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## SUCCESSION PLANNING FOR MUSLIMS IN THE UAE: NAVIGATING SHARIA LAW AND LOCAL LEGISLATIONS FOR ASSET MANAGEMENT AND ESTATE PLANNING

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**Abstract-** This write up critically analyses the concept of succession for a muslim in UAE under Sharia law, Federal Law No. (5) of 1985 on the Civil Transactions Law, and Federal Law no. (28) of 2005 on Personal Status of the United Arab Emirates. Examining its juridical dimensions and implications with the framework of the Sharia law. Succession is the process of organising and managing the transfer of assets. And how this tool of succession planning becomes an important tool for a Muslim to safeguard his assets. Furthermore, the concept of Hibah, as a form of voluntary transfer of property, is deep rooted in the Islamic jurisprudence and raises intricate questions related to contractual validity, intention, and adherence to the Sharia principle. Furthermore, analysing how estate planning and succession acts as an alternative mechanism in asset management. Dissecting the legal nuances and assessing its theological underpinnings by analysing verses stated in the holy books, Federal Civil Law statutes, and Personal Status Law.

**Keywords-** Hibah, Sharia Law, Muslim, UAE, Donor, Donee, Estate Planning

### Introduction-

The term Estate planning and Succession essentially refers to the process of organising and managing the transfer of an individuals' assets and obligations after their death. Defined under the Personal Status Law Article 274-  
**“Succession is what the decedent leaves, assets and financial rights.”** The process involves making decisions about who will inherit assets, how they will be distributed, and when the distribution will occur. A muslim in UAE is governed by the laws of Sharia which is governed on the principles of just and equitable distribution of assets which may not be the strategy that one may want to opt for.

Furthermore, in the context of the UAE, where family businesses and personal wealth form a significant part of the economy, proper succession planning becomes even more crucial. The process of estate planning and succession ensure financial stability and continuity of family businesses. Moreover, it ensures that the distribution of assets upholds

the principles of Islamic law, thereby honouring both the financial and theological legacy of an individual. Therefore, having a succession plan for Muslims is important to ensure that the plan is 'Sharia Compliant' and in compliance with the local laws of the UAE, as well as international laws.

### Objective of the Research:

- To understand the process of estate planning for muslims in UAE
- To explore the theological underpinnings of Hiba in islamic law
- To critically analyse legal validity of estate planning under sharia
- To critically analyse legal validity of estate planning under other local laws

### Methodology:

This research employs a combination of analysis, research papers and legal studies. Primary sources include the Kitab Al-Hibat, Federal law no. (5) of 1985 on the Civil

Transactions Law, Federal Law no. (28) of 2005 on Personal Status, interpretations of Quranic verses and legal texts.

### Challenges in Succession

- Absence of formal structure and boundaries
- Family conflict
- Devolution as per sharia is predetermined and too strict

### Why is asset management or succession planning important?

- Ensuring the entire control is with the founder; however, the management of each respective vertical must be de-centralized
- Enabling treasury functions
- Enabling tax efficiency
- Ensuring the robust corporate governance
- Ensuring the structure is investor friendly and is as per international laws, sharia principles and the civil code
- Fund raising (to ensure the structure may raise funds not only centrally but also through separate units)
- Economic equality of all the participants, stakeholders, which shall include devolution of the property in accordance with the sharia principles

### Different Legal Structure for Estate Planning and Succession

Businesses in UAE have grown rapidly with operations being across jurisdictions, this has resulted in a complex legal structure. Therefore, the first step towards building a succession plan is to identify the right structure as per your goal. Some of the structures are-

- Trusts
- Corporatized trust arrangements
- Foundations

Amongst many structures, Foundations being one critical tool to control and plan for the orderly transfer of assets, securing family legacies and contributing to the region's economic stability in compliance with the laws.

### Legal Structure- Foundation

Foundations are often associated with charitable or philanthropic organisations, however private interest foundations are different. The purpose behind the establishment of this type of entity is to assist multi-generational families with asset protection; high-net worth individuals and families with geographically diverse assets; and individuals, companies or family offices wishing to restructure, typically for succession planning purposes.

Foundations are essentially perpetual concepts, allowing arrangements to continue through time. This provides certainty after a founder's death. Foundations can be formed for an unlimited period, or may continue only until their objectives have been fulfilled. A Foundation requires no owner, so provision is not required for transmission of a Foundation in succession planning.

Foundations further provide flexibility as they permit beneficial class(es) to be changed, make it possible to impose obligations on a recipient as a condition of receipt of any amount from the Foundation, or even make any right of receipt liable to termination or restriction.

Furthermore, the structure of the foundation may also be vetted by an Islamic scholar in the form of an opinion or a 'Fatwa' from the local Awqaf authority to ensure the structure is in compliance with the Sharia law. It is pertinent to note that, recent precedents of the authority formally accepting the use of foundations being compatible with the local laws are also available. One of the examples is where the succession plan of an individual was tested, whereby an individual had transferred his assets to the foundation during his lifetime

where he was the beneficiary along with his children (a son and a daughter) and he wished to devolve his estate equally among his children was presented before the Awqaf authority. In this instance the Awqaf authority affirmed the gift of such property during the founder's lifetime and confirmed the allowance of such endowments.

**PURPOSE OF ESTABLISHMENT OF A FOUNDATION-**

- Philanthropy
- Wealth Structuring
- Legacy Planning
- Real Estate Ownership
- Family Business Succession
- Asset Consolidation
- Employee investment scheme and co-investment

**FOUNDATIONS ESTABLISHED FROM 2017-2024**

DIFC	ADGM	RAK ICC
500	253	248

**FREE ZONES**

Free Zones are specific areas carved out creating a more developed financial freezone in UAE. These areas are considered to be outside the customs line in terms of foreign trade, taxation, and customs legislation. These financial free zones have been at the forefront of changing the legal landscape for wealth management.

Moreover, a free zone can obtain various incentives and benefits according to the countries in which they are located. These incentives are:

- Tax advantages
- Operating licence
- Profit transfer opportunity
- Facilitation of trade

**FINANCIAL CENTRES (FREE ZONES)**

**(POPULAR JURISDICTIONS IN THE UAE)**

- DIFC- Dubai International Financial Centre- renowned free zone in UAE
- ADGM- Abu Dhabi Global Market- caters to global financial entities
- RAK ICC- Ras Al Khaimah International Cooperation- lenient regulatory environment

DIFC	ADGM	RAK ICC
- DIFC Wills service centre	- Abu Dhabi Wills Registry	- 15 December 2019
- Because of the uncertainty DIFC came up with a proposal for the creation of registry of wills that will apply to assets located in Dubai	- Abu Dhabi Judicial Department	- Operates in a different regulatory environment
- The proposed application of the new system is limited only to properties located in Dubai and available only to non muslims; gives non muslims freedom to draft wills	- first foundation regulations came into force on 16th august 2017	- More aligned with UAE Federal laws
- It collaborated with the Dubai land department, the Dubai economic department, and other government agencies	- Regulated by the financial services regulatory authority (FSRA)	- Less comprehensive as compared to DIFC and ADGM

- 21st March 2018	- Has a strong framework for investor protection	- Often chosen for its simpler and more cost-effective setup process
- Independent regulatory frameworks with civil and commercial laws		- Offers a degree of investor protection, however its mechanisms are not as developed as those in DIFC and ADGM
- Regulated by the Dubai financial services authority (DFSA)		
- Has a strong legal framework for investor protection		

**Can a person bequeath his entire estate?–**

**Analysing Sharia and other Laws**

**Federal Law no. (28) of 2005 on Personal Status**

The primary legislations in the UAE which govern the inheritance related provisions include UAE Federal Law no. 28 of 2005– Personal Status Law (“**Personal Status Law**”) which is inspired by the principles of Sharia and Federal Law No. 1 of 1987 concerning the Civil Transactions Law of UAE (“**Civil Code**”).

It is pertinent to note that a Muslim person who is a resident of UAE may make any testamentary dispositions only to the extent of 1/3<sup>rd</sup> of their total property.

“Article (240)

A testament is an act of disposition of the succession after the death of the testator”

“Article 243

The will is enforceable within the limit of one-third of the testator’s estate, after paying the rights thereon and is valid beyond this third, within the limits of the share of the major heir who accepted it.”

“Article 244

Any act of disposition taken in articulo mortis as a gift or by favoritism shall be governed by the provisions applicable to wills regardless of the characterization given to it.”

“Article (251)

1. A will is valid if made to a living specific person or to a fetus.
2. A will is valid if made to a limited or unlimited class of people.
3. A will is valid if made for charity purposes admitted by law.”

“Article 263

The general will shall be executed up to one-third of the succession.”

Hence the devolution of the remaining 2/3<sup>rd</sup> of the property has to be made in compliance with the Sharia principles.

**Federal Law No. (5) of 1985 on the Civil Transactions Law**

As per Article 614 of the Civil Code:

“(1) A gift is the **passing of property or a right in property to another person during the period of the lifetime of the owner, without consideration.**

(2) It shall be permissible for the donor, while still intending to make a gift, to make it a condition that the donee should perform a specified obligation, and such obligation shall be regarded as consideration (...)” The above provisions state that a gift is a transfer of property which is without consideration, during the lifetime of the owner. Which implies that the transaction of gift should conclude when the owner is in a fit position to carry out such a transaction.

“Article (619)

The donor must not be interdicted as concerns his gift, he must not also be a man of war or, on other words a non-Muslim citizen of a non-Muslim State that is in a state of declared or effective war with the Muslims and provided he did not ask for peace.”

Furthermore, this point implies that a gift cannot be given to a-

- non muslim and
- an enemy

“Article (646)

1. The donor may revoke the gift before receiving payment without the consent of the donee.

2. He may revoke it after payment with the consent of the donee. If the donee does not consent to the revocation, the donor may apply to the judge for rescission and revocation of the gift whenever he has reasonable grounds in support, unless there is an obstacle to the revocation.”

“ Article (647)

The following may constitute reasonable grounds for the revocation of a gift:

- a) If the donor has become unable to maintain himself in accordance with his social position or to meet an obligation to pay alimony which he is legally bound to pay to another person;
- b) In the event of a child being born to the donor after the donation and still being alive at the time of the revocation, or if the donor had a child which he believed dead at the time of the donation and is discovered to be still alive;
- c) If the donee has failed without justification to meet his contractual obligations or failed in his duties towards the donor or one of his relatives, and such failure constitutes serious ingratitude on his part.”

“Article (648)

If the donee kills the donor, with premeditation and without right, his heirs are entitled to annul the gift.”

“Article (649)

The following constitutes an impediment to revocation of a gift:

- a) If the gift is made by one spouse to the other or to a cognate to a degree precluding marriage unless the gift may unjustifiably result in discriminatory preference between them;
- b) If the donee has definitely alienated the thing given; if however, such alienation is only partial, the donor may revoke the gift as to the remaining part;
- c) If there is an inherent increase of the thing given, involving an increase in value thereof; or if the donee transforms the thing given in such a manner as causing a change in its name;
- d) If one of the contracting parties dies after receipt of the thing donated;
- e) If the thing given perished while in possession of the donee; and in case the loss is partial revocation may be for the remaining part;
- f) If the gift has been made against valuable consideration;
- g) If the donation constitutes alms or an act of charity;
- h) If a creditor donated the debt due to him to the debtor.”

“Article (1260)

1. Every legal act made by a person during an illness immediately preceding his death, with the purpose of making a gift, is deemed to be a testamentary disposition and will be governed by the rules applicable to wills regardless of the description given to such an act.

2. The heirs of the decedent have to prove that the disposition has been made by their decedent during an illness immediately preceding his death. The legal instrument

establishing the act cannot be invoked against the heirs unless the instrument bears a certified date.

3. If the heirs establish that the act of disposition was made by the decedent during the illness immediately preceding his death, the act is deemed to be a gift, unless otherwise proven by the beneficiary of such act or there exist special provisions to the contrary.”

“Article (1261)

When a person disposes of a property in favor of his heirs, reserving at the same time the possession and the enjoyment of this property during his lifetime, the disposition is deemed to be a testamentary disposition and, in the absence of any evidence to the contrary, shall be governed by the rules applicable to wills.”

And the above stated points translate to the instances when a gift can be revoked, apart from the above mentioned scenario under no circumstances can a gift be revoked.

#### Holy texts:

#### The Sharia Principle

The Sharia Law acts as a comprehensive guide for all aspects of personal law. Being the only law for interpretation, sometimes it can be challenging to deal with matters that are complex in nature such as a contemporary family structure, which can include blended families or international marriages and present unique scenarios that traditional sharia inheritance laws may not fully accommodate such variations.

It is a compulsory framework that governs succession and the distribution of inheritance, the specific division of estate under the law is based on factors such as heirs' gender and family circumstances. This specific division or devolution of fixed portions is known as '**al-fariad**'. Technically the term denotes the quantum of shares allocated to the lawful heirs as determined under shariah. The various categories of heirs include those who are

entitled to inherit by default, known as forced heirs. Article 272 of personal status law states-

“1. Whoever dies or is considered dead by decision of the court and has grandsons from his son or his daughter and this latter died before or with the testator, the grandsons shall be entitled to a mandatory will for one-third of the estate within the following limits and conditions:

a) The mandatory will for these grandsons shall be equal to their share that their father would have inherited from his father had he survived him, provided it does not exceed one-third of the estate.

b) The above-mentioned grandsons shall not be entitled to a mandatory will if they inherit their ascendant, grandfather or grandmother, or if this ascendant did not bequeath to them or grant them in his lifetime, without consideration, an amount equal to their entitlement under the mandatory will. In case he bequeathed to them below this amount it must be completed and if more than the said amount, the excess shall be considered a voluntary will. Should he bequeath to some of them only, the others shall be entitled to the mandatory will, each according to his share.

c) The right to the mandatory will shall be to the children of the son or the daughter or their descendants, without limitation and regardless of their number, the male's share shall be twice the share of a female. The ascendant shall disinherit his own descendants only and the descendant shall only be entitled to the share of his ascendant.”

The process of determining each heir's share is intricate. The larger portion of inheritance is received by the male heir, typically in a 2-to-1 ratio. This means sons, grandsons, and brothers inherit twice as much as daughters, granddaughters, and sisters. Moreover, it has rules that may disqualify or reduce some heirs' portions in favour of others with a stronger entitlement. Navigating this system requires



careful management to align with Islamic principles in each distinct case.

**The predetermined formulae for Faraidh is as follows-**

- For the male, what is equal to the share of two females.
- But if there are [only] daughters, two or more, for them is two thirds of one's estate.
- And if there is only one, for her it is half.
- And for one's parents, to each one of them is a sixth of his estate if he left children.
- But if he had no children and the parents [alone] inherit from him, then for his mother is one third.
- And if he had brothers [or sisters], for his mother is a sixth, after any bequest he [may have] made or debt.

**Essentials to qualify as an heir-**

- the individual must be a Muslim and
- must not have been involved in causing the death of the deceased.

It also elaborates on illegitimate and adopted children and how they are typically excluded from inheritance.

When an estate is divided, a probate procedure is initiated in local courts, and a Sharia scholar is appointed to oversee the distribution of the estate according to Islamic law.

**Circumstances when the principles of Faraidh apply?**

- When the person has no will
- When the donor has made a gift on his deathbed, which renders it invalid and the principles of Faraidh will follow

A basic formulae for Faraidh is 50% of the estate if devolved to the spouse, 50% to the children and default distributions will apply in the absence of a spouse or children. The mother of the children does not automatically become

the guardian of the children upon the father's death

The principles of Faraidh are mentioned under (Surah An-Nisaa verse 11)- The Hadith

"The Prophet Muhammad (pbuh) said: Give the appointed portions to those entitled to them. Then whatever remains is for the nearest male." (Narrated by Bukhari - Muslim)

Under the Sharia law, the concept of Gift or **Hibah** is a transaction that entails transfer of property during the lifetime of a person. The conditions of a valid Hibah are: the donor (wahib) must have a sincere intention to give the gift (Niyah); the donee (mawhub) must accept the gift willingly (Qabul); the actual transfer of possession of gift (Taqaabud); a contract (akad) of granting property and not debt. Furthermore, the transfer could be of money, real estate, or other valuable assets.

In the **Kitab Al-Hibat** which is the Book of Gifts, elucidates verses which essentially gives validity to the transaction of Hibah.<sup>570</sup> Under Book 12, Number 3973-

Jaber b. 'Abdullah (Allah be pleased with them) reported Allah's Messenger (may peace be upon him) as saying:

He who conferred a life grant upon a person, it becomes his possession and that of his successors, for he surrendered his right in that by his declaration.

The above verse essentially connotes to the revocation element of a gift, wherein once a donor has transferred (their) property to the donee, the transaction is irrevocable. Except in certain circumstances, which are specifically mentioned; wherein, a father is entitled to get back the gift given by him, to his children if he finds it contrary to the laws and spirit of the Islamic laws. This right of revocations is called as (Raj).<sup>571</sup> Under the Federal Law the provisions for revocations are given under Chapter two,

<sup>570</sup>IslamBasics.com, <https://islambasics.com/chapter/kitab-al-hibat-the-book-of-gifts/>, (last visited February 8, 2024)

<sup>571</sup> Supra note 1

Section three: Revocations of the Gift from Article 646 to 653.

The act or transaction of Hibah is essentially a contract, as it imbibes all the features of a valid contract in it. Analysing the origin of the rule in Muslim law, Professor Wehberg wrote-

"For the Islamic people the principle, *pacta sunt servanda* (agreements must be kept), has also a religious basis- 'Muslims must abide by their stipulations.'<sup>572</sup>

The stipulations and obligations connotes the obligations of one's own duty in a social setup. This is clearly expressed by the Koran in many places, for example, where it is said:

"Be you true to the obligations which you have undertaken... your obligations which you have taken in the sight of Allah... For Allah is your witness."

The above principle of obligations stems from two significant principles rooted in the Muslim law i.e. Individual rights and the principle of justice. So, the act of donation or gift can take place once a person has fulfilled all his obligations.

Delving deeper into the principle of individual rights, arguments of the majority of Muslims are also based on analogical reasoning (*qiyas*) and practices of the two rightly guided companions, Abu Bakr and Umar. Based on analogy, Ibn Rushd of the Maliki school highlights the authority of the majority of Muslim jurists-

"There is consensus that it is permissible for a person to give the whole of his property by Hibah to a stranger with the exclusion of children."<sup>573</sup>

<sup>572</sup> Habachy, Saba. "Property, Right, and Contract in Muslim Law." *Columbia Law Review* 62, no. 3 (1962): 450-73. <https://doi.org/10.2307/1120053>. (Last visited on February, 8 2024)

<sup>573</sup> Ibrahim, Badruddin Hj. "'Hibah' (Gift Inter Vivos) by Parent in Favour of Some Children to the Exclusion of the Others under Islamic Law." *Arab Law Quarterly*, vol. 31, no. 1, 2017, pp. 54-73. *JSTOR*, <http://www.jstor.org/stable/26396211>. (Last visited on February, 8 2024)

Citing the following Hadith:

"The property of a Muslim does not legally belong to another Muslim except from the pleasure of his heart"<sup>574</sup>

By the term 'the pleasure of his heart', it essentially connotes to free consent, which means consent which is free from Defective Assent (Duress, Deceit and Undue Influence, Mistake) under the Federal Law no. (5) of 1985. Moreover, no one has a right to oppose the disposition of property if it is during the lifetime of the person (i.e., not during illness or deathbed but when the person is fit). And in fact, the objection can be made only if the disposition of property is during illness. And since a person disposes off his own property no person has a right to object to it.

Al-Zarkashi conceded:

"The general principle is that a person is free to dispose of his property as he likes".<sup>575</sup>

The core motive of transfer of estate through Hibah is to have a tool that acts as an alternative mechanism for asset management for Muslims. If a person intends to devolve his/her/their property as per his/her/their wishes, on the face of it under sharia principles it is impossible; because the laws governing inheritance are fixed which is Al-Faraidh. Elucidated in the holy book Quran, a fixed portion is divided under this system of inheritance.

Juxtaposing the above-mentioned theological principles to the provisions of the Federal Law No. (5) of 1985 on the Civil Transactions Law of the United Arab Emirates and Personal Status Law. The Article 614 clause one elaborates that the gift is a conveyance which is to another person without consideration during the lifetime of the donor. Here, when we look at the definition of gift under the federal law and the book of Hibah, there is no restriction on the

<sup>574</sup> Ibrahim, Badruddin Hj. "'Hibah' (Gift Inter Vivos) by Parent in Favour of Some Children to the Exclusion of the Others under Islamic Law." *Arab Law Quarterly*, vol. 31, no. 1, 2017, pp. 54-73. *JSTOR*, <http://www.jstor.org/stable/26396211>. (Last visited on February, 8 2024)

<sup>575</sup> *Supra* note 4

quantum of estate that could or could not be transferred which can be further deduced that the main element that essentially permits a person to make a gift of his entire estate is during his lifetime when he is fit to make such transfer (i.e. not on his deathbed). Clause two talks about the imposition of an obligation that shall constitute as a consideration. Essentially this consideration can be looked at as a condition precedent, which implies that the doing of the act shall initiate the transfer and not entirely a consideration for the gift, which might make it a civil transaction. It simply is a condition precedent to the transfer.

This can be further elaborated as, the purpose of transfer of property by way of Hibah is aimed to benefit the beneficiary, the donor in certain situations may hesitate to surrender all or part of their property during their lifetime for fear or worry about being neglected after all the property being distributed. By this reason, the consideration may be introduced rendering the whole transaction as a valid contract (Hibah). During his/her/their lifetime, the donor retains complete control and enjoyment over the trust property. After the death of the donor, the property will pass to the beneficiary and consequently the other legal heirs cannot claim to be entitled to the property anymore.

Furthermore, when we examine Article 244 of the personal status law it states that the act of disposition shall be taken place when the person is fit and there should be no transaction taking place on the point of favoritism, which points to the principle of equity and justice of the sharia law. Hence, any transfer in compliance with the basic principles laid down in sharia and the local laws is a valid transaction.

### Conclusion

When analysing Sharia principles, it is difficult to express in a foreign language the weighty meaning and resonance of the original Arabic. Sheikh Rashid Rida, a modern Muslim leader and scholar said, - 'Muslim law proclaims

equally before the judge and before the law of the most humble protected person or ally of the Muslim community and the most powerful of the caliphs'.<sup>576</sup>

The Shariah principle is established on the grounds of equity and fairness; so, the question that arises is whether the act of Hibah and the setting up of a foundation for asset management of a muslim in UAE is a contravention of the principle? The transaction of a gift is in conformity with two principles of the whole Muslim system of law, i.e. the principle of liberty to contract within the limits of the divine law, and the principle of respect for contracts.

Stated by Ibn Taimiya as follows- 'The following rule shall be obeyed: men shall be permitted to make all the transactions they need, unless these transactions are forbidden by law'.<sup>577</sup> Hence, the act of Hibah and setting up of a foundation can be a tool for asset management for a Muslim person provided it is not in contravention with the basic principles of the Sharia law.

### W&S Comment

Accordingly, the abovementioned provisions affirm the possibility of a lifetime gift thereby enabling the structure of a Foundation. *(However, it is pertinent to note that once the gift is given, the Islamic law does not provide for claw back provisions.)*

In case the Founder wishes to abide by the Sharia rules the provisions pertaining to the devolution of the property in the foundation may be made in accordance with the Sharia principles. Alternatively, the asset distribution may be made as per the founder's wishes which may also be in accordance with Sharia which may also be considered Sharia

<sup>576</sup>Mohd Zamro Muda Syari<sup>2</sup>a Department Faculty of Islamic Studies, UKM, INSTRUMENTS OF HIBAH AND WILLS: ANALYSIS OF THE REGULATIONS AND APPLICATIONS IN MALAYSIA, e Hibah and Faraid National Convention 2008

<sup>577</sup> Ibrahim, Badruddin Hj. "Hibah' (Gift Inter Vivos) by Parent in Favour of Some Children to the Exclusion of the Others under Islamic Law." *Arab Law Quarterly*, vol. 31, no. 1, 2017, pp. 54-73. JSTOR, <http://www.jstor.org/stable/26396211>. (Last visited on February, 8 2024)

Compliant (if the distribution mechanisms are documented by the Founder by letter of wishes and are based on the concepts of fairness).

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