

# WILLS AND ADMINISTRATION OF ESTATES YOUR QUESTIONS ANSWERED



# MAKING A WILL

1.1	Why should I have an Islamic Will?	<ul style="list-style-type: none"><li>• The most fundamental benefit of having an Islamic Will is that your Estate will be administered in terms of your Islamic Will with Shari'ah Law governing the entire process.</li><li>• Whilst your Estate will be administered in an Islamic manner giving effect and recognition to your Islamic heirs, you still have the freedom to appoint an Executor of your choice to attend to this administration process.</li></ul>
1.2	What is the difference between an Islamic Will and a conventional Will?	<ul style="list-style-type: none"><li>• A Shari'ah compliant Will or Islamic Will differs from other Wills because the beneficiaries are determined on the death of the Testator rather than being specially identified under the terms of the Will drafted during the lifetime of a testator.</li></ul>



# MAKING A WILL

1.3	What happens if I do not have an Islamic Will?	<ul style="list-style-type: none"><li>• Shari'ah law will not apply &amp; your Islamic heirs will be at a disadvantage in terms of the inheritance they ought to have received.</li><li>• The Laws of South Africa will apply to govern the distribution process, which is not in line with the Shari'ah.</li><li>• A person who does not have an Islamic Will shall be held accountable on the day of judgment for his/her negligence in carrying out his rightful duties.</li></ul>
1.4	Is it compulsory for Muslims to draw up a Will?	<ul style="list-style-type: none"><li>• Yes, it is compulsory because Shari'ah Law is at present not recognised in South Africa and by not having an Islamic Will means that Intestate Succession would have to be implemented upon death.</li><li>• It is the duty of every Muslim to ensure that Quranic Law is applied to their Estates.</li></ul>
1.5	Why can I not draw up a joint Will?	<ul style="list-style-type: none"><li>• A joint Will masses your Estate to the surviving spouse and only after the surviving spouse dies would the children inherit which is contrary to Shari'ah.</li></ul>



## MAKING A WILL

1.6	Which of the 3 marital regimes (in community of property, out of community of property with accrual, out of community of property without accrual) are closest to Islamic Law?	<ul style="list-style-type: none"><li>• A marriage out of community of property (Ante-Nuptial contract) without accrual most closely reflects that which is required in terms of Shari'ah.</li></ul>
1.7	Can a Muslim inherit from a non muslim?	<ul style="list-style-type: none"><li>• The majority of the jurists are of the opinion that a difference in religion prevents inheritance.</li></ul>
1.8	What is a bequest (Wassiyah)	<ul style="list-style-type: none"><li>• Wassiyah is a gift bequeathed to any institution or person who does not qualify for inheritance, subject to a maximum of 1/3 of the Estate after payment of debts.</li></ul>
1.9	Can adopted children, step children and illegitimate children inherit?	<ul style="list-style-type: none"><li>• No, they cannot inherit in terms of the Will. However, they can be given a Bequest (Wassiyah) provided it does not exceed 1/3 of the value of the estate.</li></ul>



# APPOINTMENT OF EXECUTOR

2.1 What is the importance of having an Executor?

- The Executor is the key person in the process responsible for managing and distributing funds in the Estate.
- An Executor ought to be a person with specialised knowledge in the Estate Administration process and such nomination by a Testator should not be made lightly.

2.2 How many Executors do I need?

- You have the freedom of Testation which means you can have as many Executors and make as many Bequests as you deem fit. However, it would be advisable to have one alternatively no more than two Executors.
- If there is more than one Executor, they have to share the Executor's fees.
- Ordinarily a family member who is nominated as Co-Executor would forfeit his/her share of the fee in favour of the professional Executor who does the work.



# APPOINTMENT OF EXECUTOR

2.3	Am I limited to appointing family members as my Executors?	<ul style="list-style-type: none"><li>• As a Testator you can appoint any type of person to be your Executor, whether family, professional persons or banking institutions. However, due to the specialised knowledge required in carrying out duties by an Executor, it is recommended that professional persons be appointed as your Executor.</li></ul>
2.4	Can I appoint Al Baraka bank to be my Executor ?	<ul style="list-style-type: none"><li>• Al Baraka is a fully accredited Shari'ah compliant bank and would provide sound expertise in a Shari'ah compliant manner to administer your estate.</li><li>• With appointing the bank as your Executor you have the assurance that as an established entity, it will carry out its duties in a professional manner.</li><li>• Al Baraka, as Executor with its in-house qualified legal team, would assist in easing the burden of your financial affairs by administering your Estate.</li></ul>



# APPOINTMENT OF EXECUTOR

2.5 Would the Executor be entitled to a fee for carrying out his duties, if so, how much would it be?

- Executors are entitled to a fee referred to as Executor's fees.
- Such fee is regulated by the Administration of Estates Act, currently set at an amount of 3.5 % (excluding vat) on the gross value of your Estate.
- Executors are also entitled to a percentage on any income accrued and collected after the death of the deceased, the current rate as per the regulated tariff is 6%.



# ADMINISTRATION PROCESS

3.1	What taxes (if any) is the estate liable to pay?	<ul style="list-style-type: none"><li>• <b>Estate Duty</b> is a tax payable to SARS which is calculated at a rate of 20% on the gross value of your Estate.</li><li>• The current rebate amount is R 3.5 million. Subject to other exemptions, the residue of an Estate above R 3.5 million, will attract Estate Duty.</li><li>• In the event of the deceased being a registered tax payer, <b>Income Tax</b> will be payable up to the date of death of the deceased.</li><li>• The death of a person is considered a deemed disposal of assets and as such, <b>Capital Gains Tax</b> may also apply.</li></ul>
3.2	Can Unit Trust Investments have named beneficiaries and does this type of Investment attract Estate Duty?	<ul style="list-style-type: none"><li>• Unit Trusts are investments that do not require named beneficiaries.</li><li>• These types of investments will fall into one's estate and contributes to the total value of the estate which could potentially attract estate duty.</li><li>• At present Estate Duty is charged at 20% on estates that are valued over R3.5 million, subject to certain allowances/deductions.</li><li>• This rate is the current prescribed rate which could change if legislation is updated to this effect.</li></ul>





# ADMINISTRATION PROCESS

3.3	If a Testator is dual citizen in both South Africa and another country, for example the USA, which estate duty is applicable?	<ul style="list-style-type: none"><li>• Double taxation may arise if the same assets of the deceased person are subject to Estate Duty in South Africa, as well as the equivalent thereof in the foreign country.</li><li>• South Africa has entered into Estate Duty agreements with certain other jurisdictions, to avoid double taxation on Estate Duty, these countries are: The United States of America, the United Kingdom, Zimbabwe and the BLS Countries (Botswana, Lesotho, Swaziland).</li><li>• In the circumstances, it would be best for the Testator to engage with SARS directly or an Accountant on this query to understand the SARS requirements.</li></ul>
3.4	When would a beneficiary receive his/her inheritance?	<ul style="list-style-type: none"><li>• Ordinarily a beneficiary will receive his/her inheritance once all debts have been paid.</li><li>• The beneficiary would be paid the residue of the estate once all formalities concerned with the administration process is adhered to. However, in instances where beneficiaries are minors and funds are required in order to maintain and sustain oneself, then funds would be released to such beneficiary under the direction of the Master of the High Court.</li></ul>



## ADMINISTRATION PROCESS

3.5	How long would it take to wind up an Estate?	<ul style="list-style-type: none"><li>• Each estate is unique, having its own complexities. A fairly simple estate in terms of a Section 18(3) appointment, could be finalised within an period of three (3) to four (4) months.</li><li>• A much larger and complex Estate, valued over R 250 000.00, could take anything between one(1) to two (2) years, sometimes longer, due to problems associated with the Estate which would influence the finalisation of the estate.</li></ul>
3.6	How would I know if I am authorised to act in terms of the Estate?	<ul style="list-style-type: none"><li>• If you were nominated as the Executor in the Will of a Deceased, then the Master of the High Court would authorise your appointment and provide you with the required Letter of appointment.</li><li>• You would either receive a Letter of Authority or Letter of Executorship endorsed by the Master authorising you to act on behalf of the Estate.</li></ul>



# ADMINISTRATION PROCESS

3.7	What is the difference between a Letter of Authority and a Letter of Executorship	<ul style="list-style-type: none"><li>• A Letter of Authority is issued when an Estate is valued to be under R 250 000.00 (Section 18(3) appointment). The administration process followed in terms of this appointment is far shorter and simpler with no advertising requirements to be adhered to.</li><li>• A Letter of Executorship is issued when an Estate is valued over R 250 000.00. Advertising requirements is mandatory together with the preparation of a Liquidation and Distribution account (L &amp; D) account for inspection and approval purposes.</li></ul>
3.8	Would I need to value my Estate?	<ul style="list-style-type: none"><li>• Upon death, your Executor would have to value your Estate in order to determine which type of appointment to apply for i.e. Letter of Authority / Letter of Executorship, therefore valuation of certain assets in the Estate is required.</li></ul>



## ADMINISTRATION PROCESS

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| 3.9  | What happens to funds that are due to my minor Heirs?                                      | <ul style="list-style-type: none"><li>• Funds due to minors would be held in a trust that would have to be created by the Executor to facilitate the movement of funds from the Estate for the minors benefit.</li><li>• Monies are usually held in trust until the minor heirs reach a certain age.</li></ul> |
|      |  |  |
| 3.10 | What happens if my Estate does not have sufficient funds to pay debts and Executor's fees? | <ul style="list-style-type: none"><li>• The next of kin / heirs to the deceased would have to make good on any shortfall to satisfy claims against the Estate, failing which the estate would not be able to proceed to a state of finalisation.</li></ul>   |



# ESTATE DISTRIBUTION

4.1 How should I distribute my Estate if I have no eligible Islamic Heirs?

- The Baitul Maal or Treasury of an Islamic state is the Heir of those who have no eligible Islamic Heirs.
- Inheritance to non-muslims is prohibited.
- Therefore with no other Islamic Heirs to benefit from your Estate, it becomes important to identify an Islamic organisation so that the residue of your Estate could go to that organisation.

4.2 If one of my Heirs is married in community of property, what protection would my heir have against claims from his /her spouse.

- The Al Baraka Islamic Will has been specially designed to exclude any marital power of your heir's spouse to avoid being part of your heir's joint estate with his/her spouse.
- Heirs are therefore protected in this regard. (Refer to Article 8 in the Will).



## ESTATE DISTRIBUTION

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4.3 We are married in community of property.  
How will our joint Estate be distributed?

- The Will is only effective in half the Estate because the other half would automatically go to the surviving spouse.
- A valid Will cannot supersede or nullify the marital contract that was entered into by both parties.



# STORAGE OF WILLS

5.1	Where can I store my Will?	<ul style="list-style-type: none"><li>• The Bank will store your Will in the event that it is appointed as Executor of your Estate, alternatively should you appoint an Executor of your own choice, you can keep your Will document within your own safe custody.</li></ul>
5.2	Would the bank charge me a fee for storing my Will?	<ul style="list-style-type: none"><li>• In instances where the bank has been nominated as your Executor, we will store your Will free of charge.</li><li>• In the event of the bank Not being nominated as your Executor we will provide you with your own Will for your own safe keeping.</li></ul>



## LEGAL REQUIREMENTS

6.1 Can my beneficiary sign as a witness to my Will

- Beneficiaries to your Estate ought not to sign as witnesses as they would be disqualified from inheriting in terms of your Will as their signature as witness infers that they would have unduly influenced you as Testator when making the Will.
- It is therefore recommended to obtain signatures from independent persons that are not eligible to inherit in terms of your Will.

6.2 How should I sign a Will?

- A Testator must sign each page of the Will.
- If unable to sign, especially with elderly persons, a mark by way of a thumb print is acceptable provided such mark is accompanied by a Certificate from a Commissioner of oaths certifying that the mark was made by the Testator.





## LEGAL REQUIREMENTS

6.3	Who can make a Will?	<ul style="list-style-type: none"><li>• Any person over the age of 16 years can make a Will.</li><li>• A Will can always be amended or revoked and substituted by a new one but the important thing is to ensure that you actually have a Will in place and later on give effect to any changes by way of a Codicil or the drawing of a fresh Will.</li></ul>
6.3	Can I make amendments after I have completed and signed the Will?	<ul style="list-style-type: none"><li>• Amendments made immediately after signing a Will can be struck off and remedied followed by counter signatures by the Testator and the same witnesses to the Will.</li><li>• Amendments that are more substantial in nature would warrant changes to be recorded in a document called a Codicil.</li><li>• Such Codicil must be approved by the Bank's Shariah Department and must be signed by the Testator and can be signed two different witnesses as opposed to those witnesses whom previously signed as witnesses to the Will.</li></ul>



## LEGAL REQUIREMENTS

6.4	What is the significance of dating a Will?	<ul style="list-style-type: none"><li>• Dating a Will would indicate the date of the last Will of the Deceased.</li><li>• In instances where a Deceased had more than one Will, the last dated Will, will be considered to be the valid Will of the Deceased.</li></ul>
6.5	Will my pension fund, retirement annuities or other policies form part of my Estate?	<ul style="list-style-type: none"><li>• Pension funds and Retirement annuities is regulated by Section 37C of the Pension Fund Act and accordingly those funds would be excluded from your Estate, provided you have nominated beneficiaries.</li><li>• In the instance of any other policy the Deceased may have had, provided beneficiaries were nominated in those policies, these would be excluded from the Estate.</li></ul>



## LEGAL REQUIREMENTS

6.6	Why are the names of heirs not listed in my Will?	<ul style="list-style-type: none"><li>• Islamic heirs to your estate are determined at the time of death.</li><li>• In terms of Article 6 of the Will, the Executor will file with the Master of the High Court an inheritance certificate issued by the local Ulama body.</li><li>• The inheritance certificate will identify the names and the share entitlement to the Quranic heirs.</li></ul>
6.7	How is the value of my Estate going to be determined?	<ul style="list-style-type: none"><li>• Your Estate will be determined by completing an inventory when reporting to the Master in order to determine the value of your estate.</li><li>• The Inventory will also be useful to indicate which type of appointment the Master will make.</li></ul>
6.8	Why are my assets not recorded in my Will?	<ul style="list-style-type: none"><li>• The bequests made in your Will become effective upon your death. Therefore your assets are determined at the time of your death.</li></ul>



## LEGAL REQUIREMENTS

6.9	Can I appoint a guardian for my minor children?	<ul style="list-style-type: none"><li>• Minor children lack the required legal capacity to contract and manage their own affairs.</li><li>• Appointing a guardian in your Will shall ensure that any major decisions relating to your minor children will be dealt with responsibly ensuring their best interests at all times or until your children are old enough to make decisions themselves.</li></ul>
6.10	Who can I appoint as a guardian?	<ul style="list-style-type: none"><li>• Any person (including immediate family members) having an interest in the well-being of the minor children can be considered for the role as guardian for your minor children.</li></ul>
6.11	Can I change my guardian?	<ul style="list-style-type: none"><li>• During your lifetime you can change your choice of guardian by updating your Last Will and Testament, ensuring that you adhere to the signing formalities as required in the Wills Act, 7 of 1953 in order for your guardianship clause to be valid and acceptable.</li></ul>

