(a) Appointment of *Mutawalli* by *waqif*

The *waqif* may appoint a *Mutawalli* and he may lay down a procedure for the appointment of a *Mutawalli*. He may also invest the *Mutawalli* with power to nominate his or her successor after death or abandon of office.[42] If the *waqif* has reserved the right for himself to appoint a *Mutawalli* in the *waqf* deed, he is entitled to do so.[43]

(b) Appointment of *Mutawalli* by executor

If a *Mutawalli* dies and the *waqif* is not alive, then it is the right of the executor of the *waqif* to appoint a successor to the deceased *Mutawalli*.

(c) Appointment of mutawali by beneficiaries

If there is no duly appointed *Mutawalli* and if the number of beneficiaries is limited, then the beneficiaries may appoint a *Mutawalli* without the order of the court. But this view is opposed by the jurists.

(d) Appointment of successor by a *Mutawalli*

In the absence of any provision in the deed of *waqf* regarding succession to the office of *Mutawalli* and if neither the founder nor his successor is alive, then *Mutawalli* may appoint a successor for the time being on the death-bed illness.[44]

(e) Appointment of *Mutawalli* by the court

If the *waqif* has failed to appoint a *Mutawalli*, or a *Mutawalli* dies or dismissed and the *waqif* or his executor is not living or is incapable of performing his duties, then the Court may appoint a *Mutawalli*.

While appointing a *Mutawalli* the court must respect the whishes of the *waqif* or appropriator. If he has left any direction or laid down any procedure for appointment of a *Mutawalli*, it must be followed.[45]

15. Rights and duties of a *Mutawalli*

A *Mutawalli* is a superintendent of *waqf* property. He has, therefore, some rights and duties, which are as follows:

---

[42] AIR 1930 All. 169.
[43] AIR 1953 Mad. 958.
[44] AIR 1946 Lah, 200.
[45] Mohiuddin Chowdhury, V. Amin-ud-Din Chowdhury, AIR 1945 Cal. 441.

(i) A *Mutawalli* has the right and duty to take possession of the *waqf* property and manage it to the best of his ability for the interest of the beneficiaries.

(ii) He must take all legal steps to protect the *waqf* property.

(iii) A *Mutawalli* can lease out agricultural land for three years only and residential house for a period of one year.

(iv) A *Mutawalli* can mortgage, sell or exchange *waqf* property or any part there of with the permission of the court.

(v) He cannot increase the allowances of officers and servants attached to the *waqf* where the allowance is fixed by the *waqif*. But the court may, in a proper case, increase such allowance.[46]

(vi) A *Mutawalli* is bound to keep clear and distinct accounts of his expenses.

(vii) He may lawfully erect shops, houses etc which will yield profit to the *Waqf*

16. Remuneration of a *Mutawalli*

(i) A *Waqif* may provide for the remuneration of the *Mutawalli* at the time of the dedication. This amount may be either fixed or it may be a residue left over after all necessary payments have been made out of the income of the *Waqf*[47]

(ii) If *waqif* has not made any provision for the remuneration of the *Mutawalli*, in that case, the court (District judge) may fix a sum not exceeding one-tenth of the income of *waqf* property for his services.[48]

(iii) If the remuneration for the *Mutawalli* fixed by the *waqif* is too small, the Court may increase that allowance, but it must not exceed that limit of one tenth of the income of the *Waqf*[49]

---

[46] Ameer Ali, Vol. I, P. 469.
[47] Sayid Ismail V. Hamidi Begum (1921) 6 Pat. 125; AIR 1950 All. 154.
[48] Muhiuddin V. Sayiduddin (1833) 20 Cal. 810, 821; Mumtaz Qadir V. Advocate-General(1946) 21 Luck. 244.
[49] Ameer Ali, Vol.I, P. 469.

17. Removal of a *Mutawalli*

A *Mutawalli* is, as stated, the manager of the *waqf* property. But he can be removed from the post under certain cases which are as follows:

(i) The Court has the power in the interest of the *waqf* to remove or dismiss a *Mutawalli*, even if the founder or *waqif* may have expressly directed that he should not be removed in any case, if-

(a) He is not fit for the office, or

(b) He is dishonest, or

(c) He is negligent in the discharge of his duties.

(ii) A *Waqif* has the right to reserve the office of *Mutawalli* for himself. But if he is a person of infamous character and unworthy of confidence, the court may dismiss or suspend him from his office though he might have laid down the condition at the time of creation of *waqf* that the court shall not have the right to removal. Such a condition is considered to be void and not binding on the court.

18. Doctrine of *Cy-pres*

Where a clear charitable intention is expressed in the instrument of *wakf*, it will not be permitted to fail, because the objects, if specified, happen to fail, the income of the *wakf* properties would in such a case be applied to the benefit of the poor, or to objects as near as possible to the objects which failed. In the absence of clear evidence to the contrary a general pious intention should be presumed when a Muslim creates a wakf or trust for a charitable or religious objects. This decision calls for a wider and more general application of the doctrine of *cy-pres* than had hitherto been contemplated by the Courts, because onus has been shifted to the party which contends that the *wakf* is invalid, to prove that the *wakif* had no general pious intention when he created the *wakf*. The doctrine of *cy-pres* would apply in the a case of *wakf-al- awlad* on the extinction of the line of the *waqif* only when the object is concurrently charitable, and in that case the income of the whole of the property would be applied to charitable purpose.[50] But where there is no reference to charity in the deed, and the *waqf* appears to be only for the benefit of

[50] PLD 1957 Lah. 264.

the family of the *waqif*, the doctrine would be invalid.[51] A *wakf* which is invalid for uncertainty cannot be validated by the application of the doctrine of *cy-pres*. The trustees of a charity cannot make a *cy-pres* application of its funds to purposes other than those marked out by the instrument of trust or the scheme of a court regulating the charity. The court can, however, apply the doctrine in making the scheme for a Muslim charity.

19. Powers and functions of the *waqf* administrator under the *waqf* Ordinance.[52]

All *Waqf* estates and properties in Bangladesh are now managed and administered by the *Waqf*s Ordinance, 1962 (Ordinance No. 1 of 1962) which was promulgated to consolidate and amend all existing laws relating to the administration and management of *waqf* properties in Pakistan. This Ordinance is inforce in Bangladesh and all litigations relating to *waqf* are now disposed of under this Ordinance. The Ordinance makes the provision for appointment of the administrator of *waqf*s for Bangladesh under section 7.

The administrator have the following powers and functions for proper management of the *waqf* property.[53]

(a) He investigates and determines the nature of and extent of *waqf*s and *waqf* properties and calls from time to time, for accounts, returns and information from *Mutawallis*.

(b) He ensures that the *waqf* properties income arising therefrom are applied for the purposes for which such *waqf*s were created.

(c) He gives direction for the proper administration of *waqf*s.

(d) He manages himself or through the employed officers and servant and does necessary acts for the proper control, administration and management of *waqf* property.

[51] PLD 1959 Pesh. 152.

[52] The original little of this Ordinance (East Pakistan Ord. No: 1 of 1962) was East Pakistan Waqf Ordinance, 1962. Under P.O.48 of 1972, the words "East Pakistan" have been replaced by "Bangladesh" (Adaptation of Existing Bangladesh Laws, 1972) and now it is Waqfs Ordinance 1962.

[53] Section 27 of the Ordinance; Yar Ali Khan Chowdhury V. Administrator of Waqfs. 20 DLR 535.

(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]

---

[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]

---

[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.

---

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]

---

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.