



- Wills / Trust
- Debt Relief
- Immigration
- Divorce Mediation
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FREQUENTLY ASKED QUESTIONS:

WILLS, TRUSTS, & ISLAMIC WASIYYA

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Members of the local Islamic community often come to us with questions about how to create a Wasiyya, as well as what happens to any assets and minor children once they have passed away. The frequently asked questions (“FAQ”) found below attempt to address some of the most common concerns heard by estate planning practitioners. For more information, or for a confidential consultation, please contact our office.

The following information was accurate to the best of our knowledge at the time that it was written.

You can access the latest version online
<http://www.awlawgroup.com/wills-trusts-islamic-wasiyya-faq/>

FREQUENTLY ASKED QUESTIONS:

WILLS, TRUSTS, & ISLAMIC WASIYYA

- 01 Why does my Akhirah and the well-being of my children depend on a Will / Trust (Wasiyya)?
- 02 How can I ensure that my children will not be taken by Social Services if both of us pass away? Can I ensure that they will be cared for by a Muslim?
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- 05 A deceased friend of mine designated his minor child as the beneficiary of accounts including a 401k & life insurance. However, now the institution will not release money to the child unless his mother submits a guardianship certificate from the court. Why?
- 06 My elderly parent has Alzheimer's and/or is not able to communicate. I can't take care of his financial affairs because no one will talk to me without his consent. What should I do? If this might happen to me in the future, what can I do to prevent it?
- 07 My friend's "special needs" child used to receive government help. However, once his father died and left inheritance for him, his government benefits stopped. Why? How can I stop this from happening to my "special needs" child?

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- 08** I fear that my assets may be misused and not distributed to the correct people whom I have designated. What is the best method to ensure my wishes are carried out?
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- 09** I don't want my heirs to fight over the inheritance. How can I prevent that?
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- 10** I have a Will or a Wasiyya from a reputable Islamic organization, so why would my assets get tied up in the court process for 18 months or more – rather than immediately going to my spouse and/or children upon my death?
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- 11** My father used a template from a reputable Islamic organization to make his Will. So, why are all of his assets stuck in the court system? Why is there a dispute regarding the Islamic distribution?
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- 12** I see many templates of Trusts on the Internet; should I use one of them to create my own?
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- 13** How can I prevent the state of California from controlling my assets after my death? How can I ensure that my assets are distributed according to the Islamic injunctions?
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- 14** I paid for the house from my earnings – that means I own it, correct?
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- 15** What if I am incapacitated – who can take care of my financial affairs?
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- 16** My child is attending college and he or she has fallen ill, but the doctors will not tell me anything. Why? How can I prevent this from happening?
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- 17** How can I ensure that my assets are distributed to my family immediately, that my minor children are given to the guardian of my choice, and that someone is able to carry on my affairs if I am incapacitated?
-
- 18** I keep hearing about an estate plan. What is it?
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01 Why does my Akhirah and the well-being of my children depend on a Will / Trust (Wasiyya)?

There are both legal and religious reasons to create a proper estate plan – also known as a Wasiyya, if you are a Muslim.

Legally, if you die without a Trust or a similar mechanism, most of your property will go through the probate process. Probate is a court process that ties up a deceased person's assets for a period of time while their Will is authenticated, their assets inventoried and reported to the court, and their heirs notified. The probate process is public record, which means that anyone can look at your court file and see information on your assets and family that should be private. The probate process can take between 1-2 years to complete, and costs 5-7% of the total asset value.

Religiously, there are many applicable tenets in the hadith that mandate creating a Wasiyya, particularly: "It is the duty of a Muslim who has anything to bequest not to let two nights pass without writing a will about it" (Sahih al-Bukhari).



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02 How can I ensure that my children will not be taken by Social Services if both of us pass away? Can I ensure that they will be cared for by a Muslim?

If one parent passes away, then the children will remain with the surviving parent. However, if both parents are deceased, the state gets involved. Social services will find a temporary placement for the children if a guardian is not named. This will usually be a relative or close friend who is willing to house them. Eventually, a judge will assign a permanent guardian as part of a court case, which may take up to 6 months.

Therefore, it is important to name a guardian who resides in the same locality as yourself – even if only temporarily. If you name a guardian in your Will who lives abroad (such as an aunt residing in India) then social services will find a suitable local person to keep the children, until the guardianship process is complete. Additionally, the named foreign guardian will need to be present (here in the state of California) until he or she is granted guardianship of the children. Finally, you need to be specific in your Will as to why you have nominated someone residing abroad as the guardian and not someone local. You can ensure that your children are cared for by a Muslim by naming a Muslim as guardian for your children. Your nomination of guardian is an important part of ensuring that your children are being taken care of by the persons you choose, rather than letting the state decide.



03 Will a judge decide who becomes the guardian of my minor children, even if I have specified a guardian in my Will?

Yes. If you have nominated a guardian in your Will, the judge will honor that request – unless there is a challenge to that nomination (for example, your nomination is disputed by one of the parent's extended family).

If there is a challenge, or if you do not have a Will, or fail to mention a guardian in your Will, then the judge will choose a guardian who is "in the best interest" of the children. If you are nominating someone who does not reside in the U.S., there are other considerations you must take into account as well.

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04 Is it possible to avoid having my spouse and children suffer through the courts, costing lots of time and money, to gain possession of my assets after I pass away?

Yes! You can avoid the court process known as probate by the use of a Trust, joint assets, or assets with beneficiary designations. At the time of your death, everything you own – except for the contents of joint accounts, assets with beneficiary designations, or the assets in a Trust – will be frozen until the probate process is complete.

This is the process by which the courts authenticate your Will. A probate process can take about a year and a half with court proceedings and can cost 5-7% of your total asset value! Until the proceedings are over, your children may or may not have access to the money you leave behind for them. The best way to avoid the probate process is to establish a Trust.

05 A deceased friend of mine designated his minor child as the beneficiary of accounts including a 401k & life insurance. However, now the institution will not release money to the child unless his mother submits a guardianship certificate from the court. Why?

A minor is not allowed to own assets in his or her own name, thus a guardian must take possession of the proceeds on behalf of the minor or a special account needs to be opened at a bank for a minor under a law called the California Uniform Transfers to Minors Act. This account must have a “custodian” for the minor, such as the surviving spouse or the child’s physical guardian. At the death of a person who plans to leave assets to a minor, financial guardianship needs to be granted through a guardianship process, even if the person is the surviving biological parent of the minor.

The guardianship process takes approximately 6 months and will typically require legal assistance from an attorney. Further, the process may require on-going court supervision. Upon granting of the financial guardianship, the guardian may receive assets on behalf of the minor but must follow strict court rules regarding the assets and prepare periodic accountings for the court’s review.

A better approach is to designate the surviving spouse as the primary beneficiary and establish a Trust for any contingent beneficiaries. If you have specified Islamic distribution, then designating the Trust for the primary beneficiary may be the only option.

06 My elderly parent has Alzheimer’s and/or is not able to communicate.

I can’t take care of his financial affairs because no one will talk to me without his consent. What should I do? If this might happen to me in the future, what can I do to prevent it?



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Some of us are lucky enough to be responsible for the care of our elderly parents. If you are concerned that they may lose the capacity to make sound decisions, then it is critical that there is a Power of Attorney in place for financial and health care decisions. This allows you to take care of their affairs without hindrance.

If your elderly parent has assets, then your parent should establish an estate plan – a Trust. If an estate plan and Power of Attorney are not in place prior to a parent losing his or her capacity to make decisions, you will mostly likely need to go through the courts to obtain authority to handle his or her financial affairs—known as a conservatorship— which takes time and considerable financial resources.

You should also have powers of attorney for health care and finances in place so that if you lose capacity in the future, even temporarily, there is always someone appointed to handle your medical and financial decisions.

07 My friend’s “special needs” child used to receive government help. However, once his father died and left inheritance for him, his government benefits stopped. Why? How can I stop this from happening to my “special needs” child?



The government has many programs designed to help “special needs” individuals during their disability, even if it’s for their lifetime. However, many of these programs require that the recipient own very few assets. A “special needs” Trust allows the recipient to receive the gift of inheritance, while retaining eligibility for government aid programs since the recipient does not technically “own” the property in the Trust.

Additionally, a Trustee charged with the highest duty of care enforced by law – known as fiduciary duty – will need to be appointed with the responsibility of caring for the assets and ensuring that the inheritance is being used to directly benefit the named recipient. Establishing a Trust is the best way to ensure that the assets you leave behind will be used in the best interests of your beneficiary.

Also, it is advisable to establish a Trustee of the “special-needs” Trust who is not the child’s guardian. This way, the guardian can bring a claim against the Trustee, should he or she fail in upholding their fiduciary

08 I fear that my assets may be misused and not distributed to the correct people whom I have designated. What is the best method to ensure my wishes are carried out?

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The Trustee of a Trust has a fiduciary obligation – or the highest level of duty of care under the law – to carry out the provisions of the Trust and act in the best interest of the named beneficiary. This fiduciary duty is a serious responsibility and is enforceable in a court of law.

Therefore, if a beneficiary or legal guardian believes that the Trustee is not acting in the best interests of the recipient under the provisions of the Trust, then he or she may bring a legal action against the trustee for damages, or even to remove the Trustee and replace him or her with a more suitable person. This is part of why a Trust is one of the best vehicles for ensuring that your estate will be distributed in the manner you have specified.

If you have a Will but not a Trust, the Executor of your Will also acts under the supervision of the court. Therefore, the chances of an Executor mishandling your estate is potentially less than with a Trust because of the strict court supervision involved. However, a Will must be probated through a court process, which can be time-consuming and expensive, as discussed above.

09 I don't want my heirs to fight over the inheritance. How can I prevent that?

There is no magic bullet for this common issue. A motivated heir and a clever attorney can always dispute the provisions of a Trust or a Will. However, the following steps may help:

- ▶ Have an estate plan in place, specifically one that avoids the probate process, such as a Trust;
- ▶ Let the beneficiaries know your intent at the time that you establish your estate plan. Take them into your confidence. Usually, a surprised heir is more likely to dispute his or her inheritance;
- ▶ Include a “no contest” provision in your Trust or Will stating that – in the event of a dispute by an heir regarding the terms of distribution – that heir will lose their inheritance if they challenge the provisions of the Trust or the Will.
- ▶ Appoint an arbiter or an arbitration body which will have the full authority to make final judgments between competing claims. This is particularly useful for Islamic distributions.

10 I have a Will or a Wasiyya from a reputable Islamic organization, so why would my assets get tied up in the court process for 18 months or more – rather than immediately going to my spouse and/or children upon my death?

This is a complicated issue, but a Will is not enough to avoid the year-and-half-long costly probate process. Under California law, a Will—any Will—must go through the probate process if the gross value of the estate is over \$150,000. The process can become even more complicated when minor children are involved. Additionally, if you have specified Islamic distribution in your Will, that may complicate matters if it is challenged. The only way to avoid this court process is to use a Trust or estate planning techniques such as holding joint assets or using beneficiary designations.

However, you can avoid most pitfalls and completely avoid court proceedings if you have a properly constructed plan in place which ensures that your wishes are carried out without interference from the state or the court system.

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11 My father used a template from a reputable Islamic organization to make his Will. So, why are all of his assets stuck in the court system? Why is there a dispute regarding the Islamic distribution?

While a templated Will may be valid, if executed in accordance with California law, it still may not resolve many of the issues listed within these frequently asked questions. Specifically, it may fulfill the Islamic obligation, but may not legally be enough to execute Islamic inheritance laws under California law. California law prescribes a system of inheritance that is very different from Islamic inheritance laws. Additionally, a templated Will is not a guarantee that your family will avoid the lengthy and expensive probate process, nor will it resolve ownership issues.

Therefore, if you choose to execute a templated Will, your estate will most likely end up in a probate court. Also, the process may be further complicated with the issue of property ownership between a husband and wife.



12 I see many templates of Trusts on the Internet; should I use one of them to create my own?

A Trust is a complicated instrument. It involves many different areas of law, including the rights of creditors; Trustees; beneficiaries; Islamic injunctions; contingencies; provisions dependent on citizenship status; sub-Trusts; and survivor's rights, among other issues. Templates usually fail to take into account specific state laws and also fail to update their provisions based on changes in the law. Many templates also contain errors since they were not prepared by attorneys. These errors can be extremely complicated and expensive to fix later, and may lead to litigation by heirs when they discover the errors upon death—and by then it is too late to fix the problems.

Additionally, if you are interested in including Islamic provisions in your Trust, then most of the templates available on the Internet will not help. Therefore, it's advisable to establish a Trust through a competent attorney.

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13 How can I prevent the state of California from controlling my assets after my death? How can I ensure that they are distributed according to the Islamic injunctions?



You have the right to define how your property will be distributed upon your death. You can specify Islamic distribution through a Trust or a Will, which may be honored by the state. If you do not have an estate plan (a Trust or a Will) in place, then California law determines how your property will be distributed. California law requires a much different inheritance distribution than Islamic law. If you have no estate plan in place, your heirs will receive their inheritance based on California law, not Islamic law, and this will be done pursuant to a probate court process.

We advise our clients to use a Trust to ensure Islamic distribution as it will avoid the interpretation of Islamic law by the court of the State of California. This will also help you avoid the probate process entirely.

The following issues should be understood before specifying Islamic terms in your Trust or Will. These include:

- ▶ Ownership of the assets, such as between husband & wife;
- ▶ Timing of distribution, which may result in the liquidation of assets, potentially leaving your spouse and children homeless;
- ▶ Burial location for people who have bought burial plots;
- ▶ Arbitration during disputes;
- ▶ Inheritance to “special needs” children and public benefits;
- ▶ Inheritance to girls;
- ▶ Inheritance to grandchildren whose parents have died.

Therefore, it’s important that you consult an attorney who is familiar both with the California and Islamic laws. We usually work extensively with our clients to carefully incorporate their Islamic inheritance requirements into their Wills and Trusts.

14 I paid for the house from my earnings – that means I own it, correct?

California is a community property state. This means that anything earned through the labor of marriage is shared equally between husband and wife. However, if a spouse obtained property prior to marriage, that may be considered that spouse’s separate property. Additionally, pursuant to California law, inheritances are considered separate property, even if received during marriage.

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Community property laws are complicated and it's advisable for you to study them thoroughly or consult an attorney.

The Islamic concept of ownership is different than California law, and the person who holds the title or paid for the property retains ownership. Scholars have clarified that a simple name change on the Title document does not necessarily change the ownership. The matter of ownership has a significant impact on the Islamic distribution. This is an important consideration while you are making your estate plan and our attorneys can help you navigate the complicated issues involved in property ownership.

15 What if I am incapacitated – who can take care of my financial affairs?

No person may carry out a transaction on behalf of anyone else, unless authorized by a validly executed Power of Attorney that explicitly grants the Attorney in Fact, or agent, the power to carry out such a transaction. Therefore, it is very important to ensure that you have a Power of Attorney in place so that if you are ever incapacitated in the future, someone you trust will have the power to handle your financial affairs.

It's important to note that such a Power of Attorney is only valid during life and is automatically revoked at the death of the principal. That is, you cannot use a Power of Attorney on behalf of a person who has died.

If a person does not have a Power of Attorney in place, a court action known as a conservatorship will be required. In a conservatorship, the court appoints a person to handle financial (and/or health) matters for an incapacitated person. Conservatorships are expensive and time-consuming, and require strict court supervision. They are usually a "last resort" and should be avoided if possible.



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16 My child is attending college and he or she has fallen ill, but the doctors will not tell me anything. Why? How can I prevent this from happening?

There are many laws in place, including HIPAA, designed to protect the rights and privacy of patients. These laws prevent healthcare providers from sharing information with third parties, even with the parents of adult children. Unfortunately, this means that if your child is incapacitated while attending college, you may not have access to critical information regarding his or her health.

The best way to avoid this situation is to have your child execute a Power of Attorney for healthcare that allows you the right to access their health information if they are incapacitated and designates you as the decision-maker for medical decisions. There are several safe-guards that can help make your adult child more comfortable with executing such a Power of Attorney in your favor; for example, that such a Power of Attorney does not take effect until the child is actually incapacitated.

17 How can I ensure that my assets are distributed to my family immediately, that my minor children are given to the guardian of my choice, and that someone is able to carry on my affairs if I am incapacitated?

A properly crafted estate plan executed by a competent attorney will resolve most of these issues. A good estate plan typically consists of a Trust, possible beneficiary designations for heirs on different accounts, a Will, and Powers of Attorney for health care and finances.

An estate plan is the most efficient way to plan for any contingencies at the time of death or incapacity. Particularly, a Trust is one of the most effective mechanisms for avoiding the probate process and ensuring a quick transfer of assets to heirs.



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18 I keep hearing about an estate plan. What is it?

Like Hajj, an estate plan is something you typically need to do once in your lifetime. Once completed, it usually does not need to be modified often, depending on your situation. Also, you do not need to own an "estate" (i.e. huge assets) to do an estate plan. In California, an estate with a gross value of over \$150,000 is subject to probate and a Trust is recommended for estates in excess of that amount. In legalese, an estate just refers to all your tangible and intangible property that you leave behind.

If you don't have an estate plan which includes a Trust, then a probate process will be initiated. Then, your property will be distributed according to California laws or according to your Will, if you have one.

An estate plan includes the following major items:

- ▶ **Trust:** This allows for your property to be distributed to your beneficiaries according to your instructions through a Trustee appointed by you. A Trust completely avoids the probate process – that is, the courts will not get involved, and the process will remain private, unlike probate which is public.
- ▶ **Will:** This will place anything not already in a specific Trust at the time of your death in the Trust mentioned in #1. This typically goes through a simplified probate process which can only be used if there is a Trust involved.
- ▶ **Power of Attorney:** This gives legal powers to a person of your choosing to transact actions on your behalf if you are incapacitated.
- ▶ **Health Care Directive, or Power of Attorney for Health Care:** This provides instructions to your healthcare service providers regarding your care – such as the use of life support systems – in case you are not able to communicate to them, and allows you to name a person you trust to make medical decisions for you.
- ▶ Other documents necessary may include Deeds, a Certification of Trust, assignments, community property agreements, a Power of Appointment, etc. Your attorney can discuss which documents you will need in order to have a complete estate plan which accomplishes your goals.



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This (FAQ) is intended for basic information overview only. The information in this FAQ does not constitute legal advice, nor does it promise suitability for your specific situation. Exchange of the information in this FAQ does not initiate an attorney-client confidential relationship. We strongly advise you to consult an attorney for your specific needs.

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