(e) He fixes the remuneration of *Mutawalli*, where there is no provision for such remuneration in the *waqf* deed.

(f) He invests any money received as compensation for the acquisition of *waqf* properties either by himself or directs the *Mutawalli* to do proper investigation.

(g) He does all such acts as may be necessary for proper maintenance and administration of *waqf* property.

Besides the above, the administrator may remove a *Mutawalli* for breach of trust, mismanagement, or misappropriation of fund or if he has convicted more than once under section 61 of this Ordinance, or if he is found unsuitable, incompetent, negligent or otherwise undesirable or does any act causing loss to the *waqf* property.[54]

The administrator may transfer any part of *waqf* property for the improvement and benefit of the *waqf*, subject to previous sanction of the Government.[55] He may also take over and assume the administration, control, management and maintenance of any *waqf* property including any shrine, *dargah, imambara* or other religious institution associated with such *waqf* property.[56] In case of vacancy due to minority of the successors or unsound mindness, or insolvency by the Court which stand in the way to hold the office of *Mutawalli*, the administrator may temporarily appoint a person to act as a *Mutawalli*.[57]

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[54] Section 32 of the Waqf Ordinance, 1962; 35 DLR 277.
[55] Section 33 of the Ordinance.
[56] Section 34 of the Ordinance.
[57] Section 43 of the Ordinance; Amir Sutan Ali Hyder V. Md. K. Alam, 29 DLR (Sc) 295.

Chapter Fourteen

Wasiyat or will

1. Origin and development of the concept *wasiyat* or will

In pre-Islamic Arabiya *wasiyat* (Arabic term) or bequest was prevalent and under that system a testator or a person making bequest was free to make it in favour of any person and he could bequeath of his entire property leaving his children, parents and kindred deprived. He was also at liberty to give preference to one heir to the exclusion of the others.[1] But Islam brought a change in the law of bequest by specific rules laid down in the Quran and the Hadith. Islam restricted the unbridled power of the testator who is now not allowed to bequeath more than one-third of his property.

The Quran approved the power of making a testamentary disposition and regulates the formalities and conditions to which it is subjected. The Quran states, "When death approaches any of you, if he leave any goods, that he make a bequest to parents and next of kin, according to reasonable usage".[2] The Prophet (Peace be on him) also restricted the right of the testator to bequeath more than one-third. The Hadith is as follows:

The Hadith has been narrated and reported by Sa'd Ibn Abi Wakkas who said:-

> "In the year of the conquest of Mecca, being taken so extremely ill that my life was despaired of, the Prophet (peace be on him) came to pay me a visit of consolation. I told him that by the blessing of Allah, having a great estate but no heirs except one daughter, I wished to know if I might dispose of it all by *wasiyat*. He replied: 'No'. And when I severally interrogated him, 'If I might leave two-thirds or one-half, he also replied in the negative but when I asked if I might leave a third, he answered, 'Yes', you may leave a third of your property by bequest, but a third part to be disposed of by *wasiyat* is a great portion, and it is better you should leave your heirs rich than in a state of poverty which might oblige them to beg of others.'[3]

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[1] Abdur Rahim, Muhammadan Jurisprudence, P. 15
[2] Al-Quran, 2:180.
[3] Ameer Ali cited this hadith in Muhammedan Law from Mishkatul Masabih, PP. 569-70.

Bukhari Repots a hadith which laid stress that Muslims who possesses property should not sleep even two nights unless he has made a written *wasiyat*.[4] Thus both the Quran and Hadith emphasized the need for making *wasiyat*, though the Quran does not mention the limit of one-third. The Prophet's answer in the above hadith might very well have been taken as applying only to that particular case, which was that of a man leaving one daughter and no other heirs, but it appears, in fact, to have been treated by jurists of all schools as guarding the rights of all inheritors however remote, and as permitting bequests to the extent of one-third, even when there are sons as well as daughters.[5]

Wasiyat or will is a legal institution under both *shariya* as well as statutory law.

2. Definitions

(i) (a) *Wasiyat* or bequest means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death.[6]

(b) "When a person should say to another, 'give this article of mines, after my death, to a particular person, he is said to make a *Wasiyat*.

Thus *wasiyat* is an endowment of a right in property which is to take effect on the death of the person conferring the right.[7] So *wasiyat* means a will, whether oral or written, which signifies a moral exhortion.

(ii) Testator

The person who makes the *wasiyat* is called the testator. He intends to bequeath certain portion of his or her property in favour of a person, which takes into effect after his or her death.

(iii) Legacy

The property which is given by *wasiyat* is termed legacy. Anything which is in existence at the time of the death of testator and is

4 Muhammad Ali, Manual of Hadith (Lahore, 1944), P. 334.
5 Willson, Anglo Muhammadan Law, P. 303.
6 Section 2(h) 9, the Succession Act, 1925.
7 Hedaya, P. 676.

capable of being owned and transferred may be a valid subject of a bequest.

(iv) Legatee

Legatee is a person in whose favour *wasiyat* is made by the testator.

(v) Executor

Executor (*Wasee*) means a person to whom the execution of the last will of a deceased person is confined. He is appointed by the testator to superintend, protect and take care of his property and children after his death. He is also his personal representative.

3. Qualifications of a testator

(i) A testator must be a Muslim

According to Maliki school, *wasiyat* is annulled by the fact of apostacy of the testator. But apostacy, according to Hanafis, does not invalidate a *wasiyat*. In my opinion, Maliki view is more correct, because *wasiyat* is an Islamic institution ordained in the Quran and Sunnah, so an apostate ceases to be a Muslim and as such *wasiyat* is not related to him. But in case of a female apostate (testator), her bequest is valid, because she is not liable to put to death for apostasy.[8]

(ii) He must be a major

Under Islamic law, majority is attained at puberty and the presumption is that a Muslim attains majority on the completion of the fifteenth year. For the purpose of *wasiyat*, under section 3 of the Majority Act 1875, a Muslim is considered major only when he completed the age of eighteen years. If a minor makes a bequest and after attaining majority allows it, the bequest is valid *ab initio*.

(iii) He must be a man of sound mind

Sanity is a necessary condition for the validity of a *wasiyat*. Hence, bequest by an insane person is void. If an insane person bequeaths, but subsequently he recovers from insanity and then dies, still the bequest is invalid for want of competency at the time of making it.[9]

8 Ameer Ali, Vol. I, P. 585.
9 Ameer Ali, Vol. I, P. 573.

Conversely a *Wasiyat* made by a man of sound mind becomes void if he subsequently becomes insane and remains so till death. However, a *wasiyat* made by an insane during his lucid interval shall remain valid only if the insanity does not last longer than six months.[10]

(iv) He should not be insolvent

As Islamic law gives priority to debts over legacy, so a testator must not be insolvent. If the testator is indebted to the full amount of his property, the bequest would be invalid unless the creditors relinquish their claims.[11] So a *wasiyat* to defraud the creditors is invalid.

(v) A person condemned to death is entitled to make a valid *wasiyat.*

A *wasiyat* by a person who has been sentenced to death is perfectly valid.

(vi) Suicide by the testator

Under Shia law, if a person takes poison or wounds himself mortally to commit suicide, he cannot make a valid will. But where a person makes a *wasiyat* and then takes poison, the *wasiyat* will be valid though the testator was contemplating suicide at the time of making the *Wasiyat*.[12]

(vii) *Wasiyat* during *Marzul Maut* (death-illness) is valid

If a man makes a gift or *waqf* during death-illness, such disposition takes effect like a *wasiyat* and it is valid only as to a third.[13]

4. Object and purpose of *Wasiyat*

A *wasiyat* may be made for any legal and valid purpose but it cannot be made for a purpose which is illegal or is against public policy. If a man for, example, makes a *wasiyat* that a building be erected over his tomb, it is valid provided it has been done to protect it from wild animals, but it is invalid, if the purpose was to ornament it. Similarly, a *wasiyat* to build a Christian Church or a Hindu temple is invalid as it is sinful and prohibited for a Muslim to build a church or a temple.

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10 Syed Khalid Rashid, Muslim Law, P. 307
11 Hedaya, P. 673.
12 Mazhar Hashem V. Bodha Bibi (1898) 21 All. 91.
13 Ameer Ali, Vol. I, P. 575.

5. Form of *Wasiyat*

A *Wasiyat* may be oral or in writing. There is no prescribed form to write the *wasiyatnama*. An oral *wasiyat* is perfectly valid but the intention with respect to the property which the testator desires to be carried out after his death must be with sufficient clarity so as to be capable of being ascertained.[14] Even a letter written by a man shortly containing directions about the disposition of his property is valid.[15] A *wasiyat* in writing does not require to be signed[16] nor does it require attestation.[17] But under the Registration Act 1908, as amended, which is in force in Bangladesh, registration of *wasiyatnama* (*wasiyat* deed) is compulsory.

6.Qualifications of a legatee

Wasiyat can not be made in favour of everybody, but there some restrictions. A testator's *wasiyat* is valid if it is made in favour of certain persons while it is invalid if made in favour of some persons i.c. they cannot be lawful legatees. A list of valid and invalid legatee is stated:

(i) A Muslim can validly make *wasiyat* in favour of any person or persons, Muslim, or non-Muslim, natural or legal who are capable of receiving and owning property. But a *wasiyat* in favour of a non-Muslim who is subject of an enemy state is not valid.[18]

(ii) A *Wasiyat*, in order to be valid, must be made in favour of a person who is in existence at the time of the death of the testator. A *wasiyat*, therefore, in favour of a person who is not in existence at the time of the death of the testator is absolutely void.[19] A *wasiyat* in favour of a person who is in existence at the time of the death of the testator, but was not in existence when the *wasiyat* was made is valid. So *Wasiyat* in favour of a foetus in the womb is valid provided the birth takes place within 6 months from the date of the *wasiyat* and the legatee remains alive at the time of the death of the testator.[20]

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14 PLD 1970 Kar, 450.
15 Aulia Bibi V. Ala-ud-Din (1906) 28 All. 715.
16 AIR 1940 Mad. 153.
17 PLD 1970. 1
18 Hedaya, 673.
19 Abdul Cadur Haji V. Mohamed Turner (1884) 9 Bom. 158.
20 Hedaya, P. 674, Neil Ballic, P. 627.

(iii) Bequest cannot be made in favour heirs

Heirs cannot be legatees, because they are entitled to inherite from the testator who is a propositus. But it may be valid provided other heirs give their consent. In determining whether a person is or is not an heir, regard is to be had, not to the time of execution of the will but to the time of the death of the testator.

7. Three main principles of a *wasiyat*

A valid *wasiyat* must follow certain cardinal principles which are as follows:

(i) *Wasiyat* becomes effective only after the death of the testator

Wasiyat or will comes into force after the death of the testator and not before that. A *wasiyat* will be ineffective if the legatee dies before the death of the testator. The testator, however, can revoke the *wasiyat* at any time before his death.

(ii) *No bequest to heir*

It is one of the principles that bequest cannot be made in favour of any heir. The argument in favour of this principle is that the heirs are entitled to inherit the property of testator who is also propositus by virtue of their rights prescribed in the Islamic law of inheritance. So a testator is prevented from interferring by *wasiyat* with the course of devolution of property among his heirs according to law. It also safeguards practice of favouritism and prejudice and violation of Quranic law of inheritance. A bequest to heir, therefore, is not valid unless the other heirs consent to it after the death of the testator.[21] If one heir gives his consent, he binds his own share and none of his heirs can challenge it subsequently.[22] Bequest in favour of a disabled child, for example, who has been deprived of educational or financial opportunities enjoyed by other members of the family, is a good ground.

(iii) *Limit of testamentary power*

By *wasiyat* a Muslim cannot dispose of more than one-third of his estate left after the payment of funeral expenses and debts. This is in

[21] PLD 1966 Pesh. 147.
[22] Muhammad Ata Husein V. Husain Ali, AIR, 1944, Oudh. 139

accordance with a Hadith narrated by Abu waqqas stated above. But in case of bequest which is more than one-third, the consent of other heirs must be required after the death of testator.[23] But consent given by them during the life time of the testator is of no legal effect.[24]

The following illustration is given for easy understanding:

Abdullah died leaving tk. forty thousand as his gross assets; one thousand is spent for funeral expenses; he had debt amounting to nine thousands, his net asset is thirty thousand. Here bequethable third amounts to ten thousand taka. So any amount more than this is invalid.

8. Subject of *wasiyat*

A bequest or *wasiyat* of any property, movable or immovable, capable of being transferred is valid, provided that it is in existence at the time of the death of testator. It is, therefore, not essential that the property bequeathed must be in existence at the time of making the bequest. It may or may not be in existence at the time when the *wasiyat* is made.[25]

9. Void *Wasiyat*

A *Wasiyat* may be valid or void. A *wasiyat* is treated as valid if it satisfies all the requisite conditions. But a void *wasiyat* does not satisfy the essential conditions and thus it becomes inoperative.

Some examples of void *wasiyat* are the following:

(i) Bequest in future

A bequest in future is void. The subject of bequest is to be present at the time of death of the testator.

(ii) Contingent bequest

A contingent bequest is void. A bequest which is to take effect on the happening of a contingency is void, unless permitted by a lawful custom.

PLD 1967 (S.C) 200; PLD 1966 Pesh. 147; AIR 1964 Ker. 200 (D.B).
Ramzan V. Kamal AIR 1927 Lah. 116.
Neil Ballie, PP. 624, 66-666.

(iii) Conditional bequest

A bequest of the corpus of any property made with a condition which derogates from the completeness of the *wasiyat*, such condition is void and the legatee is entitled to the ownership of the property, as if no conditions were attached to it. For examples, a Muslim made a bequest in favour of an heir subject to condition that the legatee (heir) should not sell the property bequeathed. The other heirs gave their consent to the bequest. Here the condition is void and hence the legatee would take the property absolutely.

(iv) *Wasiyat* to heir is void

A *wasiyat* in favour of an heir is void, unless it is consented by the other heirs.

(v) Bequest more than one-third

Bequest more than one-third is void, if the other heirs refrain from giving their consent.

(vi) Bequest to an unborn child

Bequest to an unborn child is void. But it is valid if the child is born within six months from the date of *wasiyat*.

(vii) Refusal to accept the legacy

Refusal to accept the legacy by legatee is of no effect.

A legatee is at liberty to refuse the legacy as no body can be compelled to accept it against his intention. The legacy will fail in this case.

(viii) Death of legatee

If the legatee dies before the death of the testator, the legacy becomes ineffective.

(ix) Wasiyat in favour of a murderer

A bequest in favour of a person who intentionally causes the death of the testator is void according to all schools. But to Hanafis, a bequest is not lawful to a person who causes the death of the testator

even unintentionally, by accident of misadventure, unless the person causing the death is an infant or an insane person.[26]

(x) Bequest in favour of infidel

According to all schools, a *wasiyat* by a Muslim in favour of an alien infidel is void.[27]

(xi) Intention of the testator

A *Wasiyat* shall be deemed to be void if it is made with the intent to deprive the heirs.

10. Lapse of legacy

Under Hanafi law, the death of the legatee in the life time of the testator causes the legacy to lapse and heirs of the legatee receive no benefit out of that legacy.[28] But under shiya law, death of the legatee does not cause a lapse. It descends to the heirs of legatee. When the legatee leaves no heirs, the property would pass to the heirs of the testator, if any.[29]

11. Revocation of *Wasiyat*

A *wasiyat* takes effect from the time of the death of the testator and so he can revoke it at any time before his death. A *wasiyat* by its nature in all cases is a revocable instrument even if it be in terms made irrevocable.[30]

Revocation may be express or implied. Revocation is express when the testator revokes the bequest in express terms either oral or written. It is implied, when he does an act from which revocation may be inferred.

A bequest may be revoked impliedly in the following cases.[31]

(i) When the testator performs the article he had bequeathed any act, which, when performed upon the article of another is the cause of

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[26] Ameer Ali, Vol.I, P. 587.
[27] Ameer Ali, Vol. I, P. 594.
[28] Neil Ballie, PP.642-643; PLD 1952 Lah. 294.
[29] Ameer Ali, Vol. I, PP. 614-15.
[30] AIR 1964 Kerala 200 (DB).
[31] Hedaya, P. 675.

terminating the right of the proprietor, for example, fabrication of a necklace from gold.

(ii) When the testator performs upon the article any act creating an addition to the legacy, and the addition be so connected that the legacy cannot be separately delivered. For example, mixing of oil with flour (Bequeathed article).

(iii) When the testator by his act or deed occasions the extinction of the bequeathed property. For example, selling of the bequeathed article to some other person; or subsequent building a house on the land by the testator, which he bequeathed. A testator's *wasiyat* in favour of a person (say, X) is revoked by his subsequent *wasiyat* of the same property to another (say, Y).[32] Sometimes the subsequent bequest has the effect of revoking and canceling the previous bequest and sometimes it has no such effect. It all depends on the intention of the testator, which is to be gathered from the language of the second *wasiyat*. However, in case of litigation, the Court decides it depending on the circumstances.

12. Executor

(i) Who is an executor

The executor is termed "wasee" and is defined to be a trustee (*amin*) appointed by the testator to superintend, protect and take care of his property and children after his death. He is also personal representative. The post of executor is thankless job and he is to bear responsibilities and performs duties usually without any remuneration or economic benefit. Imam Abu Yusuf, a brilliant jurist and judge, is of opinion that if a person accepts the office of an executor for the first time, he commits a mistake; if he does so the second time, he is dishonest, and if he accepts the office for the third time, he is a thief.[33]

(ii) Kinds of executor

There are three kinds of executor

(a) Proper and efficient testator who is fixed (*Mukarrar*) and cannot be removed by the judge without proved breach of trust.

[32] PLD 1963 (SC) 556; 15 DLR (SC) 315.
[33] Ameer Ali, Vol.I P. 662 (Footnote No.2)

(b) Proper but inefficient executor who is a trustworthy person but he is unable to do the work or who is weak and inefficient. *Qadi* must appoint a helper for this.

(c) Improper executor who is a *Fasik*, a non-Muslim or a slave whom the judge should remove and should appoint another in his place.

(iii) Appointment of an executor

Under Hanafi law, a testator can appoint an executor and an executor of an executor can act as an executor to the person appointed by the latter. When two persons are appointed executors, one of whom is a minor and the other is adult, the adult executor may act alone until the minor has attained puberty, but when that happens the adult executor can no longer act singly.[34]

All schools agree that a Muslim cannot appoint a non-Muslim to be his executor who is hostile. So when a Muslim appoints a non-Muslim or any other improper person an executor, the acts done by the executor will be valid and effected.[35] But the Court should remove him, whenever the fact of such appointment comes to its notice. In the presence of an appointed executor by the testator, the *Qadi* or Court cannot appoint an administrator. But the Court can appoint an executor in the absence of executor.

(iv) Powers and duties of the executor

An executor has the following powers and duties-

(a) Power to alienate the property-

When the testator has the heirs who are minors, the powers of the executor are absolute.[36] He can sell the property and invest the proceeds in case of necessity, after payment of any debt of the testator or incurred for the maintenance of minor children, provided the executor has left such direction. The sale, of course, must be for adequate consideration. He cannot himself purchase that property nor he can sell it to any of his relative.

[34] Ameer Ali, Vol. I, P. 658
[35] Jehan Khan V. Mandy I.B.L. RSN, 16(a) 10W.R.
[36] Ameer Ali, Vol. I, P. 676.

(b) He can enter into a partition with co-sharers of the deceased or legates in the case of minor's property, both movable and immovable.

(c) If the testator has left specific bequests to individuals and there is absence of legatees, the executor cannot divide the property and this, ineffective. Therefore, partition by an executor among the heirs, who are all minors, is unlawful.

(d) When the executor takes loan on behalf of the minor children of the testator without any necessity therefor it cannot be operated against the minors, and if any loss arises to the orphans there- from, the executor will be liable.[37]

(e) The *Wasi* or executor is empowered to do all acts to the advantage of the minor orphans.

(f) The executor is liable for any serious inadequacy in the consideration of any property sold or purchased on behalf of the infants.

(g) The executor is also allowed to spend at the funeral of the testator not more than that is customary.

(h) The executor can take only an amount as remuneration fixed by the testator. Of course, the Court can fix any amount if the executor desires so and it it was not fixed by the executor.

(i) The executor is entitled to repay himself any expenditure incurred by him on behalf of the infants, but he must keep proof thereof. He is also entitled to recover from the estate in his hands any expenses incurred by him out of his own pocket for funeral of the testator or any of his heirs.[38]

13. *Wasiyat* and Gift compared

Wasiyat and gift involve transfer of property by the testator and donor respectively and hence there are similarities between the two. But there are also differences between the two from the point of view of law. The difference are as follows:

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[37] Ameer Ali, Vol. I, P.680.
[38] Ameer Ali, Vol. I. P. 692.

(i) As regards the existence of the property

In the case of gift, there must be existence of property at the time of making gift, but in the case of *wasiyat*, it is not essential that there must be the existence of property at the time of making *wasiyat*, but it must be in existence at the time of the death of the testator.

(ii) As regards the limit

In case of gift, there is no limit as to quantity of the property to be gifted. The donor may make gift of his entire property. But the law of *wasiyat* restricts the right of the testator to one-third of his property. *Wasiyat* more than one-third is invalid to that extent subject to certain exception.

(iii) As regards transfer of possession

There must be transfer of possession which is a must at the time of making gift subject to a few exception. But in the case of *wasiyat*, transfer of possession takes place only after the death of the testator.

(iv) As regards undivided property

The doctrine of *Musha* or undivided property is applicable in the case of gift but not applicable in the case of *wasiyat* .

(v) As regards consent of the heir

In the case of gift to heirs, no consent of other heirs is necessary but in the similar case, consent of other heirs is a must for the validity of the *wasiyat*. Again, in case of *wasiyat* more than one-third, the consent of the heirs is also necessary in order to make the *wasiyat* valid.

(vi) As regards revocation

A gift cannot be revoked after its completion. *Wasiyat* can be revoked before the death of the testator.