

FAMILY PROVISION AND ISLAMIC WILLS: PRESERVING THE TESTATOR'S WISHES THROUGH TESTAMENTARY ARBITRATION?

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This article examines how testamentary arbitration according to faith-based principles might be employed in Australia to preserve an Islamic testator's wishes where a dispute about the will arises. First, this article explores the key differences between Muslim and Australian inheritance law to demonstrate the potential for successful challenges to Islamic wills. Then, this article highlights how arbitration provides a framework in which to allow citizens to arbitrate disputes according to faith-based norms. Finally, this article examines the feasibility of testamentary arbitration in Australia. This article is concerned with two questions: first, whether inheritance disputes are presently capable of being settled by arbitration in Australia; and second, whether parties to a will dispute can (or should) be forced to submit to arbitration as opposed to litigation in the courts where the will in question contains an arbitration clause.

I INTRODUCTION

The arbitration of family law disputes according to faith-based norms, and in particular according to Islamic or *Shari'a*¹ law, has been the subject of much

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1 *Shari'a* is also spelt *Shari'at*, *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'an*, *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, this article uses the 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 this article when transliterating words from Arabic. Any variations in the spelling of Arabic transliterations used in this article come about because of citations from different authors and sources. All verses from the *Qur'an* have adopted the translation of A Yusuf Ali, *The Holy Qur'an: Translation and Commentary* (Islamic Propagation Centre, 1934).

attention in recent years across the common law world. The debate over recognition for Islamic law in Ontario, Canada led to the passing of legislation to ban faith-based arbitration for family and inheritance law matters.² In India, Muslims frequently turn to local '*Shari'a* Courts' that function as mediation and arbitration bodies for family law matters, but courts have declared that such bodies have no legal authority vis-a-vis the official law system.³ In contrast, decisions made by *Shari'a* tribunals are enforceable, but reviewable, in the United Kingdom's civil court system under the *Arbitration Act 1996* (UK). Meanwhile, it has been observed that 'there is no common practice of using arbitration to resolve family disputes in Australia'.⁴

Despite the significant body of work on the arbitration of Muslim family law disputes in common law countries,⁵ there has been more limited analysis of how such arbitration processes might benefit Muslims in matters of inheritance. In the Australian context, wills drafted to comply with Islamic inheritance principles, for example those that bequeath twice the inheritance share to a son than that bequeathed to a daughter,⁶ face a higher risk of successful challenge by way of family provision claim. This is because courts judge a testator's dispositions objectively against prevailing community standards (known as the 'moral duty test').⁷ Accordingly, the views of the community at large, as opposed to those of the community to which the testator belonged, will be used to determine whether a testator has made adequate provision for an applicant to a family provision claim.⁸ This can prejudice minority group testators who may choose to deviate from a 'standard' estate plan that devolves an estate to the testator's spouse and equally between the testator's children.

This article examines how testamentary arbitration according to faith-based principles might be employed in Australia to preserve an Islamic testator's wishes where a dispute about the will arises. It commences with an overview of the key differences between Islamic and Australian inheritance law to illustrate the potential for successful family provision applications as regards Islamic wills. Then, this article explores the concept of arbitration and its use in family law matters, and engages with scholarly discussion of arbitration's transformative potential in allowing citizens to arbitrate disputes according to religious norms. Finally, this article examines the feasibility of testamentary arbitration in Australia.

2 Section 1 of the *Arbitration Act*, SO 1991, c 17 defines a 'family arbitration' as one that 'is conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction', effectively prohibiting parties from choosing religious law as the law governing a family arbitration. See below n 114.

3 *Vishwa Lochan Madan v Union of India* [2014] AIR SC 2957 (Supreme Court of India).

4 Ghena Krayem, *Islamic Family Law in Australia: To Recognise or Not to Recognise* (Melbourne University Press, 2014) 227.

5 See below nn 112–16.

6 *Omari v Omari* [2012] ACTSC 33 ('*Omari*').

7 *Re Allen (deceased)* [1922] NZLR 218, 220–1 (Salmond J). This was accepted as the correct approach to the exercise of jurisdiction in respect of family provision applications in *Singer v Berghouse* (1994) 181 CLR 201, 209 (Mason CJ, Deane and McHugh JJ) ('*Singer*').

8 See generally Brooke Thompson, 'Navigating Dual Legal Systems: Islamic Inheritance Law in Australia's Secular Legal Framework' (2022) 41(1) *University of Queensland Law Journal* 89 <<https://doi.org/10.38127/uqlj.v41i1.6483>>.

That is, whether will-makers should be entitled to include an arbitration clause in their wills that requires any dispute about the will to be determined via arbitration.

This article aims to answer two questions: first, whether inheritance disputes are presently capable of being settled by arbitration in Australia; and second, whether parties to a will dispute can (or should) be forced to submit to arbitration as opposed to litigation in the courts where the will in question contains an arbitration clause. In answering these two questions, this article concludes that Australia's current arbitration framework would likely be reticent to enforce testamentary arbitration clauses, particularly where disputes are not of a commercial nature. While there is some argument to support testators being able to compel parties to submit to arbitration as a means to resolving disputes about a will, there remain significant hurdles that would need to be overcome.

II ISLAMIC INHERITANCE AND FAMILY PROVISION

It is relevant to begin with an exploration of the key differences between Islamic and Australian inheritance law, to demonstrate how Islamic wills can deviate from the standard Australian estate plan and are thus at heightened risk of successful challenge by way of family provision claim. As will be seen, resident Muslims who wish to maintain an Islamic inheritance must make wills that devolve their estates according to *Shari'a* law.⁹ It is acknowledged that 'the private application of Sharia is widespread in Muslim communities'¹⁰ where different forms of inheritance laws function 'side by side'.¹¹ In this respect:

Muslim leaders have defended the use of Islamic law in Australia, particularly in the execution of wills to give sons a full share of an estate over daughters' half-shares, arguing that Australian courts should respect the religious wishes of Islamic citizens.

It is only if individuals challenge sharia that courts can exert Australian legal values. It is understood many Muslims informally make provisions using sharia, but there is no way of quantifying how widespread the practice is.¹²

Muslim notions of inheritance differ to conceptions of inheritance in Australian law in three important ways; first, the concept of will-making and testamentary freedom serve different purposes under the two legal systems; second, there are differing female beneficial entitlements; and third, certain categories of persons may make a claim for family provision under Australian succession laws, whereas Islam proscribes any adjustments to beneficial entitlements for dependants based on individual need.

⁹ Ibid.

¹⁰ Jan Ali, 'Religion and the Law: Sharia-Compliant Wills in Australia', *The Conversation* (online, 28 June 2012) <<https://theconversation.com/religion-and-the-law-sharia-compliant-wills-in-australia-6795>>.

¹¹ Malcolm Joyce, 'Islamic Inheritance in Australia and Family Provision Law: Are Sharia Wills Valid?' (2018) 12(3) *Contemporary Islam* 251, 264 <<https://doi.org/10.1007/s11562-018-0417-y>>.

¹² Patricia Karvelas, 'Brandis Defends Sharia for Wills', *The Australian* (online, 30 March 2012) <<https://www.theaustralian.com.au/national-affairs/brandis-defends-sharia-for-muslim-wills/news-story/57cd2764b9e1b4b5ff6970bd5ee2c1de>>.

A Testamentary Freedom under Australian Succession Law

Historically, Australian inheritance law derives from two early components of English law. In relation to the inheritance of real property, wills were generally not permitted and freehold land passed to the deceased's heir at law under the concept of primogeniture, being the eldest legitimate son's right to inherit the deceased's real property over any other sibling or relative.¹³ As regards personal property, by the 13th century the common law generally divided such property into three parts: one-third passing by general custom to a deceased man's widow; one-third passing by general custom to his children; and, only one-third being capable of devolution by will (known as the 'dead's part'). The dead's part was customarily oral and communicated by the dying man to his confessor during final confession, leaving this property to the Church of England.¹⁴ As Palmer J has stated, '[e]xcept in cases of sudden death, to die intestate as to personalty was regarded as disgraceful, as it often meant that a man had died unshriven'.¹⁵ It became usual practice for the Church of England to administer this part and eventually led to canon law being used to administer personal property and wills.¹⁶ In 1540, the *Statute of Wills*¹⁷ conferred power on a person to dispose of his freehold land by will. The ecclesiastical courts of England, part of the Church of England, retained jurisdiction over probate of wills until 1857 when the first courts of probate were established.¹⁸ English inheritance law subsequently developed into a secularised system based on individual conceptions of property rights.

Philosophical works advanced in the 19th century evidence this shift from the religious to the secular. In a utilitarian analysis of inheritance law, both Jeremy Bentham and John Stuart Mill described the overarching purpose of inheritance as an orderly disposition of property back into the economy, and testamentary power a way to incentivise one's children. In this respect, Bentham regarded testamentary power as 'an instrument of authority' to both reward and punish children's conduct.¹⁹ Mill distinguished between the right of inheritance and the right to make a bequest. The right to make a bequest, or the power of testation, formed part of Mill's idea of private property, whereas a child's right to inheritance did not.²⁰ In Mill's view, a testator has the right to bequeath, but the testator's

13 Rosalind F Croucher and Prue Vines, *Succession: Families, Property and Death* (LexisNexis Butterworths, 4th ed, 2013) 23.

14 Ibid 24.

15 *Re Fenwick* (2009) 76 NSWLR 22, 27 [15] (Palmer J).

16 Croucher and Vines (n 13) 27. Croucher and Vines highlight that 'the leaving of chattels by will was related to final confession and the protection of the deceased's soul. It was regarded as a good thing to express some charitable intention (by will) as part of the final confession': at 24.

17 *Statute of Wills 1540*, 32 Hen 8, c 1, s 2.

18 Croucher and Vines (n 13) 25.

19 Jeremy Bentham, 'Principles of the Civil Code' in John Bowring (ed), *The Works of Jeremy Bentham* (Simpkin, Marshall & Co, 1843) 297, 337.

20 'That the property of persons who have made no disposition of it during their lifetime, should pass first to their children, and failing them, to the nearest relations, may be a proper arrangement or not, but is no consequence of the principle of private property': John Stuart Mill, *Principles of Political Economy with Some of Their Applications to Social Philosophy* (Longmans, Green and Co, 1848) bk 2 ch 2, 221.

children have no automatic right to inherit because they have not produced the property themselves.²¹ As such, children can only expect provision for necessities such as education and maintenance to ‘enable them to start with a fair chance of achieving by their own exertions a successful life’.²²

Where previously, importance was placed on the protection of a deceased’s soul and his charitable donation to the Church of England, these philosophical works expose the core legal principle of Australian succession law: the freedom of testation.²³ The principle of testamentary freedom was judicially entrenched by the close of the 19th century, as is evident in the seminal 1870 case of *Banks v Goodfellow*²⁴ where Cockburn CJ stated:

[T]he power of disposing property in anticipation of death has ever been regarded as one of the most valuable of the rights incidental to property ... The English law leaves everything to the unfettered discretion of the testator, on the assumption that, though in some instances, caprice, or passion, or the power of new ties, or artful contrivance, or sinister influence, may lead to the neglect of claims that ought to be attended to, yet, the instincts, affections, and common sentiments of mankind may be safely trusted to secure, on the whole, a better disposition of the property of the dead, and one more accurately adjusted to the requirements of each particular case, than could be obtained through a distribution prescribed by the stereotyped and inflexible rules of a general law.²⁵

In this way, the law gave ‘unfettered discretion’ to the individual testator, which is oppositional to any principle of fixed shares or forced succession. Testamentary freedom remains the cornerstone of the Australian inheritance legal system.²⁶ Indeed, Australian courts have professed that its ‘significance is both practical and symbolic and should not be underestimated’,²⁷ and further, that testamentary freedom is ‘one of the badges of a society that has graduated from primitive conditions and a notable human right’.²⁸

21 Croucher and Vines (n 13) 14.

22 Mill (n 20) bk 2 ch 2, 224. Mill qualified this opinion by acknowledging that a testator’s duty to provide for the testator’s children was affected by the testator’s financial status.

23 ‘By the late nineteenth century the concept of “testamentary freedom” embodied ... Mill’s and Bentham’s concept of parental (paternal) authority, and a rejection of the system adopted in France after the Revolution of 1789’: Rosalind 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, 22. ‘Testamentary freedom’ has since been referred to as the ‘guiding principle in succession law in the common law tradition’: Rosalind F Croucher, ‘Conflicting Narratives in Succession Law: A Review of Recent Cases’ (2007) 14(2) *Australian Property Law Journal* 179, 179 (‘Conflicting Narratives’).

24 (1870) LR 5 QB 549.

25 Ibid 564 (Cockburn CJ).

26 For a history of testamentary freedom in the common law, see Rosalind F Croucher, ‘How Free is Free? Testamentary Freedom and the Battle between “Family” and “Property”’ (2012) 37 *Australian Journal of Legal Philosophy* 9 (‘How Free is Free?’).

27 *Goodsell v Wellington* [2011] NSWSC 1232, [108] (Hallen AsJ) (‘*Goodsell*’).

28 *Grey v Harrison* [1997] 2 VR 359, 363 (Callaway JA).

Today, all Australian states and territories are governed by their own succession law frameworks.²⁹ While the application of succession law may differ across the various Australian jurisdictions, they are all founded on the fundamental legal principle of testamentary freedom.³⁰ In this way, all Australians who meet the eligibility requirements³¹ are able to dispose by will of any property to which they are entitled.³² If one does not make a will, their estate will be distributed in accordance with the relevant intestacy rules, all of which devolve the intestate person's estate to the spouse and issue, and only where there are no spouse and issue will the estate be devolved to the deceased's other next of kin.³³ Generally, people in Australia tend to make testamentary bequests primarily in favour of the same 'nuclear family' reflected in the intestacy rules. That is, they make wills in favour of their spouse and children because they believe it is 'important to make provision for immediate family members, in particular their children, their current spouse or partner and, to a lesser extent, their grandchildren'.³⁴

Further, the intestacy rules of all Australian jurisdictions reflect the fundamental principle of the equal treatment of men and women before the law, in that, for example, the spouse's entitlement does not change based on sex, nor do the issue's entitlement, who take in equal shares regardless of sex. However, testamentary bequests (along with inter vivos gifts) are expressly excluded from the ambit of anti-discrimination legislation in some Australian jurisdictions,³⁵ thus permitting

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- 29 *Administration and Probate Act 1929* (ACT); *Family Provision Act 1969* (ACT); *Trustee Act 1925* (ACT); *Wills Act 1968* (ACT); *Probate and Administration Act 1898* (NSW); *Succession Act 2006* (NSW); *Trustee Act 1925* (NSW); *Administration and Probate Act 1969* (NT); *Family Provision Act 1970* (NT); *Public Trustee Act 1979* (NT); *Succession Act 1981* (Qld); *Trusts Act 1973* (Qld); *Administration and Probate Act 1919* (SA); *Inheritance (Family Provision) Act 1972* (SA); *Trustee Act 1936* (SA); *Wills Act 1936* (SA); *Administration and Probate Act 1935* (Tas); *Intestacy Act 2010* (Tas); *Testator's Family Maintenance Act 1912* (Tas); *Trustee Act 1898* (Tas); *Wills Act 2008* (Tas); *Administration and Probate Act 1958* (Vic); *Trustee Act 1958* (Vic); *Wills Act 1997* (Vic); *Administration Act 1903* (WA); *Family Provision Act 1972* (WA); *Trustees Act 1962* (WA); *Wills Act 1970* (WA).
- 30 Based on Mill's and Bentham's concepts of parental authority and a rejection of the forced succession regimes of Europe, testamentary freedom has been referred to as the 'guiding principle in succession law in the common law tradition': Croucher, 'Conflicting Narratives' (n 23) 179.
- 31 Generally, a person must be over 18 years of age and have testamentary capacity to make a will: *Wills Act 1968* (ACT) ss 8–8A; *Succession Act 2006* (NSW) s 5; *Wills Act 2000* (NT) s 7; *Succession Act 1981* (Qld) s 9; *Wills Act 1936* (SA) ss 5–7; *Wills Act 2008* (Tas) s 7; *Wills Act 1997* (Vic) ss 5–6; *Wills Act 1970* (WA) s 7.
- 32 *Wills Act 1968* (ACT) s 7(1); *Succession Act 2006* (NSW) s 4(1); *Wills Act 2000* (NT) s 6(1); *Succession Act 1981* (Qld) s 8(1); *Wills Act 1936* (SA) s 4(1); *Wills Act 2008* (Tas) s 6(1); *Wills Act 1997* (Vic) s 4(1); *Wills Act 1970* (WA) s 6.
- 33 *Administration and Probate Act 1929* (ACT) pt 3A; *Succession Act 2006* (NSW) ch 4; *Administration and Probate Act 1969* (NT) pt III div 4; *Succession Act 1986* (Qld) sch 2; *Administration and Probate Act 1919* (SA) pt 3A; *Intestacy Act 2010* (Tas) pts 2–3; *Administration and Probate Act 1958* (Vic) pt 1A; *Administration Act 1903* (WA) ss 13–15.
- 34 Cheryl Tilse et al, 'Will-Making Prevalence and Patterns in Australia: Keeping It in the Family' (2015) 50(3) *Australian Journal of Social Issues* 319, 328 <<https://doi.org/10.1002/j.1839-4655.2015.tb00352.x>>.
- 35 *Anti-Discrimination Act 1991* (Qld) s 79; *Equal Opportunity Act 1984* (SA) s 85O; *Equal Opportunity Act 2010* (Vic) s 51; *Equal Opportunity Act 1984* (WA) ss 21A(2), 35AN(2), 35ZA(2), 47A(2), 66ZH(2) (in relation to dealings in land only). The NSW Law Reform Commission recommended that section 55 of the *Anti-Discrimination Act 1977* (NSW) be amended to broaden the charities exemption to expressly

wills devolving the testator's estate unequally between beneficiaries. Indeed, it has been said that testamentary freedom includes the 'freedom to be unfair, unwise or harsh with one's own property ... [it] may even seem morally wrong to some'.³⁶ Despite this, the results of a prevalence survey about will-making patterns in Australia reveal that most testators commonly distribute assets between partners and children, and the overwhelming majority (93%) of respondents 'stated that they would provide equal shares to their children'.³⁷

Accordingly, where a person wishes to deviate from the standard estate plan (being one favouring the nuclear family first, followed by other relatives), the person must make a valid will. Even where a will is made, however, testamentary freedom is constrained by the moral duty to provide for one's dependants on death which is set out in each state and territory's family provision legislation. Broadly, family provision legislation provides certain members of a deceased's family and, in some jurisdictions, someone who was dependant on the deceased³⁸ or had a close personal relationship with the deceased during their lifetime,³⁹ the right to challenge an estate distribution that has left them without adequate provision.⁴⁰ Courts use the two-stage test set out in *Singer v Berghouse* to determine firstly, 'whether the applicant has been left without adequate provision for his or her proper maintenance, education and advancement in life' and if answered in the affirmative, 'what provision ought to be made out of the deceased's estate for the applicant'.⁴¹ Relevantly, courts will judge a testator's dispositions against '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',⁴² measured objectively against prevailing community standards (the 'moral duty test').⁴³

The intent of family provision legislation, as a restriction on testamentary freedom, is to recognise a dependant's claim where they have not been provided with 'proper maintenance and support' by the testator and where the court is satisfied of the 'need of the dependant for the continuance of that maintenance or

cover disposal of property by inter vivos gift or by will: New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (Report No 92, 1999) recommendation 45. See also Pauline Ridge, 'Negotiating the Sacred in Law: Regulation of Gifts Motivated by Religious Faith' in Elizabeth Burns Coleman and Kevin White (eds), *Negotiating the Sacred: Blasphemy and Sacrilege in a Multicultural Society* (ANU Press, 2006) 133 <<https://doi.org/10.22459/NS.06.2006.06>>.

36 *Re Estate of Griffith (deceased)* (1995) 217 ALR 284, 294, 297 (Kirby P).

37 Cheryl Tilse et al, 'Having the Last Word? Will Making and Contestation in Australia' (Research Report, Australian Research Council Linkage Project, March 2015) 10–11.

38 *Succession Act 2006* (NSW) s 57(1)(e)(i); *Succession Act 1981* (Qld) s 41(1).

39 *Succession Act 2006* (NSW) s 57(1)(f).

40 *Ibid* pt 3.2. Note, however, that a family provision application can be made against an estate distributed according to either a will or the relevant intestacy rules: s 72(1).

41 *Singer* (n 7) 208 (Mason CJ, Deane and McHugh JJ).

42 *Singer* (n 7) 209 (Mason CJ, Deane and McHugh JJ), quoting *Re Allen (deceased)* (n 7) 220–1.

43 See Pauline Ridge, 'Moral Duty, Religious Faith and the Regulation of Testation' (2005) 28(3) *University of New South Wales Law Journal* 720.

support'.⁴⁴ Yet when considering such claims, Australian courts have shown that the nature and content of what is adequate provision 'is not fixed or static. Rather, it is a flexible concept, the measure of which should be adapted to conform with what is considered to be right and proper according to contemporary accepted community standards'.⁴⁵ Brereton JA succinctly describes the relationship between family provision and testamentary freedom:

The statutory family provision jurisdiction is not to be exercised on the footing that it must be approached with great caution because of its intrusion on testamentary freedom. Rather, the statute is to be given full operation according to its terms, notwithstanding that it encroaches on testamentary freedom. Testamentary freedom is constrained by the operation of the statutory jurisdiction, insofar as testators are obliged to make provision for those eligible persons for whom according to community standards they are expected to provide.⁴⁶

As such, while testamentary freedom is the cornerstone of Australian succession law, such freedom is restricted by family provision frameworks which impose on testators a duty to provide for certain dependants in accordance with broader community standards.

B Islamic Inheritance Law

Islamic inheritance principles form part of *Shari'a* law, which comprises the laws (*fiqh*) that are extracted through Islamic jurisprudence (*usul al-fiqh*) from both the primary and secondary sources.⁴⁷ The primary sources of Islamic law include the *Qur'anic* rules and injunctions, as well as the *Sunnah*, which is derived from the traditions, practices and sayings of the Prophet Mohammad, known individually as *Hadith*.⁴⁸ Among the various secondary sources, the most relevant are consensus of opinion among the Islamic jurists (*ijma*), and analogical deduction (*qiyas*).⁴⁹ It is also relevant to note that the Islamic inheritance laws are primarily contained in the *Qur'anic* verses and thus take on an obligatory nature for practising Muslims.⁵⁰

In contrast to the principles underlying Australian succession law, Islamic inheritance is premised on two underlying beliefs: the notion that God's will should take preference over human desires, and the security and preservation of an extended family unit through a system of forced succession and fixed shares. Comprised of two distinct elements, being the customs of ancient Arabia⁵¹ as well as the rules laid

44 *Succession Act 1981* (Qld) ss 41(1)–(1A). Legislation in other states and territories include similar provisions: *Family Provision Act 1969* (ACT) s 8; *Succession Act 2006* (NSW) s 59; *Family Provision Act 1970* (NT) s 8; *Inheritance (Family Provision) Act 1972* (SA) s 7; *Testator's Family Maintenance Act 1912* (Tas) s 3; *Administration and Probate Act 1958* (Vic) s 91; *Family Provision Act 1972* (WA) s 6.

45 *Goodsell* (n 27) [109] (Hallen AsJ).

46 *Steinmetz v Shannon* (2019) 99 NSWLR 687, 708 [97] (Brereton JA).

47 For detailed discussion on *usul al-fiqh* and the methods used to deduce *fiqh*, see Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Islamic Texts Society, 3rd ed, 2003).

48 *Ibid.* See also Abdur Rahman I Doi, *Shari'ah: The Islamic Law* (Ta-Ha Publishers, 2nd ed, 2008) 47–96.

49 Doi (n 48) 98–124.

50 Mohammad Hashim Kamali, *Shariah Law: Questions and Answers* (Oneworld, 2017) 143–4.

51 For a detailed account of the customary law of succession in pre-Islamic Arabia, see Alexander David Russell and Abdullah Al-Ma'Mun Suhrawardy, *Muslim Law: An Historical Introduction to the Law of Inheritance* (Routledge, rev ed, 2008). A brief overview can be found in Jamal J Nasir, *The Islamic Law of Personal Status* (Kluwer Law International, 3rd ed, 2009) 197–8 <<https://doi.org/10.1163/9789004182196>>.

down in the *Qur'an* and *Sunnah*,⁵² Islamic inheritance laws developed to provide more equitable distribution to female relatives of a deceased. Pre-Islamic Arabian customary law held that only a male who could fight in battle was entitled to inherit.⁵³ Women had no rights of inheritance, but rather were considered property in the inheritance of others.⁵⁴ The coming of Islam to Arabia revolutionised the customary inheritance laws by introducing a doctrine of shares to allow both males and females to inherit,⁵⁵ and allowed ascendants of the deceased to inherit for the first time.⁵⁶ The *Qur'an* sets out the inheritance principles and these are overlaid by the respective *Sunni* and *Shi'a* bodies of jurisprudence that have further refined the *Qur'anic* system and produce variations of the law between different schools of jurisprudence (*madhhabs*).⁵⁷

Present-day Islamic inheritance laws remain inextricably linked to their religious origins. Due to its divine nature and the belief that parts of the *Shari'a* are immutable, the Islamic inheritance legal system has remained reasonably static through modern times and the core inheritance legal rules remain those stated in the *Qur'an*. While this is so, it is relevant to acknowledge that the Islamic inheritance laws are neither universally nor uniformly applied. Malcolm Voyce identifies 'there has been no universal notion of Muslim family property law', where Islamic inheritance law 'may or may not be actualised in any locality'.⁵⁸ Some countries with a Muslim minority have promulgated succession laws based on the *Qur'anic* rules.⁵⁹

Additionally, the Islamic inheritance legal system is founded on the security of the broader family and the principle that property should devolve to those who are prescribed in the *Qur'an* as opposed to those whom the testator personally preferred in life.⁶⁰ These beliefs reflect the broader postulate of Islamic law; that law is divinely made. As such, beneficial entitlements under Islamic inheritance laws are fixed shares, determined according to the relationship the beneficiary had with the deceased.⁶¹ The principle of forced succession is a noticeable contrast to

52 Asaf AA Fyzee, *Outlines of Muhammadan Law* (Oxford University Press, 5th ed, 2008) 314.

53 Hamid Khan, *The Islamic Law of Inheritance* (Oxford University Press, 2nd ed, 2021) 24–6.

54 Ibid.

55 *Qur'an* 4:7: 'From what is left by parents and those nearest related there is a share for men and a share for women, whether the property be small or large – a determinate share.'

56 *Qur'an* 2:180: 'It is prescribed, when death approaches any of you, if he leave any goods, that he make a bequest to parents and next of kin'.

57 Hamid Khan (n 53) 35; Muhammad Mustafa Khan, *Islamic Law of Inheritance: A New Approach* (Kitab Bhavan, 3rd ed, 2005) 43.

58 Voyce (n 11) 253.

59 For an overview of inheritance legislation in Arab nations, see Nasir (n 51) 200–1. See also Pawancheek Marican, *Islamic Inheritance Laws in Malaysia* (LexisNexis, 2004). While such laws have typically aligned with the rules of the *Qur'an* and the *Sunnah*, the area has been the subject of debate and reform in recent years in certain Muslim-majority countries, including Iran and Tunisia.

60 Muhammad Mustafa Khan (n 57) 2.

61 Interestingly, civil systems appear more in line with this principle, in that they too have tended towards structures of at least partially forced succession, where laws prescribe who will take what property after death, regardless of the deceased's wishes: see Croucher and Vines (n 13) 19. For example, in France, forced heirship provisions require certain percentages of the deceased's estate to pass to children as well as any surviving spouse.

that of testamentary freedom. The Islamic inheritance legal system is also based on a wider concept of family, where testamentary bequests are generally made to a 'wider social network than what is normally called the "nuclear family"'.⁶² Thus, the *Qur'anic* inheritance laws 'tend to distribute wealth to a larger number of individuals than average Australian wills do, meaning that family members receive a smaller share than they would under state intestacy laws'.⁶³

The *Qur'an* provides a comprehensive set of rules for a deceased's estate distribution that effectively implements a system of forced succession.⁶⁴ The *Qur'an* establishes the five people who always inherit and the share of the estate that each person takes, who include (where relevant) the deceased's husband, wife, father, mother, and daughter ('*Qur'anic* Heirs').⁶⁵ Where the *Qur'anic* Heirs do not exist, or distribution results in a leftover sum, the deceased's male agnatic heirs (being the deceased's son, brother, paternal uncle, nephew, and in some cases the father) will inherit the residue.⁶⁶

In addition to being a system of fixed share distribution, the Islamic inheritance principles also diverge from Australian inheritance principles in relation to the beneficial entitlement of women. Known as the 'half rule', the *Qur'an* directs that female children of the deceased receive half the inheritance share of their male counterparts: 'Allah directs you as regards your children's inheritance: to the male, a portion equal to that of two females'.⁶⁷ A daughter will inherit half a deceased parent's estate where she was the deceased's only child, and will share in two thirds of the estate if there were two or more daughters.⁶⁸ However, in the presence of a son, a daughter will be relegated from the position of a *Qur'anic* Heir to a residuary heir, and will take half the share of a son.⁶⁹ The deceased's husband is entitled to inherit one half of the estate, but this is reduced to one quarter where the couple had children.⁷⁰ In contrast, the deceased's wife inherits one quarter of the estate.⁷¹ However, if the couple had children then the wife's share is reduced to one eighth.⁷²

62 Voyce (n 11) 252.

63 Ibid 253.

64 *Qur'an* 4:11–12. While it is unnecessary for the purpose of this article to examine in detail the Islamic rules of inheritance, it is important to acknowledge that the particular rules of inheritance that sit outside those explicitly stated in the *Qur'an* differ between the *Sunni* and *Shi'a madhabs*, as well as within the various sub-schools. The majority of Australia's Muslims belong to the *Hanafi* legal school of *Sunni* Islam and so this article, where necessary, draws on *Hanafi* jurisprudence. See also Thompson (n 8).

65 There are other beneficiaries who will only inherit in the absence of the *Qur'anic* Heirs. 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. See, eg, Fysee (n 52) Appendix 1.

66 This class of heirs reflects the importance of the deceased's male relatives and is a continuation of pre-Islamic Arabian customary law that prioritised male beneficial entitlement. See Hamid Khan (n 53) 74.

67 *Qur'an* 4:11.

68 Muhammad Mustafa Khan (n 57) 64; Hamid Khan (n 53) 86.

69 Hamid Khan (n 53) 86.

70 *Qur'an* 4:12.

71 Ibid.

72 Ibid.

In jurisdictions where Islamic inheritance law is applied through the official legal system, these rules will govern a person's estate where they die without a will, similar to the operation of the intestacy rules in Australia. Where Muslims wish to vary their estate distribution by making a valid will, there are three important limits on their testamentary freedom. First, they are limited to devolving one third of their net estate by will;⁷³ second, they cannot make a beneficial disposition under the allowable one third to a *Qur'anic* Heir;⁷⁴ and third, Muslims are prohibited from making bequests that conflict with the *Shari'a*.⁷⁵ Thus, Islamic inheritance law largely divests Muslims of testamentary freedom, promoting instead the safety and security of the broader family network to whom property is divinely entitled. Importantly, *Shari'a* law does not permit adjustments to the fixed shares prescribed in the *Qur'an* based on a person's individual circumstances or need. Accordingly, there is no concept of family provision in Islamic inheritance law.⁷⁶

C Islamic Wills: A Deviation from the Community Norm?

The different nature of the Islamic inheritance principles means that will-making and testamentary freedom are essential to the proper practice of Islam for those Muslims resident in Australia who wish to maintain an Islamic inheritance.⁷⁷ This is because an estate devolved according to the principles of Islamic law may not, for example, make testamentary bequests equally between males and females, or may only bequeath one quarter or one eighth of the estate to a widow. Limited studies of Islamic inheritance in Australia suggest Muslims are making wills according to *Shari'a* inheritance principles.⁷⁸ One study interviewed 16 members of Islamic communities in Sydney and Melbourne about estate distribution, finding most respondents sought to comply with Islamic inheritance principles by drafting wills that, in some cases, led to 'unequal distribution to children based on gender'.⁷⁹ A separate study involving fieldwork in Sydney that interviewed 57 Muslim respondents also found the majority of respondents wanted to devolve their estates according to Islamic inheritance principles, and identified strong beliefs regarding

73 Jamila Hussain, *Islam: Its Law and Society* (Federation Press, 3rd ed, 2011) 141.

74 Some *madhhabs* allow a bequest to a *Qur'anic* Heir, but only where all other *Qur'anic* Heirs consent to the bequest and it does not exceed the one-third rule.

75 For example, Muslims cannot bequeath a portion of their estate to a church, synagogue, or a mistress.

76 Or rather, it could be said that family provision is ingrained into the Islamic inheritance legal framework which always provides for specified members of the deceased's family. As discussed, a Muslim may, however, make a will that devolves one third of their net estate by will to someone in need, but there are restrictions on this freedom.

77 See also Thompson (n 8).

78 See, eg, 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 < <https://doi.org/10.1177/1037969X1604100106>; Malcolm Voyce et al, 'Islamic Inheritance and Sharia Wills: The Recognition of Muslim Inheritance Traditions in Australia' in Erich Kolig and Malcolm Voyce (eds), *Muslim Integration: Pluralism and Multiculturalism in New Zealand and Australia* (Lexington Books, 2016) 211. See also 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.

79 Wilson et al (n 78) 25.

female entitlements consistent with the *Qur'anic* provisions.⁸⁰ These studies also highlight Muslim concerns about family provision and generational differences in expectation as regards inheritance rights. For example, one study identified some respondents were concerned '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'.⁸¹

The only Australian case to consider an Islamic will provides a practical example of the interaction between Australian and Islamic inheritance laws. *Omari v Omari* ('*Omari*') considered the validity under Australian law of a will made by a Muslim testator.⁸² The testator had purported to devolve her estate between her nine children, granting a full share to each of her sons and a half share to each of her daughters.⁸³ One of the testator's daughters contended her mother had dementia at the time she executed the will, and was subsequently successful in her challenge to the will's validity on the basis the testator lacked the requisite testamentary capacity.⁸⁴ Despite evidence pointing to the fact that the testator indeed intended her will to follow Islamic inheritance principles, in the face of a finding of testamentary incapacity the Court was unable to enforce the terms of the will and the estate was devolved according to the relevant intestacy rules.⁸⁵ Consequently, the testator's children inherited the estate in equal shares, regardless of sex.⁸⁶ *Omari* illustrates the circumstances in which the application of the common law can invalidate or override the likely testamentary intentions of a testator where the validity of the will is challenged.

There is no case law in Australia considering the issue of an Islamic will in the context of a family provision application. However, case law in relation to other religiously motivated testators establishes that courts will apply the moral duty test to judge a testator's dispositions against prevailing community standards, as opposed to the standards of the community to which the testator belonged.⁸⁷ This leaves Muslims who make Islamic wills with some uncertainty as to family provision because it is unlikely that devolving one's estate unequally between children based on sex, or assigning one's wife only one quarter or one eighth of the estate, would meet the moral duty test in a country that emphasises equality of the sexes and equal treatment before the law. Accordingly, Islamic testators face a heightened risk that family provision claims will be successful where their will deviates from the 'standard' estate plan.

80 Voyce et al (n 78) 211, 218.

81 Wilson et al (n 78) 25–6.

82 *Omari* (n 6).

83 Ibid [8]. The case illustrates how a testator's daughters, in the place of sons, will be relegated from *Qur'anic* Heirs to residuary heirs, taking a half share of their brothers. There being no other *Qur'anic* Heirs in this scenario, the entire estate was thus to be divided among the testator's children according to the half rule.

84 Ibid [65].

85 Ibid.

86 In accordance with the *Administration and Probate Act 1929* (ACT).

87 See, eg, *Wenn v Howard* [1967] VR 91. See also Thompson (n 8); Voyce (n 11).

This issue coalesces around broader discontent with family provision laws that has surfaced in recent years; being that the law has swung too far in favour of financially comfortable applicants who make claims against an estate that directly contradict the testator's clear wishes, essentially eroding the fundamental principle of testamentary freedom.⁸⁸ Previously, established legal principles emphasised the right to testamentary freedom and, in this context, children were only entitled to maintenance from a parent's estate to the extent it would 'enable them to start with a fair chance of achieving by their own exertions a successful life'.⁸⁹ Research on the South Australian experience, however, highlights how the relevant legislation in that jurisdiction⁹⁰ has undergone a series of amendments since its enactment that 'demonstrates the significant shift of emphasis from maintenance of dependants to protection of inheritance rights'.⁹¹ In respect of the application of the moral duty test to a family provision claim, Sylvia Villios and Natalie Williams observe that courts appear 'quite willing to interfere with a testator's wishes, thus almost guaranteeing applicants a high chance of success once they are eligible'.⁹²

Significant recent work has also been done by the South Australian Law Reform Institute ('SALRI') in respect of family provision legislation in that jurisdiction.⁹³ The SALRI made a number of criticisms of family provision legislation:

A particular problem in recent years ... is that family provision laws have given rise to what has been described as greedy, vexatious or opportunistic claims. That is, claims made by family members who do not appear to be truly dependent on the testator but who seek to challenge his or her will nonetheless. Sometimes these claims are successful (or are settled out of court), but even where they are not successful, they can greatly diminish the value of the testator's estate (particularly when costs are awarded, as they often are, out of that estate) and cause considerable distress and expense to all the parties involved. Some results might also appear to restrict the deceased's testamentary freedom and to defeat the deceased's intentions for inheritance as set out in his or her will from the perspective of litigants, or fail to clarify or enhance the testator's intentions.⁹⁴

The SALRI observed a

strong perception (as also emerged in SALRI's consultation) that current law and practice erodes testamentary freedom. ... Concern has been expressed about the courts' apparent willingness in family provision claims to 'second guess' the testator's moral duties, and legally enforce its own assessment and alter the will.⁹⁵

This has resulted in the perception that 'a will can be easily challenged and does not afford a testator the ultimate freedom to dispose of their property as

88 See generally Sylvia Villios and Natalie Williams, 'Family Provision Law, Adult Children and the Age of Entitlement' (2018) 39 *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?' (n 26).

89 Mill (n 20) bk 2 ch 2, 224.

90 Being the *Inheritance (Family Provision) Act 1972* (SA).

91 Villios and Williams (n 88) 252.

92 Ibid 258.

93 South Australian Law Reform Institute, '*Distinguishing Between the Deserving and the Undeserving*': *Family Provision Laws in South Australia* (Report No 9, December 2017) ('*Distinguishing Between the Deserving and the Undeserving*').

94 Ibid 17 [2.2.3].

95 Ibid 17 [2.2.4].

they choose' and concerns have been expressed 'over the "moral duty" standard that arises under [family provision laws] insofar as [they result] in the testator's perception of his or her moral duties being overruled by a particular judge's assessment of contemporary community values'.⁹⁶ In this context, the SALRI found that 'under current law and practice, the testator's wishes are either absent or discounted and that inadequate weight is accorded to the wishes of the testators. Testators are likely to be reasonable people acting carefully and properly who wish the instructions in their will to be binding'.⁹⁷ Similar criticism of family provision legislation's 'excessive encroachment'⁹⁸ on testamentary freedom have been made in other Australian jurisdictions,⁹⁹ with numerous calls for reform to adjust the balance where 'greater focus should be given to respecting or preserving testamentary freedom'.¹⁰⁰

This raises a question in relation to Islamic wills in Australia; namely, what is the appropriate balance between respect for the testator's testamentary and religious freedom on the one hand, and the rights of those otherwise entitled to the testator's assets under family provision law on the other hand? Further, in cases like *Omari* where the Court opined, notwithstanding her lack of testamentary capacity, that it was likely the testator wanted her estate distributed according to the Islamic principles, should the testator's religious views impact a distribution under the intestacy rules? The obvious solution to the problem of unmeritorious family provision claims is legislative amendment of family provision legislation. South Australia has taken this path in the recently introduced Succession Bill 2021 (SA) which, if passed, will provide that in determining whether to make a family provision order, 'the wishes of the deceased person is the primary consideration of the Court'.¹⁰¹

Such amendments suggest a step forward in South Australia to rebalancing the scales in favour of testamentary freedom while ensuring dependants left in real need are provided with adequate provision. However, no other Australian jurisdiction has moved to prioritise the testator's wishes in family provision applications. Further, amendments to family provision legislation alone will not provide courts the ability to consider a testator's likely intentions where a will is found to be invalid (as was the case in *Omari*). In the absence of such mechanisms, this article explores the potential for testamentary arbitration as an alternative option to rebalancing the scales in favour of testamentary freedom, as a way to allow Muslims (and other minority-faith testators) to maximise compliance with their religious obligations.

96 Ibid 17–18 [2.2.5].

97 Ibid 40 [3.5.5].

98 Villios and Williams (n 88) 249.

99 Victorian Law Reform Commission, *Succession Laws* (Final Report, August 2013); Queensland Law Reform Commission, *National Committee for Uniform Succession Laws: Family Provision* (Report No 58, July 2004); New South Wales Law Reform Commission, *Uniform Succession Laws: Family Provision* (Report No 110, May 2005).

100 *Distinguishing Between the Deserving and the Undeserving* (n 93) 39 [3.5.2].

101 Succession Bill 2021 (SA) cl 116(2)(a).

III THE FEASIBILITY OF TESTAMENTARY ARBITRATION IN AUSTRALIA

As Marc Galanter highlights, many disputes ‘are resolved by negotiation between the parties, or by resort to some “forum” that is part of (and embedded within) the social setting within which the dispute arose’.¹⁰² Courts are thus but ‘one component of a complex system of disputing and regulation’.¹⁰³ Michael A Helfand recognises arbitration has, in the past, generally been chosen as a faster and more cost effective means of resolving disputes than litigation.¹⁰⁴ Arbitration was also commonly seen to serve the same purpose as litigation: to resolve disputes.¹⁰⁵ However, Helfand argues a counter-narrative to this ideal has arisen, where arbitration can ‘promote an alternative set of values beyond simply resolving disputes’, allowing citizens to arbitrate disputes according to religious norms.¹⁰⁶ In this respect, arbitration can be seen as transformative:

[A]rbitration provides a framework within which parties can opt out of the dominant legal system and establish their own rules and procedures to govern the dispute resolution process. And parties can tap into this transformative potential by employing arbitration and choice-of-law provisions that ultimately advance a shared set of objectives and values.¹⁰⁷

Consistent with Helfand’s idea of an arbitration counter-narrative, Randy Linda Sturman acknowledges religious arbitration can allow parties to resolve disputes according to the tenets of their faith and, importantly, to have such disputes determined ‘by individuals who hold cultural beliefs and values similar to their own’.¹⁰⁸ It is a ‘sense of religious obligation’, coupled with ‘the importance of maintaining a sense of community’ that makes religious arbitration a real and viable alternative for religious minorities.¹⁰⁹ Where previously, choice of law rules governing dispute resolutions were generally determined according to a territorial jurisdiction, such choices might now be informed by a broader range of considerations.¹¹⁰ In this way, governments can recognise the dual affiliation of their citizens through parties’ choice of law powers in religious arbitration.

The arbitration of family law disputes according to faith-based norms, and in particular according to Islamic law, has been the subject of much attention in

102 Marc Galanter, ‘Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law’ (1981) 13(19) *Journal of Legal Pluralism and Unofficial Law* 1, 2 <<https://doi.org/10.1080/07329113.1981.10756257>>.

103 Ibid 17.

104 Michael A Helfand, ‘Arbitration’s Counter-Narrative: The Religious Arbitration Paradigm’ (2015) 124(8) *Yale Law Journal* 2994 (‘Arbitration’s Counter-Narrative’).

105 Ibid.

106 Ibid 2997.

107 Ibid 3011.

108 Randy Linda Sturman, ‘House of Judgment: Alternative Dispute Resolution in the Orthodox Jewish Community’ (2000) 36(2) *California Western Law Review* 417, 418 (discussing religious arbitration in the context of the Jewish community).

109 Ibid 435.

110 See generally Paul Schiff Berman, ‘Global Legal Pluralism’ (2007) 80(6) *Southern California Law Review* 1155.

recent years across the common law world,¹¹¹ in countries such as Australia;¹¹² the United Kingdom;¹¹³ Canada;¹¹⁴ and the United States of America ('US').¹¹⁵ Ghena Krayem's work on Muslim family law in Australia observes 'there is no common practice of using arbitration to resolve family disputes in Australia'.¹¹⁶ Rather, Krayem argues that in keeping with the general preference in Australian law to keep family disputes out of the court system, there is room for existing family law frameworks to better accommodate the needs of Australia's Muslims.¹¹⁷ Despite the significant body of work on the arbitration of Muslim family law disputes in common law countries, there has been little analysis of how such arbitration processes might benefit Muslims in matters of inheritance.

Separately to the debate on faith-based arbitration, testamentary arbitration (also referred to as testator-compelled arbitration) has been given some consideration in the US¹¹⁸ context, primarily as an avenue to adjudicate challenges to the granting

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- 111 See generally Rex Ahdar and Nicholas Aroney (eds), *Sharia in the West* (Oxford University Press, 2010); Marie Ashe and Anissa Hélie, 'Realities of Religio-Legalism: Religious Courts and Women's Rights in Canada, the United Kingdom, and the United States' (2014) 20(2) *UC Davis Journal of International Law and Policy* 139.
 - 112 See generally Amira Aftab, 'Religious Freedom and Gender Equality: The Sharia Debates and Gendered Institutions in Australia and Britain' (2019) 25(2) *Australian Journal of Human Rights* 281 <<https://doi.org/10.1080/1323238X.2019.1622245>>; Ghena Krayem and Farrah Ahmed, 'Islamic Community Processes in Australia: An Introduction' in Samio Bano (ed), *Gender and Justice in Family Law Disputes: Women, Mediation, and Religious Arbitration* (Brandeis University Press, 2017) 246 <<https://doi.org/10.2307/j.ctv102bhb9>>; Nadav Praver, Nussen Ainsworth and John Zeleznikow, 'An Introduction to the Challenges and Possibilities of Faith-Based Arbitration in Australia' (2014) 25(2) *Australasian Dispute Resolution Journal* 91.
 - 113 See generally Samia Bano, 'Islamic Family Arbitration, Justice and Human Rights in Britain' (2007) 1 *Law, Social Justice & Global Development Journal* 15; Samia Bano, 'In Pursuit of Religious and Legal Diversity: A Response to the Archbishop of Canterbury and the "Sharia Debate" in Britain' (2008) 10(3) *Ecclesiastical Law Journal* 283 <<https://doi.org/10.1017/S0956618X08001415>>; Jessie Brechin, 'A Study of the Use of Sharia Law in Religious Arbitration in the United Kingdom and the Concerns that This Raises for Human Rights' (2013) 15(3) *Ecclesiastical Law Journal* 293 <<https://doi.org/10.1017/S0956618X13000434>>; Rowan Williams, 'Civil and Religious Law in England: A Religious Perspective' (2008) 10(3) *Ecclesiastical Law Journal* 262, 263–4 <<https://doi.org/10.1017/S0956618X08001403>>.
 - 114 See generally Natasha Bakht, 'Were Muslim Barbarians Really Knocking on the Gates of Ontario? The Religious Arbitration Controversy: Another Perspective' (2006) (40th Anniversary Edition) *Ottawa Law Review* 67; Laureve Blackstone, 'Courting Islam: Practical Alternatives to a Muslim Family Court in Ontario' (2005) 31(1) *Brooklyn Journal of International Law* 207; Marion Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* (Report, 20 December 2004); Faisal Kutty, 'The Myth and Reality of "Shari'a Courts" in Canada: A Delayed Opportunity for the Indigenization of Islamic Legal Rulings' (2010) 7(3) *University of St Thomas Law Journal* 559.
 - 115 See generally Irshad Abdal-Haqq and Qadir Abdal-Haqq, 'Community-Based Arbitration as a Vehicle for Implementing Islamic Law in the United States' (1996) 1(1) *Journal of Islamic Law* 61; Michael J Broyde, 'Faith-Based Arbitration Evaluated: The Policy Arguments For and Against Religious Arbitration in America' (2018) 33(3) *Journal of Law and Religion* 340 <<https://doi.org/10.1017/jlr.2018.44>>; Christopher R Lepore, 'Asserting State Sovereignty over National Communities of Islam in the United States and Britain: Sharia Courts as a Tool of Muslim Accommodation and Integration' (2012) 11(3) *Washington University Global Studies Law Review* 669.
 - 116 Krayem (n 4) 227.
 - 117 Ibid 241.
 - 118 See, eg, 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; Grayson MP McCouch, 'Another Perspective on Testamentary Arbitration' (2016) 68 *Florida*

of probate of wills on the basis of mental incapacity, undue influence or some other challenge to the validity of a will. In response to family provision legislation's failure to adequately preserve testamentary freedom, as highlighted earlier, it is timely to consider how existing legal mechanisms like arbitration might better facilitate the exercise of religious testamentary freedom. This article now turns to examine the feasibility of testamentary arbitration and its 'transformative potential'¹¹⁹ to enhance testamentary freedom for Islamic testators in Australia. Specifically, should Islamic will-makers be entitled to include an arbitration clause in their wills requiring any disputes about the will to be determined via arbitration? There are two questions to consider: first, whether inheritance disputes are capable of being settled by arbitration; and second, whether parties to a challenge to the validity of a will, or a family provision application, can (or should) be forced to submit to arbitration (as opposed to litigation in the courts) where the will in question contains an arbitration clause.

A Are Inheritance Disputes Arbitrable?

Domestic arbitrations in Australia are governed at the state and territory level¹²⁰ and all states and territories have adopted or enacted versions of the *United Nations Commission on International Trade Law Model Law on International Commercial Arbitration* ('*Model Law*'),¹²¹ creating a uniform framework for domestic arbitration in Australia. This article draws on the New South Wales legislation, because it is the state with the largest population of Muslims in Australia,¹²² and also recently considered the potential arbitrability of disputes involving familial relationships.

The relevant New South Wales legislation is the *Commercial Arbitration Act 2010* (NSW) ('*NSW Arbitration Act*'). Consistent with the traditional nature of arbitration, its paramount objective is to 'facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense'¹²³ by 'enabling parties to agree how their commercial disputes are resolved (subject to ... such safeguards as are necessary in the public interest)' and 'providing procedures that enable commercial disputes to be resolved in a

Law Review Forum 68 <<http://dx.doi.org/10.2139/ssrn.3619442>>; Erin Katzen, 'Arbitration Clauses in Wills and Trusts: Defining the Parameters for Mandatory Arbitration of Wills and Trusts' (2011) 24(2) *Quinnipiac Probate Law Journal* 118; Peter B Rutledge, 'The Testamentary Foundations of Commercial Arbitration' (2015) 30(2) *Ohio State Journal on Dispute Resolution* 275; Bridget A Logstrom, 'Arbitration in Estate and Trust Disputes: Friend or Foe?' (2005) 30(4) *ACTEC Journal* 266; Omar T Mohammedi, 'Sharia-Compliant Wills: Principles, Recognition, and Enforcement' (2012) 57(2) *New York Law School Law Review* 259.

119 Helfand, 'Arbitration's Counter-Narrative' (n 104) 3011.

120 *Commercial Arbitration Act 2017* (ACT); *Commercial Arbitration Act 2010* (NSW) ('*NSW Arbitration Act*'); *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT); *Commercial Arbitration Act 2013* (Qld); *Commercial Arbitration Act 2011* (SA); *Commercial Arbitration Act 2011* (Tas); *Commercial Arbitration Act 2011* (Vic); *Commercial Arbitration Act 2012* (WA).

121 United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration*, GA Res 40/72, UN Doc A/RES/40/17 (11 December 1985).

122 Jan A Ali, *Islam and Muslims in Australia: Settlement, Integration, Shariah, Education and Terrorism* (Melbourne University Press, 2010) 16.

123 *NSW Arbitration Act* (n 120) s 1C(1).

cost-effective manner, informally and quickly'.¹²⁴ In New South Wales, there is no stipulation as to what system of law parties may choose to govern a dispute and the arbitral tribunal is required to decide disputes 'in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute'.¹²⁵ In respect of the arbitrability of a particular dispute, Foster J has observed:

The issue of arbitrability goes beyond the scope of an arbitration agreement. It involves consideration of the inherent power of a national legal system to determine what issues are capable of being resolved through arbitration. The issue goes beyond the will or the agreement of the parties. The parties cannot agree to submit to arbitration disputes that are not arbitrable.¹²⁶

In *Comandate Marine Corp v Pan Australia Shipping Pty Ltd*,¹²⁷ Allsop J highlighted intellectual property, anti-trust and competition disputes, securities transactions and insolvency as the 'types of disputes which national laws may see as not arbitrable'.¹²⁸ His Honour observed that 'the common element to the notion of non-arbitrability was that there was a sufficient element of legitimate public interest in these subject matters making the enforceable private resolution of disputes concerning them outside the national court system inappropriate'.¹²⁹ This raises the question whether arbitration is an appropriate forum in which to resolve inheritance disputes. New South Wales courts are granted jurisdiction over a number of matters relating to wills by virtue of the *Succession Act 2006* (NSW), including: the power to dispense with the requirements for will execution, alteration or revocation,¹³⁰ the power to authorise a will be made, altered or revoked for a person without testamentary capacity;¹³¹ and the power to rectify a will.¹³² It might therefore be seen as contrary to public interest or public policy to oust the court's jurisdiction with respect to challenges to a will. While the common law's approach to arbitration has historically been one of a 'long tradition of distrust for arbitration'.¹³³

The clear trend in judicial decision-making about arbitration in Australia [has transformed] from suspicion, to respect and support ... In terms of intervention [by the judiciary], restraint is essential. Arbitration depends for its success on the informed and sympathetic attitude of the courts.¹³⁴

Thus, Australian courts have generally taken an expansive view on the issue of arbitrability, suggesting 'it is only in extremely limited circumstances that a

124 Ibid s 1C(2).

125 Ibid s 28(1).

126 *WDR Delaware Corporation v Hydrox Holdings Pty Ltd* (2016) 245 FCR 452, 474 [124] (Foster J).

127 (2006) 157 FCR 45.

128 Ibid 98 [200] (Allsop J).

129 Ibid.

130 *Succession Act 2006* (NSW) s 8.

131 Ibid s 18.

132 Ibid s 27.

133 *Raguz v Sullivan* (2000) 50 NSWLR 236, 247 [46] (Spigelman CJ and Mason P), quoted in Matthew Conaglen, 'The Enforceability of Arbitration Clauses in Trusts' (2015) 74(3) *Cambridge Law Journal* 450, 459 <<https://doi.org/10.1017/S0008197315000653>>.

134 Justice James Allsop, 'International Arbitration and the Courts: The Australian Approach' (Conference Paper, CI Arb Asia Pacific Conference, 27 May 2011) 1, 7, quoted in Justice Clyde Croft, 'How the Judiciary Can Support Domestic and International Arbitration' (Conference Paper, Mediators' Institute of New Zealand Annual Conference, 25–27 July 2013) 21.

dispute which the parties have agreed to refer to arbitration will [be] held to be non-arbitrable'.¹³⁵

There is limited scholarly commentary as to whether inheritance disputes or disputes relating to wills are arbitrable under Australian law. However, Peter B Rutledge explores the historical relationship of enforceable arbitration clauses in testamentary documents, arguing that 'modern-day commercial arbitration does not simply inform testamentary arbitration but, in several important respects, is informed by it'.¹³⁶ Rutledge highlights the English roots of arbitration clauses in testamentary documents:

The law governing the enforceability of arbitration clauses in wills enjoys a rich historical pedigree. Examples of such clauses date at least to the seventeenth century in England. In *Philips v Bury*, an English court confronted a clause in a will providing that 'any differences will be resolved by an arbitrator whose decision shall be final.' The court held that the arbitration provision in that case technically was enforceable but stressed that the provision could not impair the ability of any litigant to dispute the distribution of the estate in court. Consequently, as a practical matter, decisions like *Philips* emasculated arbitration provisions in wills.¹³⁷

While Rutledge highlights the court's concern in ousting its jurisdiction, it has been explained that this similar concern has been a trend in judicial views of commercial arbitration, and one that has been largely done away with.

The *NSW Arbitration Act* reflects this notion of arbitrability, where courts have the power to set aside any arbitral award made with respect to a dispute incapable of arbitration.¹³⁸ In its current form, the *NSW Arbitration Act* focuses on 'domestic commercial arbitrations',¹³⁹ making reference to the parties' 'places of business'¹⁴⁰ in identifying whether an arbitration falls within the legislation's scope. It is relevant to consider whether inheritance disputes could fall under the *NSW Arbitration Act*'s jurisdiction as an arbitral matter, even though the legislation focuses on commercial disputes. There is some limited judicial precedent to be found in *Rinehart v Rinehart [No 3]* ('*Rinehart*')¹⁴¹ for the potential arbitrability of disputes involving familial relationships. *Rinehart* considered an interlocutory order sought by Gina Rinehart ('Mrs Rinehart') and others ('the Respondents') for referral of a dispute to arbitration, pursuant to section 8(1) of the *NSW Arbitration Act* which provides:

A court before which an action is brought in a matter which is the subject of an arbitration agreement must, if a party so requests ... refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.¹⁴²

135 *Rinehart v Welker* (2012) 95 NSWLR 221, 258 [167] (Bathurst CJ) ('*Rinehart v Welker*').

136 Rutledge (n 118) 279.

137 *Ibid* 286.

138 *NSW Arbitration Act* (n 120) s 34(2)(b)(i).

139 *Ibid* s 1(1).

140 *Ibid* s 1(3).

141 (2016) 257 FCR 310 ('*Rinehart*').

142 *NSW Arbitration Act* (n 120) s 8(1). An equivalent provision is included in section 8(1) of the *Commercial Arbitration Act 2013* (Qld).

Two of Mrs Rinehart's children, Bianca Rinehart and John Hancock (together, 'the Applicants'), were pursuing relief against Mrs Rinehart for alleged misconduct in the administration of trusts associated with the late Lang Hancock, Mrs Rinehart's father and the Applicants' grandfather. The interlocutory applications were based on a number of deeds executed that were alleged to contain 'arbitration agreements' within the meaning of section 8(1) of the *NSW Arbitration Act*. Mrs Rinehart sought an interlocutory order that the dispute be referred to arbitration. In considering whether the interlocutory order should be granted, it was necessary for the Court to determine whether the dispute was a 'commercial dispute' for the purposes of the *NSW Arbitration Act*. The Court looked to the meaning of the term 'commercial' in the context of the *Model Law*. The following note appears at the end of section 1 of the *NSW Arbitration Act*:

The term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not.

Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.¹⁴³

The Court in *Rinehart* stated:

At [31] of the *Report of the Secretary-General: possible features of a model law on international commercial arbitration* (1981) UN Doc A/CN.9/207, the original drafters of the Model Law Note below s 1 (which first appeared as a note to the Model Law) referred to the differentiation of commercial arbitrations from arbitrations of a different nature:

[The term 'commercial'] has by now gained a sufficiently clear meaning, at least as a modifier to arbitration, thus excluding arbitrations of a different nature such as those in labour disputes or family law matters.¹⁴⁴

While this definition excludes family law arbitrations from the scope of the legislation,¹⁴⁵ it does not explicitly rule out the arbitration of inheritance disputes. In *Rinehart*, the Court took the view that the *NSW Arbitration Act* is concerned with the resolution of 'commercial disputes':

A natural interpretation of the word 'commercial' when qualifying the word 'arbitration' is that it refers to arbitration of commercial disputes. The note to s 1 indicates that the term 'commercial' should be given a wide interpretation, and that commercial disputes generally arise from a transaction between parties who have a relationship of a commercial nature. However, the legislation does not expressly

143 *NSW Arbitration Act* (n 120) s 1. An equivalent provision is included in section 1 of the *Commercial Arbitration Act 2013* (Qld).

144 *Rinehart* (n 141) 330 [43] (Gleeson J).

145 However, the Family Law Council has previously considered whether courts should be able to order parties to attend compulsory arbitration in family law property and financial matters: Family Law Council, *The Answer from an Oracle: Arbitrating Family Law Property and Financial Matters* (Discussion Paper, May 2007).

require the identification of a commercial relationship between the parties to an arbitration agreement.¹⁴⁶

The Applicants argued the matter did not fall under the purview of the *NSW Arbitration Act* because of the familial relationship between the parties, and the fact the dispute related primarily to a family trust, thereby demonstrating the absence of a commercial relationship. The Court, however, determined while there must be a commercial dispute in order for the *NSW Arbitration Act* to apply, the parties do not necessarily need to be ‘in a relationship of a commercial nature’.¹⁴⁷ In particular, the Court established:

The commercial nature of the dispute may arise from issues about ownership of commercial assets, or entitlements to profits, or other features of the context of the dispute which reveal an underlying concern with the making of profits or commercial gains.¹⁴⁸

For this reason, the Court held the claims subject to the proceedings did comprise commercial disputes, ‘to the extent they concern ownership of valuable commercial assets and entitlements to profits generated by those assets’.¹⁴⁹ Furthermore, the Court held the familial relationship between the Applicants and Mrs Rinehart did not deprive the claims of their commercial character.¹⁵⁰ Notably, the Court did not ‘accept that any lack of commercial sophistication on the part of either of the applicants would cause the disputes not to be characterised as commercial disputes’.¹⁵¹

While *Rinehart* considered the arbitrability of a trust dispute, it highlights while there must be a *commercial dispute* between the parties, there does not necessarily need to be a *commercial relationship*, nor commercial sophistication on the part of either party, for the dispute to be arbitrable. As a consequence, disputes relating to more sophisticated estates (eg, those involving valuable commercial assets and entitlements to those assets) are not necessarily excluded from the ambit of the *NSW Arbitration Act*.

B Can a Testator Compel Parties to Submit to an Arbitration?

The preceding analysis provides some basis for the potential arbitrability of inheritance disputes. In turn, it is relevant to determine whether a testator can effectively compel parties to submit to an arbitration with respect to a challenge to a will or family provision claim. Traditionally, arbitrations (whether in the commercial sense or relating to the resolution of disputes according to faith-based laws) are based on the parties’ consent, who voluntarily submit to the arbitration via an arbitration agreement. This is because the ‘conceptual justification for arbitration lies in the consent of the parties’.¹⁵² For example, the *NSW Arbitration*

146 *Rinehart* (n 141) 331 [51] (Gleeson J).

147 *Ibid* 336 [72] (Gleeson J).

148 *Ibid* 336.

149 *Ibid* 421 [560] (Gleeson J).

150 *Ibid* 421 [561].

151 *Ibid*.

152 Conaglen (n 133) 468.

Act defines an ‘arbitration agreement’ as ‘an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not’.¹⁵³ Importantly, the fact that a testamentary instrument (ie, a will) is not a contractual agreement does not prevent it from being arbitrated. However, there remains the necessity for some sort of agreement between the parties.

Under the *NSW Arbitration Act*, an arbitration agreement must be in writing,¹⁵⁴ but such agreement will be taken to be in writing if its content is recorded ‘in any form’ whether or not the agreement was ‘concluded orally, by conduct or by other means’.¹⁵⁵ Theoretically, beneficiaries and testators might pre-agree that disputes about a will are to be conducted via arbitration and this might constitute an arbitration agreement under the *NSW Arbitration Act*. However, in the absence of any agreement, the issue is one of statutory construction. It is unlikely an arbitration clause in a testamentary instrument to which the parties to the dispute do not agree can be termed an ‘arbitration agreement’ for the purposes of the *NSW Arbitration Act*. In light of this, the relevant question is whether there is some conceptual argument for why testators *should* be able to compel parties to submit to arbitration in the event a dispute arises about the testator’s will. The remainder of this article sets out some arguments for and against testamentary arbitration.

1 Preserving Testamentary Freedom

The main argument in favour of testamentary arbitration, in the context of Islamic wills, is to prioritise the Islamic testator’s wishes in the event a dispute about the will arises. Considering the facts in *Omari* again, the testator’s daughter may have agreed to testamentary arbitration on the basis she knew it was her mother’s desire and intention to distribute her estate according to the Islamic principles. Outside of informal family or community mediation, the daughter’s only redress was to the official court system in which no account could be taken of the testator’s religious values and wishes. Testamentary arbitration would provide a more official forum in which the dispute could be adjudicated according to a particular pre-determined set of laws proposed by the testator. The traditional benefits of arbitration over litigation would also be realised, including: confidentiality and privacy; efficiency; expediency; and cost savings (both to the parties of the dispute and the courts). Edward F Sherman notes that:

Advocates of enforcing arbitration clauses in wills ... also emphasise that ‘enforcement can prevent arguments among family members by having a prompt and final process to resolve disputes. Enforcement of arbitration clauses may avoid the dissipation of the estate in prolonged expensive litigation. A related motive is to avoid these protracted disputes that can severely damage family and friend relationships for decades afterwards’.¹⁵⁶

153 *NSW Arbitration Act* (n 120) s 7(1).

154 *Ibid* s 7(3).

155 *Ibid* s 7(4).

156 Edward F Sherman, ‘Arbitration in Wills and Trusts: From George Washington to an Uncertain Present’ (2017) 9 *Arbitration Law Review* 83, 87.

More difficult issues arise where parties do not consent to testamentary arbitration. There is some argument in favour of mandatory testamentary arbitration, however, which derives its reasoning in analogies with mandatory trust arbitration. Similar to a will dispute, when a trust dispute arises, the beneficiaries to the property the subject of the trust are not party to the relevant instrument (ie, the trust deed). There has been some consideration as to whether arbitration clauses in trusts are enforceable in Australia,¹⁵⁷ and courts have commented '[t]here may be powerful commercial or domestic reasons for parties to have disputes between a trustee and beneficiary settled privately'.¹⁵⁸ While there is little case law addressing the issue, the New South Wales Supreme Court held in *Rinehart v Welker*¹⁵⁹ that a dispute about the removal of a trustee from a family trust was capable of arbitration. There is, however, disagreement as to whether beneficiaries can be *compelled* to attend arbitration of a trust dispute where they have not agreed to do so.¹⁶⁰ Matthew Conaglen contends the strongest justification for enforcing arbitration clauses in trusts lies in, as with the other terms of the trust, 'giving effect to the settlor's intention'.¹⁶¹ Where such disputes are not able to be facilitated by arbitration statutes like the *NSW Arbitration Act*, Conaglen argues they could nonetheless be contemplated to fall within the scope of the court's inherent jurisdiction:

If arbitration of trust disputes is not considered repugnant to the gifts which have been made in a trust and is not contrary to public policy as it does not illegitimately oust the jurisdiction of the court, then a stay of proceedings granted under the inherent jurisdiction of the court may be an effective means of giving effect to the settlor's intention as to how the trust would operate.

A further potential benefit to this approach to the issue lies in the degree of control that the court maintains over the dispute resolution process. Because the stay of proceedings lies in the court's discretion, rather than being mandated as it is under the arbitration statutes (where they apply), the court could refuse a stay where it considered arbitration inappropriate.¹⁶²

An analogous argument could be made for testamentary arbitration, where the court's inherent jurisdiction could be invoked to compel parties to attend arbitration to give effect to the underlying purpose of the testamentary instrument, being the testator's intentions (and testamentary freedom).¹⁶³

157 Conaglen (n 133). For consideration in the Canadian context, see Lucas Clover Alcolea, 'Trust Arbitration: 99 Problems and 99 Solutions' (2020) 26(3) *Trusts and Trustees* 260 <<https://doi.org/10.1093/tandt/taaa003>>. See also Logstrom (n 118).

158 *Rinehart v Welker* (n 135) 260 [175] (Bathurst CJ).

159 *Rinehart v Welker* (n 135).

160 Conaglen (n 133) 468–9.

161 *Ibid* 476.

162 *Ibid*.

163 For discussion on the intent theory and its application to mandatory testamentary arbitration in the United States context, see generally Stephen Wills Murphy, 'Enforceable Arbitration Clauses in Wills and Trusts: A Critique' (2011) 26(4) *Ohio State Journal on Dispute Resolution* 627, 652–5.

2 *Implied Consent: Direct Benefit Theory*

In the US context, arbitration clauses in wills and trusts have also been enforced on the basis of what is termed the direct benefit theory.¹⁶⁴ Under the doctrine of direct benefit,

a beneficiary who accepts benefits from a will or trust either impliedly agrees to be bound by its terms (thus making the donative arbitration clause an “agreement” under state arbitration statutes), or is estopped from challenging the validity of the terms of the will or trust (thus preventing the beneficiary from challenging the donative arbitration clause in the first place).¹⁶⁵ In this respect, it is said a party can ‘manifest assent to arbitrate by exercising rights under an instrument that includes an arbitration provision.’¹⁶⁶

Put differently, when a beneficiary accepts money or property distributed out of an estate under the provisions of the testator’s will, they ‘[acquiesce] to its terms, including its arbitration provision’.¹⁶⁷

There are limits to this argument. Specifically, the direct benefit theory would only apply to beneficiaries who: (a) were included in the terms of the will; and (b) accepted those benefits included in the will prior to contesting its terms. In the context of an Islamic will, those included in the will would presumably include (where relevant) the testator’s spouse, parents, biological children and other close blood relatives. It may not include, for example, adopted children, or biological children who have converted to another faith, both of whom are not entitled to inherit under Islamic law.¹⁶⁸ Accordingly, a child who is disinherited due to conversion to another faith would be unable to be compelled to submit to arbitration because they would have received no benefit from the will and thus could not be taken to consent to its terms. As regards challenges to the validity of a will, the direct benefit theory could not apply because such challenges essentially contend that the document in its entirety is a ‘legal nullity’.¹⁶⁹

3 *A Hierarchy of Rights*

Another argument in favour of enforcing arbitration clauses in testamentary instruments lies in asserting the testator’s rights as superior to those of any beneficiary or expectant beneficiary in a hierarchy of rights analysis. As E Gary Spitko argues: ‘The testator’s right to dispose of her property as she sees fit is indisputably superior to the right of an intestate heir or beneficiary under a prior will to receive the testator’s property at her death’.¹⁷⁰ The position that the testator’s rights are superior to those of any potential beneficiaries can be said to be supported by both Bentham and Mill, where Bentham viewed testamentary freedom in the

164 *Rachal v Reitz*, 403 SW 3d 840 (Tex, 2013).

165 Murphy (n 163) 648–9.

166 David Horton, ‘The Limits of Testamentary Arbitration’ (2016) 68 *Florida Law Review Forum* 12, 16.

167 Ibid.

168 Hamid Khan (n 53) 51–3. However, it should be noted the testator may include such beneficiaries in the testator’s will within the one third allowance: 241–5.

169 Horton (n 166) 16–17.

170 Spitko (n 118) 299.

context of ‘an instrument of authority’¹⁷¹ to reward or punish conduct, and Mill differentiated between the right to make a bequest as forming part of the matrix of private property rights, whereas the right to receive a bequest does not.¹⁷² While neither Bentham nor Mill saw testamentary freedom as an unfettered power,¹⁷³ in the absence of family provision legislation, it exposed a hierarchy of rights in which the testator’s right to make a disposition as the testator saw fit was superior to that of any potential beneficiary’s right to receive a bequest.

The superior nature of the testator’s right is somewhat analogous with the donor’s superior right in the law relating to inter vivos gifts. The common law dictates that the donee’s right to the property only comes into effect when the gift is fully completed at law; in that the donor intends unequivocally to gift the property to the donee; the gift is delivered to the donee (whether actually or constructively),¹⁷⁴ and the donee accepts the gift.¹⁷⁵ A testator, in choosing whom to gift their estate to after death, should retain the same level of rights as one who is gifting property to another during their lifetime. Additionally, it is established at common law that the property in question returns to the donor on the failure of a conditional gift.¹⁷⁶ In such instances, ‘the issue is one of intention; and the relevant intention is that of the transferor’.¹⁷⁷ On this line of argument, a testator should be able to effectively ‘condition’ their testamentary disposition on the parties submitting to arbitration as a means to resolve any disputes about such disposition. As Spitko argues, ‘the testator ought to be able to condition any distribution of her property on compliance with her reasonable directions respecting resolution of disputes over her estate’.¹⁷⁸

This hierarchy of rights flows through to the common law principle of ademption that dictates where a gift is left to a beneficiary in the terms of a will, and the subject matter of said gift is sold or disposed of before the testator’s death, the gift is considered to be ‘adeemed’ and has no legal effect.¹⁷⁹ As such, the testator’s right to deal with the property inter vivos is also considered hierarchically superior to a beneficiary’s right to a bequest, even where said bequest is provided for under the terms of a will.

171 See above n 19.

172 See above n 20.

173 Rather, they saw it as one to be exercised within a framework of moral responsibility.

174 *Rowland v Stevenson* [2005] NSWSC 325.

175 *Re Cole* [1964] 1 Ch 175; LexisNexis, *Halsbury’s Laws of Australia* (online at 17 June 2017) 315 Personal Property, ‘4 Transfer of Ownership’ [315-415]. It is noted, however, that equity may perfect an imperfect gift in some limited circumstances: Matthew Freeman and Zachariah Pullar, ‘Equity: Now Assisting Volunteers? A Case Comment on *Khan v Mahmood* [2021] EWHC 597 (Ch)’ (2021) 28(2) *Trusts & Trustees* 141 <<https://doi.org/10.1093/tandt/ttab108>>. Additionally, there are important distinctions between the requirements of the inter vivos and probate doctrines of undue influence: Matthew Tyson, ‘An Analysis of the Differences between the Doctrine of Undue Influence with Respect to Testamentary and Inter Vivos Dispositions’ (1997) 5(1) *Australian Property Law Journal* 38.

176 *Cohen v Sellar* [1926] 1 KB 536. Cf *Toh v Su* [2017] NSWLC 10.

177 *Flourentzou v Spink* [2019] NSWCA 315, [21] (Barrett AJA).

178 Spitko (n 118) 299.

179 *Durrant v Friend* (1852) 64 ER 1145; *Brown v Heffer* (1967) 116 CLR 344; *Johnston v Maclarn* [2002] NSWSC 97, [13]–[15] (Young CJ).

4 *Impartiality in Arbitration Proceedings*

While the above discussion highlights some arguments in favour of testamentary arbitration, there are some significant hurdles to enforcing arbitration clauses in wills. One is the issue of arbitrator impartiality. Under the *NSW Arbitration Act*, there will be grounds to challenge an arbitrator's appointment where 'circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence'.¹⁸⁰ However, there must be 'a real danger of bias on the part of the arbitrator in conducting the arbitration'.¹⁸¹ As Spitko highlights, 'public policy should preclude the testator from unilaterally compelling arbitration before an arbitrator that is so biased that the arbitration is unlikely to provide a meaningful opportunity for the will contestant to present her case and prevail on the merits'.¹⁸² A particular mechanism would need to be developed to ensure that arbitrators act without bias towards the parties. For example, a three-panel arbitration tribunal could adjudicate the dispute, with one arbitrator being that proposed by the testator in the will, one by the relevant party to the dispute, and the third arbitrator by the first two appointed arbitrators.¹⁸³

Another core principle of arbitration proceedings is that parties are to be treated with 'equality'.¹⁸⁴ In the context of faith-based arbitration, Helfand notes that

religious law lends itself to the application of procedures that are potentially discriminatory. Indeed, many of the latent concerns regarding the enforceability of religious arbitral awards stem from the possibility that religious arbitration courts will apply rules that make the resulting judgments deeply unfair.¹⁸⁵

It is difficult to see how arbitration decisions made in accordance with the Islamic inheritance laws (eg, that order females to receive half the beneficial share of males) would meet the requirement for equal treatment, and it is practically impossible to impose requirements of equality on the adjudication of Islamic wills without challenging the very foundations of Islamic inheritance law itself. Rather, the argument for testamentary arbitration lies in the purpose of the arbitration being to give effect to the terms of the testamentary instrument in line with the testator's wishes.

5 *Equal Access to Justice*

Notwithstanding the potential for testamentary arbitration to preserve an Islamic testator's testamentary freedom, and while litigation in the courts will not provide a satisfactory outcome for all parties due to its adversarial nature, litigation can be said to result in the 'correct' outcome for the (living) parties to a will dispute because the issue has been adjudicated according to fundamental principles of Australian law by an impartial court to which all citizens have equal

180 *NSW Arbitration Act* (n 120) s 12(3).

181 *Ibid* s 12(6).

182 Spitko (n 118) 308.

183 A similar mechanism is provided for under section 11(3)(a) of the *NSW Arbitration Act* (n 120).

184 *Ibid* s 18.

185 Michael A Helfand, 'Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders' (2011) 86(5) *New York University Law Review* 1231, 1241.

access. Under the *Succession Act 2006* (NSW), courts are granted the jurisdiction to determine the validity and effect of wills, as well as the validity of family provision applications. It might therefore be seen as contrary to public policy for a testator to be able to oust the court's jurisdiction to supervise the validity of a will or determine the merits of a family provision claim. In this respect, Grayson MP McCouch observes that '[i]ronically, testator-compelled arbitration seeks to avoid the majoritarian cultural preferences of judges and juries but at the same time relies on the courts for validation and enforcement'.¹⁸⁶ This also goes to the fundamental issue of consent to testamentary arbitration based on religious laws. In some cases, parties to a dispute may not consent at all to testamentary arbitration. In others, consent could be procured by way of social or community pressure, and this is a well-known problem in relation to religious arbitration in other contexts, on which Helfand observes:

The lofty aspirations of religious arbitration can at times also emerge as the forum's Achilles heel. Religious arbitration tribunals provide parties with the option to resolve disputes in accordance with shared religious rules and values. But sometimes parties agree to submit disputes to arbitration tribunals not because they personally desire to have their dispute resolved in accordance with a particular brand of religious law, but because they find themselves enmeshed in a religious community that expects them to do so. ... [T]he expectations of religious communities can put pressure on reluctant members to forego access to judicial resolution of disputes in favour of the community's preferred religious tribunal.¹⁸⁷

Accordingly, it is imperative that any consideration of testamentary arbitration consider appropriate mechanisms for those with validly meritorious claims to an estate, either with respect to challenging the validity of a will or making a family provision claim. Not doing so would lock Australian citizens out of recourse to Australian law and Australian courts. Again, however, this could be facilitated through the court's inherent jurisdiction that would (in assessing an application for family provision or challenge to the validity of a will) enable the court to consider whether, in the circumstances, it would be just and proper (or on the contrary, unconscionable) to enforce a testamentary arbitration clause in the specific circumstances.

6 Testamentary Arbitration as a Means to Adjudicate Challenges to the Validity of a Will

Consideration would also need to be given to whether an arbitration clause contained in a will would be enforceable where the validity of the will itself is challenged (eg, on grounds of testamentary capacity, undue influence etc). The doctrine of separability is recognised and enforced in Australia and underpins both the *Model Law* (on which the *NSW Arbitration Act* is based) and the common law,¹⁸⁸ providing that arbitration clauses are treated as separate contracts within the documents that contain them. As such, questions as to the enforceability of the testamentary instrument 'would not necessarily taint the arbitration clause'.¹⁸⁹

¹⁸⁶ McCouch (n 118) 78.

¹⁸⁷ Helfand, 'Arbitration's Counter-Narrative' (n 104) 3042.

¹⁸⁸ *Hancock Prospecting v Rinehart* (2017) 257 FCR 442, 531 [360].

¹⁸⁹ Rutledge (n 118) 281.

Accordingly, testamentary arbitration could also be used to compel parties to submit to arbitration when the validity of an Islamic will is disputed, where an arbitration tribunal would not be bound to apply the intestacy rules to an estate distribution. In this way, testamentary arbitration offers the opportunity for greater weight to be placed on a testator's intentions. It is, however, important to acknowledge that challenges to the validity of a will on grounds such as testamentary incapacity (where the testator does not know the effect of what they are doing) or undue influence (where the testator is coerced into signing the will) do not present strong arguments on which to then compel a beneficiary to submit to arbitration in relation to the will. Despite this, the court's inherent jurisdiction could allow it to determine the merits of a case and whether it is suitable for arbitration.

7 *An Unofficial Law Framework*

Finally, while testamentary arbitration might provide a means to ensure further protection of a testator's intentions, maintaining the status quo (ie, the operation of Islamic inheritance law at an unofficial, community level only) provides a degree of autonomy to Australian Muslims. As Joumanah El Matrah, Executive Director of the Islamic Women's Welfare Council of Victoria highlights, 'establishing parallel systems for Muslims does not ensure a culturally appropriate response to justice; it fundamentally locks out Muslims from organisations and services they as citizens have a right to access'.¹⁹⁰ Muslims can already agree to re-distribute an estate outside the realm of the official legal system and are not prohibited from seeking the advice of a family member, local Muslim religious leader (*imam*) or Muslim lawyer in doing so, where the remedies of the Australian legal system remain available to them regardless of religious belief or adherence. Indeed, formalising testamentary arbitration could simply complicate the ability of Muslims who can already make adjustments (where they wish) to better comply with the Islamic requirements, if not in their will.

C Additional Reform Options

Arbitration is but one existing legal mechanism that may facilitate the better exercise of testamentary freedom for religious testators and other reform proposals should also be considered. For example, Australian states and territories could look to the work done by the SALRI to inform changes to family provision legislation that seek to give adequate consideration to the testator's wishes in such claims. The SALRI has made five law reform recommendations to the laws in that state, including:

- the addition of a statutory object or guiding principle in the legislation to provide that 'in considering any family provision claim a court should, as far as possible or practicable, respect the wishes of the testator';¹⁹¹

¹⁹⁰ Joumanah El Matrah, 'A Sharia Tribunal Is a Contradiction of Islam', *The Sydney Morning Herald* (online, 20 October 2009) <<https://www.smh.com.au/politics/federal/a-sharia-tribunal-is-contradiction-of-islam-20091020-h59c.html>>.

¹⁹¹ *Distinguishing Between the Deserving and the Undeserving* (n 93) 43 [3.5.17].

- placing greater focus on respecting and preserving testamentary freedom both in law and practice;¹⁹²
- allowing courts to alter a testator's will in only limited circumstances and that courts should, as far as possible or practicable, respect the wishes of the testator;¹⁹³
- amending the law to 'discourage or deter baseless, opportunistic, undeserving or unmeritorious claims' under family provision legislation;¹⁹⁴ and
- allowing a signed written account or statement by a testator to be admissible as a specific exception to the hearsay rule as evidence of the truth of its contents as to the testator's reasons for the distribution in their will.¹⁹⁵

Separately, Irene D Johnson proposes that testators be entitled to appoint a 'will guardian' to speak for the testator and the will in the event the will is challenged:

[T]he 'will guardian' would not be an interested party but rather someone selected by the testator to represent the will in legal proceedings. The will guardian would have been present at the execution of the will (but not a witness) and would have been made aware, by the testator, of the testator's goals and desires for his testamentary plan. Moreover, the testator would have informed the will guardian of any special relevant circumstances, such as the testator's reasons for making a particular disposition.¹⁹⁶

These additional reform options, while considered in the broader context of testamentary freedom, are equally applicable to Muslim wills where Islamic testators have clear reasons for their estate distribution. Nonetheless, it remains that there have been no cases in Australia that have considered a family provision application with respect to an Islamic will, indicating that such claims might be settled prior to litigation or that Muslims in Australia are less likely to challenge an Islamic will.

IV CONCLUSION

To conclude, there are key differences between Islamic and Australian inheritance laws that can result in Islamic wills deviating from the 'standard' Australian estate plan. This places such wills at heightened risk of successful challenge by way of family provision claim if they do not meet the objective community standard test. Additionally, where the validity of an Islamic will is successfully challenged, there is no room for courts to consider the testator's intentions and the estate will instead be distributed according to the relevant intestacy rules.

192 Ibid.

193 Ibid.

194 Ibid.

195 Ibid.

196 Irene D Johnson, 'There's a Will, But No Way: Whatever Happened to the Doctrine of Testamentary Freedom and What Can (Should) We Do to Restore It?' (2011) 4(1) *Estate Planning and Community Property Law Journal* 105, 125–6.

It is in this context that this article explores the feasibility of testamentary arbitration as one legal mechanism that may facilitate enhanced testamentary freedom and allow Muslims to maximise compliance with their religious obligations. There is some existing authority to support the potential arbitrability of inheritance disputes, where case law has established there does not necessarily need to be a commercial relationship existing between the parties, nor commercial sophistication on the part of either party, for a dispute to be arbitrable. Rather, the focus has been on whether the dispute is of a commercial nature. Despite this, it is unlikely that the current arbitration law framework in Australia would support the enforcement of an arbitration clause contained in a testamentary instrument to which the parties have not agreed.

This article explores whether there is a conceptual argument for why testators should be able to compel parties to submit to testamentary arbitration in the event of a dispute over a testator's will. For example, a hierarchy of rights analysis positions the testator's right as superior to those of any beneficiaries, because it is analogous to a donor's superior right to their property against any donee. Additional justification for testamentary arbitration, as has been argued in the context of trust arbitration, lies in, as with the other terms of a will, giving effect to the testator's intention. Nonetheless, significant hurdles remain in relation to arbitrator impartiality; equality; equal access to justice; consent; and whether arbitration is the most appropriate forum in which to adjudicate challenges to the validity of a will on certain bases (ie, undue influence or capacity).

This article concludes with some alternative solutions that warrant further examination: first, recent amendments proposed by the SALRI to protect the principle of testamentary freedom and ensure that family provision legislation gives adequate consideration to the testator's wishes; and second, a system where testators may appoint a 'will guardian' to speak for the testator and the will in relation to the testator's wishes and reasons for any particular distribution plan. Such reforms, however, would not change the current position that courts cannot consider the testator's wishes in any finding of invalidity on account of, for example, testamentary capacity or undue influence.