

# NAVIGATING DUAL LEGAL SYSTEMS: ISLAMIC INHERITANCE LAW IN AUSTRALIA'S SECULAR LEGAL FRAMEWORK

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*This article explains the distinctive nature of Islamic inheritance law and considers the extent to which Muslim residents in Australia can assimilate their faith-based obligations with their country-based obligations in matters of inheritance. The article identifies conflict in the Islamic and Australian intestacy rules and sets out three ways that Muslims can manage this conflict. The article considers the scope for, and feasibility of, the execution of Islamic wills in Australia to demonstrate how they assist Muslims to comply with their religious inheritance obligations. While there is no manifest inadequacy in the current legal framework that impedes Muslims from maintaining an Islamic inheritance, the article establishes two instances where Muslims remain at a disadvantage and adds to calls for reform in the area of family provision.*

## I INTRODUCTION

In 2012, the Australian Capital Territory Supreme Court considered an inheritance case, *Omari v Omari* ('*Omari*'),<sup>1</sup> involving a Muslim family where the testator had made a will devolving her estate according to Islamic principles. Mariem Omari (the deceased, who was a non-English speaking Muslim migrant) executed a will in which she appointed her two sons as executors. At the time, Mariem Omari was illiterate, and so she executed her will by making a thumbprint on each page.<sup>2</sup> The will followed a precedent available for adherents of the Muslim faith, provided by a former *imam*, and was prepared by one of Mariem Omari's sons. The will left the estate to eight children and provided that each son was to receive a full share and

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<sup>1</sup> [2012] ACTSC 33 ('*Omari*').

<sup>2</sup> *Ibid* [1].

each daughter a half share, in accordance with Islamic inheritance principles.<sup>3</sup> On Mariem Omari's death, the executors (being Mohamed and Mustapha Omari) applied for probate of the will. Before this application was lodged, the defendant (one of the deceased's daughters) lodged a caveat, alleging that the testator was suffering from dementia at the time the will was made.<sup>4</sup> The Court stated that '[t]he basis for the caveat was expressed to be the fact that the will was made at a time when the testator was suffering from dementia, and that it did not express her wishes.'<sup>5</sup>

The case was resolved as a probate case and the court applied the common law test developed in *Banks v Goodfellow*.<sup>6</sup> The court accepted the evidence of a local *imam* as to the expectations within Islam regarding the disposition of an estate by will where the testatrix had children. However, after hearing the testimony of medical witnesses, the court concluded that, against a background of the testatrix's diagnosed dementia, the deceased did not have the requisite testamentary capacity at the time the will was made.<sup>7</sup> As such, the court appointed the Public Trustee to administer the estate according to the relevant intestacy provisions contained in the *Administration and Probate Act 1929* (ACT) ('*ACT Administration Act*'), in the light of the probability of dispute between the deceased's surviving children.<sup>8</sup> The intestacy provisions contained in the *ACT Administration Act* meant that the result of a distribution in *Omari* under those provisions would deliver a different result to that contemplated by Mariem Omari's will, and would require the estate to be distributed equally between her children. The decision was subsequently upheld in a 2016 appeal.<sup>9</sup>

This article explores the issues highlighted by *Omari* where resident Muslims seek to maintain an Islamic inheritance. First, the article explains the distinctive nature of Islamic inheritance law in Australia and explains, within a framework of legal pluralism, how many Muslims are able to skilfully navigate their way through dual legal systems. Secondly, the article discusses the limits of religious freedom as it relates to Islamic inheritance in Australia. The article then clarifies the extent to which resident Muslims can maintain an Islamic inheritance through a comparative analysis of the Australian and Islamic inheritance laws. In particular, the article identifies intestacy conflicts between the two systems and considers how Muslims can manage and navigate these conflicts by examining the scope for, and feasibility of, the execution of Islamic wills in Australia. This discussion illustrates that will-making can assist Muslims to maintain an Islamic inheritance but cautions that wills require careful legal drafting to ensure compliance with both legal systems. The article then considers how Islamic wills

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<sup>3</sup> Ibid [8].

<sup>4</sup> Ibid [9].

<sup>5</sup> Ibid.

<sup>6</sup> (1870) LR 5 QB 549, 565 (Cockburn CJ for the Court).

<sup>7</sup> *Omari* (n 1) [65].

<sup>8</sup> Ibid [67]–[68].

<sup>9</sup> *Omari v Omari* (2016) 14 ASTLR 23.

can be challenged in Australian courts and how these challenges are likely to be resolved according to principles of Australian law.

The article establishes the ways that Muslims can navigate both official Australian inheritance laws and unofficial Islamic inheritance laws to assimilate their faith-based obligations with their country-based obligations in matters of inheritance. However, some areas of legal complexity remain for Muslims, particularly relating to family provision. Specifically, the article questions whether the interpolation of morality by reference to prevailing community standards in the construction of family provision legislation is at odds with the principle of testamentary freedom.

## II ISLAMIC INHERITANCE LAW IN AUSTRALIA

The question whether Muslims can maintain an Islamic inheritance in Australia is closely connected to the existence and operation of unofficial law in the Australian legal structure, and more specifically, its interaction with official law. Legal pluralism 'is generally defined as a situation in which two or more legal systems coexist in the same social field' or jurisdiction.<sup>10</sup> Legal pluralism may be contrasted with legal centralism, which commits one to the ideal of 'one law for all and no exceptions',<sup>11</sup> and acknowledges, for example, that members of minority faith groups may wish to abide by faith-based obligations that are not recognised by the official (ie national) legal system. This article borrows from Chiba's model of legal pluralism to set out the structural position and function of Islamic law within the broader Australian legal framework and to demonstrate its significance to Muslims in matters of inheritance and its relationship with the official legal system.<sup>12</sup>

### A *The Validity of Islamic Inheritance Law in Australia*

Chiba's three-level structure of law theorises that the whole structure of law encompasses three levels: official law; unofficial law; and legal postulates.<sup>13</sup> Official law is said to encompass state law and any laws officially authorised by the state.<sup>14</sup> In Australia, the succession laws of each state and territory form the

<sup>10</sup> Sally Engle Merry, 'Legal Pluralism' (1988) 22(5) *Law & Society Review* 869, 870. See also John Griffiths, 'What is Legal Pluralism' (1986) 24(1) *Journal of Legal Pluralism and Unofficial Law* 1, 3; MB Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Clarendon Press, 1975); Brian Z Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30(3) *Sydney Law Review* 375; Brian Z Tamanaha, 'A Non-Essentialist Version of Legal Pluralism' (2000) 27(2) *Journal of Law and Society* 296.

<sup>11</sup> Jeremy Waldron, 'One Law For All? The Logic of Cultural Accommodation' (2002) 59(1) *Washington and Lee Law Review* 3, 3.

<sup>12</sup> Masaji Chiba, *Asian Indigenous Law: In Interaction with Received Law* (KPI, 1986) ('Asian Indigenous Law').

<sup>13</sup> *Ibid* 5–7.

<sup>14</sup> *Ibid* 5.

foundation of official laws relating to inheritance. Unofficial laws refer to any laws that are not officially sanctioned by the state but are nonetheless valid outside of official law.<sup>15</sup> These laws are ‘sanctioned in practice by the general consensus of a certain circle of people, whether within or beyond the bounds of a country’.<sup>16</sup> While there is broad agreement among scholars that law encompasses more than just state law, Merry questions how far the concept of non-state law extends. As she puts it, ‘[w]here do we stop speaking of law and find ourselves simply describing social life’?<sup>17</sup>

Chiba limits unofficial law to ‘those unofficial practices which have a distinct influence upon the effectiveness of official law; in other words those which distinctively supplement, oppose, modify, or undermine any of the official laws, including state law’.<sup>18</sup> As such, not all unofficial practices should be included in the definition of ‘unofficial law’, where it is necessary to distinguish between religious laws (as unofficial laws) and religious practices, because not all aspects of religion are legal.<sup>19</sup> Tamanaha observes that,

[a]lthough customary and religious sources of normative ordering are usually seen in terms distinct from and broader than official legal systems, they also can contain a subset of norms that have specifically ‘legal’ status, in two different senses: (1) through recognition by the official legal system; or (2) on their own terms.<sup>20</sup>

Thus, religious laws can be official law, by way of recognition by the official legal system, or unofficial law, where they retain legal status on their own terms outside the realm of official law.

In Australia, parts of the *Shari’a*<sup>21</sup> can be said to have legal status on their own terms because Muslims can view these norms as inherently legal, even though

<sup>15</sup> Ibid 6.

<sup>16</sup> Ibid.

<sup>17</sup> Merry (n 10) 878. Tamanaha argues that the inability of legal pluralism to delineate law from social control has resulted in scholars ‘drowning’ in legal pluralism: Tamanaha, ‘Understanding Legal Pluralism: Past to Present, Local to Global’ (n 10) 393. Santos also concedes that perceiving law too broadly can trivialise the concept and remarks that ‘if law is everywhere it is nowhere’: B de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (Routledge, 1995) 429, quoted in Brian Tamanaha, ‘A Non-Essentialist Version of Legal Pluralism’ (n 10) 298. See also B de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (Reed Elsevier, 2<sup>nd</sup> ed, 2002); John Griffiths, ‘The Idea of Sociology of Law and its Relation to Law and to Sociology’ in Michael Freeman (ed), *Law and Sociology* (Oxford University Press, 2006) 49, 63–4; Sally Falk Moore, ‘Certainties Undone: Fifty Turbulent Years of Legal Anthropology, 1949–1999’ (2001) 7(1) *Journal of the Royal Anthropological Institute* 95, 106.

<sup>18</sup> Chiba, *Asian Indigenous Law* (n 12) 6.

<sup>19</sup> However, it is important to note that religious practices can assume normative functions, especially in the realm of unofficial ordering.

<sup>20</sup> Tamanaha, ‘Understanding Legal Pluralism: Past to Present, Local to Global’ (n 10) 398.

<sup>21</sup> *Shari’a* is also spelt *Shari’a*, *Sharia*, *Shariah*, *Shari’ah*, *Syariah* and *Shariat*. Arabic words can legitimately be spelled in English in several ways. For example, the holy book of Islam, the *Qur’an*, can also be spelled *Qur’ān*, *Quran* or *Koran*. The spelling of certain words can also change depending on the geographical context in which a particular word is used. For consistency, the article uses the

they are not officially recognised by the national legal system. Translated, *Shari'a* traditionally meant 'the path to be followed to reach a watering place in the desert'.<sup>22</sup> It is now understood to mean 'the path upon which the believer has to tread'.<sup>23</sup> Muslims believe that the *Shari'a* is the ultimate path ordained by Allah that must be followed.<sup>24</sup> It is a fully integrated value system and prescribed way of being that regulates all facets of a believer's life.<sup>25</sup>

Islamic laws (*fiqh*) are extracted through Islamic jurisprudence (*usul al-fiqh*) from both primary and secondary sources, which have four basic constituents: the *Qur'anic* rules and injunctions; the *Sunnah* (which is derived from the traditions of the Prophet Mohammad, known as *hadith*); consensus of opinion among the jurists (*ijma*); and analogical deduction (*qiyas*).<sup>26</sup> Kamali explains that Islamic inheritance law is 'very much embedded in the clear *Qur'anic* text and bears therefore an obligatory character', and that '[t]he category of recipients and the quantum of their shares in the estate of their deceased relatives are stipulated in the *Qur'an* and make the whole schema of *Qur'anic* inheritance law internally self-contained'.<sup>27</sup> Islamic inheritance law, in this sense, can be said to have legal status on its own terms because it is contained in the *Qur'an*, which is viewed by Muslims as the primary and most authoritative source of Islamic law.<sup>28</sup> In countries where Islamic inheritance law is not officially recognised, like Australia, the basis for authority lies not in any state-based law or legal instrument, but rather is divine in nature and emphasises the extent of the follower's spiritual beliefs.

As discussed above, Chiba limits unofficial laws to those practices with a distinct influence upon the effectiveness of official law. Some studies indicate that Islamic inheritance legal rules influence the operation of official law and can be said to fall within Chiba's structural definition of unofficial law. One study that involved a series of interviews with 16 members of Islamic communities in Sydney and Melbourne, focusing on the principles underlying estate distribution, found that most interviewees sought to draft wills that comply with the Islamic rules of inheritance, in some cases 'leading to unequal distribution to children based on

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transliterations provided in Aisha Bewley, *A Glossary of Islamic Terms* (Ta-Ha Publishers, 1998). However, to keep the text uncluttered, very few diacritical marks (other than apostrophes) are used in the article when transliterating words from Arabic. Any variations in the spelling of Arabic transliterations used in the article come about because of citations from different authors and sources.

<sup>22</sup> Shaheen Saradar Ali, *Modern Challenges to Islamic Law* (Cambridge University Press, 2016) 23.

<sup>23</sup> Irshad Abdal-Haqq, 'Islamic Law: An Overview of its Origins and Elements' (2002) 7(1) *Journal of Islamic Law and Culture* 27, 33.

<sup>24</sup> Jamila Hussain, *Islam: Its Law and Society* (Federation Press, 3<sup>rd</sup> ed, 2011) 32.

<sup>25</sup> See, eg, Carole Hillenbrand, *Islam: A New Historical Introduction* (Thames & Hudson, 2015) 114.

<sup>26</sup> For a detailed account of the methods used to deduce Islamic laws (*usual al-fiqh*) and the four main sources of law, see Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Islamic Texts Society, 3<sup>rd</sup> ed, 2003).

<sup>27</sup> Mohammad Hashim Kamali, *Shariah Law: Questions and Answers* (Oneworld Publications, 2017) 143–4.

<sup>28</sup> Muslims believe that the *Qur'an* is the word of God as revealed to the Prophet Muhammad, and it cannot be disputed because its authority is infallible: Hamid Khan, *The Islamic Law of Inheritance: A Comparative Study of Recent Reforms in the Muslim Countries* (Oxford University Press, 2007) 5.

gender'.<sup>29</sup> That study also sought to assess participants' views on whether conflicts arise between the two inheritance legal systems, finding that '[m]any respondents discussed needing to accommodate both Australian law and religious and cultural values when making their will.'<sup>30</sup> Within this group, there were some who 'perceived a conflict between their beliefs and those of the broader Australian community' and some who did not.<sup>31</sup> The study also considered the impact of family provision on Islamic wills, citing some respondents' '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'.<sup>32</sup>

A separate group of scholars examined Islamic inheritance within a broader study on legal pluralism and *Shari'a* law.<sup>33</sup> That study involved fieldwork conducted in Sydney between 2014 and 2015, where 57 respondents were interviewed about their experiences living as Muslims and applying *Shari'a* in Australia.<sup>34</sup> Consistently with findings of the previous study, the researchers identified that 'many respondents believe that family property should devolve to family members as set out in the Quran'.<sup>35</sup> The study also highlighted the presence of strong beliefs regarding female entitlement in inheritance, namely 'that women's place is in the home, that women should receive less than the sons, and that women's proportion should be less because they do not have to contribute to the family by engaging in outside work'.<sup>36</sup> A minority of interviewees 'expressed more liberating ideals for women, such as the idea that women cannot expect to be supported by extended family and that most women prefer to be independent in any event'.<sup>37</sup> Importantly, this study suggests that Muslims appear to be navigating their religious inheritance obligations within the current Australian legal framework:

Interviewees for this study showed how Muslims work out the issues in their lives within a framework of religion, family, and personal economic circumstances. On most occasions, their actions related to their understandings of Sharia law as regards family property and inheritance.<sup>38</sup>

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<sup>29</sup> Jill Wilson et al, 'Cultural Considerations in Will-Making in Australia: A Case Study of Islamic or Sharia-Compliant Wills' (2016) 41(1) *Alternative Law Journal* 23, 25.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid 25–6.

<sup>32</sup> Ibid.

<sup>33</sup> Malcolm Voyce et al, 'Islamic Inheritance and Sharia Wills: The Recognition of Muslim Inheritance Traditions in Australia' in Eric Kolig and Malcolm Voyce (eds), *Muslim Integration: Pluralism and Multiculturalism in New Zealand and Australia* (Lexington Books, 2016) 211.

<sup>34</sup> Ibid 214. However, the study uses terms such as 'many', 'the majority', 'a few', and 'some' in its conclusions, which makes it difficult to quantify the numbers on which its conclusions are based.

<sup>35</sup> Ibid 211. The study also noted that some interviewees saw Islamic family law 'as a bastion against corrupting secular values': at 218.

<sup>36</sup> Ibid 218.

<sup>37</sup> Ibid.

<sup>38</sup> Ibid 221.

These studies demonstrate the influence that Islamic inheritance practices can have on official (or state-based) inheritance laws, illustrating how some resident Muslims seek to abide by Islamic inheritance practices within the official Australian legal framework. They also point to a diversity in opinion as to how assets should be distributed.

The third tier of Chiba's three-level structure of law comprises legal postulates, which are value principles or value systems 'specifically connected with a particular official or unofficial law, which act to found, justify and orient' the law.<sup>39</sup> Specifically, legal postulates are taken to consist of established legal ideas (eg, equity, justice, natural law etc); religious precepts; social and cultural postulates related to the fundamental social structure; and political ideologies.<sup>40</sup> The Islamic inheritance law system is based on the security and preservation of an extended family unit and a belief that society requires property to be devolved to those who are naturally entitled to it, rather than according to the testator's personal wishes.<sup>41</sup> Accordingly, the *Qur'anic* inheritance laws distribute estates through a system of forced succession and fixed shares.<sup>42</sup> In contrast, modern Australian inheritance laws are based on the underlying principle of testamentary freedom, which allows people to dispose by will of any property to which that person is entitled. The principle of testamentary freedom is codified in all Australian jurisdictions.<sup>43</sup> Where a person dies without a will, the intestacy rules apply to the distribution of the estate, and those rules preference the deceased's nuclear family, being the spouse and issue, to the exclusion of all other family members.<sup>44</sup>

## B *Muslims as Skilled Legal Navigators*

Legal pluralism thus provides a framework within which to conceptualise the operation of unofficial Islamic inheritance law vis-a-vis official Australian inheritance law. Research on Islamic law in common law countries such as Australia demonstrates the ways in which the *Shari'a* for Muslims 'provides a moral compass as they navigate their way through the formal legal system and informs their choices open to them within the formal law. It does not operate in

<sup>39</sup> Chiba, *Asian Indigenous Law* (n 12) 6. See also Masaji Chiba, 'Other Phases of Legal Pluralism in the Contemporary World' (1998) 11(3) *Ratio Juris* 228, 241 ('Other Phases of Legal Pluralism').

<sup>40</sup> Chiba, *Asian Indigenous Law* (n 12) 6.

<sup>41</sup> Mohammad Mustafa Ali Khan, *Islamic Law of Inheritance: A New Approach* (Kitab Bhavan, 3<sup>rd</sup> ed, 2005) 2.

<sup>42</sup> See below Part IVB(2).

<sup>43</sup> *Succession Act 1981* (Qld) s 8(1); *Succession Act 2006* (NSW) s 4(1); *Wills Act 1968* (ACT) s 7(1); *Wills Act 1997* (Vic) s 4(1); *Wills Act 1936* (SA) s 4(1); *Wills Act 2008* (Tas) s 6(1); *Wills Act 1970* (WA) s 6; *Wills Act 2000* (NT) s 6(1).

<sup>44</sup> *Succession Act 1981* (Qld) s 35, sch 2; *Succession Act 2006* (NSW) ch 4; *Administration and Probate Act 1929* (ACT) pt 3A ('ACT Administration Act'); *Administration and Probate Act 1958* (Vic) pt 1A; *Administration and Probate Act 1919* (SA) pt 3A; *Intestacy Act 2010* (Tas); *Administration Act 1903* (WA) s 14; *Administration and Probate Act 1969* (NT) s 66, sch 6.

parallel or in necessary contestation to the formal law.<sup>45</sup> As Krayem observes, Muslims in Australia may choose to deal with two relevant legal systems and ‘comply with the requirements of both of the official legal systems as well as relevant Islamic principles and values’.<sup>46</sup>

In this way, it can be said that ‘Muslims recreate, redefine and reconstruct their laws and customs as “skilled legal navigators”’, and that ‘they develop strategies to satisfy the requirements of both official legal systems of modern nation-states and their “Muslim law”’.<sup>47</sup> For example, studies have examined how Muslims can abide by their faith-based obligations in Australia in matters of family law<sup>48</sup> and banking and finance.<sup>49</sup> However, there are relatively few studies that have examined this phenomenon with respect to Islamic inheritance in Australia.<sup>50</sup> The article proceeds to examine the Australian and Islamic inheritance laws to demonstrate how Muslims wanting to maintain an Islamic inheritance can navigate their way through official and unofficial inheritance laws in Australia. First, however, it necessary to briefly explore the limits of religious freedom in Australia in the context of Islamic inheritance.

<sup>45</sup> Salim Farrar and Ghena Krayem, *Accommodating Muslims under Common Law: A Comparative Analysis* (Routledge, 2016) 45. See also Ann Black, ‘Accommodating Shariah Law in Australia’s Legal System: Can We? Should We?’ (2008) 33(4) *Alternative Law Journal* 214; Hossein Esmaeili, ‘Australian Muslims: The Role of Islamic Law and Integration of Muslims into Australian Society’ (2015) 17(1) *Flinders Law Journal* 69; Ann Black, ‘In the Shadow of Our Legal System: Shari’a in Australia’ in Rex Ahdar and Nicholas Aroney (eds), *Shari’a in the West* (Oxford University Press, 2010) 239.

<sup>46</sup> Ghena Krayem, ‘Australian Muslim Women: Skilful Legal Negotiators in a Plural Legal World’ in Abdullah Saeed and Helen McCue (eds), *Family Law and Australian Muslim Women* (Melbourne University Publishing, 2013) 70, 71.

<sup>47</sup> Ihsan Yilmaz, *Muslim Laws, Politics and Society in Modern Nation States: Dynamic Legal Pluralisms in England, Turkey and Pakistan* (Ashgate Publishing, 2005) 6.

<sup>48</sup> Ann Black, ‘Legal Recognition of Sharia law: Is This the Right Direction for Australian Family Matters?’ (2010) 84 *Family Matters* 64; Ismail Essof, ‘Divorce in Australia from an Islamic Law Perspective’ (2011) 36(3) *Alternative Law Journal* 182; Ghena Krayem, *Islamic Family Law in Australia: To Recognise or Not to Recognise* (Melbourne University Publishing, 2014); Anisa Buckley, *Not ‘Completely’ Divorced: Muslim Women in Australia Navigating Muslim Family Laws* (Melbourne University Publishing, 2019); Abdullah Saeed and Helen McCue (eds), *Family Law and Australian Muslim Women* (Melbourne University Publishing, 2013); Archana Parashar, ‘Australian Muslims and Family Law: Diversity and Gender Justice’ (2012) 33(5) *Journal of Intercultural Studies* 565; Jenny Richards and Hossein Esmaeili, ‘The Position of Australian Women in Polygamous Relationships under the Family Law Act 1975 (Cth): Still “Taking Multiculturalism Seriously”?’ (2012) 26(2) *Australian Journal of Family Law* 142; Malcolm Voyce and Adam Possamai, ‘Legal Pluralism, Family Personal Laws, and the Rejection of Shari’a in Australia: A Case of Multiple or “Clashing” Modernities?’ (2011) 7(4) *Democracy and Security* 338.

<sup>49</sup> Ann Black and Kerrie Sadiq, ‘Good and Bad Sharia: Australia’s Mixed Response to Islamic Law’ (2011) 34(1) *University of New South Wales Law Journal* 383; Ann Black and Kerrie Sadiq, ‘Embracing Sharia-Compliant Products through Regulatory Amendment to Achieve Parity of Treatment’ (2012) 34(1) *Sydney Law Review* 189; Salim Farrar, ‘Accommodating Islamic Banking and Finance in Australia’ (2011) 34(1) *University of New South Wales Law Journal* 413.

<sup>50</sup> See above Part IIA for studies on Islamic inheritance law in Australia.



### III THE LIMITS OF RELIGIOUS FREEDOM

In *Omari*, one of the deceased's sons (who was a plaintiff in the case) argued that his mother's estate should be distributed according to Islamic law, regardless of whether her will was valid, on the basis, it seems, that this is necessary to ensure religious freedom:

He went on to say that if a will was not made by a Muslim, this did not excuse them from applying the Islamic inheritance system. He said that if a Muslim died without a will, his or her sons and daughters were obliged to distribute the estate according to the Muslim faith. The defendant put to him that this applied in Muslim countries but not in Australia. His response was that this was not necessarily the case. The principle applied everywhere, except in countries with specific laws prohibiting Muslims from practising their faith. Thankfully, he said, Australia had no such law and allowed freedom of worship to people of various faiths.<sup>51</sup>

This argument hints at some sort of guaranteed right to religious freedom that would operate so as to defeat the relevant state or territory legislation and mandate the default distribution of an intestate Muslim estate according to the Islamic legal rules. This is incorrect. Section 116 of the *Australian Constitution* prohibits the Commonwealth from 'establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion'. The 'free exercise of any religion' as protected under s 116 of the *Australian Constitution* has been interpreted narrowly by the High Court of Australia in the few cases that have considered the issue. In *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth*,<sup>52</sup> Latham CJ remarked that the purpose of s 116 is to 'protect the religion (or absence of religion) of minorities',<sup>53</sup> and that this purpose extends to protect the right to have no religion,<sup>54</sup> as well as 'acts done in pursuance of religious belief as part of religion'.<sup>55</sup> However, on the limits of the exercise of religion, Latham CJ asked:

Can any person, by describing (and honestly describing) his beliefs and practices as religious exempt himself from obedience to the law? Does s 116 protect any religious belief or any religious practice, irrespective of the political or social effect of that belief or practice?

It has already been shown that beliefs entertained by a religious body as religious beliefs may be inconsistent with the maintenance of civil government. The complete protection of all religious beliefs might result in the disappearance of organized society, because some religious beliefs, as already indicated, regard the existence of organized society as essentially evil.<sup>56</sup>

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<sup>51</sup> *Omari* (n 1) [42].

<sup>52</sup> (1943) 67 CLR 116.

<sup>53</sup> *Ibid* 124 (Latham CJ).

<sup>54</sup> *Ibid* 123 (Latham CJ).

<sup>55</sup> *Ibid* 124 (Latham CJ).

<sup>56</sup> *Ibid* 126 (Latham CJ).

In discussing what freedom means, Latham CJ opined that ‘in all these cases an obligation to obey the laws which apply generally to the community is not regarded as inconsistent with freedom’.<sup>57</sup> He also cited John Stuart Mill’s distinction between liberty and licence, in which Mill ‘recognized that liberty did not mean the licence of individuals to do just what they pleased, because such liberty would mean the absence of law and of order, and ultimately the destruction of liberty’.<sup>58</sup> To that end, Latham CJ concluded that it ‘is consistent with the maintenance of religious liberty for the State to restrain actions and courses of conduct which are inconsistent with the maintenance of civil government or prejudicial to the continued existence of the community’.<sup>59</sup>

In a later case, *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)*,<sup>60</sup> Mason ACJ and Brennan J affirmed the fundamental importance of freedom of religion.<sup>61</sup> However, their Honours also affirmed previous statements to the effect that there are limits on the free exercise of religion:

But the area of legal immunity marked out by the concept of religion cannot extend to all conduct in which a person may engage in giving effect to his faith in the supernatural. The freedom to act in accordance with one’s religious beliefs is not as inviolate as the freedom to believe, for general laws to preserve and protect society are not defeated by a plea of religious obligation to breach them.<sup>62</sup>

More recently, in *Kruger v Commonwealth*,<sup>63</sup> the High Court determined that it is the purpose of the act in question that will be relevant in considering whether it has breached s 116.<sup>64</sup> The case also confirmed that s 116 of the *Australian Constitution* only acts to limit Commonwealth legislative power and does not confer a constitutionally guaranteed right to freedom of religion:

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<sup>57</sup> Ibid 126–7 (Latham CJ).

<sup>58</sup> Ibid 131 (Latham CJ).

<sup>59</sup> Ibid. In this way, liberalism acknowledges that, although there is a place for freedom of religion in society that must be protected, it must be balanced against competing freedoms and priorities, for example protecting freedom from religion and the need to establish civil order and governance. See generally Paul Babie and Neville Rochow, ‘Protecting Religious Freedom under Bills of Rights: Australia as Microcosm’ in Paul Babie and Neville Rochow (eds), *Freedom of Religion under Bills of Rights* (University of Adelaide Press, 2012) 1. Harrison argues that this approach places religious liberty claims within a framework of concern for personal autonomy in which claims to religious freedom are more often than not rejected in favour of competing individual interests: Joel Harrison, *Post-Liberal Religious Liberty* (Cambridge University Press, 2020).

<sup>60</sup> (1983) 154 CLR 120.

<sup>61</sup> ‘Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society. The chief function in the law of a definition of religion is to mark out an area within which a person subject to the law is free to believe and to act in accordance with his belief without legal restraint. Such a definition affects the scope and operation of s 116 of the Constitution and identifies the subject matters which other laws are presumed not to intend to affect. Religion is thus a concept of fundamental importance to the law’: *Church of the New Faith v Commissioner of Pay-Roll Tax (Victoria)* (n 60) 130 (Mason ACJ and Brennan J).

<sup>62</sup> Ibid 135–6 (Mason ACJ and Brennan J).

<sup>63</sup> (1997) 190 CLR 1.

<sup>64</sup> Ibid 128 (Gaudron J) and 160 (Gummow J).

[Section] 116 does no more than effect a restriction or limitation on the legislative power of the Commonwealth. It is not, 'in form, a constitutional guarantee of the rights of individuals'. It does not bind the States: they are completely free to enact laws imposing religious observances, prohibiting the free exercise of religion or otherwise intruding into the area which s 116 denies to the Commonwealth. It makes no sense to speak of a constitutional right to religious freedom in a context in which the Constitution clearly postulates that the States may enact laws in derogation of that right. It follows, in my view, that s 116 must be construed as no more than a limitation on Commonwealth legislative power.<sup>65</sup>

Importantly, s 116 of the *Australian Constitution* does not apply to legislation enacted by the Australian states. There is some argument as to whether the provision might operate to restrict legislation passed by the Australian Capital and Northern Territories (which rely on Commonwealth legislation).<sup>66</sup> Nonetheless, it is inaccurate to say that there is a constitutionally guaranteed right to freedom of religion, as suggested in *Omari*, that would defeat state or territory legislation to mandate distribution of an estate according to the Islamic legal rules. In any event, Mariem Omari had the right to exercise her testamentary freedom to make a will in accordance with her religious principles. She was found unable to do so, not for any reason relating to her religious beliefs, but because she lacked testamentary capacity. In this respect, 'legal documents are not held invalid because they are drafted in accordance with the tenets of a religion, but because of legal impropriety'.<sup>67</sup>

#### IV COMPARATIVE ANALYSIS OF ISLAMIC AND AUSTRALIAN INHERITANCE LAWS

The result of *Omari* meant that Mariem Omari's estate was distributed according to the intestacy rules under the *ACT Administration Act*, as opposed to the Islamic distribution rules as outlined in her will. The article now turns to consider whether there are conflicts in the Islamic and Australian intestacy rules and explores how some resident Muslims navigate dual legal systems in order to

<sup>65</sup> Ibid 124–5 (Gaudron J) (citations omitted).

<sup>66</sup> In favour of the proposition that the Australian Territories fall outside the purview of s 116, see Holly Randell-Moon, 'Section 116: The Politics of Secularism in Australian Legal and Political Discourse' in Basia Spalek and Alia Imtoul (eds), *Religion, Spirituality and the Social Sciences: Challenging Marginalisation* (Policy Press, 2008) 51, 54; Michael Hogan, 'Separation of Church and State: Section 116 of the Australian Constitution' (1981) 53(2) *Australian Quarterly* 214, 216–17; Stephen McLeish, 'Making Sense of Religion and the Constitution: A Fresh Start for Section 116' (1992) 18(2) *Monash University Law Review* 207. Cf Beck who argues that, unlike the state Governments, the Australian territories (eg the Australian Capital Territory and the Northern Territory) are bound by the s 116 restrictions by virtue of s 122 of the *Australian Constitution*: Luke Beck, 'Clear and Emphatic: The Separation of Church and State under the Australian Constitution' (2008) 27(2) *University of Tasmania Law Review* 161, 170–4.

<sup>67</sup> Margaret Beazley, 'The Intersection of the Australian Law and the Islamic Faith: A Selection of Cases' (2015) 12(2) *The Judicial Review* 147, 150.

maintain an Islamic inheritance. It undertakes this examination by way of comparative analysis.

### A *The Comparative Method*

There is little agreement in comparative-method legal scholarship as to the process of comparison.<sup>68</sup> Rather, there are a multitude of processes of comparison that can be drawn upon to undertake a comparative analysis. The comparative analysis undertaken in this article draws on a five-step process set out by Paris, which includes identifying the legal problem; setting out the choice of comparators; discussing the research material (sources of law) used; outlining the comparative method; and evaluating the findings.<sup>69</sup>

The legal question being examined here is whether Muslims in Australia can assimilate their faith-based obligations with their country-based obligations in matters of inheritance, such that they can maintain an Islamic inheritance if they choose to do so. As regards the choice of comparators, the article uses the Australian and Islamic inheritance rules. However, each Australian state and territory is governed by a different legislative framework,<sup>70</sup> and while the inheritance laws across these jurisdictions espouse the same principles, there are differences in their application.<sup>71</sup> The intestacy rules also differ between the states and territories. A deceased person who has a connection with one or more jurisdictions may have their estate distributed according to multiple systems of succession law.<sup>72</sup> Additionally, if the deceased person's parents wanted to make a

<sup>68</sup> See, eg, Catherine Grubb, 'The Implications of Postmodernism on Comparative Methodology' [2003] *UCL Jurisprudence Review* 13, 13–14; Otto Kahn-Freund, 'Comparative Law as an Academic Subject' (1966) 82(1) *Law Quarterly Review* 40, 41; Vernon Valentine Palmer, 'From Lerotholi to Lando: Some Examples of Comparative Law Methodology' (2005) 53(1) *American Journal of Comparative Law* 261, 290.

<sup>69</sup> Marie-Luce Paris, 'The Comparative Method in Legal Research: The Art of Justifying Choices' in Laura Cahillane and Jennifer Schweppe (eds), *Legal Research Methods: Principles and Practicalities* (Clarus Press, 2016) 39. This method contains both intellectual and practical steps and is inspired by de Cruz's more detailed method of comparison: Peter de Cruz, *Comparative Law in a Changing World* (Cavendish Publishing Ltd, 2<sup>nd</sup> ed, 1999) 235–9.

<sup>70</sup> *Probate and Administration Act 1898* (NSW); *Trustee Act 1925* (NSW); *Succession Act 2006* (NSW); *Trustee Act 1925* (ACT); *ACT Administration Act* (n 44); *Wills Act 1968* (ACT); *Family Provision Act 1969* (ACT); *Administration and Probate Act 1958* (Vic); *Trustee Act 1958* (Vic); *Wills Act 1997* (Vic); *Administration and Probate Act 1919* (SA); *Wills Act 1936* (SA); *Trustee Act 1936* (SA); *Inheritance (Family Provision) Act 1972* (SA); *Trustee Act 1898* (Tas); *Testator's Family Maintenance Act 1912* (Tas); *Administration and Probate Act 1935* (Tas); *Wills Act 2008* (Tas); *Intestacy Act 2010* (Tas); *Administration Act 1903* (WA); *Trustees Act 1962* (WA); *Wills Act 1970* (WA); *Family Provision Act 1972* (WA); *Administration and Probate Act 1969* (NT); *Public Trustee Act 1979* (NT); *Family Provision Amendment Act 1980* (NT); *Wills Act 2000* (NT); *Trusts Act 1973* (Qld); *Succession Act 1981* (Qld).

<sup>71</sup> For example, a will may be admitted to probate in some states and territories but not others because of different execution formalities.

<sup>72</sup> Because if a person dies domiciled in one state or territory, but leaves real property in a different state or territory, *lex situs* will apply to the deceased's real property (being the law of the

family provision application with respect to the estate, they could do so in Queensland,<sup>73</sup> but not in Victoria.<sup>74</sup> The article uses the *ACT Administration Act* as the Australian basis for comparison, because the only case to consider Islamic inheritance laws in Australia, *Omari*, concerned the application of that Act.

Unlike the Australian legal system, which is based on secular norms, the Islamic legal system is religious in nature with eschatological connotations (ie relating to death, judgement and the final destiny of the soul and of mankind).<sup>75</sup> The Islamic legal rules are also not applied uniformly across particular jurisdictions.<sup>76</sup> This is not to say, however, that the two legal systems are incomparable, because 'no subject matter and no legal system can, on a priori grounds, be excluded as beyond the domain of comparative law. The only requirement is that the material studied be compared — that is to say, approached in the context of two or more different legal orders.'<sup>77</sup> The multiplicity of jurisdictions in Islamic law is that of legal schools of thought (*madhhabs*), rather than of national or state legal systems.<sup>78</sup> As no *madhhab* is regarded as hierarchically superior to another,<sup>79</sup> it is necessary to choose either a particular *madhhab*, or a jurisdiction in which Islamic law is officially applied, as the basis for comparison.

Importantly, Australia's Muslims are not homogenous and do not adhere to one branch of Islam or one *madhhab*.<sup>80</sup> All the major *madhhabs* are represented in Australia. According to Saeed, however, the three most followed *madhhabs* are the *Hanafi*, *Shafi'i*, and *Ja'fari*.<sup>81</sup> In a recent national survey on Islam in Australia, 1034 Muslim Australian citizens and permanent residents were asked with which

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jurisdiction in which the real property lies) and *lex domicilii* will apply to the deceased's personal property or chattels (being the law of the jurisdiction in which the deceased lived on their death): Michael Tilbury, Gary Davis and Brian Opeskin, *Conflict of Laws in Australia* (Oxford University Press, 2002) ch 25.

<sup>73</sup> See *Succession Act 1981* (Qld) s 40 (definition of 'dependant').

<sup>74</sup> Where they are not included in the definition of 'eligible person' under s 90 of the *Administration and Probate Act 1958* (Vic).

<sup>75</sup> Hamid Harasani, 'Islamic Law as a Comparable Model in Comparative Legal Research' (2014) 3(2) *Global Journal of Comparative Law* 186, 188.

<sup>76</sup> Malcolm Joyce, 'Islamic Inheritance in Australia and Family Provision Law: Are Sharia Wills Valid?' (2018) 12(3) *Contemporary Islam* 251, 253.

<sup>77</sup> Arthur von Mehren, 'An Academic Tradition for Comparative Law?' (1971) 19(4) *American Journal of Comparative Law* 624, 624.

<sup>78</sup> Islam's followers are traditionally divided into two denominations: *Sunni* and *Shi'a*. Initially a matter of pure political succession, the differences between the two branches of Islam grew wider over the centuries and now span legal, theological and ideological divergences. They are further broken down into legal schools of thought (*madhhabs*), each of which has developed its own body of jurisprudence and interpretation of the Islamic legal rules. The four major *Sunni madhhabs* are *Hanafi*; *Maliki*; *Shafi'i*; and *Hanbali*. There are three main *Shi'a madhhabs*, being *Ja'fari* (or *Ithna Ashari* or *Twelvers*); *Ismaili* (or *Seveners*); and *Zaydi*.

<sup>79</sup> Harasani (n 75) 194.

<sup>80</sup> This is in contrast to some other Muslim minority countries, such as the United Kingdom, where over 75 per cent of Muslims come from the South Asian countries of Pakistan, India and Bangladesh. See Yilmaz (n 47) 57.

<sup>81</sup> Abdullah Saeed, *Islam in Australia* (Allen & Unwin, 2003) 69.

school of religious thought, group, or Islamic tradition they most identify.<sup>82</sup> A majority of 63.6 per cent answered ‘*Sunni*’, followed by 34 per cent who answered ‘just Muslim’ and 18 per cent who answered ‘*Hanafi*’ (being one of the *Sunni madhhabs*).<sup>83</sup> For the sake of simplicity, therefore, the following analysis draws on the *Hanafi madhhab* of *Sunni* Islamic jurisprudence.<sup>84</sup>

However, it is important to acknowledge that, while the Islamic inheritance laws are similar as between the *Sunni madhhabs*, there are nuances between the *madhhabs* that result in different legal rulings on some points and the devolution of an estate according to the Islamic inheritance laws will differ depending on the *madhhab* to which the deceased ascribed. The greatest differences appear between the *Sunni* and *Shi’a madhhabs*. The agnatic heirs, who were the principal heirs before Islam, continue to remain the principal heirs in the *Sunni madhhabs* (subject to the rules of the *Qur’an*), who layer the Islamic inheritance legal rules on top of pre-Islamic Arabian inheritance customs.<sup>85</sup> In contrast, the *Shi’a madhhabs* do not have as sharp a distinction between agnate and cognate heirs and use the *Qur’anic* rules as ‘illustrations of general principles underlying therein.’<sup>86</sup> Thus, it must be acknowledged that the results of the comparative analysis would differ if an alternative *madhhab* was selected as the basis for comparison.

With respect to ACT law, the *ACT Administration Act*, the *Wills Act 1968* (ACT) (‘*Wills Act*’) and the *Family Provision Act 1969* (ACT), collectively set out the legal rules relating to inheritance, which are supplemented by established common law principles. The *Qur’an* and *Sunnah* form the primary sources of Islamic law, with each *madhhab* promulgating its own distinct set of legal rules that have been developed by the *madhhab*’s legal scholars from the primary sources. The study

<sup>82</sup> Halim Rane et al, ‘Islam in Australia: A National Survey of Muslim Australian Citizens and Permanent Residents’ (2020) 11(8) *Religions* 419:1, 6.

<sup>83</sup> Ibid 6–7. Other responses included Ahl Sunnah Wal Jamaa (12.6 per cent), Shafi’i (6.7 per cent), Sufi (6.5 per cent), progressive (5.2 per cent), Shiite (4.1 per cent) and Salafi (2.8 per cent).

<sup>84</sup> The article refers to ‘Islamic inheritance legal rules’ and ‘*Hanafi* inheritance legal rules’ and uses these terms interchangeably.

<sup>85</sup> See Mohammad Mustafa Ali Khan (n 41) 72. Khan highlights that ‘[t]he Sunnis take the specific provisions of the Holy Quran applicable to and affecting the individuals mentioned therein without disturbing the pre-Islamic customary laws and usages. They restrict the effect of specific provisions of the Quran only to the cases specified therein and do not generalize them to extract general rules. ... They interpret these provisions simply as amendments relating to the individual instances and not repealing the customary provisions in general’: 173–4. See also Asaf A A Fyzee, *Outlines of Muhammadan Law* (Oxford University Press, 5<sup>th</sup> ed, 2008) 314–22; N J Coulson, *Succession in the Muslim Family* (Cambridge University Press, 1971) 30.

<sup>86</sup> Mohammad Mustafa Ali Khan (n 41) 174. Coulson provides that ‘[f]rom a comparative standpoint the outstanding characteristic of the Shi’i law of inheritance is its refusal to afford any special place or privileged position to agnate relatives as such – a fundamental distinction which is somewhat graphically expressed in the alleged dictum of the Shi’i Imam, Ja’far al-Sadiq: “As for the *asaba*, dust in their teeth.”’: Coulson (n 85) 108. For a more detailed discussion of the differences between the *Sunni* and *Shi’a* laws of inheritance, see Mohammad Mustafa Ali Khan (n 41) 173–84; Fyzee (n 85) 364–6; Coulson (n 85) 108–34; Shahbaz Ahmad Cheema, ‘Shia and Sunni Laws of Inheritance: A Comparative Analysis’ (2012) 10 *Pakistan Journal of Islamic Research* 69; Lucy Carroll, ‘The Ithna Ashari Law of Intestate Succession: An Introduction to Shia Law Applicable in South Asia’ (1985) 19(1) *Modern Asian Studies* 85.

relies on the *Qur'anic* verses; relevant *hadith*; and, the *Hanafi* inheritance laws as set out in Fyzee's *Outlines of Muhammadan Law*,<sup>87</sup> supplemented by other scholarly commentary on Islamic law. Given the heterogeneity of Australia's Muslim communities, the article also points to some relevant similarities and differences between the different *Sunni madhhabs*.

There are numerous techniques by which comparison can occur, including historical; functional; evolutionary; structural; thematic; empirical; and statistical comparisons.<sup>88</sup> The most prevalent is the functional method developed by Zweigert and Kötz.<sup>89</sup> The functional method of comparison presupposes that the legal systems being examined are only comparable if they 'fulfil the same function'.<sup>90</sup> Broadly, the inheritance laws of both the Islamic and Australian legal systems are functionally equivalent, in that their function is the orderly devolution of property upon a deceased's death. The analysis can proceed at a macro or micro level, or both.<sup>91</sup> The study applies the functional method of comparison to analyse the inheritance legal rules at a micro level.

The comparative study is split into two parts: intestate succession and testate succession.

## ***B Intestate Succession***

It is necessary to outline the process for intestate distribution under each inheritance legal system. Also of relevance is the distinction in Islamic law between the laws pertaining to inheritance (*mirath*) and the laws pertaining to wills (*wasiyyah*). Islamic law does not explicitly distinguish between testate and intestate succession. Rather, the inheritance laws as set out under the *Qur'an* are intended to apply to every deceased Muslim's estate. For the purpose of the article, the Islamic laws not relating to wills are referred to as the intestacy rules.

### ***1 Australian Intestacy Rules***

While the intestacy rules vary across the Australian States and Territories, they all prioritise the beneficial rights of the deceased's nuclear family (being the spouse and issue). Only where there is no spouse or issue will the deceased's next of kin be entitled to the estate.

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<sup>87</sup> Fyzee (n 85).

<sup>88</sup> Palmer (n 68) 263.

<sup>89</sup> Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law*, tr Tony Weir (Clarendon Press, 3<sup>rd</sup> ed, 2011).

<sup>90</sup> *Ibid* 43.

<sup>91</sup> *Ibid* 4–5.

Using the ACT as an example, where a Muslim dies intestate,<sup>92</sup> pt 3A of the *ACT Administration Act* applies to the intestate's estate.<sup>93</sup> The property available for distribution is the property of the intestate left over after payment of all debts.<sup>94</sup> The partner of the intestate inherits the entire estate if the deceased had no children,<sup>95</sup> and also where the deceased had children if the estate's total value is less than \$200,000.<sup>96</sup> Where the intestate is survived by both a partner and issue and the estate exceeds \$200,000, the partner inherits the first \$200,000, plus 8 per cent interest for every year that they have to wait for their inheritance, plus a portion of the remaining balance of the estate (the 'remainder').<sup>97</sup> For example, if there was one child, the partner inherits one-third of the remainder, and the children inherit equal shares of the remainder. If the deceased had no partner but did have children, then the children inherit the whole of the estate in equal shares.<sup>98</sup>

Interestingly, s 45A of the *ACT Administration Act* contemplates the potential for an intestate to be survived by a spouse, civil union partner or civil partner, as well as an eligible partner. In such cases, where the eligible partner and the intestate had been domestic partners<sup>99</sup> continuously for less than five years when the intestate died, the partnership share<sup>100</sup> is distributed equally between the spouse, civil union partner or civil partner and the eligible partner.<sup>101</sup> Where the domestic partnership had been in place continuously for five years or more when the intestate died, however, the eligible partner is exclusively entitled to the partnership share.<sup>102</sup>

It is only where the deceased leaves no partner/s and no children that other family members inherit. In such cases, the surviving parent or parents are entitled

<sup>92</sup> Being 'a person who dies on or after 1 July 1967 and either does not leave a will or leaves a will but does not dispose effectively, by the will, of the whole or part of his or her real or personal property': *ACT Administration Act* (n 44) s 44 (definition of 'intestate').

<sup>93</sup> Where the deceased's real property is situated in the ACT and they are taken to have been domiciled in the ACT upon their death.

<sup>94</sup> *Act Administration Act* (n 44) s 41A.

<sup>95</sup> Under s 44 of the *ACT Administration Act* (n 44), 'an intestate's 'partner' is either of the following: (a) the spouse, civil union partner or civil partner of the intestate when the intestate died;' or '(b) the eligible partner of the intestate' (definition of 'partner'). The 'eligible partner' of 'an intestate means someone, other than the spouse, civil union partner or civil partner of the intestate who — (a) was the intestate's domestic partner when the intestate died; and (b) either — (i) had been the intestate's domestic partner continuously for 2 or more years when the intestate died; or (ii) is the parent of the intestate's child, if the child was under 18 years old when the intestate died' (definition of 'eligible partner').

<sup>96</sup> *ACT Administration Act* (n 44) sch 6 pt 6.1.

<sup>97</sup> *Ibid* item 2.

<sup>98</sup> *Ibid* sch 6 pt 6.2 item 1.

<sup>99</sup> See *Legislation Act 2001* (ACT) s 169(1)–(2): being a reference to someone who lives with the person in a domestic partnership, and includes a reference to a spouse, civil union partner or civil partner of the person. Domestic partnership is the relationship between 2 people, whether of a different or the same sex, living together as a couple on a genuine domestic basis.

<sup>100</sup> Being, in relation to an intestate estate, 'the share of the estate to which the intestate's partner is entitled' under div 3A.2 of the *ACT Administration Act* (n 44): s 45A(2).

<sup>101</sup> *ACT Administration Act* (n 44) s 45A(1)(a).

<sup>102</sup> *Ibid* s 45A(1)(b).



to the whole of the intestate estate in equal shares.<sup>103</sup> If no parent survives the intestate, then 'next of kin'<sup>104</sup> inherit in the following order of succession (each among whom excludes the next): brothers and sisters; grandparents; aunts and uncles; and cousins.<sup>105</sup> Where the intestate is not survived by any partner, children, parent or next of kin, the ACT is entitled to the intestate estate.<sup>106</sup>

There are limited bars to inheritance under general Australian intestacy rules. For example, women under Australian law in all jurisdictions have the same inheritance entitlements as men. There are no faith-based restrictions on inheritance to an estate. The intestate's children are treated equally in inheritance entitlements, regardless of whether they are born in or outside of a marriage.<sup>107</sup> Similarly, adopted children inherit from the adoptive parent as issue of the adoptive parent.<sup>108</sup> It is also immaterial whether the relationship is one of whole blood or half blood.<sup>109</sup> One recognised bar to inheritance is that a person cannot generally inherit from a deceased person if that person contributed to the deceased's death under the common law forfeiture rule.<sup>110</sup>

## 2 Islamic Intestacy Rules

Similarly to the Australian intestacy rules, any distribution of an estate under Islamic law occurs only after the payment of debts.<sup>111</sup> However, the Islamic intestacy rules are more complex and cover a comprehensive range of circumstances. They are contained in a series of *Qur'anic* verses,<sup>112</sup> which detail succession entitlements according to a system of fixed shares. The *Qur'anic* rules are supplemented by various *hadith*, and a Muslim's estate is generally devolved according to the *madhhab* to which the deceased belonged at the time of death.<sup>113</sup>

<sup>103</sup> Ibid sch 6 pt 6.2 item 2.

<sup>104</sup> Ibid s 49(5).

<sup>105</sup> Ibid sch 6 pt 6.2 item 3.

<sup>106</sup> Ibid item 4.

<sup>107</sup> For example, the *ACT Administration Act* does not distinguish between children born in or outside of marriage: *ACT Administration Act* (n 44).

<sup>108</sup> Once a child is legally adopted, it ceases to be the child of any person who was its parent previously and becomes the lawful child of the adoptive parent: *Adoption Act 1993* (ACT) ss 43(1)(a)–(b). Note, however, that s 43(2) provides that 'an adoption order does not exclude any right of inheritance that the adopted person might otherwise have from or through a deceased person if — (a) 1 of the birth or former adoptive parents of an adopted person has died; and (b) an adoption order is made in favour of a step-parent after that death.'

<sup>109</sup> *ACT Administration and Probate Act* (n 44) s 44A.

<sup>110</sup> Note, however, that the Supreme Court has the power to modify the forfeiture rule in the ACT where the justice of the particular case requires it to do so (apart from cases which involve a person who stands convicted of murder): *Forfeiture Act 1991* (ACT) ss 3–4.

<sup>111</sup> '(The distribution in all cases is) after the payment of legacies and debts': *Qur'an* 4:11. However, the wife's *mahr* (being the dowry paid to the wife upon marriage under Islam) is regarded as a debt and must be paid out of the estate with priority as such: see, eg, Hamid Khan (n 28) 31; Abdur Rahman I Doi, *Shari'ah: Islamic Law* (Ta-Ha Publishers, 2<sup>nd</sup> ed, 2008) 256.

<sup>112</sup> *Qur'an* 4:11–12, 4:176.

<sup>113</sup> See, eg, Hamid Khan (n 28) 35.

The *Hanafi* inheritance rules<sup>114</sup> retain elements of the pre-Islamic customary law system.<sup>115</sup> The *Hanafi* inheritance legal system is classified by reference to seven classes of heirs:<sup>116</sup>

1. the Qur'anic heirs ('Sharers');
2. the agnatic heirs ('Residuaries');
3. the uterine heirs ('Distant Kindred', who, together with the Sharers and Residuaries, are the 'Principal Classes');
4. successor by contract;
5. the acknowledged kinsman;
6. the sole legatee; and
7. the state, by escheat (which, together with successor by contract, the acknowledged kinsman, and the sole legatee, are the 'Subsidiary Classes').<sup>117</sup>

The *Qur'anic* verses<sup>118</sup> establish the five Sharers ('Primary Sharers') who are never excluded from inheritance, being (where relevant) the deceased's husband; wife; father; mother; and daughter. While a Primary Sharer will always inherit, his or her beneficial entitlement may be reduced due to the existence of another heir. A number of other Sharers (the 'Substitute Sharers' and 'Secondary Sharers') will only inherit in the absence of the Primary Sharers. The Substitute Sharers include the deceased's paternal and maternal grandmother; agnatic grandfather; and agnatic granddaughter. The Secondary Sharers are the deceased's full sister; agnate sister; uterine brother; and uterine sister.

Where there are no Sharers, or where distribution to the Sharers results in a leftover sum (the residue), the Residuaries will inherit any portion of the estate leftover. While the term 'residuary' implies such shares are nominal, the Residuaries (of whom the most important class are the male agnatic heirs, including the father (in certain cases), son, brother, paternal uncle and nephew) 'were the principal heirs before Islam; they continue to remain in Sunni law the principal heirs provided always that the claims of nearer relations mentioned in the *Qur'an* are satisfied' first.<sup>119</sup> This class of heirs reflects a continuation of pre-Islamic Arabian customary law that prioritised the deceased's male relatives.<sup>120</sup>

<sup>114</sup> Along with the majority of the *Sunni madhhabs*.

<sup>115</sup> Pre-Islamic Arabian inheritance law was based on the principle that only a male who could fight in battle was entitled to inherit. Women were prohibited from inheriting and were themselves property to be inherited upon the death of their male guardian.

<sup>116</sup> Fyzee (n 85) 314–45.

<sup>117</sup> Ibid 320.

<sup>118</sup> *Qur'an* 4:11–12.

<sup>119</sup> Fyzee (n 85) 322.

<sup>120</sup> Jurists rely on a *hadith* to support this class of heirs that mandates Muslims to distribute the shares of inheritance 'to those who are entitled to receive it. Then whatever remains, should be given to the closest male relative of the deceased.': Sahih Al-Bukhari, 'Laws of Inheritance (Al-Faraa'id)',

Only when there are no Sharers or Residuaries will the estate devolve to the Distant Kindred.<sup>121</sup> Where none of the Principal Classes exist, the deceased's estate is devolved to the Subsidiary Classes, 'among whom each class excludes the next'.<sup>122</sup>

Table 1 sets out the Primary Sharers' beneficial entitlements.<sup>123</sup>

**Table 1: Primary Sharers' Beneficial Entitlements under Hanafi Rules**

Heir	Shares		When entirely excluded	When share may be affected	How share is affected
	One	Two or more			
Wife	1/4	Equal share of 1/4 (no children) or 1/8 (children)	Never	Child or child of son hls <sup>124</sup>	Reduced to 1/8
Husband	1/2	–	Never	Child or child of son hls	Reduced to 1/4
Daughter	1/2	Equal share of 2/3	Never	Son	Becomes residuary heir and takes 1/2 share of son as residuary
Mother	1/3	–	Never	Male descendant (son, son's son hls)	Reduced to 1/6
				2 Siblings	Reduced to 1/6
Father	2/3	–	Never	Male descendant (son, son's son hls)	Reduced to 1/6
				Female descendant (daughter, son's daughter hls, but absence of male descendant)	Share reduced to 1/6, but also inherits residue
				No descendant	Inherits entire residue

*Sunnah.com* (Web Page) Volume 8, Book 80, Hadith 724 <<https://sunnah.com/bukhari/85/9>>. The *Shafi'i madhhab* also recognises, for example, that 'inheritors by right of agnation are understood the legitimate inheritors to whom the Koran does not assign a definite fraction of the estate, but who, in default of persons entitled to such fraction, share amongst them the entire succession, and who, if there are persons so entitled, can claim only the remainder, after deducting the portions prescribed in the Book of God': Abu Zakaria Yahya Ibn Sharaf An Nawawi, *Minhaj et Talibin: A Manual of Muhammadan Law, According to the School of Shafii*, tr E C Howard (Independently Published) 251.

<sup>121</sup> Fyzee (n 85) 323. The Distant Kindred are related to the deceased through one or more female links.

<sup>122</sup> Ibid.

<sup>123</sup> Based on the *Hanafi* jurisprudence under the *Sunni* law of inheritance, as expounded by Fyzee (n 85) 314–45.

<sup>124</sup> Meaning 'how low soever'.

Unlike the Australian intestacy rules, there are five generally recognised bars to inheritance under Islamic law. First, non-Muslims are generally proscribed from inheriting from Muslims, and vice versa.<sup>125</sup> Second, illegitimate children can inherit from their mother, but not from their father.<sup>126</sup> Half-siblings may not inherit from one another if one is classed as illegitimate. Third, adopted children are not permitted to inherit from adoptive parents because Islam does not legally recognise adoption.<sup>127</sup> Fourth, full blood relations are entitled to greater beneficial shares from one another than those who are not full blood relations.<sup>128</sup> Fifth, and similarly to Australian law, a person cannot inherit from a deceased if that person killed the deceased.<sup>129</sup>

Importantly, Islamic law directs that a male takes double the inheritance of a female in the same degree of relationship (known as the 'half rule').<sup>130</sup> Additionally, ascendants of the deceased inherit simultaneously with the spouse and issue, and may never be excluded.<sup>131</sup>

### 3 Comparative Analysis of the Intestacy Rules

There are significant differences in the distribution of an estate under the Australian and Islamic intestacy rules, which evidence a broad incompatibility

<sup>125</sup> Usama bin Zaid narrated, the Prophet said, 'A Muslim cannot be the heir of a disbeliever, nor can a disbeliever be the heir of a Muslim': Sahih Al-Bukhari, 'Laws of Inheritance (Al-Faraa'id)', *Sunnah.com* (Web Page) Volume 8, Book 80, Hadith 756 <<https://sunnah.com/bukhari:6764>>. See also An Nawawi (n 120) 253.

<sup>126</sup> See, eg, Fyze (n 85) 320; Hamid Khan (n 28) 29.

<sup>127</sup> The *Qur'an* states that Allah has not 'made your adopted sons your sons. Such is (only) your (manner of) speech by your mouths': 33:4. See also Fyze (n 85) 344. The only circumstances in which adopted children may inherit from adoptive parents is where the adoptive parent provides for the child in the one third of the estate that is permitted to be bequeathed under the Islamic legal rules (discussed later in this article).

<sup>128</sup> The *Qur'an* states that 'kindred by blood have prior rights against each other in the Book of Allah': 8:75. See Sunan Ibn Majah, Chapters on Shares of Inheritance', *Sunnah.com* (Web Page) Volume 4, Book 23, Hadith 2735 <<https://sunnah.com/ibnmajah/23>> where it is narrated that '[t]he killer does not inherit'. See also Fyze (n 85) 344. While the *Sunni maddhabs* agree on the general principle that a killer cannot inherit from his or her victim, there is divergence among the schools as to the exact circumstances in which homicide does constitute a bar to inheritance. For example, the *Shafi'i madhhab* applies the rule absolutely, regardless of moral culpability: Mohammad Mustafa Ali Khan (n 41) 50. Of the *Shafi'i* application of the rule, An Nawawi writes that '[a] person who has killed another cannot succeed to the estate of the person killed: though some authorities admit an exception to this rule in the case of a homicide for which the perpetrator was not in any respect to blame': An Nawawi (n 120) 253. In contrast, the *Hanbali madhhab* provides that a homicide that is justified and not punishable at law will not constitute a bar to inheritance: Mohammad Mustafa Ali Khan (n 41) 50; Coulson (n 85) 180. *Hanafi* and *Maliki* jurisprudence place importance on causation and hold that only a direct, unlawful killing is a bar to inheritance: Mohammad Mustafa Ali Khan (n 41) 50. See also Syed Ameer Ali, *The Law Relating to Gifts, Trusts, and Testamentary Dispositions Among the Mahomedans, According to the Hanafi, Maliki, Shāfi'i, and Shiah Schools* (Thacker, Spink and Co, 1885) 459–61.

<sup>130</sup> See, eg, Fyze (n 85) 318. 'The only exception is the relatives connected through the mother only, like uterine brothers and sisters, when inheriting from each other, take equally, regardless of sex.': Hamid Khan (n 28) 43.

<sup>131</sup> *Qur'an* 4:11. There is a general duty in Islam to provide for one's parents as they age: Mohammad Mustafa Ali Khan (n 41) 12.

between the two systems of intestate succession. For example, the general bars to inheritance under Islamic law highlight the significance that is placed on certain beneficiary characteristics, including their religious affiliation, blood relation to the deceased, adoptive status, and gender. Perhaps the greatest difference between the two legal systems is their application with respect to female beneficiaries. Australian law provides women the same inheritance entitlements as men, echoing the prevailing belief that everyone should be treated equally before the law. Conversely, the Islamic rules show a clear preference for male entitlement over female entitlement. This gender differentiation is traced back to the influence of pre-Islamic Arabian customary law, which preferred male entitlement over female entitlement. It was only the later *Qur'anic* provisions that allowed females to inherit for the first time, and then to a lesser degree than their male counterparts.<sup>132</sup> Mariem Omari ostensibly wanted her estate distributed in accordance with the *Qur'anic* provisions, because she sought to leave a full share to each of her sons and a half share to each of her daughters.<sup>133</sup> This distribution accords with the *Qur'anic* system of forced succession, which requires the estate be devolved to those whom Islam considers to be naturally entitled to it. Nonetheless, due to the unofficial nature of Islamic law in Australia, Muslims who die intestate or, as in Mariem Omari's case, whose wills are found to be void, cannot have their estate distributed according to Islamic law.

The conflicts in intestacy provide a basis from which to evaluate whether Muslims can otherwise assimilate their faith-based obligations with their country-based obligations in matters of inheritance within the current legal framework. Specifically, there are three ways that Muslims can manage the intestacy conflicts.

### ***(a) Unofficial Redistribution of the Estate***

Firstly, where a Muslim dies intestate in Queensland, the deceased's family may choose to re-distribute the estate according to the unofficial Islamic rules after it passes through the official legal system. In such instances, however, it is the living family members' religious beliefs that will determine whether or not distribution occurs according to Islamic law, not the beliefs of the deceased.<sup>134</sup>

### ***(b) Inter Vivos Gifts***

Secondly, Muslims who do not want their estate distributed under the intestacy legal rules may make *inter vivos* gifts during their lifetime, if they satisfy the

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<sup>132</sup> Although males and females do not have equal rights in inheritance, Fyzee argues that '[m]ales and females have equal rights over property' where females, by reason of their sex, do not 'suffer from any disability to deal with [their] share of the property': Fyzee (n 85) 318.

<sup>133</sup> *Omari* (n 1) [8].

<sup>134</sup> Who may, or may not, have wanted their estate distributed according to the Islamic legal rules.

relevant common law rules and the Islamic rules relating to gifts. There are three requirements to be met under the common law rules for gifts: intention to give the gift to the donee; delivery of the gift to the donee (or declaration of trust, or embodiment in a deed); and acceptance of the gift by the donee.<sup>135</sup> *Hiba* is the legal concept in *Hanafi* jurisprudence that refers to an immediate and unqualified transfer. There are three conditions to a valid *hiba*: the declaration of the gift by the donor; the acceptance of the gift by the donee; and delivery of possession to the donee.<sup>136</sup>

Gifting allows Muslims to distribute their estates in accordance with the Islamic rules during their lifetime. However, it also provides them with flexibility to foreshadow and deal with any issues prior to death.<sup>137</sup> This is because, in contrast to the stricter Islamic inheritance legal rules, the Islamic rules relating to *inter vivos* gifts do not impose restrictions on beneficiaries, or limits on the quantum that may be transferred. Practically, however, *inter vivos* gifts can also attract significant stamp duty and other costs.

### (c) Testamentary Instruments

Alternatively, Muslims can make wills that are valid under Islamic law and the laws of the relevant Australian jurisdiction. In fact, will-making is actively encouraged by Australian *imams* and Australian Muslim communities. The Australian National Imams Council website states that '[a]s Australian Muslims, it is our duty to ensure that we have a Will in place which conforms with Islamic

<sup>135</sup> See *Re Cole* [1964] 1 Ch 175, CA; LexisNexis, *Halsbury's Laws of Australia* (online at 17 June 2017) [315] Personal Property, '4 Transfer of Ownership' [315]–[415].

<sup>136</sup> Imam Abu'l-Husayn Ahmad Ibn Muhammad Ibn Ahmad Ibn Ja'far Ibn Hamdan Al-Quduri, *The Mukhtasar of Al-Quduri: A Manual of Islamic Law According to the Hanafi School*, tr Tahir Mahmood Kiani (Ta-Ha Publishers, 2010) 315. The *Shafi'i madhhab* similarly prescribes that a gift is valid whether the object is brought by the donor and taken possession of by the donee, where ownership is transferred upon the donee taking possession with the consent of the donor: An Nawawi (n 120) 234. It appears that *inter vivos* gifts may also be used to remedy some of the injustices of the distribution rules, where parents, for example, may make *inter vivos* gifts to their children to ensure daughters are adequately provided for: Ali (n 129) 45. Note, however, that the *Shafi'i madhhab* explicitly notes that there is uncertainty as to whether parents should be allowed to distribute *inter vivos* gifts equally among their children so as to circumvent the laws of inheritance that provide that sons receive double the share of inheritance as daughters: An Nawawi (n 120) 234–5; Ali (n 129) 176. The *Shi'a madhabs* condone gifts to relatives, in particular the donor's direct descendants, mother and father, and recommend equal distribution among the children: Ali (n 129) 171. There are different rules relating to gifts made in anticipation of death, both under Australian common law and Islamic law. Holmes JA sets out the three threshold requirements for the constitution of a *donatio mortis causa* (deathbed gift) under the common law in *Dufficy v Mollica* [1968] 3 NSW 751, 758. For the rules relating to deathbed gifts (*marad al-mawt*) under Islamic law, see Hiroiyuki Yanagihashi, 'The Doctoral Development of "*Marad al-Mawt*" in the Formative Period of Islamic Law' (1998) 5(3) *Islamic Law and Society* 326; Ali (n 129) 58–64; Doi (n 111) 514; Abdur Rahim, *The Principles of Muhammadan Jurisprudence According to the Hanafi, Maliki, Shafi'i and Hanbali Schools* (Cosmo Publications, 2010) 254–60.

<sup>137</sup> For example, where they wish to ensure their children will receive equal shares regardless of gender, or they wish to provide financial support to a friend.

guidelines and Australian law.<sup>138</sup> As Voyce observes,<sup>139</sup> a number of religious organisations<sup>140</sup> and legal providers<sup>141</sup> offer services relating to drafting Islamic wills. Additionally, the Queensland-based Lambat Trust, in a four-part publication titled *Australian and Islamic Laws of Inheritance*, advise that Muslims ‘do not have a choice’ in following the Islamic distribution rules, directing that ‘it is imperative or obligatory for you, as a Muslim, to make a last will in which you clearly state that your assets/wealth must be distributed in accordance with the Islamic law of succession/inheritance.’<sup>142</sup> The limited research in this area suggests that Australian Muslims are heeding this guidance.<sup>143</sup> It is important to determine, therefore, whether a comparative analysis of the rules relating to testate succession support the claim that Muslims can simultaneously comply with both sets of legal rules relating to wills.

### C *Testate Succession*

Wills are generally encouraged in Australia because they outline how a person wishes their assets to be distributed on death and appoints the person who will be responsible for administering the estate. Importantly, it is either the intestacy rules or the rules relating to wills that will apply to an estate. Conversely, the Islamic inheritance rules outlined above are intended to apply to all Muslim estates, regardless of whether the deceased left a will. While there are Islamic laws relating to will-making, they operate so as to supplement the general rules of distribution, rather than to replace them.<sup>144</sup>

A threshold question arises as to whether Muslims in Australia are allowed to make wills under Islamic law. In pre-Islamic times, men were free to dispose

<sup>138</sup> ‘Islamic and Legal Wills’, *Australian National Imams Council* (Web Page) <<https://www.anic.org.au/islamic-and-legal-wills/>>.

<sup>139</sup> Voyce, ‘Islamic Inheritance in Australia and Family Provision Law: Are Sharia Wills Valid?’ (n 76) 255–6.

<sup>140</sup> For example, the Australian National Imams Council (‘ANIC’).

<sup>141</sup> A search on Google for ‘Islamic wills Brisbane’ brings up numerous legal and religious providers offering services relating to preparing wills in accordance with Islamic inheritance laws.

<sup>142</sup> Ebrahim Iqbal Lambat, *Australian and Islamic Laws of Inheritance: Part I: Drafting a Will* (Lambat Trust, 2005) 4.

<sup>143</sup> In a broader study on will-making in Australia, 16 members of Islamic communities were interviewed, where 11 had made wills and all five non-will-makers ‘intended to make a will and simply had not yet done so’. Additionally, the study found that ‘[m]ost 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’: Wilson et al (n 28) 24–5. See also Cheryl Tilse et al, *Having the Last Word? Will Making and Contestation in Australia* (Report, March 2015) 6–7.

<sup>144</sup> ‘[I]t is ethically incumbent upon a man to make moral exhortations and give spiritual directions to his close relatives, and incidentally, to indicate within the limits laid down by the law what should be done regarding his property’: Fyzee (n 85) 289.

of their property according to their personal wishes.<sup>145</sup> When the *Qur'an* explicitly set out the inheritance distribution rules, 'it was thought undesirable for man to interfere with God's ordinances'.<sup>146</sup> As such, Fyzee reports that 'Muslim sentiment is in most cases opposed to the disposition of property by will'.<sup>147</sup> Despite this, there are multiple *hadith* indicating it is incumbent on Muslims to provide directions to their close relatives as to their property on death within the bounds of Islamic law by will.<sup>148</sup> Doi remarks that, in light of these *hadith*, 'the making of a will is specifically recommended' (*mustahabb*).<sup>149</sup> Although the rules relating to inheritance (*mirath*) are prescribed in the *Qur'an*, the will (*wasiyyah*) remains a way for Muslims to 'leave something for those who are helpless but are not recipients of *Qur'anic* shares'.<sup>150</sup> Therefore, testamentary freedom and a lack of any prohibition on will-making under Islamic law suggests that Islamic wills<sup>151</sup> would be valid under Australian law. It is relevant, then, to comparatively analyse the legal rules relating to wills.

<sup>145</sup> Individual ownership was well established in Arab tribes, and men were able to make *inter vivos* gifts and testamentary dispositions to those who would otherwise receive nothing (eg wives and daughters): Alexander David Russell and Abdullah Al-Ma'Mun Suhrawardy, *Muslim Law: An Historical Introduction to the Law of Inheritance* (Routledge, 2013) 38–9.

<sup>146</sup> Fyzee (n 85) 289.

<sup>147</sup> Ibid. Coulson also notes that traditional *Sunni* jurisprudence 'approves of bequests only where the residue of the testator's estate is substantial enough to constitute a real benefit for his legal heirs. If this is not the case, then bequests, even for charitable or other worthy purposes, are generally disapproved. ... Certainly, in the majority view, the duty to make a bequest as laid down in the earliest *Qur'anic* regulations had lapsed in all cases except where the bequest was designed to discharge a legal duty of the deceased — to pay a debt, for example, which could not otherwise be discharged because of the lack of legal proof.' Coulson (n 85) 215. See also Ali (n 129) 436–8, who discusses the different possible constructions of whether wills are lawful under Islamic law.

<sup>148</sup> Fyzee (n 85) 289–90. 'It is the duty of a Muslim who has something which is to be given as a bequest not to have it for two nights without having his will written down regarding it': Sahih Muslim, 'The Book of Wills', *Sunnah.com* (Web Page) Book 13, Hadith 3987 <<https://sunnah.com/muslim/25>>. See also Imam Malik Ibn Anas, *Al-Muwatta*, tr Aisha Abdurrahman Bewley (Madinah Press, 2004) 314, ch 37.1. There is also the *hadith*: 'A man may do the deeds of the people of goodness for seventy years, then when he makes his will, he is unjust in his will, so he ends (his life) with evil deeds and enters Hell. And a man may do the people of evil for seventy years, then he is just in his will, so he ends (his life) with good deeds and enters Paradise': Sunan Ibn Majah, 'The Chapters on Wills', *Sunnah.com* (Web Page) Volume 3, Book 22, Hadith 2704 <<https://sunnah.com/ibnmajah/22>>. Al-Quduri also confirms that while making a will is not obligatory, it is recommended: Al-Quduri (n 136) 694.

<sup>149</sup> Doi (n 111) 503.

<sup>150</sup> Ibid 502.

<sup>151</sup> The article refers to wills made by Muslims that distribute their estates according to the Islamic legal rules as 'Islamic wills' or 'Muslim wills'. It is acknowledged that all wills made by Muslims (whether they devolve an estate according to Islamic law or not) could be referred to as Islamic wills. Hussain acknowledges that 'there is nothing to prevent a Muslim from making a will which directs that his or her estate is to be distributed according to Islamic law, although the effect of doing this should be carefully considered in the context of current social conditions.' Hussain (n 24) 259.



## 1 *Formal validity of wills*

Australian laws relating to making a will are stricter than those under Islamic law. For example, in the ACT wills must be in writing and signed by the testator or someone else in the presence of, and by the direction of, the testator.<sup>152</sup> Wills must be attested to, and witnessed by, two witnesses in the presence of the testator.<sup>153</sup> The threshold age for making a will is 18 years old, although there are some circumstances in which the Supreme Court can enable a child to make a will.<sup>154</sup> A will is revoked by the marriage of the testator unless explicitly made in contemplation of marriage,<sup>155</sup> and the termination of marriage also generally revokes a testator's disposition to the former spouse.<sup>156</sup> Additionally, a later will revokes a prior will.<sup>157</sup>

In contrast, the threshold for making a will under Islamic law is 16,<sup>158</sup> there is no prescribed form for the drafting of wills, and a will need not be in writing, signed or attested.<sup>159</sup> Gestures, if comprehended, may form part of a will.<sup>160</sup> There are no rules relating to the effect of marriage or divorce on a will, because a testator's spouse is provided for as a Primary Sharer and, similarly, there is no general provision for an ex-spouse. As under Australian law, however, a later will revokes a prior will.<sup>161</sup>

While there are differences in the rules relating to the formal validity of wills under the two legal systems, they are procedural in nature and Muslims can satisfy their obligations under both legal systems by complying with the stricter state and territory laws. Even where Muslims fail to adhere to the formality requirements, the court may, through its dispensing powers, admit a document, or part of a document, purporting to embody testamentary intentions of a

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<sup>152</sup> Wills Act 1968 (ACT) ss 9(1)(a)–(c).

<sup>153</sup> Ibid ss 9(1)(c)–(d).

<sup>154</sup> Ibid ss 8, 8A, 8B.

<sup>155</sup> Ibid s 20(1). However, see ss 20(2)–(3) for circumstances where a marriage will not revoke a will.

<sup>156</sup> Ibid s 20A.

<sup>157</sup> Ibid s 21(b).

<sup>158</sup> Under Islamic law, 'majority' is attained at puberty, and the presumption is that a Muslim attains majority on completion of their fifteenth year': Ali (n 129) 48. The *Sunni* schools diverge in their opinions here, and the *Shafi'i*, *Maliki* and *Hanbali madhhabs* will consider the will of a discerning child as valid. As to the *Shi'a maddhabs*, Ali writes that they hold 'that perfect intellect and freedom are indispensably requisite to the validity of a bequest, and the will of a *majnun* and of a *sabi* (youth or child) under ten years of age is not valid; when he has attained to that age all bequests by him for proper purposes in favour of his relatives and others are lawful according to the most common and approved doctrine, if he is capable of discernment': Ali (n 129) 453–4.

<sup>159</sup> Fyzee (n 85) 291. However, the *Maliki madhhab* requires that a will must take the form of a written document. As oral wills have difficulties of proof, 'most modern Muslim countries require by legislation that a will be in writing or be capable of proof by writing': Hussain (n 24) 141.

<sup>160</sup> Fyzee (n 85) 141.

<sup>161</sup> Hussain (n 24) 143. 'Where a testator makes a will, and by subsequent will gives the same property to someone else, the prior bequest is revoked': Fyzee (n 85) 297. Islamic wills are also revoked where the testator acts inconsistently with a bequest.

deceased person, notwithstanding that it has not been executed in accordance with the formal legislative requirements.<sup>162</sup> As Hallen J observes:

It is not necessary that the document said to be a Will should assume any particular form, or be couched in language technically appropriate to its testamentary character. It is sufficient if it is intended to dispose of property, or of rights of the deceased, in a disposition that is to take effect upon death, but until then is not to take effect but is to be revocable. Although usual, it is not legally essential to find a clear statement identifying the document as a Will.<sup>163</sup>

It is, however, preferable that Muslims comply with the formal requirements of will-making under the relevant Australian state or territory legislation.<sup>164</sup> Where they do so, the formal validity of wills is not an area of legal conflict for Muslims.

## 2 Substantive Validity of Wills

In Australia, a will may only be made by a person with testamentary capacity, which is determined according to the common law principles set out in *Banks v Goodfellow* (the ‘*Banks v Goodfellow Test*’):

It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties — that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.<sup>165</sup>

The testator is presumed to be of sound mind until that fact is proven otherwise.<sup>166</sup> There is a general preference for upholding validly made wills over court made dispositions. As Cockburn CJ has stated, ‘the absolute and uncontrolled power of testamentary disposition conceded by the law is founded on the assumption that a rational will is a better disposition than any that can be made by the law itself.’<sup>167</sup>

Under Islamic law, the testator must simply have capacity, meaning he or she must be ‘a major’ of sound mind, be ‘sane and rational’ and exercise free will.<sup>168</sup> Accordingly, while the threshold for capacity is lower under Islamic law,

<sup>162</sup> *Wills Act 1968* (ACT) s 11A.

<sup>163</sup> *Re Estate of Angius* [2013] NSWSC 1895, [242] (citations omitted).

<sup>164</sup> See, eg, Ben McEniery, ‘Succession Law Keeping Pace with Changes in Technology and Community Expectations: Informal Wills’ (2014) 12(1) *Journal of New Business Ideas and Trends* 1.

<sup>165</sup> *Banks v Goodfellow* (n 6) 565 (Cockburn CJ for the Court). However, where a person is alive and is found to be without testamentary capacity, the court may authorise the making of a will with certain provisions, or that a will or part of a will be revoked or amended on behalf of a person: *Wills Act 1968* (ACT) s 16A.

<sup>166</sup> *Re Estate of Hodges* (1988) 14 NSWLR 698, 706 (Supreme Court of New South Wales).

<sup>167</sup> *Banks v Goodfellow* (n 6) 565 (Cockburn CJ for the Court).

<sup>168</sup> Fyzee (n 85) 292. The *Shafi’i madhhab* provides that capacity to make a will is also afforded to ‘a person otherwise incapable by reason of imbecility’: An Nawawi (n 120) 259.

the principle under both legal systems is intended to achieve the same purpose: that wills are made by capable persons exercising free will. Muslims can thus comply with both legal systems by following the stricter Australian laws.

### 3 *Disposition of Property by Will*

While Muslims can comply with the rules relating to the formal and substantive validity of wills, there are differences in the two legal systems with respect to the property that may be disposed of by will. As an embodiment of the principle of testamentary freedom, Australian law enables the disposition of property according to the deceased's personal wishes, subject to any application for family provision. Using the ACT as an example, s 7(1) of the *Wills Act* provides that '[a] person may, by his or her will, devise, bequeath or dispose of any real or personal property to which he or she is entitled at the time of his or her death, whether he or she became entitled to the property before or after the execution of his or her will.'<sup>169</sup>

In contrast, testamentary freedom under Islamic law is limited in two respects. First, Muslims are limited in the quantum of the property they may devolve by will to one third of their net estate.<sup>170</sup> Secondly, Muslims are proscribed from making a beneficial disposition under the one third legacy to a Sharer.<sup>171</sup> Additionally, the testator must not dispose of property in a way that contravenes the *Shari'a* (eg bequests to a mistress, church, synagogue etc).<sup>172</sup> Yet Muslims can also manage these conflicts by using their testamentary freedom to make a will that devolves one third of their estate in the manner of their choosing<sup>173</sup> and then set out the fixed share entitlements of each heir for the remaining two thirds of the estate. In this way, although testamentary freedom is contradictory to the Islamic fixed share succession system, it is in fact integral to enabling Muslims to comply with their religious obligations in Australia.

The half rule dictates that a female will receive half the share of a male in the same degree of relationship. Research has found that some Muslim will-makers, however, would prefer to distribute assets 'to reflect their personal views of fairness (eg equal allocation regardless of gender, unequal distribution based on

<sup>169</sup> *Wills Act 1968 (ACT)* s 7(1).

<sup>170</sup> See, eg, Hamid Khan (n 28) 244–5; Mohammad Mustafa Ali Khan (n 41) 26; Hussain (n 24) 141.

<sup>171</sup> Unless, in certain circumstances, consent of all the Sharers is obtained for a testamentary bequest to a Sharer and such bequest does not exceed one-third of the estate. See Sunan an-Nasa'i, 'The Book of Wills', *Sunnah.com* (Web Page) Volume 4, Book 30, Hadith 3673, <<https://sunnah.com/nasai/30/33>>. The opinion that a gift to an heir is valid if it falls within one-third of the estate and if the other heirs consent is 'held by the majority of the schools, other than the Ithna-Asharis, Zahiris and Zaidis': Hussain (n 24) 142. The *Shafi'i madhhab*, for example, provides that testamentary dispositions must not exceed one third of the estate and a legacy in favour of an heir 'is valid only if unanimously approved by the coinheritors, after the succession has been opened': An Nawawi (n 120) 260.

<sup>172</sup> Hussain (n 24) 141.

<sup>173</sup> Provided it remains within the *Shari'a* guidelines for the one third disposition (ie, no gift to an heir, no gift to a mistress etc).

need)'.<sup>174</sup> Technically, a deviation from the Islamic rules would void the will under Islamic law. In its direction to Muslim will-makers on similar matters, the Lambat trust quotes Sheikh Al-Qaradawi:

If it happens that a man has made a will for one of his heirs, this will should be executed if endorsed by the rest of the heirs. This opinion is held by the majority of 'Ulama (Muslim scholars). But if any of the heirs object to that will, the will should be executed without tampering with the right of the dissenting heir.<sup>175</sup>

Effectively, a variation to the rules via the one third distribution is acceptable if all the Sharers agree. As such, Muslims may use the one third allowance to increase the beneficial shares of some heirs (for example, a daughter or wife), or provide assistance to other dependants as required (for example, an adopted child) who would not otherwise inherit under the Islamic legal rules.

#### ***4 Muslim Wills Must be Specific***

The decision to make a will is an active choice to have an estate distributed in a certain way, and there are some drafting considerations that need to be addressed for Islamic wills to be valid under Australian law. Specifically, Muslims must ensure their wills clearly set out how their estates are to be devolved. Due care must be taken with respect to 'the construction of the will and its voidness for uncertainty'.<sup>176</sup> Stating that a deceased's estate is to be devolved, for example, 'according to the *Qur'an*', 'according to *shari'a* law', or even 'according to the *Hanafi* school of inheritance law' may be too uncertain for a court to enforce.

As a minimum, Muslim wills should reference a particular document that sets out the rules the testator wishes the estate devolution to follow. The common law doctrine of incorporation by reference establishes that such a document 'may be included in a will by reference, and may be admitted to probate together with the will, provided it existed at the date of the will' and is sufficiently identified.<sup>177</sup> Where the document fails to meet the requirements of the doctrine of incorporation by reference, it may nevertheless be admitted through the court's power to admit informal documents to probate.<sup>178</sup> Nonetheless, best practice would encourage Muslims to explicitly set out in their will the fixed shares to be received by each beneficiary.

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<sup>174</sup> Wilson et al (n 29) 25.

<sup>175</sup> Lambat, *Australian and Islamic Laws of Inheritance: Part I: Drafting a Will* (n 142) 12.

<sup>176</sup> P A Buttar, 'Muslim Personal Law in Western Countries: The Case of Australia' (1985) 6(2) *Institute of Muslim Minority Affairs Journal* 271, 275.

<sup>177</sup> John K De Groot, *Wills, Probate and Administration Practice* (de Groot Publishing, 1985), pt 2.

<sup>178</sup> *Wills Act 1968* (ACT) s 11A.

## 5 *Islamic Will Kits*

It has been suggested that Muslims can use pro forma will kits to assist in complying with the legal rules of both inheritance legal systems.<sup>179</sup> There are also resources that provide detailed guidance on will-making for Australian Muslims who subscribe to the *Hanafi madhhab*.<sup>180</sup> While pro forma will kits can assist Muslims of a particular *madhhab*, the diversity of Australia's Muslim communities and the subtle legal divergences between *Sunni* and *Shi'a* jurisprudence make a single pro forma will kit impractical, because distribution under the different Islamic legal schools 'would yield very different results'.<sup>181</sup> In other words, Muslims who wish to use a pro forma Islamic will kit must ensure that it follows a formula consistent with the legal rules of the particular *madhhab* to which they subscribe, in addition to the relevant Australian State or Territory laws relating to wills.

In summary, comparative analysis indicates there are few legal conflicts between the two legal systems with respect to testate succession as to wills. As such, Muslims may make valid wills under Australian law and simultaneously comply with their obligations arising under Islamic law. However, as *Omari* illustrates, even where legal will kits and other templates are available, 'such tools generally do not provide testators and their families with the advice and guidance necessary in some of the more technical and complicated aspects of effective estate planning'.<sup>182</sup>

## V CHALLENGING ISLAMIC WILLS

While Muslims can maintain an Islamic inheritance by making a will that devolves their estate according to Islamic law, such wills may nonetheless face challenges in Australian courts that will be decided according to established principles of Australian law. *Omari* attracted media attention, much of which incorrectly assumed that the will was being challenged on the basis that Islamic law should not apply to the distribution of the deceased's estate because the principle of a son

<sup>179</sup> Asmi Wood, 'Splitting Heirs — Succession between Two Worlds: Australian Law and the Sharia' in Abdullah Saeed and Helen McCue (eds), *Family Law and Australian Muslim Women* (Melbourne University Press, 2013) 150, 150–1.

<sup>180</sup> Lambat, *Australian and Islamic Laws of Inheritance: Part I: Drafting a Will* (n 142); Ebrahim Iqbal Lambat, *Australian and Islamic Laws of Inheritance: Part II: What to Include in an Estate* (Lambat Trust, 2005); Ebrahim Iqbal Lambat, *Australian and Islamic Laws of Inheritance: Part III: Inheritance Shares per the Shariah* (Lambat Trust, 2005).

<sup>181</sup> Wood (n 179) 159.

<sup>182</sup> Shelley Mulherin, 'Where There's a Will, There's Not Always a Way...' (2013) 227 *Ethos* 17, 17.

inheriting twice that of a daughter was unfair.<sup>183</sup> While that might well have been Mariem Omari's daughter's motivation in lodging the caveat and requiring the executors to prove the validity of the will, vague notions of unfairness do not in and of themselves constitute a cause of action. Media coverage of the case exposed a generally negative attitude towards what is the legal reality in Australia: that Muslims can make valid wills under Australian law that also comply with Islamic inheritance obligations. What is interesting, however, is the assumption that such a will could be challenged on the basis that the testator's wishes were unfair, or in other words, against prevailing community standards that emphasise equality between the sexes.

### ***A Prevailing Community Norms within a Majority Culture Legal System***

The court heard evidence from the Imam of the Canberra Islamic Centre on the process for estate distribution according to Islamic principles, who 'confirmed that the standard expectation is that a Muslim will leave full shares to sons and half shares to daughters. He said that one boy is equal to two girls.'<sup>184</sup> On this basis, Mariem Omari's sons pursued *Shari'a* arguments, essentially seeking that the official legal system facilitate discrimination against their sisters on the basis of gender. They would have undoubtedly fared better if the dispute was resolved informally within the Muslim community according to these Islamic principles. Mariem Omari's daughter (presumably also a Muslim) clearly did not agree with this position and pressed her rights under official law to have the will proven in an Australian court. This was despite evidence suggesting it was her mother's intention and desire to have her estate distributed according to *Shari'a* law.

Accepting that Mariem Omari did not have testamentary capacity at the time she made her will, the court opined that, notwithstanding this, Mariem Omari 'might well have decided to make a will in the same or similar terms'.<sup>185</sup> The court believed that the sons, in wanting to distribute the estate according to the terms of their mother's will, had acted in good faith and with the genuine belief that it was both their mother's duty to make a will according to the Islamic rules, and their duty to distribute the estate according to such rules.<sup>186</sup> Yet neither of these facts entitled the court to distribute the estate according to the unofficial Islamic

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<sup>183</sup> See, eg, Sophie Gosper, 'Respect our Way on Wills, Say Muslims', *The Australian* (online, 15 March 2012) <<https://www.theaustralian.com.au/business/legal-affairs/respect-our-way-on-wills-say-muslims/news-story/0ef657df7d03f52f81843a05c04bb27a>>; Caroline Overington, 'Daughter Disputes Muslim Will That Gave Brothers Twice As Much', *The Australian* (online, 14 March 2012) <<https://www.theaustralian.com.au/business/legal-affairs/daughter-disputes-muslim-will-that-gave-brothers-twice-as-much/news-story/4d4df0ee4a7c2c0521a15a58af83bcf3>>; Patricia Karvelas, 'Roxon Baulks at Role for Sharia', *The Australian* (online, 17 March 2012).

<sup>184</sup> *Omari* (n 1) [49].

<sup>185</sup> *Ibid* [65].

<sup>186</sup> *Ibid* [63].

intestacy rules in the face of established common law doctrine relating to testamentary capacity. In this way, it can be said that testators such as Mariem Omari are somewhat disadvantaged in a legal system where, upon the application of common law legal doctrine, wills can be invalidated and courts required to distribute an estate contrary to the testator's intentions. Spitko frames this disadvantage in the language of the 'majority-culture' that undermines the ability of minority-group testators to exercise their testamentary freedom:

[C]ultural minorities have cause to fear adjudication of their legal rights and responsibilities in a legal system dominated by majority-culture personnel (most notably including judges and jurors). This is particularly true when cultural minorities attempt to use formal legal processes to give effect to choices which are inconsistent with prevailing community norms. In such cases, the substantive merit of their legal claims is at risk of being subjugated to majoritarian values, through a process that relies on members of the majority culture to vindicate the substantive rights at issue.<sup>187</sup>

The court in *Omari* decided the validity of the will using established legal principles relating to testamentary capacity, and in doing so, was not required to opine on, interpret, or apply, religious rules to the matter. Assuming Mariem Omari had testamentary capacity, she could have made a will which complied with the relevant state-based succession rules to give effect to her religious beliefs. In those circumstances, Mariem Omari's daughter would have needed to pursue a family provision claim. The impact of the family provision rules on Islamic wills is examined below.

## **B Family Provision**

A moral duty to provide for one's dependants, enshrined in family provision legislation, can restrict a testator's testamentary freedom in certain circumstances. The class of persons entitled to make an application for family provision varies across the Australian states and territories. In the ACT, the persons so entitled are the deceased's partner; a person other than a partner who was in a domestic relationship with the deceased for 2 or more years continuously at any time; a child; a stepchild; a grandchild; and a parent.<sup>188</sup> In some other jurisdictions, anyone who was dependent on the deceased during their lifetime and has not been adequately provided for after their death may make a family provision application.<sup>189</sup> Courts assess the validity of a family provision claim by reference to a two-stage test:

<sup>187</sup> E Gary Spitko, 'Gone but Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration' (1999) 49(2) *Case Western Reserve Law Review* 275, 275.

<sup>188</sup> *Family Provision Act 1969* (ACT) s 7(1). However, the circumstances in which a stepchild, grandchild and parent of the deceased may make an application for provision out of the estate are limited: ss 7(2)–(4).

<sup>189</sup> For example, in Queensland see *Queensland Succession Act 1981* (Qld) s 41(1).

The first stage calls for a determination of whether the applicant has been left without adequate provision for his or her proper maintenance, education and advancement in life. The second stage, which only arises if that determination be made in favour of the applicant, requires the court to decide what provision ought to be made out of the deceased's estate for the applicant.<sup>190</sup>

A testator's dispositions in a family provision claim are measured by reference to 'that which a just and wise father would have thought it his moral duty to make in the interests of his widow and children had he been fully aware of all the relevant circumstances',<sup>191</sup> measured objectively against prevailing community standards (the 'moral duty test').<sup>192</sup> In this way, courts can alter a will or void a testator's wishes 'where moral rights and obligations of support' have been discarded.<sup>193</sup> However, courts cannot rewrite a will,<sup>194</sup> and intervention should only be to the minimum 'extent necessary to ensure adequate provision for the proper maintenance education and advancement' of an applicant.<sup>195</sup>

There is no legal rule per se regarding family provision under Islamic law, because Islam ingrain family provision into the prescribed shares that are set aside for each close family member, where shares cannot be altered by the deceased based on personal preference. The general rule that there can be no bequest to an heir reflects the underlying belief that the *Qur'anic* system provides appropriately for all of the deceased's heirs, and members cannot apply to have an estate redistributed on a needs basis. Islamic law would oppose a family

<sup>190</sup> *Singer v Berghouse* (1994) 181 CLR 201, 208 (Mason CJ, Deane and McHugh JJ) ('*Singer*'). See also *Vigolo v Bostin* (2005) 221 CLR 191, 230–1 [122] (Callinan and Heydon JJ) ('*Vigolo*'), doubting whether the two-stage test is appropriate in all contexts.

<sup>191</sup> *Re Allen (deceased)* [1922] NZLR 218, 220–1 (Supreme Court). This was accepted as the correct approach to the exercise of jurisdiction in respect of family provision applications in *Singer* (n 190) 209 (Mason CJ, Deane and McHugh JJ).

<sup>192</sup> Pauline Ridge, 'Moral Duty, Religious Faith and the Regulation of Testation' (2005) 28(3) *University of New South Wales Law Journal* 720, 720. All members of the High Court in *Vigolo* (n 190) accepted that such determination will be made by reference to prevailing community standards. Prior to *Vigolo*, there had been some level of disagreement as to whether it was correct to use a moral duty test. Courts had previously considered such applications by placing themselves in the testator's position. In *Re Allardice* (1910) 29 NZLR 959, 972–3 (Court of Appeal), Edwards J stated:

It is the duty of the Court, so far as is possible, to place itself in all respects in the position of the testator, and to consider whether or not, having regard to all existing facts and surrounding circumstances, the testator has been guilty of a manifest breach of that moral duty which a just, but not a loving, husband or father owes towards his wife or towards his children, as the case may be.

This approach has been described as a mere 'gloss' that is 'likely to obscure rather than clarify the legislation': *Re McNamara* (1938) 55 WN (NSW) 180, 181 (Jordan CJ, Nicholas and Owen JJ) (Supreme Court of New South Wales (Full Court)). See also R Atherton, 'The Concept of Moral Duty in the Law of Family Provision: A Gloss or Critical Understanding?' (1999) 5(1) *Australian Journal of Legal History* 5. However, the High Court has upheld considerations of moral claims and moral duty as a 'guide to the meaning of the statute. They are not meant to be a substitute for the text. They connect the general but value-laden language of the statute to the community standards which give it practical meaning': *Vigolo* (n 190) 204 [25] (Gleeson CJ).

<sup>193</sup> *Barns v Barns* (2003) 214 CLR 169, 173 [2] (Gleeson CJ).

<sup>194</sup> *Pontifical Society for the Propagation of the Faith v Scales* (1962) 107 CLR 9, 19 (Dixon CJ).

<sup>195</sup> *Permanent Trustee Co Ltd v Fraser* (1995) 36 NSWLR 24, 43 (Sheller JA) ('*Permanent Trustee*').



member making a family provision claim, because the estate is to be distributed according to the established *Qur'anic* legal rules.

### 1 *The Religiously Motivated Testator*

This article has so far established that there are legal complexities in making a will that is compliant with both the Australian and Islamic inheritance legal rules. If these complexities are overcome, then Muslims can make valid wills under Australian law, which devolve their estates according to the Islamic inheritance legal rules. Such wills are undoubtedly motivated by religious values and principles. When determining the validity of a family provision claim, Australian courts have developed a moral duty test that measures the testator's dispositions against those of an objective just and wise testator who acts in accordance with prevailing community standards. Currently, there is no judicial precedent as to how courts would decide a family provision application with respect to an Islamic will. However, other case law in this area suggests that courts will apply the same moral duty test to Islamic wills as they do in other family provision applications.<sup>196</sup>

For example, the case of *Wenn v Howard* considered the issue of multiple family provision claims made against the will of a religiously motivated testator.<sup>197</sup> In that case, a number of the testator's children had been excluded from his will for not acting in accordance with the Catholic faith (specifically, marrying outside the Catholic Church or failing to attend church services on a regular basis). The executor of the will argued that, because the testator's religious beliefs were so central to his life, the children's actions were a repudiation of the Catholic faith and justified their exclusion from any testamentary entitlement. The court rejected this argument and did not consider it appropriate to measure the testator's actions against those of other devout Catholics. Rather, the court reiterated that the testator's actions should be judged according to prevailing community standards:

[T]he matter to be resolved is whether the conduct of the applicant is such as would, in the eyes of the right thinking and reasonable members of the community, disentitle the applicant to relief: it is not to be tested solely by reference to the question whether it evoked or was likely, having regard to [the] testator's own character and antecedents, to evoke his disapproval. It is not to be tested by whether the applicant's conduct would incur the disapprobation not only of the testator but also of all sincere and reasonable people of his Church.<sup>198</sup>

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<sup>196</sup> See generally Ridge (n 192); Rosalind F Croucher, 'Conflicting Narratives in Succession Law: A Review of Recent Cases' (2007) 14(2) *Australian Property Law Journal* 179; Voyce, 'Islamic Inheritance in Australia and Family Provision Law: Are Sharia Wills Valid?' (n 76).

<sup>197</sup> [1967] VR 91 (Supreme Court of Victoria).

<sup>198</sup> Ibid 95.

A separate line of cases involve family provision claims in rural Queensland farming families, where primogeniture (the right of a firstborn son to inherit their parent's entire or main estate) continues to be a popular concept. Farm families have traditionally embodied a distinct rural ideology that reinforces conventional gender roles:

Farming has always been construed as a man's occupation in Australia and women are usually regarded as inherent dependent farmers' wives and daughters. ... Patriarchy is underpinned by rural cultural norms where, under notions of public and private spheres, men are seen as responsible for the hard and physical work while rural women are seen as the bearers and nurturers of children and responsible for the cultivation of a stable and supportive homelife.<sup>199</sup>

Voyce explores the impact of family provision legislation on this rural ideology, arguing that in previous times courts were sympathetic to testators' wishes that gifted the family farm to a son, provided a life estate for the testator's widow, and presumed that daughters would be provided for in other ways.<sup>200</sup> As such, family provision claims by daughters were often rejected where they had married into families and were sufficiently provided for, 'hence relieving the farm of its obligation to support them'.<sup>201</sup> However, Voyce explores a new group of cases that indicate modern interpretations of family provision legislation no longer endorse the principle that favours the right of sons to inherit farms to the detriment of the testator's other children.<sup>202</sup> Voyce notes that these recent cases show 'decreasing judicial sentiment to accommodate the strong rural norm that sons should automatically inherit a farm to the detriment of those with competing claims' and further, that 'married daughters are decreasingly being deprived of awards because they have married well'.<sup>203</sup>

These decisions highlight that the set of values used to determine whether the testator has fulfilled their moral duty are those of the community at large, as opposed to the values of the community to which the deceased belonged. Such an approach inevitably impacts minority groups whose values diverge from those of the majority.<sup>204</sup> It has been stated more broadly that 'it is unlikely that the standard will be met by a person with religious convictions ... especially if he or she belonged to a minority religious group'.<sup>205</sup> With respect to wills made by Muslims who devolve their estates according to the Islamic legal rules, it is unlikely that some provisions of such wills<sup>206</sup> would meet the standard of the

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<sup>199</sup> MB Voyce, 'The Impact of the Testator's Family Maintenance Legislation as Law and Ideology on the Family Farm' (1993) 7(3) *Australian Journal of Family Law* 191, 193–4 (citations omitted).

<sup>200</sup> *Ibid* 206.

<sup>201</sup> *Ibid*.

<sup>202</sup> *Ibid* 208.

<sup>203</sup> *Ibid* 208–9 (citations omitted).

<sup>204</sup> Ridge (n 192) 721.

<sup>205</sup> *Ibid* 726.

<sup>206</sup> For example, bequeathing a daughter half the amount of inheritance as a son, or bequeathing only one-quarter (or one-eighth) of an estate to a surviving wife (or wives).

moral duty test, and courts will be reluctant to deny family provision claims by dependants left in need, regardless of the testator's religious beliefs. The fact that a will has been made in accordance with religious legal rules that do not match broader community values might also be used as a bargaining chip in pre-litigation mediation or settlement negotiations relating to family provision (for example, by a deceased's daughter or wife) even where the applicant has not necessarily been left in financial need.

## ***2 Criticisms of the Current Family Provision Legislation***

Australia's inheritance law emphasises testamentary freedom and provides all citizens the ability to make a will devolving their estate according to their personal wishes. For Muslims, testamentary freedom is critical to facilitating their ability to abide by religious laws. Yet testamentary power is not unfettered, and successful family provision applications will override a testator's personal wishes. Two criticisms are made with respect to the impact of family provision laws on Islamic wills. First, it is questioned whether the moral duty test remains the most appropriate approach to assessing a family provision claim made by a testator from a minority community. Second, broader discontent with family provision legislation argues it is corroding the principle of testamentary freedom.

### ***(a) The Moral Duty Test in a Pluralist and Multicultural Society***

The moral duty test has been criticised as 'unsatisfactory and inappropriate',<sup>207</sup> 'fundamentally flawed',<sup>208</sup> 'problematic in a pluralist and multicultural society'<sup>209</sup> and as 'too vague to ensure that the purpose, meaning and effect of the law are clearly communicated'.<sup>210</sup> As Perry ACJ has stated:

I tend to think that in the pluralist, multicultural society in which we now live, it is difficult to identify a single, commonly accepted set of moral precepts. Differing cultural, religious and other beliefs and practices may well give rise to quite different but honestly held views as to what may be regarded as the appropriate manner in which a testator should make provision for his family.<sup>211</sup>

<sup>207</sup> Virginia Grainer, 'Is Family Protection a Question of Moral Duty?' (1994) 24(2) *University of Wellington Law Review* 141, 161.

<sup>208</sup> Ridge (n 192) 739.

<sup>209</sup> Ibid 738.

<sup>210</sup> New Zealand Law Commission, *Succession Law: Testamentary Claims* (Preliminary Paper 24, August 1996) 14 [50]. For criticism of the 'moral duty' test in Australian courts, see, eg, *Coates v National Trustees Executors & Agency Co Ltd* (1956) 95 CLR 494, 512 (Williams J), 522 (Fullagar J); *Hughes v National Trustees, Executors & Agency Co of Australasia Ltd* (1979) 143 CLR 134, 158 (Murphy J); *Goodman v Windeyer* (1980) 144 CLR 490, 504–5 (Murphy J); *Singer* (n 190) 209 (Mason CJ, Deane and McHugh JJ); *Permanent Trustee* (n 195), 44 (Sheller JA). The High Court, however, reversed its attitude towards the moral duty test in *Vigolo* (n 190).

<sup>211</sup> *Drioli v Rover* [2005] SASC 395, [144].

Indeed, Ridge observes there is a ‘danger of injustice’ when judges applying the moral duty test in family provision claims ‘make assumptions regarding the content of community standards without clearly articulating the bases on which these assumptions are made and without referring to supporting evidence’.<sup>212</sup> The New Zealand Law Commission takes the view that using prevailing community standards to judge testators’ dispositions

might have been acceptable when people had a common (if gendered and monocultural) vision of the family. But we now accept that families are different and should not be treated all in the same way. They differ in their ethnic and cultural backgrounds ... We now believe that the value systems of a prevailing culture or a particular type of family should not be applied indiscriminately to others who do not share that system ...<sup>213</sup>

Reference has also been made to *inter vivos* gifts,<sup>214</sup> and the New Zealand Law Commission recognises that ‘no-one making a gift to one of their adult children is legally required to consider whether they are being fair to their other children. But when applying the [family provision legislation], courts often question the fairness of wills as between two or more children’.<sup>215</sup> The interpolation of morality by reference to prevailing community standards into the construction of family provision legislation is at odds with the principle of testamentary freedom. Consequently, Muslim will-makers who wish to abide by their religious obligations may be disadvantaged with respect to a family provision claim, because their dispositions will be judged against the values of the broader community.

### ***(b) An Erosion of Testamentary Freedom?***

More broadly, scholarly commentary suggests that family provision no longer fulfils its original intent and is eroding testamentary freedom.<sup>216</sup> Jurisprudence in this area has developed ‘to the point where disinheritance is almost impossible within a family circle if recourse is had to mediation or the courts’<sup>217</sup> under family provision legislation where ‘the pendulum has swung too far in favour of family provision applicants’.<sup>218</sup> This argument stems from the significant number of

<sup>212</sup> Ridge (n 192) 728.

<sup>213</sup> New Zealand Law Commission (n 210) 2 [9].

<sup>214</sup> Where testamentary freedom was seen ‘as a natural extension of the rights of disposition of property *inter vivos*’: Rosalind F Croucher, ‘How Free Is Free? Testamentary Freedom and the Battle between “Family” and “Property”’ (2012) 37 *Australian Journal of Legal Philosophy* 9, 11.

<sup>215</sup> New Zealand Law Commission (n 210) 2 [7].

<sup>216</sup> See generally Sylvia Villios and Natalie Williams, ‘Family Provision Law, Adult Children and the Age of Entitlement’ (2018) 39(2) *Adelaide Law Review* 249; Myles McGregor-Lowndes and Frances Hannah, ‘Reforming Australian Inheritance Law: Tyrannical Testators vs Greying Heirs?’ (2009) 17(1) *Australian Property Law Journal* 62; Croucher, ‘How Free is Free? Testamentary Freedom and the Battle between “Family” and “Property”’ (n 214).

<sup>217</sup> McGregor-Lowndes and Hannah (n 216) 62–3.

<sup>218</sup> *Ibid* 71.

successful family provision claims made by financially comfortable applicants that go directly against the testator's wishes. Villios and Williams argue that

family provision laws have broadened substantially through judicial interpretation and legislative amendments. What started out as a protective measure to ensure adequate provision for dependent widows and orphans has transformed into a rigid entitlement to inheritance rights for financially comfortable applicants. The current law faces heavy criticism over its excessive encroachment on testamentary freedom and encouragement of opportunistic claims ...<sup>219</sup>

With respect to Islamic wills, a disregard for the testator's wishes in a family provision claim has the potential to disrupt estate devolution according to the Islamic legal rules and render the distribution void under Islamic law. Practically, however, there have been no cases in Australia that consider a family provision application with respect to an Islamic will.<sup>220</sup> One study opines that, because Muslim families do not appear to contest wills, the current legal framework 'has had little impact on the inheritance practices of Muslim families'.<sup>221</sup> Other research validates some Muslim concerns about possible estate contestation by their children, whose values may not match those of their parents.<sup>222</sup> It is true that there may be a failure by Muslims to engage with the official legal system even though family provision claims have a high likelihood of success. However, without further research this claim remains unsubstantiated. For example, given that '[a]lmost all family provision claims settle at mediation, including those that might not have succeeded at trial',<sup>223</sup> a lack of case law does not mean that Islamic wills are not contested. Alternatively, it might be representative of a broader desire by Muslim communities to accommodate both legal systems and respect a testator's wishes to have their estate devolved according to their religious beliefs, even where a beneficiary may have a valid family provision claim.

## VI CONCLUSION

This article has established that, although there is inflexibility in the Australian intestacy rules, Australian inheritance law can otherwise accommodate Islamic inheritance law through the use of testamentary instruments, such that Muslims are largely able to assimilate their faith-based legal obligations with their

<sup>219</sup> Villios and Williams (n 216) 249.

<sup>220</sup> This is contrary to commentary in the United States context, which claims that 'due to the religious nature of the will bequests, Sharia-compliant wills are often more likely to be challenged. Bequests under the Sharia law tend to distribute the wealth to a larger number of individuals, forcing several family members to receive a lesser share than they would otherwise receive under state intestacy laws. Thus, certain family members have a greater incentive to contest the will': Omar T Mohammedi, 'Sharia-Compliant Wills: Principles, Recognition, and Enforcement' (2012–2013) 57(2) *New York Law School Law Review* 259, 281.

<sup>221</sup> Voyce et al (n 33) 221.

<sup>222</sup> Wilson et al (n 29) 25–6.

<sup>223</sup> Victorian Law Reform Commission, *Succession Laws* (Report, August 2013) xvii [24].

country-based legal obligations. It is important for practitioners to be aware of the complexity inherent in drafting a will that needs to comply with two legal systems. While Islamic will kits go some way to providing Muslims the ability to draft *Shari'a*-compliant wills, specific legal advice is recommended to ensure compliance with the relevant State and Territory legislative framework.

While Muslims must carefully navigate the complexities of dual inheritance legal systems, this article has not identified any manifest inadequacy in the current legal framework that hinders Muslims in maintaining an Islamic inheritance. There are, however, two instances where Muslims remain at a disadvantage under state succession laws: first, a successful challenge to the validity of an Islamic testamentary instrument will result in the default application of the intestacy legal rules where courts cannot account for a testator's intention to distribute their estate according to religious principles, as illustrated by *Omari*; and second, Islamic wills are at heightened risk of successful family provision claims because the imposition of prevailing community norms to judge testator dispositions inevitably disadvantages Muslim will-makers whose views might diverge from the majority.

As regards the second instance, this article has found that evaluating an Islamic testator's dispositions against those of a just and wise testator according to prevailing community standards is not completely compatible with a pluralist and multicultural society such as Australia. Accordingly, further research into how family provision legislation might be reformed is necessary to ensure it meets the needs of all Australians and upholds the guiding principle of testamentary freedom, while remaining a safeguard for those who have not adequately been provided for out of an estate.