

BENEFICIARIES IN FAMILY TAKAFUL IN THE GLOBAL CONTEXT

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Under Islamic law, the beneficiary in an insurance policy cannot be determined based on a nomination clause. A nomination in a policy is just a mere formality, which has no effect as to the benefits of the policy. This is because the benefits from a policy are not outside the property of the policyholder, rather any policy or any form of savings under the name of a person must be regarded as his own property and he shall have his/her legitimate proprietorship over such a property.

Therefore, the beneficiary in a policy may be determined based on the test of whether one has an insurable interest on the subject matter of the policy, and one's insurable interest over a policy under Islamic law may be determined based on the principles of *al-Milkiyah* (ownership), *al-Mirath* (inheritance) and *al-Wasiyah* (bequest). In other words, the benefits from an insurance policy would be regarded as the property of the policy holder, and the policy holder, so long as he is alive, would have the sole ownership² (unless the policy holder creates *al-Waqaf*³ out of the policy) of the benefits of the policy, but after his death the benefits would be disbursed and distributed to the rightful persons relying on the principles of *al-Mirath* and *al-Wasiyah*.

Relying on this contention it is suggested here that the right of the beneficiary in any kind of policy should first go to the policy holder⁴ who pays regular premiums as savings for future security against unexpected risk. However in two situations the policyholder will cease to have his right of beneficiary over the benefits of the policy. Firstly, if the policy holder creates a *Waqaf* (charitable trust) out of the policy, the *Waqaf* becomes the property of *Allah (s.w.t.)* in which the *Waqif* (dedicator) has no right to hold his ownership nor to seek benefits from it after it is given away as *Waqaf*.⁵ Secondly, if the benefits of the policy are subject to the settlement of the policyholder's debt. Once the policyholder dies, it is suggested here that the right of beneficiary over the benefits of the policy may move from the policyholder to the following recipients with the following procedures:⁶

- (i) First of all the total benefits obtained from the policy would be calculated together with other legitimate wealth left by the policy holder;
- (ii) If the policyholder has incurred a debt during his lifetime and it remains unsettled at his death, the amount of debt would be deducted from the policyholder's properties. Debt is a right of creatures (*Huququl Ibad*) which should be settled before the settlement of the right of *Allah (s.w.t.) (Huququllah)*.⁷

In the event of the death of a person, the right of the creature is any form of debt while the right of *Allah (s.w.t.)* is, *inter alia*, the funeral prayer (*salatul janaza*). Thus, it is the general practice, under Islamic teachings, that the debts (if any) of the deceased should be settled before proceeding to offer the funeral prayer (*Salatul Janaza*). This is indicated in the Quranic sanctions where *Allah (s.w.t.)* repeatedly says:

“(The distribution in all cases) is after the settlement of will (made during the lifetime of the deceased) and debts” ⁸

“..(The distribution of deceased property takes place only) after the settlement of legacies and debts....” ⁹

“... [The distribution in all cases] is after the payment of legacies and debts....” ¹⁰

The Holy Prophet (*s.a.w.*) also said:

*“Settle the debt of the deceased before his funeral”*¹¹

In the aforementioned three *ayat* of the Holy *Qur'an* and the tradition of the Holy Prophet (*s.a.w.*), it has been expressly sanctioned that, the distribution of one's wealth after his death should take place only after the settlement of his debts and legacies.

(iii) After the settlement of debt, the funeral expenses of the deceased (policyholder) should be deducted from his remaining properties.¹² Shaikh Mohammad Abduh expressed in one of the *Fatwa* sessions that it is necessary under *Shari'ah* principles to separate the funeral expenses of the deceased from of his left property.¹³

(iv) The next step on the remaining properties of the deceased (policyholder) is the deduction of the portion given away in his lifetime as *al-Wasiyah* (will) ¹⁴. A will is enforceable only up to 1/3 of the total property.¹⁵ This is found in the saying of the Holy Prophet (*s.a.w.*):

*“Narrated by Amir bin Saad bin Abi Waqqas ® , he said that: I was taken very ill during the year of the conquest of Macca and felt that I was about to die. The Prophet (s.a.w.) visited me and I asked: ‘O’ Messenger of Allah (s.w.t.) I own a good deal of property and I have no heir but a daughter. May I make a will, leaving all my wealth for the cause of religious and charitable activities? The Prophet (s.a.w.) replied: “No”. Again I asked: May I do so in respect of 2/3 of my property? He (s.a.w.) replied: “No”. I asked may I do so with 1/2 of it? He (s.a.w.) replied : “No”. I again asked: May I do so with 1/3 of it? The Prophet (s.a.w.) replied: Make a will disposing of 1/3 in that manner because 1/3 is quite enough (of the wealth that you possess) for it is better for you to leave your offspring wealthy than to leave them poor, asking others for help.”*¹⁶

It is also worth noting here that, the will may only be made in favour of the stranger (non-heir) because a will made in favour of any of the heirs is not valid unless the remaining heirs consent to it.¹⁷ The Holy Prophet (*s.a.w.*) said:

“Narrated by Sarhil bin Muslim al-Khawlani, ® , the holy Prophet (s.a.w.) said: Verily Allah (s.w.t.) has bestowed upon every entitled his right (and) now there is no will in favour of any heir”¹⁸

The Holy Prophet (s.a.w.) also said:

“Narrated by Ibn Abbas ® : The holy Prophet (s.a.w.) Said: will in favour of an heir is not permissible unless when the remaining heirs consent to it.”¹⁹

Imam Shafii ® expressed two views as regards to a will in favour of an heir. Firstly, the will in favour of an heir is not valid relying on the *Hadith* reported by Amr Ibn Kharja (r.a):

“Narrated by Amr Ibn Kharja ® The holy Prophet (s.a.w.) said: There is no will made in favour of any heir.”²⁰

The second view of al-Shafii is that a will in favour of an heir may be valid if the remaining heirs consent to it. This view is based on the following *Hadith*:

“Narrated by Ibn Abbas ® the holy Prophet (s.a.w.) said: it is not permissible to make a will in favour of an heir unless it is made with the consent of the remaining heirs.”²¹

To sum up, a will could be valid if it is made within 1/3 of the property,²² and the will should not be made in favour of any heir unless the remaining heirs consciously consent to it.²³

The will should be made during the lifetime of the legator but the legatee has no right to enjoy the benefits of the will until the legator dies. *Bahr al-Raqaiq* and *Majma al-Anhur* ruled:

“A will is an act constituting a person proprietor of another’s property gratuitously by that other person following his own demise.”²⁴

A similar principle has been laid down in the following juristic view:

“The ownership under a will could be transferred only after the demise (of the legator)”²⁵

While *Al-Ma* expressed that:

“A will is a direction for appropriation (of property) after one’s death”.²⁶

A similar ruling has been given by al-Hilli that:

“A will is that which renders one with ownership or benefits over a particular property only after the legator’s death.”²⁷

In the light of this analysis and based on authorities it is suggested here that, in an insurance policy if the policy holder nominates a stranger (outside the heirs) in the policy, the nominee shall not have any right over the benefits of the policy, rather he may be treated as a mere trustee.²⁸ But if the policyholder expressly mentions that the benefits from the policy are to be regarded as a will in favour of the nominee, then the nominee will have the right only up to 1/3 of the total property of the policyholder. If the policyholder nominates any of his heirs, the nominee in this case also may be treated as a mere trustee and will have the right of a portion over the benefits of the policy according to the principles of *al-Mirath*. But if the nominee is among the heirs and the policy holder expressly mentions in the policy that the policy is made as a will in favour of the nominee (heir), the will in this case may not be valid unless the remaining heirs of the policy holder consent to it.

(v) After all these aforementioned deductions, the final step on the remaining properties of the policyholder (deceased) after the settlement of the aforementioned obligations is to distribute them among the heirs of the policyholder according to the principles of *al-Mirath*. This is indicated in the following sanction where *Allah (s.w.t.)* rules:

*“From what is left by parents and those nearest related (next of kin), there is a share for men and a share for women, whether the property be small or large - a determinated share.”*²⁹

To conclude here that, after one's demise, the debt (if any) shall be settled first prior to the actual distribution of his property left by him according to the principles of *al-Mirath*. It will then be followed by the funeral expenses and also the disbursement of the portion created as a will (which should not exceed 1/3 of the whole property).³⁰

Notes

¹ See www.islamic-insurance.com for an introduction to the author's related works on *Takaful*.

² In which the owner has an absolute right to enjoy the benefits of the policy. (See the general principles of ownership Art. 125 of the *Mejelle*).

³ As the ownership of a dedicator of a *Waqaf* (charitable trust) would be transferred to the ownership of *Allah (s.w.t.)* soon after the property is given away as a trust. See Salabi, Dr. Mohammad Mustafa, *infra*.

⁴ Relying on the principles of *Milkiyah* ownership.

⁵ See Tanzil ur Rahman, *op. cit* at pp 104, 108. See also Dr. Mohammed Mustafa Islami, *Muhadarat Fil Waqaf wal Wasiyah*, Cairo, 1956, p. 9.

⁶ Relying on the general principles of *Al-Milkiyyah* (ownership). See the general principles of *al-Milkiyyah* (ownership) Art 125 of the *Mejelle*

⁷ This is the opinion of Imam Abu Hanifah and Malik. See Idoi, A. Rahman, *Shariah: The Islamic Law*, A.S. Noordeen, K.L. 1990, p. 29.

⁸ *Al-Quran, Surah an - Nisa* 4:12.

⁹ *Ibid.*

¹⁰ *Al-Quran, Surah an-Nisa* 4:11.

¹¹ As quoted in Tanzil ur Rahman, Vol. II, *op. cit.*, p. 425.

¹² See Ali, A. Yusof, *The Meaning of the Holy Quran, op. cit.*, p. 186, 516.

¹³ See *al-Fatwa al-Islamiyyah*, Darul Ifta al-Misriyyah, Cairo, 1981, Vol. III, p. 984, See *footnote*.

¹⁴ See *Al-Quran, Surah an-Nisa* 4:11, 12.

¹⁵ See Ali, A. Yusof, *op. cit.*, p. 186, 516.

¹⁶ *Sahih al-Bukhari, Kitab al-Faraid, op. cit.* Vol. 8, No. 725, p. 477f.

¹⁷ See Rahman, Tanjilur, *A Code of Muslim Personal Law, op. cit.*, S. 241(1).

¹⁸ Al-Baihaqi Ahmad Ibn. Hossain, *al-Sunan al-Kubra*, Deccan, 1953, Vol. VI, p. 412. See also al-Kasani, *Badai al-Sanai*, Cairo 1327 A.H. Vol. VII, p. 337, See also *Mishkatul masabih, op. cit.*, 2:34, p. 324.

¹⁹ Dar al-Qutni, Ali Ibn ‘Umar, *Sunan*, Matbaal-Ansuri, Delhi, 1310 AH. pp. 488 - 89; See also *Mishkat, loc. cit.*

²⁰ Dar al-Qutni, *loc. cit.*; See also *al-Fatwa al-Islamiyyah*, Darul Ifta al-Misriyyah, Cairo, 1981, Vol. III, p. 984; See also *Mishkat, loc. cit.*

²¹ Dar al-Qutni, *op. cit.*, pp. 488 - 89. See also *al-Fatwa al-Islamiyyah, loc. cit.*; See also *Mishkat, loc. cit.*

²² Ibn Rushd, *Bidayatul Mujtahid, Kitab al-Wasaya*, Cairo, *n.d.* Vol. II, p. 336.

²³ al-Din, Shaikh Nijam, See *Fatwa Alamgiri*, Dewband, India, *n.d.* Vol. IV, p. 223; See also al-Haskafi, *al-Durrul Mukhtar,(Raddul Muhtar)* Cairo, 1324 AH, Vol. V, p. 593; See also al-Sarakhsi, *al-Mabsut*, Cairo, 1324 AH, Vol. XXVII, pp. 175 - 76.

²⁴ Najim, *Ibn Bahral-Raqaiq*, Cairo, *n.d.* Vol. VIII, p. 403; also Afandi, Daman, *Majma al-Anhur*, Cairo, Vol. II, p. 691.

²⁵ Al-Haskafi, *al-Durrul Mukhtar, op. cit.*, Vol. 1, p. 458.

²⁶ Al-Maqdisi, *al-Iqra*, Cairo, *n.d.* Vol. III, p. 47.

²⁷ Al-Hilli, *Shariah al-Islamiyah*, Bairut, *n.d.* p. 258.

²⁸ See *Hedayatullah V. Mst. Rahiman*, [1935] AIR 73.

²⁹ *al-Quran, Surah an-Nisa* 4: 7; as for a detailed distribution of wealth see *al-Quran, loc. cit.*, *ayat* 11 - 12.

³⁰ Ibn Abidin II, *Qurratul ‘ayun al-Akhyar*, Cairo, 1299 AH. Vol. II p. 436, See also al-Babarti Akmaluddin, *al-Inayah*, Calcutta, 1830 AH, Vol. IV, p. 137.