277076 - Ruling on Bequeathing to Non-Heirs When Fixed Shares Exhaust the Estate

the question

What is the ruling on making a bequest to male relatives on the father's side for whom there is no allocated share, if the testator has heirs whose allocated shares will leave nothing for other relatives, as their shares will use up all of the estate?

Detailed answer

Making a bequest is prescribed and recommended for the one who has wealth, within the limit of one third, if the bequest is made to someone other than an heir [who will receive an allocated share according to the laws on inheritance]. It is prohibited to make a bequest to an heir.

It says in *Sharh Muntaha al-Iradat* (2/456): It is prohibited to make a bequest to someone who will inherit [an allocated share] from the testator other than a husband or a wife of more than one third of the estate to a non-relative, or to bequeath anything to an heir. This was stated by Imam Ahmad, and that applies whether the testator makes the bequest in good health or when he is sick.

With regard to the prohibition on making a bequest of more than one third of the estate, that is because of what the Prophet (blessings and peace of Allah be upon him) said to Sa`d, when he asked him: Can I bequeath all of my wealth? [The Prophet (blessings and peace of Allah be upon him) said: "No." He said: One half? He said: "No." He said: One third? He said: "One third, and one third is a lot."

This hadith was narrated by al-Bukhari and Muslim.

With regard to the prohibition on bequeathing anything to an heir, that is because of the hadith: "Allah, may He be Exalted, has given each one who has a right his right, so there is no bequest to an heir." Narrated by the five except an-Nasa'i, from `Amr ibn Kharijah; also narrated by Abu Dawud, at-Tirmidhi and Ibn Majah from Abu Umamah al-Bahili.

This bequest that is prohibited may become valid if the heirs agree to it, because of the hadith of Ibn `Abbas which is attributed to the Prophet (blessings and peace of Allah be upon him): “There is no bequest to an heir unless the other heirs agree to it.” And it was narrated from `Amr ibn Shu`ayb, from his father, from his grandfather, and attributed to the Prophet (blessings and peace of Allah be upon him): “There is no bequest to an heir unless the other heirs allow it.” Both reports were narrated by ad-Daraqutni.

Making a bequest to an heir is disallowed because it undermines the rights of the other heirs, but if they agree to allow it, the bequest may be executed. End quote.

It is permissible for a person to make a bequest to someone who he thinks is not an heir, based on what appears to him to be the case at the time of making the bequest, such as if he makes a bequest to his male relatives on his father’s side if there will be nothing left of the estate after the allocated shares of the heirs are distributed, or making a bequest to other relatives because there are male relatives on the father’s side [which would prevent the other relatives from receiving anything of what is left of the estate after the allocated shares of the heirs are distributed].

However, if someone who is not an heir has become an heir at the time of the testator’s death, then the bequest becomes invalid, unless the other heirs allow it.

So what determines whether someone is an heir or not is the circumstances of that person when the testator dies.

Ibn Qudamah (may Allah have mercy on him) said (4609): Discussion: if someone has a bequest made to him, and it appears that he is an heir, but the testator did not die before the one to whom the bequest was made became no longer an heir for some reason, then the bequest to him is valid, because what matters with regard to a bequest is the situation at the time of the testator’s death. We know of no difference of opinion among the scholars regarding the fact that what matters with regard to a bequest is the situation at the time of the testator’s death. So if someone made a bequest to three brothers of his of different types, and he has no son, then he

dies before a son is born to him, the bequest to his brother other than his brother through his father is not valid unless the other heirs allow it.

If a son is born to him, the bequest to all of the brothers becomes valid and does not require the approval of the other heirs, so long as the bequest is not greater than one third of the estate.

If a daughter is born to him, the bequest to his brother through his father and to his brother through his mother is valid, so they receive two thirds of what was bequeathed, to be shared equally between them, but the bequest to his brother through both parents is not valid, because he is an heir.

This is the view of ash-Shafa`i, Abu Thawr, Ibn al-Mundhir, as-hab ar-ra'y and others, and we do not know of any difference of opinion among other scholars.

If he made a bequest to them and he has a son, but his son dies before him, the bequest is not permissible for his full brother through both parents or his brother through his mother, but it is permissible for his brother through his father.

If his brother from both parents dies before him, the bequest is not permissible for his brother through his father only, because he becomes an heir. End quote.

Al-Baji said in *Al-Muntaqa* (6/179): What matters in that regard is if that person (who cannot receive the bequest) has become an heir at the time of the testator's death. If a bequest was made to someone who was not an heir, then he became an heir, the bequest becomes invalid.

If he made a bequest to an heir, then that person became no longer an heir, that bequest becomes valid. End quote.

Zakariyya al-Ansari said in *Asna al-Matalib* (3/34): What determines whether a person is an heir or not is his situation on the day the testator dies. So if a bequest was made to someone who is not an heir, such as a bequest to a brother when he has a son, then that person becomes an heir, such as if the son dies before the testator, or dies with him, then that becomes a bequest to an heir, therefore it becomes invalid, unless there is no other heir except him, otherwise it becomes dependent on the permission of the other heirs.

Or the opposite scenario: he makes a bequest to an heir, such as his brother, who then becomes not an heir, such as if a son is born to the testator, in which case the bequest becomes valid and applies to anything within the limit of one third of the estate, and anything more than one third is not valid unless the heirs allow it. End quote.

Conclusion:

If someone has heirs with allocated shares that will use up all of the estate, he may make a bequest to relatives on his father's side, on the grounds that such relatives are not heirs, as appears to be the case.

Then we should look at that relative's situation at the time of the testator's death: if he is not an heir, then the bequest is valid.

But if he is an heir, the bequest becomes invalid, unless the other heirs allow it.

It should be noted that the bequest should be taken from the estate before it is divided among the heirs. So the male relatives on the father's side should take what was bequeathed to them, then what remains is to be distributed among the heirs according to their allocated shares.

And Allah knows best.