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AUSTRALIAN SUCCESSION LAW IN CONVERSATION WITH THE "INHERITANCE LAWS" OF RELIGIOUS COMMUNITIES

by

Justice Geoff Lindsay AM
Equity Division
Supreme Court of New South Wales

INTRODUCTION

1 Professor Prue Vines, of the University of NSW's Law Faculty, has long had an interest in a perceived need for culturally appropriate wills in a multicultural society, with a particular interest in how to manage an Indigenous intestate estate.

2 My judgment in *Re Estate Wilson, Deceased* [2017] NSWSC 1; 93 NSWLR 119 (dealing with Part 4.4, sections 133-135, of the *Succession Act* 2006 NSW) has not escaped her critical attention: P Vines, "Just and Equitable Distribution on Intestacy According to Aboriginal Tradition - The First Use of the Succession Act 2006 NSW, Part 4.4" (2017) 11 *Journal of Equity* 114; "Re Estate Wilson, Deceased (2017): The Last Frontier for Aboriginal Intestacy in Australia? in B Sloan (ed), *Landmark Cases in Succession Law* (Hart Publishing, 2019), Chapter 20; R Croucher and P Vines (eds), *Succession: Families, Property and Death* (LexisNexis, Australia, 6th edition, 2024), paragraph [5.36] *et seq*.

3 I look forward to publication of an essay prepared by Professor Vines (entitled "Cultural Negotiation of Inheritance Law in Australia") as a chapter in a book entitled *Life and Death in Private Law* due to be published by Hart Publishing later this year, edited by Kit Barker, Kate Falconer and Andrew Fell.

4 In that paper Professor Vines draws to attention the fact that religious culture can make a substantial difference to attitudes to death and succession law.

5 She notices that that is true of the distinctive cultures associated with each of the Christian traditions (Catholic, Protestant and Orthodox), Judaism, Islam, Hindu and Buddhism, not to mention Australia's own Indigenous people.

RE ESTATE OF AHMED ABOU KHALID

6 As it happens, Professor Vines' recent treatment of this topic has come to my notice at a time I have been called upon, as a judge of the Supreme Court of NSW, to grapple with the proper construction (and operation in the administration of a deceased estate) of **a testamentary direction in the will of an observant Muslim for the deceased's legal personal representative to "pay [the deceased's] debts, funeral and testamentary expenses, death and estate duties *and zakat payments***: *Re Estate of Ahmed Abou Khalid* [2024] NSWSC 253 (18 March 2024).

7 This paper provides a brief outline of salient points in that judgment, drawing on the text of the judgment.

8 Although the judgment deals specifically with an Islamic faith community the legal principles identified are of general significance for all religious communities which perceive that their faith compels them to adhere to an idiosyncratic "customary inheritance law" that distinguishes them from the mainstream community within which they live and die.

9 The case came before me as an application by the legal personal representative of the deceased (an independent administrator) for an order for the partial administration of the deceased's estate (under the *Uniform Civil Procedure Rules* 2005 NSW, rule 54.3) or for judicial advice under section 63 of the *Trustee Act* 1925 NSW.

10 These two heads of jurisdiction are complimentary. Each provides a vehicle for a determination of the question ultimately stated for the Court's attention in the

Statement of Facts filed in support of the summons: Whether the administrator would be justified in distributing the whole of the estate of the deceased without applying any part of the estate towards payment of Zakat in accordance with the direction in the deceased's will.

11 The question, on one view of the case, was whether the deceased's will itself, by its terms express or implied, authorised or mandated some form of Zakat payment or service absent an extrinsic obligation to perform a Zakat function.

THE FACTUAL CONTEXT

12 "Zakat" is a distinctly Islamic form of charitable donation, the nature and parameters of which, within an Islamic community, are governed by "Sharia Law".

13 There is no single body that receives Zakat in Australia. There is no secular law or instrument of secular government that requires, let alone compels, Zakat payments to be made. Custom within a particular Islamic community apart, there is no set rate for Zakat payments. In Australia, Zakat payments are voluntary, a function of the conscience of individual Muslims.

14 In substance, the deceased's will contained no explicit profession of a religious faith, but it provided for the payment of "zakat payments" and for distribution of the deceased's estate to his children (favouring a son over daughters in the ratio of 2:1) as indicia of a "Sharia (Islamic) Law compliant will" as understood by the deceased. The 2:1 preference for sons over daughters is perhaps the most commonly embraced feature of a "Sharia will" of any description.

15 The preference afforded sons over daughters bears upon the nature of Sharia Law and incidentally upon the nature of Zakat. A will structured as was the will of the deceased in this case might, in a particular case, involve a tension between a perceived religious obligation to "do charity" by payment of Zakat and a religious obligation to deny testamentary provision to a daughter in need even if it can reasonably be seen that she cannot rely on a brother to address her need from his more generous inheritance.

16 Some commentators on Islamic law maintain that an observant Muslim intent upon leaving a Sharia-compliant will is bound by his or her faith to leave a will that gives his or her estate to family members in fixed proportions that favour sons over daughters *regardless of need*.

17 In justification of this view, it is said that under Sharia Law males within a family have a religious duty to support female family members and that, consistent with this, sons have a religious duty to support sisters.

18 If that is the case, there appears nevertheless to be no testamentary practice of expressly articulating a son's obligation to support his sisters as a condition of preferment or by subjecting a gift to him to a trust in favour of his sisters for their maintenance, education and advancement in life. In the absence of a firm, enforceable, explicit commitment on the part of a son, a court exercising family provision jurisdiction might be reluctant to embrace that line of reasoning in disposition of a daughter's application for a family provision order.

19 The justification for favouring the male line over the female is grounded, in historical terms, upon a contention that a virtue of the Sharia fixed proportions inheritance scheme is that it was introduced to favour women by ensuring that they received something (instead of nothing) under earlier inheritance laws.

20 Although Sharia Law evidently has capacity, within the Islamic faith, to adapt to changing social conditions the preferential treatment of sons over daughters is generally justified in dogmatic terms.

21 A seemingly small question about the validity of the testamentary direction to pay "zakat payments" required a detailed exploration of the meaning of "zakat" in the context of a will understood by the testator to be compliant with "Sharia Law".

THE CONCEPTS OF "ZAKAT" AND "SHARIA LAW"

22 The *Concise Australian Legal Dictionary* (LexisNexis, Australia, 6th edition, 2021) defines "Zakat" in the following terms:

> "**Zakat** Ar-charity tax. The payment of alms or a tithe which will be used for Muslims in need. The payment of *Zakat* is required as one of the five pillars of Islam: *Qur'an* 8:60."

23 Jamila Hussain in *Islam: Its Law and Society* (Federation Press, Sydney, 3rd edition, 2011), at page 208, makes the following observations (omitting footnotes):

> "Some writers have described zakat as a form of taxation. Others have translated it as 'alms', suggesting that it is purely a charity. It has also been called 'an act of worship expressing a Muslim's gratitude for God's *financial* gifts'. It is similar in concept to a tithe, its purpose being to discourage the concentration of wealth and to 'purify' the surplus wealth of the relatively well-to-do by re-disposition to the poor. It discourages hoarding and encourages the return of idle wealth into economic activity for the benefit of society generally."

24 To describe Zakat, without qualification, as a "tax" is too strong a meaning to attribute to the word in the context of the will here under consideration. A better description (which reflects legal advice likely to have been given to the deceased at the time he executed his will) might be "a philanthropic donation (of money or kind) commonly expected within an Australian Islamic community to be paid voluntarily by an observant Muslim". What, for some, is a "tax" is for others a "free will offering". The proper meaning to be attributed to "Zakat" depends on context.

25 To the Islamic faithful Zakat is seen as a distinctively Islamic form of charity, but not the only form of charity known to them. It has parallels in a shared history of Judaism and Christianity (evidenced by the concept of a tithe grounded in the Hebrew Bible, the Torah, and the Christian Old Testament), but a distinctive field of operation defined by Islamic scripture, tradition and practice.

26 "Sharia" is regarded as the code of conduct or law of religion of Islam. It is perceived to be a metaphor for achieving salvation for God's ordained total way of life.

27 The customary inheritance rules of Islamic communities vary from place to place, although they have a common foundation in religious literature (notably, the Qur'an and the Sunna) regarded by Muslims to be sacred scripture.

28 The Qur'an records revelations received by the Prophet Mohammed from God. The Sunna is a compiled record (including but not limited to entries of a legal nature) of words, deeds and actions of Mohammed and his implicit approval or disapproval of others' actions around him.

29 There is a vast pool of literature on the meaning, terms and operation of "Sharia Law" throughout the world, including scholarly works about the intersection between Sharia Law and various national, secular legal systems viewed, particularly, from an Islamic perspective. **There is, however, a dearth of Australian case law dealing with the meaning of "Sharia law", a "Sharia will", a "Sharia-compliant will" or (*inter vivos* or testamentary) "zakat".**

30 In her paper entitled "Family Provision and Islamic Wills: Preserving the Testator's Wishes through Testamentary Arbitration?" (2023) 46 *UNSW Law Journal* 205 at 216, Brooke Thompson maintains that "[the] only Australian case to consider an Islamic will" is *Omari v Omari* [2014] ACTSC 202; (and on appeal) [2016] ACTCA 16; 14 ASTLR 23. That appears to be the common view of other commentators on Islamic law. Nothing to the contrary emerged during the proceedings before me. Although *Omari* demonstrates the dynamics of an Islamic family with different perspectives of enforcement of a contested "Islamic will", in default of which a testatrix would die intestate, the legal issue upon which the case turned was whether or not the testatrix had testamentary capacity, which the Court found she did not.

31 The meaning of "zakat" cannot be determined without placing it within the broader concept of Sharia Law, which views inheritance law as including arrangements for the management of property within a family antecedent to death and, upon death, succession to property within a family, imagining that although property may be held by an individual member of family he or she holds it (in a religious sense) on trust for the family.

"SHARIA LAW" AS A FEATURE OF A VOLUNTARY ASSOCIATION

32 The meaning and legitimate operation of Sharia Law in an Australian context cannot be determined, at least in relation to inheritance law, unless it is placed (conceptualised) within the context of the general law governing a religious community operating as a voluntary association and recognised, in essence, as "the rules" of "a club" of like-minded people. Depending on context, and the form such "rules" take, they could equally be called "religious customary law".

33 This is a point which may not have been fully appreciated in conversations about the place of "Sharia Law" in the Australian legal system, despite the deployment of corporate structures within the Islamic community for local mosques and regional representative bodies.

34 Through the deployment of voluntary associations, local and regional communities can accommodate their particular and shared religious beliefs and practices, providing for continuity and change from which a broadly based consensus might emerge and differences might be managed.

35 In *Attorney General Ex rel Elisha v Holy Apostolic and Catholic Church of the East (Assyrian) Australia NSW Parish Association* (1989) 98 ALR 327 at 348; 95 FLR 392 at 412-413 Young J (a leading Australian authority on law and religion) adopted as convenient for analysis of different models of church governance a scheme distinguishing between the "Hierarchical", the "Presbyterian" and the "Congregational".

36 The Hierarchical model is one which has a superior clergy and in which the government of the church is committed to those superior clergy. The "Presbyterian" model is where there are a succession of committees at national, regional and local level, so that a decision of the local congregation may, in appropriate cases, be overturned by that of a general assembly. With a "Congregational" model, the local congregation is the body which makes or unmakes the rules.

37 Accepting: (a) that Islam has no "clergy" or religious authority akin to those who serve a Christian church; (b) that religious specialists in Islam do not practise sacramental or priestly functions; and (c) that Muslim clerics do not serve as intermediaries between human beings and God but principally serve as teachers, guides, judges and community leaders (Jan A Ali, *Islam and Muslims in Australia: Settlement, Integration, Shariah, Education and Terrorism* (Melbourne University Press, 2020), page 116), the centrality of a local mosque to the lives and worship of observant Muslims suggests that a standard model for the governance of an Islamic community in Australia is "Congregational" in character as adherents gather together with like-minded believers within a broader, more diffuse Islamic community.

38 What is spoken of as "Sharia Law" in an Australian context is perhaps best understood, in a legal context, as an understanding of the rules of practice indicative of religious obligations voluntarily assumed by a participant in an Islamic community as part of the consensual compact between members of the community, not (without entry into an obligation independently enforceable at law or in equity or as may be necessary to determine a "civil or propriety right" or a dispute about property) enforceable under the general law.

39 In court proceedings concerning members of a religious community the nature and effect of the obligations of a member of the community (a voluntary association) must generally be established by evidence or admissions: *Scandrett v Dowling* (1992) 27 NSWLR 483 at 491B-E. The law recognises in this way that in the determination of a particular controversy the facts of the case are of central importance.

40 In an Australian context, Sharia Law takes its colour from local communities, each member of which, by dint of his or her membership, may be required to submit to the religious practices of his or her particular community, may be excused from doing so or may cease his or her membership, moving on to another community. This, at least, reflects the essence of a voluntary

association of co-religionists: *Scandrett v Dowling* (1992) 27 NSWLR 483 at 522F.

THE LEGAL NATURE OF A RELIGIOUS COMMUNITY

41 The character of an obligation to pay Zakat under "Sharia Law" (understood in Australia to be a religious obligation of individual conscience) invites consideration of the legal character of "Sharia Law" under Australian law and its intersection with the general law.

42 Under the general law a religious body is in the eyes of the law a voluntary association, the mutual relations and obligations of the members of which are regulated by the terms of an agreement or "consensual compact" to which they are parties: *Macqueen v Frackelton* (1909) 8 CLR 673 at 679; *Wylde v Attorney-General (NSW) (at the Relation of Ashelford)* (1948) 78 CLR 224 at 257, 275, 286, 298.

43 The terms of a "consensual compact" may not be enforceable in a secular court absent a need for the court to determine a civil or proprietary right in a dispute between contesting parties.

44 In an Australian context, Sharia Law may inform the operation of Australian law, as may the rules of practice of non-Islamic religious communities, but they cannot rise above, or operate outside of, the general law.

45 In Australia, in common with "the Law" of other religious communities, "Sharia Law" is (to adopt a description of "Islamic economics" in Mona Atia, *Building a House in Heaven: Pious Neoliberalism and Islamic Charity in Egypt* (University of Minnesota Press, Minneapolis, 2013) at page 5), a body of knowledge and a set of practices resulting from the application of an Islamic ethical framework to legal concerns. It might inform an application of the general law but it is not itself a law of general application.

46 Importance may attach to identification of a testator's particular Islamic community because of the diversity of communities within the global or national

community of persons who share an Islamic faith. Australian Muslims represent an exemplar of this because of a variety of cultural traditions they each enjoy from their family's particular place of origin within a world-wide setting. Differences between Sunnism and Shi'ism are perhaps the most prominent example of differences within a common cause; but, in Australia, Islamic communities are free, within the general community of Australia, to gather together, to coalesce and to stand apart as they may be moved to do. The general law endeavours to respect the individual living, and dying, in his or her community.

A LAWYER'S APPROACH TO GIVING ADVICE ABOUT A "SHARIA WILL"

47 In preparation of the judgment in *Re Estate of Ahmed Abou Khalid* I became aware that a number of solicitors are said to have developed a practice of promoting their professional services by claiming expertise in the preparation of a "Sharia will". I have not been provided with empirical evidence of this and, accordingly, I am not to be taken to have endorsed, or criticised, claims by particular solicitors of expertise in "Sharia law". **I do, however, counsel caution against dogmatic claims of expertise in an area of law at the intersection of "law" and "religion" which, because of diversity within Islamic communities, is inherently uncertain unless tied to a particular tradition in the particular community of the person who seeks to make a will**.

48 If (as appears to be the case) a scheme for the distribution of estate assets traditionally favoured by some Islamic communities is at the core of what is meant by a "Sharia will", and if the exercise of making a will is one that requires a testator to act in consultation with his or her family, a solicitor needs clear boundaries to be drawn in identifying his or her client, limiting the possibility that a disappointed beneficiary might look to the solicitor for compensation: cf, *Hill v Van Erp* (1997) 188 CLR 159. A solicitor needs to ensure that the testator is fully informed about the potential operation of the Court's family provision jurisdiction, including its jurisdiction under Chapter 3 of the *Succession Act* 2006 NSW to make an order for the designation of property as notional estate.

The complexity of what is said to be a traditional Islamic system of inheritance law invites caution in a simple representation of an ability to draft a “Sharia compliant will”.

49 There is, at least, doubt about whether there is a settled concept of a “Sharia compliant will”. To the question, “Is this a Sharia will?” the appropriate response might be: “Who wants to know and for what purpose?”

50 Questions like these may need to be addressed because the issues they raise, and any answers to them, may depend upon the estate planning arrangements of a prospective testator and the potentially different perspectives of his or her immediate family (spouse and children, including adopted or ex nuptial children who might be excluded from benefits under a “Sharia will”), members of his or her extended family (who might have expectations of benefit under a “Sharia will”) and dependents and charities who might have an expectation of, or a perceived need for, testamentary recognition.

51 If (but, perhaps, only if) a testator’s wealth justifies the expense and administrative inconvenience of legal structures like a “family trust” or a “family company”, and he or she is prepared to cede ownership or control of property in anticipation of death, he or she might, in life, distribute property in a way that represents a just and fair outcome for his or her family (however defined) not constrained by a forced succession style of will commonly associated with the concept of a “Sharia will”.

52 A lawyer advising an observant Muslim about the management of his or her property in anticipation of death needs, at that time, to be able to look at his or her client’s personal circumstances in terms of past experience, the present state of affairs and the likely future course of the inheritance process within the client’s family, however defined. Likewise, a lawyer acting for the legal personal representative of a deceased observant Muslim needs to be able to look at that process in retrospect in order to appreciate nuances that might be at the core of tensions between the general law of succession and the experiences, and

expectations, of the deceased's family, be they themselves observant Muslims or not.

POINTS OF INTERSECTION BETWEEN "SHARIA LAW" AND AUSTRALIA'S LAW OF SUCCESSION

53 There appear to be three points of intersection between "Sharia Law" and the Australian law of succession, which may require careful management by those engaged with an observant Muslim who seeks to make a "Sharia will" to accommodate the religious views of his or her community or in administration of the estate of such a person. They are not unique to an Islamic community but might be encountered in connection with any community in which individuals who are part of the community live with an expectation (of themselves and others) that idiosyncratic inheritance rules govern the administration of a deceased estate.

54 **The first point of intersection** (perhaps the most difficult for a legal advisor) occurs during a phase of estate planning when it is necessary to identify a testator's community, the inheritance rules customarily associated with that community, and interests that may be affected by the death of the testator (which may or may not involve consultations with others than the testator) so that he or she can make an informed decision about whether or not to make a will and the terms of any will that might be made, to die intestate, or to effect *inter vivos* transactions in order to manage or circumvent customary inheritance rules.

55 **The second point of intersection** occurs during the administration of an intestate estate should an individual (by choice or otherwise) be found to have died without a will. This may or may not involve management of a community's expectations about who should administer the estate and whether beneficiaries under statutory rules for the distribution of an intestate estate should make concessions to others who may have a claim on the deceased's bounty according to customs of the community. A person who chooses to die intestate should perhaps be cautioned against unwittingly leaving a written explanation

of his or her decision to die without a will lest it be advanced by an interested person as an informal will.

56 **The third point of intersection** occurs when decisions must be made about whether an application for a family provision order should be made or opposed, whether any persons outside the class constituted by the immediate family of the deceased, his or her beneficiaries and persons eligible to make a family provision application should be consulted, and whether it is or is not forensically prudent to raise an issue about the operation of customary law which might involve expense and delay not cost effective or warranted in the due administration of a deceased estate.

57 It may be unwise for solicitors and testators to label a will as a "Sharia (compliant) will" because to do so may invite disputes about the extent to which, if at all, contested views about the nature and content of "Sharia law" should be taken into account in the administration of a deceased estate.

THE OUTCOME IN *RE ESTATE OF AHMED ABOU KHALID*

58 In the context of the will of the deceased as a whole (and, in particular, the words "pay my debts, funeral and testamentary expenses, death, estate duties" with which it is associated) **the expression "Zakat payments" in the testamentary direction for the payment of debts in the deceased's will referred, in my opinion, to a conscientious commitment entered into by the deceased during his lifetime, enforceable at law or in equity, against his deceased estate, for a payment of money or a payment in kind of a type recognised in his community as a Zakat purpose not proscribed by Australian law**.

59 In my opinion, the deceased's testamentary direction to "pay … Zakat payments", if unqualified by the existence of a liability at law or in equity accrued by the deceased during his lifetime, would have been void for uncertainty because it would have to be construed as conferring on a legal personal representative a power, and a duty, to exercise the function of making unconstrained discretionary "payments" of an unspecified character and value

to unidentified parties for a particular purpose or purposes of an indefinite nature: cf *Tatham v Huxtable* (1950) 81 CLR 639 at 653.

60 I did not accept that an unqualified direction to pay "Zakat payments" could be saved by an assumption that the deceased, or his estate, might have a "religious liability in the nature of a debt" arising from a religious obligation which, during the lifetime the deceased, was no more than a voluntary obligation according to conscience.

61 Nevertheless, I leant against a finding that the deceased's testamentary direction to "pay … zakat payments" must fail for a want of certainty or that it served no purpose other than simply lending support to characterisation of his will as a "Sharia will". In my opinion, the direction had work to do if construed as an implicit acknowledgement at the time of execution of the will that, at the time of death, the deceased may have bound himself and his estate, at law or in equity, to pay a debt (enforceable under the general law) in the nature of a Zakat payment.

62 In disposition of the proceedings before me I made orders to the effect of those foreshadowed in paragraph [235] of the judgment; namely:

(1) Upon an assumption that she has received at the time of distribution of estate assets no notice of a claim for Zakat based on a cause of action accrued at or before the death of the deceased, ORDER that the administrator would be justified in distributing the estate of the deceased on the basis that no allowance is to be made for a payment of, or in the nature of, Zakat.

(2) ORDER that the administrator's costs of and incidental to these proceedings be paid out of the estate of the deceased on the indemnity basis.

CONCLUSION

63 The genius of the common law tradition to which Australia adheres is that religious, social and political groupings of like-minded people can be accommodated within the general law by legal principles governing voluntary associations; the law of trusts (where ownership of property is involved); a public policy (subject to regulatory intervention) that leans against interference by the courts in the domestic affairs of a voluntary association unless necessary to determine a dispute about a civil or proprietary right; and, within a responsible system for the administration of justice, freedom of association, freedom of contract and testamentary freedom. These understated freedoms (underpinned by ordinary common law rules and principles of general application) provide a rock upon which human rights lawyers have built a more visible narrative in support of "freedom of religion".

GCL
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