was the saying of the prophet (SAS) as quoted by Amr Bin Shu'ib.

**Maliki** - Balance goes to Baithul Maal. This is the opinion of Zaid bin Thabit (R.A)

**Shafei** - Balance goes to Baithul Maal but if Baithul Maal is not functioning then Radd is allowed.

There may be **different situations**

1. Born dead – No inheritance
2. One male
3. One female
4. Two males
5. Two females
6. One male + one female

**General Rule** : Share of the child and other heirs is calculated as both for male /female child. Whatever is the maximum share for the child, it is kept separate. For others minimum share is given.

# Unborn child - Conditions

1. Should **be born alive**
  - o Hadeeth : If the child cries he /she becomes a heir (Abu huraira)
  - o If the child is born dead or dies during delivery it does not inherit.
2. The **child should be in mother's womb** i.e.; mother should have conceived.

# Unborn child

**If every heir agrees** then it is better if the property is  
**kept aside** till the child is born.

- 1. No share at all:** W, 2Sf, M, father's pregnant wife.

If child is male he is Bc = bal = nil , no balance. If female Sc = nil excluded by Sf

- 2. No change if male/ female.**

If the child becomes Bu/Su, if M is pregnant with second marriage.

- 3. Child either inherits or not.** H, M, 2Su, pregnant wife of father. If male child , Bc = bal = nil, no balance left. If female, Sc = 1/2 share by Awl it becomes 3/9. Kept aside

**4. Inherits but share differs.** pregnant wife and F.

If child is male  $S = \text{bal} = 17/24$ ,

if female daughter =  $1/2 = 12/24$ .  $17/24$  kept.

**5. Inherits all:** father's pregnant wife.

If child is male =  $Bc = \text{bal} = \text{whole property}$ ,

if female  $Sc = 1/2 + \text{Radd} = \text{whole balance}$ .



# Hermaphrodite

Hermaphrodite is a person **whose sex is doubtful.**

They may be:

- 1. Male predominant**
- 2. Female predominant**
- 3. Ambiguous (doubtful) sex.** Who may grow into either male or female or uncertain sex at puberty.

First type is considered as male, second as female, the third type opinions differ.

# Hermaphrodite

Property division - opinion differs.

**Abu Hanifa**: in whichever sex the share is **lowest** that is given.

H, M, Su, Consang bisexual.

If as female

$$H = 1/2 = 3/8$$

$$M = 1/6 = 1/8$$

$$Su = 1/6 = 1/8$$

$$Sc = 1/2 = 3/8$$

If as male

$$= 1/2$$

$$= 1/6$$

$$= 1/6$$

$$Bc = 1/6$$

Since Bc share is less than Sc , 1/6 is given(lower share)

If bisexual has the possibility of transformation into male or female, one among the different ways is chosen.

1. Division is kept pending till sex is evident.
2. Share is calculated both as male and female and in whichever sex share is lowest that is given. Most of the companions of the prophet(sas) are of this opinion. Hanaf
3. Give the least share and the other share considering the maximum share is kept aside till the sex is evident. Shafei , Hanbali
4. Calculate as both male and female and take the mean and that is kept aside.-  
Maliki
5. Everyone is given the lowest share the rest is kept aside till the sex is known.

# Waseeyat or Will

There are different opinions about the Will or Waseeyat in Islam.

180. It is prescribed, when death approaches any of you, if he leave any goods that he make a bequest to parents and next of kin, according to reasonable usage; this is due from the Muttaqeen (God fearing).

181. If anyone changes the bequest after hearing it, the guilt shall be on those who make the change. For Allah hears and knows (All things).

182. But if anyone fears partiality or wrongdoing on the part of the testator, and makes peace between (The parties concerned), there is no wrong in him: For Allah is Oft-forgiving, Most Merciful.

كُتِبَ عَلَيْكُمْ إِذَا حَضَرَ أَحَدَكُمُ الْمَوْتُ إِنْ تَرَكَ خَيْرًا  
الْوَصِيَّةَ لِلْوَالِدَيْنِ وَالْأَقْرَبِينَ بِالْمَعْرُوفِ حَقًّا عَلَى  
الْمُتَّقِينَ ﴿180﴾ فَمَنْ بَدَّلَهُ بَعْدَمَا سَمِعَهُ فَإِنَّمَا إِثْمُهُ  
عَلَى الَّذِينَ يُبَدِّلُونَهُ إِنَّ اللَّهَ سَمِيعٌ عَلِيمٌ ﴿181﴾  
فَمَنْ خَافَ مِنْ مُوصٍ جَنَفًا أَوْ إِثْمًا فَأَصْلَحَ بَيْنَهُمْ  
فَلَا إِثْمَ عَلَيْهِ إِنَّ اللَّهَ غَفُورٌ رَحِيمٌ ﴿182﴾

## Waseeyat – Quranic verses

106. O ye who believe! When death approaches any of you, (take) witnesses among yourselves when making bequests,- two just men of your own (brotherhood) or others from outside if ye are journeying through the earth, and the chance of death befalls you (thus). If ye doubt (their truth), detain them both after prayer, and let them both swear by Allah. "We wish not in this for any worldly gain, even though the (beneficiary) be our near relation: we shall hide not the evidence before Allah. if we do, then behold! the sin be upon us!"

يَا أَيُّهَا الَّذِينَ آمَنُوا شَهَادَةُ بَيْنِكُمْ إِذَا حَضَرَ أَحَدَكُمُ  
الْمَوْتُ حِينَ الْوَصِيَّةِ اثْنَانِ ذَوَا عَدْلٍ مِنْكُمْ أَوْ آخَرَانِ  
مِنْ غَيْرِكُمْ إِنْ أَنْتُمْ ضَرَبْتُمْ فِي الْأَرْضِ فَأَصَابَتْكُمْ  
مُصِيبَةُ الْمَوْتِ تَحْبِسُونَهُمَا مِنْ بَعْدِ الصَّلَاةِ فَيُقْسِمَانِ بِاللَّهِ إِنْ  
ارْتَبْتُمْ لَا نَشْتَرِي بِهِ ثَمَنًا وَلَوْ كَانَ ذَا قُرْبَىٰ وَلَا نَكْتُمُ  
شَهَادَةَ اللَّهِ إِنَّا إِذَا لَمِنَ الْأَثْمِينَ

{ Quran 5:106 }

## Waseeyat – Quranic verses

107. But if it gets known that these two were guilty of the sin (of perjury), let two others stand forth in their places,- nearest in kin from among those who claim a lawful right: let them swear by Allah. "We affirm that our witness is truer than that of those two, and that we have not trespassed (beyond the truth): if we did, behold! the wrong be upon us!"

108. That is most suitable: that they may give the evidence in its true nature and shape, or else they would fear that other oaths would be taken after their oaths. But fear Allah, and listen (to His counsel): for Allah guideth not a rebellious people:

فَإِنْ عَثَرَ عَلَىٰ أَنَّهُمَا اسْتَحَقَّا إِثْمًا فَأَخْرَجِ يَقُومَانِ  
مَقَامَهُمَا مِنَ الَّذِينَ اسْتَحَقَّ عَلَيْهِمُ الْأَوْلِيَانِ فَيُقْسِمَانِ  
بِاللَّهِ لَشَهَادَتُنَا أَحَقُّ مِنْ شَهَادَتِهِمَا وَمَا اعْتَدَيْنَا إِنَّا إِذَا  
لِمَنِ الظَّالِمِينَ ﴿107﴾ ذَلِكَ أَدْنَىٰ أَنْ يَأْتُوا بِالشَّهَادَةِ  
عَلَىٰ وَجْهِهَا أَوْ يَخَافُوا أَنْ تُرَدَّ أَيْمَانٌ بَعْدَ أَيْمَانِهِمْ وَاتَّقُوا  
اللَّهَ وَاسْمِعُوا وَاللَّهُ لَا يَهْدِي الْقَوْمَ الْفَاسِقِينَ

{ Quran 5:107,108 }

## Waseeyat – Quranic verses

After the payment of legacies and debts. You know not whether your parents or your children are nearest to you in benefit. These are the portions ordered by Allah; Allah is All knowing All wise.

مِن بَعْدِ وَصِيَّةٍ يُوصِي بِهَا أَوْ دَيْنٍ

آبَاؤُكُمْ وَأَبْنَاؤُكُمْ

لَا تَدْرُونَ أَيُّهُم أَقْرَبُ لَكُمْ نَفْعًا

فَرِيضَةً مِّنَ اللَّهِ

إِنَّ اللَّهَ كَانَ عَلِيمًا حَكِيمًا

{ Quran 4:11 }



1. Prophet (SAS) said Allah has given every heir his due in inheritance. Hence be known, there is no waseeyat for inheritance heirs.
2. Ibn Ummer reports prophet(sas) as saying—If anyone has the property then let him anticipate death and make will accordingly.
3. Saad b. Abi Vaqas reports. Once he was ill and prophet(sas) visited him. He wanted to donate his property after his death and prophet sas said no. He asked if he can donate  $\frac{1}{2}$  prophet said no. Then when he asked  $\frac{1}{3}$  prophet sas said OK that itself is too much. Don't leave your successors as poor stretching their hands to others for help, instead it is better you leave them rich.

## Ibn Maja reported from Jabir

Whoever has died with a waseeyat, he has died on the straight path, sunnah of the prophet, with piety, and with all his sins forgiven.

## Thirmidhi, Ahmed, Ibn Maja, Abu dawood

Hadees quoted by AbuHurraira, Prophet(sas) said-A man might perform actions of righteous people for seventy years but when it is time to compile his will commits injustice and because of this he enters the Fire. Similarly a man might perform ill deeds for seventy years but leaves a fair will and thus enters paradise.

# Waseeyat - Different opinions

1. Some feel that It is a must.
2. Some others feel It is a must for those who do not get any share in the property.
3. Some feel that both opinions are not correct but rules keep changing depending on situation. Most scholars agree for this. There are different situations.

# Waseeyat - Different opinions

**a) Must** -If one has certain obligations towards Allah and humans and if he feels that it may not be implemented after his death , then making a will becomes must on him. E.g. Dues to Allah and persons. pending Zakath, Hajj

**b) Optional** - Poor relatives, good friends in need, for good causes. : When the property is less and the inheritors are there it is undesirable, Likewise to make waseeyat to somebody who uses wealth in an unislamic way is also undesirable.

rich person to make a will for relatives is Permitted & favoured

**c) Prohibited** - Will to prevent heirs getting the inheritance.

- When waseeyat ayah in Surah Al Baqara was revealed it was a command.
- Then later on when the inheritance verses were revealed this ayah became Mansukh.
- But considering prophet's hadees and the inheritance verses in which it says “fter fulfillment of waseeyat” following deductions can be made:

1. There is no waseeyat for heirs.
2. Exceptionally it may be done for heirs if they are very poor but consent of the other heirs should be there during implementation.
3. For close relatives who do not get shares writing a waseeyat on them becomes a must. E.g.. Parents of a different religion. Parents who are excluded as heirs, relatives who are otherwise excluded.
4. It should not be more than  $1/3$
5. Waseeyat should be based on amount of wealth and the condition of the person on whom it is written ( Ma'roofa)
6. If a person has the property then it is advisable to make a waseeyat, as Allah has with His mercy given the final chance to have a good deed after death. It was encouraged by Prophet (sas)

In other words one should know the rules of inheritance and Waseeyat

## Method

- ✓ By writing or by mouth.
- ✓ 2 good witnesses; Sura al Maaida-106
- ✓ A person before his death can alter or cancel it.
- ✓ After death nobody can alter it if it is according to Islamic sharia.



# Waseeyat - Conditions

- A. **One who writes the will** – Should be sane, adult, not a playboy. An adult by definition is the one who reached puberty-menstruation in girls and ejaculation in boys. If it is not sure then 15 years is taken as the age.
- B. **On whom will is written** – he should not be a heir., he should be alive. This situation is at the time of person's death. Exceptions: Person makes waseeyat on brother in the absence of child. Waseeyat is not valid .But he gets a son and dies with the same waseeyat . , waseeyat becomes valid one.

- C. **Property**. Should not exceed 1/3 of the property at all occasions. But Abu Hanifa feels that if there are no successors then it can be more than this. Prophet's(sas) Hadeeth.- Don't leave your children...
- D. **The will**
- It can be on any person (except a heir,) or masjids, charitable institutions, islamic centres, other institutions, or without any specific names like the poor orphans etc.
  - It can be oral by mouth or written. 2 witnesses are required. Some consider a written waseeyat without witness as valid one.
  - In non islamic countries it is better it is written as per the law of that country eg attestation before judge or notary where it becomes a legally valid will.

- There is a difference of opinion as to whether  $1/3$  of the property at the time of waseeyat or at the time of death.
- Many feel that it is the  $1/3$  of the property at the time of death.

## Difference between will and gift

A gift or Hiba is done during the life of a person and all transactions are over before the death of a person. But in Will person declares a certain thing which is implemented after the death of the person. A gift made during dying hours is considered as will.

# Invalid Waseeyat

1. Mentally ill person
2. Person on whom is written dies before the 1st person.
3. If the property is lost before the death.
4. If the person on whom waseeyat is written kills the person. Some accept the will if it is made after the fatal act but before the death of the person. –maliki  
hanbali
5. On a heir

# Advise on Waseeyat

- ✓ If it is a must write a waseeyat and keep
- ✓ If you have property Allah has given you a chance to do good at the time of your death. Write a will and keep
- ✓ Along with the waseeyat about the property you can specify about the do's and don'ts to your heirs about religion.

# Advise on Waseeyat

- In islamic countries where sharia is followed inheritance rules are applied after death.
- But in non islamic countries one may have to follow the rules of the land. After death inheritance rules may not be applicable and importance is given to the will, in such cases it is a must for a muslim to make a will stating that his property be distributed after death as per islamic law of inheritance and if required mention the which madhab to be followed.

## Advise on Waseeyat

In a non islamic country If one knows that there are no heirs surviving person can make a will naming the beneficiary so that property may not go the government treasury as there is no Baithul Maal in that country.



رَبَّنَا تَقَبَّلْ مِنَّا إِنَّكَ أَنْتَ السَّمِيعُ الْعَلِيمُ

وَتُبَّ عَلَيْنَا إِنَّكَ أَنْتَ التَّوَّابُ الرَّحِيمُ

اللهم اغفر لنا، يا أرحم الراحمين

رَبَّنَا آتِنَا فِي الدُّنْيَا حَسَنَةً وَفِي الْآخِرَةِ حَسَنَةً وَقِنَا عَذَابَ النَّارِ

رَبَّنَا ظَلَمْنَا أَنفُسَنَا وَإِن لَّمْ تَغْفِرْ لَنَا وَتَرْحَمْنَا لَنَكُونَنَّ مِنَ الْخَاسِرِينَ

اللهم صلِّ وسلِّم وبارك على عبدك ورسولك محمد سيد الأولين

والآخرين، وعلى آله وصحبه أجمعين