

Al-Waṣiyyah (Bequest) for the Heir and its Implications A Comparative Study In Islamic Jurisprudence and Kuwaiti Law

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Introduction

Praise be to Allah, Lord of the worlds, and all Prayers and Blessings of Allah be upon the Messenger of Allah, his family and companions, and those who followed them with the best way until the Day of Judgment.

Islam has laid clear foundations for achieving social justice amongst the society members in general, and the family members to establish the nucleus of society with whom they have bloody ties.

Islam gives all people their rights even after the death, and it urges the will (Al- Wasiyyah) to relatives, to give charity to the poor and needy, and to spend for the sake of Allah, so that any imbalance would affect the family, society or the state. The will is

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considered one of the types of social solidarity. The bequest (the will) like all the provisions of Islam has a precise system based on truth, justice, mercy, and the spread of goodness to meet both private and public interests.

The will is defined as the disposition of the estate added to after death, and it is in itself legal within the limits of one-third of what a person possesses. The Messenger of Allah, May Allah bless him and grant him peace, prohibited to will from more than a third of the wealth. In addition, also, the Messenger of Allah, peace and blessings be upon him, prevented Saad bin Abi Waqqas from the will with all his money, or even by more than a third.

The bequest originally is enacted to do well, but the will to an heir may cause malice and hatred among individuals, especially if those owners take advantage of it in favor of some of the heirs, but not others. However, will to an heir may have advantages to some weak or young heirs.

I chose to focus on the topic of “ the heir’s will» because it is one of the most important issues in the science of inheritance, and because it is presented to be discussed as one of the most complex problems in our contemporary Islamic societies.

Research Questions:

- 1- What is the amount of Al- Wasiyyah (the will) that is permissible?
- 2- What is the rule of Al-Wasiyyah to the heir?
- 3- Has the Kuwaiti Personal Status Law agreed with the jurisprudence of the will of the heir?.

Research Methodology:

I adopted in this research the inductive, descriptive, and analytical method: I extrapolated and tracked related matters and issues from their sources, and studied and analyzed them in order to reach good results.

Previous studies:

Through my research, I did not find anyone who wrote on this subject in English, but I found some general research about bequest such as:

1- The Contemporary Application of Wasiyah (Muslim Will) in Malaysia. Written by: Mohammad Tahir Sabit Haji Mohammad. International Journal of Real Estate Studies, Universiti Teknologi Malaysia, Volume 9 Number 1.

The study was aimed to find the rate of success of the alternative tools for the transfer of properties from one generation to the next, among Muslims Wills (Wasiyah) were examind among Muslims Citizens of Malaysia.

The research contains: Defining Wasiyah, The Fundamental elements of valid Will, The perceived advantages and disadvantages of Wasiyah, Efficiency of distribution process of the Muslims Wills in Malaysia, Validity of instrument of Wasiyah, The response of the public.

2- Will-Making (Wasiyah) in Islam: A Juristic Exposition, weitten by: Taiwo Moshood Salisu, Shariah Journal, Lagos State University, Vol.24, No.1 (2016). The research contains: Conceptual Meaning of Al- Wasiyah in Islam, Basis of Will-making in Islam:

Qur'an and Ahadith, Juristic Basis of Wasiyah in Islam, Will-Making and its Juridical amount in Islam, Fundamentals of Will-Making in Islam, Philosophies behind Will-Making in Islam.

3- Islamic Will & Testament Booklet, written by:

Muhammad Al-Jibali, Al-Kitaab & As-Sunnah Publishing. The book contains: Writing the Will, Texts Concerning inheritance, The Islamic law of inheritance, Examples and Computations.

4- Al-Wasiyah (Bequest) according to the Four Sunni Schools: A Concise Analysis, written by: Busari Jamiu Muhammad, IOSR Journal of Humanities and Social Science, Vol.23, Issue 2, Ver.11 (2018).

The research contains: Islam and Shari'ah, The Four Sunni Schools of Thought and Divergence of Opinions, Al-Fara'id's Concepts in Islam with special reference to Al- Wasiyyah, Conditions and Benefits of Al-Wasiyah, Al-Wasiyah According to the Four Sunni Schools, The Judicial Pronouncement of Al-Wasiyah.

It is noted from the previous studies that it did not focus on the issue of the will of the heir in jurisprudence and Kuwaiti law, and this is what characterizes my research.

Search Plan:

This research is divided into preface and five sections, as **follow:**

Preface: Definition of Al-Wasiyyah (Bequest) and Heir.

First Section: Linguistic and Technical Definition of Bequest.

Second Section: Definition of Heir (inheritor) and legatee (al-

musa lahu):

First Subject: Legality of a Bequest and its Importance.

First section: The legality of a Bequest.

Second section: The importance of a Bequest.

Second Subject: The bequest to the Heir.

First section: The will to the Legatee (Al-Mūṣā lahu).

Second section: Permission of the heirs in the testator's life.

Third Section: Approval time of the Legatee (Al-Mūṣā lahu).

Third Subject: The will to the heir in Kuwaiti civil law.

Conclusion

Preface

Definition of Al-Waṣiyyah (Bequest) and Heir

First Section: Linguistic and Technical Definition of Bequest:

First: Linguistic Definition of Al-Waṣiyyah (Bequest):

Al- Wasiyyah, linguistically: is a singular noun, while its plural is وصايا (wasaayaa), thus, it comes from its Arabic root- a verb-, «wassa» (وصى) which means: ‘to command’ or ‘to instruct», to bequeath», «to give by will»,» to entrust» or» to recommend». It could mean ‘legacy’ and ‘testamentary disposition’ ⁽¹⁾. Allah (SWT) has used the Arabic root of wasiyyah (وصية), that is wassa (وصى) to give command order or instruction (wasiyyah) to His creatures (mankind) to fear and obey Him (to be sincerely dutiful to Allah) where He said:« And certainly We enjoined those who were given the Book before you and (We enjoin) you (Muslims) too to keep your duty to Allah»⁽²⁾.

﴿وَلَقَدْ وَصَّيْنَا الَّذِينَ أُوتُوا الْكِتَابَ مِنْ قَبْلِكُمْ وَإِيَّاكُمْ أَنْ اتَّقُوا اللَّهَ﴾

In addition, Allah (SWT) gives us Al-Wasiyyah (an instruction) to be kind and dutiful to our parents, where He said:« We have enjoined man to do well (to be kind and dutiful to) to his parents»⁽³⁾. ﴿وَوَصَّيْنَا الْإِنْسَانَ بِوَالِدَيْهِ حُسْنًا﴾

The literal meaning suggests imposition upon someone or command with something.

(1) Ibn Manzūr, Lisān al-‘Arab 15/394, Al-Razi, Mukhtar Al-shihah, p740.

(2) Surah An-Nisaa, 4:131.

(3) Surah Al-’Ankaboot, 29:8.

Second: Technical Definition of Bequest:

The jurists define the Bequest with many definitions, and these definitions differ according to the difference of their doctrines in some rulings, including:

- 1- The Hanafi School defines al-wasiyyah as a: means of transferring of right of a certain property to someone else through charity after the demise of the owner ⁽¹⁾.
- 2- The Māliki School, defines it as: “aqd» (contract) that obligates one-third of the testator’s property to be given out to legatee with the occurrence of testator’s death⁽²⁾.
- 3- The Shāfi,ī School defines it as: donation of a right to be fulfilled even estimatedly after the death ⁽³⁾.
- 4- The Hanbali School defines it as: a donation that must be fulfilled after the death⁽⁴⁾.

It is shown from the above definitions that al-wasiyyah entails the transference of certain portion of someone’s estate, not exceeding one-third to his legatee (al-Musa lahu) while alive and which must be executed after his death. In other words, it is a set of instructions given by a person to individuals whom he expects to survive him. Consequently, bequest can be defined as: an act

(1)Ibn al-Humam, Fath al-Qadir 8/416, Ibn Nujaim, Al-Bahr Al- Raayiq 8/459.

(2) Al-Hattab, Mawahib Al-Jalil 6/364, Al-Khurshi, Sharh Al-Khurshi 8/167.

(3)Al-Ramli, Nihayat Al-muhtaj 6/40, Al-Sherbiny, Mughni Al-muhtaj 3/39.

(4)Ibn Qudamah, Al-Mughni 6/137, Ibn muflih, Al-Mubdie 5/227.

of donation which is to be executed after death. In other words; a statement, which is acted when the testator places a lien on the third of his property, which the latter will become definitive on his demise.

The bequest is executed after payment of funeral expenses and any outstanding debts. The one who makes a will (wasiyya) is called a testator (al-musi). The one to whose benefit a will is made is generally referred to as a legatee (al-musa lahu). Technically speaking the term “legatee» is perhaps a more accurate translation of al-musa lahu.

Second Section:Definition of Heir (inheritor) and Legatee (al-musa lahu):

First: Definition of Heir:

1- Linguistic Definition of Heirs:

The heirs: its origin is triple from “heir», it is said: he inherited his father, and he is the person who deserves the inheritance; to the existence of one of the causes of inheritance, such as kinship and matrimony. The one who deserves all the inheritance of the dead or some of it is called the inheritor; as the supplication of the Prophet peace be upon Him:«Oh Allah, take care of my hearing, my sight, and make them the Heir of me»⁽¹⁾.

(1) Al-Tirmidhi, Sunan Al-Tirmidhi, Book of Supplications,H(3961), Al-Hakim, Al-Mustadrak, Book of Supplication, H(1918). Al-Hakim said: This is a sound hadith on the condition of Muslim and he did not narrate it.

2- Technical Definition of Heir (the inheritor):

The heir: is the one who deserves the inheritance when the deceased dies⁽¹⁾.

Second: Definition of Legatee (al-musa lahu):

The legatee (al-musa lahu): Is the one for whom the bequest is made⁽²⁾.Some conditions must exist for the legatee to deserve the bequest:

- 1- The Legatee (al -Mūṣālahu) must not be an individual who is a legitimate heir to inheritance. There are some differences of opinions among the scholars over this issue that will be explained later.
- 2- The Legatee (Al-Mūṣālahu) must be in existence at the time of death of the testator. This is the view of the Hanafi, Shafi'I and Hanbali schools. While the Maalikis, a saying in Shaafa'is and Hanbali schools opine the existence of the Legatee is not required⁽³⁾.
- 3- The Legatee must be in existence at the time of making of the Will. Thus, a bequest to an unborn is void. This is the view of the Hanafi, Shafi'I and Hanbali schools⁽⁴⁾.

(1)Al-Ghamedi, Science of inheritance, p86, Abu Eid, Inheritance, p51.

(2)Ibn rushd, Bidayat al-Mujtahd 2/234, Ibn Abd al-Barr, Al-Istidhkar7/280, Alzuhili, Alfaqih Al'Islami 10/165.

(3)Al-Kasani, Bada'i Al-Sanayeh 7/335, Al- Desouqi, Hashiat al-Desouqi 4/423, Al-Ramli, Nihayat Al-muhtaj 6/43, Al-Mardawi, al'Iinsaf 7/231.

(4) Al-kasani, Bada'i Al-Sanayeh 3/240, Ibn al-Humam, Fath al-Qadir 10/432, Al-Mawerdi, Al-Hawi al-kabeer 8/215, Al Shiyarazi, al-Muhdhab1/451, Ibn Qudamah, Al-Mughni 6/90, Al-Mardawi, al'Iinsaf

- 4- The acceptance or rejection of Al-Mūṣā lahu is validated only after the death of the testator and not before. Therefore, the offer and acceptance or offer and rejection has no meaning except after the death of the testator. Generally speaking once a legatee has accepted or rejected a bequest he cannot change his mind subsequently.
- 5- The legatee must be known to the testator.
- 6- The legatee must not be the killer of the testator either unintentionally or intentionally. This is the view of the Hanafis, a saying in Shafi'i school, and some of the Hanbalis⁽¹⁾.
- 7- The language of offer and acceptance must be an explicit utterance that specifies the bequest either loudly or in written form or using epithet (Kināyah) such as“he has portion in my property». This is the view of the majority of jurists, contrary to Zufar from the Hanafi school who said acceptance is not required⁽²⁾.
- 8- The acceptance language should be explicit also by saying “I have accepted it», but such acceptance occurs after the death of the testator.

7/229.

- (1) Al- Sarkhasi, al-Mabsut 27/177, Al-kasani, Bada'i Al-Sanayeh 7/339. Al-nawawi, Rawdat al-Talibin 6/107, Al-Sherbiny, Mughni Al-muhtaj 3/43, Ibn Qudamah, Al-Mughni 6/90, Al-Mardawi, al'Iinsaf 6/126.
- (2) Ibn al-Humam, Fath al-Qadir 5/205, Al- Desouqi, Hashiat al-Desouqi 4/422, nawawi, Rawdat al-Talibin 6/311, Al Buhuti, Kashaf al- Qunae 4/345.

First Subject

Legality of a Bequest and its Importance

First section: The legality of a Bequest:

The will is legislated according to the Qur'an, the Sunnah, and consensus:

1- Allah Almighty said:“ It is prescribed for you when death approaches any of you, if he leaves abundant wealth that he make a bequest to parents and the next of kin according to the reasonable usage; This is due to from God-fearing»⁽¹⁾.

قوله تعالى: ﴿ كُتِبَ عَلَيْكُمْ إِذَا حَضَرَ أَحَدَكُمُ الْمَوْتُ إِنْ تَرَكَ خَيْرًا الْوَصِيَّةَ لِلْوَالِدَيْنِ وَالْأَقْرَبِينَ بِالْمَعْرُوفِ حَقًّا عَلَى الْمُتَّقِينَ ﴾ .

2- Allah Almighty said: “After payment of legacies that they may have bequeathed or debts»⁽²⁾.

قوله تعالى: ﴿ مِنْ بَعْدِ وَصِيَّةٍ يُوصِي بِهَا أَوْ دَيْنٍ ﴾

And Allah Almighty also said:«After payment of legacies he (or she) may have bequeathed or debts»⁽³⁾.

قوله تعالى: ﴿ مِنْ بَعْدِ وَصِيَّةٍ يُوصِي بِهَا أَوْ دَيْنٍ ﴾

3- Abd Allah Ibn 'Umar (may Allah be pleased with them) reported the prophet peace be upon him said:«It is the duty of a Muslim who has anything to bequest not to let two nights pass without writing a will about it»⁽⁴⁾.

(1) Surah al-Bakhras, 2: 180-182.

(2) Surah an-Nisa 4:11.

(3) Surah an-Nisa 4:12.

(4) Sahih al-Bukhari, Book of will, H(2738), Sahah Muslim, Book of will, H(1627).

أَنَّ رَسُولَ اللَّهِ ﷺ قَالَ: «مَا حَقُّ أَمْرِي مُسْلِمٍ، لَهُ شَيْءٌ يُوصِي فِيهِ، يَبِيتُ لَيْلَتَيْنِ، إِلَّا وَوَصِيَّتَهُ عِنْدَهُ مَكْتُوبَةٌ عِنْدَهُ».

4- Narrated Sa'd ibn Abi Waqqas (may Allah be pleased with him): "I was stricken by an ailment that led me to the verge of death. The Prophet came to pay me a visit. I said, "O Allah's Apostle! I have much property and no heir except my single daughter. Shall I give two-thirds of my property in charity?" He said, "No.» I said, "Half of it?" He said, "No.» I said, "One-third of it?" He said, "You may do so, though one-third is also too much, for it is better for you to leave your offspring wealthy than to leave them poor, asking others for help»⁽¹⁾.

عَنْ سَعْدِ بْنِ أَبِي وَقَّاصٍ قَالَ قَالَ رَسُولُ اللَّهِ ﷺ فِي حَجَّةِ الْوَدَاعِ مِنْ وَجَعٍ أَشْفَيْتُ مِنْهُ عَلَى الْمَوْتِ فَقُلْتُ يَا رَسُولَ اللَّهِ: بَلِّغْنِي مَا تَرَى مِنَ الْوَجَعِ، وَأَنَا ذُو مَالٍ، وَلَا يَرِثُنِي إِلَّا ابْنَةٌ لِي وَاحِدَةٌ، أَفَأَتَصَدَّقُ بِثُلثِي مَالِي، قَالَ: «لَا». قَالَ قُلْتُ: أَفَأَتَصَدَّقُ بِشَطْرِهِ، قَالَ: «لَا الثُّلُثُ وَالثُّلُثُ كَثِيرٌ، إِنَّكَ أَنْ تَدْرَ وَرَثَتَكَ أَغْنِيَاءَ، خَيْرٌ مِنْ أَنْ تَدْرَهُمْ عَالَةً يَتَكَفَّفُونَ النَّاسَ».

These hadiths desired and urged for the will, and showed its legitimacy and the great reward.

5- Abū Hurira(may Allah be pleased with him) narrated that the Prophet Peace be upon Him said: "Allah granted you at the time of your demise a third of your wealth to increase your good deeds»⁽²⁾.

عن أبي هريرة، قَالَ: قَالَ رَسُولُ اللَّهِ ﷺ: «إِنَّ اللَّهَ تَصَدَّقَ عَلَيْكُمْ عِنْدَ وَفَاتِكُمْ بِثُلْثِ أَمْوَالِكُمْ،

(1) Sahih al-Bukhari, Book of will, H(2744), Sahah Muslim, Book of will, H(1628).

(2) Ahmed, Musnad al-Imam Ahmed, H (27482), Sunan Ibn Majah, Book of Will, H(2709).

زِيَادَةٌ لَكُمْ فِي أَعْمَالِكُمْ».

6- Consensus: The nation's predecessors and successors unanimously agreed on the legality of the will and its desirability for those who had money and that it is one of the good deeds that benefit a person after his death⁽¹⁾.

Second section: The importance of a Bequest:

The importance of the Islamic will (wasiyya) is clear from the following two hadiths:

1- Abd Allah Ibn 'Umar(may Allah be pleased with them) reported the prophet peace be upon him said:«It is the duty of a Muslim who has anything to bequest not to let two nights pass without writing a will about it»⁽²⁾.

2- Abū Hurira (may Allah be pleased with him) narrated that the Prophet Peace be upon Him said:«A man may do good deeds for seventy years but if he acts unjustly when he leaves his last testament, the wickedness of his deed will be sealed upon him, and he will enter the Fire. If, (on the other hand), a man acts wickedly for seventy years but is just in his last will and testament, the goodness of his deed will be sealed upon him, and he will enter the Garden»⁽³⁾.

(1)Ibn al-Munder, Consensus, p38, Al-Sherbiny, Mughni Al-muhtaj 4/66
Ibn Qudamah, Al-Mughni 8/390.

(2) Sahih al-Bukhari, Book of will, H(2738), Sahah Muslim, Book of will, H(1627).

(3) Ahmad, Musnad of Imam Ahmad, Musnad of Abu Hurairah, H (7742),
Ibn Majah,Sunan Ibn Majah, Kitab al-Waisiyah, H (2704)

عن أبي هريرة قال: قال رسول الله ﷺ: «إِنَّ الرَّجُلَ لَيَعْمَلُ بِعَمَلِ أَهْلِ الْخَيْرِ سَبْعِينَ سَنَةً، فَإِذَا أَوْصَى حَافٍ فِي وَصِيَّتِهِ، فَيُحْتَمُّ لَهُ بِشَرِّ عَمَلِهِ فَيَدْخُلُ النَّارَ، وَإِنَّ الرَّجُلَ لَيَعْمَلُ بِعَمَلِ أَهْلِ الشَّرِّ سَبْعِينَ سَنَةً، فَيُعَدُّ فِي وَصِيَّتِهِ، فَيُحْتَمُّ لَهُ بِخَيْرِ عَمَلِهِ فَيَدْخُلُ الْجَنَّةَ».

From these two hadiths, we can conclude the following points:

- 1- The will is a way to perform the duties that a person ignored because of his preoccupation with the worldly life, or his stalling. And when he feels the arrival of his death, tries to correct these shortcomings and bequeath his duties (Zakat, or debt) before being asked about it in his grave, and held accountable for in hereafter.
- 2- The will gives the testator an opportunity to offer righteousness and the tie to some relatives who are not inheritors, preventing need and poverty from them.
- 3- Getting closer to Allah Almighty with the will in different aspects of righteousness and goodness seeking reward and recompense in the hereafter, as it came in the hadith: “Allah granted you at the time of your demise a third of your wealth to increase your good deeds»⁽¹⁾.
- 4- Contributing to some charitable projects that serve the Islamic community and help the needy, such as building mosques, Islamic schools, hospitals and orphanages.

(1) Ahmed, Musnad al-Imam Ahmed, H(27482), Sunan Ibn Majah, Book of Will, H(2709).

Second Subject

The bequest to the Heir

This subject can be divided into two sections:

First section: The will to the Legatee (Al-Mūṣā lahu):

The Jurists unanimously agreed that the testator (al-Mūṣiy) could only give away up to one-third of his or her property and not beyond that, as one for the relatives who are not heirs of the deceased or for the poor. Because of the saying of the Prophet peace be upon him to Sa'd when he said that he wants to give: One-third of it?» He (pbuh) said, “You may do so, though one-third is also too much». In addition, said: “Allah granted you at the time of your demise a third of your wealth to increase your good deeds».

They also agreed that if the testator bequeaths some heirs, and the remainder of heirs rejected and refused to give their consent the will then will be void. They also agreed that the Legatee (al-Mūṣālahu) must not be an individual who is a legitimate heir to inheritance, because Allah Almighty has already appointed to them their rightful shares of the inheritance, and The Prophet peace be upon him said:«Allah has given each fixed due right. Therefore there is no will for a rightful inheritor»⁽¹⁾.

عن أمامة الباهلي رضي الله عنه قال: سَمِعْتُ رَسُولَ اللَّهِ ﷺ يَقُولُ: «إِنَّ اللَّهَ أَعْطَى كُلَّ ذِي حَقٍّ حَقَّهُ فَلَا وَصِيَّةَ لَوَارِثٍ».

(1) Al-Tirmidhi, Sunan Al-Tirmidhi, Book of will, H(2121), al-Tirmidhi said: this is a good and authentic hadith.

However, they differ if the heirs approved the will for the heir, is it valid? In addition, if it is approved, will it have a ruling of the will, or is it a gift (hibah) from the heirs, in which what is required in the will same is required in hibah? It has two sayings:

The first saying: The will of the heir is correct, and it will be suspended upon all the remaining heirs endorsement, so if it is approved, it will be valid, and this will be in implementation of what was recommended by the deceased. If they do not allow it, it will be invalidated, but if some of them approved it and some of them rejected, the will is valid in the portion of the one who permits. This is the view of the majority of scholars from the Hanafi⁽¹⁾, Shafi'i⁽²⁾, Hanbali⁽³⁾ schools of thought, and one of the two views in the Maliki school⁽⁴⁾. The evidence of their saying:

1- Amr ibn Kharijah (may Allah be pleased with him) narrated that the Prophet Peace be upon Him said:«There is no will for an heir **save** the (other) heirs permit»⁽⁵⁾.

عن عمرو بن خارجه رضي الله عنه أَنَّ رَسُولَ اللَّهِ ﷺ قَالَ: «لَا وَصِيَّةَ لَوَارِثٍ إِلَّا أَنْ يُجِيزَ الْوَرِثَةَ».

2- Ibn 'Abbās (may Allah be pleased with them) narrated that the Prophet PBUH said:«A legacy is not permitted for an heir save

(1)Al- Sarkhasi, al-Mabsut 27/147, Al-kasani, Bada'i Al-Sanayeh 7/338.

(2)Al-nawawi, Rawdat al-Talibin 6/108, Al-Ramli, Nihayat Al-Muhtaj 6/49.

(3)Ibn Qudamah, Al-Mughni 6/58, Ibn muflih, Al-Mubdie 5/235.

(4)Alish, Manh al-Jalil 9/513, Ibn Abd al-Barr, Al-Istidhkar7/267.

(5)Al-Bayhaqi, Sunan al-Bayhaqi, Book of wills,H(12917), Al-Dara Qutni, Sunan al-Dara qtni, Book of Wills, H(4341).

when the (other) heirs acceded to it»⁽¹⁾.

عن ابن عباس رضي الله عنهما قال: قال رسول الله ﷺ: «لَا تَجُوزُ وَصِيَّةٌ لِوَارِثٍ إِلَّا أَنْ يَشَاءَ الْوَرِثَةُ».

3- The analogy of the will for a non-heir in more than one third, so if the heirs passed it, it is permissible, so is the will for the heirs if the heirs authorize it⁽²⁾.

4- When the testator has bequeathed, he has acted of his property, his disposition must take place, but the right of others is related to it, so the influence over his consent has ceased, and this has not prevented it from being valid, such as selling without permission, so if the heirs permit it then the will is implemented⁽³⁾.

The second saying: The bequest is not valid for the heir, and if the heirs approved it, it will be considered as a gift(hibah) from them, not bequest, so it takes the requirement of the gift(hibah). This is the well-known view of Maliki doctrine⁽⁴⁾, Al-Muzaniy chose it from the Shafi'is⁽⁵⁾, and some Hanbalis⁽⁶⁾ said it, and al-Zaahiri⁽⁷⁾.

(1) Al-Bayhaqi, Sunan al- Bayhaqi, Book of Wills, H(12913), Al-Dara Qutni, Sunan al- Dara qtni, Book of wills, H(4155).

(2) Al-Khattabi, Ma'lim al-Sunan 4/85.

(3) Al Dubyan, al-Mueamalat al Maliat 17/317, Albasam, Tawdih al' Ahkam 5/202.

(4) Al- Desouqi, Hashiat al-Desouqi 4/427, Al-Sawi, Hashiat al-Sawi 4/586.

(5) Al- Shirazi, al-Muhadhab 1/451, Al-Mawerdiy, Al-Hawi al-Kabeer 8/195.

(6) Ibn Qudamah, Al-Mughni 6/58, Ibn Muffih, Al-Mubdie 5/235.

(7) Ibn Hazm, al-Muhala 9/316.

The evidence of their saying:

- 1- The Prophet peace be upon him said:«Allah has given each a fixed due right. Therefore there is no will for a rightful inheritor»⁽¹⁾.

عن أمامة الباهلي رضي الله عنه قال : سَمِعْتُ رَسُولَ اللَّهِ ﷺ يَقُولُ : «إِنَّ اللَّهَ أَعْطَى كُلَّ ذِي حَقٍّ حَقَّهُ فَلَا وَصِيَّةَ لِرِثٍ».

In this hadith: Allah prohibited the will to the heir, it is not for the heirs to authorize what Allah Almighty invalidated by the Messenger of Allah (PBUH) except that **if** they begin a gift for this from themselves, it is their money.

- 2- The will of the heir is not permissible in any case, even if the rest of the heirs authorizes it, because the prohibition from it is for the right of Sharia. If we had permitted it, we would have used the abrogated rule, and that is not permissible, same as the will to the murderer is not permissible, even if the heirs approve it⁽²⁾.
- 3- On the authority of Nu'man bin Bashir (may Allah be pleased with him), his father brought him to the Messenger of Allah, peace and blessings be upon him. He said: I gave my son a servant boy, and he said: “Have you given equivalent ones to everyone of your children, he said: “No,» he said» Take it back»⁽³⁾.

(1) Al-Tirmidhi, Sunan Al-Tirmidhi, Book of Will, H(2121), al-Tirmidhi said: this is a good and authentic hadith.

(2) Al-Khattabi, Malem al-Sunan4/85.

(3) Al-Bukhariy, Sahih al- Bukhariy, Book of Hibah, H(2446), Muslim,

عن النعمان بن بشير أَنَّ أَبَاهُ أَتَى بِهِ إِلَى رَسُولِ اللَّهِ ﷺ فَقَالَ: إِنِّي نَحَلْتُ ابْنِي هَذَا غَلَامًا، فَقَالَ: «أَكُلْ وَلَدِكَ نَحَلْتُ مِثْلَهُ» قَالَ: لَا، قَالَ: «فَارْجِعْهُ».

If this is in the event of health and completeness of the ownership, then in the event of his death, the transfer of his property, and rights attached to it, is forbidden with greater reason.

4- The will to the heir, such as the will of more than one third of the non- heir, is not permissible from the testator. The Messenger, may Allah's prayers and peace be upon him, said to Saad when he said to him: I bequeath half of my wealth? He said:« No»⁽¹⁾, and he did not say to him: If your heirs authorize it, this indicates that the approved is a gift from them, and this is not a will⁽²⁾.

The preference:

I prefer the first saying which sees that the will is valid for heirs, but it is pending in the approval of the rest of the heirs after the death of the testator. If the rest of the heirs permit it, then it is permissible. Otherwise, it is not. This is because of the strength of their evidence and their keenness on the unity of the heirs of the deceased, as this will reduce all hatred, enmity and strife between the heirs. The prohibition here is for saving the rights of the rest

Sahih Muslim, Book of Hibah, H(1623).

(1) Al-Bukhariy, Sahih al-Bukhariy, Book of Will, H(2744), Muslim, Sahah Muslim, Book of Will, H(1628).

(2) Al- Desouqi, Hashiat al-Desouqi 4/427, Al-Mawerdiy, Al-Hawi al-Kabeer 8/195, Ibn Qudamah, Al-Mughni 6/58, Al-Khattabi, Ma'lim al-Sunan4/85.

of the heirs and for removing any harm could affect the heirs. Accordingly, the will must be valid if the heirs drop their rights and approve the will.

Second section: Permission of the heirs in the testator's life:

If a man bequeaths to anyone of the heirs, and obtains the approval of the heirs in his life, are they allowed returning it after his death?

The scholars had three different sayings on this issue: **The first saying:** There is no account regarding the heirs' permission in the event of the testator's life. If they permitted during his life, then they reject it after his death, this rejection will be correct, and the will is invalidated, and this is the view of the majority⁽¹⁾. Because the heir does not have the right to the testator's money before his death , this makes the leave in the life of the testator not considered, because it is before the right proven. In addition, the right proven at death, they would return it after his death, unlike that proven after death, because after the right has been proven, they have no right to return from it.

The second saying:

If the heir accepts during the condition of the testator's disease, then the permission is obligated, and there will be no return after

(1) Al- Sarkhasi, al-Mabsut 27/147, Ibn al-Humam, Fath al-Qadir 10/417, Al-Shafi'i, Al- Umm 4/109, Ibn Qudamah, Al-Mughni 6/58.

that except for an excuse. This is the view of the Malki school⁽¹⁾.

The Third saying: If the heirs permitted this, even if it was in the life of the testator, then he goes on to it, which is the saying of Al-Hassan, Ataa, Al-Zuhri, Rabiaa, Al-Awza'i and others⁽²⁾. Because the right is theirs, and if they are satisfied with leaving it, their right is lost, as if the purchaser was satisfied with the defect.

The preference:

The most correct opinion is the view of the majority of the Jurists that the permission in life of the testator is not binding, whether in the health of the testator or in his illness.

Third Section: Approval time of the Legatee (Al-Mūṣā lahu):

The most jurists agreed that the Legatee (Al-Mūṣā lahu) is considered heir or non-heir in the time of the testator's death, not the time when the will is offered, because the will is Ownership added to the time after death. So it should be considered the approval time⁽³⁾.

Based on this, if he was an heir, he becomes non-heir at death: the will is valid for him, and if he bequeathed to him while he was not an heir, then he would become heir at death, the will is rejected unless the heirs authorize it.

(1) Al- Desouqi, Hashiat al-Desouqi 4/437, Al-Sawi, Hashiat al-Sawi 4/595, Al-Khurshi, Sharh Al-Khurshi 8/180.

(2) Ibn Qudamah, al-Mughni 6/63.

(3) Al-kasani, Bada'i Al-Sanayeh 7/338, Ibn Abdin, Hashiat Ibn Abdin 6/651, Al-Khurshi, Sharh Al-Khurshi 8/180, Alish, Manh al-jalil 9/513, Al-Mawerdi, Al-Hawi al-kabeer 8/195, Al-Sherbiny, Mughni Al-muhtaj 4/66.

Third Subject

The will to the heir in Kuwaiti civil law

First section: Definition of Al-Wasiyyah (Bequest):

The Kuwaiti Civil law defines the will in Article (213) as: (Behavior of the estate added to after death).

The will has been defined in Article (213), as: Behavior of the estate added to after death, and this definition is more comprehensive, and is more precise than what the jurists defined, because the behavior in the inheritance contains the preparing of the funeral and burial expense payment, debts payment, testamentary will's execution of the deceased person, and distribution of the remainder of estate and property of the deceased person among the heir relatives⁽¹⁾.

Being after death: is a restriction that precludes the disposition in life such as: gift (Hibah) and ordinary charity.

Second Section: Will of the heir:

Article (247) of the Kuwaiti Civil Law stipulates that: (The will to the non-heir is implemented within the limits of one-third of what is left of the estate after the payment of the debt without the heirs 'approval, and it is not implemented for the heir or by more than one-third unless the heirs authorize it after the death of the testator. And if some of the heirs authorize the will of an heir, or by what exceeded one-third, and some not, it will be executed against the one who authorizes it).

(1) Al-Mudhakhirat al'Idahia. p207.

The article included that the amount of the will that is executed without the heirs' approval is one third of the estate at the death of the testator, for a non-heir. If the will is for the heir or more than a third, then the bequest will be suspended due to the heirs' approval, if it is approved, it will be valid, and this will be in implementation of what was recommended by the deceased. If they do not allow it, it will be invalidated, but if some of them approve it, and some of them reject, the will is valid in the portion of the one who permits.

The approval should be considered after death, and not before. Because before the testator dies, he does not know the heirs specifically, the reason of that someone may die before the testator, or may exclude from inheritance, or may be impediments from inheritance, so the attribute that was the cause of the right was not exist, because the approval is a donation, and It will not exist before the testator has died. The heir whose approval is deemed eligible to donate is fully qualified⁽¹⁾.

It is noted that the Kuwaiti law has followed the opinion of the majority of jurists that the will for the heir is to be suspended on the heirs' approval, so if it is approved, it will be valid, and this will be in implementation of what was recommended by the deceased. If they do not allow it, it will be invalidated, but if some of them approve it and some of them reject, the will is valid in the portion of the one who permits.

(1) Al-Mudhakat al'Idahia. p230

Conclusion

Praise be to Allah, Lord of the worlds, may He be glorified and exalted be He in all cases. I pray and grant peace to the master of creation, our master Muhammad, his family and companions, and I ask Allah, may He be glorified, to conclude to us the rest of the righteous. Moreover,

After I came to the end of my research. I record the results that I concluded through my treatment of various issues, and they could be summarized as follows:

- 1- Bequest is defined as: an act of donation executed after death.
- 2- The Jurists have unanimously agreed that the testator (al-Mūṣiy) could only give away up to one-third of his or her property and not beyond that.
- 3- The Jurists agreed that the Legatee (al -Mūṣālahu) must not be an individual who is a legitimate heir.
- 4- The basic principle of a will is that it is not for the inheritor, so if a person bequeaths an inheritor, the validity of this will depends on the permission of the rest of the heirs, even if it is within the limits of a third.
- 5- The bequest is not valid for the heir, until all the remaining heirs' agreement.
- 6- The permission in testator's life is not required, whether in the health of the testator or in his illness.
- 7- the Legatee (Al-Mūṣā lahu) is considered heir or non-heir in the time of the testator's death, not the time a will is offered, because the will is Ownership added to the time after death.

- 8- The definition of the Will of the Kuwaiti Civil law is more comprehensive, and is more precise than what the jurists defined.
- 9- The Kuwaiti law has followed the opinion of the majority of jurists that the will for the heir is to be suspended on the heirs' approval.

In addition, our final prayer is that praise be to Allah, Lord of the worlds, and may Allah's prayers be upon our Prophet Muhammad and upon his family and companions as a whole.

References

- 1- Ibn Abidin, Muhammad Amin bin Omar al-Dimashqi, **Hashiat Ibn Abidin**, Dar Al-Fikr, 1412 AH.
- 2- Ibn Abd al-Barr, Yusef bin Abdullah. **Alaistidhkar**, Beirut: Dar Al-Kutub Al-Alami, 2000.
- 3- Ahmad, Ahmad bin Muhammad bin Hanbal bin Hilal Al-Shaibani, **Musnad Ahmad**, investigation: Ahmed Muhammad Shaker, Dar Al-Hadith, 1416 AH.
- 4- Alish, Muhammad bin Ahmed, **Manh al-Jalil**, Beirut: Dar Al-Fikr, 1989.
- 5- Al-Bayhaqi, Ahmed bin al-Hussein bin Ali bin Musa, **Sunan al-Bayhaqi**, Beirut: Scientific Books House, 1424 AH.
- 6- Al-Bukhari, Muhammad bin Ismail, **Sahih al-Bukhari**, Dar Touq al-Najat, 1422 AH.
- 7- Al-Dara Qutni, Ali bin Omar, **Sunan Al-Dara Qutni**, Cairo: Dar Al-Mahasin Printing.
- 8- Al- Desouqi, Mohamed bin Ahmed bin Arafa, **Hashiat al-**

- Desouqi**, Beirut: Dar Al-Fikr Al-Arabi.
- 9- Abu Eid, Aref Khalil, **Al-Wajeez in the inheritance**, Amman: Dar Al-Nafees, 1426-2006.
- 10- Al-Hakim, Muhammad bin Abdullah Al-Nisaburi, **Al-Mustadrak**, Beirut: House of Scientific Books.
- 11- Ibn al-**Humam**, Muhammad ibn Abd al-Wahid al-Siwasi, **Fateh al-Qadir**, Beirut: Dar al-Fikr.
- 12- Al-Hattab, Muhammad bin Muhammad bin Abdul Rahman, **Mawahib Al-Jalil**, Beirut: Dar Al-Fikr, 1398/1979.
- 13- Ibn Hazm, Ali bin Ahmed Al Dhaheri, **al-Muḥallā**, Cairo: Dar Al-Turath.
- 14- Al-Ghamdi, Nasser bin Muhammad, **alkhalasat fi eilm alfarayid**, Makkah Al- Mukarramah: Dar Taibah Al-Khadra, 1426.
- 15- Al-Kasani, Aladdin Abu Bakr bin Masoud, **Bada'i Al-Sanayei**, Beirut: Dar Al-Fikr.
- 16- Al-Khattabi, Ahmad ibn Muhammad, **Malem al- Sunan**, Halb: The Scientific Press, 1351 AH – 1932.
- 17- Al-Khurshi, Muhammad Al-Khurshi, **Sharh Al-Khurshi**, Beirut: Dar Al-Fikr.
- 18- Ibn Majah, Muhammad bin Yazid al-Qazwini, **Sunan Ibn Majah**, Arabic Books Revival House.
- 19- Ibn Manzūr, Jamal al-Din Muhammad bin Makram, **Lisān al-‘Arab**, Beirut: Dar Sader.
- 20- Al-Mawardi, Ali bin Mohammed, **Al-Hawi Al-Kabeer**,

- Beirut: Dar Al-Kutub Al-Alami, 1999.
- 21- Ibn Muflih, Ibrahim bin Mohammed. **Al-mubdie fi sharah almaqnae**, Beirut: Dar Al-Kutub Al-Alami, 1997.
- 22- Muslim, Muslim ibn al-Hajjaj Abu al-Hasan al-Qushairi al-Nisaburi, **Sahih Muslim**, the Arab Heritage Revival House.
- 23- Al- Nisaei, Ahmad bin Shuaib, **Sunan Al-Nasa'i**, Riyadh: Dar Al-Salam, 1420-1999.
- 24- Al-Nawawi, Yahya bin Sharaf, **Rawdat Al-Talibin**, Beirut: Islamic Office.
- 25- Ibn Nujim, Zainuddin bin Ibrahim, **Al-Bahr Al- Raayiq**, Beirut: Dar Al-Maarefa, 1413.
- 26- Al-Ramli, Muhammad ibn Abi al-Abbas bin Shihab **Nihayat Al-muhtaj**, Beirut: Dar Al-Fikr.
- 27- Al-Razi, Muhammad ibn Abi Bakr ibn Abd al-Qadir, **Mukhtar al- shihah**, General Egyptian Book Organization, 1977.
- 28- Ibn Qudamah, Abdullah bin Ahmed bin Muhammad al-Maqdisi, **al-Mughni**, Beirut: Scientific Books House, 1414-1994.
- 29- Al-Sarkhasi, Muhammad bin Ahmed bin Abi Sahl, **Al-Mabsut**, Beirut, Dar Al-Maarefa, 1418-1997.
- 30- Al-Sawi, Ahmed bin Muhammad, **Hashiat al-Sawi**, Beirut: Dar al-Fikr.
- 31- Al-Shafi'i, Muhammad bin Idris bin Al-Abbas Al-Muttalabi, **Al- umm**, Beirut: Dar Al-Maarefa, 1410-1990.
- 32- Al-Sherbiny, Muhammad ibn Ahmad al-Khatib, **Mughni al-**

Muhtaj, Beirut: Dar al-Fikr.

- 33- Al-Shirazi, Ibrahim bin Ali Al-Fayrouz Abadi, **al-Muhadhab**,
Egypt: Mustafa Al-Babi Al-Halabi Press, 1396 AH.
- 34- Al-Tirmidhi, Muhammad bin Isa, **Sunan Al-Tirmidhi**,
Mustafa Al-Babi Al-Halabi Press, 1395 AH.

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