WILLS AND ADMINISTRATION OF ESTATES
YOUR QUESTIONS ANSWERED

MAKING A WILL

1.1	Why should I have an Islamic Will?	• 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. • 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.
1.2	What is the difference between an Islamic Will and a conventional Will?	• Islamic Will: Distributes the estate according to Shari'ah principles, with beneficiaries and their shares determined at the time of the Testator's death. • Conventional Will: Generally identifies beneficiaries in the Will and allows greater freedom to decide who inherits and how much.

MAKING A WILL

1.3	What happens if I do not have an Islamic Will?	• Shari'ah law may not be applied to the distribution of your estate, which could disadvantage your Islamic heirs. • The Laws of South Africa in particular, Intestate Succession, will apply to govern the distribution process, which is not in line with Shari'ah principles. • From an Islamic perspective, a person may be held accountable on the day of judgment for failing to fulfil their responsibilities regarding the distribution of their estate.
1.4	Is it compulsory for Muslims to draw up a Will?	• Yes, it is compulsory because Muslims should have an Islamic Will to ensure that their estate is distributed according to Shari'ah principles. Without a valid Will, South African intestate succession laws will apply. • It is the duty of every Muslim to ensure that their estate is distributed in accordance with Shari'ah principles.
1.5	Why can I not draw up a joint Will?	• A joint Will masses your Estate to the surviving spouse, with children inheriting only after that spouse's death. This conflicts with Shari'ah inheritance principles, which require each deceased person's estate to be distributed to their rightful heirs upon death.

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?	• A marriage out of community of property without accrual most closely aligns with the principles of Shari'ah.
1.7	Can a Muslim inherit from a non muslim?	• According to the majority of Islamic jurists, a difference in religion generally prevents inheritance between a Muslim and a non-Muslim.
1.8	What is a bequest (Wassiyah)	• A Wassiyah is a bequest made to a person or institution that does not qualify as an Islamic heir, limited to a maximum of one-third of the estate after payment of debts.
1.9	Can adopted children, step children and illegitimate children inherit?	• Adopted children and stepchildren do not qualify as Shari'ah heirs. Provision may be made for them through a Wassiyah (bequest) of up to one-third of the estate, subject to Shari'ah principles.

APPOINTMENT OF EXECUTOR

2.1	What is the importance of having an Executor?	• The Executor is responsible for administering and distributing the estate in accordance with the Will and applicable law. • The Executor has significant duties and legal obligations to fulfil throughout the estate administration process. • It is advisable to appoint an Executor with the necessary knowledge and experience in estate administration.
2.2	How many Executors do I need?	• You may appoint more than one Executor; however, it is generally advisable to appoint one, or no more than two Executors. • Where more than one Executor is appointed, the Executor's fee may be shared between them. • Where a family member is appointed as Co-Executor with a professional Executor, arrangements regarding the sharing or waiver of the Executor's fee should be clearly agreed upon.

APPOINTMENT OF EXECUTOR

2.3	Am I limited to appointing family members as my Executors?	• No. You may appoint a family member, professional person or financial institution as your Executor. • Given the specialised knowledge and responsibilities involved in estate administration, it is advisable to appoint a suitably qualified and experienced Executor.
2.4	Can I appoint Al Baraka bank to be my Executor ?	• Yes. Al Baraka Bank can be appointed as your Executor, providing expertise in administering your estate in a Shari'ah-compliant manner. • As an established institution, Al Baraka Bank provides continuity and professional administration throughout the estate administration process. • With the support of its in-house legal expertise, Al Baraka Bank can assist in administering your estate and easing the burden on your family.

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 an Executor's fee for administering the estate. • The prescribed tariff is currently 3.5 % (excluding vat) which is calculated on the gross value of the Estate. • Executors are also entitled to charge 6% (excluding VAT) on income accrued and collected after the date of death.

ADMINISTRATION PROCESS

3.1	What taxes (if any) is the estate liable to pay?	• Estate Duty is a tax payable to SARS on the dutiable value of the estate, after allowable deductions and the R3.5 million abatement. • Estate Duty is currently charged at 20% on the first R 30 million of the dutiable amount and 25% on any amount above the R 30million. • In the event of the deceased being a registered tax payer, Income Tax may be payable on income earned by the deceased up to the date of death. Income accruing to the deceased estate after death may also be taxable. • As death generally results in a deemed disposal of assets, Capital Gains Tax (CGT) may also arise, subject to applicable exclusions and exemptions.
3.2	Can Unit Trust Investments have named beneficiaries and does this type of Investment attract Estate Duty?	• Unit Trust investments generally do not require named beneficiaries as they form part of the deceased estate and may be subject to Estate duty, depending on the estate's overall dutiable value. • At present, Estate Duty is currently charged at 20% on the first R30 million of the dutiable amount and 25% above R30 million, after applicable deductions and the R3.5 million abatement.

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?	• Double taxation may arise where the deceased's estate or assets are subject to Estate Duty in South Africa and a similar tax in another country. • South Africa has entered into Estate Duty agreements with certain other countries to provide relief from double taxation, these countries are: The United States of America, the United Kingdom, Zimbabwe and the BLS Countries (Botswana, Lesotho, Swaziland). • As the tax treatment will depend on the deceased's individual circumstances and the countries involved, professional tax advise should be obtained.
3.4	When would a beneficiary receive his/her inheritance?	• A beneficiary will receive their inheritance once the estate administration process is complete and all debts, taxes, costs, and required formalities have been finalised. • Where a beneficiary is a minor, special arrangements under the direction of the Master of the High Court may apply to safeguard and manage their inheritance until they are legally entitled to receive it.

ADMINISTRATION PROCESS

3.5	How long would it take to wind up an Estate?	• Each estate is unique, and the time required will depend on its size and complexity. • A relatively simple estate administered under a Section 18(3) appointment, could be finalised within approximately three (3) to four (4) months. • A larger or more complex estate may take approximately one(1) to two (2) years, or longer, depending on the circumstances and any complexities that arise during the administration process.
3.6	How would I know if I am authorised to act in terms of the Estate?	• Being nominated as an Executor in a Will does not automatically authorise you to act; you must first be formally appointed by making an application to the Master of the High Court. • Once appointed, the Master will issue a Letter of Authority or Letter of Executorship, which authorizes you to act on behalf of the estate.

ADMINISTRATION PROCESS

3.7	What is the difference between a Letter of Authority and a Letter of Executorship	• A Letter of Authority is issued when an Estate is valued at R 250 000.00 or less under a Section 18(3) appointment, allowing for a simpler administration process. • A Letter of Executorship is issued when an Estate is valued at more than R 250 000.00 and requires the full estate administration process, including applicable advertising and the preparation of a Liquidation and Distribution account (L & D) account.
3.8	Would I need to value my Estate?	• Yes. After your death, the Executor will need to determine the value of the estate and, where necessary, obtain valuations of assets to establish the appropriate administration process and appointment.

ADMINISTRATION PROCESS

3.9	What happens to funds that are due to my minor Heirs?	• Funds due to minors may be held in a trust, to be created by the Executor, to facilitate the movement of funds from the Estate for the minors benefit. • The funds are generally held and administered until the minor reaches the age specified in the Will or becomes entitled to receive them.
3.10	What happens if my Estate does not have sufficient funds to pay debts and Executor's fees?	• If the estate does not have sufficient assets to meet its debts and administration costs, it may be treated as an insolvent estate, and the available assets will be dealt with in accordance with the applicable legal process. • Where the Estate does not have sufficient cash available, the next of kin or heirs may be requested to advance funds to cover the shortfall, which may be reimbursed from the proceeds of assets subsequently sold by the Estate.

ESTATE DISTRIBUTION

4.1	How should I distribute my Estate if I have no eligible Islamic Heirs?	• Where there are no eligible Islamic heirs, the estate would traditionally devolve upon the Baitul Maal (Islamic Treasury). • In the absence of a Baitul Maal, the residue of the estate may pass to a nominated Islamic organization. • Inheritance to non-muslims is prohibited. • Article 6 in the Will allows you to nominate an Islamic organisation of your choice to inherit in these circumstances.
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 provides that an heir's inheritance is excluded from their joint estate, thereby protecting the inheritance from the marital rights of their spouse. • Heirs are therefore protected in this regard. (Refer to Article 8 in the Will).

ESTATE DISTRIBUTION

4.3	We are married in community of property. How will our joint Estate be distributed?	• Upon the death of one spouse, the joint estate is divided, with one half belonging to the surviving spouse and the deceased’s half being administered and distributed in accordance with their Wil. • A valid Will cannot override the consequences of the marital regime entered into by the spouses.

STORAGE OF WILLS

5.1	Where can I store my Will?	• If Al Baraka Bank is appointed as your Executor, the Bank will safely store your original Will. • If you appoint another Executor (not the Bank), the original Will shall be provided to you for your own safe keeping.
5.2	Would the bank charge me a fee for storing my Will?	• No. Where the bank has been nominated as your Executor, the Bank will store your Will free of charge. • If the Bank is not appointed as your Executor, your original Will will be provided to you for your own safe keeping. No storage fees apply.

LEGAL REQUIREMENTS

6.1	Can my beneficiary sign as a witness to my Will	• A beneficiary should not sign as a witness, as doing so may disqualify them from inheriting under the Will. Their signature may suggest that they would have unduly influenced you when making the Will. • It is therefore recommended to obtain signatures from independent witnesses who are not beneficiaries, as they are not eligible to inherit in terms of the Will.
6.2	How should I sign a Will?	• The Testator must sign each page of the Will in the presence of two competent witnesses, who are present at the same time. • If unable to sign, a mark can be made such as an "X" or the Testator can sign by way of affixing his thumb print at all relevant sections in the Will. Signature by an X or thumb print requires additional requirements including certification by a Commission of Oaths.

LEGAL REQUIREMENTS

6.3	Who can make a Will?	• Any person of sound mind aged 16 years or older can make a Will. • A witness to a Will must be at least 14 years old and competent to give evidence in a court of law. • A Will can be changed or replaced at any time, either by adding a Codicil or by drawing up a new Will.
6.3	Can I make amendments after I have completed and signed the Will?	• Yes. Minor 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. • Substantial amendments require such changes to be regulated in the form of a Codicil (*which is subject to Shariah approval*) or by the making of a new Will. • A Codicil must comply with the required signing formalities and may be witnessed by two different witnesses from those who witnessed the original Will.

LEGAL REQUIREMENTS

6.4	What is the significance of dating a Will?	• Dating a Will helps to identify when it was executed, particularly where more than one Will exists. • Where there is more than one Will, the most recent valid Will is relevant, subject to whether earlier Wills were properly revoked and whether the documents are intended to operate together.
6.5	Will my pension fund, retirement annuities or other policies form part of my Estate?	• Pension and Retirement fund death benefits generally do not form part of the deceased estate and are distributed by the fund in accordance with Section 37C of the Pension Fund Act. • SARS also confirms that benefits payable from approved retirement funds as a result of death are excluded from the deceased estate for Estate Duty purpose. • 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.

LEGAL REQUIREMENTS

6.6	Why are the names of heirs not listed in my Will?	• Islamic heirs and their respective shares are determined at the time of death in accordance with Shari'ah principles. • In terms of Article 6 of the Will, the Executor will obtain an Inheritance Certificate from the relevant Ulama body, identifying the eligible Islamic heirs and their respective shares and will be submitted to the Master of the High Court as part of the estate administration process.
6.7	How is the value of my Estate going to be determined?	• An inventory of your assets will be prepared when the Estate is reported to the Master of the High Court to determine the value of the Estate, which assists in determining the appropriate type of appointment and administration process.
6.8	Why are my assets not recorded in my Will?	• Your assets may change during your lifetime and are therefore determined and distributed in accordance with your Will at the time of your death.

LEGAL REQUIREMENTS

6.9	Can I appoint a guardian for my minor children?	• Yes. You may nominate a guardian in your Will to care for your minor children and act in their best interests should the need arise. • This is done through a Codicil which is reviewed and approved by the Bank's Shariah department prior to signature to ensure Shariah compliance.
6.10	Who can I appoint as a guardian?	• You may nominate a suitable and responsible person, including a family member, whom you trust to act in the best interests of your minor children.
6.11	Can I change my guardian?	• Yes. You may change your nominated guardian at any time by concluding a further Codicil, provided the required signing formalities are followed.