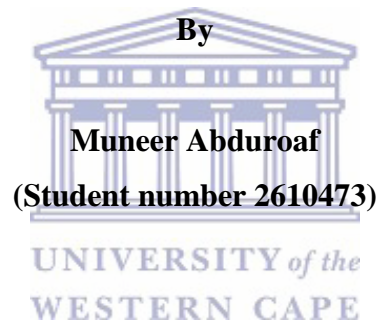


UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

THE IMPACT OF SOUTH AFRICAN LAW ON THE ISLAMIC LAW OF SUCCESSION



Thesis submitted in fulfilment of the requirements for the award of the LLD degree

Supervisor

Professor N Moosa

16 January 2018

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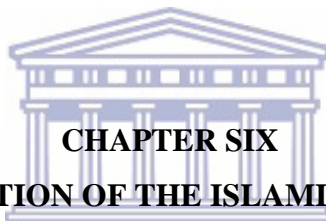
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DECLARATION

I declare that '*The Impact of South African Law on the Islamic Law of Succession*' is my own work, that it has not been submitted before for any degree or examination at any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.



.....
Muneer Abduroof

16 January 2018

DEDICATION

I dedicate this work to all my teachers who have been instrumental to where I am today.



ACKNOWLEDGEMENTS

First of all, I thank my creator (Allaah Almighty) who gave me the ability to further my studies, and to have completed my doctoral thesis.

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KEYWORDS

- Constitution
- Intestate succession
- Inheritance
- Islamic law
- Muslim marriage
- Quraan
- South African Constitution
- Sunnah
- Testate succession
- Wills



TABLE FOR ARABIC WORDS

The table below is used in this thesis for Arabic transliteration purposes.¹ The transliteration is intended to be as close as possible to the Arabic pronunciation. This would assist the reader in identifying the Arabic terms when visiting the Arabic sources. The long vowels as provided in Arabic words would be shortened when the letters 'ic' are connected to it. Islaam would therefore become Islamic. This is done for the purpose of easy reading.

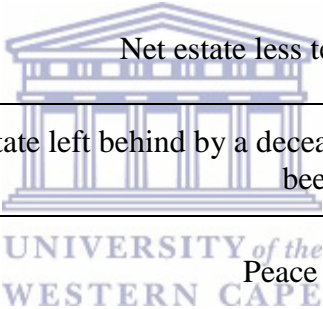
| Arabic Letters | | | | | | | | | |
|----------------|---------|-------------|---------|------------|---------|--------|---------|--------|---------|
| Arabic | English | Arabic | English | Arabic | English | Arabic | English | Arabic | English |
| ا | a | خ | kh | ش | sh | غ | gh | ن | n |
| ب | b | د | d | ص | ṣ | ف | f | و | w |
| ت | t | ذ | dh | ض | ḍ | ق | q | ه | h |
| ث | th | ر | r | ط | ṭ | ك | k | ة | h/t |
| ج | j | ز | z | ظ | Dh | ل | l | ي | y |
| ح | ḥ | س | s | ع | ‘ | م | m | | |
| Short Vowels | | | | | | | | | |
| Short Vowels | | Long Vowels | | Diphthongs | | | | | |
| Arabic | English | Arabic | English | Arabic | English | Arabic | English | | |
| َ | a | آ | aa | أو | aw | | | | |
| ِ | i | ي | ee | أي | ay | | | | |
| ُ | u | أو | oo | | | | | | |

¹ This table was sourced from the book Philips B *The Evolution of Fiqh - Islamic Law and the Madh habs* (2002) 10.

GLOSSARY

The following table is a list of the technical terms that are used in this thesis.

The table can be used for easy reference.

| Terminology | Explanation |
|-----------------------------|---|
| Consanguine sibling | A sibling that shares the same father but a different mother |
| Distant kindred beneficiary | Intestate beneficiaries who are not sharer beneficiaries and not residuary beneficiaries |
| Full sibling | A sibling that shares the same father and mother |
| Gross estate | Estate left behind by a deceased prior to any deductions |
| Intestate beneficiary | A beneficiary who inherits from the intestate estate |
| Intestate estate | Net estate less testate succession claims |
| Net estate | Estate left behind by a deceased after estate liability claims have been deducted |
| PBUH |  UNIVERSITY of the WESTERN CAPE Peace Be Upon Him |
| Residuary beneficiary | An intestate beneficiary who inherits the residue of the intestate estate |
| Residue | Residue of the estate after the fractional shares of the sharer beneficiaries have been deducted |
| Return beneficiary | A sharer beneficiary who also inherits from the residue when there are no inheriting residuary beneficiaries present |
| Sharer beneficiary | An intestate beneficiary who inherits a fractional share of the intestate estate |
| Testate beneficiary | A beneficiary who inherits from the testate estate |
| Testate estate | Generally up to 1/3 of the net estate from which testate succession claims are deducted |
| Uterine sibling | A sibling that shares the same mother but different father |

ABSTRACT

South African Muslims constitute a religious minority group that is subject to dual legal systems. In the public sphere they are bound by South African law whereas in the private sphere are duty bound in terms of their religion to follow Islamic law. Muslims are required, in terms of their religion, to ensure that their estates devolve in terms of the Islamic law of succession. A son inherits double the share of a daughter in terms of the Islamic law of intestate succession. This unequal distribution of shares has led to a premise that the Islamic law of intestate succession discriminates against females. The South African Constitution strongly promotes the right to equality and non-discrimination. There is therefore a serious need to investigate the fairness of the Islamic law of intestate succession within the context of South African law. This is in the interest of a religious minority group who have been in South Africa since 1654. No cases have (to date) gone to the South African courts concerning the constitutionality of the Islamic law of intestate succession. This thesis investigates how the estate of a deceased Muslim devolves in terms of Islamic law as well as South African law. It compares the devolution of estates in terms of the Shaafi'ee and Hanafee schools of Islamic law. It also compares the devolution of estates in terms of the South African customary and common law. It answers the question as to whether the unequal distribution of shares in favour of males is consistent throughout the Islamic law of intestate succession. It investigates the rationale behind the unequal distribution of shares within the Islamic law of intestate succession. It looks at the application of the Islamic law of succession within the South African context in terms of a will, and by way of a fictitious scenario. It compares the application of the Islamic law of succession and administration of estates in Singapore with South Africa (both being Muslim minority countries) and looks at a feature (requiring that a specific school of law must be applied) found within the Singaporean model that can be used within the South African context. It highlights possible constitutional challenges to

discriminatory provisions found within the Islamic law of intestate succession and within the South African law of intestate succession. It looks at a mechanism (1/3 bequest) found within the Islamic law of succession that could possibly be used by a testator or testatrix in order to equalise the shares received by certain intestate beneficiaries. The thesis concludes with an analysis of the findings and gives recommendations as to a way forward.

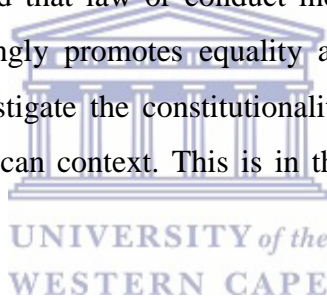


CHAPTER ONE

INTRODUCTION

1.1 Overview of the research

This thesis looks at the impact of South African law on the application of the Islamic law of succession within the South African context. Muslims are required in terms of their religion to ensure that their estates devolve in terms of the Islamic law of succession.² There has (to date) been no legislation enacted that governs the Islamic law of succession within the South African context. Al Quraan (4) 11 states that ‘Allah commands you as regards your children’s (inheritance); to the male, a portion equal to that of two females...’³ It can be clearly seen by this verse that the daughter inherits less favourably than the son in their capacities as intestate beneficiaries, in terms of the Islamic law of intestate succession. This unequal distribution of shares has led to a premise that the Islamic law of intestate succession discriminates against females. Section 2 of the South African Constitution states that the Constitution is the supreme law of the Republic and that law or conduct inconsistent with it is invalid.⁴ The South African Constitution strongly promotes equality and non-discrimination.⁵ There is therefore a serious need to investigate the constitutionality of the Islamic law of intestate succession within the South African context. This is in the interest of a religious minority



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- 2 The number in brackets refers to the chapter number of the Quraan. The number outside the brackets refers to the verse in the chapter. The terms ‘Al Quraan’ and ‘the Quraan’ are used interchangeably in this thesis. It should be noted that Muslims believe that the Quraan is the word of Allaah (God Almighty). See Khan MM *The Noble Qur’an - English Translation of the Meanings and Commentary* 1404H (4) 13 where it states that ‘[t]hese are the limits (set by) Allah (or ordainments as regards laws of inheritance), and whosoever obeys Allah and His Messenger (Muhammad PBUH) will be admitted to Gardens under which rivers flow (in Paradise), to abide therein, and that will be the great success.’ and 4(14) where it states that ‘... whosoever disobeys Allah and His Messenger (Muhammad PBUH), and transgresses His limits, He will cast him into the Fire, to abide therein; and he shall have a disgraceful torment.’
- 3 See Khan MM *The Noble Qur’an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that ‘Allah commands you as regards your children’s (inheritance); to the male, a portion equal to that of two females...’
- 4 See s 2 of the Constitution where it states that ‘[t]his Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.’
- 5 See s 9 of the Constitution where it states that ‘(1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.’

group who have been living in South Africa since 1654.⁶ It should be noted that (to date) no cases have gone to the South African courts concerning the constitutionality of the Islamic law of intestate succession. The constitutionality of the Islamic law of intestate succession is examined in Chapter Seven. The following sections of this chapter look at the significance of the research, current position with regard to the topic, aims of the research and research questions, literature review, research methodology, and the chapter breakdown of the thesis.

1.2 Significance of the research

Muslims in South Africa constitute a minority religious group that is subject to dual legal systems. In the public sphere they are bound by South African law whereas in the private sphere they are duty bound in terms of their religion by Islamic law.⁷ The significance of this research lies in the fact that it provides answers as to whether or not South African Muslims are entitled to the legal application (public sphere) of their religious beliefs (private sphere) in relation to the law of succession. It also provides answers as to how the Islamic law of succession can be applied within the South African context. It provides insight into the similarities and differences between the Islamic and South African law of succession. It also provides insight into the rationale behind why males and females (at times) inherit unequal shares within the Islamic law of intestate succession. It looks at a mechanism (1/3 bequest) found within the Islamic law of testate succession that could possibly be used by a testator or testatrix in order to augment the shares received by certain intestate beneficiaries.

1.3 Current position with regard to the topic

The application of the Islamic law of succession in the South African context has been widely canvassed in books, journal articles and the media. Some authors have compared the Islamic law of succession to the South African law of succession and expanded on its application

6 The first recorded Muslim arrived in South Africa in 1654. See Mahida EM *History of Muslims in South Africa: A Chronology* (1993) 1.

7 The number in brackets refers to the chapter number of the Quraan. The number outside the brackets refers to the verse in the chapter. The terms 'Al Quraan' and 'the Quraan' are used interchangeably in this thesis. It should be noted that Muslims believe that the Quraan is the word of Allaah (God Almighty). See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 13 where it states that '[t]hese are the limits (set by) Allah (or ordinances as regards laws of inheritance), and whosoever obeys Allah and His Messenger (Muhammad PBUH) will be admitted to Gardens under which rivers flow (in Paradise), to abide therein, and that will be the great success.' and 4(14). Where it states that '... whosoever disobeys Allah and His Messenger (Muhammad PBUH), and transgresses His limits, He will cast him into the Fire, to abide therein; and he shall have a disgraceful torment.'

within the South African context.⁸ This thesis is different as it primarily investigates the similarities and differences between the Shaafi'ee and Ḥanafee schools of law.⁹ It compares the similarities and differences between the Islamic and the South African laws of succession. It looks at the development of the South African Muslims' right to inherit as a result of case law and interpretation of statutes. This thesis also looks at the impact of South African law on the practical application of the Islamic law of succession.

The rationale behind the unequal distribution of shares within the intestate estate, in terms of the Islamic law, has gone largely unnoticed and only written about by a few authors within the South African context.¹⁰ This thesis investigates the possible rationale behind the unequal distribution of shares in terms of the Islamic law of intestate succession.

Other authors have looked at the possible constitutional challenges regarding the Islamic law of intestate succession based on equality provisions.¹¹ The constitutional challenge is generally based on a premise that the Islamic law of intestate succession discriminates against females. The Constitutional Court has not yet had the opportunity to apply its equality jurisprudence to claims brought by Muslims concerning the Islamic law of intestate succession.¹² This thesis looks at competing rights within the Bill of Rights with regard to the laws of succession. It looks at the right to private property, the right to dignity, the right to freedom of religion, and the right to equality. It investigates whether Islamic law of intestate succession provisions found in an Islamic will would pass constitutional muster if

-
- 8 See Moosa N *Unveiling the Mind: The Legal Position of Women in Islam - A South African Context* (2011); Moosa N A *Comparative Study of the South African and Islamic Law of Succession and Matrimonial Property with Especial Attention to the Implication for Muslim Women* (Unpublished LL.M thesis, University of the Western Cape, 1991); Omar MS *The Islamic Law of Succession and its Application in South Africa* (1998); and Cassiem M *Towards a Codification of the Muslim Personal Law of Inheritance* (Unpublished M.A thesis, Randse Afrikaanse Universiteit, 1996).
- 9 See Moosa N *Unveiling the Mind - The Legal Position of Women in Islam - A South African Context* (2011) 151 where the author states that the South African Muslim population essentially follows two of the four Sunnee based schools of law called the Shaafi'ee and Ḥanafee schools of law. The founder of Shaafi'ee school of law is known as Imaam Al Shaafi'ee. His name was Muḥammad bin Idrees Al Shaafi'ee. See Al Khin M and Al Bughaa M *Al Fiqh Al Manhajee 'Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 276-277. The founder of the Ḥanafee school of law is known as Imaam Aboo Ḥaneefah. His name was Al Nu'maan Bin Thaabit.
- 10 See Moosa N A *Comparative Study of the South African and Islamic Law of Succession and Matrimonial Property with Especial Attention to the Implication for Muslim Women* (Unpublished LL.M thesis, University of the Western Cape, 1991).
- 11 Du Toit F 'The Constitutional Family in the Law of Succession' (2009) 126(3) *South African Law Journal*.
- 12 Rautenbach C, Bekker JC & Goolam NMI *Introduction to Legal Pluralism* 3 ed (2010) 211.

challenged.¹³ It also compares the Islamic law of intestate succession with the rule of male primogeniture that was found to be unconstitutional based on equality provisions.¹⁴ This thesis investigates whether the Islamic law of intestate succession would follow the same fate.

1.4 Aims of the thesis and research questions

There are two aims to this thesis. The first aim is to investigate a possible way in which the Islamic law of succession can be applied within the South African context. The five research questions that are answered in this regard are: What are the similarities and differences between the two dominant schools of law (Shaafi'ee and Hanafee schools) followed by South African Muslims?¹⁵ What tool, found within the South African law of succession (a will), can be used in order to apply the Islamic law of succession within the South African context?¹⁶ What are some of the problems that could be encountered in the event where a testator or testatrix states in his or her will that the Islamic law of succession must apply to his or her estate, without stating the school of law that should be applied?¹⁷ How is the Islamic law of succession applied in another Muslim minority country (Singapore) which, like South Africa, is governed by equality provisions?¹⁸ What features found within the Singaporean model (school of law applicable to the estate) can be used within the South African context?¹⁹

The second aim of this thesis is to investigate the constitutionality of the Islamic law of intestate succession. The four research questions that are looked at in this regard are: What is the position of females within the Islamic law of intestate succession?²⁰ What is the possible rationale behind the unequal distribution of shares within the Islamic law of intestate succession?²¹ Will an 'Islamic will' pass constitutional muster?²² Will the Islamic law of intestate succession per se pass constitutional muster in South Africa?²³ What mechanism

13 See ss 9 and 36 of the Constitution of the Republic of South Africa, 1996. See Chapter Three (3.5.1) for a discussion on an Islamic will.

14 See *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA (CC).

15 See Chapter Two (2.1-2.7) of this thesis for a discussion on this research question.

16 See Chapter Three (3.5.1) of this thesis for a discussion on this research question.

17 See Chapter Five (5.1-5.7) of this thesis for a discussion on this research question.

18 See Chapter Six (6.1-6.7) of this thesis for a discussion on this research question.

19 See Chapter Six (6.1-6.7) of this thesis for a discussion on this research question.

20 See Chapter Two (2.6.7) of this thesis for a discussion on this research question.

21 See Chapter Seven (7.5) of this thesis for a discussion on this research question.

22 See Chapter Seven (7.4) of this thesis for a discussion on this research question.

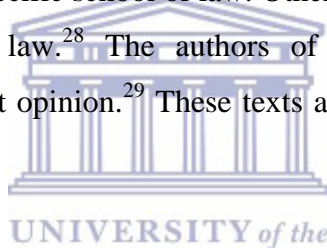
23 See Chapter Seven (7.5) of this thesis for a discussion on this research question.

(1/3 bequest) found within Islamic law can be used to augment the shares received by certain intestate beneficiaries?²⁴

1.5 Literature review

Many authors who have written on the Islamic law of succession have done so in general terms.²⁵ These texts give the reader a general understanding of how the Islamic law of succession operates. They look at the primary sources of Islamic law and the interpretation thereof in terms of the different schools of law.²⁶ I have made use of some of these texts in order to provide a good understanding of how the Islamic law of succession operates in terms of the Shaafi'ee and Ḥanafee schools of law.

Some authors have written texts on the Islamic law of succession within books that cover the complete body of Islamic law.²⁷ These texts normally constitute quite a number of volumes. Some of these texts focus on a specific school of law. Other texts compare the opinions found within the various schools of law.²⁸ The authors of these texts often provide their understanding of the most correct opinion.²⁹ These texts are very important as it shows that



-
- 24 See Chapter Seven (7.5) of this thesis for a discussion on this research question.
- 25 Examples of these texts would include Abduroaf K *Deceased Estates: Islamic Law Mode of Distribution* (2017) Highlands Estate: Highlands Waqaf Trust Publishers; Al Ghaamidee N *Al Khulaasah Fee 'Ilm Al Faraaid* (1426 H) Makkah: Daar Al Tayibah; Al Fawzaan S *Al Mawaareeth* (1999) Riyadh: Maktabah Maarif; Hussain A *Islamic Law of Succession* (2005) New York: Darussalam; Powers DS *Studies in the Quran and Hadith: The Formation of the Islamic Law of Inheritance* (1986) Berkeley: University of California Press; Abdul Aziz MZ *The Islamic Law of Bequest* (1986) Essex: Scorpion Publishers; Bukhari A *Treatise on Inheritance in Islam* (2004) Madinah: Al Rasheed Printers; Bashir M & Bagvi A *The Learners Guide to the Division of Inheritance (Hanafi)* (1974) Lahore: Sheikh Muhammad Ashraf; and Al Ḥakamee I *Tahdheeb Al Aḥaadeeth Fee 'Ilm Al Mawaareeth: Sharḥ limandHoomah Al Raḥbiyyah Al Musammaah: Bughyah Al Baahitheen 'An Jumal Al Mawaareeth* (2004) Riyadh: Musasah Fuad.
- 26 A school of law is the interpretation of the divine primary sources of Islamic law according to a specific individual or individuals. The Shaafi'ee and Ḥanafee schools of law are predominantly followed in South Africa. See Moosa N *Unveiling the Mind - The Legal Position of Women in Islam - A South African Context* (2011) 151.
- 27 Books on Islamic law (fiqh) generally cover all aspects of the life of a Muslim. These aspects include laws of purification, prayer, marriage, divorce, crimes and punishment and more. These books are used by Muslims to understand what obligations they have towards their Creator. The Islamic law of succession would constitute one of the chapters within these books.
- 28 These texts include Al Zuḥaylee W *Al Fiqh Al Islaamee Wa Adillatuhoo* 2 ed (1989) Damascus: Darul Fikr; Al Zuḥaylee W *Al Fiqh Al Mu'aasirah* (2003) Damascus: Darul Fikr; Merchant MV *A Book on Quran Laws* (1987) New Delhi: Kitab Bhavan; Ramadan HM *Understanding Islamic Law: From Classical to Contemporary* (2006) Lanham: Rowman and Littlefield.
- 29 An example of such a text would be Al Sharbeenee S *Mughnee Al Muḥtaaj Ilaa Ma'rifah Ma'aanee Alfaadh Al Minhaaj* 2 ed (2004) Beirut: Daar Al Ma'rifah. *Mughnee Al Muḥtaaj Ilaa Ma'rifah Ma'aanee Alfaadh Al Minhaaj* includes a chapter based on the Islamic law of succession in terms of the Shaafi'ee school of law.

the Islamic law of succession does not operate in a vacuum.³⁰ I have made use of some of these texts in order to explain general and specific aspects regarding the Islamic law of succession as applied in other jurisdictions.

Many South African authors have written on the South African law of succession and its application in general terms.³¹ These texts provide the reader with a good understanding of how the South African law of succession operates. Most of the recent texts look at the constitutional angle with regard to the South African law of succession. I have made use of some of these texts in order to explain how the South African law of succession operates. These texts were very useful when the similarities and differences between the Islamic law of succession and the South African law of succession were looked at.

M Cassiem has written a possible code for the incorporation of the Islamic law of succession in South Africa.³² The author of the text is of the opinion that the code should be incorporated into South African law. The author is also of the opinion that the current South African law of succession operates unconstitutionally towards South African Muslims.³³ The text does not specifically focus on the question of whether the Islamic law of succession would satisfy the equality provisions as found in the Constitution of South Africa.³⁴ This thesis investigates the constitutionality of the Islamic law of intestate succession.

N Gabru has looked at the applicability of the Islamic Law of succession in South Africa.³⁵ The author of the text advises Muslims to use the principle of freedom of testation in order to ensure that their estates are distributed in terms of the Islamic law of succession upon their demise.³⁶ This thesis looks at whether the principle of freedom of testation (if used in the

30 See Goolam NMI 'Muslim Law' in Rautenbach C, Bekker J & Goolam NMI *Introduction to Legal Pluralism* 3 ed (2010) 351.

31 These texts include Corbet M et al *The Law of Succession in South Africa* (2001) Lansdowne: Juta; Cronje DSP *Workbook for the Law of Succession* (1996) Durban: Butterworths; Jamneck J et al *The Law of Succession in South Africa* (2009) South Africa: Oxford University Press; Meyer M 'An Overview on the Distribution of an Estate of a Person Dying Without or With a Will' available at http://www.justice.gov.za/juscol/news/20116_intestate-and-testate-succession.pdf (accessed 01 October 2012).

32 See Cassiem M *Towards a Codification of the Muslim Personal Law of Inheritance* (Unpublished MA thesis, Randse Afrikaanse Universiteit, 1996).

33 Cassiem M *Towards a Codification of the Muslim Personal Law of Inheritance* (Unpublished MA thesis, Randse Afrikaanse Universiteit, 1996) iii.

34 Constitution of the Republic of South Africa, 1996.

35 Gabru N 'The Applicability of the Islamic Law of Succession in South Africa' (2005) 26(2) *Obiter* 340 356.

36 The problem with this is that many South African Muslims die intestate.

above way) would pass constitutional muster if challenged in terms of the equality provisions as provided in the Constitution of South Africa.³⁷ The principle of freedom of testation has already been challenged in the South African courts.³⁸ No cases have, to date, gone to the courts concerning the constitutionality of the Islamic will. This thesis looks into the question of whether the Islamic will would pass constitutional muster if challenged.

Other authors have looked at how the laws of succession affect females.³⁹ These texts argue that females have been discriminated against in the past. The texts also give the reader a general understanding of the difficulties that are faced by females regarding succession laws. A good understanding of this topic is required before investigating the fairness of the Islamic law of succession.

Some authors have compared various religious legal systems and secular legal systems.⁴⁰ These texts give the reader an understanding of current diversities in South Africa as far as various customs and religions are concerned. They also give the reader a good understanding of the problematic issues and difficulties that are faced by various religions. The Islamic law of succession is thus not the only law that could possibly be declared unconstitutional.

Very few authors have written about the application of the Islamic law of succession in South Africa.⁴¹ These texts were written over two decades ago. It was written prior to the enactment

37 Constitution of the Republic of South Africa, 1996.

38 See *Minister of Education and Another v Syfrets Trust Ltd NO and Another* 2006 (4) SA 205 (C). See also Du Toit F 'The Limits Imposed Upon Freedom of Testation by the Boni Mores: Lessons from the Common Law and the Civil Law (Continental) Legal Systems' 2000 available at <http://repository.uwc.ac.za/xmlui/handle/10566/229> (accessed 01 May 2012).

39 These texts include Moors A *Women, Property and Islam* (1995) Cambridge: Cambridge University Press; South African Law Commission *Review of the Law of Succession: Formalities of a Will, Alteration and Revocation of Wills, Disqualification of Inheriting, Substitution and the Succession Rights of Adopted Children: Report* Pretoria: The Commission; Ruminger J et al *CEDAW and Muslim Family Laws: in Search of Common Grounds* (1991) Malaysia: Musawa; Moosa N *Unveiling the Mind: The Legal Position of Women in Islam - A South African Context* (2011) Cape Town: Juta; Moosa N 'Women and the Islamic Law of Succession' (1994) 5 *African Law Review* 25 30; Rautenbach C 'Indian Succession Laws with Special Reference to the Position of Females: A Model for South Africa?' (2008) *XLI CILSI* 105 135.

40 These texts include Rautenbach C & Goolam NMI *Introduction to Legal Pluralism in South Africa* (2002) London: Butterworths; Rautenbach C, Bekker JC & Goolam NMI *Introduction to Legal Pluralism* (2010) Cape Town: Lexis Nexis; Reid K et al *Comparative Succession Law: Testamentary Formalities* (2011) Oxford: University Press.

41 N Moosa has subsequently written a comparative study of the Islamic law of succession and the South African law of succession in her thesis Moosa N *A Comparative Study of the South African and Islamic Law of Succession and Matrimonial Property with Especial Attention to the Implication for Muslim Women* (Unpublished LL.M thesis, University of the Western Cape, 1991). See also Omar MS *The Islamic Law of Succession and its Application in South Africa* (1988) Durban: Butterworths.

of the Interim Constitution and the Final Constitution of South Africa.⁴² The constitutionality of the Islamic law of intestate succession is specifically looked at in this thesis.

Other authors have looked at the laws of succession with specific regard to the Constitution of South Africa.⁴³ These texts clearly demonstrate how Constitutional Court cases have affected family laws within the South African context. It demonstrates the power of the South African Constitution. No cases have (to date) been heard by the Constitutional Court that concerns the constitutionality of the Islamic law of intestate succession. Some authors have reviewed Constitutional Court cases concerning the laws of succession. They have also critically analysed the decisions.⁴⁴ These cases include claims made by spouses that were married in terms of Islamic law. The authors of the texts generally see the judgments as victorious for the South African Muslim community. The problem with these cases is that the applicants were granted relief in terms of the South African law of intestate succession and not in terms of the Islamic law of intestate succession.⁴⁵ This thesis compares the consequences of these decisions to the consequences that would have applied in terms of Islamic law.

Some authors argue that the unequal distribution of shares within the Islamic law of intestate succession is based on sex or gender.⁴⁶ Some of these authors hold the view that the Islamic law of intestate succession would probably not pass constitutional muster due to gender

42 Constitution of the Republic of South Africa, 1996.

43 Du Toit F (2000) is an authority on this issue. The texts on the constitutional dimension include Du Toit F 'The Constitutional Family Law of Succession' (2009) 3 *South African Law Journal* 463 488; Du Toit F 'The Limitation Placed upon Freedom of Testation by the Boni Mores: Lessons from Common and Civil Law (Continental) Legal Systems' (2000) 3 *Stellenbosch Law Review* 358 384.

44 These texts include Moosa N and Abduroaf M 'Faskh (Divorce) and Intestate Succession in Islamic and South African law: Impact of the Watershed Judgment in *Hassam v Jacobs* and the Muslim Marriages Bill' in De Waal M and Paleker M *South African Law of Succession and Trusts - The Past Meeting the Present and Thoughts for the Future* (2014) Claremont: Juta; Osman-Hyder M 'The Impact and Consequences of *Hassam v Jacobs No* on Polygynous Muslim Marriages [a Discussion of the *Hassam v Jacobs No* 2009 11 BCLR 1148 (CC)]' (2011) 2 *Stellenbosch Law Review* 233 246.

45 See *Hassam v Jacobs NO & Others* 2009 (5) SA 572 (CC). *Re Meerum* (1890) 11 NLR 259. See Moosa N *Unveiling the Mind: The Legal Position of Women in Islam - A South African Context* (2011) 153. N Moosa mentions in her book *Unveiling the Mind - The Legal Position of Women in Islam - A South African Context* (2011) that courts have already held (in the past) that a widow in terms of Islamic law was entitled to half the estate of her deceased husband.

46 See Rautenbach C, Bekker JC & Goolam NMI *Introduction to Legal Pluralism* 3 ed (2010) 210. It should be noted that 'sex' is a biological term whereas gender is a 'social' term. See Currie I & De Waal J *The Bill of Rights Handbook* (2013) 229-230. See also Chapter Two (2.1) for a further discussion on this issue.

inequalities that are based on discriminatory justification.⁴⁷ Others hold the view that the Islamic law of intestate succession does not discriminate on grounds of gender and that the unequal distribution is fair.⁴⁸

1.6 Research methodology

This thesis is based on desktop research. It analyses primary and secondary sources. The religious primary sources include the Quraan and the Sunnah.⁴⁹ The secular primary sources include national legislation, international human rights treaties, and international conventions. All religious primary sources are found in Arabic literature. Some of these sources have been translated into English. I am a graduate of the Islamic University of Madinah in Saudi Arabia, Faculty of Sharee'ah, as well as a Sworn Translator of the High Court of South Africa. I interact with material found in both the Arabic as well as English texts. The secondary sources that are used in this thesis include academic books, journals, and electronic sources.

1.7 Chapter breakdown

This chapter introduces the thesis in broad terms. Chapter Two of this thesis primarily looks at the Islamic law of succession and administration of estates in terms of the Shaafi'ee and Hanafee schools of law. It compares provisions found within the two schools of law by way of examples. It also looks at opinions found within other schools of law and legal rulings by contemporary scholars where deemed relevant. The position of females within the Islamic law of intestate succession is analysed in the chapter.

Chapter Three of this thesis looks at the South African laws of succession and administration of estates in general terms. It focuses on how the South African law of succession applies to the estates of deceased Muslims. The position of females within the South African law of intestate succession is analysed in the chapter. The possibility of using existing South African

47 These texts include Rautenbach C, Bekker JC & Goolam NMI 'Religious Legal Systems: Constitutional Analysis' in *Introduction to Legal Pluralism* 3 ed (2010) Cape Town: Lexis Nexis.

48 These texts include Goolam NMI 'Gender Equality in Islamic Family Law: Dispelling Common Misconceptions and Understandings' (2001) 12 *Stellenbosch Law Review* 199 2014; Goolam NMI and Rautenbach C 'The Legal Status of a Muslim Wife under the Law of Succession: Is She Still a Whore in terms of South African Law?' (2004) 15 *Stellenbosch Law Review* 369 380. See also Moosa N A *Comparative Study of the South African and Islamic Law of Succession and Matrimonial Property with Especial Attention to the Implication for Muslim Women* (Unpublished LL.M thesis University of the Western Cape, 1991) 134. N Moosa has made a comparative evaluation in this regard.

49 Muslims believe that the Quraan is the word of Allah (God Almighty). The Sunnah refers to the oral sayings, practical actions, and tacit approvals of Prophet Muhammed Peace Be Upon Him (PBUH).

law provisions governing wills in order to apply the Islamic law of succession within the South African context is looked at.

Chapter Four of this thesis looks at the right of South African Muslims to inherit as a result of developments in case law and interpretation of statutes. A comparison is made between the distribution of the estates in terms of the consequences of South African court judgments and the distribution that should occur in terms of Islamic law. The comparison is done by way of mathematically worked out examples.

Chapter Five of this thesis looks at the practical application of the Islamic law of succession within the South African context. The chapter is based on a fictitious scenario. Four aspects are looked at. The first aspect concerns the Islamic will. The second aspect concerns the Islamic distribution certificate. The third aspect concerns interpretation of the Islamic will and the Islamic distribution certificate. The fourth aspect concerns conflicts between the Islamic law of succession and the Constitution of South Africa. The current application of the Islamic law of succession within the South African context leaves much to be desired.

Chapter Six of the thesis compares the application of the Islamic law of succession and administration of estates in Singapore (Muslim minority country) with South Africa (Muslim minority country). The chapter looks at whether there are any features that can be taken from the Singaporean model (stating the school of law that should be applied) and applied within the South African context.

Chapter Seven of this thesis investigates whether the Islamic law of intestate succession would pass constitutional muster in South Africa if challenged. This is important to note as any law or conduct that is inconsistent with the South African Constitution is deemed invalid.⁵⁰ The rationale behind the unequal distribution of shares within the Islamic law of succession is investigated in the chapter. Similar cases that have gone through the South African courts are also looked at as part of the investigation. The thesis concludes with an analysis of the conclusions reached, and recommendations are given for a way forward.

⁵⁰ See s 2 of the Constitution of the Republic of South Africa, 1996 where it states that '[t]his Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'

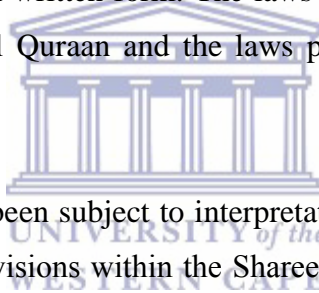
CHAPTER TWO

THE ISLAMIC LAW OF SUCCESSION AND ADMINISTRATION OF ESTATES

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2.1 Introduction¹

The Islamic law of succession as applied in South Africa today finds its basis in the Sharee'ah. The Sharee'ah comprises two primary sources known as the Quraan and Sunnah. Persons who adhere to the Sharee'ah are referred to as Muslims and deemed followers of the religion of Islaam. The two dominant branches of Islaam are known as the Sunnee and Shee'ee branches.² Adherents to the Sunnee branch are called Sunnee Muslims whereas adherents to the Shee'ee branch are called Shee'ee Muslims. The two branches differ regarding certain theological matters. There are also different schools of law within these two branches. A more detailed distinction between these branches is beyond the scope of this thesis. Muslims believe that the Sharee'ah was divinely revealed to the Prophet Muḥammad Peace Be Upon Him (PBUH) in the seventh century AD. They further believe that it was revealed in the geographic location of the Arabian Peninsula and transmitted in the Arabic language. The Sharee'ah is fixed and unchangeable.³ The Sharee'ah was subsequently codified and is currently found in written form. The laws provided in the Quraan have been recorded in a book known as Al Quraan and the laws provided in the Sunnah have been recorded in books of Ḥadeeth.



The texts of the Sharee'ah have been subject to interpretation and application since the time of its revelation. Speculative provisions within the Sharee'ah are subjected to interpretation. Cases not found within the Sharee'ah are subjected to it by way of analogy. The deductions made when interpreting the provisions of the Sharee'ah or when applying it to given sets of facts are referred to as fiqh opinions (aqwaal). These opinions are not fixed and may change due to circumstances. A person who has mastered the science of deducing fiqh opinions from the Sharee'ah is referred to as a jurist (mujtahid). The body of fiqh opinions deduced by a jurist is referred to as a school of law (madh hab). A school of law is generally named after its founder.⁴ The fiqh opinions deduced by one jurist may differ from those of another. This could be due to a number of factors which include the principles of jurisprudence (usool al

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- 1 The substantive content of this chapter has already been co-authored and published based on this chapter. See Abduroaf M & Moosa N 'Islamic Law Mode of Estate Distribution in South Africa' in Atkin B & Banda F (eds) *The International Survey of Family Law* (2016) United Kingdom: Jordan Publishers.
 - 2 Amien W 'Overcoming the Conflict between the Right to Freedom of Religion and Women's Rights to Equality: A South African Case Study of Muslim Marriages' 28 *Human Rights Quarterly* (2006) 731.
 - 3 Philips B *The Evolution of Fiqh - Islamic Law and the Madh Habs* (2000) 2.
 - 4 See Kamali H *Principles of Islamic Jurisprudence* (1997) for an extensive discussion on this topic. The first jurist to codify the principles of Islamic jurisprudence was the founder of the Shaafi'ee Math hab. He was known as Imaam Shaafi'ee. The name of the book he authored is called *Al Risalah*. See Khudduri M *Al-Shaafi'i's Risala: Treatise on the Foundations of Islamic Jurisprudence* 2 ed (1961).

fiqh) used to deduce these fiqh opinions. This situation has led to the introduction of various schools of law. There are instances when conflicting fiqh opinions are found within a single school of law. This would occur when a later jurist applies the principles used by the founder of a school of law but comes to a different conclusion to that of its founder. This conclusion would constitute a fiqh opinion within the school of law of its founder. The fiqh opinions were initially oral opinions but were later codified and are currently available in written form.⁵ A person who is unable to deduce fiqh opinions directly from the Sharee'ah has the option of following fiqh opinions as already deduced by a jurist. This would be referred to as blind following (taqleed). The second option would be where a person picks and chooses from the most lenient fiqh opinions found within various schools of law. This is referred to as following allowances (tatabbu' al rukhas). The third option would be where a person combines fiqh opinions found within various schools of law and comes up with a new opinion (talfeeq).⁶ Some Islamic countries have chosen the most suitable fiqh opinions found within the various schools of law and had them incorporated into their statutory laws (qawaaneen). Egypt and Syria are examples of such countries.⁷

The religion of Islaam was introduced into South Africa in the seventeenth century AD. The first Muslim is recorded to have stepped onto the South African shore in 1654.⁸ There are currently approximately over 750 000 Muslims living in South Africa.⁹ Tuan Yusuf was the first recorded religious scholar to have arrived in South Africa. This prompted the spread of Islaam. Tuan Guru on the other hand (and not Tuan Yusuf) established the first Islamic place of worship (Masjid) and the first Islamic institution (Madrrasah) in South Africa. Tuan Guru introduced the first written Quraan into South Africa. The Quraan was written from his

5 See Kamali H *Principles of Islamic Jurisprudence* (1997); Khudduri M *Al-Shaafi'i's Risala: Treatise on the Foundations of Islamic Jurisprudence* 2 ed (1961); and Al Salmee A *Usool Al Fiqh Al Ladhee La Yas'u Al Faqeeh Jahluhoo* 2 ed (2008).

6 See Al Shashree S *Al Taqleed Wa Ahkaamuhoo* 2 ed (1421H) for a detailed discussion on this issue.

7 See Al Subaa'ee *Sharh Al Qaanoon Al Ahwaal Al Shakhshiyyah* (2000) vol 1 and 2 for the laws applicable in Egypt and Syria in this regard. The focus in the book is based on laws applied in Syria. This book is used primarily in Chapter Two of this thesis. The book consists of two volumes and three parts. Part 1 is found in volume 1, whereas part 2 and 3 is found in volume 2. Part 1 incorporates the Islamic law of marriage and divorce. Part 2 incorporates the Islamic law of testate succession. Part 3 incorporates the Islamic law of intestate succession. The three parts have been published jointly in 2000. Part 1 is in its eighth edition (8 ed), part 2 is in its seventh edition (7 ed), and part 3 is in its third edition (3 ed).

8 See Mahida EM *History of Muslims in South Africa: A Chronology* (1993) 1.

9 Statistics South Africa 'Census 2001 Primary Tables South Africa 96 and 2001 Compared' available at <http://www.statssa.gov.za/census01/html/RSAPrimary.pdf> (accessed 3 January 2015). It should be noted that religion has not formed part of the published censuses since 2001.

memory during his time spent on Robben Island as a political prisoner.¹⁰ The Quraan contains the primary Islamic laws of succession. Tuan Guru was a religious scholar of note. His father, Abdussalaam, was a known judge (qaadhee). The lineage of Tuan Guru can be traced back to the Prophet Muhammad PBUH.¹¹ I am a sixth generation descendant of Tuan Guru. South African Muslims do not generally deduce fiqh opinions directly from the Sharee'ah but rather follow the fiqh opinions within the schools of law that were introduced into South Africa.¹² There are two dominant Sunnee based schools of law found within the South African context.¹³ These schools of law are referred to as the Shaafi'ee and Ḥanafee schools of law.¹⁴ The other less dominant schools of law found within the South African context are the Sunnee based Maalikee school of law and the Shee'ee based Ithnaa 'Ashariyyah school of law.¹⁵

This chapter examines the laws of succession in terms of the religion of Islaam as revealed to the Prophet Muḥammad PBUH. It primarily examines the fiqh opinions as provided in the Sunnee based Shaafi'ee and Ḥanafee schools of law. This is done for practical reasons. Other opinions are referred to in this chapter where deemed relevant. The founders of these opinions are then clearly stated. This chapter does not generally examine the methodologies that were used by Islamic jurists in order to deduce opinions from the primary sources of Islamic law. This was done for practical reasons. The fiqh opinions referred to in this chapter were taken from reliable primary and secondary written sources. The term 'Islamic law' is used hereafter as a general term to refer to both the Sharee'ah as well as the fiqh opinions. The term 'opinion' is used hereafter to refer to a 'fiqh opinion'. The term 'school' is used hereafter to refer to a 'school of law'. The term 'both schools' is used hereafter to refer to the

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- 10 Tuan Guru was sent to South Africa in 1780 as political prisoner due to his outspoken opposition to the Dutch Colonial monopoly of forced labour, and slavery. See Auwal Masjid 'Tuan Guru' available at <http://auwalmasjid.co.za/index.php/tuan-guru/> (accessed 18 November 2017). See also Boorhaanol 'Cape Muslim heritage at a glance' 22 August 2009 available at http://livingislam.co.za/index.php?option=com_content&view=article&id=180:cape-muslim-history-at-a-glance&catid=87:history&Itemid=445 (accessed 18 November 2017).
- 11 See Auwal Masjid 'Tuan Guru' available at <http://auwalmasjid.co.za/index.php/tuan-guru/> (accessed 18 November 2017).
- 12 See Moosa N *Unveiling the Mind - The Legal Position of Women in Islam - A South African Context* (2011) 151 where the author states that the South African Muslim population essentially follows two of the four Sunnee based schools called the Shaafi'ee and Ḥanafee schools of law.
- 13 The founder of Shaafi'ee school is known as Imaam Al Shaafi'ee. His name was Muḥammad bin Idrees Al Shaafi'ee. See Al Khin M and Al Bughaa M *Al Fiqh Al Manhajee 'Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 276-277.
- 14 Moosa N *Unveiling the Mind - The Legal Position of Women in Islam - A South African Context* (2011) 151.
- 15 Amien W 'Overcoming the Conflict between the Right to Freedom of Religion and Women's Rights to Equality: A South African Case Study of Muslim Marriages' 28 *Human Rights Quarterly* (2006) 731.

Shaafi'ee and the Ḥanafee schools. This is done to avoid repetition. The opinions referred to hereafter are according to both schools except where expressly mentioned otherwise. Opinions from other reliable sources are looked at where deemed necessary. This would include legal verdicts by contemporary jurists and institutions.

There are 35 verses in Al Quraan that refer to succession.¹⁶ There are, however, only three verses in Al Quraan that provide specific details of succession laws. These three verses are Al Quraan (4) 11, 12, & 176. The prophetic traditions elaborate and clarify how the verses must be interpreted and applied.¹⁷ Al Quraan 4(11) states that 'Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females; if (there are) only daughters, two or more, their share is two thirds of the inheritance; if only one, her share is half. For parents, a sixth share of inheritance to each if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased left brothers or (sisters), the mother has a sixth. (The distribution in all cases is) after the payment of legacies he may have bequeathed or debts. You know not which of them, whether your parents or your children, are nearest to you in benefit, (these fixed shares) are ordained by Allah. And Allah is Ever All-Knowing, All-Wise.'¹⁸ Al Quraan (4) 12 states '[i]n that which your wives leave, your share is a half if they have no child; but if they leave a child, you get a fourth of that which they leave after payment of legacies that they may have bequeathed or debts. In that which you leave, their (your wives) share is a fourth if you leave no child; but if you leave a child, they get an eighth of that which you leave after payment of legacies that you may have bequeathed or debts. If the man or woman whose inheritance is in question has left neither ascendants nor descendants, but has left a brother or a sister, each one of the two gets a sixth; but if more than two, they share in a third; after payment of legacies he (or she) may have bequeathed or debts, so that no loss is caused (to anyone). This is a Commandment from Allah; and Allah is Ever All-Knowing, Most-Forbearing.'¹⁹

Al Quraan (4) 176 states that '[t]hey ask you for a legal verdict. Say: "Allah directs (thus) about Al-Kalalah (those who leave neither descendants nor ascendants as heirs). If it is a man that dies, leaving a sister, but no child, she shall have half the inheritance. If (such a deceased

16 See Hussain A *The Islamic Law of Succession* (2005) 29.

17 See Hussain A *The Islamic Law of Succession* (2005) 29. See also Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11.

18 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11.

19 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 12.

was) a woman, who left no child, her brother takes her inheritance. If there are two sisters, they shall have two-thirds of the inheritance; if there are brothers and sisters, the male will have twice the share of the female. (Thus) does Allah make clear to you (His Law) lest you go astray. And Allah is the All-Knower of everything.”²⁰

A daughter inherits half the share of a son in terms of Al Quraan (4) 11.²¹ This chapter investigates whether the unequal distribution of shares in favour of males is consistent throughout the Islamic law of intestate succession. It has been argued that the Islamic law of intestate succession discriminates against the daughter based on sex because of gender.²² Sex is a biological term whereas gender is a social term.²³ The argument is made that the daughter (female sex) inherits less, as Islamic law places less financial obligations on her (gender role), whereas the son (male sex) inherits more, as Islamic law places more financial obligations on him (gender role). The reason as to why the daughter inherits half the share of the son is not stated in the primary sources of Islamic law. The constitutionality of this situation and the rationale behind the unequal distribution of shares (at times) between males and females within the Islamic law of intestate succession is further investigated in Chapter Seven (7.5) of this thesis with a focus on sex and gender discrimination.

The scenario that is looked at throughout this chapter is where a South African Muslim (male or female) dies leaving behind an estate located wholly within the South African borders. This chapter looks at various examples of how the estate could devolve. The testate and intestate beneficiaries referred to in this thesis are in relation to the deceased. The words ‘of the deceased’ are therefore implied but not repeated hereafter. The laws referred to in this chapter are applicable to the estates of both male and female deceased persons except where stated otherwise. An overview of the Islamic law of succession within the South African context is first looked at by way of introduction. This is followed by looking at the conditions that need to be met before administering the estate of a deceased Muslim. The claims against the gross estate are then looked at. This is followed by a detailed analysis of liability claims,

20 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 176.

21 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that ‘Allah commands you as regards your children’s (inheritance); to the male, a portion equal to that of two females...’

22 See Dar Al Ifta Al-Misriyyah ‘Do Women Take Unequal Shares of Inheritance in Islam?’ available at <http://eng.dar-alifta.org/foreign/ViewArticle.aspx?ID=120&> (accessed 28 November 2017) for a discussion on this issue.

23 Currie I & De Waal J *The Bill of Rights Handbook* (2013) 229-230.

testate succession claims, and intestate succession claims. The position of females within the Islamic law of intestate succession is then critically discussed. Possible constitutional challenges to the Islamic law of intestate succession provisions are highlighted herein. The findings of this chapter are then briefly examined and concluding remarks are made.

2.2 Conditions to be met before administering an estate

There are certain conditions that must be met before the estate of a person may be deemed a 'deceased estate' and thus qualify to be liquidated and distributed in terms of the law of succession and distribution of estates. The person in question must have died, been declared dead by a court of law, or declared dead by a religious tribunal. It is at this moment that the estate falls open. It is also at this moment that the rights of beneficiaries to the estate become vested. The moment is referred to hereafter as 'dies cedit'.²⁴

The term 'beneficiaries' is used in this chapter to refer to those persons who are appointed in terms of a will (testate beneficiaries) and those persons who are related to the deceased in terms of one or more intestate succession ties (intestate beneficiaries).²⁵ A testate beneficiary must have survived the deceased in order to have a vested right in the intestate estate. No rights are vested in a predeceased testate beneficiary.²⁶ Similarly, an intestate beneficiary must have survived the deceased in order to have a vested right in the intestate estate. No rights are vested in a predeceased intestate beneficiary.²⁷ The intestate benefit of an unborn child must be kept in trust until he or she is born. A right would vest in him or her only if born alive.²⁸ Persons who die simultaneously are not able to mutually inherit from one another in terms of the Islamic law of intestate succession. There is a presumption in favour of simultaneous death unless the contrary is proven.²⁹

24 See Al Hakamee I *Tahdheeb Al Ahaadeeth Fee 'Ilm Al Mawaareeth: Sharh limandHoomah Al Rahbiyyah Al Musammaah: Bughyah Al Baahitheen 'An Jumal Al Mawaareeth* (2004) 67, Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee 'Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 274, and Abdul Hameed M *Sharh Al Siraajiyah* (1944) 3.

25 The term 'testate beneficiary' is used in this chapter to refer to a person who has been appointed to inherit a benefit in terms of a will. See 2.5 of this chapter for a discussion on testate beneficiaries in terms of the law of testate succession. See also 2.3 of this chapter for a discussion on the gross estate, net estate, testate estate, and intestate estate.

26 See Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee 'Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 274; and Al Subaa'ee M *Sharh Al Qaanoon Al Ahwaal Al Shakhshiyah* 7 ed (2000) vol 2, part 2, 250-251.

27 See Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee 'Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 274; and Al Subaa'ee M *Sharh Al Qaanoon Al Ahwaal Al Shakhshiyah* 3 ed (2000) vol 2, part 3, 37.

28 See Al Subaa'ee M *Sharh Al Qaanoon Al Ahwaal Al Shakhshiyah* 3 ed (2000) vol 2, part 3, 81.

29 See Al Fawzaan S *Al Tahqeeqaat Al Mardiyah F Mabaahith Al Fardiyyah* (1999) 240-241.

The moment at which a vested right becomes enforceable is referred to hereafter as 'dies venit'. Dies cedit and dies venit could coincide but dies venit can never precede dies cedit.³⁰ An example of an instance where dies cedit precedes dies venit would be where X bequeaths 1/3 of his net estate in favour of his full brother subject to the condition that he passes all his final year law modules with distinction. Dies cedit would take place upon X having died. Dies venit would, however, take place the moment that the full brother obtains distinctions for all his final year law modules. This is referred to as a conditional bequest. Conditional bequests are discussed in more detail in 2.5.4 of this chapter.³¹ Dies cedit and dies venit would always coincide in terms of the law of intestate succession.³² The examples referred to hereafter are where dies cedit and dies venit coincide unless expressly stated otherwise.

2.3 Claims against the gross estate

The term 'estate' is used in this chapter to refer to the assets and liabilities of a deceased person. The estate must be administered in terms of the law of succession and administration of estates. If the assets in an estate exceed the liabilities, then the estate would be deemed solvent. If the liabilities in an estate exceed the assets, then the estate would be deemed insolvent. The term 'gross estate' is used in this chapter to refer to the sum of assets in an estate. The assets in the gross estate include movable assets, immovable assets, as well as claims in favour of the estate. The term 'net estate' is used in this chapter to refer to the remainder of the gross estate after the liabilities have been deducted. The net estate can further be divided into the 'testate estate' and the 'intestate estate'. The testate estate is generally limited to a maximum of 1/3 of the net estate. The intestate estate would be the remainder of the net estate after all testate succession claims have been deducted.

The question as to whether an item forms part of the assets in the estate depends on certain factors. Items can be classified into those that were acquired lawfully and those that were acquired unlawfully. Lawfully acquired items form part of the assets in the estate.³³ Unlawfully acquired assets are divided into three categories. They are items that are unlawful to possess, items that have been stolen, and assets that were acquired through unlawful transactions. Alcohol would be an example of an item that is unlawful to possess. A stolen

30 See Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee 'Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 274; and Abdul Hameed M *Sharh Al Siraajiyah* (1944) 3.

31 See Al Zuhaylee W *Al Fiqh Al Islaamee Wa Adillatuhoo* 3 ed (1989) vol 8, 22-25.

32 The laws of intestate succession are discussed in 2.6 of this chapter.

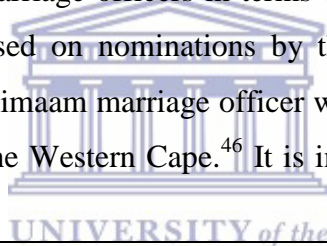
33 See Al Zuhaylee W *Al Fiqh Al Islaamee Wa Adillatuhoo* 3 ed (1989) vol 8, 247.

car would be an example of an unlawful item. The proceeds of gambling, interest based transactions, life insurance, and prostitution are examples of items that have been acquired through unlawful transactions. Both schools are of the opinion that the three classes of items do not form part of the assets in the estate.³⁴ The first class of items must be disposed of. The second and third classes must be returned to their rightful owners if they are alive. If they had passed on, the items must be returned to their beneficiaries. If their beneficiaries cannot be found, the items must be given to charity.³⁵ Shaykh Muhammad Bin Saalih Al Uthaymeen is of the opinion that an item found within the third class (item acquired through an unlawful transaction) forms part of the estate.³⁶ It would therefore be subject to the law of succession and administration of estates. The argument here is that the asset was unlawfully acquired by the deceased person but lawfully acquired by the beneficiaries of the estate in terms of the law of succession.³⁷ In terms of this opinion it would be permissible to inherit the proceeds of gambling, life insurance, prostitution, and interest based transactions. The proof for this is that the Prophet Muhammad PBUH did business with non-Muslims even though these persons had unlawfully-earned income. I agree with this opinion.³⁸ Mufti Muhammad Taqi Usmani is of the opinion that death benefits awarded to the dependants of the deceased in terms of the Pension Funds Act 24 of 1956 belong to those dependants and do not form part of the estate. The awarded benefits are therefore not subject to the Islamic law of succession based on this opinion.³⁹ The Muslim Judicial Council (SA) is an Islamic institution based in

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- 34 See Al Munajjid MS '184222: If a Person Dies and his Heirs Receive Some Money from his Life Insurance, Is it Permissible for them to keep it?' available at <https://islamqa.info/en/184222> (accessed 20 October 2017).
- 35 Muslim Judicial Council (SA) Fatwa Committee 'MJC Position on Succession Law and Related Matters' (2017) document on file with the author of this thesis. See also Al Munajjid MS '184222: If a Person Dies and his Heirs Receive Some Money from his Life Insurance, Is it Permissible for them to keep it?' available at <https://islamqa.info/en/184222> (accessed 20 October 2017).
- 36 Shaykh Al 'Uthaymeen was one of the members of the Council of Senior Scholars of Saudi Arabia. See Umm Haarith 'Biography of Shaykh Ibn 'Uthaymeen' available at <https://firqatunaajiyah.wordpress.com/2013/01/16/short-biography-of-shaykh-ibn-uthaymeen/> (accessed 8 December 2017). See also Muhammad bin Saalih Al 'Uthaymeen 'Muhammad bin Saalih Al 'Uthaymeen' available at <http://ibnaluthaymeen.tumblr.com/biography> (accessed 8 December 2017).
- 37 See Al Munajjid MS '184222: If a Person Dies and his Heirs Receive Some Money from his Life Insurance, Is it Permissible for them to keep it?' available at <https://islamqa.info/en/184222> (accessed 20 October 2017).
- 38 See Al Munajjid MS '184222: If a Person Dies and his Heirs Receive Some Money from his Life Insurance, Is it Permissible for them to keep it?' available at <https://islamqa.info/en/184222> (accessed 20 October 2017).
- 39 Mufti Taqi Usmani an Islamic jurist. He served as judge of the Shariat Appellate Bench of the Supreme Court of Pakistan from 1982 - 2002. See Mufti Muhammad Taqi Usmani 'Mufti Muhammad Taqi Usmani' available at http://muftitaqiusmani.com/en/?page_id=11333 (accessed 28 November 2017). See also Mufti Muhammad Taqi Usmani 'Entitlement to Death Benefits Payable by Pension Funds' where he states that the grants awarded to the dependants of a deceased in terms of the Pension Funds Act 24 of 1956 are not subject to the rules of inheritance available at http://www.muftitaqiusmani.com/index.php?option=com_content&view=article&id=54:entitlement-to-

the Western Cape. The Fatwa Department of the Muslim Judicial Council (SA) is of the opinion that the lawful proceeds (but not the unlawful proceeds) of a pension fund would form part of the assets in the estate and would be governed by the Islamic law of succession.⁴⁰

The claims against the estate in order of priority are referred to hereafter as liability claims, testate succession claims, and intestate succession claims. The estate must first be liquidated by settling the liabilities. The remainder (if any) must then be distributed in terms of the law of testate and intestate succession.⁴¹ The default marital regime in terms of Islamic law is that the estates of the parties are kept separate.⁴² The examples referred to in this chapter are where the deceased person was married in terms of the default system. There are a large number of South African Muslim jurists ('ulamaa) who are of the opinion that marriage in community of property is not permitted in Islaam.⁴³ The Department of Home Affairs appointed a number of imaam marriage officers in terms of the Marriage Act 25 of 1961.⁴⁴ The imaams were appointed based on nominations by the religious bodies that they are members of.⁴⁵ I am an appointed imaam marriage officer who was nominated by the Muslim Judicial Council (SA) based in the Western Cape.⁴⁶ It is interesting to note that the Muslim



death-benefits-payable-by-pension-funds&catid=10:economics&Itemid=17 (accessed 11 January 2015). See also Omar MS 'Are Pension and Provident Fund Death Benefits Payable into the Estate of the Deceased Member?' available at <http://www.msolaw.co.za/2015-06-28-12-00-16/77-are-pension-and-provident-fund-death-benefits-payable-into-the-estate-of-the-deceased-member> (accessed 28 November 2017). See also s 37 C of the Pension Funds Act 24 of 1956 that specifically states that the death benefits do 'not form part of the assets in the estate of such a member.'

- 40 Muslim Judicial Council (SA) Fatwa Committee 'MJC Position of Succession Law and Related Matters' (2017) document on file with the author of this thesis.
- 41 See Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee 'Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 272-275; and Abdul Hameed M *Sharh Al Siraajiyah* (1944) 3-7.
- 42 This means that the parties to the marriage each have separate estates. See also Chapter Three (3.3) of this thesis, where the different marital systems governing marriages in terms of the Matrimonial Property Act 88 of 1984 is discussed.
- 43 See Omar MS *The Islamic Law of Succession and its Application in South Africa* (1988) 11. See Muslim Judicial Council (SA) Fatwa Committee 'MJC Position of Succession Law and Related Matters' (2017) document on file with the author of this thesis. See also Jamiatul Ulama Kwazulu Natal 'Resolving a Community of Property Estate?' available at <https://jamiat.org.za/resolving-a-community-of-property-estate/> (accessed 21 October 2017).
- 44 See Marriage Act 25 of 1961. See also Moosa N and Abduroaf M 'Implications of the Official Designation of Muslim Clergy as Authorised Civil Marriage Officers for Muslim Polygynous, Interfaith and Same-Sex Marriages in South Africa' in *The International Survey of Family Law* (2017) 324.
- 45 See Department of Home Affairs South Africa 'Minister Gigaba and Deputy Minister Chohan Officiate at Graduation of Imams as Marriage Officers' available at <http://www.dha.gov.za/index.php/statements-speeches/795-minister-gigaba-and-deputy-minister-chohan-officiate-at-graduation-of-imams-as-marriage-officers> (accessed 27 October 2017).
- 46 See Department of Home Affairs 'Imams Graduated through the Department of Home Affairs' available at <http://www.dha.gov.za/index.php/organisational-structure2/2-uncategorised/this.href> (accessed 27 October 2017).

Judicial Council (SA) requires that all marriages solemnised by their members in terms of the Marriage Act of 1961 must be out of community of property without the application of the accrual system. This is also the advice given by some practicing attorneys in South Africa.⁴⁷

The South African government is looking into the possibility of regulating Muslim Marriages in terms of legislation. The South African government published a bill in the Government Gazette in this regard in 2011.⁴⁸ The Bill is referred to as the 2010 Muslim Marriages Bill (2010 MMB) and states that marriages concluded in terms of the Bill would be out of community of property without the application of the accrual system. It is interesting to note that the Bill does allow for the possibility of concluding an ante nuptial contract that would deem the marriage to be in community of property.⁴⁹

It is possible that an asset in the estate is subject to a lifelong usufruct.⁵⁰ Ownership of the asset would pass to the beneficiaries of the owner upon dies cedit. The use thereof would be suspended until the conditions governing the usufruct have come to an end. A lifelong usufruct registered in favour of a spouse would be an example of such a situation.⁵¹ Registration of a lifelong usufruct is permitted in terms of the Maalikee school but not in terms of the Shaafi'ee and Hanafee schools.⁵² It is interesting to note that the Muslim Judicial

47 See Khan F 'Shariah Marriage in South Africa' available at https://www.findanattorney.co.za/content_shariah-marriage-south-africa (accessed 27 October 2017).

48 See 2010 MMB, Government Notice 37 in *Government Gazette* 33946 of 21 January 2011 available at www.gov.za/sites/www.gov.za/files/33946_gen37.pdf (accessed 26 October 2017). The 2010 MMB is the latest version of the proposed legislation to govern Muslim marriages. See Chapter Six (6.5) for a discussion on the previous versions of the proposed legislation.

49 See ss 2(4), 8(1), 8(6) of the 2010 MMB, Government Notice 37 in *Government Gazette* 33946 of 21 January 2011 available at www.gov.za/sites/www.gov.za/files/33946_gen37.pdf (accessed 26 October 2017). Section 8(1) of the 2010 MMB states that '[a] Muslim marriage to which this Act applies is deemed to be a marriage out of community of property excluding the accrual system...'

50 See De Waal MJ & Schoemann-Malan MC *Law of Succession* 5 ed (2015) 164 where it states that '[a] usufruct (usufructs) is defined as a personal servitude giving the usufructuary a limited right to use another person's property and to take the fruits with the obligation to return the property eventually to the owner, retaining its essential quality (*salva rei substantia*). The purpose of the usufruct is thus to ensure the usufructuary an income from the property for the particular length of time (usually lifelong) without giving him or her ownership of the property.' This is the concept in terms of South African law. A very similar concept would apply in terms of Islamic law.

51 See Al Zuhaylee W *Al Fiqh Al Islaamee Wa Adillatuhoo* 3 ed (1989) vol 5, 8-11.

52 A surviving spouse (or any other person) has the right to enjoy the use of a property in the gross estate if it was registered in his or her favour as a lifelong usufruct ('umraa) in the form of a gift. The usufruct does not come to an end on the death of its owner. An example of this would be where X registers a lifelong usufruct regarding his house in favour of his wife in the form of a gift during his lifetime. His widow would then be entitled to continue enjoying the benefit (usufruct) up to the moment of her death. Ownership of the house would pass on to the heirs upon X having died. The usufruct would however pass on to the heirs of X only subsequent to the death of his widow (usufructory). It is a requirement that the lifelong usufruct must be registered prior to X having died. The lifelong usufruct (as above) is not valid in terms of the two schools. It is however valid in terms of the Maalikee school which is also a

Council (SA) that is based in the Western Cape encourages the registration of a lifelong usufruct in the name of a spouse in the event where a need exists.⁵³ This would also eliminate any difficulties that would be encountered in the event where the house would have to be sold in order for the beneficiaries to inherit their shares of testate and intestate estates. The surviving spouse could then resume living in the property without any hindrances.

2.4 Liability claims

Liabilities are the first claims deducted from the gross estate. These claims take priority over testate and intestate succession claims. Liabilities can be broadly divided into administration costs and debt.⁵⁴ There is an order of priority between these claims in the event where the liability claims exceed the value of the gross estate. This discussion, however, is beyond the scope of this thesis and is not discussed any further herein.

2.4.1 Administration costs

Administration costs within the South African context include funeral costs, maintenance, and other administration costs. Funeral costs are restricted to the expenses that are required to be settled (if any) in order to have the deceased buried. This would include purchasing a shroud and grave plot in which the deceased is to be buried. It would also include any other incidental funeral costs.⁵⁵ The schools differ in their opinions as to whether funeral costs must be deducted from the gross estate when the deceased is a female.⁵⁶ The Shaafi'ee school is of the opinion that a widower is liable to settle the funeral costs of his deceased wife if he

Sunnee based school. See *Al Sharḥ Al Kabeer Ma'a Al Dusqee* (4)94 Misr: Matba'ah Al Baabee, as cited in *Al Zuhaylee W Al Fiqh Al Islaamee Wa Adillatuhoo* 3 ed (1989) vol 5, 8-11.

- 53 The following should be noted regarding the Fatwa Committee of the Muslim Judicial Council: '1.1 In principle, The MJC Fatwa Committee proceeds in all matters from the given position of the Shaafi'ee Madhhab. 1.2 Where warranted by circumstances or the specific nature of the case in question, there would be departure from the position of the Shaafi'ee Madhhab to any of the Four Madhaahib. 1.3 When the Shaafi'ee Madhhab does not provide a solution, the MJC avails itself of solutions from any of the Four Madhaahib. 1.4 At times, and in lieu of specific circumstances, the MJC would even advise the adoption of positions from beyond the Four Madhaahib.' The Muslim Judicial Council Fatwa Committee states in its Fatwa regarding usufructs that '[a]lthough the separation of usufruct from corpus in gifts that continue posthumously is not supported by the Shaafi'ee, Ḥanafee or Ḥanbalee school, it is recognised that a social need exists to provide relief, especially to widows.' See Muslim Judicial Council (SA) Fatwa Department 'MJC Position of Succession Law and Related Matters' (2017) document on file with the author of this thesis.
- 54 See Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee 'Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 272-275, Al Ḥakamee I *Tahdheeb Al Aḥaadeeth Fee 'Ilm Al Mawaareeth: Sharḥ limandHoomah Al Raḥbiyyah Al Musammaah: Bughyah Al Baahitheen 'An Jumal Al Mawaareeth* (2004) 67-68, and Abdul Ḥameed M *Sharḥ Al Siraajiyah* (1944) 3-7.
- 55 See Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee 'Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 272-273; and Abdul Ḥameed M *Sharḥ Al Siraajiyah* (1944) 3-4.
- 56 These claims are briefly looked at as they have a bearing on the value of the estate that would remain for testate and/or intestate distribution.

is by the means to do so. The obligation does not apply in the instance where he does not have the means. The funeral costs must then be deducted from the gross estate.⁵⁷ The Ḥanafee school is of the opinion that a widower is always liable to settle the funeral costs of his deceased wife irrespective of his financial situation. The Maalikee and Ḥanbalee schools are of the opinion that a widower is not liable to pay for the funeral costs of his deceased wife as his maintenance obligation towards her ends upon her death.⁵⁸ A widow is never liable to pay for the funeral costs of her deceased husband.⁵⁹ The above clearly shows that the right of a wife (female) to be maintained by her husband (male) extends even beyond her death in terms of the Shaafi'ee and Ḥanafee schools. It has been argued that this is one of the reasons why males at times inherit more favourably than females.⁶⁰ The current amount needed in order to bury a deceased Muslim is approximately between R2 500.00 and R5 000.00.⁶¹

Accommodation is the only possible claim for maintenance against the estate. The Maalikee school is of the opinion that a widow (but not a widower) is entitled to remain in the house that she was residing at when her husband died, if the house formed part of the estate. This is permitted only for the duration of her waiting period ('iddah).⁶² A widow would also be entitled to remain in the house that she was residing at when her husband died, if it was leased by her deceased husband and rent for the duration of her waiting period had already been paid in full.⁶³ A widow would not be entitled to the free accommodation in the event of any of the aforementioned conditions not being met.⁶⁴ It should be noted that neither a widow nor widower is entitled to reside at the house in terms of the Shaafi'ee and Ḥanafee schools.

57 See Al Fawzaan S *Al Tahqeeqaat Al Marḍiyyah Fee Al Mabaahith Al Farḍiyyah* (1999) 28-29. See also Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee 'Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 272-273.

58 See Al Fawzaan S *Al Tahqeeqaat Al Marḍiyyah Fee Al Mabaahith Al Farḍiyyah* (1999) 28.

59 See Al Fawzaan S *Al Tahqeeqaat Al Marḍiyyah Fee Al Mabaahith Al Farḍiyyah* (1999) 28.

60 See Dar Al Ifta Al-Misriyyah 'Do Women Take Unequal Shares of Inheritance in Islam?' available at <http://eng.dar-alifta.org/foreign/ViewArticle.aspx?ID=120&> (accessed 28 November 2017).

61 Compare Guru 'Funerals in South Africa and what they Cost - Muslim Burial Culture' available at <http://compareguru.co.za/news/funeral-customs-in-sa-and-what-they-cost/> (accessed 03 January 2017).

Hartley U 'The Cost of Death' available at <http://www.vocfm.co.za/the-cost-of-death/> (accessed 18 June 2016).

62 This is the period during which a widow mourns her deceased husband. She is inter alia not permitted to enter into a marriage contract during this time.

63 See Al Zuhaylee W *Al Fiqh Al Islaamee Wa Adillatuho* 3 ed (1989) vol 7, 816.

64 See Moosa N & Karbanee S 'An Exploration of Mata'a Maintenance in Anticipation of the Recognition of Muslim Marriages in South Africa: (Re-) Opening a Veritable Pandora's box?' *Law Democracy and Development* (2009) 269 for a discussion on the maintenance that is due to widows.

2.4.2 Debt

Debt claims can be divided into debt owing to God Almighty (Allaah) and debt owing to persons ('ibaad). Debt owing to persons can further be divided into secured and unsecured debt. An unperformed pilgrimage to Makkah (hajj) is an example of a debt owing to God Almighty.⁶⁵ A mortgage bond is an example of a secured debt owing to a person. An unpaid dower (mahr) is an example of an unsecured debt owing to a person. Payment of a dower is an obligation imposed upon the groom (male) in favour of his bride (female) subsequent to the conclusion of their marriage contract. The bride (female) has no such monetary obligation towards her groom (male).⁶⁶ It has been argued that there is nothing in Islamic law that prevents a husband and wife, by mutual agreement, from increasing the dower even subsequent to the conclusion of their marriage contract.⁶⁷ This could be used as a viable option in the event where a husband owns a house and would want his wife to take ownership of the house when he dies. The husband and wife could mutually agree to increase the dower to the value of the house. The wife would then have a claim against the estate of her deceased husband to the value of the increased dower. She would then also be entitled to inherit in terms of the Islamic law of intestate succession. It should be noted that the increased dower would also become payable upon divorce.⁶⁸ The dower that is owed would remain a debt of the husband as long as it is not paid. It is possible that a deferred dower could take up the entire gross estate. This would mean that there would be nothing left for testate and intestate beneficiaries to inherit. There is also nothing in Islamic law that prevents a wife from foregoing the right to her dower in part or in full.⁶⁹

65 See Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 272-273. See also Al Fawzaan S *Al Tahqeeqaat Al Marḍiyyah Fee Al Mabaahith Al Farḍiyyah* (1999) 28-30.

66 See Al Fawzaan S *Al Tahqeeqaat Al Marḍiyyah Fee Al Mabaahith Al Farḍiyyah* (1999) 27-30.

67 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 4. The verse refers to a wife decreasing the dower. There is, however, nothing in Islamic law that prohibits a husband and wife from increasing the dower by mutual consent. See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 4 where it states '[a]nd give to the women (whom you marry) their Mahr (obligatory bridal money given by the husband to his wife at the time of marriage) with a good heart, but if they, of their own good pleasure, remit any part of it to you, take it, and enjoy it without fear of any harm (as Allah has made it lawful).'

68 See Singh RK *Textbook on Muslim Law* (2011) 96.

69 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 4 where it states '[a]nd give to the women (whom you marry) their Mahr (obligatory bridal money given by the husband to his wife at the time of marriage) with a good heart, but if they, of their own good pleasure, remit any part of it to you, take it, and enjoy it without fear of any harm (as Allah has made it lawful).'

The Ḥanafee school is of the opinion that debt owing to God Almighty falls away upon death. The debt must be deducted from the estate only if the deceased made provision for payment thereof in terms of a will. It would then constitute part of the 1/3 limitation applicable to the Islamic law of testate succession.⁷⁰ Debt owing to God Almighty must be deducted from the gross estate as a liability claim in terms of the Shaafi'ee school.⁷¹ Debts owing to God Almighty and/or debts owing to persons do not fall away after the elapse of time.

The discussion on liability claims has shown that there are quite a number of possible liability claims against the estate of a deceased Muslim in terms of Islamic law. These include debt to God Almighty. The laws of dower, funeral costs, and maintenance favour females and not males. It could be argued that these laws discriminate against males and has the opposite effect to the intestate succession laws in the instances where males inherit more favourably. It could also be argued that males are discriminated against in terms of the law of maintenance, dower, and intestate succession law in the instances where males directly and indirectly inherit less favourably than females. Examples of instances where males directly and indirectly inherit less favourably than females are looked at in 2.6.6 of this chapter.

2.5 Testate succession claims

The remainder of the gross estate, after the liabilities have been deducted, is referred to as the net estate. The net estate is further divided into the testate estate and intestate estate. The testate estate is generally limited to a maximum of 1/3 of the net estate. The intestate estate would be the remainder of the net estate after all testate succession claims have been deducted. A person who is appointed to inherit from the testate estate is referred to as a testate beneficiary. The person making the appointment is referred to as a testator (male) or testatrix (female). Persons appointed as testate beneficiaries inherit only if they are neither prevented from inheriting due to a disqualification (ḥajb awṣaaf) nor prevented from inheriting due to a total exclusion (ḥajb ḥirmaan).⁷² These persons are referred to hereafter as 'inheriting' testate beneficiaries.

Bequeathing property from the testate estate is optional and the entire net estate would devolve in terms of the law of intestate succession in the event where a deceased dies

70 See Abdul Ḥameed M *Sharḥ Al Siraajiyah* (1944) 5-6.

71 See Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee 'Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 273.

72 See Al Zuhaylee W *Al Fiqh Al Islaamee Wa Adillatuhoo* 3 ed (1989) vol 8, 36-37.

intestate. The same would apply to the remainder of the net estate in the event where a deceased bequeathed less than 1/3 in terms of a will.⁷³ It is for this reason that testate beneficiaries can be referred to as ‘optional’ beneficiaries. The remainder of the net estate should then be devolved in terms of the law of intestate succession. It is for this reason that intestate beneficiaries can be referred to as ‘compulsory’ beneficiaries. The law of intestate succession can also be referred to as the law of ‘compulsory’ succession. There are a number of conditions that must be satisfied in order for a will to be valid.

2.5.1 Law of wills

A will must be witnessed by two males or one male and two females.⁷⁴ The Shaafi’ee and Hanafee schools require that the witnesses must have knowledge of the contents of the will. An example of an oral will would be where a testatrix instructs the witnesses to bear testimony that she bequeaths 1/3 of her net estate in favour of the Highlands Waqaf Trust based in Highlands Estate. An example of a written will would be where a testatrix drafts a will and then reads out the content thereof in front of the witnesses. She then instructs the witnesses to bear testimony that the document before them is her will.⁷⁵ The Maalikee school is of the opinion that witnesses are not required to have knowledge of the contents of a written will. It would be sufficient for the testatrix to draft and sign a will document in the presence of the witnesses. The testator or testatrix would then instruct the witnesses to bear testimony that the document is his or her will.⁷⁶

The classical texts only refer to handwritten wills.⁷⁷ It could be argued that a printed will that is then signed in the presence of witnesses would satisfy the requirements. It is interesting to note that the Jamiatul Ulamaa based in Kwazulu Natal advises the Muslim community to draft their wills strictly in conformity with the Wills Act 7 of 1953.⁷⁸ This would be more in conformity with the Maalikee school as looked at above. This is also the practice of the

73 This means that the deceased died without executing a will, or executed a will that governs only part of the assets in the net estate.

74 See Al Zahraanee S *Taraaiq Al Hukum Al Muttafaq ‘Alayhaa Wa Al Mukhtalaf Feehaa Fee Al Sharee’ah Al Islaamiyyah* 3 ed (2002) 132-135. See also Al-Islam.org ‘Will and Bequest Wasaya’ available at <https://www.al-islam.org/waqf-hajr-and-wasaya-according-five-schools-islamic-law-allah-muhammad-jawad-maghniyyah/will-and> (accessed 25 October 2017). See also Anwarullah PD *Principles of Evidence in Islam* 2 ed (2004) 12-28.

75 See Al Zuhaylee W *Al Fiqh Al Islaamee Wa Adillatuhoo* 3 ed (1989) vol 8, 126-128.

76 See Al Zuhaylee W *Al Fiqh Al Islaamee Wa Adillatuhoo* 3 ed (1989) vol 8, 126-128.

77 See Al Zuhaylee W *Al Fiqh Al Islaamee Wa Adillatuhoo* 3 ed (1989) vol 8, 126-128.

78 See Jamiatul Ulama KZN ‘Islamic Will Forms’ available at <https://jamiat.org.za/islamic-wills/> (accessed 22 October 2017).

Muslim Judicial Council (SA) based in the Western Cape.⁷⁹ Each of the persons involved in the execution of a will must have legal capacity to act (takleef).⁸⁰ The South African law requirements for a valid will are looked at in Chapter Three (3.5.1) of this thesis.

2.5.2 Testate succession disqualifications and substitution

A testate succession disqualification prevents a testate beneficiary from inheriting due to the presence of certain attributes. The two testate succession disqualifications looked at in this section are status and killing. A testate beneficiary would be disqualified from inheriting where he or she is an inheriting intestate beneficiary of the testator or testatrix (status) at the moment the testator or testatrix died, and the remaining inheriting intestate beneficiaries do not consent to the bequest made in his or her favour.⁸¹ The relevant moment in time regarding the consent is when the testator or testatrix dies and not when a testator or testatrix executes the will.⁸² It is possible that a testate beneficiary can be an inheriting intestate beneficiary at the time when the will was executed but a non-inheriting intestate beneficiary at the time the testator or testatrix died. An example of this would be where X bequeaths 1/3 of his net estate in favour of his full sister in 2005. At this time, a wife, a mother, and a full sister were his only intestate beneficiaries. X then dies in 2015 leaving behind a widow, a mother, a full sister, and a son as his only intestate beneficiaries. The full sister was an inheriting intestate beneficiary in 2005 but a non-inheriting intestate beneficiary in 2015 when X died. This is due to the son of X totally excluding her.

79 The following should be noted regarding the Fatwa Committee of the Muslim Judicial Council: '1.1 In principle, The MJC Fatwa Committee proceeds in all matters from the given position of the Shaafi'ee Madhhab. 1.2 Where warranted by circumstances or the specific nature of the case in question, there would be departure from the position of the Shaafi'ee Madhhab to any of the Four Madhaahib. 1.3 When the Shaafi'ee Madhhab does not provide a solution, the MJC avails itself of solutions from any of the Four Madhaahib. 1.4 At times, and in lieu of specific circumstances, the MJC would even advise the adoption of positions from beyond the Four Madhaahib.' See Muslim Judicial Council (SA) Fatwa Department 'MJC Position of Succession Law and Related Matters' (2017) document on file with the author of this thesis.

80 The requirements are that they must each be of sound mind and have reached the age of maturity. The schools differ in their opinions as to when maturity is reached. A further discussion on this issue is beyond the scope of this thesis. See Al Subaa'ee M *Sharh Al Qaanoon Al Ahwaal Al Shakhshiyah* 7 ed (2000) vol 2, part 2, 65-66 for a further discussion on this issue.

81 See Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee 'Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 258. The disqualification would be lifted in the event where the inheriting intestate beneficiaries consent. See Al Subaa'ee M *Sharh Al Qaanoon Al Ahwaal Al Shakhshiyah* 7 ed (2000) vol 2, part 2, 70.

82 A son may therefore not inherit as a testate beneficiary as he is already an inheriting intestate beneficiary. See Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee 'Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 259.

It is also possible that a testate beneficiary can be a non-inheriting intestate beneficiary when the will was executed, but an inheriting intestate beneficiary when the testator or testatrix died. An example of this would be where X bequeaths 1/3 of his net estate in favour of his full sister in 2005. At this time his wife, mother, full sister, and son were his only intestate beneficiaries. X then dies in 2015 leaving behind a widow, mother, and full sister as the only intestate beneficiaries. The son of X predeceases him. The consanguine sister was a non-inheriting intestate beneficiary in 2005 due to the son totally excluding her, but an inheriting intestate beneficiary in 2015 when X died. This is due to the son of X no longer totally excluding her. The consent by the inheriting intestate beneficiaries must be given subsequent to the death of the testator or testatrix. Prior consent is neither valid nor enforceable.⁸³

It is quite interesting to note that Egypt has adopted an opinion that an inheriting intestate beneficiary may inherit as a testate beneficiary without the consent of the remaining inheriting intestate beneficiaries.⁸⁴ The Egyptian opinion is based primarily on Al Quraan (2) 180 where it states '[i]t is prescribed for you, when death approaches any of you, if he leaves wealth, that he make a bequest to parents and next of kin, according to reasonable manners. (This is) a duty upon Al-Muttaqun'.⁸⁵ It should be noted that this is a minority opinion.⁸⁶ This issue is further discussed in Chapter Seven (7.6) of this thesis when the constitutionality of the Islamic law of intestate succession is investigated.⁸⁷ This mechanism (1/3 bequest) could be used as an option in order to equalise the shares inherited by certain intestate beneficiaries in terms of Islamic law of succession. It must be noted that the Egyptian opinion is not found within the Shaafi'ee or Hanafee schools.

The Shaafi'ee school is of the opinion that an inheriting intestate beneficiary (status) may not benefit from a charitable trust (waqf) established by the deceased in terms of the law of testate succession. The restriction would not exist if the remaining inheriting intestate beneficiaries consent thereto subsequent to the moment when the testator or testatrix died.⁸⁸ The restriction is not found within the Hanafee school. The Hanafee school is of the opinion

83 See Al Subaa'ee M *Sharh Al Qaanoon Al Ah'waal Al Shakshiyah* 7 ed (2000) vol 2, part 2, 81.

84 See Al Subaa'ee M *Sharh Al Qaanoon Al Ah'waal Al Shakshiyah* 7 ed (2000) vol 2, part 2, 70-71.

85 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (2) 180.

86 See Al Zuhaylee W *Al Fiqh Al Islaamee Wa Adillatuhoo* 3 ed (1989) vol 8, 104.

87 See 2.5.4 of this chapter for a further discussion on this issue.

88 See Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee 'Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 259.

that a killer would be disqualified from inheriting as a testate beneficiary if he or she killed the testator or testatrix.⁸⁹ The majority opinion within the Shaafi'ee school states that a killer would not be disqualified from inheriting as a testate beneficiary. The minority opinion within the Shaafi'ee school, however, states that he or she would be disqualified from inheriting as a testate beneficiary.⁹⁰

The consequences of killing, in terms of the Islamic law of intestate succession, is looked at in 2.6.2 hereunder. A testate succession benefit that would have been due to a disqualified testate beneficiary would vest in a substitute if provision for substitution was made by the testator or testatrix. The testate benefit that would have been due to a disqualified testate beneficiary would devolve in terms of the law of intestate succession if no provision was made for substitution.

2.5.3 Testate succession exclusions

A testate succession exclusion prevents a testate beneficiary from inheriting due to the presence of one or more other persons. These exclusions could be partial or in full. There are no such exclusions according to the Shaafi'ee and Hanafee schools. There is, however, one such exclusion according to the law applied in Egypt. This is due to reform of their law. The reform is mentioned here as Egypt is a country that partly follows the Shaafi'ee school, and which is one of the two dominant schools followed within the South African context.

This exclusion would find application, for example, where X dies leaving behind a net estate of R150 000.00. He bequeaths 1/3 thereof in favour of his non-relative (Y). X also leaves behind a son and an excluded agnate grandson (who is the son of a predeceased son) as the only intestate beneficiaries.⁹¹ The excluded grandson is excluded in terms of the law of intestate succession. He would be eligible to inherit the lesser of either 1/3 of the net estate or the share that his father would have inherited. The predeceased son would have inherited 1/2 of the net estate had he been alive and the living son would have inherited the other 1/2. One half of the net estate is more than 1/3. The excluded grandson would therefore inherit 1/3 of the net estate which is R50 000.00.⁹² The son would inherit the remaining R100 000.00.⁹³

89 See Al Subaa'ee M *Sharh Al Qaanoon Al Ahwaal Al Shakshiyah* 7 ed (2000) vol 2, part 2, 75-76.

90 See Al Damishqee A *Rawdhah Al Taalibeen* (2000) vol 5, 102. See also Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee 'Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 251-252.

91 See Al Zuhaylee W *Al Fiqh Al Islaamee Wa Adillatuhoo* 3 ed (1989) vol 8, 123-125.

92 See Al Zuhaylee W *Al Fiqh Al Islaamee Wa Adillatuhoo* 3 ed (1989) vol 8, 124-125.

The excluded grandson therefore totally excludes Y from inheriting the testate succession benefit. This exclusion could also be referred to as the compulsory bequest exclusion.⁹⁴ The reform does not change the law of intestate succession. It does, however, impact upon the application of the law of testate succession as the testate beneficiary in this example would not inherit due to being totally excluded.

2.5.4 Testate succession limitations

A testate succession limitation restricts the right of the testator or testatrix to freedom of testation. There are three such limitations that apply in terms of Islamic law. A bequest made in favour of an inheriting intestate beneficiary is invalid if the remaining inheriting intestate beneficiaries do not consent thereto.⁹⁵ A bequest made in excess of 1/3 of the net estate is also invalid if the inheriting intestate beneficiaries do not consent thereto.⁹⁶ The consent in the above situations must be given subsequent to the death of the testator or testatrix.⁹⁷ Prior consent is neither valid nor enforceable. This is due to the fact that intestate beneficiaries acquire vested rights only upon the deceased having died.⁹⁸ The above two situations could be seen as conditional bequests, and the conditions are imposed by law. This type of a bequest could be used in order to augment the shares inherited by certain intestate beneficiaries. An example of this would be where a person dies leaving behind a net estate of R200 000.00. He bequeaths R50 000.00 in favour of his daughter. He also leaves behind a son and a daughter as the only intestate beneficiaries. The daughter would inherit the R50 000.00 in terms of the law of testate succession if they both consent to the bequest. The son would inherit R100 000.00 and the daughter would inherit R50 000.00 in terms of the law

93 See Khan MM *The Translation of the Meanings of Sahih Al Bukhari* 2004 (724) vol 8, 477 where it states that “[t]he Prophet said, “Give the Fara’id (the shares of the inheritance that are prescribed in the Qur’an) to those who are entitled to receive it. Then whatever remains, should be given to the closest male relative of the deceased.” The number in brackets (after the year of publication) refers the number of the hadeeth in the book.

94 See Al Subaa’ee M *Sharh Al Qaanoon Al Ahwaal Al Shakhshiyah* 7 ed (2000) vol 2, part 2, 105.

95 Al Zuhaylee W *Al Fiqh Al Islaamee Wa Adillatuhoo* 3 ed (1989) vol 8, 104-105; and Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee ‘Alaa Madh hab Al Imaam Al Shaafi’ee* (2000) vol 2, 258-259.

96 See Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee ‘Alaa Madh hab Al Imaam Al Shaafi’ee* (2000) vol 2, 256; and Al Subaa’ee M *Sharh Al Qaanoon Al Ahwaal Al Shakhshiyah* 7 ed (2000) vol 2, part 2, 80. See also Powers DS *Studies in Qur’an and Hadith: The Formation of the Islamic Law of Inheritance* (1986) 21.

97 See Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee ‘Alaa Madh hab Al Imaam Al Shaafi’ee* (2000) vol 2, 258-259; and Al Subaa’ee M *Sharh Al Qaanoon Al Ahwaal Al Shakhshiyah* 7 ed (2000) vol 2, part 2, 74-75.

98 See 2.5.2 above where this issue was discussed in more detail.

of intestate succession.⁹⁹ The son and daughter would then inherit R100 000.00 each. It should also be noted that there is a minority opinion stating that prior consent is valid and enforceable.¹⁰⁰ I would recommend that this opinion be used where a need arises. It is interesting to note that Egyptian law does not require the consent of the remaining inheriting intestate beneficiaries in the event where a testator bequeaths up to 1/3 of the net estate in favour of inheriting intestate beneficiaries.¹⁰¹ This issue is further discussed in Chapter Seven (7.6) of this thesis.

A testator or testatrix may not incorporate unlawful provisions in a will. An example of an unlawful provision would be where a testator or testatrix states in his or her will that a bottle of wine must be bought and given to each of the attendees of the local mosque (Masjidur-Raof) in Highlands Estate. The provision is unlawful as Muslims are not permitted to drink wine. A provision that contravenes either of these limitations would be invalid and have no binding effect.¹⁰² Conditional bequests are permitted as long as they are lawful and beneficial.

An example of a non-beneficial condition would be where X bequeaths 1/3 of his net estate in favour of his non-married brother on condition that he never marries. In this situation the bequest would be valid but the condition would be unenforceable.¹⁰³ This condition is non-beneficial and in conflict with Islamic law, and is therefore unenforceable. It is interesting to note that the Maalikee school is of the opinion that consent given prior to the demise of the testator or testatrix is valid and enforceable if the consent was given by the inheriting intestate beneficiaries while the testator or testatrix was on his or her death-bed.¹⁰⁴ The Hanafee school is of the opinion that the 1/3 limitation would not exist in a situation where there are no intestate beneficiaries present. The testator or testatrix may then bequeath more

99 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states 'Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females...'

100 See Al Subaa'ee M *Sharh Al Qaanoon Al Ahwaaal Al Shakhshiyyah* 7 ed (2000) vol 2, part 1, 74. See also Al Kardee *Al Ahwaaal Al Shakhshiyyah* 7 ed (2000) 167 where it states that this the opinion of Al Awzaa'ee, Ibn Abee Laylaa and others.

101 See Al Zuhaylee W *Al Fiqh Al Islaamee Wa Adillatuhoo* 3 ed (1989) vol 8, 104. See 2.5.2 above for a further discussion on this issue.

102 See Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee 'Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 248-249; and Al Subaa'ee M *Sharh Al Qaanoon Al Ahwaaal Al Shakhshiyyah* 7 ed (2000) vol 2, part 2, 60. See also Goolam NMI 'Muslim law' in Rautenbach C, Bekker JC & Goolam NMI *Introduction to Legal Pluralism* 3 ed (2010) 343.

103 See Al Zuhaylee W *Al Fiqh Al Islaamee Wa Adillatuhoo* 3 ed (1989) vol 8, 22-25.

104 See Al Subaa'ee M *Sharh Al Qaanoon Al Ahwaaal Al Shakhshiyyah* 7 ed (2000) vol 2, part 2, 75.

than 1/3 of the net estate in favour of a testate beneficiary.¹⁰⁵ The recipient of the bequest would then be referred to as a universal legatee. This concept of a universal legatee is not found within the Shaafi'ee school.

There is a minority opinion stating that a bequest made in favour of a non-Muslim widow must not exceed the amount that a Muslim widow or widows would inherit.¹⁰⁶ This would apply, for example, where X dies leaving behind a Muslim widow, a Christian widow, and a son as the only intestate beneficiaries. The Christian widow would be disqualified from inheriting as an intestate beneficiary. X may not bequeath more than 1/8 of the net estate in favour of his Christian wife as his Muslim wife would be inheriting 1/8. There is, however, no clear limitation in this regard found within the two schools.

2.5.5 Testate succession adiation, repudiation, substitution and collation

Adiation in the context of succession is where a testate beneficiary accepts a benefit. Adiation must have taken place subsequent to the moment of death of the testator or testatrix (dies credit) in terms of the Shaafi'ee school. The Hanafee school is of the opinion that adiation is permitted prior to the testator or testatrix having died but that repudiation (rejection) is not.¹⁰⁷ Ownership would pass to the testate beneficiary only once the testator or testatrix has died, on condition that the testator or testatrix has not revoked the bequest prior to having died.¹⁰⁸ Taking possession of a testate benefit is not required in order for ownership to pass to a testate beneficiary.¹⁰⁹ The Hanafee school is of the opinion that adiation of a testate benefit may be done tacitly whereas the Shaafi'ee school is of the opinion that adiation of a testate benefit must be done expressly.¹¹⁰ The Shaafi'ee school is also of the opinion that the right to adiate or repudiate passes to the beneficiaries of a deceased testate beneficiary in the event where he or she survives the testator or testatrix, but dies before adiating or repudiating the benefit.¹¹¹ There is a presumption found within the Hanafee school in favour of adiation in

105 There must be no sharer beneficiaries (ashaab al furoodh), no residuary beneficiaries ('asabah), and no distant kindred beneficiaries (dhawil arhaam). See Al Zuhaylee *W Al Fiqh Al Islaamee Wa Adillatuhoo* 3 ed (1989) vol 8, 286. See 2.6.6 of this chapter for a discussion on the various intestate beneficiaries in terms of the Islamic law of intestate succession.

106 See Goolam NMI 'Muslim law' in Rautenbach C, Bekker JC & Goolam NMI *Introduction to Legal Pluralism* 3ed (2010) 343 for a discussion of this issue.

107 See Al Zuhaylee *W Al Fiqh Al Islaamee Wa Adillatuhoo* 3 ed (1989) vol 8, 15-16.

108 See Al Zuhaylee *W Al Fiqh Al Islaamee Wa Adillatuhoo* 3 ed (1989) vol 8, 54.

109 See Al Zuhaylee *W Al Fiqh Al Islaamee Wa Adillatuhoo* 3 ed (1989) vol 8, 20.

110 See Al Zuhaylee *W Al Fiqh Al Islaamee Wa Adillatuhoo* 3 ed (1989) vol 8, 17-18.

111 See also Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 255.

the event where a testate beneficiary survives the testator or testatrix but dies before adiating or repudiating.¹¹² The law in Syria states that a testate beneficiary must practice his or her right to adiate within 30 days from the moment of death of the testator or testatrix or within 30 days from becoming aware of the benefit. Non-repudiation within this time period would be presumed to be adiation for all legal purposes. The same would apply where a testate beneficiary dies during this period.¹¹³ It is at this point that a testate beneficiary becomes an inheriting testate beneficiary. The repudiated testate benefit of a testate beneficiary would devolve in terms of the Islamic law of intestate succession. There is no automatic substitution by operation of law found within the Islamic law of testate succession.¹¹⁴ The doctrine of collation as applicable in South African law does not apply in terms of Islamic law. This issue is discussed in more detail in Chapter Three (3.5.5) of this thesis.

2.6 Intestate succession claims

Intestate succession claims are settled from the remainder of the net estate after all testate succession claims have been deducted. The remainder is referred to hereafter as the intestate estate. Persons who could possibly inherit from the intestate estate are referred to hereafter as intestate beneficiaries. An intestate beneficiary is a person who has one or more intestate succession ties to the deceased. An intestate beneficiary would inherit only if he or she is neither disqualified from inheriting due to the presence of an intestate succession disqualification nor totally excluded from inheriting due to the presence of one or more intestate succession exclusions. Intestate beneficiaries who are neither disqualified nor totally excluded from inheriting are referred to hereafter as inheriting intestate beneficiaries. Inheriting intestate beneficiaries comprise both males and females and may not be disinherited through testacy unless they consent thereto. It is for this reason that these beneficiaries could also be referred to as compulsory beneficiaries. The shares of these beneficiaries are prescribed by law.

112 See Al Zuhaylee W *Al Fiqh Al Islaamee Wa Adillatuhoo* 3 ed (1989) vol 8, 18 and 22.

113 The period is after obtaining a vested right and before adiating the benefit. See Al Subaa'ee M *Sharh Al Qaanoon Al Ahwaal Al Shakhshiyyah* 7 ed (2000) vol 2, part 2, 61-64. See also See Al Zuhaylee W *Al Fiqh Al Islaamee Wa Adillatuhoo* 3 ed (1989) vol 8, 21-22.

114 See Al Zuhaylee W *Al Fiqh Al Islaamee Wa Adillatuhoo* 3 ed (1989) vol 8, 20; and Al Subaa'ee M *Sharh Al Qaanoon Al Ahwaal Al Shakhshiyyah* 3 ed (2000) vol 2, part 3, 63-64.

2.6.1 Intestate succession ties

The five intestate succession ties that are discussed in this section are: consanguinity, affinity, religion, contract and acknowledgement.¹¹⁵ The Shaafi'ee school recognises three of the five ties whereas the Ḥanafee school recognises four of the five. Both schools recognise consanguinity (blood) and affinity (marriage) as intestate succession ties.¹¹⁶ A child is related to the deceased through a consanguinity tie whereas a spouse is related to the deceased through an affinity tie. It is interesting to note that an intestate succession tie exists between a child conceived as a result of adultery and the husband of the adulteress (not the biological father) at the time when it was conceived. This could be seen as a quasi-consanguinity tie based upon marriage. The child would be deemed the child of the husband for all legal purposes.¹¹⁷ The child could be referred to as his legal child (son or daughter). A quasi-consanguinity tie would cease to exist in the event where the child is disqualified from inheriting due to imprecation (li'aan) by the husband in question.¹¹⁸ The issue of imprecation is further discussed in the next section (2.6.2) where intestate succession disqualifications are looked at in more detail.

The Shaafi'ee school recognises an intestate succession tie based upon a common religion between the deceased and other persons observing his religion. The intestate estate would be deposited into the Islamic public treasury (bayt al maal) for the benefit of such persons. These persons could also be referred to as public treasury beneficiaries.¹¹⁹ It is a requirement that the Islamic public treasury must be established and functioning in terms of Islamic law principles. There is no Islamic public treasury found in South Africa.¹²⁰ It has also been

115 See Al Zuḥaylee *W Al Fiqh Al Islaamee Wa Adillatuhoo* 3 ed (1989) vol 8, 279-287.

116 See Al Zuḥaylee *W Al Fiqh Al Islaamee Wa Adillatuhoo* 3 ed (1989) vol 8, 279-287. See also Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee 'Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 275-276; and Al Ḥakamee I *Tahdheeb Al Aḥaadeeth Fee 'Ilm Al Mawaareeth: Sharḥ limandHoomah Al Raḥbiyyah Al Musammaah: Bughyah Al Baahitheen 'An Jumal Al Mawaareeth* (2004) 39.

117 See Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee 'Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 147; and Al Zuḥaylee *W Al Fiqh Al Islaamee Wa Adillatuhoo* 3 ed (1989) vol 8, 582; and Al Nafaad A *Al Jaami' Fee Ahkaam Al Abnaa Ghair Al Shar'iiyyeen - Diraasah Fiqhiyah Ijtimaa'iyah Ḥadeethiyah Muqaaranah* (2007) 71-72.

118 See Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee 'Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 145-146. See also Al Nafaad A *Al Jaami' Fee Ahkaam Al Abnaa Ghair Al Shar'iiyyeen - Diraasah Fiqhiyah Ijtimaa'iyah Ḥadeethiyah Muqaaranah* (2007) 75-76; and See Al Zuḥaylee *W Al Fiqh Al Islaamee Wa Adillatuhoo* 3 ed (1989) vol 7, 582.

119 See Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee 'Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 277; and Al Ḥakamee I *Tahdheeb Al Aḥaadeeth Fee 'Ilm Al Mawaareeth: Sharḥ limandHoomah Al Raḥbiyyah Al Musammaah: Bughyah Al Baahitheen 'An Jumal Al Mawaareeth* (2004) 70-71.

120 This is the opinion of the Fatwa Committee of the Muslim Judicial Council (SA) based in the Western Cape. See Muslim Judicial Council (SA) Fatwa Committee 'MJC Position of Succession Law and Related Matters' (2017) document on file with the author of this thesis.

argued that it is not foreseen that an Islamic public treasury would be established any time soon.¹²¹ The Ḥanafee school does not recognise an intestate succession tie based upon a common religion.¹²²

The Ḥanafee school recognises an intestate succession tie based upon a contract between the deceased and his or her surviving contracting partner.¹²³ The terms of the contract must state that the surviving partner must inherit his or her intestate estate in the event where certain conditions are met.¹²⁴ This person could also be referred to as a contractual beneficiary (*mawlaa al muwaalaa*). This tie would only apply in the event where there is no person present who is more eligible to inherit.

The Ḥanafee school also recognises an intestate succession tie based upon acknowledgement. An example of this would be where X acknowledges that an unknown person is the son of his brother. This has, however, not been confirmed in a legal manner. The acknowledged person would inherit from X in terms of the Ḥanafee school if there are no other intestate beneficiaries present.¹²⁵

Both schools recognise emancipation (freeing of a slave) as an intestate succession tie.¹²⁶ This specific tie and all laws related thereto are not discussed any further in this chapter as they are not applicable within the South African context and are beyond the scope of this thesis.

The intestate estate must be deposited into an Islamic public treasury if there are no intestate beneficiaries present. The remainder thereof must be deposited therein if one or more surviving spouses are present, but no other intestate beneficiaries are present.¹²⁷ There is also a minority opinion stating that the surviving spouse or spouses should inherit the remainder

121 See Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee 'Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 277.

122 See Al Subaa'ee M *Sharḥ Al Qaanoon Al Aḥwaal Al Shakhshiyah* 3 ed (2000) vol 2, part 3, 53.

123 See Al Zuhaylee W *Al Fiqh Al Islaamee Wa Adillatuhoo* 3 ed (1989) vol 8, 251; and Al Ghaamidee N *Al Khulaasah Fee 'Ilm Al Faraaid* (1426 H) 116.

124 There must be no 'more eligible' beneficiary present.

125 See Al Subaa'ee M *Sharḥ Al Qaanoon Al Aḥwaal Al Shakhshiyah* 3 ed (2000) vol 2, part 3, 52.

126 See Al Zuhaylee W *Al Fiqh Al Islaamee Wa Adillatuhoo* 3 ed (1989) vol 8, 282.

127 See Al Zuhaylee W *Al Fiqh Al Islaamee Wa Adillatuhoo* 3 ed (1989) vol 8, 287. See also Al Subaa'ee M *Sharḥ Al Qaanoon Al Aḥwaal Al Shakhshiyah* 3 ed (2000) vol 2, part 3, 53; and Al Hakamee I *Tahdheeb Al Aḥaadeeth Fee 'Ilm Al Mawaareeth: Sharḥ limandHoomah Al Raḥbiyyah Al Musammaah: Bughyah Al Baahitheen 'An Jumal Al Mawaareeth* (2004) 70-71.

through the application of the doctrine of return.¹²⁸ The Islamic public treasury must then administer the funds in terms of Islamic law principles. This is in terms of both schools.¹²⁹ I would suggest that Islamic institutions like the Muslim Judicial Council (SA) should administer these funds in terms of Islamic law. A more detailed discussion on this is beyond the scope of this thesis.

2.6.2 Intestate succession disqualifications and substitution

An intestate succession disqualification (*ḥajb awṣāaf*) prevents an intestate beneficiary from inheriting due to certain attributes. The six disqualifications that are looked at in this section are divorce, imprecation, illegitimacy, religion, killing and the moment of death. An affinity tie would be suspended for the duration of the waiting period (*‘iddah*) subsequent to a revocable (*raj’ee*) divorce. The waiting period could be three menstrual cycles or three lunar months.¹³⁰ A husband may revoke the divorce during this period and the affinity tie would remain intact. The divorce becomes irrevocable and final upon the expiration of the waiting period. The affinity tie would then be severed. The parties would then be disqualified from inheriting from each other in terms of the affinity tie.¹³¹ An affinity tie is immediately severed subsequent to an irrevocable (*baain*) divorce. The divorced spouses would then be disqualified from inheriting from each other.¹³²

An example of this would be where X divorces his wife for the third time since the start of the marriage. The divorce was done by way of *ṭalaaq*. X dies one month later. The divorced wife would not inherit as she was subject to an irrevocable divorce. A judicial divorce in the form of a *faskh* is another example of an irrevocable divorce which immediately severs the affinity tie. The impact of this type of divorce on an affinity tie is further discussed in Chapter Four (4.3.2) of this thesis.¹³³ There is an exception to the irrevocability rule regarding its impact on an affinity tie. The *Ḥanafee* school is of the opinion that an irrevocable divorce

128 See Al Fawzaan S *Al Tahqeeqaat Al Marḍiyyah Fil Mabaahith Al Farḍiyyah* (1999) 255-256.

129 See Al Zuḥaylee W *Al Fiqh Al Islaamee Wa Adillatuhoo* 3 ed (1989) vol 8, 287.

130 The parties to the divorce would be disqualified from inheriting from each other upon the elapse of (but not during) the waiting period. The *Shaafi’ee* school is of opinion that three clean periods (when not menstruating) must pass whereas the *Ḥanafee* school is of the opinion that three menstruating periods must pass in order for the waiting period to end. See Al Zuḥaylee W *Al Fiqh Al Islaamee Wa Adillatuhoo* 3 ed (1989) vol 7, 630-632.

131 See Al Fawzaan S *Al Tahqeeqaat Al Marḍiyyah Fee Al Mabaahith Al Farḍiyyah* (1999) 39-40.

132 See Al Fawzaan S *Al Tahqeeqaat Al Marḍiyyah Fee Al Mabaahith Al Farḍiyyah* (1999) 39-40.

133 See Moosa N and Abduroaf M ‘Faskh (Divorce) and Intestate Succession in Islamic and South African Law: Impact of the Watershed Judgment in *Hassam v Jacobs* and the Muslim Marriages Bill’ in De Waal M and Paleker M *South African Law of Succession and Trusts - The Past Meeting the Present and Thoughts for the Future* (2014) for a full discussion on this issue.

issued by a husband while experiencing an illness that causes his death (death-bed illness) would not disqualify his divorced wife from inheriting as an intestate beneficiary if his intention was to disinherit her and as long as her waiting period had not elapsed.¹³⁴

A quasi-consanguinity tie would cease to exist in the event of a child being disqualified from inheriting due to an imprecation divorce (li'aan). This specific divorce procedure finds application when a husband imprecates his wife by accusing her of having committed adultery. The accusation must be done in a judicial setting.¹³⁵ The husband must allege that the child that his wife is carrying is the product of an adulterous act between her and a third party.¹³⁶ Completion of this procedure automatically results in an irrevocable divorce in terms of the Shaafi'ee school. The affinity tie would be severed and the parties would be disqualified from inheriting from each other in terms of an affinity tie.¹³⁷ The judge must further issue a divorce between the two parties in terms of the Hanafee school as the completion of the procedure does not automatically sever the affinity tie. The parties could therefore inherit from each other (in terms of the Hanafee school) in the event of the death of one of them, after the procedure has been completed but before the judge has issued a divorce, if no other disqualifications are present.¹³⁸ One of the other automatic consequences of the procedure would be that the quasi-consanguinity tie between the child in question and the non-biological father would automatically be severed. They would be disqualified from inheriting from each other in terms of this tie.¹³⁹

A biological child is disqualified from inheriting as an intestate beneficiary in the event where he or she was conceived out of wedlock (illegitimacy). The disqualification applies only to the biological father (and vice versa) and never to the biological mother (and vice versa). This raises the question of discrimination based on birth. It should be noted that unfair discrimination based on birth is prohibited in terms of the Constitution of South Africa.¹⁴⁰

134 See Al Fawzaan S *Al Tahqeeqaat Al Mardiyyah Fee Al Mabaahith Al Fardiyyah* (1999) 40.

135 See Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee 'Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 145-146. See also Al Nafaad A *Al Jaami' Fee Ahkaam Al Abnaa Ghair Al Shar'iyyeen - Diraasah Fiqhiyyah Ijtima'iyah Hadeethiyah Muqaaranah* (2007) 75-76; and See Al Zuhaylee W *Al Fiqh Al Islaamee Wa Adillatuhoo* 3 ed (1989) vol 7, 582.

136 See Al Zuhaylee W *Al Fiqh Al Islaamee Wa Adillatuhoo* 3 ed (1989) vol 7, 556-73.

137 See Al Zuhaylee W *Al Fiqh Al Islaamee Wa Adillatuhoo* 3 ed (1989) vol 7, 580-582.

138 See Al Zuhaylee W *Al Fiqh Al Islaamee Wa Adillatuhoo* 3 ed (1989) vol 7, 580.

139 See Al Zuhaylee W *Al Fiqh Al Islaamee Wa Adillatuhoo* 3 ed (1989) vol 7, 582.

140 See s 9(3) of the Constitution of the Republic of South Africa, 1996 where it states that '[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability,

There is an opinion within the Ḥanafee school that a child conceived out of wedlock would not be disqualified if the biological father marries the biological mother at least six months prior to the birth of the child.¹⁴¹ This is also the opinion followed by the Muslim Judicial Council (SA) based in the Western Cape.¹⁴² The Shaafi'ee school states that there is a rebuttable presumption in favour of a child having been conceived in wedlock in the event where the biological parents had married each other at least six months prior to the birth of the child. The six months commences from the moment of possible consummation after the marriage has been concluded.¹⁴³ The presumption can be rebutted through evidence. There is a minority opinion stating that the disqualification would cease to exist if the biological father acknowledges paternity and the mother of the child was not married to another person at the time of the child having been conceived. The child conceived out of wedlock would then be deemed the child of the biological father for all legal purposes.¹⁴⁴

An intestate beneficiary would be disqualified from inheriting if he or she follows a different religion to that of the deceased at the moment that the deceased died.¹⁴⁵ This raises the question of discrimination on the basis of religion. It should be noted that unfair discrimination based on religion is prohibited in terms of the Constitution of South Africa¹⁴⁶ There is a minority opinion stating that the disqualification based on religion would cease to exist if the intestate beneficiary embraces the religion of Islaam subsequent to the deceased

religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'

- 141 See Al Zuhaylee *W Al Fiqh Al Islaamee Wa Adillatuhoo* 3 ed (1989) vol 7, 148-149. See also Al Nafaad *A Al Jaami' Fee Ahkaam Al Abnaa Ghair Al Shar'iyyeen - Diraasah Fiqhiyah Ijtimaa'iyah Hadeethiyah Muqaaranah* (2007) 85, 90, and 91.
- 142 See Muslim Judicial Council (SA) Fatwa Committee 'MJC Position on Succession Law and Related Matters' (2017) document on file with the author of this thesis.
- 143 See Al Nafaad *A Al Jaami' Fee Ahkaam Al Abnaa Ghair Al Shar'iyyeen - Diraasah Fiqhiyah Ijtimaa'iyah Hadeethiyah Muqaaranah* (2007) 75.
- 144 This is the opinion of some Muslim jurists including: Ibn Taymiyyah, Ibn Al Qayyim, Al Hassan Al Basri and others. See Al Nafaad *A Al Jaami' Fee Ahkaam Al Abnaa Ghair Al Shar'iyyeen* (2007) 91-92.
- 145 See Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee 'Alaa Madh hab Al Imaam Al Shaafi'ee* vol 2 (2000) 278-279; and Al Subaa'ee M *Sharh Al Qaanoon Al Ahwaal Al Shakhshiyah* 3 ed (2000) vol 2, part 3, 41.
- 146 See s 9(3) of the Constitution of the Republic of South Africa, 1996 where it states that '[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'

having died, but before the intestate estate had been distributed.¹⁴⁷ The schools differ in their opinions as to which killings (qatl) disqualify an intestate beneficiary from inheriting as such. The Shaafi'ee school is of the opinion that all forms of killing would disqualify an intestate beneficiary from inheriting as such.¹⁴⁸ The Ḥanafee school is of the opinion that only killings that require retaliation (qisaas) or expiation (kaffaarah) would disqualify an intestate beneficiary from inheriting as such. A killing in self-defence is an example of an instance where an intestate beneficiary would not be disqualified from inheriting as such, as neither retaliation nor expiation is required for the killing.¹⁴⁹ A further discussion on this issue is beyond the scope of this chapter.

The doctrine of collective death (gharqaa or hadmaa) would apply in the event where two or more persons who qualify to inherit from each other as intestate beneficiaries die collectively in the same incident. These persons would be disqualified from inheriting from each other in the event where they died simultaneously. There is a presumption in favour of simultaneous death unless the contrary is proven.¹⁵⁰

The doctrine of a missing person (mafqood) would apply in the event where an intestate beneficiary cannot be located due to his or her whereabouts being unknown. The missing person would be deemed alive regarding his or her own property. This is in terms of both schools.¹⁵¹ The Shaafi'ee school is of the opinion that he or she would be deemed alive regarding the property of others. He or she would therefore be eligible to inherit from others.¹⁵² The Ḥanafee school is of the opinion that he or she would be deemed predeceased regarding the property of others and would not be eligible to inherit from them.¹⁵³ He or she would then be disqualified from inheriting as such. The testate benefit of a disqualified

147 This is an opinion within the Ḥanbalee school of law. See Al Fawzaan S *Al Tahqeeqaat Al Marḍiyyah Fil Mabaahith Al Farḍiyyah* (1999) 19-28.

148 The rules regarding this disqualification are quite complicated and are beyond the scope of this thesis. For further reading on this disqualification see Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee 'Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 278; and Al Subaa'ee M *Sharḥ Al Qaanoon Al Ahḥwaal Al Shakhshiyyah* 3 ed (2000) vol 2, part 3, 40-42.

149 See Abdul Ḥameed M *Sharḥ Al Siraajiyah* (1944) 18-21 for a further discussion on this issue.

150 See Al Fawzaan S *Al Tahqeeqaat Al Marḍiyyah Fil Mabaahith Al Farḍiyyah* (1999) 240-241.

151 See Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee 'Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 331-334; and Al Subaa'ee M *Sharḥ Al Qaanoon Al Ahḥwaal Al Shakhshiyyah* 3 ed (2000) vol 2, part 3, 81.

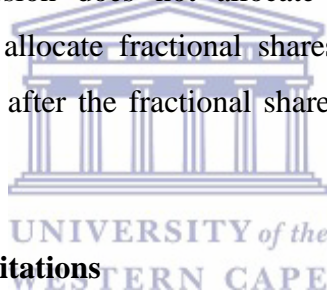
152 See Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee 'Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 331-334.

153 See Al Subaa'ee M *Sharḥ Al Qaanoon Al Ahḥwaal Al Shakhshiyyah* 3 ed (2000) vol 2, part 3, 161-163.

intestate beneficiary would devolve in terms of the Islamic law of intestate succession. There is no automatic substitution by operation of law.

2.6.3 Intestate succession exclusions

An intestate succession exclusion (ḥajb ashkhaaṣ) prevents an intestate beneficiary from inheriting due to the presence of one or more other intestate beneficiaries. Exclusions can be in part (ḥajb nuqṣaan) or in full (ḥajb ḥirmaan).¹⁵⁴ An example of a partial exclusion would be where, for example, X dies leaving behind a widower, a daughter, and a full brother as the only intestate beneficiaries. The widower would inherit 1/4 instead of 1/2 due to the presence of the daughter. The widower would inherit 1/2 in the example where the widower and full brother are the only intestate beneficiaries.¹⁵⁵ An example of a total exclusion would be where X dies leaving behind a son and a full brother as the only intestate beneficiaries. The son would totally exclude the full brother from inheriting as an intestate beneficiary. The Islamic law of intestate succession does not allocate amounts of money to intestate beneficiaries. It does, however, allocate fractional shares of the intestate estate, and the remainder of the intestate estate, after the fractional shares (if any) have been deducted, to intestate beneficiaries.



2.6.4 Intestate succession limitations

There are no direct limitations that apply to the law of intestate succession. There is, however, an indirect limitation. The law of intestate succession would apply only where the liability claims have not depleted the gross estate. This means that liability claims take priority over intestate succession claims.¹⁵⁶ It is interesting to note that the law of testate succession may not be used as a tool to prevent the application of the law of intestate

154 See Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee 'Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 305-306; and Al Subaa'ee M *Sharh Al Qaanoon Al Ah'waal Al Shakhshiyah* 3 ed (2000) vol 2, part 3, 91-96.

155 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 12 where it states '[i]n that which your wives leave, your share is a half if they have no child; but if they leave a child, you get a fourth of that which they leave after payment of legacies that they may have bequeathed or debts...'

156 See Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee 'Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 272-274; and Al Subaa'ee M *Sharh Al Qaanoon Al Ah'waal Al Shakhshiyah* 3 ed (2000) vol 2, part 3, 47-50.

succession. This is because the law of testate succession is generally applicable to a maximum of 1/3 of the net estate.¹⁵⁷

2.6.5 Intestate succession adiation, repudiation, substitution and collation

Adiation is where a testate beneficiary accepts a benefit. Adiation is not a requirement in terms of the Islamic law of intestate succession. An inheriting intestate beneficiary would automatically have an enforceable right to an intestate benefit subsequent to the death of the deceased. Repudiation (renouncement) is therefore not possible.¹⁵⁸ An intestate beneficiary may cede his or her right to a benefit in favour of one or more of the other inheriting intestate beneficiaries in terms of the doctrine of opting out (takhaaruj).

An example of this would be where X dies leaving behind a house. He also leaves behind two sons (Y and Z) as the only inheriting intestate beneficiaries. Y enters into an agreement with Z stating that Y would cede his right to his share in the intestate estate in exchange for the 2017 Mercedes Benz of Z. This type of arrangement is valid.¹⁵⁹ There is, however, nothing in Islamic law that prevents an inheriting intestate beneficiary from ceding his or her right in the intestate estate favour of one or more of the other inheriting intestate beneficiaries in the form of a gift. The law of gifting would then apply. Y could therefore alternatively gift his share in the house to Z if he wishes to do so. The doctrine of collation as applicable in South African law does not apply to Islamic law. This issue is discussed in more detail in Chapter Three.

2.6.6 Categories of intestate beneficiaries and their shares

The Shaafi'ee school recognises four categories of intestate beneficiaries whereas the Hanafee school recognises seven. The order of priority according to the Shaafi'ee school is: sharer beneficiaries, residuary beneficiaries, return beneficiaries, and distant kindred

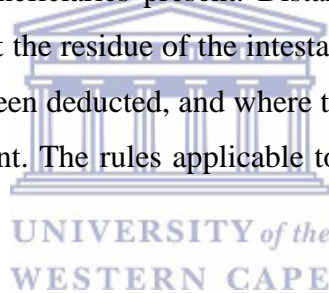
157 See Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee 'Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 255-257; and Al Subaa'ee M *Sharh Al Qaanoon Al Ahwaaal Al Shakhshiyyah* 3 ed (2000) vol 2, part 3, 49-51.

158 An intestate beneficiary automatically becomes the owner of his or her part of the intestate estate, the moment the person from whom he or she would inherit from dies. An example of this would be where X dies on 1 January 2015 at 10:00 AM. X leaves behind an intestate estate of R500 000.00 and a son as the only intestate beneficiary. The son then dies at 10:01 AM. The R500 000.00 would automatically pass to the estate of the deceased son. Ownership would pass even if the son was not aware of the death of his father. Adiation (acceptance) is not a requirement for the passing of ownership. It is for this reason that repudiation (renouncement) does not apply in terms of the Islamic law of intestate succession as an intestate beneficiary automatically becomes the owner of the property.

159 See Al Subaa'ee M *Sharh Al Qaanoon Al Ahwaaal Al Shakhshiyyah* 3 ed (2000) vol 2, part 3, 177-178; Al Zuhaylee W *Al Fiqh Al Islaamee Wa Adillatuhoo* 3 ed (1989) vol 8, 440-442;

beneficiaries.¹⁶⁰ The order of priority according to the Ḥanafee school is: sharer beneficiaries, residuary beneficiaries, return beneficiaries, distant kindred beneficiaries, contractual beneficiaries, acknowledged kinsmen beneficiaries, and universal legatee beneficiaries.¹⁶¹ This section focuses on the four categories common to both schools. The unequal distribution of shares applies only within these four categories. The four categories that are looked at below, in order of priority, are: sharer beneficiaries, residuary beneficiaries, return beneficiaries, and distant kindred beneficiaries.

Sharer beneficiaries are intestate beneficiaries who inherit fractional shares of the intestate estate. Residuary beneficiaries are intestate beneficiaries who inherit the residue (if any) of the intestate estate after the fractional shares of the sharer beneficiaries have been deducted. Return beneficiaries are certain sharer beneficiaries who inherit the residue (if any) of the intestate estate after the fractional shares of the sharer beneficiaries have been deducted, and where there are no residuary beneficiaries present. Distant kindred beneficiaries are those intestate beneficiaries who inherit the residue of the intestate estate after the fractional shares of the sharer beneficiaries have been deducted, and where there are no residuary beneficiaries and no return beneficiaries present. The rules applicable to these beneficiaries are looked at hereunder.



There are certain terminologies that must be understood before reading the next section. The first set of terminologies applies to descendants whereas the second set applies to collaterals. An agnate descendant is an intestate beneficiary related to the deceased through male linkage. An agnate grandson (son of a son) would be an example of such a descendant. A cognate descendant is related to the deceased through male and/or female linkage. A cognate granddaughter (daughter of daughter) would be an example of such a descendant. A full sibling is related to the deceased through the same father and mother. A consanguine sibling is related to the deceased through the same father but different mother. A uterine sibling is related to the deceased through the same mother but different father. Sharer beneficiaries are first in line to inherit from the intestate estate in terms of both schools. They are intestate beneficiaries who inherit (or share) fractional shares. There are 12 sharer beneficiaries. They

160 See Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee 'Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 390.

161 See Al Subaa'ee M *Sharḥ Al Qaanoon Al Aḥwaaal Al Shakhshiyyah* 3 ed (2000) vol 2, part 3, 51-54; and Khan MM 'Distribution of Heritage Sunni (Ḥanafī) Law' in Muhammad MM *The Islamic Law of Inheritance - A New Approach* (1989) 56-57.

are the husband, the wife, the father, the mother, the true grandfather,¹⁶² the true grandmother, the daughter, the agnate female descendant, the full sister, the consanguine sister, the uterine sister, and the uterine brother.¹⁶³ It is interesting to note that eight of the 12 persons are female and only four are male.

A sharer beneficiary would inherit one of the seven fractional shares only where he or she is neither disqualified nor totally excluded from inheriting as such. The fractional shares are 1/8, 1/6, 1/4, 1/2, 1/3, and 2/3 of the intestate estate.¹⁶⁴ The seventh fractional share is 1/3 of the remainder of the intestate estate after all other fractional shares of inheriting sharer beneficiaries have been deducted.¹⁶⁵ The seventh fractional share applies to the mother of a deceased. She would inherit 1/3 of the remainder of the intestate estate in specific situations. This is the position in terms of both schools (majority opinion).¹⁶⁶ Abdullah Ibn Abbaas (May Allaah be pleased with him) is of the opinion (minority opinion) that the mother must inherit the 1/3 of the intestate estate in those situations, and not 1/3 of the remainder of the intestate estate.¹⁶⁷

An example of how the 1/3 applied in terms of the minority opinion would be where, for example, a person dies leaving behind a widower, a mother and a father as the only intestate beneficiaries. The widower would inherit $1/2 = 3/6$ of the intestate estate,¹⁶⁸ the mother would inherit $1/3 = 2/6$ of the net estate,¹⁶⁹ and the father would inherit the residue of 1/6 of

162 The word 'true' is put in front of certain intestate beneficiaries to denote that certain requirements need to be met before the said beneficiary may inherit. A father's father is an example of a true grandfather whereas a mother's father is not. A further discussion on this issue is beyond the scope of this thesis.

163 See Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee 'Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 279-282; and Al Subaa'ee M *Sharh Al Qaanoon Al Ahwaaal Al Shakhshiyah* 3 ed (2000) vol 2, part 3, 57-82.

164 See Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee 'Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 282-283. See also Al Subaa'ee M *Sharh Al Qaanoon Al Ahwaaal Al Shakhshiyah* 3 ed (2000) vol 2, part 3, 67-68.

165 See Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee 'Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 283; and Al Subaa'ee M *Sharh Al Qaanoon Al Ahwaaal Al Shakhshiyah* 3 ed (2000) vol 2, part 3, 67-68.

166 See Al Fawzaan S *Al Tahqeeqaat Al Mardiyah F Mabaahith Al Fardiyyah* (1999) 92.

167 Abdullah Ibn Abbaas, may Allaah be pleased with him, is one of the companions of the Prophet Muhammad PBUH. See Al Subaa'ee M *Sharh Al Qaanoon Al Ahwaaal Al Shakhshiyah* 3 ed (2000) vol 2, part 3, 67-68.

168 It should be noted that the fractions in this example (and all examples to follow in this thesis) have been changed to have a common denominator. See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 12 where it states that '[i]n that which your wives leave, your share is a half if they have no child...'

169 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that '... [f]or parents, a sixth share of inheritance to each if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased left brothers or

the intestate estate.¹⁷⁰ It can clearly be seen that the mother inherits double the share of the father in this example.

The majority opinion (where the father inherits a more favourable share than the mother) is based on the premise that males generally inherit more favourably than females in the event where they belong to the same generation, and they have the same strength of intestate succession tie.¹⁷¹ An example of this would be where a son and daughter inherit collectively. The son would inherit double the share of the daughter.¹⁷² The constitutionality of a male generally inheriting more favourably than a female in the event where they belong to the same generation and have the same strength of intestate succession tie, is investigated in Chapter Seven (7.4) of this thesis.

There are five sharer beneficiaries that are never subject to total exclusion but can be partially excluded or even disqualified. These five beneficiaries comprise two males and three females. The mother, widow(s), and daughter are three of the five sharer beneficiaries that are never subject to total exclusion. The father and widower are the remaining two of the five sharer beneficiaries who are never subject to total exclusion. A son is the last of the six intestate beneficiaries who is never subject to total exclusion. A son inherits in his capacity as a residuary beneficiary and not as a sharer beneficiary. These six intestate beneficiaries could be referred to as 'primary intestate beneficiaries' as they are never subject to total exclusion.

The fractional share of a sharer beneficiary is fixed and would change in the event where the doctrine of increase ('awl) finds application.¹⁷³ It would also change in the event where the doctrine of return (radd) finds application.¹⁷⁴ The doctrine of increase (when applied) reduces

(sisters), the mother has a sixth. (The distribution in all cases is) after the payment of legacies he may have bequeathed or debts...'

170 See Khan MM *The Translation of the Meanings of Sahih Al Bukhari* 2004 (724) vol 8, 477 where it states that '[t]he Prophet said, "Give the Fara'id (the shares of the inheritance that are prescribed in the Qur'an) to those who are entitled to receive it. Then whatever remains, should be given to the closest male relative of the deceased."

171 See Al Fawzaan S *Al Tahqeeqaat Al Marḍiyyah F Mabaahith Al Farḍiyyah* (1999) 92-94.

172 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states 'Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females...'

173 See Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 346-352; and Al Subaa'ee M *Sharh Al Qaanoon Al Ahwaaal Al Shakhshiyah* 3 ed (2000) vol 2, part 3, 103-106.

174 See Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 367-376; See Al Subaa'ee M *Sharh Al Qaanoon Al Ahwaaal Al Shakhshiyah* 3 ed (2000) vol 2, part 3, 107-112.

the fractional share of a sharer beneficiary. The doctrine of increase would apply only in situations where the fractional shares of the inheriting sharer beneficiaries add up to more than one unit.¹⁷⁵ The common denominator of all the fractional shares is then increased to the same value as the sum of all the numerators. This doctrine applies to all sharer beneficiaries.

An example of where the doctrine of increase finds application would be where X dies leaving behind an intestate estate of R240 000.00. She also leaves behind a full sister, a widower, a mother, and a consanguine brother as the only intestate beneficiaries. The full sister would inherit $1/2$,¹⁷⁶ the widower would inherit $1/2$,¹⁷⁷ and the mother would inherit $1/3$.¹⁷⁸ The lowest common denominator would be six. The three shares would be $1/2 = 3/6$ for the full sister, $1/3 = 2/6$ for the mother, and $1/2 = 3/6$ for the widower. The total adds up to $8/6$. Application of the doctrine of increase would mean that the new lowest common denominator would be eight. The modified shares would be $3/8$ for the widower, $2/8$ for the mother, and $3/8$ for the full sister. The widower would inherit $3/8 \times R240\ 000.00 = R90\ 000.00$, the mother would inherit $2/8 \times R240\ 000.00 = R60\ 000.00$, and the full sister would inherit $3/8 \times R240\ 000.00 = R90\ 000.00$. It is interesting to note that the consanguine brother is totally excluded from inheriting by the full sister.¹⁷⁹

The doctrine of return (when applied) would increase the share of a sharer beneficiary. It is important to note that the doctrine of return does not apply to surviving spouses.¹⁸⁰ There is a

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- 175 See Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 346-352; and Al Subaa'ee M *Sharh Al Qaanoon Al Ah'waal Al Shakhshiyah* 3 ed (2000) vol 2, part 3, 103-106.
- 176 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 176 where it states '[t]hey ask you for a legal verdict. Say: "Allah directs (thus) about Al-Kalalah (those who leave neither descendants nor ascendants as heirs). If it is a man that dies, leaving a sister, but no child, she shall have half the inheritance...'
- 177 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 12 where it states '[i]n that which your wives leave, your share is a half if they have no child...'
- 178 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states '... [f]or parents, a sixth share of inheritance to each if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased left brothers or (sisters), the mother has a sixth...'
- 179 See Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee 'Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 301-302; and Al Subaa'ee M *Sharh Al Qaanoon Al Ah'waal Al Shakhshiyah* 3 ed (2000) vol 2, part 3, 87.
- 180 See Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 367-376; See Al Subaa'ee M *Sharh Al Qaanoon Al Ah'waal Al Shakhshiyah* 3 ed (2000) vol 2, part 3, 107-112.

minority opinion that the doctrine must also apply to a surviving spouse.¹⁸¹ The doctrine of return is discussed in more detail later in this section where ‘return beneficiaries’ is looked at.

Residuary beneficiaries are second in line to inherit from the intestate estate in terms of both schools.¹⁸² They inherit the remainder (if any) of the intestate estate after the sharer beneficiary claims have been deducted.¹⁸³ The remainder of the intestate estate is referred to hereafter as the ‘residue’. The residue must be distributed to the most entitled residuary beneficiary or among the residuary beneficiaries within this category. A son and a father are the only primary intestate beneficiaries who are never subject to total exclusion from inheriting as residuary beneficiaries. The doctrines of return and increase do not apply to residuary beneficiaries. They would not inherit when there is no residue. The three classes of residuary beneficiaries (‘aşabah) are: residuary beneficiaries in their own right (bin nafs), residuary beneficiaries by another (bilghair) and residuary beneficiaries with another (ma‘alghair).¹⁸⁴

A residuary beneficiary in his own right is a male intestate beneficiary. He inherits as such in his own right and does not require a ‘residuary maker’ to make him inherit as a residuary beneficiary. A son is an example of a residuary beneficiary in his own right. He would inherit the residue of the intestate estate if he is the most eligible residuary beneficiary.¹⁸⁵

A residuary beneficiary by another is a female intestate beneficiary. She does not inherit as a residuary beneficiary in her own right. She requires a residuary maker in order for her to inherit from the residue. Her residuary maker is a male intestate beneficiary. She would not inherit as a residuary beneficiary if there is no residuary maker for her present. A daughter is an example of a residuary beneficiary by another. Her residuary maker would be a son. The

181 See Al Subaa’ee M *Sharh Al Qaanoon Al Aḥwaal Al Shakhshiyah* 3 ed (2000) vol 2, part 3, 107.

182 See M Al Khin & M Al Bughaa M *Al Fiqh Al Manhajee ‘Alaa Madh hab Al Imaam Al Shaafi’ee* (2000) vol 2, 297; Al Subaa’ee M *Sharh Al Qaanoon Al Aḥwaal Al Shakhshiyah* 3 ed (2000) vol 2, part 3, 85-86.

183 See Khan MM *The Translation of the Meanings of Sahih Al Bukhari* 2004 (724) vol 8, 477 where it states that ‘[t]he Prophet said, “Give the Fara’id (the shares of the inheritance that are prescribed in the Qur’an) to those who are entitled to receive it. Then whatever remains, should be given to the closest male relative of the deceased.”’

184 See M Al Khin & M Al Bughaa M *Al Fiqh Al Manhajee ‘Alaa Madh hab Al Imaam Al Shaafi’ee* (2000) vol 2, 298-304; Al Subaa’ee M *Sharh Al Qaanoon Al Aḥwaal Al Shakhshiyah* 3 ed (2000) vol 2, part 3, 85-89.

185 See M Al Khin & M Al Bughaa M *Al Fiqh Al Manhajee ‘Alaa Madh hab Al Imaam Al Shaafi’ee* (2000) vol 2, 298-304; Al Subaa’ee M *Sharh Al Qaanoon Al Aḥwaal Al Shakhshiyah* 3 ed (2000) vol 2, part 3, 85-89.

daughter would share the residue with the son. The son would inherit double the share of the daughter.¹⁸⁶

A residuary beneficiary with another is a female intestate beneficiary. She does not inherit as a residuary beneficiary in her own right. She requires a residuary maker in order for her to inherit from the residue. Her residuary maker is a female intestate beneficiary. She would not inherit as a residuary beneficiary if there is no residuary maker for her present. A full sister is an example of a residuary beneficiary with another. Her residuary maker would be a daughter or agnate granddaughter. She would inherit the residue to the exclusion of the daughter or agnate granddaughter. The daughter or agnate granddaughter would inherit as a sharer beneficiary and the full sister would inherit as a residuary beneficiary with another.¹⁸⁷

A full brother would inherit as a residuary beneficiary in his own right where, for example, X dies leaving behind a mother, a daughter and a full brother as the only intestate beneficiaries. The mother would inherit $1/6$,¹⁸⁸ the daughter would inherit $1/2 = 3/6$,¹⁸⁹ and the full brother would inherit the remaining $2/6$.¹⁹⁰ It is interesting to note that the females in this example would inherit more favourably than the male. A consanguine sister would inherit as a residuary beneficiary by another where, for example, X dies leaving behind a mother, a daughter, a consanguine brother and a consanguine sister as the only intestate beneficiaries. The mother would inherit $1/6 = 3/18$,¹⁹¹ the daughter would inherit $1/2 = 9/18$,¹⁹² and the

186 See M Al Khin & M Al Bughaa *M Al Fiqh Al Manhajee 'Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 298-304; Al Subaa'ee *M Sharh Al Qaanoon Al Ahwaaal Al Shakhshiyah* 3 ed (2000) vol 2, part 3, 85-89.

187 See M Al Khin & M Al Bughaa *M Al Fiqh Al Manhajee 'Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 298-304; Al Subaa'ee *M Sharh Al Qaanoon Al Ahwaaal Al Shakhshiyah* 3 ed (2000) vol 2, part 3, 85-89.

188 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states '... [f]or parents, a sixth share of inheritance to each if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased left brothers or (sisters), the mother has a sixth...'

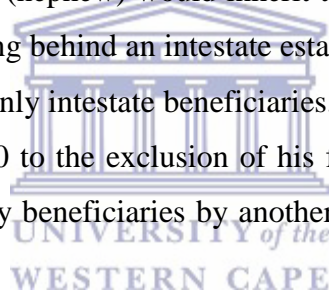
189 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states '...if (there are) only daughters, two or more, their share is two thirds of the inheritance; if only one, her share is half...'

190 See also Khan MM *The Translation of the Meanings of Sahih Al Bukhari* 2004 (724) vol 8, 477 where it states that '[t]he Prophet said, "Give the Fara'id (the shares of the inheritance that are prescribed in the Qur'an) to those who are entitled to receive it. Then whatever remains, should be given to the closest male relative of the deceased."'

191 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states '... [f]or parents, a sixth share of inheritance to each if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased left brothers or (sisters), the mother has a sixth...'

consanguine brother and consanguine sister would inherit the remaining 6/18.¹⁹³ The consanguine brother would inherit double the share of the consanguine sister. The consanguine brother would inherit 4/18 and the consanguine sister would inherit 2/18. It is interesting to note that the bulk of the inheritance in this example is not inherited by the male. The share inherited by the male is quite small in proportion to those inherited by the females in the example with the exception of the consanguine sister.

A full sister would inherit as a residuary beneficiary with another, for example, where X dies leaving behind a mother, a daughter, a full sister and a consanguine brother as the only intestate beneficiaries. The mother would inherit 1/6,¹⁹⁴ the daughter would inherit 1/2 = 3/6,¹⁹⁵ and the full sister would inherit the remaining 2/6.¹⁹⁶ It is interesting to note that the only male in this scenario does not inherit while all the females do. It is also interesting to note that the daughter of a brother (niece) is neither a sharer beneficiary nor a residuary beneficiary. The son of a brother (nephew) would inherit to her exclusion.¹⁹⁷ An example of this would be where X dies leaving behind an intestate estate of R500 000.00 and the son and daughter of a full brother as the only intestate beneficiaries. The son of the full brother would inherit the complete R500 000.00 to the exclusion of his female counterpart. This is due to the fact that the rules of residuary beneficiaries by another apply only to those females who

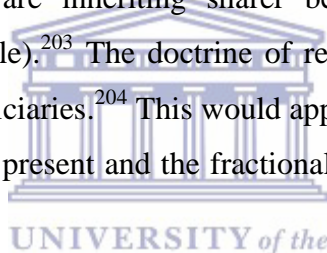


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- 192 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404 H (4) 11 where it states '...if (there are) only daughters, two or more, their share is two thirds of the inheritance; if only one, her share is half...'
- 193 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 176 where it states '...[i]f there are two sisters, they shall have two-thirds of the inheritance; if there are brothers and sisters, the male will have twice the share of the female...'
- 194 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states '... [f]or parents, a sixth share of inheritance to each if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased left brothers or (sisters), the mother has a sixth...'
- 195 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states 'if (there are) only daughters, two or more, their share is two thirds of the inheritance; if only one, her share is half...'
- 196 See Khan MM *The Translation of the Meanings of Sahih Al Bukhari* 2004 (728) vol 8, 480 where it states that 'Abu Musa was asked regarding (the inheritance of) a daughter, a son's daughter, and a sister. He said, "The daughter will take one-half and the sister will take one-half. If you go to Ibn Mas'ud, he will tell you the same." Ibn Mas'ud was asked and was told of Abu Musa's verdict. Ibn Mas'ud then said, "If I give the same verdict, I would stray and would not be of the rightly-guided. The verdict I will give in this case, will be the same as the Prophet did, i.e. one-half is for the daughter, and one-sixth for the son's daughter, i.e. both shares make two-thirds of the total property; and the rest is for the sister." Afterwards we cam[e] to Abu Musa and informed him of Ibn Mas'ud's verdict, whereupon he said, "So, do not ask me for verdicts, as long as this learned man is among you"'
- 197 See Khan MM *The Translation of the Meanings of Sahih Al Bukhari* 2004 (724) vol 8, 477 where it states that '[t]he Prophet said, "Give the Fara'id (the shares of the inheritance that are prescribed in the Qur'an) to those who are entitled to receive it. Then whatever remains, should be given to the closest male relative of the deceased."'

are also sharer beneficiaries. The niece in the example is classified as a distant kindred beneficiary. The law applicable to distant kindred beneficiaries is discussed in the next section.

It is interesting to note that a father is an intestate beneficiary who could inherit as both a sharer beneficiary as well as a residuary beneficiary in his own right. An example of this would be where X dies leaving behind a mother, a father, and a daughter as the only intestate beneficiaries. The mother would inherit 1/6,¹⁹⁸ the father would inherit 1/6,¹⁹⁹ the daughter would inherit $1/2 = 3/6$,²⁰⁰ and the father would also inherit the remainder of 1/6 as a residuary beneficiary.²⁰¹ It is interesting to note that the females in this example inherit the bulk of the intestate estate.

Return beneficiaries are third in line to inherit from the intestate estate in terms of both schools.²⁰² These beneficiaries are inheriting sharer beneficiaries, to the exclusion of surviving spouses (male or female).²⁰³ The doctrine of return (when applied) increases the fixed shares of these sharer beneficiaries.²⁰⁴ This would apply in situations where there are no inheriting residuary beneficiaries present and the fractional shares of the sharer beneficiaries



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- 198 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states '... [f]or parents, a sixth share of inheritance to each if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased left brothers or (sisters), the mother has a sixth...'
- 199 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states '... [f]or parents, a sixth share of inheritance to each if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased left brothers or (sisters), the mother has a sixth...'
- 200 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states '...if (there are) only daughters, two or more, their share is two thirds of the inheritance; if only one, her share is half...'
- 201 See Khan MM *The Translation of the Meanings of Sahih Al Bukhari* 2004 (724) vol 8, 477 where it states that '[t]he Prophet said, "Give the Fara'id (the shares of the inheritance that are prescribed in the Qur'an) to those who are entitled to receive it. Then whatever remains, should be given to the closest male relative of the deceased."'
- 202 The contemporary opinion within the Shaafi'ee school is that public treasury beneficiaries would be third in line to inherit from the intestate estate on condition that there is an Islamic public treasury present that is properly functioning in terms of Islamic law. The Islamic public treasury would then administer the funds in favour of the public treasury beneficiaries. These are the persons who share the same religion as that of the deceased. The return beneficiaries would be third in line in to inherit the remainder in the event that there is no Islamic public treasury in place. There is currently no Islamic public treasury in operation in South Africa. This is also the opinion of the Muslim Judicial Council (SA) Fatwa Committee, based in the Western Cape. See Muslim Judicial Council (SA) Fatwa Committee 'MJC position on Succession Law and Related matters' (2017) document on file with the author of this thesis. This Hanafee school does not recognise public treasury beneficiaries.
- 203 There is a minority opinion that the doctrine would apply to surviving spouses as well. See Al Subaa'ee M *Sharh Al Qaanoon Al Ahwaal Al Shakhshiyah* 3 ed (2000) vol 2, part 3, 107.
- 204 See Al Subaa'ee M *Sharh Al Qaanoon Al Ahwaal Al Shakhshiyah* 3 ed (2000) vol 2, part 3, 107.

add up to less than one unit. An example of where the doctrine of return finds application would be where X dies leaving behind an intestate estate of R400 000.00. She also leaves behind a widower and daughter as the only intestate beneficiaries. The widower would inherit $1/4$,²⁰⁵ and the daughter would inherit $1/2 = 2/4$.²⁰⁶ The daughter would also inherit the remainder of $1/4$ in her capacity as the only return beneficiary in this example. The daughter would inherit $3/4 \times R400\ 000.00 = R300\ 000.00$. The widower would inherit $1/4 \times R400\ 000.00 = R100\ 000.00$. It is interesting to note that the female in this example inherits three times more than the male.

Distant kindred beneficiaries are fourth in line to inherit from the intestate estate in terms of both schools.²⁰⁷ They are those remaining persons who have consanguinity ties with the deceased but who are neither sharer beneficiaries nor residuary beneficiaries.²⁰⁸ Both schools are of the opinion that distant kindred beneficiaries may inherit.²⁰⁹ Cognate grandchildren are examples of distant kindred beneficiaries. It should be emphasised here that surviving spouses (male or female) do not exclude distant kindred beneficiaries from inheriting as such in terms of the two schools.

The Shaafi'ee school is of the opinion that distant kindred beneficiaries must inherit by way of representation (ahl al tanzeel). The doctrine of increase and doctrine of return would apply to distant kindred beneficiaries only if it would have been applicable to those predeceased intestate beneficiaries whom they represent. They are of the opinion that the unequal

205 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 12 where it states '[i]n that which your wives leave, your share is a half if they have no child; but if they leave a child, you get a fourth of that which they leave after payment of legacies that they may have bequeathed or debts...'

206 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states '...if (there are) only daughters, two or more, their share is two thirds of the inheritance; if only one, her share is half...'

207 The Shaafi'ee school is of the opinion that return beneficiaries and distant kindred beneficiaries would inherit only in the event where there is no properly functioning Islamic public treasury in operation. There is currently no Islamic public treasury in operation in South Africa. This is also the opinion of the Muslim Judicial Council (SA) based in the Western Cape. See Muslim Judicial Council (SA) Fatwa Committee 'MJC Position on Succession Law and Related Matters' (2017) document on file with the author of this thesis.

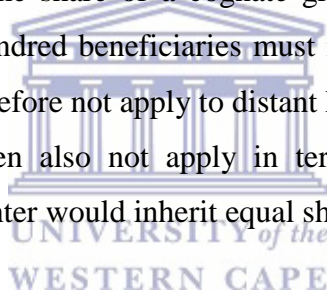
208 See Al Fawzaan S *Al Tahqeeqaat Al Marḍiyyah Fee Al Mabaahith Al Farḍiyyah* (1999) 263–264; N Al Ghaamidee *Al Khulaashah Fee 'Ilm Al Faraaid* (1426 H) 532–546; M Al Khin & M Al Bughaa *Al Fiqh Al Manhajee 'Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 390 for detailed discussion of distant kindred beneficiaries.

209 See Al Fawzaan S *Al Tahqeeqaat Al Marḍiyyah Fee Al Mabaahith Al Farḍiyyah* (1999) 263-264; Al Ghaamidee N *Al Khulaashah Fee 'Ilm Al Faraaid* (1426 H) 532-546; Al Subaa'ee M *Sharḥ Al Qaanoon Al Ahwaal Al Shakhshiyah* 3 ed (2000) vol 2, part 3, 52 & 115; Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee 'Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 390 for detailed discussion of distant kindred beneficiaries.

distribution of shares should apply to distant kindred beneficiaries with limited exceptions.²¹⁰ A cognate grandson would inherit double the share of a cognate granddaughter.

It is interesting to note that the Ḥanbalee school is also of the opinion that distant kindred beneficiaries must inherit by way of representation. They are of the opinion that the unequal distribution of shares should not apply to these beneficiaries.²¹¹ A cognate grandson and cognate granddaughter would inherit equal shares in terms of this opinion.

The Ḥanafee school is of the opinion that distant kindred beneficiaries must inherit similarly to the way in which residuary beneficiaries inherit (ahl al quraabah). The doctrine of increase and doctrine of return (according to this school) would then not apply to distant kindred beneficiaries as they do not apply to residuary beneficiaries. They are also of the opinion that the unequal distribution of shares must apply to distant kindred beneficiaries.²¹² A cognate grandson would inherit double the share of a cognate granddaughter. There is a minority opinion stating that all distant kindred beneficiaries must inherit collectively (ahl al rahim). The rules of exclusion would therefore not apply to distant kindred beneficiaries. The unequal distribution of shares would then also not apply in terms of this school.²¹³ A cognate grandson and cognate granddaughter would inherit equal shares in terms of this opinion.



2.6.7 Position of females within the law of intestate succession

The position of females within the Islamic law of succession has been much debated on. President Beji Caid Essebsi of Tunisia recently made an announcement that they are planning to introduce legislation that grants equal inheritance rights to Muslim males and females. The announcement was made on 13 August 2017. This was the same day that Women's Day was celebrated in Tunisia.²¹⁴ There has been much opposition concerning the announcement.

210 See Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee 'Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 390-396; Al Ghaamidee N *Al Khulaasah Fee 'Ilm Al Faraaid* (1426 H) 547-572; Al Subaa'ee M *Sharḥ Al Qaanoon Al Aḥwaal Al Shakhshiyah* 3 ed (2000) vol 2, part 3, 123-124.

211 See Al Ghaamidee N *Al Khulaasah Fee 'Ilm Al Faraaid* (1426 H) 547; Al Subaa'ee M *Sharḥ Al Qaanoon Al Aḥwaal Al Shakhshiyah* 3 ed (2000) vol 2, part 3, 123-124.

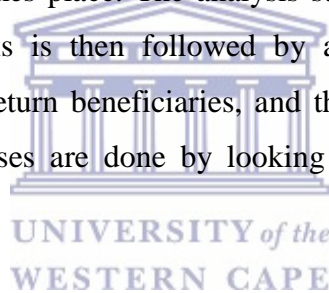
212 See Al Ghaamidee N *Al Khulaasah Fee 'Ilm Al Faraaid* (1426 H) 573-581; Al Subaa'ee M *Sharḥ Al Qaanoon Al Aḥwaal Al Shakhshiyah* 3 ed (2000) vol 2, part 3, 124-125.

213 See Al Ghaamidee N *Al Khulaasah Fee 'Ilm Al Faraaid* (1426 H) 547; Al Subaa'ee M *Sharḥ Al Qaanoon Al Aḥwaal Al Shakhshiyah* 3 ed (2000) vol 2, part 3, 123.

214 See Nadhif A 'Tunisian President Calls for Gender Equality in Inheritance Law' available at <http://www.al-monitor.com/pulse/originals/2017/08/equality-in-inheritance-raises-controversy-in-tunisia.html> (accessed 25 October 2017). See also Al Arabiya 'First in Muslim World, Tunisian President Seeks Equal Inheritance for Women' available at <http://english.alarabiya.net/en/News/north->

Many Islamic jurists have opposed what has been stated in the announcement as it goes against Islamic law.²¹⁵ A further analysis on the application of the law of succession in Tunisia is beyond the scope of this thesis. There is a contemporary Syrian jurist who is of the opinion that the intestate succession shares represent upper and lower limits.²¹⁶ He is of the opinion that a son and daughter would inherit equal shares where, for example, X dies leaving behind a son and two daughters as the only intestate beneficiaries. This theory is not discussed any further in this chapter as it is beyond the scope of the research.²¹⁷ It is mentioned here for the sake of completeness.

The following sections analyse the position of females within various categories of intestate beneficiaries as found within the Shaafi'ee and Ḥanafee schools. The four categories that are looked at are: sharer beneficiaries, residuary beneficiaries, return beneficiaries, and distant kindred beneficiaries. It is within the above categories of intestate beneficiaries where an unequal distribution of shares takes place. The analysis starts by looking at the position of female sharer beneficiaries. This is then followed by analysing the position of female residuary beneficiaries, female return beneficiaries, and then finally female distant kindred beneficiaries. The various analyses are done by looking at a number of situations found within these four categories.



The position of female sharer beneficiaries within the law of intestate succession is quite complex. There are situations where female sharer beneficiaries indirectly inherit more favourably than their male counterparts. There are also situations where female sharer beneficiaries and their male counterparts inherit equal shares. There are further situations where female sharer beneficiaries inherit less favourably than their male counterparts. The first situation that is looked at is where a female sharer beneficiary indirectly inherits more favourably than her male counterpart.

[africa/2017/08/13/Unprecedented-in-Mulsim-world-Tunisian-president-seeks-equal-inheritance-for-women.html](http://www.dailynewsegypt.com/2017/08/13/Unprecedented-in-Mulsim-world-Tunisian-president-seeks-equal-inheritance-for-women.html) (accessed 25 October 2017).

- 215 See Daily News Egypt 'Al-Azhar Rejects Calls for Inheritance Equality between Men and Women following Tunisian Initiative' available at <https://dailynewsegypt.com/2017/08/21/al-azhar-rejects-calls-inheritance-equality-men-women-following-tunisian-initiative/> (accessed 25 October 2017).
- 216 His name is Muhammad Shahrur. He was a former professor at the Faculty of Engineering in Damascus, Syria. See Shahrur M *The Qur'an, Morality and Critical Reason - The Essential Muhammad Shahrur* (2009) XX. See also Shahrur M *The Qur'an, Morality and Critical Reason - The Essential Muhammad Shahrur* (2009) 238.
- 217 See Shahrur M *The Qur'an, Morality and Critical Reason - The Essential Muhammad Shahrur* (2009) 234-259 for a full discussion on this theory.

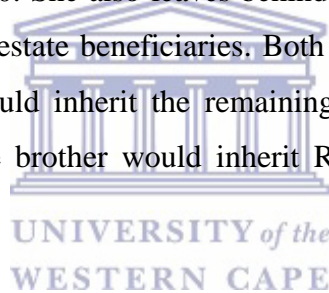
This would apply, for example, where X dies leaving behind an intestate estate of R240 000.00. She also leaves behind a full sister, a widower, and a mother as the only intestate beneficiaries. The full sister would inherit $1/2$,²¹⁸ the widower would inherit $1/2$,²¹⁹ and the mother would inherit $1/3$.²²⁰ The lowest common denominator would be six. The three shares would be $1/2 = 3/6$ for the full sister, $1/3 = 2/6$ for the mother, and $1/2 = 3/6$ for the widower. The total adds up to $8/6$. The doctrine of increase would apply in this example.²²¹ The doctrine of increase finds application when the sum of the fractional shares of the inheriting sharer beneficiaries adds up to more than one unit. The common denominator of all the fractional shares is increased to the same value as the sum of all the numerators. Application of the doctrine of increase would mean that the new lowest common denominator in this example would be eight. The modified shares would be $3/8$ for the widower, $2/8$ for the mother, and $3/8$ for the full sister. The widower would inherit $3/8 \times R240\ 000.00 = R90\ 000.00$, the mother would inherit $2/8 \times R240\ 000.00 = R60\ 000.00$, and the full sister would inherit $3/8 \times R240\ 000.00 = R90\ 000.00$.

The same example is now looked at, save for the full sister being substituted by a full brother. The widower would inherit $1/2$,²²² the mother would inherit $1/3$,²²³ and the full brother would inherit the residue.²²⁴ The lowest common denominator would be six. The widower would

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- 218 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 176 where it states that '[t]hey ask you for a legal verdict. Say: "Allah directs (thus) about Al-Kalalah (those who leave neither descendants nor ascendants as heirs). If it is a man that dies, leaving a sister, but no child, she shall have half the inheritance...'
- 219 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 12 where it states '[i]n that which your wives leave, your share is a half if they have no child; but if they leave a child, you get a fourth of that which they leave after payment of legacies that they may have bequeathed or debts.'
- 220 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states '... [f]or parents, a sixth share of inheritance to each if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased left brothers or (sisters), the mother has a sixth...'
- 221 See Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 346-352; and Al Subaa'ee M *Sharh Al Qaanoon Al Ahwaaal Al Shakhshiyah* 3 ed (2000) vol 2, part 3, 103-106.
- 222 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 12 where it states '[i]n that which your wives leave, your share is a half if they have no child; but if they leave a child, you get a fourth of that which they leave after payment of legacies that they may have bequeathed or debts.'
- 223 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states '... [f]or parents, a sixth share of inheritance to each if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased left brothers or (sisters), the mother has a sixth...'
- 224 See Khan MM *The Translation of the Meanings of Sahih Al Bukhari* 2004 (724) vol 8, 477 where it states that '[t]he Prophet said, "Give the Fara'id (the shares of the inheritance that are prescribed in the Qur'an) to those who are entitled to receive it. Then whatever remains, should be given to the closest male relative of the deceased."'

inherit $1/2 = 3/6$, the mother would inherit $1/3 = 2/6$, and the full brother would inherit the remainder, which would be $1/6$. The total adds up to $6/6$. The doctrine of increase would not apply in this example. The widower would inherit $3/6 \times R240\,000.00 = R120\,000.00$, the mother would inherit $2/6 \times R240\,000.00 = R80\,000.00$, and the full brother would inherit the remainder which would be $1/6 \times R240\,000.00 = R40\,000.00$. The R90 000.00 that would be inherited by the full sister is clearly more than the R40 000.00 that would be inherited by a full brother. A full sister would indirectly inherit more than double that which a full brother would inherit. It could be argued that the full brother is indirectly being discriminated against. It should be noted that indirect unfair discrimination on the basis of sex is prohibited in terms of the Constitution of South Africa.²²⁵

The second situation that is looked at is where a female sharer beneficiary and her male counterpart inherit equal shares. This would apply, for example, where X dies leaving behind an intestate estate of R600 000.00. She also leaves behind a uterine sister, a uterine brother, and a full brother as the only intestate beneficiaries. Both uterine siblings would inherit $1/6$ each,²²⁶ and the full brother would inherit the remaining $4/6$.²²⁷ The uterine sister would inherit R100 000.00, the uterine brother would inherit R100 000.00, and the full brother would inherit R400 000.00.



The third situation that is looked at is where a female sharer beneficiary inherits less favourably than her male counterpart. This would apply, for example, where X leaves behind an intestate estate of R600 000.00. She also leaves behind a mother and a father as the only

225 See s 9(3) of the Constitution of the Republic of South Africa, 1996 where it states that '[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'

226 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 12 where it states '... If the man or woman whose inheritance is in question has left neither ascendants nor descendants, but has left a brother or a sister, each one of the two gets a sixth; but if more than two, they share in a third; after payment of legacies he (or she) may have bequeathed or debts, so that no loss is caused (to anyone). This is a Commandment from Allah; and Allah is Ever All-Knowing, Most-Forbearing.'

227 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 176 where it states '[t]hey ask you for a legal verdict. Say: "Allah directs (thus) about Al-Kalalah (those who leave neither descendants nor ascendants as heirs). If it is a man that dies, leaving a sister, but no child, she shall have half the inheritance. If (such a deceased was) a woman, who left no child, her brother takes her inheritance...'

intestate beneficiaries. The mother would inherit 1/3,²²⁸ and the father would inherit the residue of 2/3.²²⁹ The mother would inherit R200 000.00, and the father would inherit the remaining R400 000.00.²³⁰ The father inherits as a residuary beneficiary in this example and not as a sharer beneficiary. It could be argued that the mother is being unfairly discriminated against. It should be noted that unfair discrimination on the basis of sex is prohibited in terms of the Constitution of South Africa.²³¹

The position of female residuary beneficiaries within the law of intestate succession is also quite complex. There are situations where female residuary beneficiaries inherit more favourably and to the exclusion of all other male intestate beneficiaries present. There are also situations where female residuary beneficiaries and their male counterparts inherit equal shares. Furthermore, there are situations where female residuary beneficiaries inherit less favourably than their male counterparts. There are also situations where male residuary beneficiaries inherit to the exclusion of their female counterparts.

The first situation that is looked at is where a female residuary beneficiary inherits more favourably and to the exclusion of all other male intestate beneficiaries present. This would apply, for example, where X dies leaving behind an intestate estate of R100 000.00. He also leaves behind a daughter, a full sister, and a consanguine brother as the only intestate

228 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states '... [f]or parents, a sixth share of inheritance to each if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased left brothers or (sisters), the mother has a sixth. (The distribution in all cases is) after the payment of legacies he may have bequeathed or debts...'

229 See Khan MM *The Translation of the Meanings of Sahih Al Bukhari* 2004 (724) vol 8, 477 where it states that '[t]he Prophet said, "Give the Fara'id (the shares of the inheritance that are prescribed in the Qur'an) to those who are entitled to receive it. Then whatever remains, should be given to the closest male relative of the deceased."'

230 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states '... [f]or parents, a sixth share of inheritance to each if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased left brothers or (sisters), the mother has a sixth. (The distribution in all cases is) after the payment of legacies he may have bequeathed or debts...' See also Khan MM *The Translation of the Meanings of Sahih Al Bukhari* 2004 (724) vol 8, 477 where it states that '[t]he Prophet said, "Give the Fara'id (the shares of the inheritance that are prescribed in the Qur'an) to those who are entitled to receive it. Then whatever remains, should be given to the closest male relative of the deceased."'

231 See s 9(3) of the Constitution of the Republic of South Africa, 1996 where it states that '[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'

beneficiaries. The daughter would inherit $1/2$,²³² and the full sister would inherit the remaining $1/2$.²³³ The daughter would inherit R50 000.00, and the full sister would inherit the remaining R50 000.00. The consanguine brother would not inherit at all as he is totally excluded by the full sister.²³⁴

The second situation that is looked at is where a female residuary beneficiary and her male counterpart inherit equal shares. This would apply, for example, where X dies leaving behind an intestate estate of R600 000.00. She also leaves behind a widower, a mother, a uterine brother, a uterine sister, a full brother, and a full sister as the only intestate beneficiaries. The widower would inherit $1/2 = 3/6$,²³⁵ and the mother would inherit $1/6$.²³⁶ The widower would inherit R300 000.00 and the mother would inherit R100 000.00. The position of the siblings in the above scenario is complicated.²³⁷ The Shaafi'ee school is of the opinion that the uterine brother, the uterine sister, the full sister, and full brother must all equally share the $1/3$. Each of the four siblings would then inherit R50 000.00.²³⁸ The Ḥanafee school is of the opinion

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- 232 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states 'Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females; if (there are) only daughters, two or more, their share is two thirds of the inheritance; if only one, her share is half...'
- 233 See Khan MM *The Translation of the Meanings of Sahih Al Bukhari* 2004 (728) vol 8, 480 where it states that 'Abu Musa was asked regarding (the inheritance of) a daughter, a son's daughter, and a sister. He said, "The daughter will take one-half and the sister will take one-half. If you go to Ibn Mas'ud, he will tell you the same." Ibn Mas'ud was asked and was told of Abu Musa's verdict. Ibn Mas'ud then said, "If I give the same verdict, I would stray and would not be of the rightly-guided. The verdict I will give in this case, will be the same as the Prophet did, i.e. one-half is for the daughter, and one-sixth for the son's daughter, i.e. both shares make two-thirds of the total property; and the rest is for the sister." Afterwards we came to Abu Musa and informed him of Ibn Mas'ud's verdict, whereupon he said, "So, do not ask me for verdicts, as long as this learned man is among you"'
- 234 See M Al Khin & M Al Bughaa *M Al Fiqh Al Manhajee 'Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 298-304; Al Subaa'ee *M Sharh Al Qaanoon Al Ahwaaal Al Shakhshiyah* 3 ed (2000) vol 2, part 3, 85-89 for a discussion on residuary beneficiaries.
- 235 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 12 where it states '[i]n that which your wives leave, your share is a half if they have no child; but if they leave a child, you get a fourth of that which they leave after payment of legacies that they may have bequeathed or debts...'
- 236 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states '... [f]or parents, a sixth share of inheritance to each if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased left brothers or (sisters), the mother has a sixth. (The distribution in all cases is) after the payment of legacies he may have bequeathed or debts...'
- 237 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 12 where it states '...[i]f the man or woman whose inheritance is in question has left neither ascendants nor descendants, but has left a brother or a sister, each one of the two gets a sixth; but if more than two, they share in a third; after payment of legacies he (or she) may have bequeathed or debts, so that no loss is caused (to anyone). This is a Commandment from Allah; and Allah is Ever All-Knowing, Most-Forbearing.'
- 238 The opinion of the Shaafi'ee school is based on independent reasoning (ijtihad). This question is referred to as the mushtarikah case as the one third is shared between the various classes of siblings. See

that the uterine brother and uterine sister must equally share the 1/3 to the exclusion of the full siblings.²³⁹ Each of the uterine siblings would then inherit R100 000.00.

The third situation that is looked at is where a female residuary beneficiary inherits less favourably than her male counterpart. This would apply, for example, where X dies leaving behind an intestate estate of R600 000.00. He also leaves behind a son and a daughter as the only intestate beneficiaries. The son would inherit double the share of the daughter.²⁴⁰ The daughter would inherit R200 000.00 and the son would inherit R400 000.00. The rationale behind the above distribution has been discussed at the beginning of this chapter (2.1). The constitutionality of this situation is looked at in Chapter Seven (7.4 and 7.5).

The fourth situation that is looked at is where a female residuary beneficiary is totally excluded from inheriting whereas her male counterpart inherits. This would apply, for example, where X dies leaving behind an intestate estate of R500 000.00. She also leaves behind a son of a full brother and a daughter of a full brother as the only intestate beneficiaries. The son of the full brother would inherit the complete intestate estate to the exclusion of the daughter of the full brother.²⁴¹ The son of the full brother would inherit R500 000.00 and the daughter of the full brother would not inherit. The daughter of the full brother would not inherit as she is totally excluded by the son of the full brother. This would be an example of total disinheritance. The daughter of a full brother would be an example of a distant kindred beneficiary and would inherit if there are no 'more entitled' intestate beneficiaries present.

The position of female return beneficiaries within the law of intestate succession is also quite complex. There are situations where female return beneficiaries would inherit more favourably and to the exclusion of all other male intestate beneficiaries present. There are

Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee 'Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 400-401.

239 See Al Fawzaan S *Al Tahqeeqaat Al Marḍiyyah Fil Mabaahith Al Farḍiyyah* (1999) 132-133.

240 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states 'Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females...'

241 See Khan MM *The Translation of the Meanings of Sahih Al Bukhari* 2004 (724) vol 8, 477 where it states that '[t]he Prophet said, "Give the Fara'id (the shares of the inheritance that are prescribed in the Qur'an) to those who are entitled to receive it. Then whatever remains, should be given to the closest male relative of the deceased.'" See also M Al Khin & M Al Bughaa M *Al Fiqh Al Manhajee 'Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 298-304; and Al Subaa'ee M *Sharḥ Al Qaanoon Al Ahwaaal Al Shakhshiyyah* 3 ed (2000) vol 2, part 3, 85-89.

also situations where female return beneficiaries and their male counterparts would inherit equal shares. There are further situations where female return beneficiaries and their male counterparts would inherit equal shares.²⁴²

The first situation that is looked at is where a female return beneficiary inherits to the exclusion of all other male intestate beneficiaries present. This would apply, for example, where X dies leaving behind an intestate estate of R300 000.00. She also leaves behind a mother, a cognate grandson and two sons of a full sister as the only intestate beneficiaries. The mother would inherit $1/3 = R100\ 000.00$ as a sharer beneficiary,²⁴³ and she would also inherit the remaining $2/3 = R200\ 000.00$ as a return beneficiary.²⁴⁴ The cognate grandson and two sons of the full sisters would be totally excluded from inheriting by the mother. All males in this example are totally excluded by the presence of the female.

The second situation that is looked at is where a female return beneficiary and her male counterpart inherit equal shares.²⁴⁵ This would apply, for example, where X dies leaving behind an intestate estate of R600 000.00. She also leaves behind a uterine brother and a uterine sister as the only intestate beneficiaries. Both the uterine brother and uterine sister would each inherit $1/6 = R100\ 000.00$ as sharer beneficiaries.²⁴⁶ They would also equally share the remaining R400 000.00 as return beneficiaries. Both the uterine brother and sister would therefore inherit R300 000.00 each.

242 See N Al Ghaamidee *Al Khulaaṣah Fee 'Ilm Al Faraaid* (1426 H) 547; Al Subaa'ee *M Sharḥ Al Qaanoon Al Ahḥwaal Al Shakhshiyah* 3ed (2000) vol 2, part 3, 123-124.

243 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states '... [f]or parents, a sixth share of inheritance to each if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased left brothers or (sisters), the mother has a sixth. (The distribution in all cases is) after the payment of legacies he may have bequeathed or debts...'

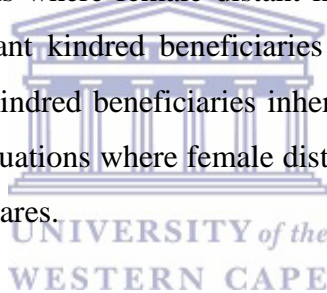
244 See Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 367-376; See Al Subaa'ee *M Sharḥ Al Qaanoon Al Ahḥwaal Al Shakhshiyah* 3 ed (2000) vol 2, part 3, 107-112.

245 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 12 where it states '[i]f the man or woman whose inheritance is in question has left neither ascendants nor descendants, but has left a brother or a sister, each one of the two gets a sixth; but if more than two, they share in a third...'

246 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 12 where it states '[i]f the man or woman whose inheritance is in question has left neither ascendants nor descendants, but has left a brother or a sister, each one of the two gets a sixth; but if more than two, they share in a third...' See Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 367-376; See Al Subaa'ee *M Sharḥ Al Qaanoon Al Ahḥwaal Al Shakhshiyah* 3 ed (2000) vol 2, part 3, 107-112.

The third situation that is looked at is where a female return beneficiary and her male counterpart indirectly inherit equal shares. This would apply, for example, where X dies leaving behind an intestate estate of R300 000.00. She also leaves behind a mother as the only intestate beneficiary. The mother would inherit $1/3 = R100\ 000.00$ as a sharer beneficiary,²⁴⁷ and the remaining $2/3 = R200\ 000.00$ as a return beneficiary. The same example is now looked at save for the mother being substituted with her male counterpart. The father would inherit the complete $3/3 = R300\ 000.00$ but as a residuary beneficiary. He would not inherit as a sharer beneficiary and return beneficiary. The inheritance that he would inherit is, however, the same. There are no examples where a female return beneficiary inherits more than her male counterpart.²⁴⁸

The position of female distant kindred beneficiaries within the two schools is quite complicated. The position of female distant kindred beneficiaries within the Shaafi'ee school is as follows. There are situations where female distant kindred beneficiaries inherit to the exclusion of all other male distant kindred beneficiaries who are present. There are also situations where female distant kindred beneficiaries inherit less favourably than their male counterparts. There are further situations where female distant kindred beneficiaries and their male counterparts inherit equal shares.



The first situation that is looked at within the Shaafi'ee school is where a female distant kindred beneficiary inherits to the exclusion of all other male distant kindred beneficiaries present. This would apply, for example, where X dies leaving behind an intestate estate of R500 000.00. She also leaves behind a cognate granddaughter and a cognate great-grandson as the only intestate beneficiaries. The cognate granddaughter would inherit the intestate estate of R500 000.00 to the exclusion of the cognate great-grandson.²⁴⁹ It can clearly be seen that this example favours the female.

247 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states '... [f]or parents, a sixth share of inheritance to each if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased left brothers or (sisters), the mother has a sixth...'

248 See Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 367-376; See Al Subaa'ee M *Sharh Al Qaanoon Al Ahwaal Al Shakhshiyah* 3 ed (2000) vol 2, part 3, 107-112.

249 See Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee 'Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 390-396; Al Ghaamidee N *Al Khulaasah Fee 'Ilm Al Faraaid* (1426 H) 547-572; and Al Subaa'ee M *Sharh Al Qaanoon Al Ahwaal Al Shakhshiyah* 3 ed (2000) vol 2, part 3, 123-124.

The second situation that is looked at within the Shaafi'ee school is where a female distant kindred beneficiary inherits less favourably than her male counterpart. This would apply, for example, where X dies leaving behind an intestate estate of R600 000.00. He also leaves behind a cognate granddaughter and a cognate grandson as the only intestate beneficiaries. The cognate grandson would inherit double the share of the cognate granddaughter.²⁵⁰ The cognate granddaughter would inherit R200 000.00 and the cognate grandson would inherit R400 000.00. The constitutionality of this type of a scenario is looked at in Chapter Seven.

The third situation that is looked at within the Shaafi'ee school is where a female distant kindred beneficiary and her male counterpart inherit equal shares. This would apply, for example, where X dies leaving behind an intestate estate of R600 000.00. She also leaves behind a daughter of a uterine sister and a son of the same uterine sister as the only intestate beneficiaries. Both children of the uterine sister would inherit equal shares. The uterine brother would inherit R300 000.00 and the uterine sister would inherit R300 000.00.²⁵¹

The position of female distant kindred beneficiaries within the Ḥanafee school is also complicated. There are situations where female distant kindred beneficiaries inherit to the exclusion of all other male distant kindred beneficiaries present. There are also situations where female distant kindred beneficiaries inherit less favourably than their male counterparts.

The first situation that is looked at within the Ḥanafee school is where a female distant kindred beneficiary inherits to the exclusion of all other male distant kindred beneficiaries present. This would apply, for example, where X dies leaving behind an intestate estate of R500 000.00. She also leaves behind a cognate granddaughter and a cognate great-grandson as the only intestate beneficiaries.²⁵² The cognate granddaughter would inherit the complete R500 000.00 to the exclusion of the cognate great-grandson. The female in this example clearly inherits more than the male.

250 See Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee 'Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 390-396; Al Ghaamidee N *Al Khulaasah Fee 'Ilm Al Faraaid* (1426 H) 547-572; and Al Subaa'ee M *Sharḥ Al Qaanoon Al Aḥwaal Al Shakhshiyah* 3 ed (2000) vol 2, part 3, 123-124.

251 See Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee 'Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 390-396; Al Ghaamidee N *Al Khulaasah Fee 'Ilm Al Faraaid* (1426 H) 547-572; and Al Subaa'ee M *Sharḥ Al Qaanoon Al Aḥwaal Al Shakhshiyah* 3 ed (2000) vol 2, part 3, 123-124.

252 See N Al Ghaamidee *Al Khulaasah Fee 'Ilm Al Faraaid* (1426 H) 573-581; and Al Subaa'ee M *Sharḥ Al Qaanoon Al Aḥwaal Al Shakhshiyah* 3 ed (2000) vol 2, part 3, 124-125.

The second situation that is looked at within the Ḥanafee School is where a female distant kindred beneficiary inherits less favourably than her male counterpart. This would apply, for example, where X dies leaving behind an intestate estate of R600 000.00. She also leaves behind a cognate granddaughter and a cognate grandson as the only intestate beneficiaries. The cognate grandson would inherit double the share of the cognate granddaughter.²⁵³ The cognate granddaughter would inherit R200 000.00, and the cognate grandson would inherit R400 000.00.

There are no examples of cases within the Ḥanafee School where the male and female distant kindred beneficiaries inherit equally. This should also be looked at in terms of the rationale behind Islamic law distribution. The constitutionality of this position is looked at in Chapter Seven.

2.7 Conclusion

One of the questions posed at the beginning of this chapter was whether the unequal distribution of shares in favour of males is consistent throughout the Islamic law of intestate succession. The analysis has shown that there are situations where females are in a less favourable position. The findings have also shown that there are situations where females and their male counterparts inherit equally. It has further shown that there are situations where females inherit more favourably both directly and indirectly. There are also examples where males and females inherit equally. The question of the constitutionality of the Islamic law of intestate succession is quite an important one. This question is answered in Chapter Seven (7.4 and 7.5) of this thesis. This chapter has also shown that there are some differences between the Islamic law of succession and administration of estates in terms of the Shaafi'ee and Ḥanafee schools of law. This would be important to note when a testator or testatrix bequeaths his or her estate in terms of the Islamic law of intestate succession.

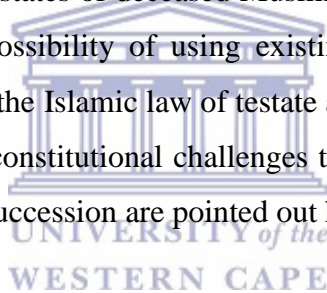
253 See N Al Ghaamidee *Al Khulaaṣah Fee 'Ilm Al Faraaiḍ* (1426 H) 573-581; and Al Subaa'ee M *Sharḥ Al Qaanoon Al Ahwaal Al Shakhshiyah* 3 ed (2000) vol 2, part 3, 124-125.

CHAPTER THREE
THE SOUTH AFRICAN LAW OF SUCCESSION AND ADMINISTRATION OF
ESTATES

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3.1 Introduction

South Africa was subject to approximately 350 years of colonialism. It was during this time that apartheid dominated the South African legal system. The Cape was colonised by Dutch settlers on 6 April 1652. It remained under Dutch rule until 1795 when it fell to British occupation. It reverted back to Dutch rule in 1803. It then later reverted back to British occupation in 1806. Many of the Dutch settlers then moved north in order to avoid living under British rule.¹ Apartheid was introduced into South Africa in 1948 and South Africa became a Republic on 31 May 1961.² The above-mentioned situation led to South Africa reflecting the values of the colonial and apartheid rules. South Africa currently has a mixed legal system. The sources of South African law include customary law, case law, and legislation.³ The South African law of succession and administration of deceased estates in its current form incorporates all of these sources. This chapter looks at the South African law of succession and administration of estates in general terms. It looks at how the South African law of succession applies to the estates of deceased Muslims who lived in South Africa prior to dying. It also looks at the possibility of using existing South African law provisions governing wills in order to apply the Islamic law of testate and intestate succession within the South African context. Possible constitutional challenges to discriminatory provisions found within the South African law of succession are pointed out herein.



There are two branches of succession law within the South African context. These branches are referred to hereafter as the common law and the customary law.⁴ There are two versions of the customary law. These versions are referred to as the living and the official versions. The living version of customary law refers to the actual customs and practices of the indigenous community.⁵ The official version of customary law refers to the law that is applied by the court and other state institutions.⁶ The laws referred to in this chapter are in

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- 1 See African Charter on Human and Peoples' Rights - Chapter 2 'Introduction to the South African Legal System' available at <http://www.justice.gov.za/policy/african%20charter/afr-charter02.html> (accessed 14 October 2017). See also Du Toit F 'Roman-Dutch Law in Modern South African Succession Law' *Ars Aequi* (2014) 278.
 - 2 See South African History Online 'A history of Apartheid in South Africa' available at <http://www.sahistory.org.za/article/history-apartheid-south-africa> (accessed 2 January 2018).
 - 3 See Rautenbach C 'Introduction' in Juanita J & Rautenbach C *The Law of Succession in South Africa* (2009) 1-3.
 - 4 Paleker M 'Intestate Succession' in Juanita J & Rautenbach C *The Law of Succession in South Africa* (2009) 17.
 - 5 Himonga C & Nhlapo (eds) *T African Customary Law in South Africa - Post Apartheid and Living Law Perspectives* (2015) 27.
 - 6 Himonga C & Nhlapo (eds) *T African Customary Law in South Africa - Post Apartheid and Living Law Perspectives* (2015) 33.

terms of the official version except where stated otherwise.⁷ The rule of male primogeniture was originally found within the official version of customary law. An example of how the rule applies could be seen where X dies, leaving behind a son and a daughter as the only relatives. The son would inherit to the exclusion of the daughter. The rule was found to be unconstitutional in *Bhe and Others v Khayelitsha Magistrate and Others (Bhe)*.⁸ It was declared invalid to the extent that it excludes or hinders women and extramarital children from inheriting property.⁹ The judgment was decided by the Constitutional Court on 15 October 2004. The question as to whether the Islamic law of intestate succession would follow the same fate is investigated in Chapter Seven (7.5) of this thesis. The *Bhe* judgment led to the enactment of the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.¹⁰ The Act states that there is nothing preventing persons subject to customary law from disposing assets in terms of a will.¹¹ This is an innovation in terms of customary law as freedom of testation was initially restricted to a large extent.¹²

A testator or testatrix can technically bequeath his or her estate in terms of the rule of primogeniture. There is no clear answer as to whether such a provision in a will would pass constitutional muster.¹³ A similar question could be asked concerning the Islamic law of intestate succession. A testator or testatrix can also technically bequeath his or her estate in terms of the Islamic law of intestate succession. The constitutionality of the Islamic law of intestate succession is critically looked at in Chapter Seven (7.4 and 7.5) of this thesis. The current position in South Africa is that the common and the customary laws of succession are subject to almost identical laws with minor variations.¹⁴ Some of these variations are

7 Paleker M 'Intestate Succession' in Juanita J & Rautenbach C *The Law of Succession in South Africa* (2009) 17-18.

8 *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA 580 (CC) 80-84.

9 *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA 580 (CC) 80-84.

10 Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.

11 Section 4(3) of the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 where it states that '[n]othing in this section is to be construed as preventing any person subject to customary law, other than the woman referred to in subsection (1), from disposing assets in terms of a will.'

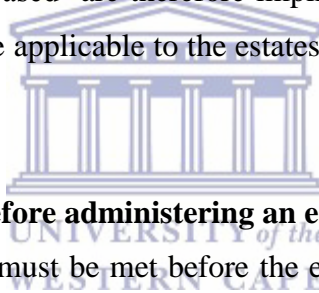
12 Rautenbach C 'A Few Comments on the (Possible) Revival of the Customary Law Rule of Male Primogeniture: Can the Common Law Principle of Freedom of Testation Come to its Rescue?' in De Waal M and Paleker M *South African Law of Succession and Trusts* (2014) 152.

13 Rautenbach C 'A Few Comments on the (Possible) Revival of the Customary Law Rule of Male Primogeniture: Can the Common Law Principle of Freedom of Testation Come to its Rescue?' in De Waal M and Paleker M *South African Law of Succession and Trusts* (2014) 152-157 for a discussion on this issue.

14 See Reform of the Customary Law of Succession of Related Matters Act 11 of 2009.

compared to each other where relevant. The provisions referred to in this chapter are in terms of the common law and customary law except where stated otherwise.

An overview of the South African law of succession and administration of estates is looked at by way of introduction. This is followed by looking at the conditions before administering an estate. The claims against the gross estate are then looked at. This is then followed by a more detailed analysis of liability claims, testate succession claims, and then intestate succession claims. The position of females within the South African law of intestate succession is looked at in more detail thereafter. The findings of this chapter are then briefly examined and concluding remarks are made. The scenario that is looked at throughout this chapter is where a South African Muslim (male or female) dies, leaving behind an estate located wholly within the South African borders. This chapter looks at examples of how the estate could devolve. The testate and intestate beneficiaries referred to in this chapter are in relation to the deceased. The words 'of the deceased' are therefore implied but not repeated hereafter. The laws referred to in this chapter are applicable to the estates of both male and female deceased except where stated otherwise.



3.2 Conditions to be met before administering an estate

There are certain conditions that must be met before the estate of a person can be deemed a deceased estate and thus subject to liquidation and distribution in terms of the law of succession and administration of estates.¹⁵ The person in question must have died or been declared dead by a court of law. It is at this moment that the estate falls open.¹⁶ It is also at this moment that the rights of beneficiaries to the estate become vested.¹⁷ The moment is referred to hereafter as *dies cedit*. The exception to this rule would be where a court pronounces a presumption of death and orders that the estate must be divided.¹⁸ The beneficiaries must be alive at the time of *dies cedit*. The exception to this would be where a testator or testatrix made provision in a will for benefiting persons who are born later, or where statutory substitution finds application.¹⁹ A beneficiary that was conceived but not yet

15 Rautenbach C 'Introduction' in Juanita J & Rautenbach C *The Law of Succession in South Africa* (2009) 12-16.

16 This moment is also referred to as *delatio*. See De Waal MJ & Schoeman-Malan *Law of Succession* 5 ed (2015) 9.

17 This refers to those beneficiaries who are neither totally excluded nor disqualified.

18 De Waal MJ & Schoeman-Malan *Law of Succession* 5 ed (2015) 11-12; and Rautenbach C 'Introduction' in Juanita J & Rautenbach C *The Law of Succession in South Africa* (2009) 12-16.

19 See De Waal MJ & Schoeman-Malan *Law of Succession* 5 ed (2015) 11-12; and Rautenbach C 'Introduction' in Juanita J & Rautenbach C *The Law of Succession in South Africa* (2009) 12-16.

born at the time of dies cedit would inherit the benefit only if subsequently born alive.²⁰ Persons who die simultaneously are not able to mutually inherit from one another. The courts would accept that they died simultaneously unless the contrary is proven.²¹ An example of this would be where a husband and wife die in a car accident and the moment of death of either party cannot be confirmed.²²

The term 'beneficiaries' is used in this chapter to refer to those persons who are appointed as such in terms of a will (testate beneficiaries) and/or those persons who are related to the deceased in terms of one or more intestate succession ties (intestate beneficiaries). The moment at which a vested right becomes enforceable is referred to hereafter as 'dies venit'.²³ It should be noted that the two moments could coincide but that dies cedit can never precede dies venit.²⁴ An example of an instance where dies cedit precedes dies venit would be where X bequeaths 1/3 of his testate estate in favour of his full brother (testate beneficiary) subject to the condition that he passes all his final year law modules with distinctions. Dies cedit would take place at the moment of the deceased having died but dies venit would take place the moment the full brother obtains distinctions for all his final year modules. Dies cedit and dies venit would always coincide in terms of the law of intestate succession (intestate beneficiaries). The examples referred to hereafter are where dies cedit and dies venit coincide unless expressly stated otherwise.²⁵

3.3 Claims against the gross estate

The term 'estate' is used in this chapter to refer to the assets and liabilities of a deceased person. If the assets in an estate exceed the liabilities then it would be deemed solvent. If the liabilities in an estate exceed the assets it would be deemed insolvent.²⁶ The term 'gross estate' is used in this chapter to refer the sum of assets within an estate. The term 'net estate'

20 See De Waal MJ & Schoeman-Malan *Law of Succession* 5 ed (2015) 11-12; and Rautenbach C 'Introduction' in Juanita J & Rautenbach C *The Law of Succession in South Africa* (2009) 12-16.

21 De Waal MJ & Schoeman-Malan *Law of Succession* 5 ed (2015) 12.

22 It should be noted that Islamic law has a similar position in this regard and includes a presumption of simultaneous death. See Chapter Two (2.6.2) of this thesis for a discussion on this issue.

23 De Waal MJ & Schoeman-Malan *Law of Succession* 5 ed (2015) 9.

24 The beneficiaries to an estate would have an expectation to a benefit (but not a vested right) prior to the estate falling open. See De Waal MJ & Schoeman-Malan *Law of Succession* 5 ed (2015) 11-12. See also Rautenbach C 'Introduction' in Juanita J & Rautenbach C *The Law of Succession in South Africa* (2009) 12-16.

25 See De Waal MJ & Schoemann-Malan MC *Laws of Succession* 5 ed (2015) 7-11 for a detailed discussion on this issue.

26 Rautenbach C 'Administration of Estates' in Juanita J & Rautenbach C *The Law of Succession in South Africa* (2009) 241.

is used in this chapter to refer to the remainder of the gross estate, after all liability claims have been deducted. The net estate is further divided into the ‘testate estate’ and ‘intestate estate’. The testate estate is distributed in terms of the law of testate succession and the intestate estate is distributed in terms of the law of intestate succession. It is quite interesting to note that the proceeds of a pension fund do not form part of the assets in the estate of the deceased member. The laws of testate and intestate succession therefore do not apply to it.²⁷ It should be noted that there is a contemporary opinion within Islamic law stating that the proceeds of a pension fund is not subject to the Islamic law of intestate succession, as it is not regarded as an asset in the deceased estate.²⁸ This would be the more preferred view within the South African context. I agree with this opinion.

Assets within the estate include movable assets, immovable assets, as well as claims in favour of the estate. The claims against these assets (in order of priority) are referred to hereafter as liability claims, testate succession claims, and intestate succession claims.²⁹ The estate must first be liquidated by settling the liability claims. The remainder (if any) must then be distributed in terms of the law of testate and intestate succession.

There are three matrimonial property systems that govern marriages in terms of the Matrimonial Property Act 88 of 1984. These systems could be referred to as in community of property,³⁰ out of community of property without accrual,³¹ and out of community of

27 See s 37C of the Pension Funds Act 24 of 1956 where it states that ‘[n]otwithstanding anything to the contrary contained in any law or in the rules of a registered fund, any benefit payable by such a fund upon the death of a member, shall, subject to a pledge in accordance with section 19 (5) (b) (i) and subject to the provisions of section 37A (3) and 37D, not form part of the assets in the estate of such a member’.

28 See Mufti Muhammad Taqi Usmani ‘Entitlement to Death Benefits Payable by Pension Funds’ where he states that the grants given to the dependants of a deceased in terms of the Pension Funds Act 24 of 1956 are not subject to the rules of inheritance. Available at http://www.muftitaqiusmani.com/index.php?option=com_content&view=article&id=54:entitlement-to-death-benefits-payable-by-pension-funds&catid=10:economics&Itemid=17 (accessed 11 January 2015). See also s 37 C of the Pension Funds Act 24 of 1956 that specifically states that the death benefits in favour of the dependants of the deceased does not form part of a deceased’s estate.

29 See De Waal MJ & Schoemann-Malan MC *Law of Succession* 4 ed (2008) 3.

30 One joint estate comes into existence upon conclusion of a marriage in community of property. The joint estate would consist of all the assets and liabilities that both spouses had prior to and after entering into the marriage. There are however a few exceptions to this rule. See Skelton A & Carnelley (eds) *M Family law in South Africa* (2011) 72-73. See s 1 of the Matrimonial Property Act that states that the term joint estate ‘means the joint estate of a husband and a wife married in community of property.’ There are a number of South African Muslim theologians (‘ulamaa) who are of the opinion that a marriage in community of property is not permissible in terms of Islamic law. See Omar MS *The Islamic Law of Succession and its Application in South Africa* (1988) 11; and Muslim Judicial Council (SA) Fatwa Committee ‘MJC Position on Succession Law and Related Matters’ (2017) document on file with

property with accrual.³² This chapter focuses on the estates of deceased persons who were married out of community of property without accrual.³³ Two separate estates are retained after entering into a marriage that is out of community of property without accrual. The individual estates of each spouse would consist of the assets and liabilities obtained before and after entering into the marriage.³⁴ It is possible that an asset within the deceased estate is subject to a lifelong usufruct in favour of an individual.³⁵ Ownership of the asset would pass to the beneficiaries thereof in terms of the law of succession. The right to use, enjoy, and take the fruits of the asset would be suspended until the usufruct comes to an end. An example of a lifelong usufruct would be where a husband registers a lifelong usufruct of his family home in favour of his wife.³⁶

3.4 Liability claims

Liability claims are the first claims that must be deducted from the gross estate and they take priority over testate and intestate succession claims.³⁷ Liability claims can be broadly divided into administration costs and debt. Administration costs include funeral costs, maintenance,

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- the author of this thesis. See also Jamiatul Ulama Kwazulu Natal 'Resolving a Community of Property Estate?' <https://jamiat.org.za/resolving-a-community-of-property-estate/> (accessed 21 October 2017).
- 31 Two separate estates are retained after entering into a marriage that is out of community of property with the accrual system. The individual estates of each spouse would consist of the assets and liabilities obtained before and after conclusion of the marriage. See Skelton A & Carnelley M (eds) *Family Law in South Africa* (2011) 72-73.
- 32 S 2 of the Matrimonial Property Act 88 of 1984 that states that '[e]very marriage out of community of property in terms of an antenuptial contract by which community of property and community of profit and loss are excluded, which is entered into after the commencement of this Act, is subject to the accrual system specified in this chapter, except in so far as that system is expressly excluded by the antenuptial contract.' Section 4 of the Matrimonial Property Act 88 of 1984 states that '[t]he accrual of the estate of a spouse is the amount by which the net value of his estate at the dissolution of his marriage exceeds the net value of his estate at the commencement of that marriage.' The spouse who has shown a smaller accrual estate can share in the growth of the accrual estate of the other spouse upon death or divorce. See Skelton A & Carnelley M (eds) *Family Law in South Africa* (2011) 72-73.
- 33 Two separate estates are retained after entering into a marriage that is out of community of property without accrual. The individual estates of each spouse would consist of the assets and liabilities obtained before and after entering into the marriage. Skelton A & Carnelley M (eds) *Family Law in South Africa* (2011) 73.
- 34 Skelton A & Carnelley M (eds) *Family Law in South Africa* (2011) 73.
- 35 A usufruct can be defined 'as a personal servitude giving the usufructuary a limited real right to use another person's property and to take its fruits with the obligation to return the property eventually to the owner, retaining its essential quality' See De Waal MJ & Schoemann-Malan MC *Law of Succession* 5 ed (2015) 164.
- 36 See De Waal MJ & Schoemann-Malan MC *Law of Succession* 5 ed (2015) 163-166 for a detailed discussion on this issue. It should be noted that the Maalikee school of law is of the opinion that it is permissible to register a lifelong usufruct in favour of another person in the form of a gift. The registration is not permitted in terms of the Shaafi'ee and Hanafee schools of law. See Al Zuhaylee W *Al Fiqh Al Islaamee Wa Adillatuhoo* 3 ed (1989) vol 5, 8-11. The Muslim Judicial Council based in the Western Cape encourages the registration of a usufruct in instances where it is deemed necessary. Muslim Judicial Council (SA) Fatwa Committee 'MJC Position on Succession Law and Related Matters' (2017) document on file with the author of this thesis.
- 37 See De Waal MJ & Schoemann-Malan MC *Law of Succession* 4 ed (2008) 3.

estate duty, bank charges, transfer fees, executor's fees, and Master's fees. There is an order of priority between these claims in the event where the liability claims exceed the value of the gross estate. This discussion, however, is beyond the scope of this chapter and is not discussed any further herein.

3.4.1 Administration costs

Administration costs include funeral costs, maintenance, estate duty, bank charges, transfer fees, executor's fees, and Master's fees. The funeral costs are restricted to those expenses reasonably needed in order to prepare the deceased for burial as well as the burial proceedings. The average Christian funeral cost in South Africa is approximately R12 000.00.³⁸ This would include the cost of a tombstone.³⁹ Maintenance claims include those claims by certain dependants that are in need of it. This would include claims by certain inheriting intestate beneficiaries (if any). It is possible that an intestate beneficiary could claim maintenance as well as inherit in terms of the law of testate and/or intestate succession.

There are certain requirements that must be met in order to successfully claim future maintenance from a deceased estate.⁴⁰ South African Muslim women have gone to courts to claim future maintenance against the estates of their deceased husbands. They have also claimed intestate succession claims in terms of South African law provisions.⁴¹ These cases are critically discussed in Chapter Four of this thesis. Estate duty, bank charges, transfer fees, executor's fees, and Master's fees are all claims against the deceased estate and are required to be settled in order to successfully administer the estate within the South African context.⁴²

38 Funeral-cover-quotes.co.za 'Apart from Cultural Beliefs, Cost is a Big Factor in Deciding on Cremation' available at <http://funeral-cover-quotes.co.za/326/costs/cremation-high-funeral-cost> (accessed 27 June 2016).

39 See s 4(a) of Estate Duty Act 4 of 1955 where it states that 'The net value of any estate shall be determined by making the following deductions from the total value of all property included therein in accordance with section 3, that is to say - (a) so much of the funeral, tombstone and death-bed expenses of the deceased which the Commissioner considers to be fair and reasonable...' It is interesting to note that a claim for a tombstone would not be permitted in terms of Islamic law as it is not deemed as a necessary expense. The average cost of a Muslim funeral is approximately between R2 500.00 and R5 000.00. See Compare Guru 'Funerals in South Africa and what they Cost - Muslim Burial Culture' available at <http://compareguru.co.za/news/funeral-customs-in-sa-and-what-they-cost/> (accessed 03 January 2017). See also Hartley U 'The Cost of Death' available at <http://www.vocfm.co.za/the-cost-of-death/> (accessed 18 June 2016).

40 Jamneck J 'Freedom of Testation' in Juanita J & Rautenbach C *The Law of Succession in South Africa* (2009) 122-124.

41 See *Daniels v Campbell NO & Others* 2004 (5) SA 331 (CC); and *Hassam v Jacobs NO & Others* 2009 (5) SA 572 (CC).

42 See De Waal MJ & Schoeman-Malan MC *Law of Succession* 5 ed (2015) 244. It should be noted that these claims are not expressly stated in the classical texts governing the laws of succession and

3.4.2 Debt

Debt claims can be divided into secured debt and unsecured debt. A mortgage bond is an example of a secured debt whereas an unpaid dower is an example of an unsecured debt. It should be noted that a debt prescribes (is cancelled) upon the elapse of a certain amount of time.⁴³

3.5 Testate succession claims

Testate succession claims must be settled from the remainder of the gross estate (if any) after the liability claims have been deducted.⁴⁴ The remainder is referred to hereafter as the net estate.⁴⁵ The net estate is further divided into the testate estate and intestate estate. The testate estate is governed by the law of testate succession and the intestate estate is governed by the law of intestate succession. South African law recognises the common law principle of freedom of testation.⁴⁶ A testator or testatrix may appoint beneficiaries to inherit from his or her estate in terms of a valid will. There are few limitations that apply to this freedom.⁴⁷ A person appointed to inherit in terms of a will is referred to hereafter as a testate beneficiary. This section looks at the appointments in terms of a will. There are also other ways in which the appointment can be done. An explanation of these ways is beyond the scope of this thesis.⁴⁸ The person appointing a testate beneficiary is referred to as a testator (male) or

administration of estates in terms of Islamic law. They are, however, incidental costs that are required to be settled in order to successfully liquidate and distribute an estate in terms of South African law. See Chapter Two (2.4.1) of this thesis for a discussion on this issue.

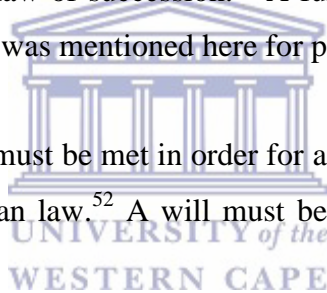
- 43 See s 11 of the Prescription Act 68 of 1969 where it states that '[p]eriods of prescription of debts. - The periods of prescription of debts shall be the following:(a) thirty years in respect of - (i) any debt secured by mortgage bond; (ii) any judgment debt; (iii) any debt in respect of any taxation imposed or levied by or under any law; (iv) any debt owed to the State in respect of any share of the profits, royalties or any similar consideration payable in respect of the right to mine minerals or other substances; (b) fifteen years in respect of any debt owed to the State and arising out of an advance or loan of money or a sale or lease of land by the State to the debtor, unless a longer period applies in respect of the debt in question in terms of paragraph (a) ; (c) six years in respect of a debt arising from a bill of exchange or other negotiable instrument or from a notarial contract, unless a longer period applies in respect of the debt in question in terms of paragraph (a) or (b); (d) save where an Act of Parliament provides otherwise, three years in respect of any other debt.' It should be noted that debts do not prescribe in terms of Islamic law. A debtor would always be liable in terms of Islamic law to pay his or her creditor. This issue of debt is further discussed in Chapter Four of this thesis.
- 44 A Muslim person is only permitted to bequeath up to 1/3 of the net estate. A person dies partly intestate when he or she bequeaths less than 1/3 of the net estate in a will. The remaining 2/3 must be distributed in terms of the laws of intestate succession. The complete 3/3 of the net estate is distributed in terms of the laws of intestate succession when there is no will.
- 45 See De Waal MJ & Schoemann-Malan MC *Law of Succession* 5 ed (2015) 245.
- 46 Jamneck J 'Freedom of testation' Juanita J & Rautenbach C *The Law of Succession in South Africa* (2009) 115.
- 47 Jamneck J 'Freedom of testation' Juanita J & Rautenbach C *The Law of Succession in South Africa* (2009) 115.
- 48 See De Waal MJ & Schoemann-Malan MC *Law of Succession* 4 ed (2008) 3 for further discussion on this issue.

testatrix (female). A testate beneficiary would inherit only if he or she is neither prevented from inheriting due to a disqualification nor prevented from inheriting due to a total exclusion. These persons are referred to hereafter as ‘inheriting’ testate beneficiaries.⁴⁹ The laws of testate disqualifications and testate exclusions are discussed in the forthcoming sections of this chapter.

3.5.1 The law of wills

A Muslim testator or testatrix may technically bequeath his or her estate in terms of the Islamic law of succession in terms of the principle of freedom of testation. This could be referred to as an Islamic will.⁵⁰ The practical application of the Islamic law of succession by means of an Islamic will is looked at in Chapter Five of this thesis and the constitutionality of the Islamic will is looked at in Chapter Seven (7.4). A Muslim testator or testatrix may also technically bequeath his or her estate to a trust and stipulate that the trustees must administer the trust in terms of the Islamic law of succession.⁵¹ A further discussion on this method is beyond the scope of this thesis. It was mentioned here for purposes of completeness.

There are certain conditions that must be met in order for a will (including an Islamic will) to be valid in terms of South African law.⁵² A will must be executed in writing.⁵³ It must be



49 See Paleker M ‘Capacity to inherit’ in Juanita J & Rautenbach C *The Law of Succession in South Africa* (2009) 99-114.

50 An example of an Islamic will can be found in Appendix One of this thesis. See also Rautenbach C, Gokul R, Bernhard BN, and Goolam MM ‘Law of Succession’ in Rautenbach C & Goolam NMI *Introduction to Legal Pluralism in South Africa. Part II Religious Legal Systems* (2002) 107-108.

51 Rautenbach C, Gokul R, Bernhard BN & Goolam MMI ‘Law of Succession’ in Rautenbach C & Goolam NMI *Introduction to Legal Pluralism in South Africa. Part II Religious Legal Systems* (2002) 108.

52 See s 2(1)(a) of the Wills Act 7 of 1953 states that ‘no will executed on or after the first day of January, 1954, shall be valid unless - (i) the will is signed at the end thereof by the testator or by some other person in his presence and by his direction; and (ii) such signature is made by the testator or by such other person or is acknowledged by the testator and, if made by such other person, also by such other person, in the presence of two or more competent witnesses present at the same time; and (iii) such witnesses attest and sign the will in the presence of the testator and of each other and, if the will is signed by such other person, in the presence also of such other person; and (iv) if the will consists of more than one page, each page other than the page on which it ends, is also so signed by the testator or by such other person anywhere on the page; and (v) if the will is signed by the testator by the making of a mark or by some other person in the presence and by the direction of the testator, a commissioner of oaths certifies that he has satisfied himself as to the identity of the testator and that the will so signed is the will of the testator, and each page of the will, excluding the page on which his certificate appears, is also signed, anywhere on the page, by the commissioner of oaths who so certifies: Provided that - (aa) the will is signed in the presence of the commissioner of oaths in terms of subparagraphs (i), (iii) and (iv) and the certificate concerned is made as soon as possible after the will has been so signed; and (bb) if the testator dies after the will has been signed in terms of subparagraphs (i), (iii) and (iv) but before the commissioner of oaths has made the certificate concerned, the commissioner of oaths shall as soon as possible thereafter make or complete his certificate, and sign each page of the will, excluding the page on which his certificate appears...’

signed by the testator or testatrix aged 16 years or older and must be signed in the presence of at least two competent witnesses.⁵⁴ The witnesses must be 14 years or older and must sign the will in the presence of the testator or testatrix and each other.⁵⁵ It is interesting to note that a minor acquires full capacity to act subsequent to marriage.⁵⁶ This could be as young as 12 years of age for a female and 14 years of age for a male.⁵⁷ A female as young as 12 years of age and a male as young as 14 years of age may therefore technically execute a will and witness a will in terms of this rule. The unequal treatment regarding the age requirements of males and females raises the question of discrimination based on sex. A further discussion on this point is beyond the scope of this thesis.

3.5.2 Testate succession disqualifications and substitution

A testate succession disqualification prevents a testate beneficiary from inheriting due to the presence of certain attributes. The two types of testate succession disqualifications that are looked at in this chapter are divorce and unworthiness.⁵⁸ A testate beneficiary who is a previous spouse of the testator or testatrix would be disqualified from inheriting as such if their marriage was dissolved less than three months prior to the testator or testatrix having died. The disqualification would cease to exist upon completion of three months. The exception to the rule would be where it appears from the will that the testator or testatrix intended to benefit his or her previous spouse notwithstanding the divorce. The disqualification is in terms of s 2B of the Wills Act.⁵⁹ The wording of s 2B refers to spouses

53 Section 2(1) of the Wills Act 7 of 1953 where states that a will is ‘a codicil and any other testamentary writing...’

54 Section 2(1) of the Wills Act 7 of 1953. See also s 4 of the Wills Act 7 of 1953 where it states that ‘[e]very person of the age of sixteen years or more may make a will unless at the time of making the will he is mentally incapable of appreciating the nature and effect of his act, and the burden of proof that he was mentally incapable at that time shall rest on the person alleging the same.’

55 Wood-Bodley M ‘Formalities for a Will’ in Juanita J & Rautenbach C *The Law of Succession in South Africa* (2009) 66. See also s 1 of the Wills Act 7 of 1953 where it states that a competent witness ‘means a person of the age of fourteen years or over who at the time he witnesses a will is not incompetent to give evidence in a court of law...’ It should be noted that these requirements would also satisfy the Islamic law provisions in this regard. See Chapter Two (2.5.1) for the rules concerning Islamic law wills.

56 This is in terms of the common law. See Skelton A & Carnelley M (eds) *Family Law in South Africa* (2014) 58.

57 Kruger H & Skelton A (eds) *The Law of Persons in South Africa* (2012) 129. See also s 12(2)(a) of the Children’s Act 38 of 2005.

58 See Paleker M ‘Capacity to Inherit’ in *The Law of Succession in South Africa* (2009) 105-112 for a discussion on this issue.

59 See s 2B of Wills Act 7 of 1953 which states that ‘[i]f any person dies within three months after his marriage was dissolved by a divorce or annulment by a competent court and that person executed a will before the date of such dissolution, that will shall be implemented in the same manner as it would have been implemented if his previous spouse had died before the date of the dissolution concerned, unless it appears from the will that the testator intended to benefit his previous spouse notwithstanding the dissolution of his marriage.’ It should be noted that a revocable divorce as applied in terms of Islamic law

who are subject to divorce or annulment. It is not clear as to whether an Islamic revocable divorce or Islamic irrevocable divorce is applicable to this section. The section was added to the Wills Act in 1992.⁶⁰ It is more likely that the intended purpose of the section was for persons who were married in terms of the Marriage Act 25 of 1961.⁶¹ A testate beneficiary would be disqualified from inheriting as such in the event where he or she is deemed to be an unworthy person. Examples of unworthiness would be where a testator or testatrix killed the testator or testatrix unlawfully, where he or she destroyed the will of the testator or testatrix, where he or she forged the will of the testator or testatrix, where he or she caused the testator or testatrix to lead an immoral life, and where he or she had been enriched through a crime.⁶²

A testate benefit that was bequeathed to a disqualified testate beneficiary would vest in a substitute if substitution was provided for in terms of the will, if common law accrual applies, or where substitution applies by operation of law. The benefit would devolve in terms of the law of intestate succession if none of the three instances of substitution applies.

The first instance would be where substitution was provided for in terms of the will. This could also be referred to as testamentary substitution.⁶³ An example of testamentary substitution would be where X bequeaths 1/3 of her net estate in favour of Y (instituted beneficiary). She further states that the 1/3 must be given to Z (substituted beneficiary) in the event where Y is disqualified from inheriting the benefit. Z would inherit the benefit if Y is disqualified.

The second instance would be where substitution is provided for in terms of statute. This could be referred to as statutory substitution. Statutory substitution would apply in the event

has the opposite effect. A spouse who is subject to a revocable divorce would inherit as long as the waiting period has not elapsed. This period is approximately three lunar months. The divorce becomes final upon conclusion of the waiting period. See Chapter Two (2.5.2) for a further discussion on this issue.

60 Law of Succession Amendment Act 43 of 1992.

61 See Marriage Act 25 of 1961.

62 See Paleker M 'Capacity to Inherit' in *The Law of Succession in South Africa* (2009) 105-112. It is quite interesting to note that a person who unlawfully killed the testator or testatrix would not be disqualified from inheriting as a testate beneficiary in terms of the Shaafi'ee school law. He or she would be disqualified from inheriting as a testate beneficiary in terms of the Hanafee school of law. See Chapter Two (2.5.2) of this thesis for a further discussion on this issue. It would be advisable to follow the Hanafee school of law within the South African context as the application of the Shaafi'ee opinion could be quite problematic as it is in direct conflict with South African law 'de bloedige hand neemt geen erf' principle. See Paleker M 'Capacity to Inherit' in *The Law of Succession in South Africa* (2009) 105.

63 De Waal MJ & Schoeman-Malan *Law of Succession* 5 ed (2015) 143-144.

where testamentary substitution does not find application.⁶⁴ An example of statutory substitution would be where X bequeaths 1/3 of his net estate in favour of his Christian son (Y) who subsequently kills him. The descendants of Y (if any) would substitute Y as he would be disqualified because he killed the testator.⁶⁵

The third instance in this regard would be where substitution is provided for in terms of the common law. This is also referred to as common law accrual. Common law accrual can only operate in the event where no provision was made for substitution by the testator or testatrix and statutory substitution does not apply. Common law accrual is the right of a co-legatee or a co-heir to inherit the benefit that his or her co-legatee or co-heir cannot or does not wish to inherit.⁶⁶ An example of common law accrual would be where X leaves behind a full sister and a full brother as the only relatives. X bequeaths 1/3 of the net estate in favour of her full brother and her full sister. The full sister predeceases X. The full brother would inherit the complete 1/3 in terms of common law accrual.⁶⁷

A testate benefit that would have been due to a disqualified testate beneficiary would devolve in terms of the law of intestate succession if none of the three instances of substitution finds application.⁶⁸ An example of this would be where X bequeaths 1/3 of her net estate in favour of her full brother. She leaves behind a son, a full brother, and a daughter of the full brother as the only relatives. Her full brother, however, unlawfully kills her. The 1/3 would devolve

64 See Van Der Linder A 'Content of Wills - Substitution, Usufruct, and Accrual' in Juanita J & Rautenbach C *The Law of Succession in South Africa* (2009) 153.

65 See s 2C(2) of the Wills Act 7 of 1953 which states that '[i]f a descendant of the testator, whether as a member of a class or otherwise, would have been entitled to a benefit in terms of the provisions of a will if he had been alive at the time of death of the testator, or had not been disqualified from inheriting, or had not after the testator's death renounced his right to receive such a benefit, the descendants of that descendant shall, subject to the provisions of subsection (1), per stirpes be entitled to the benefit, unless the context of the will otherwise indicates.' See also Van Der Linder A 'Content of Wills - Substitution, Usufruct, and Accrual' in Juanita J & Rautenbach C *The Law of Succession in South Africa* (2009) 153-166. It should be noted that statutory substitution does not apply in terms of the Islamic law of testate and intestate succession. The benefit due to a disqualified testate or intestate beneficiary would be redirected into the intestate estate and distributed in terms of the Islamic law of intestate succession.

66 See Van Der Linder A 'Content of Wills - Substitution, Usufruct, and Accrual' in Juanita J & Rautenbach C *The Law of Succession in South Africa* (2009) 164-165.

67 See Van Der Linder A 'Content of Wills - Substitution, Usufruct, and Accrual' in Juanita J & Rautenbach C *The Law of Succession in South Africa* (2009) 164-165.

68 See De Waal MJ & Schoemann-Malan MC *Laws of Succession* 4 ed (2008) 3.

in terms of the law of intestate succession. The son would inherit the complete 3/3 in terms of the law of intestate succession.⁶⁹ The daughter of the full brother would not substitute him.

3.5.3 Testate succession exclusions

A testate succession exclusion would prevent a testate beneficiary from inheriting due to the presence of one or more other persons. The exclusion could be partial or in full. There are no direct exclusions in terms of South African law. There are, however, indirect exclusions. An example of a testate succession exclusion would be where X dies leaving behind a net estate of R100 000.00 and a daughter and a full brother as his only relatives. He bequeaths the R100 000.00 in favour of his full brother. His minor daughter is not able to support herself and is in need of R20 000.00 maintenance and R10 000.00 for her education. The minor daughter would then partially exclude the full brother from inheriting the entire R100 000.00 and would only inherit R70 000.00. This could also be seen as an indirect limitation to the right to freedom of testation.⁷⁰

A surviving spouse would have a claim for future maintenance in terms of the Maintenance of Surviving Spouses Act 27 of 1990. S 2(1) of the Act states that '[i]f a marriage is dissolved by death after the commencement of this Act the survivor shall have a claim against the estate of the deceased spouse for the provision of his reasonable maintenance needs until his death or remarriage insofar as he is not able to provide therefore from his own means and earnings.'⁷¹ The section applies to Islamic law monogamous marriages as well as Islamic law

69 See s 1(1) of the Intestate Succession Act 81 of 1987 that states that '[i]f after the commencement of this Act a person (hereinafter referred to as the "deceased") dies intestate, either wholly or in part, and - ... (b) is survived by a descendant, but not by a spouse, such descendant shall inherit the intestate estate'

70 See Jamneck J 'Freedom of Testation' in Juanita J & Rautenbach C *The Law of Succession in South Africa* (2009) 122 where it is stated that 'maintenance and education of minor children remains an obligation on the estate and does not die with the testator.' It should be noted that Islamic law does not generally include a right to claim future maintenance from a deceased estate. Islamic law does however include a right to compulsory inheritance as an intestate beneficiary. The daughter in this example would have inherited 1/2 of the intestate estate in terms of Islamic law. She would inherit this share irrespective of being either destitute or affluent. See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that 'Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females; if (there are) only daughters, two or more, their share is two thirds of the inheritance; if only one, her share is half...'

71 See s 2(1) of the Maintenance of Surviving Spouses Act 27 of 1990 where it states that '[i]f a marriage is dissolved by death after the commencement of this Act the survivor shall have a claim against the estate of the deceased spouse or the provision of his reasonable maintenance needs until his death or remarriage in so far as he is not able to provide therefore from his own means and earnings.'

polygynous marriages.⁷² The case law development in this regard is looked at in Chapter Four (4.3.1 and 4.3.2) of this thesis.

3.5.4 Testate succession limitations

Testators have quite wide freedom of testation in terms of South African law.⁷³ The principle of freedom of testation is, however, limited to a certain extent. The courts will not enforce a condition in a will that is found to be *contra bona mores* (against public policy). An example of a condition that is against public policy would be where X bequeaths 1/3 of his net estate in favour of his unmarried full brother on condition that he never marries. The condition would be deemed *contra bona mores* and it would be regarded as if it had never been written.⁷⁴ Discriminatory conditions found in a will can be declared invalid on constitutional grounds.⁷⁵ Section 9(3) read with s 9(4) of the Constitution of South Africa has the effect of prohibiting unfair discrimination on a number of grounds which include sex, gender, religion, and birth.⁷⁶ The issue of discrimination is discussed in more detail in Chapter Seven (7.4 and 7.5) of this thesis where the constitutionality of the Islamic will and the Islamic law of intestate succession *per se* is investigated.

Testamentary power must be exercised by a testator or testatrix himself or herself. He or she may generally not delegate others to choose who his or her beneficiaries under his or her will should be.⁷⁷ The delegation of testamentary power would be invalid in a situation where the grantee thereof is given unlimited discretion. This could be referred to as a general power of appointment. An example of general power of appointment would be where X states in his

72 See *Daniels v Campbell NO & Others* 2004 (5) SA 331 (CC); and *Hassam v Jacobs NO & Others* 2008 (4) All SA 350 (C).

73 Jamneck J 'Freedom of Testation' in Juanita J & Rautenbach C *The Law of Succession in South Africa* (2009) 126.

74 Jamneck J 'Freedom of Testation' in Juanita J & Rautenbach C *The Law of Succession in South Africa* (2009) 117-118. Islamic law has a similar provision and the condition would also be deemed as if it had never been written. See Al Zuhaylee W *Al Fiqh Al Islaamee Wa Adillatuhoo* 3 ed (1989) vol 8, 24-25. It is interesting to note that the same example is found within both legal systems.

75 Jamneck J 'Freedom of Testation' in Juanita J & Rautenbach C *The Law of Succession in South Africa* (2009) 122-126. See also De Waal MJ & Schoemann-Malan MC *Laws of Succession* 4 ed (2008) 139.

76 See s 9 of the Constitution of Republic of South Africa, 1996 where it states that '... (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth 4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection. (3). National legislation must be enacted to prevent or prohibit unfair discrimination (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'

77 Jamneck J 'Freedom of Testation' in Juanita J & Rautenbach C *The Law of Succession in South Africa* (2009) 126.

will that the beneficiaries of his estate shall be decided by his daughter Y.⁷⁸ There are few exceptions where a testator or testatrix may delegate his or her testamentary power.⁷⁹ An example of an exception would be where a testator creates a charitable trust in his will and leaves it up to the executor to appoint beneficiaries in terms of the trust.⁸⁰

3.5.5 Testate succession adiation, repudiation, substitution and collation

Adiation within the context of testate succession is when a testate beneficiary accepts a benefit. A testate beneficiary would acquire an enforceable right to a benefit upon adiation.⁸¹ Adiation must, however, take place subsequent to dies cedit.⁸² There is a presumption in favour of adiation. The presumption would be rebutted through repudiation.⁸³ A repudiated testate benefit would vest in a substitute in certain instances. An example of this would be where X bequeaths 1/8 of his intestate estate in favour of his wife and 7/8 in favour of his son. The son renounces the testate benefit after X died. The 7/8 would be inherited by the widow as a statutory substitute in terms of s 2C(1) of the Wills Act 7 of 1953.⁸⁴

The principle of collation is applicable to the law of testate succession. The executor or executrix of a deceased estate must, under certain circumstances, take into account the benefits bestowed upon certain heirs by the deceased during his or her lifetime when distributing the assets in the deceased's estate.⁸⁵ The principle of collation is based on the assumption that the parent or grandparent intended that his or her assets must be equally

78 See De Waal MJ & Schoeman-Malan *Law of Succession* 5 ed (2015) 49.

79 See De Waal MJ & Schoeman-Malan *Laws of Succession* 5 ed (2015) 47-51.

80 Jamneck J 'Freedom of Testation' in Juanita J & Rautenbach C *The Law of Succession in South Africa* (2009) 127.

81 It should be noted that this is also the position in terms of Islamic law.

82 Rautenbach C 'Introduction' in Jamneck J & Rautenbach C *The Law of Succession in South Africa* (2009) 12-16.

83 See De Waal MJ & Schoeman-Malan MC *Law of Succession* 4 ed (2008) 193. The Shaafi'ee school requires express adiation whereas the Hanafee school accepts implied adiation. Non-adiation has no legal and binding effect in terms of Islamic law. The Hanafee school is of the opinion that adiation must be presumed in the event where a testate beneficiary survives the testator but dies before adiating. The Shaafi'ee school is of the opinion that the right to adiate would pass to the inheriting beneficiaries of the appointed testate beneficiary if he or she dies after dies cedit but before adiating the testate benefit. See Chapter Two (2.5.5) of this thesis for a discussion on this issue.

84 See s 2C(1) of the Wills Act 7 of 1953 which states that '[i]f any descendant of a testator excluding a minor or a mentally ill descendant, who, together with the surviving spouse of the testator, is entitled to a benefit in terms of a will renounces his right to receive such a benefit, such benefit shall vest in the surviving spouse.' See also *Moosa NO & Others v Harnaker and Others* 2017 (6) SA 425 (WCC) where this matter was discussed. It should be noted that the widow would not automatically inherit the renounced benefit in terms of Islamic law. There is nothing in terms of Islamic law that prevents the son from gifting the 7/8 in favour of the widow. The outcome would then effectively be the same in terms of the two legal systems.

85 See De Waal MJ & Schoeman-Malan *Law of Succession* 5 ed (2015) 204.

divided amongst his or her children and further descendants.⁸⁶ The principle of collation applies to heirs and not legatees.⁸⁷

An example of how the principle of collation applies would be where X dies leaving behind a testate estate of R50 000.00.⁸⁸ He bequeaths the entire net estate in favour of his son and daughter. X, however, gave his son R10 000.00 in order to start a business. The money was given two weeks prior to him dying. The son and daughter would then inherit R25 000.00 each if collation is not called for by the daughter. If the daughter does, however, call for collation to take place, then the R10 000.00 given to the son would be taken into account and added to the R50 000.00. The daughter would inherit R30 000.00 and the son would inherit R20 000.00 as he had already received R10 000.00 two weeks prior to the death of the testator.⁸⁹

3.6 Intestate succession claims

Intestate succession claims are settled from the remainder of the net estate after all testate succession claims have been deducted. The remainder is referred to hereafter as the intestate estate. Persons who are eligible to inherit from the intestate estate are referred to hereafter as intestate beneficiaries. An intestate beneficiary (in terms of this chapter) is a person who has one or more intestate succession ties to the deceased person. An intestate beneficiary would inherit only in the event that he or she is neither disqualified from inheriting due to the presence of an intestate disqualification nor totally excluded from inheriting due to the presence of an intestate exclusion.⁹⁰ Intestate beneficiaries who are neither disqualified nor totally excluded are referred to hereafter as ‘inheriting’ intestate beneficiaries. Inheriting intestate beneficiaries comprise both males and females and can be disinherited through

86 See De Waal MJ & Schoeman-Malan *Law of Succession* 5 ed (2015) 204.

87 An heir ‘is a beneficiary who inherits a testator’s entire estate, a portion thereof, or the residue thereof. An heir is distinguished from a legatee, who is a beneficiary who inherits a specific asset.’ See Rautenbach C ‘Introduction’ in Jamneck J & Rautenbach C *The Law of Succession in South Africa* (2009) 9.

88 See De Waal MJ & Schoeman-Malan MC *Law of Succession* 5 ed (2015) 204-209 for a discussion on the doctrine of collation.

89 See De Waal MJ & Schoeman-Malan MC *Law of Succession* 5 ed (2015) 204-209 for a discussion on the doctrine of collation. It should be noted that the principle of collation does not apply in terms of the Islamic law of succession. A testate beneficiary would always inherit the complete testate succession benefit even if he or she received a gift from the testator or testatrix prior to his or her death. See Chapter Two (2.5.5) of this thesis for a discussion on this issue.

90 See De Waal MJ & Schoeman-Malan MC in *Law of Succession* (2015) 115-124.

testacy.⁹¹ The shares of intestate beneficiaries are prescribed by law. The rules referred to in this chapter apply to the estates of both male and female deceased persons.

3.6.1 Intestate succession ties

The ties that are discussed in this section are affinity, consanguinity, adoption, surrogacy, acceptance, and union.⁹² A widow or widower is related to the deceased through affinity. A same sex domestic partner is deemed to be a spouse in terms of the Intestate Succession Act 81 of 1987 whereas a heterosexual domestic partner is not deemed to be a spouse for purposes of the legislation. This raises the question of discrimination.⁹³ A further discussion on this issue is beyond the scope of this thesis.⁹⁴ Some of the consequences of monogamous and polygynous Islamic law marriages have been recognised for purposes of the South African law of succession. A surviving spouse to a de facto monogamous Islamic law marriage was recognised as a spouse for purposes of the Intestate Succession Act 81 of 1987 in *Daniels v Campbell NO & Others* 2004 (5) SA 331 (CC). Surviving spouses to de facto polygynous marriages were recognised as surviving spouses for intestate purposes of the Intestate Succession Act 81 of 1987 in *Hassam v Jacobs NO & Others* 2009 (5) SA 572 (CC).⁹⁵ The facts and outcomes of these cases are critically discussed and compared to Islamic law provisions in Chapter Four (4.3.1 and 4.3.2) of this thesis.

A biological son is related to the deceased through consanguinity. This includes a child born from a marriage that was contracted in terms of Islamic law. Children born from Islamic law marriages do inherit for purposes of the Intestate Succession Act 81 of 1987. The children

91 Jamneck J 'Freedom of Testation' in Juanita J & Rautenbach C *The Law of Succession in South Africa* (2009) 122 where it states that a 'testator has complete freedom to disinherit his or her children.' This is different to Islamic law where disinheritance of inheriting intestate beneficiaries is not permitted unless the inheriting intestate beneficiaries consent thereto subsequent to the testator or testatrix having died. See Chapter Two (2.6) of this thesis for a discussion on this issue.

92 A child born as a result of surrogacy can inherit from his commissioned parents. See s 297(2) of the Children's Act 38 of 2005. A lawfully adopted child would have the capacity to inherit from his adoptive parents and vice versa. Their adoptive parents would be deemed his natural parents for all legal purposes. See Paleker M 'Intestate Succession' in Juanita J & Rautenbach C *The Law of Succession in South Africa* (2009) 22-23. See s 1(4)(e) and s 1(5) of the Intestate Succession Act 81 of 1987.

93 See *Volks v Robinson* 2005 (5) BCLR 446 (CC) where it was held that heterosexual domestic partners are not eligible to inherit in terms of the Intestate Succession Act 81 of 1987 in their capacities as surviving Spouses. It is quite interesting to note that in *Gory v Kolver* 2007 (4) SA 97 (CC) the court held that the Intestate Succession Act applies to same sex domestic partners. This was later confirmed in *Duplan v Loubser* 2015 ZAGPPHC 849. It should be noted that *Duplan v Loubser* was heard after the enactment of the Civil Union Act 17 of 2006.

94 It should be noted that Islamic law does not include adoption and surrogacy as intestate succession ties. See Chapter Two (2.6.1) of this thesis for a discussion on this issue.

95 See Intestate Succession Act 81 of 1987. See also *Daniels v Campbell NO & Others* 2004 (5) SA 331 (CC); and *Hassam v Jacobs NO & Others* 2009 (5) SA 572 (CC).

born from these marriages do not inherit as children born in wedlock but rather as children born out of wedlock.⁹⁶ This situation raises the question of discrimination based on marital status and birth and can be challenged on constitutional grounds.⁹⁷ A further discussion on this is beyond the scope of this chapter. An adopted child is deemed to be the child of his or her adoptive parents and vice versa for purposes of the Intestate Succession Act 81 of 1987.⁹⁸ A surrogate child is deemed to be the child of the commissioning parents in terms of s 297 of the Children's Act 38 of 2005.⁹⁹ The tie would be based upon the surrogacy agreement.¹⁰⁰ A

96 See s 1(2) of the Intestate Succession Act 81 of 1987 where it states that '[n]otwithstanding the provisions of any law or the common or customary law, but subject to the provisions of this Act and sections 40(3) and 297(1)(f) of the Children's Act, 2005 (Act No. 38 of 2005), having been born out of wedlock shall not affect the capacity of one blood relation to inherit the intestate estate of another blood relation.'

97 See s 9(3) of the Constitution of the Republic of South Africa, 1996 where it states that '[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'

98 See s 1(4) of the Intestate Succession Act 81 of 1987 where it states that '... (e) an adopted child shall be deemed - (i) to be a descendant of his adoptive parent or parents; (ii) not to be a descendant of his natural parent or parents, except in the case of a natural parent who is also the adoptive parent of that child or was, at the time of the adoption, married to the adoptive parent of the child'; and s 1(5) of the Intestate Succession Act 81 of 1987 where it states that '[i]f an adopted child in terms of subsection (4)(e) is deemed to be a descendant of his adoptive parent, or is deemed not to be a descendant of his natural parent, the adoptive parent concerned shall be deemed to be an ancestor of the child, or shall be deemed not to be an ancestor of the child, as the case may be.'; and s 20(2) of the Child Care Act 74 of 1983 where it states that '[a]n adopted child shall for all purposes whatever be deemed in law to be the legitimate child of the adoptive parent, as if he was born of that parent during the existence of a lawful marriage.' See also Paleker M 'Intestate Succession' in Juanita J & Rautenbach C *The Law of Succession in South Africa* (2009) 22. The consequences that flow from a South African law adoption are prohibited in terms of Islamic law. Adoptive parents may not legally replace biological parents in terms of Islamic law. See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (33) 4 where it states that '... [a]nd he has not made your adopted sons your [true] sons'. A person may however assist a child by being his or her caregiver. This is also recommended in terms of Islamic law. See Al Munajjid MS '10010: Adoption is of Two Types - Forbidden and Prescribed' <https://islamqa.info/en/10010> (accessed 28 October 2017).

99 A surrogate agreement is 'an agreement between a surrogate mother and a commissioning parent in which it is agreed that the surrogate mother will be artificially fertilised for the purpose of bearing a child for the commissioning parent and in which the surrogate mother undertakes to hand over such a child to the commissioning parent upon its birth, or within a reasonable time thereafter, with the intention that the child concerned becomes the legitimate child of the commissioning parent.' A commissioning parent is 'a person who enters into a surrogate motherhood agreement with a surrogate mother' See s 1 of the Children's Act 38 of 2005.

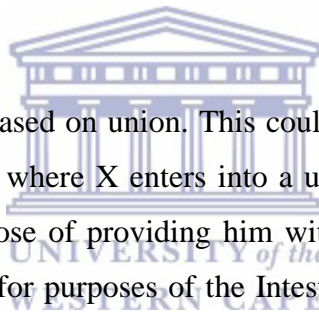
100 See s 297 of the Children's Act 38 of 2005 where it states that '(1) The effect of a valid surrogate motherhood agreement is that- (a) any child born of a surrogate mother in accordance with the agreement is for all purposes the child of the commissioning parent or parents from the moment of the birth of the child concerned; (b) the surrogate mother is obliged to hand the child over to the commissioning parent or parents as soon as is reasonably possible after the birth; (c) the surrogate mother or her husband, partner or relatives have no rights of parenthood or care of the child; (d) the surrogate mother or her husband, partner or relatives have no right of contact with the child unless provided for in the agreement between the parties; (e) subject to sections 292 and 293, the surrogate motherhood agreement may not be terminated after the artificial fertilisation of the surrogate mother has taken place; and (f) the child will

child conceived through artificial fertilisation is deemed to be the child of his or her birth mother in terms of s 40 of the Children's Act 38 of 2005. He or she would be able to inherit as an intestate beneficiary of his or her biological father and vice versa, only if the biological father was married to the biological mother prior to the artificial fertilisation procedure.¹⁰¹ The question as to whether an Islamic law marriage would satisfy the requirement of marriage is an important one. An example of this would be where a Muslim couple is married for a number of years in terms of Islamic law only. They later have difficulty conceiving a child and decide to attempt the artificial fertilisation procedure. It is not clear as to whether the Islamic law marriage would satisfy the requirement in terms of s 40 of the Children's Act.¹⁰² The different treatment between the biological parents raises the question of discrimination based on sex and marital status.¹⁰³ A further discussion is beyond the scope of this chapter.

have no claim for maintenance or of succession against the surrogate mother, her husband or partner or any of their relatives. (2) Any surrogate motherhood agreement that does not comply with the provisions of this Act is invalid and any child born as a result of any action taken in execution of such an arrangement is for all purposes deemed to be the child of the woman who gave birth to that child.' See also Paleker M 'Intestate Succession' in Juanita J & Rautenbach C *The Law of Succession in South Africa* (2009) 22. It should be noted that surrogacy as applied in South African law is not permitted in terms of Islamic law. See Al Munajjid MS '83799: Is it Permissible to Put the Sperm of the Husband and the Egg from the Wife in the Womb of the Second Wife?' available at <https://islamqa.info/en/83799> (accessed 28 October 2017).

- 101 See s 40 of the Children's Act 38 of 2005 that states that '(1) (a) Whenever the gamete or gametes of any person other than a married person or his or her spouse have been used with the consent of both such spouses for the artificial fertilisation of one spouse, any child born of that spouse as a result of such artificial fertilisation must for all purposes be regarded to be the child of those spouses as if the gamete or gametes of those spouses had been used for such artificial fertilisation. (b) For the purpose of paragraph (a) it must be presumed, until the contrary is proved, that both spouses have granted the relevant consent. (2) Subject to section 296, whenever the gamete or gametes of any person have been used for the artificial fertilisation of a woman, any child born of that woman as a result of such artificial fertilisation must for all purposes be regarded to be the child of that woman. (3) Subject to section 296, no right, responsibility, duty or obligation arises between a child born of a woman as a result of artificial fertilisation and any person whose gamete has or gametes have been used for such artificial fertilisation or the blood relations of that person, except when- (a) that person is the woman who gave birth to that child; or (b) that person was the husband of such woman at the time of such artificial fertilisation.' See also s 1(2) of the Intestate Succession Act 81 of 1987; Paleker M 'Intestate Succession' in Juanita J & Rautenbach C *The Law of Succession in South Africa* (2009) 22; and De Waal MJ & Schoemann-Malan MC *Laws of Succession* 4 ed (2008) 115-116.
- 102 See s 40 of the Children's Act 38 of 2005. See s 1(2) of the Intestate Succession Act 81 of 1987. See also Paleker M 'Intestate Succession' in Juanita J & Rautenbach C *The Law of Succession in South Africa* (2009) 22. See De Waal MJ & Schoemann-Malan MC *Laws of Succession* 4 ed (2008) 115-116.
- 103 It raises the question of discrimination based on sex as only the biological father would possibly be disqualified and not the biological mother. See s 9(3) of the Constitution of the Republic of South Africa, 1996 where it states that '[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'

Customary law recognises a tie based on acceptance.¹⁰⁴ This could be referred to as an acceptance tie. An example of where an acceptance tie applies to a person would be where X (who practices African culture) accepts a person (non-biological child) as his own child in accordance with customary law. The child would be deemed his descendant for intestate succession purposes.¹⁰⁵ This tie is not recognised in terms of common law. The different treatment raises the question of discrimination. It should be noted that Islamic law does not recognise an acceptance tie. It is not clear as to what the situation of a non-biological child would be in the event where he was accepted as a child in accordance with customary law by a deceased person who was Muslim and who practiced African culture. Would Islamic law take preference or customary law? An example of such a person would be Nkosi Zwelivelile Mandela. He is also known as Mandla Mandela and is the chief of the Mvezo Traditional Council. He is the grandson of the former president Nelson Mandela.¹⁰⁶ He has reverted to Islaam and has married a Muslim wife.¹⁰⁷ A further discussion on this is beyond the focus of this chapter.



Customary law recognises a tie based on union. This could be referred to as a union tie. An example of a union tie would be where X enters into a union with a woman in accordance with customary law for the purpose of providing him with children. The woman would be regarded as the descendant of X for purposes of the Intestate Succession Act 81 of 1987.¹⁰⁸ The same question raised concerning the acceptance tie could also be raised here regarding the union tie. It is highly unlikely that the cultural practice would be applied by a Muslim as it is contrary to Islamic law provisions regarding sexual relations. It should be noted that the

104 See s 1 of the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 that states that a descendant ‘means a person who is a descendant in terms of the Intestate Succession Act, and includes - (a) a person who is not a descendant in terms of the Intestate Succession Act, but who, during the lifetime of the deceased person, was accepted by the deceased person in accordance with customary law as his or her own child.’

105 See s 1 (a) of the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.

106 See Traditional Council ‘Mvezo Komkhlu’ available at <http://www.mvezotraditionalcouncil.org.za/the-chief> (accessed 20 October 2017).

107 See BBC News ‘Mandla Mandela’s Conversion to Islam Sparks South Africa: Disquiet’ available at <http://www.bbc.com/news/world-africa-35539541> (accessed on 20 October 2017).

108 See s 1 (b) read with 2 (b) of the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 that states that ‘a woman, other than the spouse of the deceased, with whom he had entered into a union in accordance with customary law for the purpose of providing children for his spouse's house must, if she survives him, be regarded as a descendant of the deceased’

intestate estate (if any) would devolve to the State in the event where there are no intestate beneficiaries present.¹⁰⁹

3.6.2 Intestate succession disqualifications and substitution

An intestate succession disqualification prevents an intestate beneficiary from inheriting due to certain attributes. The three types of intestate succession disqualifications looked at in this chapter are divorce, adoption, and unworthiness. An affinity tie is severed subsequent to the dissolution of a marriage through divorce. A divorced spouse would not be deemed a surviving spouse for purposes of the Intestate Succession Act 81 of 1987.¹¹⁰ Spouses who were married in terms of Islamic law are recognised as spouses for purposes of the Intestate Succession Act 81 of 1987.¹¹¹ A matter concerning an Islamic law irrevocable divorce in the form of a faskh was heard at the Western Cape High Court in *Hassam v Jacobs NO and Others*.¹¹² This case is critically discussed in Chapter Four (4.3.2) of this thesis.¹¹³

A child would be disqualified from inheriting as an intestate beneficiary from his natural parents and vice versa in the event where an adoption order has been granted in favour of his or her adoptive parents. The exception to the disqualification would be where the natural parent is also the adoptive parent of the child or was married to the adoptive parent at the time the adoption order was granted. The natural parent would then not be disqualified.¹¹⁴ An intestate beneficiary would be disqualified from inheriting as such if he or she is deemed to

109 See s 92 of the Administration of Estates Act 66 of 1965. Islamic law has a similar provision in this regard. Islamic law requires the intestate estate be deposited into an Islamic public treasury. See Chapter Two (2.6.1) of this thesis for a discussion on this issue.

110 See s 1 of the Intestate Succession Act 81 of 1987.

111 See Intestate Succession Act 81 of 1987. See also *Daniels v Campbell NO & Others* 2004 (5) SA 331 (CC) para 40(1)(a)(i) where it was declared that ‘the word “spouse” as used in the Intestate Succession Act 81 of 1987, includes the surviving partner to a monogamous Muslim marriage.’ and *Hassam v Jacobs NO & Others* 2009 (5) SA 572 (CC) para 47.3.1 where it was declared that ‘section 1 of the Intestate Succession Act 81 of 1987 is inconsistent with the Constitution and invalid to the extent that it does not include more than one spouse in a polygynous Muslim marriage in the protection it affords to “a spouse”.’ A spouse subject to an Islamic irrevocable divorce would be disqualified from inheriting as an intestate beneficiary in terms of both Islamic law as well as South African law. See Chapter Two (2.6.2) of this thesis for a discussion on this issue.

112 See *Hassam v Jacobs NO & Others* 2009 (5) SA 572 (CC) para 6 where the court noted that ‘[t]he High Court, relying on the rule enunciated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*, found that the marriage was extant at the time of the deceased’s death.’

113 See Moosa N and Abduroaaf M ‘Faskh (Divorce) and Intestate Succession in Islamic and South African Law: Impact of the Watershed Judgment in *Hassam v Jacobs* and the Muslim Marriages Bill’ in De Waal M and Paleker M *South African Law of Succession and Trusts - The Past Meeting the Present and Thoughts for the Future* (2014) 160-191.

114 See s 1(4)(e) of the Intestate Succession Act 81 of 1987 where it states that ‘an adopted child shall be deemed - ... (ii) not to be a descendant of his natural parent or parents, except in the case of a natural parent who is also the adoptive parent of that child or was, at the time of the adoption, married to the adoptive parent of the child.’ De Waal MJ & Schoeman-Malan *Law of Succession* 5 ed (2015) 28.

be an unworthy person.¹¹⁵ An example of unworthiness would be where an intestate beneficiary unlawfully killed the deceased.¹¹⁶ A disqualified intestate beneficiary would be deemed predeceased. The intestate benefit due to a disqualified intestate beneficiary would devolve in terms of the law of intestate succession. An example of this would be where X leaves behind an intestate estate of R300 000.00 and a widower, a disqualified son, and an agnate granddaughter who is the child of the disqualified son as the only intestate beneficiaries. The widower would inherit R250 000.00 and the agnate granddaughter would inherit the remaining R50 000.00. The same would apply if the son in the example was predeceased.¹¹⁷

3.6.3 Intestate succession exclusions

An intestate succession exclusion prevents an intestate beneficiary from inheriting in part or in full due to the presence of one or more other intestate beneficiaries. An example of a partial exclusion would be where X dies leaving behind an intestate estate of R300 000.00. She also leaves behind a widower and a daughter as the only intestate beneficiaries. The widower would inherit R250 000.00 and the daughter would inherit the remaining R50 000.00. The daughter is partially excluded by the widower.¹¹⁸ The daughter would have inherited the full R300 000.00 if the widower was not present.¹¹⁹ An example of total

115 See Paleker M 'Capacity to Inherit' in *The Law of Succession in South Africa* (2009) 105-112.

116 De Waal MJ & Schoeman-Malan *Law of Succession* 5 ed (2015) 116-118. It should be noted that the killer in the example would also be disqualified in terms of the Islamic law of intestate succession. See Chapter Two (2.6.2) of this thesis for a discussion on this issue.

117 This is in terms of s 1(7) of the Intestate Succession Act 81 of 1987 that states that '[i]f a person is disqualified from being an heir of the intestate estate of the deceased, or renounces his right to be such an heir, any benefit which he would have received if he had not been so disqualified or had not so renounced his right shall, subject to the provisions of subsection (6), devolve as if he had died immediately before the death of the testator and, if applicable, as if he was not so disqualified.' It should be noted that a disqualified intestate beneficiary is also regarded as predeceased in terms of Islamic law. The consequences of being deemed predeceased in terms Islamic law differ to the consequences of being predeceased in terms of South African law. The widower would inherit $1/4 \times R300\ 000.00 = R75\ 000.00$ as a sharer beneficiary; the agnate granddaughter would inherit $1/2 = 2/4 \times R150\ 000.00$ as a sharer beneficiary; and the agnate daughter would also inherit the residue of $1/4 \times R300\ 000.00 = R75\ 000.00$ as a return beneficiary. It can clearly be seen in this example that the Islamic law provisions are more favourable for the agnate granddaughter (female).

118 See s 1 of the Intestate Succession Act 81 of 1987 where it states that '(1) If after the commencement of this Act a person (hereinafter referred to as the "deceased") dies intestate, either wholly or in part, and - ... (c) is survived by a spouse as well as a descendant - (i) such spouse shall inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister of Justice by notice in the Gazette, whichever is the greater; and (ii) such descendant shall inherit the residue (if any) of the intestate estate.' The amount fixed by the Minister is currently R250 000.00. See Chief Master's Directive 3 of 2015, Circular 58 of 2015, effective 17 August 2015, available at www.justice.gov.za/master/m_docs/2015-03_chm-directive.pdf (accessed 16 November 2017).

119 Partial exclusion would also apply to the above example in terms of Islamic law. The daughter would have inherited more favourably in terms of Islamic law. She would inherit $1/2 = 4/8 \times R300\ 000.00 =$

exclusion would be where X leaves behind an intestate estate of R300 000.00. She also leaves behind a widower and a mother as the only intestate beneficiaries. The widower would inherit the R300 000.00 and the mother would not inherit. The widower totally excludes the mother from inheriting.¹²⁰

3.6.4 Intestate succession limitations

There are no direct limitations that apply to the law of intestate succession. There are, however, some indirect limitations. The law of intestate succession would apply only in the event where the liability claims and testate succession claims have not depleted the gross estate.¹²¹ This means that liability claims and testate succession claims take priority over intestate succession claims.¹²² Intestate beneficiaries could be referred to as optional beneficiaries as they can be disinherited through testacy.¹²³

R150 000.00 as a sharer beneficiary. See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states 'Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females; if (there are) only daughters, two or more, their share is two thirds of the inheritance; if only one, her share is half; but if they leave a child, you get a fourth of that which they leave after payment of legacies that they may have bequeathed or debts.' The widower would inherit $1/4 = 2/8 \times R300\,000.00 = R75\,000.00$ as a sharer beneficiary. See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 12 where it states '[i]n that which your wives leave, your share is a half if they have no child.' The daughter would also inherit the remaining $2/8 \times R300\,000.00 = R75\,000.00$ as a doctrine of return beneficiary. See Chapter Two (2.6.6) of this thesis for a discussion on this issue. It should be noted that the daughter would inherit three times more than the widower. It can be seen that Islamic law clearly favours the daughter (female) over the widower (male) in this example.

120 See s 1 of the Intestate Succession Act 81 of 1987 where it states that '(1) If after the commencement of this Act a person (hereinafter referred to as the "deceased") dies intestate, either wholly or in part, and - (a) is survived by a spouse, but not by a descendant, such spouse shall inherit the intestate estate.' It should be noted that the widower would not totally exclude the mother in terms of Islamic law. The widower would inherit $1/2 = 6/12 \times R300\,000.00 = R150\,000.00$ as a sharer beneficiary. See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 14004H (4) 12 where it states '[i]n that which your wives leave, your share is a half if they have no child...' The mother would inherit $4/12 \times R300\,000.00 = R100\,000.00$ as a sharer beneficiary. See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H 4 (11) where it states that '... [f]or parents, a sixth share of inheritance to each if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased left brothers or (sisters), the mother has a sixth.' The mother would inherit the remaining $1/3 = 2/12 \times R300\,000.00 = R50\,000.00$ as a doctrine of return beneficiary. See Chapter Two (2.6.6) of this thesis for a discussion on this issue. The mother and widower inherit equal amounts in this example. It is interesting to note that the mother (female) in this example inherits more favourably in terms of Islamic law than in terms of South African law.

121 See De Waal MJ & Schoemann-Malan MC *Law of Succession* 5 ed (2015) 14-15.

122 It is interesting to note that the Islamic law position is similar in this regard. Liability claims and testate succession claims take priority over intestate succession claims. The Islamic law liability claims are not exactly the same as those found in terms of South African law. See Chapter Two (2.6.4) of this thesis for a discussion on this issue in terms of Islamic law.

123 The Islamic law position is quite different as these intestate beneficiaries can be referred to as compulsory beneficiaries. They can only be disinherited through testacy if the inheriting intestate beneficiaries consent thereto. See Chapter Two (2.6) of this thesis for a discussion on the issue in terms of Islamic law.

3.6.5 Intestate succession adiation, repudiation, substitution and collation

An intestate beneficiary has the option to either adiate (accept) or to repudiate (reject) the benefit. The repudiated benefit could devolve to a substitute beneficiary or could devolve in terms of the law of intestate succession depending on which intestate beneficiary repudiates.¹²⁴ An intestate beneficiary acquires an enforceable right to the intestate benefit upon adiation thereof. Adiation must take place subsequent to the testator or testatrix having died. This moment is also referred to as *dies cedit*.¹²⁵ There is a presumption in favour of adiation. The presumption is rebutted by repudiation.¹²⁶

Section 1(6) of the Intestate Succession Act 81 of 1987 states that '[i]f a descendant of a deceased, excluding a minor or mentally ill descendant, who, together with the surviving spouse of the deceased, is entitled to a benefit from an intestate estate renounces his right to receive such a benefit, such benefit shall vest in the surviving spouse.'¹²⁷ It could be said that the surviving spouse would substitute the repudiating descendant. Section 1(7) of the Intestate Succession Act 81 of 1987 states that '[i]f a person is disqualified from being an heir of the intestate estate of the deceased, or renounces his right to be such an heir, any benefit which he would have received if he had not been so disqualified or had not so renounced his right shall, subject to the provisions of subsection (6), devolve as if he had died immediately before the death of the testator and, if applicable, as if he was not so disqualified.'¹²⁸

124 An example of how repudiation would affect the distribution is where a deceased leaves behind an intestate estate of R300 000.00. He also leaves behind a mother, a widow, and a child who is neither a minor nor mentally ill and repudiates as the only intestate beneficiary. The widow would totally exclude the mother from inheriting. She would inherit R250 000.00 as a surviving spouse and the remaining R50 000.00 as a substitute for the child who repudiated the benefit. See s 1 of the Intestate Succession Act 81 of 1987 where it states that '(1) If after the commencement of this Act a person (hereinafter referred to as the "deceased") dies intestate, either wholly or in part, and - ... (c) is survived by a spouse as well as a descendant - (i) such spouse shall inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister of Justice by notice in the Gazette, whichever is the greater; and (ii) such descendant shall inherit the residue (if any) of the intestate estate.' read with s 1(6) of the Intestate Succession Act 81 of 1987 where it states that '[i]f a descendant of a deceased, excluding a minor or mentally ill descendant, who, together with the surviving spouse of the deceased, is entitled to a benefit from an intestate estate renounces his right to receive such a benefit, such benefit shall vest in the surviving spouse.'

125 Rautenbach C 'Introduction' in Jamneck J & Rautenbach C *The Law of Succession in South Africa* (2009) 12-16.

126 See De Waal MJ & Schoemann-Malan MC *Laws of Succession* 4 ed (2008) 193. It should be noted that adiation of an intestate benefit is not required in terms of Islamic law. The intestate benefit would automatically devolve in terms of the general laws of intestate succession. See Chapter Two (2.6.5) of this thesis for a discussion on this issue.

127 See s 1(6) of the Intestate Succession Act 81 of 1987.

128 See s 1(7) of the Intestate Succession Act 81 of 1987.

The doctrine of collation states that the value of all gifts given to certain intestate heirs prior to the death of the deceased must be subtracted from his or her intestate estate. The doctrine of collation would apply only if it is called for by a person entitled to do so.¹²⁹ An example of how the doctrine applies would be where X dies leaving behind an intestate estate of R3 000 000.00. He also leaves behind a son and daughter as his only intestate beneficiaries. His daughter is an admitted attorney and has recently started her own law firm. X gave his daughter R500 000.00 in order to start a law firm. The amount was given to her one month prior to X having died. The son and daughter would inherit R1 500 000.00 each if collation is not called for. The R500 000.00 would be included in the intestate estate calculation if the son calls for collation to take place. The son would then inherit R1 750 000.00 and the daughter would inherit R1 250 000.00 as she had already received R500 000.00 one month prior to X having died.¹³⁰

3.6.6 Classes of intestate beneficiaries and their shares

There are five classes of intestate beneficiaries who are eligible to inherit from the intestate estate. The order of priority regarding these classes is: spouses, descendants, parents, descendants of parents, and the nearest blood relatives other than those in the preceding four classes.¹³¹ The intestate estate would devolve to the Guardian's Fund in the event where there are no persons within the five classes present.¹³² There are nine rules that govern the distribution of the intestate estate in terms of South African law.¹³³ These rules are now looked at by way of examples.

129 Collation does not apply to legatees as they inherit under a particular title. See Wood-Bodley M 'Collation' in Juanita J & Rautenbach C *The Law of Succession in South Africa* (2009) 193.

130 See Wood-Bodley M 'Collation' in Juanita J & Rautenbach C *The Law of Succession in South Africa* (2009) 193. It should be noted that the doctrine does not apply in terms of Islamic law of intestate succession.

131 See Intestate Succession Act 81 of 1987.

132 See s 25(13) of the Administration of Estates Act 66 of 1965 where it states that '[t]he executor shall not later than two months after the estate has become distributable in terms of subsection (12), pay to the Master for deposit in the Guardian's Fund on behalf of the persons entitled thereto, all moneys which he has for any reason been unable to distribute in accordance with the account.' See also s 92 of the Administration of Estates Act 66 of 1965 where it states that '[a]ny money in the Guardian's Fund (whether such money has been paid into the said fund before or after the commencement of this Act) which has remained unclaimed by the person entitled thereto for a period of thirty years as from the date upon which such person became entitled to claim the said money, shall be forfeited to the State.' It should be noted that a similar provision is found in terms of Islamic law where the intestate estate would devolve to an Islamic public treasury. See Chapter Two (2.6.1) of this thesis for a discussion on this issue. The mode of administration would however differ in terms of the two legal systems.

133 See s 1 of the Intestate Succession Act 81 of 1987 where it states that '(1) If after the commencement of this Act a person (hereinafter referred to as the "deceased") dies intestate, either wholly or in part, and - (a) is survived by a spouse, but not by a descendant, such spouse shall inherit the intestate estate; (b) is survived by a descendant, but not by a spouse, such descendant shall inherit the intestate estate; (c) is

Rule number one states that the spouse or spouses of a deceased person would inherit the intestate estate in the event where a deceased leaves behind a spouse or spouses, but where there are no descendants present.¹³⁴ An example of rule number one would be where X dies leaving behind an intestate estate of R150 000.00. She also leaves behind a widower, a mother, a father, and two daughters as the only intestate beneficiaries. The widower would inherit the entire R150 000.00 in terms of s 1(1)(a) of the Intestate Succession Act 81 of 1987 to the exclusion of the mother and father.¹³⁵ It should be noted that the definition of a surviving spouse has been extended to include surviving spouses to de facto monogamous marriages as well as polygynous marriages that were contracted in terms of Islamic law.¹³⁶ The cases that led to these changes are critically discussed in Chapter Four of this thesis.

survived by a spouse as well as a descendant - (i) such spouse shall inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister of Justice by notice in the Gazette, whichever is the greater; and (ii) such descendant shall inherit the residue (if any) of the intestate estate; (d) is not survived by a spouse or descendant, but is survived (i) by both his parents, his parents shall inherit the intestate estate in equal shares; or (ii) by one of his parents, the surviving parent shall inherit one half of the intestate estate and the descendants of the deceased parent the other half, and if there are no such descendants who have survived the deceased, the surviving parent shall inherit the intestate estate; or (e) is not survived by a spouse or descendant or parent, but is survived (i) by - (aa) descendants of his deceased mother who are related to the deceased through her only, as well as by descendants of his deceased father who are related to the deceased through him only; or (bb) descendants of his deceased parents who are related to the deceased through both such parents; or (cc) any of the descendants mentioned in subparagraph (aa), as well as by any of the descendants mentioned in subparagraph (bb), the intestate estate shall be divided into two equal shares and the descendants related to the deceased through the deceased mother shall inherit one half of the estate and the descendants related to the deceased through the deceased father shall inherit the other half of the estate; or (ii) only by descendants of one of the deceased parents of the deceased who are related to the deceased through such parent alone, such descendants shall inherit the intestate estate; (f) is not survived by a spouse, descendant, parent, or a descendant of a parent, the other blood relation or blood relations of the deceased who are related to him nearest in degree shall inherit the intestate estate in equal shares.'

134 S 1(1) of the Intestate Succession Act 81 of 1987 where it states that '(1) If after the commencement of this Act a person (hereinafter referred to as the "deceased") dies intestate, either wholly or in part, and - (a) is survived by a spouse, but not by a descendant, such spouse shall inherit the intestate estate.' See also *Hassam v Jacobs NO & Others 2009 (5) SA 572 (CC)* where it was held that the section applies to surviving spouses in polygynous marriages.

135 See s 1(1)(a) of the Intestate Succession Act 81 of 1987.

136 See *Daniels v Campbell NO & Others 2004 (5) SA 331 (CC)*; and *Hassam v Jacobs NO & Others 2009 (5) SA 572 (CC)* where it was held that the section applies to surviving spouses in monogamous and polygynous Islamic law marriages. The distribution of the abovementioned example would be different in terms of Islamic law. The widower would inherit $1/2 = 3/6 \times R600\,000.00 = R300\,000.00$; the mother would inherit $1/6 \times R600\,000.00 = R100\,000.00$ and the father would inherit $2/6 \times R600\,000.00 = R200\,000.00$. See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 12 where it states '[i]n that which your wives leave, your share is a half if they have no child...' and Chapter Two (2.6.6) of this thesis for further discussion on this issue. It should also be noted that there is a minority opinion within Islamic law that the mother should inherit $1/3 = 2/6 \times R600\,000.00 = R200\,000.00$; and the father should inherit $1/6 \times R600\,000.00 = R100\,000.00$ in this example. See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states '... [f]or parents, a sixth share of inheritance to each if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased left brothers or (sisters), the mother has a sixth. See Chapter Two (2.6.6) of this thesis for further discussion on this issue. A more detailed discussion on this issue is beyond the scope of this thesis. It can clearly be seen

Rule number two states that the descendant or descendants of a deceased person would inherit the intestate estate in the event where a deceased is survived by one or more descendants, but where there is no spouse present.¹³⁷ An example of rule number two would be where X dies leaving behind an intestate estate of R180 000.00. He also leaves behind a son, a daughter, a mother, and a father as the only intestate beneficiaries. The son would inherit R90 000.00 and the daughter would inherit R90 000.00. The mother and father would be totally excluded from inheriting from the intestate estate.¹³⁸ It should be noted that the definition of a descendant also includes a son or daughter born out of a marriage concluded in terms of Islamic law.

Rule number three states that each spouse would inherit R250 000.00 or a child's share,¹³⁹ whichever is the greater, and the child or children would inherit the remainder of the intestate estate, in the event where a deceased leaves behind a spouse or spouses, including one or more descendants.¹⁴⁰ An example of rule number three would be where X dies leaving behind

that Islamic law distributes the intestate estate to a larger number of intestate beneficiaries than South African law.

137 See s 1 of the Intestate Succession Act 81 of 1987 where it states that '(1) If after the commencement of this Act a person (hereinafter referred to as the 'deceased') dies intestate, either wholly or in part, and - ... (b) is survived by a descendant, but not by a spouse, such descendant shall inherit the intestate estate.'

138 The share that each descendant would inherit would not always be the same in Islamic law. See Chapter Two (2.6.6) of this thesis for a discussion on this issue. The distribution of the intestate estate in the above example would be different in terms of Islamic law. The mother would inherit $1/6 = 3/18 \times R180\ 000.00 = R30\ 000.00$; the father would inherit $1/6 = 3/18 \times R180\ 000.00 = R30\ 000.00$; and the son and daughter would share the remainder. See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that '... [f]or parents, a sixth share of inheritance to each if the deceased left children.' and Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that 'Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females.' The son would inherit double the share of the daughter. The son would inherit $8/18 \times R180\ 000.00 = R80\ 000.00$; and the daughter would inherit $4/18 \times R180\ 000.00 = R40\ 000.00$. It is interesting to note that the mother and father inherit equal shares in this example. The son, however, inherits double the share of the daughter. The constitutionality of the unequal distribution is looked at in Chapter Seven (7.4 and 7.5) of this thesis with regard to discrimination.

139 See s 1(4) of the Intestate Succession Act 81 of 1987 where it states that '[i]n the application of this section - ... (f) a child's portion, in relation to the intestate estate of the deceased, shall be calculated by dividing the monetary value of the estate by a number equal to the number of children of the deceased who have either survived him or have died before him but are survived by their descendants, plus the number of spouses and women referred to in paragraphs (a), (b) and (c) of section 2(2) of the Reform of Customary Law of Succession and Related Matters Act, 2008.'

140 See s 1(1) of the Intestate Succession Act 81 of 1987 where it states that '[i]f after the commencement of this Act a person (hereinafter referred to as the 'deceased') dies intestate, either wholly or in part, and - ... (c) is survived by a spouse as well as a descendant - (i) such spouse shall inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister of Justice by notice in the Gazette, whichever is the greater; and (ii) such descendant shall inherit the residue (if any) of the intestate estate.' The amount fixed by the Minister is currently R250 000.00. See Chief Master's Directive 3 of 2015, Circular 58 of 2015, effective 17 August 2015, available at www.justice.gov.za/master/m_docs/2015-03_chm-directive.pdf (accessed 16 November 2017).

an intestate estate of R150 000.00. She also leaves behind a widower, a mother, a father, and two daughters as the only intestate beneficiaries. The widower would inherit the entire R150 000.00 to the exclusion of the mother, father, and the two daughters. In Islamic law marriages, spouses and the children born from these marriages are also eligible to inherit in terms of this rule. The widower is the only inheriting intestate beneficiary in this example.¹⁴¹

Rule number four states that the parents would inherit the intestate estate in equal shares in the event where a deceased leaves behind no spouse or descendant, but leaves behind both parents.¹⁴² An example of rule number four would be where X leaves behind an intestate estate of R300 000.00. He also leaves behind a mother and a father as the only intestate beneficiaries. The mother would inherit R150 000.00 and the father would inherit R150 000.00.¹⁴³

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- 141 It should be noted that the parents, children, and spouses in the example would inherit collectively with the widower in terms of Islamic law. The widower would inherit $1/4 = 3/12$; the mother would inherit $1/6 = 2/12$; the father would inherit $1/6 = 2/12$; and the two daughters would equally share $2/3 = 8/12$. The doctrine of increase would apply in this example as the fractions add up to more than one unit. The new denominator would be 15. The widower would inherit $3/15 \times R150\,000.00 = R30\,000.00$, the mother would inherit $2/15 \times R150\,000.00 = R20\,000.00$, the father would inherit $2/15 \times R150\,000.00 = R20\,000.00$, and the two daughters would share the $8/15 \times R150\,000.00 = R80\,000.00$. Each daughter would inherit R40 000.00. It can clearly be seen in this example that the females inherit the bulk of the intestate estate, and that the mother and father inherit equal shares. See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that '[i]n that which your wives leave, your share is a half if they have no child.', Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that '... [f]or parents, a sixth share of inheritance to each if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased left brothers or (sisters), the mother has a sixth.', Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that '... [f]or parents, a sixth share of inheritance to each if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased left brothers or (sisters), the mother has a sixth.', Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that 'Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females; if (there are) only daughters, two or more, their share is two thirds of the inheritance.', and Chapter Two (2.6.6) of this thesis for a discussion on this issue.
- 142 See s 1 of the Intestate Succession Act 81 of 1987 where it states that '(1) If after the commencement of this Act a person (hereinafter referred to as the 'deceased') dies intestate, either wholly or in part, and - ... (d) is not survived by a spouse or descendant, but is survived - (i) by both his parents, his parents shall inherit the intestate estate in equal shares.'
- 143 A different distribution would apply in terms of Islamic law. The mother would inherit $1/3 \times R300\,000.00 = R100\,000.00$; and the father would inherit the remainder which is $2/3 \times R300\,000.00 = R200\,000.00$. See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that '... [f]or parents, a sixth share of inheritance to each if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased left brothers or (sisters), the mother has a sixth.', and Khan MM *The Translation of the Meanings of Sahih Al Bukhari* vol 8 (724) 477 where it states that '[t]he Prophet said, "Give the Fara'id (the shares of the inheritance that are prescribed in the Qur'an) to those who are entitled to receive it. Then whatever remains, should be given to the closest male relative of the deceased.'"'. It can clearly be seen that the father inherits double the share of the mother.

Rule number five states that the surviving parent would inherit 1/2 of the intestate estate and the descendants of the predeceased parent would inherit the remaining 1/2 in the event where a deceased leaves behind no spouse and no descendants, but leaves behind one parent, and the predeceased parent leaves behind descendants.¹⁴⁴ An example of rule number five would be where X dies leaving behind an intestate estate of R600 000.00. He also leaves behind a mother and a consanguine brother as the only intestate beneficiaries. The mother would inherit $1/2 \times R600\ 000.00 = R300\ 000.00$ and the consanguine brother would inherit $1/2 \times R600\ 000.00 = R300\ 000.00$.¹⁴⁵

Rule number six states that the surviving parent would inherit the entire intestate estate in the event where the deceased leaves behind no spouse or descendants, but leaves behind one surviving parent, while the predeceased parent did not leave behind any descendants.¹⁴⁶ An example of rule number six would be where, for example, X dies leaving behind an intestate estate of R500 000.00. He also leaves behind a father and a consanguine sister as the only intestate beneficiaries. The father would inherit the entire R500 000.00 and the consanguine sister would be totally excluded by the father.¹⁴⁷

144 See s 1(1) of the Intestate Succession Act 81 of 1987 where it states that '[i]f after the commencement of this Act a person (hereinafter referred to as the 'deceased') dies intestate, either wholly or in part, and - ... (d) is not survived by a spouse or descendant, but is survived - ... (ii) by one of his parents, the surviving parent shall inherit one half of the intestate estate and the descendants of the deceased parent the other half.'

145 A different distribution would apply in terms of Islamic law. The mother would inherit $1/3 \times R600\ 000.00 = R200\ 000.00$; and the consanguine brother would inherit the remainder which is $2/3 \times R600\ 000.00 = R400\ 000.00$. See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that '...[f]or parents, a sixth share of inheritance to each if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third.', and See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* (4) 176 where it states that 'They ask you for a legal verdict. Say: "Allah directs (thus) about *Al-Kalalah* (those who leave neither descendants nor ascendants as heirs). If it is a man that dies, leaving a sister, but no child, she shall have half the inheritance. If (such a deceased was) a woman, who left no child, her brother takes her inheritance.' See also Khan MM *The Translation of the Meanings of Sahih Al Bukhari* 1391H (724) vol 8, 477 where it states that '[t]he Prophet said, "Give the Fara'id (the shares of the inheritance that are prescribed in the Qur'an) to those who are entitled to receive it. Then whatever remains, should be given to the closest male relative of the deceased."'.

146 See s 1(1) of the Intestate Succession Act 81 of 1987 where it states that '[i]f after the commencement of this Act a person (hereinafter referred to as the 'deceased') dies intestate, either wholly or in part, and - ... (d) is not survived by a spouse or descendant, but is survived- (ii) by one of his parents, the surviving parent shall inherit one half of the intestate estate and the descendants of the deceased parent the other half, and if there are no such descendants who have survived the deceased, the surviving parent shall inherit the intestate estate.'

147 It is interesting to note that the same distribution would apply in terms of Islamic law as far as this example is concerned. The father would inherit the complete intestate estate of R500 000.00 in his capacity of being the only residuary beneficiary. See Khan MM *The Translation of the Meanings of Sahih Al Bukhari* 1391H (724) vol 8, 477 where it states that '[t]he Prophet said, "Give the Fara'id (the shares of the inheritance that are prescribed in the Qur'an) to those who are entitled to receive it. Then whatever remains, should be given to the closest male relative of the deceased."'.

Rule number seven states that the intestate estate must be split up into two equal parts in the event where the deceased leaves behind no spouse, no descendants, and no parents, but leaves behind descendants of both predeceased parents. One half of the intestate estate must be distributed between the descendants related to the deceased through the predeceased mother and the remaining 1/2 must be distributed between the descendants related to the deceased through the predeceased father.¹⁴⁸ An example of rule number seven would be where X dies leaving behind an intestate estate of R400 000.00. He also leaves behind a uterine brother and a consanguine sister as the only intestate beneficiaries. The uterine brother would inherit R200 000.00 and the consanguine sister would inherit R200 000.00.¹⁴⁹

Rule number eight states that the one or more descendants of a predeceased parent would inherit the entire intestate estate in the event where the deceased leaves behind no spouses, no descendants, and no parents, but leaves behind one or more descendants of one predeceased parent only.¹⁵⁰ An example of rule number eight would be where a deceased leaves behind an intestate estate of R500 000.00. He also leaves behind a consanguine sister as the only intestate beneficiary. The consanguine sister would inherit the R500 000.00.¹⁵¹

148 See s 1(1) of the Intestate Succession Act 81 of 1987 where it states that '[i]f after the commencement of this Act a person (hereinafter referred to as the 'deceased') dies intestate, either wholly or in part, and - ... (e) is not survived by a spouse or descendant or parent, but is survived - (i) by - (aa) descendants of his deceased mother who are related to the deceased through her only, as well as by descendants of his deceased father who are related to the deceased through him only; or (bb) descendants of his deceased parents who are related to the deceased through both such parents; or (cc) any of the descendants mentioned in subparagraph (aa), as well as by any of the descendants mentioned in subparagraph (bb), the intestate estate shall be divided into two equal shares and the descendants related to the deceased through the deceased mother shall inherit one half of the estate and the descendants related to the deceased through the deceased father shall inherit the other half of the estate.'

149 It should be noted that a different distribution would apply in terms of Islamic law. The uterine brother would inherit 1/6; and the consanguine sister would inherit 1/2 = 3/6. The doctrine of return would apply. The new denominator would be four. The uterine brother would inherit $1/4 \times R400\ 000.00 = R100\ 000.00$ and the consanguine sister would inherit R300 000.00. It is interesting to note that the female in this example would inherit more favourably in terms of Islamic law than in terms of South African law. See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 12 where it states that '...[i]f the man or woman whose inheritance is in question has left neither ascendants nor descendants, but has left a brother or a sister, each one of the two gets a sixth...', Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 176 where it states that '[t]hey ask you for a legal verdict. Say: "Allah directs (thus) about *Al-Kalalah* (those who leave neither descendants nor ascendants as heirs). If it is a man that dies, leaving a sister, but no child, she shall have half the inheritance...', and Chapter Two (2.6.6).

150 See s 1(1) of the Intestate Succession Act 81 of 1987 where it states that '[i]f after the commencement of this Act a person (hereinafter referred to as the 'deceased') dies intestate, either wholly or in part, and - ... (e) is not survived by a spouse or descendant or parent, but is survived - ... (ii) only by descendants of one of the deceased parents of the deceased who are related to the deceased through such parent alone, such descendants shall inherit the intestate estate'

151 It should be noted that the same distribution would apply in terms of Islamic law as far as this example is concerned. The consanguine sister would inherit $1/2 \times R500\ 000.00 = R250\ 000.00$ as a sharer beneficiary; and the residue of R250 000.00 as a doctrine of return beneficiary. See Khan MM *The Noble*

Rule number nine states that nearest blood relation to the deceased would inherit the intestate estate in the event where the deceased leaves behind no spouse, or descendants, or parents, or descendants of his parents.¹⁵² An example of this would be where a deceased leaves behind an intestate estate of R500 000.00. He also leaves behind a paternal grandfather as the only intestate beneficiary. The paternal grandfather would inherit the R500 000.00.¹⁵³

3.6.7 Position of females within the law of intestate succession

This position of females within the South African law of intestate beneficiaries in terms of the Intestate Succession Act 81 of 1987 is now looked at.¹⁵⁴ The South African law of intestate succession is generally gender-neutral. Males and females would inherit equal shares. This is now shown by looking at a few examples.

A surviving spouse would inherit the entire intestate estate in the event where X dies leaving behind an intestate estate of R100 000.00, a surviving spouse, and a mother as the only intestate beneficiaries. This is in terms of s 1(1)(a) of the Intestate Succession Act 81 of 1987.¹⁵⁵ The provision is gender-neutral and the surviving spouse would inherit the R100 000.00 irrespective of whether it is a widow or widower.

A surviving descendant would inherit the entire intestate estate in the event where X dies leaving behind an intestate estate of R100 000.00, a surviving descendant, and a mother as the only intestate beneficiaries. This is in terms of s 1(1)(b) of the Intestate Succession Act 81

Qur'an - English Translation of the Meanings and Commentary 1404H (4) 176 where it states that '[t]hey ask you for a legal verdict. Say: "Allah directs (thus) about Al-Kalalah (those who leave neither descendants nor ascendants as heirs). If it is a man that dies, leaving a sister, but no child, she shall have half the inheritance...', and Chapter Two (2.6.6).

152 See s 1(1) of the Intestate Succession Act 81 of 1987 where it states that '[i]f after the commencement of this Act a person (hereinafter referred to as the 'deceased') dies intestate, either wholly or in part, and - ... (f) is not survived by a spouse, descendant, parent, or a descendant of a parent, the other blood relation or blood relations of the deceased who are related to him nearest in degree shall inherit the intestate estate in equal shares.'

153 It is interesting to note that the same distribution would apply in terms of Islamic law. The paternal grandfather would inherit the R500 000.00 as a residuary beneficiary. See Khan MM *The Translation of the Meanings of Sahih Al Bukhari* 1391H (724) vol 8, 477 where it states that '[t]he Prophet [PBUH] said, "Give the Fara'id (the shares of the inheritance that are prescribed in the Qur'an) to those who are entitled to receive it. Then whatever remains, should be given to the closest male relative of the deceased."

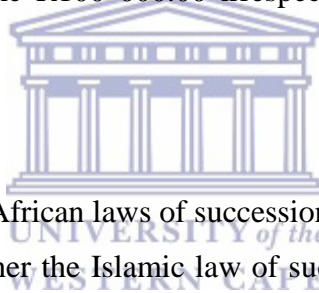
154 See Intestate Succession Act 81 of 1987.

155 See s 1(1) of the Intestate Succession Act 81 of 1987 where it states that '[i]f after the commencement of this Act a person (hereinafter referred to as the "deceased") dies intestate, either wholly or in part, and - (a) is survived by a spouse, but not by a descendant, such spouse shall inherit the intestate estate.'

of 1987.¹⁵⁶ The provision is gender-neutral and the surviving descendant would inherit the R100 000.00 irrespective of whether it is a son or daughter.

A surviving parent would inherit the entire intestate estate in the event where X dies leaving behind an intestate estate of R100 000.00, a surviving parent, and a full brother of father as the only intestate beneficiaries. This is in terms of s 1(1)(d)(ii) of the Intestate Succession Act 81 of 1987.¹⁵⁷ The provision is gender-neutral and the surviving parent would inherit the R100 000.00 irrespective of whether it is a mother or father.

A descendant of a deceased parent would inherit the entire intestate estate in the event where X dies leaving behind an intestate estate of R100 000.00, a descendant of a deceased parent, and a full brother of father as the only intestate beneficiaries. This is in terms of s 1(1)(e)(ii) of the Intestate Succession Act 81 of 1987.¹⁵⁸ The provision is gender-neutral and the surviving parent would inherit the R100 000.00 irrespective of whether it is a brother or sister.



3.7 Conclusion

This chapter looked at the South African laws of succession and administration of estates. One of the issues looked at was whether the Islamic law of succession can be applied within the South African context in terms of the law governing wills. It has been seen that the common law principle of freedom of testation can technically be used by a Muslim testator or testatrix as a tool to ensure that the Islamic law of succession applies to his or her estate after he or she dies. The viability of this method is further looked at in Chapter Five of this thesis by way of a fictitious scenario. The chapter has shown that Islamic law marriages have been recognised

156 See s 1(1) of the Intestate Succession Act 81 of 1987 where it states that '[i]f after the commencement of this Act a person (hereinafter referred to as the 'deceased') dies intestate, either wholly or in part, and - ... (b) is survived by a descendant, but not by a spouse, such descendant shall inherit the intestate estate.'

157 See s 1(1) of the Intestate Succession Act 81 of 1987 where it states that '[i]f after the commencement of this Act a person (hereinafter referred to as the 'deceased') dies intestate, either wholly or in part, and - ... (d) is not survived by a spouse or descendant, but is survived ... (ii) by one of his parents, the surviving parent shall inherit one half of the intestate estate and the descendants of the deceased parent the other half, and if there are no such descendants who have survived the deceased, the surviving parent shall inherit the intestate estate.'

158 See s 1 of the Intestate Succession Act 81 of 1987 where it states that '(1) If after the commencement of this Act a person (hereinafter referred to as the 'deceased') dies intestate, either wholly or in part, and - ... (e) is not survived by a spouse or descendant or parent, but is survived ... (ii) only by descendants of one of the deceased parents of the deceased who are related to the deceased through such parent alone, such descendants shall inherit the intestate estate.'

for purposes of certain statutes. The developments in this regard are further critically discussed in the next chapter.



CHAPTER FOUR
AN ANALYSIS OF THE RIGHT OF SOUTH AFRICAN MUSLIMS TO INHERIT
AS A RESULT OF DEVELOPMENTS IN CASE LAW AND INTERPRETATION OF
STATUTES

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4.1 Introduction

This chapter analyses the right of South African Muslims to inherit as a result of developments in case law and interpretation of statutes. Developments in terms of the law of testate succession are looked at first. This is followed by looking at developments in terms of the law of intestate succession. These South African law developments are critically looked at by comparing them to the provisions of Islamic law. It also looks at existing Islamic law provisions that could have been used in order to place the beneficiaries in better positions.

4.2 A recent development regarding the South African law of testate succession

The South African law of testate succession is primarily governed by the Wills Act 7 of 1953, the common law principle of freedom of testation, and various other provisions.¹ A case has recently been heard in the Western Cape High Court concerning the consequences of renouncing a testate benefit in terms of an Islamic distribution certificate issued by the Muslim Judicial Council (SA). The judgment was delivered on 14 September 2017 and is now looked at below.²

4.2.1 *Moosa NO and Others v Harnaker and Others* [2017]

The facts of this case concerned a deceased Muslim (X) male who died testate on 9 June 2014. X was married to two wives when he died.³ He married his first wife (Y) in terms of Islamic law on 10 March 1957. He subsequently married his second wife (Z) in terms of Islamic law on 31 May 1964. Y consented to the marriage between X and Z.⁴ X subsequently married Y in terms of South African law during August 1982. Z consented to the civil marriage between X and Y.⁵ It is interesting to note that section 8(6)(a) of the 2010 MMB states that '[a] husband in a Muslim marriage, to which this Act applies, who wishes to conclude a further Muslim marriage with another woman after the commencement of this Act must apply to court - (a) for approval to conclude a further Muslim marriage...'⁶ Court consent is required in terms of the 2010 MMB.

1 De Waal MJ & Schoemann-Malan MC *Law of Succession* 5 ed (2015) 2-3.

2 *Moosa NO and Others v Harnaker and Others* 2017 (6) SA 425 (WCC).

3 *Moosa NO and Others v Harnaker and Others* 2017 (6) SA 425 (WCC) para 4.

4 Y married to X in terms of both Islamic law and the Marriage Act 25 of 1961. See *Moosa NO and Others v Harnaker and Others* 2017 (6) SA 425 (WCC) para 3.

5 *Moosa NO and Others v Harnaker and Others* 2017 (6) SA 425 (WCC) paras 3-7.

6 See s 8(6)(a) of the 2010 MMB, Government Notice 37 in *Government Gazette* 33946 of 21 January 2011 available at www.gov.za/sites/www.gov.za/files/33946_gen37.pdf (accessed 26 October 2017).

A total of nine children were born of the two marriages. Four of these children were male and five were female. X's will was executed on 23 January 2011 and it stated that his estate must devolve in terms of Islamic law. It further stated that an Islamic distribution certificate issued by the Muslim Judicial Council (SA) or other judicial body shall be final and binding upon the executors of his will.⁷ The Islamic distribution certificate was issued by the Muslim Judicial Council (SA) in terms of Al Quraan (4) 11-12.⁸ The Islamic distribution certificate stated that each widow must inherit $1/16 = 13/208$, each son must inherit $7/52 = 28/208$, and each daughter must inherit $7/104 = 14/208$.⁹ It can clearly be seen that there is unequal distribution of shares between the sons and daughters where a son inherits double the share of a daughter. The constitutionality of the Islamic distribution certificate is looked at in Chapter Seven (7.4 and 7.5) of this thesis.

The nine children renounced (repudiated) the benefits due to them in terms of the Islamic distribution certificate.¹⁰ Section 2C(1) of the Wills Act 7 of 1953 states that '[i]f any descendants of a testator, excluding a minor or a mentally ill descendant, who, together with the surviving spouse of the testator, is entitled to a benefit in terms of a will renounces his right to receive such benefit, such benefit shall vest in the surviving spouse.'¹¹ The benefits renounced by the nine children were testate benefits in terms of the South African law of succession but intestate succession benefits in terms of the Islamic law of succession.¹² The

7 *Moosa NO and Others v Harnaker and Others* 2017 (6) SA 425 (WCC) paras 4-8.

8 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11-12 where it states '11. Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females; if (there are) only daughters, two or more, their share is two thirds of the inheritance; if only one, her share is half. For parents, a sixth share of inheritance to each if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased left brothers or (sisters), the mother has a sixth. (The distribution in all cases is) after the payment of legacies he may have bequeathed or debts. You know not which of them, whether your parents or your children, are nearest to you in benefit, (these fixed shares) are ordained by Allah. And Allah is Ever All-Knower, All-Wise. 12. In that which your wives leave, your share is a half if they have no child; but if they leave a child, you get a fourth of that which they leave after payment of legacies that they may have bequeathed or debts. In that which you leave, their (your wives) share is a fourth if you leave no child; but if you leave a child, they get an eighth of that which you leave after payment of legacies that you may have bequeathed or debts. If the man or woman whose inheritance is in question has left neither ascendants nor descendants, but has left a brother or a sister, each one of the two gets a sixth; but if more than two, they share in a third; after payment of legacies he (or she) may have bequeathed or debts, so that no loss is caused (to anyone). This is a Commandment from Allah; and Allah is Ever All-Knowing, Most-Forbearing.' These verses stipulate the inheritance of parents, children, surviving spouses, and uterine siblings.

9 *Moosa NO and Others v Harnaker and Others* 2017 (6) SA 425 (WCC) para 7.

10 The renouncement was reduced to writing. The children stated that they wanted the surviving spouses to inherit the renounced benefits in equal shares. See *Moosa NO and Others v Harnaker and Others* 2017 (6) SA 425 (WCC) para 8.

11 See s 2C(1) of the Wills Act 7 of 1953.

12 See Chapter Two (2.6) where the Islamic law of intestate succession is discussed in terms of Islamic law.

right to freedom of testation was used by X as a tool in order to apply to consequences of the Islamic law of intestate succession to his estate. The court noted that ‘[t]he executor opted not to follow Islamic law with regard to renunciation.’¹³

The following should be noted with regard to testate and intestate benefits in terms of Islamic law. Testate beneficiaries have the right to adiate or renounce benefits bequeathed to them in terms of a will.¹⁴ A renounced testate benefit would devolve back into the deceased estate. It would not devolve in terms of s 2C(1) of the Wills Act 7 of 1953,¹⁵ in terms of Islamic law. Each of the nine children could have adiated their benefits and then gifted it to X and Y.¹⁶ Renunciation of intestate succession benefits is foreign to Islamic law. The nine children were all inheriting intestate beneficiaries. They had vested and enforceable rights to claim their intestate benefits from the estate the moment when X died. They were permitted to cede their intestate benefits in favour of X and Y.¹⁷ The Court noted that ‘the heirs of the deceased agreed and expressed their intention in writing to renounce all their benefits accruing to them in terms of the Will read with the Islamic distribution certificate and stipulated that it be inherited in equal shares by the Second [Y] and Third [Z] Applicants.’¹⁸ The wording of the agreement is not completely in conformity with Islamic law principles with regard to ceding of rights.¹⁹ The executor of the deceased estate considered both Y and Z to be surviving spouses for purposes of s 2C(1), and was of the opinion that the renounced benefits should therefore vest in them equally.²⁰ The liquidation and distribution account recorded that Y and Z would each inherit an equal share of the renounced benefits. The liquidation and distribution account was accepted by the Master of the High Court.²¹ Each of the widows should therefore have inherited 104/208 in terms of the account.

13 *Moosa NO and Others v Harnaker and Others* 2017 (6) SA 425 (WCC) para 8. See also Chapter Five of this thesis where the practical application of the Islamic law of succession and administration of estates in South Africa is looked at.

14 See Chapter Two (2.5.5) for a discussion on this issue.

15 See Wills Act 7 of 1953.

16 The normal rules regarding gifting in terms of Islamic law would find application.

17 See Chapter Two (2.6.5) for a discussion on intestate succession adiation, repudiation, substitution and collation, in terms of Islamic law.

18 See *Moosa NO and Others v Harnaker and Others* 2017 (6) SA 425 (WCC) para 8.

19 See Chapter Two (2.6.5) for a discussion on intestate succession adiation, repudiation, substitution, and collation, in terms of Islamic law.

20 S 2C(1) of the Wills Act states that ‘[i]f any descendants of a testator, excluding a minor or a mentally ill descendant, who, together with the surviving spouse of the testator, is entitled to a benefit in terms of a will renounces his right to receive such benefit, such benefit shall vest in the surviving spouse.’

21 *Moosa NO and Others v Harnaker and Others* 2017 (6) SA 425 (WCC) para 9.

The Registrar of Deeds was of the view that the benefits renounced by the descendants of X who were born from his marriage to Y should vest in Y as she was recognised as a surviving spouse for purposes of s 2C(1) due to her civil marriage with the deceased. The Registrar of Deeds was, however, of the opinion that the benefits renounced by the descendants of X who were born from his marriage to Z should vest in the children of those descendants in terms of s 2C(2) as the Islamic marriage between X and Z was not recognised for purposes of s 2C(1).²² It could be argued that the renounced benefits should technically vest in Y as she was the surviving spouse in terms of s 2C(1). Section 2C(2) is also subject to s 2C(1). A further discussion on this issue is beyond the scope of this thesis.

The matter was taken to the Western Cape High Court where it was argued that s 2C(1) unfairly discriminates against Z on the grounds of religion and marital status.²³ The Court declared s 2C(1) inconsistent with the Constitution as it does not include a husband or wife in a marriage that was solemnised in terms of Islamic law.²⁴ Section 2C(1) was declared invalid insofar as it does not include multiple widows married to a deceased husband in terms of Islamic law.²⁵ The judgment does not refer to multiple widowers. This does make sense as Islamic law permits polygyny and does not permit polyandry. This also raises the question of discrimination. A further discussion on this is beyond the scope of this thesis. A final point to note regarding this case is that no mention was made by the court regarding the discrimination against the daughters in terms of the Islamic distribution certificate. The constitutionality of the provisions in the will is looked at in Chapter Seven (7.4 and 7.5) of this thesis. The order of invalidity in this case was suspended subject to confirmation by the Constitutional Court as is required by the Superior Courts Act 10 of 2013.²⁶ The matter had not yet been heard by the Constitutional Court at the time this section was written.

22 *Moosa NO and Others v Harnaker and Others* 2017 (6) SA 425 (WCC) paras 12-13. See also s 2C(2) that states that '[i]f a descendant of the testator, whether as a member of a class or otherwise, would have been entitled to a benefit in terms of the provisions of a will if he had been alive at the time of death of the testator, or had not been disqualified from inheriting, or had not after the testator's death renounced his right to receive such a benefit, the descendants of that descendant shall, subject to the provisions of subsection (1), per stirpes be entitled to the benefit, unless the context of the will otherwise indicates.'

23 *Moosa NO and Others v Harnaker and Others* 2017 (6) SA 425 (WCC) para 17.

24 *Moosa NO and Others v Harnaker and Others* 2017 (6) SA 425 (WCC) para 39(a)(i).

25 *Moosa NO and Others v Harnaker and Others* 2017 (6) SA 425 (WCC) para 39(a)(ii).

26 *Moosa NO and Others v Harnaker and Others* 2017 (6) SA 425 (WCC) para 39(g).

4.3 Development of the South African law of intestate succession

The South African law of intestate succession is primarily governed by the Intestate Succession Act 81 of 1987 and the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.²⁷ These statutes govern how the intestate estates of a deceased person must devolve. The laws of intestate succession apply only in the event where a testator or testatrix does not bequeath his or her whole net estate in terms of the law of testate succession.²⁸ Spouses married in terms of Islamic law and the children that are born from these marriages did not qualify to inherit from the estates of their deceased husbands and fathers who died intestate. The situation started to change since 1981 when the Intestate Succession Act 81 of 1987 was enacted. Section 1(2) of the Intestate Succession Act provides that children conceived out of wedlock would inherit from their deceased parents. This includes children born as a result of a marriage contract entered into in terms of Islamic law.²⁹ The position of surviving spouses in de facto monogamous marriages had changed in 2003 when the *Daniels v Campbell NO & Others* Constitutional Court judgment was handed down.³⁰ The position of surviving spouses in de facto polygynous marriages had changed in 2009 when the *Hassam v Jacobs NO & Others* Constitutional Court judgment was handed down.³¹ A more recent case is *Faro v Bingham NO & Others*.³² In this case, the Western Cape High Court overruled a decision issued by the Muslim Judicial Council (SA) regarding the revocation of a divorce. These cases are now looked at in more detail.

4.3.1 *Daniels v Campbell NO & Others* [2003]

This case concerned a deceased Muslim male (X) who died intestate on 27 November 1994.³³ X entered into two marriages during his lifetime. The first marriage ended in divorce. The second marriage was concluded in terms of Islamic law on 2 March 1977. No children were born from the second marriage. The second marriage was intact at the time X died. X was in

27 See Intestate Succession Act 81 of 1987 and Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.

28 See Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 and Intestate Succession Act 81 of 1987.

29 See s 1(2) of the Intestate Succession Act 81 of 1987 where it states that '[n]otwithstanding the provisions of any law or the common or customary law, but subject to the provisions of this Act and sections 40(3) and 297(1)(f) of the Children's Act, 2005 (Act No. 38 of 2005), having been born out of wedlock shall not affect the capacity of one blood relation to inherit the intestate estate of another blood relation.'

30 See *Daniels v Campbell NO & Others* 2004 (5) SA 331 (CC).

31 See *Hassam v Jacobs NO & Others* 2009 (5) SA 572 (CC).

32 See *Faro v Bingham NO & Others* (ZAWHC) unreported case no 4466/13 (25 October 2013).

33 See *Daniels v Campbell NO & Others* 2004 (5) SA 331 (C) 2.

a de facto monogamous marriage at the time of his death.³⁴ X left behind a widow, two daughters and two sons.³⁵ The facts found in the judgment do not state whether the parents of X were alive at the time of him dying. This is relevant as parents, spouses, and children inherit together in terms of Islamic law.³⁶ It will be assumed for purposes of this discussion that the parents of X predeceased him. An executor was appointed by the Master of the High Court on the 25 January 2001. The main asset in the deceased estate was a modest house situated in Hanover Park (the property).³⁷

The background to the property is important to note. X left behind a surviving spouse (Y) who resided at the property for nearly 30 years. On 7 July 1969 the first husband of Y submitted a written application to the City of Cape Town to rent a council dwelling.³⁸ Y was married to her first husband in terms of Islamic law only. On 15 October 1976 the City of Cape Town allocated the property to Y in her own name for tenancy purposes. Y and her children were in occupation of the property when she married X in terms of Islamic law. Y informed the City of Cape Town of her remarriage and furnished them with a copy of her marriage certificate. The policy of the City of Cape Town at that time required that the tenancy of the property be registered in the name of the principal breadwinner. The tenancy of the property was therefore transferred to X.³⁹ Tenants of council houses were given the opportunity to purchase the houses. On 24 September 1990 X entered into an instalment sale agreement to purchase the house from the City of Cape Town for the amount of R3 915.50.⁴⁰

Y contributed substantially towards the household expenses concerning the property. This included contributions towards the rent, service charges, and the purchase price of the property.⁴¹ Y had also signed the deed of sale. The outstanding balance owing on the purchase price of the property was written off in terms of State policy when the deceased died on 27 November 1994.⁴² The property was then transferred into the estate of X on 29 July

34 See *Daniels v Campbell NO & Others* 2004 (5) SA 331 (C) 2.

35 See *Daniels v Campbell NO & Others* 2003 (3) SA 331 (C) 2.

36 See Chapter Two (2.6.6) where the various categories of intestate beneficiaries are discussed.

37 See *Daniels v Campbell NO & Others* 2004 (5) SA 331 (C) 2.

38 See *Daniels v Campbell NO & Others* 2004 (5) SA 331 (C) 6.

39 See *Daniels v Campbell NO & Others* 2003 (3) All SA 139 (C) 6.

40 The judgment refers to the amount of R3 915.00 with a 10 percent discount. See *Daniels v Campbell NO & Others* 2003 (3) All SA 139 (C) 6.

41 See *Daniels v Campbell NO & Others* 2003 (3) All SA 139 (C) 48.

42 See *Daniels v Campbell NO & Others* 2003 (3) All SA 139 (C) 6.

1998.⁴³ This is almost four years after X died. The contributions made by Y were not required in terms of Islamic law as it was the duty of X to maintain Y and not the other way round. Y could therefore have claimed these expenses from the deceased estate in the form of a liability claim. Y could even have claimed arrear maintenance if X had not maintained her during the marriage.⁴⁴ This was done in *Ryland v Edros* [1997] (*Ryland*) that was delivered in the Western Cape High Court in 1997.⁴⁵ The facts of *Ryland* concerned a divorce matter. The claims would also be valid against the deceased estate in terms of Islamic law as well.⁴⁶ Y was told by the Master of the High Court that she could not inherit from the estate of her deceased husband for purposes of the Intestate Succession Act 81 of 1987.⁴⁷ The reason given was that she was not recognised as a surviving spouse due to her Islamic law marriage not being recognised for purposes of the Act. A claim for maintenance for purposes of the Maintenance of Surviving Spouses Act 27 of 1990 was also rejected on the same basis.⁴⁸

A surviving spouse cannot claim future maintenance from the estate of her deceased husband in terms of Islamic law. The issue of a future maintenance claim against a deceased estate is foreign to Islamic law. An exception to this is found within the Maalikee school.⁴⁹ The exception allows for a surviving widow (and not a surviving widower) to reside in the property owned or leased by a deceased husband for the duration of the waiting period.⁵⁰ It is not clear from the facts of the judgment which school was followed by X. Even though Y was not entitled to claim maintenance in terms of Islamic law of maintenance, she was entitled to claim 1/8 of the net estate in terms of Islamic law of intestate succession.⁵¹ The Islamic law of intestate succession claim was, however, not enforceable in terms of South African law. X had therefore failed in his Islamic law duty to have executed an Islamic will in order to ensure that his estate devolved in terms of the Islamic law of succession.⁵²

43 See *Daniels v Campbell NO & Others* 2003 (3) All SA 139 (C) 6.

44 See Chapter Two (2.4) where liability claims are discussed, in terms of Islamic law.

45 See *Ryland v Edros* 1997 (2) SA 690 (C) 718-719. See also Maintenance of Surviving Spouses Act 27 of 1990.

46 See Chapter Two (2.4) where liability claims are discussed, in terms of Islamic law.

47 See Intestate Succession Act 81 of 1987.

48 See *Daniels v Campbell NO & Others* 2003 (3) All SA 139 (C) 7.

49 See Moosa N & Karbanee S 'An exploration of Mata'a Maintenance in Anticipation of the Recognition of Muslim Marriages in South Africa: (Re-) Opening a Veritable Pandora's Box?' *Law Democracy and Development* (2009) 269 for a discussion on the maintenance that is due to widows.

50 See Chapter Two (2.4) of this thesis for a more detailed discussion on liability claims in terms of Islamic law.

51 See Chapter Two (2.6.6) of this thesis for a discussion on this issue.

52 See Chapter Five of this thesis where the practical application of the Islamic law of succession and administration of estates in South Africa is looked at.

Y approached the Western Cape High Court for an order declaring that she was a 'spouse' of the deceased in terms of the Intestate Succession Act and a 'survivor' of the deceased in terms of the Maintenance of Surviving Spouses Act. In the alternative she asked for the provisions found in the legislation to be declared unconstitutional to the extent that they unfairly discriminated against Muslim marriages.⁵³ On 24 June 2003 the Western Cape High Court declared that the provisions were unconstitutional as they did not include a husband or wife married in terms of Islamic law in a de facto monogamous union.⁵⁴ The order was referred to the Constitutional Court for confirmation. The Constitutional Court held that Y was a spouse of the deceased for purposes of the Intestate Succession Act 81 of 1987 and a survivor of the deceased for purposes of the Maintenance of Surviving Spouses Act 27 of 1990 in terms of the ordinary meaning of the terms 'spouse' and 'survivor'.⁵⁵ The judgment had the effect of recognizing a spouse who was married to a deceased in terms of Islamic law as 'spouse' for purposes of the Intestate Succession Act 81 of 1987 and a 'survivor' for purposes of the Maintenance of Surviving Spouses Act 27 of 1990.

The maintenance claim by a surviving spouse has a limited Islamic law basis in terms of the Maalikee school, but not in terms of the Shaafi'ee and Hanafee schools. The inheritance claim does have an Islamic law basis. The share that Y was entitled to in terms of South African law was not in conformity with Islamic law. The main asset in the estate was a property that was sold to the deceased in 1990 for R3 915.50. The deceased died intestate on 27 November 1994. The law at that time was that if a deceased dies intestate and leaves behind a surviving spouse and descendants then the surviving spouse would inherit the greater of a child's share or R125 000.00.⁵⁶ The judgment does not give an indication as to what the exact value of the estate was at the time the deceased died.⁵⁷ It does, however, state that letters of authority were issued by the Master of the High Court in terms of s 18 (3) of the

53 See *Daniels v Campbell NO & Others* 2003 (3) All SA 139 (C) 3-4.

54 See *Daniels v Campbell NO & Others* 2003 (3) All SA 139 (C) 62-63.

55 See *Daniels v Campbell NO & Others* 2004 (5) SA 331 (CC) 25 para 40(1) where it states that '(a) [i]t is declared that (i) the word - spouse as used in the Intestate Succession Act 81 of 1987, includes the surviving partner to a monogamous Muslim marriage; (ii) the word - survivor as used in the Maintenance of Surviving Spouses Act 27 of 1990, includes the surviving partner to a monogamous Muslim marriage.'

56 The amount was increased from R125 000.00 to R250 000.00 on 17 August 2015. The change affects the estates of deceased persons who died on or after 24 November 2014. The deceased in this case died on 27 November 1994. This judgment was handed down prior to the increase. The amount of R125 000.00 is therefore used in this example for purposes of calculation. See Chief Master's Directive 3 of 2015, Circular 58 of 2015, effective 17 August 2015, available at www.justice.gov.za/master/m_docs/2015-03_chm-directive.pdf (accessed 16 November 2017).

57 See *Daniels v Campbell NO & Others* 2003 (3) All SA 139 (C) 3.

Administration of Estates Act 66 of 1965.⁵⁸ It could therefore be said with certainty that the value of the deceased estate was less than R125 000.00 as letters of authority were issued at that time when the gross estate was valued at less than R125 000.00.⁵⁹ It is questionable what the value of the property was at the time the judgment was delivered approximately 14 years later on 11 March 2004. It will be assumed for purposes of comparison between Islamic law and South African law that the value of the net estate, after deducting liabilities, was R96 000.00.⁶⁰ A child's share (at that time) was calculated by dividing the net estate of the deceased by the number of children plus the surviving spouse.⁶¹

In this scenario a child's share would have been R96 000.00 divided by five (four children plus the surviving spouse). A child's share would have been $R96\ 000.00 \div 5 = R19\ 200.00$. This is less than R125 000.00. X would have been eligible to inherit the greater share which is R96 000.00. The four children are totally excluded by X.⁶² The four children would have a right to claim maintenance from the deceased estate in terms of South African law if they were in need. The claim would be in terms of maintenance law and not in terms of succession law.⁶³ A claim for maintenance is restricted, in Islamic law, to accommodation. This is in terms of the *Maalikee school*.⁶⁴ The inheritance distribution in this scenario is not in conformity with Islamic law. The facts of the judgment do not provide information as to whether the parents of the deceased were alive at the time X died. It will be assumed for purposes of the comparison that both parents predeceased X. The facts do not provide details as to whether the children were conceived in wedlock or out of wedlock. It will also be assumed for purposes of the comparison that all the children were conceived in wedlock.

58 See s 18(3) of the Administration of Estates Act 66 of 1965.

59 Letters of Authority are issued in terms of s 18(3) of the Administration of Estates Act 66 of 1965 in the event where the deceased estate is valued at less than R125 000.00. See s 18(3) of the Administration of Estates Act 66 of 1965. The amount was increased from R125 000.00 to R250 000.00 on 17 August 2015. The change affects the estates of deceased persons who died on or after 24 November 2014. The deceased in this case died on 27 November 1994. This judgment was handed down prior to the increase. The amount of R125 000.00 would be applicable to this case. See Chief Master's Directive 3 of 2015, Circular 58 of 2015, effective 17 August 2015, available at www.justice.gov.za/master/m_docs/2015-03_chm-directive.pdf (accessed 16 November 2017).

60 This amount has been used in order to facilitate calculations. It would ensure that the amount inherited by each of the intestate beneficiaries is in Rands only, with no cents.

61 The calculation of a child's share has changed subsequent to the *Hassam v Jacobs NO* case. See Chief Master's Directive 3 of 2015, Circular 58 of 2015, effective 17 August 2015, available at www.justice.gov.za/master/m_docs/2015-03_chm-directive.pdf (accessed 16 November 2017).

62 See Chapter Three (3.6.6) for a discussion on classes of intestate beneficiaries and their shares in terms of South African law.

63 See Chapter Three (3.4) for a discussion on liability claims against the gross estate in terms of South African law.

64 See Chapter Three (2.4) for a discussion on liability claims against the gross estate in terms of Islamic law.

The deceased died leaving behind a widow, two sons, and two daughters. The widow would inherit 1/8 of the net estate and the remainder would be shared between the two sons and two daughters. A son would inherit double the share of a daughter.⁶⁵ This has also been seen in the Muslim Judicial Council (SA) Islamic distribution certificate when the *Moosa NO and Others v Harnaker & Others* case was discussed above and testate succession developments in terms of South African law were looked at.⁶⁶ The constitutionality of unequal distribution of shares is looked at in Chapter Seven (7.4 and 7.5). Y would inherit $1/8 = 6/48 \times R96\,000.00 = R12\,000.00$. The residue of $42/48$ would be inherited by the sons and daughters. A son would inherit double the share of a daughter. The two sons would inherit $14/48 \times R96\,000.00 = R28\,000.00$ each, and the two daughters would inherit $7/48 \times R96\,000.00 = R14\,000.00$ each.⁶⁷ There is nothing preventing the children in this example from ceding their rights in the inheritance in favour of Y who is their stepmother. This ceding of rights would also be compliant with Islamic law.⁶⁸

There is quite a big difference between the R96 000.00 that the widow would inherit in terms of South African law and the R12 000.00 that she would inherit in terms of Islamic law. It can be clearly seen in this example that both the male and female children inherit more favourably than the widow. It can also be seen that Islamic law favours the children (male and female) whereas South African law favours the widow. It should be noted that the children would be entitled to inherit in terms of Islamic law irrespective of whether they are affluent or destitute. The South African law position would favour the children in the event where they are in need. The question as to which legal system is more favourable towards females is dependent on whether we are looking at it from the position of the daughters or the position of the widow. The children in this scenario were not the children of the widow. They were her stepchildren. It is questionable whether the stepmother would use the inheritance monies to benefit her stepchildren. It is, however, possible.

65 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states 'Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females; if (there are) only daughters, two or more, their share is two thirds of the inheritance; if only one, her share is half...'

66 *Moosa NO & Others v Harnaker and Others* 2017 (6) SA 425 (WCC).

67 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states 'Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females; if (there are) only daughters, two or more, their share is two thirds of the inheritance; if only one, her share is half...'

68 See Chapter Two (2.6.5) for a further discussion on intestate succession adiation, repudiation, substitution, and collation, in terms of Islamic law.

4.3.2 *Hassam v Jacobs NO & Others* [2009]

This case concerns a deceased Muslim male (X) who died intestate on 22 August 2001. X entered into three marriages during his lifetime. X married his first wife (W) in terms of Islamic law during February 1966. One son and two daughters were born from this marriage.⁶⁹ W obtained a judicial divorce in the form of a faskh in 1976. The faskh was issued by the Muslim Judicial Council (SA). The grounds for the faskh were based on physical desertion and non-maintenance. The faskh brought an end to the marriage between X and W.⁷⁰ X subsequently married his second wife (Y) in terms of Islamic law on 3 December 1972. Y bore him four daughters. Y obtained a judicial divorce in the form of a faskh during June 1998. The faskh was also issued by the Muslim Judicial Council (SA). The faskh brought an end to the marriage of X and Y. The faskh papers were presented to X who then destroyed them. X and Y continued to live as husband and wife. The Muslim Judicial Council (SA) subsequently arranged a meeting with X in order to explain the consequences of a faskh.⁷¹ This was done in 1999. X then moved out of the matrimonial home that he shared with Y and his daughters. X later married his third wife (Z) in terms of Islamic law during February 2000. Y was neither aware of the marriage nor did she consent to the marriage. Z bore X two sons out of wedlock and one daughter in wedlock.⁷² The death certificate of X stated that he had never been married even though he had married three women in terms of Islamic law during his lifetime and had a total of 10 biological children.⁷³ This issue raises the question of discrimination against Muslim marriages. The issue will not be discussed any further as it is beyond the scope of this thesis.

The facts found in the judgment do not state whether the parents of X (or any other inheriting ascendants) were alive at the time of his death. It will be assumed that all his ascendants had

69 See Moosa N and Abduroaf M 'Faskh (Divorce) and Intestate Succession in Islamic and South African Law: Impact of the Watershed Judgment in *Hassam v Jacobs* and the Muslim Marriages Bill' in De Waal M and Paleker M *South African Law of Succession and Trusts - The Past Meeting the Present and Thoughts for the Future* (2014) 165.

70 See Moosa N and Abduroaf M 'Faskh (Divorce) and Intestate Succession in Islamic and South African Law: Impact of the Watershed Judgment in *Hassam v Jacobs* and the Muslim Marriages Bill' in De Waal M and Paleker M *South African Law of Succession and Trusts - The Past Meeting the Present and Thoughts for the Future* (2014) 171. See also Chapter Two (2.6.2) for a discussion on intestate succession disqualifications and substitution, in terms of Islamic law.

71 See Chapter Two (2.6.2) for a discussion on intestate succession disqualifications and substitution, in terms of Islamic law.

72 See Moosa N and Abduroaf M 'Faskh (Divorce) and Intestate Succession in Islamic and South African Law: Impact of the Watershed Judgment in *Hassam v Jacobs* and the Muslim Marriages Bill' in De Waal M and Paleker M *South African Law of Succession and Trusts - The Past Meeting the Present and Thoughts for the Future* (2014) 171-172.

73 See *Hassam v Jacobs NO & Others* 2009 (5) SA 572 (CC) para 3.

predeceased him, for purposes of the following discussion. The presence of ascendants has an effect on how the intestate estate must devolve regarding these facts in terms of Islamic law.⁷⁴ It does not have an effect on how the intestate estate must devolve regarding these facts in terms of South African law.⁷⁵ As far as South African law is concerned, spouses, as well as children, totally exclude parents from inheriting.⁷⁶

The deceased acquired an immovable property situated at 2 Heron Street, Pelican Park, Cape Town (the property) on 13 February 1990. The property served as the matrimonial home of Y, the deceased, and their children. This could also be seen as the main asset in the estate.⁷⁷ Y submitted two claims to the executor. The one was in terms of the Intestate Succession Act and the other was in terms of the Maintenance of Surviving Spouses Act (the two Acts).⁷⁸ The executor refused to recognise these claims for two reasons. The first reason was because he doubted whether the marriage between Y and X was intact at the time of X's death due to the faskh that that was granted.⁷⁹ The second reason was that, even if he accepted that her marriage to X was intact at the time, it would have been a polygynous one.⁸⁰ The Acts at that time did not recognise widows who were married to their deceased husbands in terms of de facto polygynous marriages.⁸¹ It was therefore not possible to treat Y as a survivor or a spouse for purposes of the two Acts.⁸²

Even though Y did have an intestate succession claim against the estate in terms of Islamic law, she did not have a maintenance claim against the estate in terms of Islamic law. The same issue was raised in *Daniels v Campbell NO & Others*.⁸³ This case, however, was based upon claims made by a widow who was married in terms of a de facto monogamous marriage whereas the case at hand deals with a de facto polygynous marriage according to the court.

74 See Chapter Two (2.6.3) of this thesis for a discussion on intestate succession exclusions in terms of Islamic law.

75 See Chapter Two (3.6.3) of this thesis for a discussion on intestate succession exclusions in terms of South African law.

76 See s 1(1)(d) of the Intestate Succession Act 81 of 1987.

77 *Hassam v Jacobs NO & Others* 2008 (4) All SA 350 (C) para 2.

78 See Intestate Succession Act 81 of 1987 and Maintenance of Surviving Spouses Act 27 of 1990.

79 *Hassam v Jacobs NO & Others* 2008 (4) All SA 350 (C) para 6.

80 *Hassam v Jacobs NO & Others* 2008 (4) All SA 350 (C) para 6.

81 The Acts did however recognise surviving spouses who were married to their deceased husbands in terms of monogamous Muslim marriages. See *Daniels v Campbell NO & Others* 2004 (5) SA 331 (CC).

82 *Hassam v Jacobs NO & Others* 2008 (4) All SA 350 (C) para 3.

83 See *Daniels v Campbell NO & Others* 2003 (3) All SA 139 (C); and *Daniels v Campbell NO & Others* 2004 (5) SA 331 (CC).

Y submitted a claim against the deceased estate for the value of physical improvements, allegedly made by her, to the property. The claim was rejected on the ground of prescription. The claim has not been pursued any further in the case. This claim had Islamic law backing. A claim against a person does not prescribe in terms of Islamic law. A similar issue was argued in the *Ryland v Edros* case where a divorced spouse claimed arrear maintenance from her divorced husband. The Court held that she could not claim debt going back further than three years.⁸⁴ This is in terms of the Prescription Act 68 of 1969.⁸⁵ It is interesting to note that the 2010 MMB states that the South African law of prescription would not apply to claims against a divorced husband.⁸⁶ It is also interesting to note that the Islamic law of maintenance favours females and not males, and that the Islamic law of intestate succession at times, but not always, favour males. This issue is further discussed in Chapter Seven (7.5) where the constitutionality of the Islamic law of intestate succession per se is investigated.⁸⁷

Y instituted proceedings in the Western Cape High Court for an order declaring that she was one of the surviving spouses of X. She also wanted an order declaring that the provisions of the two Acts applicable to a surviving spouse in terms of monogamous Islamic law marriage must also be applicable to surviving spouses who were married to their deceased husband in terms of a polygynous Islamic law marriage. Y alternatively sought an order for the provisions of the two Acts to be declared unconstitutional and be remedied.⁸⁸ The executor did not provide any evidence to refute the facts on which Y based her argument regarding her marriage having not come to an end. The argument made by the executor was not made by any of the other respondents in the case.⁸⁹ Y, however, argued that the faskh was revoked when X tore up the faskh papers and reconciled with her during the waiting period. The reconciliation includes X taking Y on a trip to India during the waiting period.⁹⁰ The Court held that Y had succeeded in proving on a balance of probabilities that her marriage to X was intact at the time of X's death.⁹¹ It must be noted here that the court incorrectly applied Islamic law with regard to the divorce. It was not possible for the faskh to have revoked during the waiting period as a faskh is irrevocable. X was therefore not married to Y at the

84 See *Ryland v Edros* 1997 (2) SA 690 (C) 718-719.

85 See s 3 of the Prescription Act 68 of 1969.

86 See section 11(5) of the 2010 MMB, Government Notice 37 in *Government Gazette* 33946 of 21 January 2011 available at www.gov.za/sites/www.gov.za/files/33946_gen37.pdf (accessed 26 October 2017).

87 The Islamic law of intestate succession is looked at in light of the Islamic law of maintenance.

88 *Hassam v Jacobs NO & Others* 2008 (4) All SA 350 (C) para 4.

89 *Hassam v Jacobs NO & Others* 2008 (4) All SA 350 (C) para 5.

90 See *Hassam v Jacobs NO & Others* 2008 (4) All SA 350 (C) para 2.

91 *Hassam v Jacobs NO & Others* 2008 (4) All SA 350 (C) para 8.

time of his death. Y would therefore be disqualified from inheriting as an intestate beneficiary in terms of Islamic law.⁹² A further discussion on this issue is beyond the focus of this chapter. X was also married to Z at the time of his death. This caused the marriage between Y and the X to be a polygynous one in terms of the judgment.

This case was thus different to *Daniels v Campbell* where the Court held that the provisions of the two Acts include a spouse to a de facto monogamous marriage entered into in terms of Islamic law.⁹³ The Court, in *Daniels v Campbell*, specifically refrained from extending the operation of the two Acts to polygynous marriages entered into in terms of Islamic law. This was done merely because the issues on which the Court had to decide were based upon a de facto monogamous marriage. The Western Cape High Court held in *Hassam v Jacobs* that the continued exclusion of spouses in polygynous Islamic law marriages from the two Acts would be unfairly discriminatory against them.⁹⁴ The exclusion would also be in conflict with the provisions of s 9 of the Constitution.⁹⁵

The Western Cape High Court declared that the word ‘survivor’ as used in the Maintenance of Surviving Spouses Act includes a surviving partner to a polygamous Muslim marriage. It also declared that the word ‘spouse’ as used in the Intestate Succession Act includes a surviving partner to a polygamous Muslim marriage.⁹⁶ Both Y and Z were declared survivors and spouses for purposes of the two Acts. Section 1(4)(f) of the Intestate Succession Act was declared to be inconsistent with the Constitution to the extent that it makes provision for only one spouse in a marriage entered into in terms of Islamic law to be an intestate beneficiary in the intestate estate of the deceased person.⁹⁷ The order was referred to the Constitutional Court for confirmation.⁹⁸ The order was confirmed by the Constitutional Court with minor variations. It is interesting to note that the Western Cape High Court did not give a ruling concerning the constitutionality of the Maintenance of Surviving Spouses Act 27 of 1990.

92 See Moosa N and Abduroaf M ‘Faskh (Divorce) and Intestate Succession in Islamic and South African Law: Impact of the Watershed Judgment in *Hassam v Jacobs* and the Muslim Marriages Bill’ in De Waal M and Paleker M *South African Law of Succession and Trusts - The Past Meeting the Present and Thoughts for the Future* (2014) for a further discussion on this issue.

93 See *Daniels v Campbell NO & Others* 2003 (3) All SA 139 (C); and *Daniels v Campbell NO & Others* 2004 (5) SA 331 (CC).

94 *Hassam v Jacobs NO & Others* 2008 (4) All SA 350 (C) para 19.

95 See s 9 of the Constitution of the Republic of South Africa, 1996.

96 *Hassam v Jacobs NO & Others* 2008 (4) All SA 350 (C) para e23.

97 *Hassam v Jacobs NO & Others* 2008 (4) All SA 350 (C) para 23.

98 *Hassam v Jacobs NO & Others* 2008 (4) All SA 350 (C) para 23.

This matter was therefore not referred to the Constitutional Court for confirmation.⁹⁹ The Constitutional Court did not raise any objections to the Western Cape High Court's interpretation of the Maintenance of Surviving Spouses Act extending to de facto polygynous Islamic marriages.¹⁰⁰

X leaves behind two widows (in terms of this judgment), three sons, and seven daughters.¹⁰¹ A comparison is now made of how the net estate of X must be distributed in terms of Islamic law and then how it must be distributed in terms of South African law. Two of the three sons in the scenario were conceived out of wedlock.¹⁰² Islamic law requires that a child be conceived in wedlock in order for him or her to be eligible to inherit as an intestate beneficiary. This is in terms of both schools. The disqualification applies only in the event where the child is inheriting from his or her biological father. The disqualification does not apply when he or she is inheriting from his or her biological mother.¹⁰³ It would be relevant to note here that South African law initially stated that a child who was conceived out of wedlock was disqualified from inheriting from his or her biological father's intestate estate. This was prior to the enactment of the Intestate Succession Act 81 of 1987.¹⁰⁴ There is nothing in Islamic law that prevents a father from bequeathing up to 1/3 of the net estate in favour of his or her son or daughter who was conceived out of wedlock. This was, however, not done in this case. The remaining seven daughters and son were all conceived in wedlock. They are therefore not disqualified.¹⁰⁵ The issue of the surviving spouses is also problematic

99 See *Hassam v Jacobs NO & Others* 2008 (4) All SA 350 (C) para 23; and *Hassam v Jacobs NO & Others* 2009 (5) SA 572 (CC) para 57.

100 See Moosa N and Abduroaf M 'Faskh (Divorce) and Intestate Succession in Islamic and South African Law: Impact of the Watershed Judgment in *Hassam v Jacobs* and the Muslim Marriages Bill' in De Waal M and Paleker M *South African Law of Succession and Trusts - The Past Meeting the Present and Thoughts for the Future* (2014) 170 for a further discussion on this issue.

101 The High Court and Constitutional Court judgments do not make reference to the children that were born as a result of the first marriage of X. It has however been confirmed that he had one son and two daughters born from his marriage with W. See Moosa N & Abduroaf M 'Faskh (Divorce) and Intestate Succession in Islamic and South African Law: Impact of the Watershed Judgment in *Hassam v Jacobs* and the Muslim Marriages Bill' in De Waal M and Paleker M *South African Law of Succession and Trusts - The Past Meeting the Present and Thoughts for the Future* (2014) 187.

102 See *Hassam v Jacobs NO & Others* 2008 (4) All SA 350 (C) para 23; *Hassam v Jacobs NO & Others* 2009 (5) SA 572 (CC) para 173; and Moosa N & Abduroaf M 'Faskh (Divorce) and Intestate Succession in Islamic and South African Law: Impact of the Watershed Judgment in *Hassam v Jacobs* and the Muslim Marriages Bill' in De Waal M and Paleker M *South African Law of Succession and Trusts - The Past Meeting the Present and Thoughts for the Future* (2014) 173.

103 See Chapter Two (2.6.1) and (2.6.2) of this thesis for a full discussion on intestate succession ties, intestate succession disqualifications, and substitution, in terms of Islamic law.

104 Intestate Succession Act 81 of 1987.

105 See Moosa N and Abduroaf M 'Faskh (Divorce) and Intestate Succession in Islamic and South African Law: Impact of the Watershed Judgment in *Hassam v Jacobs* and the Muslim Marriages Bill' in De Waal

as far as Y is concerned. Even though Y was disqualified from inheriting as a surviving spouse in terms of Islamic law, she is regarded as a surviving spouse in terms of South African law. The judgment does not state whether X left behind any parents or other inheriting ascendants. It also does not state whether there were any other surviving relatives present. It will be assumed that the inheriting ascendants and all other relatives of X had predeceased him. This assumption is made in order to present a discussion as to how the estate must be distributed in terms of each of the two legal systems.

The distribution of the deceased estate is now undertaken based on the above facts. The value of the deceased estate has neither been stated in the High Court judgment nor in the Constitutional Court judgment. These judgments do, however, state that an executor had been appointed. No reference has been made to the appointment in terms of s 18(3) of the Administration of Estates Act 66 of 1965.¹⁰⁶ It could therefore be assumed that the estate was greater than R125 000.00. It will be assumed that the net estate in this scenario is R144 000.00.¹⁰⁷ This is also done in order to compare the distribution in terms of the two legal systems. The purpose of this comparison is also to ascertain how close or far these judgments were to Islamic law principles.

The Islamic law of intestate succession states that the widow must inherit $1/8 = 9/72$ and the son and daughters must share the remainder which is $63/72$. A son would inherit double the share of a daughter. The son would inherit $14/72$ and each daughter would inherit $7/72$. Z would inherit $9/72 \times R144\ 000.00 = R18\ 000.00$, the son would inherit $14/72 \times R144\ 000.00 = R28\ 000.00$, and each daughter would inherit R14 000.00.¹⁰⁸ The two sons are disqualified

M and Paleker M *South African Law of Succession and Trusts - The Past Meeting the Present and Thoughts for the Future* (2014) 173.

106 Letters of Authority are issued in terms of s 18(3) of the Administration of Estates Act 66 of 1965 in the event where the deceased estate is valued at less than R125 000.00. The amount was increased from R125 000.00 to R250 000.00 on 17 August 2015. The change affects the estates of deceased persons who died on or after 24 November 2014. The deceased in this case died on 22 August 2001. This judgment was handed down prior to the increase. The amount of R125 000.00 would be applicable to this case. See Chief Master's Directive 3 of 2015, Circular 58 of 2015, effective 17 August 2015, available at www.justice.gov.za/master/m_docs/2015-03_chm-directive.pdf (accessed 16 November 2017).

107 This amount has been used in order to facilitate calculations. It would ensure that the amount inherited by each of the intestate beneficiaries is in Rands only, with no cents.

108 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11-12 where it states '11. Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females; if (there are) only daughters, two or more, their share is two thirds of the inheritance; if only one, her share is half. For parents, a sixth share of inheritance to each if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased left brothers or (sisters), the mother has a sixth. (The distribution in all cases is) after the payment of legacies he may have bequeathed or debts. You know not which of them, whether your

from inheriting due to having been conceived out of wedlock. This example shows that the Islamic law of intestate succession favours children over widows. It also shows that a son inherits double the share of a daughter. The constitutionality of the unequal distribution is looked at in Chapter Seven.

The South African law situation is quite different. This is governed by the Intestate Succession Act 81 of 1987. The Act states that the surviving spouse or spouses would inherit the greater of R125 000.00 each or a child's share.¹⁰⁹ A child's share is calculated by adding all 10 children plus the number of surviving spouses. In this scenario it would be 10 plus two which equals 12. A child's share in this scenario would be $R144\ 000.00 \div 12 = R12\ 000.00$. Y, Z, and each of the 10 children would inherit this amount. R12 000.00 is, however, less than R125 000.00. The R144 000.00 must therefore be equally shared between the two widows in terms of the Intestate Succession Act 81 of 1987.

It is interesting to note that the children are all totally excluded from inheriting in this example. South African law allows children to claim maintenance from the deceased estate if certain conditions are met. This claim for maintenance is not allowed in terms of Islamic law. It is, however, quite interesting to note that the net estate was not distributed in terms of Islamic law.¹¹⁰ The seven daughters and one son could have renounced their rights to the benefits in favour of Y in terms of the Intestate Succession Act 81 of 1987.

parents or your children, are nearest to you in benefit, (these fixed shares) are ordained by Allah. And Allah is Ever All-Knowing, All-Wise. 12. In that which your wives leave, your share is a half if they have no child; but if they leave a child, you get a fourth of that which they leave after payment of legacies that they may have bequeathed or debts. In that which you leave, their (your wives) share is a fourth if you leave no child; but if you leave a child, they get an eighth of that which you leave after payment of legacies that you may have bequeathed or debts. If the man or woman whose inheritance is in question has left neither ascendants nor descendants, but has left a brother or a sister, each one of the two gets a sixth; but if more than two, they share in a third; after payment of legacies he (or she) may have bequeathed or debts, so that no loss is caused (to anyone). This is a Commandment from Allah; and Allah is Ever All-Knowing, Most-Forbearing.'

109 The amount was changed from R125 000.00 to R250 000.00 on 17 August 2015. The change affects the estates of deceased persons who died on or after 24 November 2014. The deceased in this case died on 22 August 2001. This was before the change was made. The amount of R125 000.00 is therefore used in this example for purposes of calculation. See Chief Master's Directive 3 of 2015, Circular 58 of 2015, effective 17 August 2015, available at www.justice.gov.za/master/m_docs/2015-03_chm-directive.pdf (accessed 16 November 2017).

110 See Abduroaf M 'The Evolution of Muslim Personal Law in the South African Constitutional Dispensation' in *Dutch Reformed Theological Journal* 54 (2013) 9.

4.3.3 *Faro v Bingham NO & Others* [2013]

This case concerned a deceased Muslim male (X) who died intestate.¹¹¹ X married his wife (Y) in terms of Islamic law on 28 March 2008. The couple had problems and X wanted a divorce. X issued Y with a revocable divorce in the form of a talaq on 24 August 2009.¹¹² X was diagnosed with lung cancer during 2009.¹¹³ X died on 4 March 2010. Y was appointed as the executrix of the deceased estate. A dispute arose concerning whether X was married to Y when he died. Y argued that she was married to X when he died. She argued that the divorce was revoked during the waiting period as she had sexual relations with X during that time.¹¹⁴ Sexual relations do not revoke a divorce in terms of the Shaafi'ee school.¹¹⁵ Express words of revocation are required in this regard. The Muslim Judicial Council (SA) based in Cape Town was approached for a verification certificate regarding the status of the marriage between X and Y when X died. The Muslim Judicial Council (SA) issued a certificate and two subsequent letters regarding this matter. The last letter issued by the Muslim Judicial Council (SA) stated that the marriage had not been revoked during the waiting period. Y was therefore not a surviving spouse according to the Muslim Judicial Council (SA).¹¹⁶ It has been suggested that the Muslim Judicial Council (SA) should be more structured concerning the procedures followed when issuing certificates and letters in this regard.¹¹⁷ The Master of the High Court was also of the view that Y was not married to X when he died.¹¹⁸

The decision of the Master of the High Court was taken on appeal to the Western Cape High Court. The Court noted that the predominant view in Islamic law is that a divorce may be revoked by express words or by sexual relations between the parties concerned.¹¹⁹ The Western Cape High Court overruled the final decision of the Muslim Judicial Council (SA) as well as the decision of the Master of the High Court. It held that the marriage was intact at the time

111 See *Faro v Bingham NO & Others* (ZAWHC) unreported case no 4466/13 (25 October 2013) para 4.

112 See *Faro v Bingham NO & Others* (ZAWHC) unreported case no 4466/13 (25 October 2013) para 3-4.

113 See *Faro v Bingham NO & Others* (ZAWHC) unreported case no 4466/13 (25 October 2013) para 4.

114 See Chapter Two (2.6.2) for a discussion on the various types of Islamic divorces and waiting periods.

115 See Al Sharbeene S *Mughnee Al Muhtaaj Ilaa Ma'rifah Ma'aanee Alfaadh Al Minhaaj* 2 ed (2004) vol3, 441; and Al Zuḥaylee W *Al Fiqh Al Islaamee Wa Adillatuhoo* 3 ed (1989) vol 7, 465.

116 See Amien W 'The Viability for Women's Rights of Incorporating Islamic Inheritance Laws into the South African Legal System' in De Waal M and Paleker M *South African Law of Succession and Trusts - The Past Meeting the Present and Thoughts for the Future* (2014) 216.

117 See Amien W 'The Viability for Women's Rights of Incorporating Islamic Inheritance Laws into the South African Legal System' in De Waal M and Paleker M *South African Law of Succession and Trusts - The Past Meeting the Present and Thoughts for the Future* (2014) 216.

118 See *Faro v Bingham NO & Others* (ZAWHC) unreported case no 4466/13 (25 October 2013) para 16

119 See *Faro v Bingham NO & Others* (ZAWHC) unreported case no 4466/13 (25 October 2013) para 4.

that X died. This raises the question of religious entanglement.¹²⁰ A further discussion on this issue is beyond the scope of this thesis. X was therefore declared to be the spouse of Y for purposes of the Intestate Succession Act 81 of 1987 and the Maintenance of Surviving Spouses Act 27 of 1990.¹²¹

X died leaving behind Y, a major son, a major daughter, a minor son conceived in wedlock, and a minor son conceived out of wedlock.¹²² The facts of the judgment do not state whether the major son and major daughter were conceived in wedlock or out of wedlock. It will be assumed for purposes of this discussion that they were conceived in wedlock. The distribution of the deceased estate is now looked at based on the above facts. The value of the deceased estate has not been stated in the judgment. The judgment does, however, state that an executor had been appointed. No reference has been made to the appointment in terms of s 18(3) of the Administration of Estates Act 66 of 1965.¹²³ It could therefore be assumed that the estate was greater than R125 000.00. It will be assumed for purposes of comparison between the Islamic law and South African law that the net estate was R160 000.00.¹²⁴ The Islamic law beneficiaries in this scenario would be the two sons, a daughter and Y. The minor son conceived out of wedlock would be disqualified from inheriting in terms of Islamic law. There was nothing preventing X from including the son conceived out of wedlock as a testate beneficiary in terms of the Islamic law of testate succession.¹²⁵ Y would inherit 1/8 and the remaining 7/8 would be shared between the two sons and one daughter.¹²⁶ The sons would

120 See *Faro v Bingham NO & Others* (ZAWHC) unreported case no 4466/13 (25 October 2013) para 47(a). See also See Amien W 'The Viability for Women's Rights of Incorporating Islamic Inheritance Laws into the South African Legal System' in De Waal M and Paleker M *South African Law of Succession and Trusts - The Past Meeting the Present and Thoughts for the Future* (2014) 215 for a short discussion on this issue.

121 See *Faro v Bingham NO & Others* (ZAWHC) unreported case no 4466/13 (25 October 2013) para 47(a).

122 See *Faro v Bingham NO & Others* (ZAWHC) unreported case no 4466/13 (25 October 2013) paras 2 and 5.

123 Letters of Authority are issued in terms of s 18(3) in the event where the deceased estate is valued at less than R125 000.00. See s 18(3) of the Administration of Estates Act 66 of 1965. The amount was increased from R125 000.00 to R250 000.00 on 17 August 2015. The change affects the estates of deceased persons who died on or after 24 November 2014. The deceased in this case died on 22 August 2001. This judgment was handed down prior to the increase. The amount of R125 000.00 would be applicable to this case. See Chief Master's Directive 3 of 2015, Circular 58 of 2015, effective 17 August 2015, available at www.justice.gov.za/master/m_docs/2015-03_chm-directive.pdf (accessed 16 November 2017).

124 This amount has been used in order to facilitate easy calculations. It would ensure that the amount inherited by each of the intestate beneficiaries is in Rands only, with no cents.

125 See Chapter Two (2.5) for a discussion on the Islamic law of testate succession.

126 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that 'Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females; if (there are) only daughters, two or more, their share is two thirds of the inheritance; if only one, her share is half. For parents, a sixth share of inheritance to each if the deceased

each inherit double the share of the daughter. The widow would inherit $1/8 = 5/40$ and the remainder $7/8 = 35/40$. The widow would inherit $5/40 \times R160\,000.00 = R20\,000.00$, each of the two sons would inherit $14/40 \times R160\,000.00 = R56\,000.00$, and the daughter would inherit $7/40 \times R160\,000.00 = R28\,000.00$. The South African law position is quite different. The widow would inherit the greater of a child's share or R125 000.00.¹²⁷ The widow would inherit R125 000.00 and the remaining R35 000.00 would be equally shared between the three sons and daughter. Each of the four children would inherit R8 750.00.¹²⁸ It can clearly be seen that the two legal systems operate quite differently in the event where intestate laws find application.

4.4 Conclusion

This chapter looked at various developments within the South African law of succession regarding case law and interpretation of statutes, with a focus on the rights of Muslims. What can be seen from these cases is that Muslims are being given rights to inheritance in terms of existing South African law provisions. The examples in this chapter have shown that the Islamic law distribution is quite different to the South African law distribution. The examples have shown that there are instances where a beneficiary would be eligible to inherit in terms of South African law but not in terms of Islamic law. This has clearly been seen in the instance of children conceived out of wedlock. What came across quite clearly is that the Islamic law of intestate succession favours children over surviving spouses whereas the South African law of intestate succession favours surviving spouses over children. This has been

left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased left brothers or (sisters), the mother has a sixth. (The distribution in all cases is) after the payment of legacies he may have bequeathed or debts. You know not which of them, whether your parents or your children, are nearest to you in benefit, (these fixed shares) are ordained by Allah. And Allah is Ever All-Knowing, All-Wise. 12. In that which your wives leave, your share is a half if they have no child; but if they leave a child, you get a fourth of that which they leave after payment of legacies that they may have bequeathed or debts. In that which you leave, their (your wives) share is a fourth if you leave no child; but if you leave a child, they get an eighth of that which you leave after payment of legacies that you may have bequeathed or debts. If the man or woman whose inheritance is in question has left neither ascendants nor descendants, but has left a brother or a sister, each one of the two gets a sixth; but if more than two, they share in a third; after payment of legacies he (or she) may have bequeathed or debts, so that no loss is caused (to anyone). This is a Commandment from Allah; and Allah is Ever All-Knowing, Most-Forbearing.'

127 The amount was changed from R125 000.00 to R250 000.00 on 17 August 2015. The change affects the estates of deceased persons who died on or after 24 November 2014. The deceased in this case died on 4 March 2010. This was before the change was made. The amount of R125 000.00 is therefore used in this example for purposes of calculation. See Chief Master's Directive 3 of 2015, Circular 58 of 2015, effective 17 August 2015, available at www.justice.gov.za/master/m_docs/2015-03_chm-directive.pdf (accessed 16 November 2017).

128 See Chapter Three (3.6.6) for a discussion on the categories of intestate beneficiaries and their shares, in terms of South African law.

seen in all of the cases. The children in these cases would have inherited much more favourably in terms of Islamic law. It must, however, be noted that the distribution might be different if there were different sets of facts. This chapter based the discussion on the four cases heard in the South African courts. The contentious issue, however, is when the son inherits double the share of the daughter as was discussed in 4.2.1 above. The constitutionality of the unequal distribution is investigated in Chapter Seven (7.4 and 7.5). The practical application of the Islamic law of succession within the South African context is further looked at in the next chapter.



CHAPTER FIVE
PRACTICAL APPLICATION OF THE ISLAMIC LAW OF SUCCESSION IN
SOUTH AFRICA

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5.1 Introduction

This chapter looks at the practical application of the Islamic law of succession and administration of estates within the South African context by way of a fictitious scenario. It highlights some of the problem areas when a Muslim testator or testatrix bequeaths his or her estate in terms of Islamic law by means of a will (Islamic will). Four aspects are looked at in this regard. The aspects are: the Islamic will, the Islamic distribution certificate, interpretation of the Islamic will and the Islamic distribution certificate, and possible constitutional challenges to provisions found in the Islamic law of intestate succession. The scenario that is looked at in this chapter is where a person (X) dies on 30 August 2017 at 10:00 PM at the age of 45 due to a gunshot wound that caused his death. He died six hours after being shot. He was shot at 4:00 PM. The time of his death was confirmed by a registered medical doctor. X resided in the Western Cape for all of his life. He was a Black African Muslim who practiced aspects of African customary law. He was also one of the cultural leaders in the African community. He left behind a gross estate to the value of R2 200 000.00.

X executed a written will on 30 August 2016. The will satisfied the conditions required for it to be valid in terms of South African law. It was also valid and enforceable in terms of Islamic law. This type of will is referred to hereafter as an 'Islamic will'. X appointed his wife (C) as the executrix of his estate. The will stated that the liabilities first needed to be deducted from the gross estate before settling the testate and intestate succession claims. The will further stated that the appointed executrix should ascertain whether there were any legal and/or religious liabilities against the estate. The will expressly made mention of any deferred dower, arrear maintenance, and/or contractual debts as examples of legal liabilities in this regard. It also expressly made mention of an unperformed pilgrimage to Makkah (hajj) as an example of a religious liability.

X made a number of bequests in his will. He bequeathed 1/6 of his net estate to his divorced wife (E). He bequeathed another 1/6 of his net estate to his daughter (J) who was conceived out of wedlock. The will stated that the remainder of his estate should be distributed in terms of the Islamic law of intestate succession. The will further stated that the executrix of the estate must acquire an 'Islamic distribution certificate' from a qualified Islamic law expert with a degree in Islamic law in this regard. The certificate must provide the names of his intestate succession beneficiaries at the time of his death in terms of Islamic law. The will did not state the school of law (hereafter referred to as school) that should be used in this regard.

The divorced wife (E) killed X. The daughter who was conceived out of wedlock (J) renounced the 1/6 bequest X made to her. The renouncement was made after X had died.

The liabilities against the estate were R232 000.00 in total. These included administration costs; funeral costs; an unpaid dower that was due nine years back; an arrear maintenance that was due eight years back; an unperformed pilgrimage owing to God Almighty; and a debt owed to a creditor that was due six years back. There were no other liability claims against the estate. The executrix (C) approached an Islamic law expert for an Islamic distribution certificate as required in terms of the will. She was instructed to depose a next of kin affidavit in order for the Islamic law expert to draft and issue the Islamic distribution certificate. All supporting documentation, including a certified copy of the death certificate, copy of the last will and testament, marriage certificates, divorce certificates, birth certificates, and any other relevant documents were required to be submitted with the affidavit. It is interesting to note that similar documents are required by the Muslim Judicial Council (SA) before issuing an Islamic distribution certificate to an executor or executrix.¹

The relatives of X who were stated in the next of kin affidavit were his parents, four spouses whom he had married, a number of descendants, and a number of siblings. The affidavit stated that X left behind both parents and he was conceived in wedlock. His mother is (A) and his father is (B). His father had converted to Christianity two years prior to X having died. X married four women during his lifetime. All these marriages were in terms of Islamic law only. The first wife is C. She is also the executrix of the estate. Her marriage to X was intact at the time of his demise. The second wife is (D). D has successfully obtained a judicial divorce in the form of a faskh nine months prior to X having died. They subsequently reconciled one month later but did not remarry. The third wife is (E). She is a practising Jewess. E is also the person who killed X. The fourth wife is (F). X issued F with an irrevocable divorce one hour prior to dying. His intention was to disinherit her.

X also leaves behind a number of children. They are an adopted daughter (G); a non-biological accepted son in terms of African custom (H); a biological daughter who was conceived out of wedlock by artificial fertilisation (I), a biological daughter who was conceived out of wedlock (J); a cognate grandson (K) whose mother had predeceased X; a

1 See Dante Z 'Distribution Certificates (Estates)' (2016) <http://mjc.org.za/2016/06/14/distribution-certificates-estates/> (accessed 20 October 2017).

legal daughter (L) who was conceived in wedlock but as a result of an adulterous act between the wife of X and another man;² and an agnate granddaughter (M). X further left behind a number of siblings. They were a full brother who converted to Christianity (N); a full sister (O); and a consanguine brother (P). All the persons mentioned above are Muslim with the exception of his father B (Christian), his divorced wife E (Jewess), and his full brother N (Christian).

The liquidation and distribution of the estate is now discussed in terms of the abovementioned facts. The application of the scenario is looked at in terms similar headings as found in Chapters Two and Three of this thesis. They are: the conditions to be complied with before administering an estate, estate liability claims, testate succession claims, and then intestate succession claims. Minor comparisons between the laws of the two legal systems are made where deemed relevant.

5.2 Conditions to be met before administering an estate

The conditions that must be met before the estate of a person may be deemed a deceased estate is that he must have died or been declared dead by a court of law. X died on 30 August 2017 at 10:00 PM. This was confirmed by a registered medical doctor. His estate fell open at that moment in time. This is also referred to as *delatio*. It should be noted that the rights of the testate and intestate beneficiaries vest at this time.³

5.3 Claims against the gross estate

The value of the assets in the estate prior to any deductions was R2 200 000.00. This is also referred to as the gross estate. The first claims against the amount would be the liabilities, then the testate succession claims, and then the intestate succession claims. All three claims are present in the scenario.⁴

5.4 Liability claims

There are a number of liabilities referred to in the scenario. The total amount of liabilities totalled R232 000.00. This included the funeral costs, the administration costs, the unpaid dower, the unpaid maintenance claim, the contractual claim, and the unperformed pilgrimage.

2 See Chapter Two (2.6.1) where the term ‘legal child’ is referred to.

3 See Chapter Two (2.2) and Chapter Three (3.2) of this thesis for a discussion on this issue.

4 See Chapter Two (2.3) and Chapter Three (3.3) of this thesis for a discussion on this issue.

The estate would be considered solvent as the assets exceeded the liabilities by R1 968 000.00.⁵

5.4.1 Administration costs

Administration costs include funeral costs, estate duty, bank charges, transfer fees, executor's fees, and Master's fees, which are all claims against the estate that are required to be settled in order to successfully liquidate the estate within the South African context.⁶ These claims are not expressly stated in the classical texts governing the laws of succession and administration of estates in terms of the Shaafi'ee and Hanafee schools. They are, however, incidental costs as they are required to be settled in order to successfully liquidate and distribute an estate in terms of South African law.⁷

The funeral costs include all expenses that were directly related to the burial of a deceased Muslim. This claim would be allowed in terms of South African law even in the event where there was no will stating that these costs must be paid. It is interesting to note that the current funeral costs for burying a deceased averages between R2 500.00 and R5 000.00.⁸ There is a legal maxim within Islamic law that states that any act needed to fulfil an obligation is in itself an obligation.⁹ These payments must be made in order to ensure that the creditors as well as the testate and intestate succession beneficiaries receive what is rightfully due to them. There are currently Islamic institutions in South Africa that offer the services of an executor and claim the executor's fees. This has been accepted as standard practice for services rendered. These institutions include Absa Islamic and Albaraka banks.¹⁰

5 See Chapter Two (2.4) and Chapter Three (3.4) of this thesis for a discussion on this issue.

6 See De Waal MJ & Schoeman-Malan MC *Law of Succession* 5 ed (2015) 244.

7 See Chapter Two (2.4.2) of this thesis for a discussion on this issue.

8 Compare Guru 'Funerals in South Africa and what they Cost - Muslim Burial Culture' available at <http://compareguru.co.za/news/funeral-customs-in-sa-and-what-they-cost/> (accessed 03 January 2017). See Hartley U 'The Cost of Death' (2016) available at <http://www.vocfm.co.za/the-cost-of-death/> (accessed 20 October 2017).

9 Ibn Qudaamah M *Rawḍah Al Naadhīr Wa Jannah Al Manaadhīr Fee Usool Al Fiqh 'Alaa Madh hab Al Imaam Ahmad* (1998) vol 1, 118-120.

10 See Absa Bank 'Have Peace of Mind with an Islamic Will' <https://www.absa.co.za/personal/bank/islamic-banking/islamic-wills/> (accessed 20 October 2017). See also Albaraka Bank 'Administration of Estates and Wills' <http://www.albaraka.co.za/ProductsandServices/Administrationofestatesandwills.aspx#Estate> (accessed 20 October 2017).

5.4.2 Debt

The other possible liabilities in this scenario include both legal and religious claims against the estate. The arrear dower claim, the arrear maintenance claim, and the contractual debt claim are the legal claims mentioned in this scenario. These claims are all older than three years and have therefore prescribed in terms of South African law. Prescription was also applied in the Western Cape High Court in *Ryland v Edros* where a divorced spouse claimed arrear maintenance.¹¹ The divorced spouse claimed for approximately 20 years of arrear maintenance from her former husband to whom she was married in terms of Islamic law. Her claim was based on Islamic law principles. Her claim for maintenance was successful. She could, however, claim maintenance for only up to three years from the date that her claim was served on her former husband.¹² This was due the application of the Prescription Act 68 of 1969.¹³ It is quite interesting to note that the current version of the Muslim Marriages Bill includes a clause that excludes the application of the Prescription Act to Islamic law marriages concluded in terms of the Bill.¹⁴ The Bill has not yet been enacted and would have no impact on the scenario.

The executrix could argue that these claims have prescribed and are therefore not enforceable and that the creditors should therefore not be paid.¹⁵ The claims have not prescribed in terms of Islamic law and must therefore be paid.¹⁶ X had made provision for these claims to be settled by empowering his executrix with the authority to settle them. These claims must therefore be settled by the executrix in terms of the provisions in the will. It could be argued that the right to freedom of testation should override the prescription rule.

11 The South African law position has been confirmed in *Ryland v Edros* 1997 (2) SA 690 (C). In this case the Court recognised some of the consequences that flow from marriages entered into in terms of Islamic law. One of the consequences was a claim for arrear maintenance in terms of the law of contract. It should be noted that the facts in *Ryland v Edros* 1997 (2) SA 690 (C) involved a claim for arrear maintenance subsequent to a divorce. The scenario at hand deals with a claim for arrear maintenance subsequent to death. It should be noted that *Ryland v Edros* is a High Court decision and is binding only in the Western Cape.

12 See *Ryland v Edros* 1997 (2) SA 690 (C) 718-719.

13 See s 10(1)(a) of the *Prescription Act* 68 of 1969 where it states that '(1) [s]ubject to the provisions of this chapter and of Chapter IV, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt.'

14 See section 11(5) of the 2010 MMB available at www.gov.za/sites/www.gov.za/files/33946_gen37.pdf (accessed 26 October 2017) where it states that '[a]ny unpaid arrear maintenance, either mutually agreed to or in terms of a court order, which is due and payable to a wife may not be extinguished by prescription, notwithstanding the provisions of the Prescription Act, 1969 (Act No. 68 of 1969), or any other law.'

15 See Chapter Three (3.4.2) of this thesis for a discussion on this issue.

16 See Chapter Three (3.4.2) of this thesis for a discussion on this issue.

The unperformed pilgrimage claim is the only religious claim in this scenario. This claim is not automatically enforceable as a liability in terms of South African law. X has, however, made provision for this payment in terms of the will. The religious liability is enforceable in terms of the Shaafi'ee school but not in terms of the Ḥanafee school.¹⁷ The will does, however, make express reference to the unperformed pilgrimage. It can therefore be assumed that the testator wanted the Shaafi'ee school to apply in this regard. The executrix must therefore settle this claim as per the will by instructing a person to perform the pilgrimage on behalf of X. The average package cost for a pilgrimage is approximately R32 650.00.¹⁸

5.5 Testate succession claims

The remainder of the gross estate after the liabilities have been deducted in this scenario is R1 968 000.00. This amount is also referred to as the net estate.

5.5.1 Law of wills

X executed a Sharee'ah compliant will that satisfied all the South African law requirements for validity. Absa Islamic Bank offers the service of drafting and executing a Sharee'ah compliant will. They charge a nominal fee of R342.00 for the drafting and execution of these wills.¹⁹ The Muslim Judicial Council, based in the Western Cape, offers this service of drafting and executing a Sharee'ah compliant will as well.

An Islamic will normally has a clause in it stating that the residue of the estate must devolve in terms of the Islamic law of succession. An Islamic institution or an Islamic law expert would then be appointed in the will to issue an Islamic distribution certificate. The facts of the scenario did not state who drafted the will. It did, however, state that the Islamic distribution certificate needed to be issued by an Islamic legal expert. This raises the question of delegation of testamentary powers which is generally not allowed in terms of South African law. There are limited exceptions.²⁰ The Islamic law expert would not have authority to draft the Islamic distribution certificate as he or she pleases. He or she must identify the

17 See Chapter Two (2.4.2) of this thesis for a discussion on this issue.

18 Al Anwar Express 'Swissotel Al Maqam Package 2017' <http://alanwarexpress.co.za/tours/swissotel-al-maqam-package/> (accessed 20 October 2017).

19 See Absa Bank 'Have Peace of Mind with an Islamic Will' available at <https://www.absa.co.za/personal/bank/islamic-banking/islamic-wills/> (accessed 20 October 2017). See also Albaraka Bank 'Administration of Estates and Wills' available at <http://www.albaraka.co.za/ProductsandServices/Administrationofestatesandwills.aspx#Estate> (accessed on 20 October 2017).

20 See Chapter Three (3.5.4) of this thesis for a discussion on this issue.

beneficiaries in terms of Islamic law. This type of certificate was accepted by the Master of the High Court in *Moosa NO & Others v Harnaker & Otherson* 14 September 2017.²¹ The Court noted that the will stated that the estate should devolve in terms of Islamic law and that an Islamic distribution certificate from the Muslim Judicial Council shall be binding in this regard. The Islamic distribution certificate was executed by the Muslim Judicial Council in terms of the will.²² It is interesting to note that the validity of the certificate was not disputed by the Master of the High Court and the Registrar of Deeds. It was also not commented on by the Court.²³

It should be noted that I have also issued a few Islamic distribution certificates in my capacity as a holder of an Islamic law degree. The certificates that I have issued in the Western Cape were accepted by the Master of the High Court and the estates have since been finalised. It is interesting to note that the Muslim Judicial Council (SA) currently charges a fee of R300.00 for issuing an Islamic distribution certificate and that it takes approximately seven days for them to issue the certificate.²⁴ It could therefore be said that these certificates are generally accepted by the Master of the High Court. It should be noted that the validity of a clause in an Islamic will that requires an Islamic law expert to issue an Islamic distribution certificate has (to date) not been considered by the courts in light of the rule that prohibits delegation of testamentary powers. The rule is also not applied by the Master's Office in this regard as stated above. There is, however, no obvious reason for ignoring the rule. It could be argued that in the case of Islamic wills, that the common law has been developed through custom as envisaged in *Breda v Jacobs* 1921 AD 330.²⁵

21 *Moosa NO and Others v Harnaker and Others* 2017 (6) SA 425 (WCC) para 7.

22 *Moosa NO and Others v Harnaker and Others* 2017 (6) SA 425 (WCC) para 7.

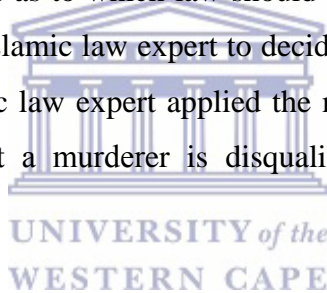
23 See *Moosa NO & Others v Harnaker & Others* (ZAWHC) unreported case no 400/17 (14 September 2017).

24 See Dante Z 'Distribution Certificates (Estates)' (2016) available at <http://mjc.org.za/2016/06/14/distribution-certificates-estates/> (accessed 20 October 2017).

25 See *Breda v Jacobs* 1921 AD 330. The court held that the requirements for proving a custom are that the custom must have been in existence for a long period, that the relevant community must generally observe the custom, that the custom must be reasonable, and the content of the custom must be certain and clear. See also Himonga C & Nhlapo T (eds) *African Customary Law in South Africa - Post Apartheid and Living Law Perspectives* at page 30, See also Bennet TW *Customary Law in South Africa* (2004) Juta: Lansdowne page 11 where it states that 'a local custom may be deemed obligatory, and thus part of the legal code, once witnesses attested to the existence of a repeated practice that was reasonable, certain, uniform and well established.'

5.5.2 Testate succession disqualifications and substitution

X bequeathed 1/6 of his net estate to his Jewish wife (E). She is disqualified from inheriting as an intestate beneficiary due to her following a different religion to that of X. This raises the question of discrimination based on religion.²⁶ E is, however, eligible to inherit as a testate beneficiary as she is not an inheriting intestate beneficiary.²⁷ E is, however, also the person who had unlawfully killed X. E is therefore disqualified from inheriting the 1/6 in terms of South African law.²⁸ E is also disqualified from inheriting the 1/6 in terms of the Ḥanafee school.²⁹ The majority opinion within the Shaafi'ee school states that a murderer would be eligible to inherit as a testate beneficiary but not as an intestate beneficiary. The minority opinion within the Shaafi'ee school states that a murderer would be disqualified from inheriting as an intestate beneficiary. It could be argued that Islamic law should take preference over the South law as the will is based on Islamic law principles. It is, however, not certain as to whether Islamic law would override the South African law principle in this regard.³⁰ The question then arises as to which law should apply in the scenario.³¹ This is, in the final analysis, left up to the Islamic law expert to decide. It will be assumed for purposes of this discussion that the Islamic law expert applied the minority opinion found within the Shaafi'ee school that states that a murderer is disqualified from inheriting as a testate beneficiary.



5.5.3 Testate succession exclusions

X bequeathed 1/6 of his net estate to his daughter (J) who was conceived out of wedlock. X also leaves behind a totally excluded cognate grandson (K). J would inherit the 1/6 in terms of both the Shaafi'ee and Ḥanafee schools. However, K could totally exclude J from inheriting in terms of the compulsory bequest rule that is applied in Syria. K would then

26 See s 9(3) of the Constitution of the Republic of South Africa, 1996 where it states that '[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.'

27 A person who inherits as an intestate beneficiary cannot inherit as a testate beneficiary unless the remaining intestate beneficiaries consent thereto after the deceased has passed on. E is disqualified from inheriting as an intestate beneficiary due to her religion. Difference of religion does not disqualify a person from inheriting as a testate beneficiary. Murder is different as it is a disqualification in terms of law of testate succession as well as the law of intestate succession in terms of the Ḥanafee school. Murder is not a testate succession disqualification in terms of the Shaafi'ee school.

28 See Chapter Three (3.5.2) of this thesis for a discussion on this issue.

29 See Chapter Two (2.5.2) of this thesis for a discussion on this issue.

30 See Chapter Three (3.5.2) of this thesis for a discussion on this issue.

31 See Chapter Two (2.5.2) of this thesis for a discussion on this issue.

inherit the share of his predeceased mother which is 1/3. He would inherit the 1/3 as a compulsory bequest. The 1/3 would take preference over the 1/6 bequest to J.³²

The question as to whether the compulsory bequest rule would apply in this scenario is solely dependent on whether or not the Islamic law expert would include K as the recipient of the 1/3 in terms of the Islamic law reform as applied in Syria and Egypt. These two countries also have followers of the Shaafi'ee school. It could be argued that the practice in these two countries has not been incorporated into the Islamic law applied by Muslims in South Africa. This type of argument was also made in *Ryland v Edros* with regard to the application of the Malaysian custom of harta sepencarian to South African Muslims.³³ Bequests should not exceed 1/3 of the net estate. The Islamic law expert cannot change the bequest made to J as he has not been empowered to do so. The Islamic law expert could, however, include K as a compulsory beneficiary of 1/6 only. The bequest would be within the 1/3 limitation. It would be 1/6 as an optional bequest in terms of the will, and the 1/6 as a compulsory bequest. This would then be a reformed version of the compulsory bequest within the South African context. It should be noted that there is nothing in this scenario that prevents the Islamic law expert from applying the compulsory bequest rule regarding the Islamic distribution certificate. This scenario is therefore, different to the situation found in *Ryland v Edros*.³⁴ It will, however, be assumed for purposes of the discussion that K was not included in the Islamic distribution certificate.

5.5.4 Testate succession limitations

X bequeathed the remainder of his net estate in terms of the Islamic law of intestate succession. He was empowered to do this in terms of the principle of freedom of testation. The principle is restricted in terms of the South African Constitution which prohibits unfair discrimination.³⁵ Possible constitutional violations found within Islamic law of intestate succession are highlighted in 5.6 of this chapter.

32 See Chapter Two (2.5.3) of this thesis for a discussion on this issue.

33 The South African law position has been confirmed in *Ryland v Edros* 1997 (2) SA 690 (C) at 717 where the court held that the 'evidence falls far short of proving that a custom similar to the Malay adat relating to harta sepencarian prevails among the Islamic community in the Western Cape.'

34 See *Ryland v Edros* 1997 (2) SA 690 (C).

35 See s 9(4) of the Constitution where it states that '[n]o person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3).'

5.5.5 Testate succession adiation, repudiation, substitution and collation

Adiation is when an appointed testate beneficiary accepts the benefit in terms of a will.³⁶ X bequeathed 1/6 of the net estate ($1/6 \times R1\,968\,000.00 = R328\,000.00$) to his divorced wife (E). He also bequeathed 1/6 thereof ($1/6 \times R1\,968\,000.00 = R328\,000.00$) to his biological daughter (J), conceived out of wedlock. E was disqualified due to having unlawfully killed X. Her benefit would be redirected into the net estate.³⁷

The daughter (J) conceived out of wedlock repudiated the benefit. The repudiated benefit would be inherited by the surviving spouses of X in terms of South African law.³⁸ The 1/6 of the net estate ($1/6 \times R1\,968\,000.00 = R328\,000.00$) must be redirected back into the net estate in terms of Islamic law.³⁹ Nothing prevents J from accepting the benefit and then gifting it in favour of the surviving spouses. The distribution would then be correct in terms of both Islamic law and South African law.⁴⁰

It could be argued that X accepted the South African law position regarding representation as he has not made provision for a different mode of substitution. It could also be argued that X was unaware that J would repudiate the benefit. A solution to this type of situation would be for a testator or testatrix to expressly state in his or her will that all matters concerning interpretation should be done strictly in terms of Islamic law and that a qualified Islamic law expert should issue a ruling in this regard.

5.6 Intestate succession claims

The remainder of the net estate, after the value of all bequests have been deducted, constitutes the intestate estate. The intestate inheritance in this scenario is R1 968 000.00. This part of the estate must be distributed to the intestate beneficiaries as provided in the Islamic distribution certificate. The following sections discuss the provisions that govern how the intestate beneficiaries as provided in the Islamic distribution certificate are determined from the surviving relatives. The possible constitutional challenges to the Islamic law provisions are highlighted where relevant. The discussion is based on the distribution in terms of the Hanafee and Shaafi'ee schools. Other schools are mentioned where deemed fit.

36 See Chapter Two (2.5.5) and Chapter Three (3.5.5) of this thesis for a discussion on this issue.

37 See Chapter Two (2.5.5) and Chapter Three (3.5.5) of this thesis for a discussion on this issue.

38 See Chapter Three (3.5.5) of this thesis for a discussion on this issue.

39 See Chapter Two (2.5.5) of this thesis for a discussion on this issue.

40 See Chapter Two (2.5.5) and Chapter Three (3.5.5) of this thesis for a discussion on this issue.

5.6.1 Intestate succession ties

The intestate succession ties looked at in this section are those in terms of Islamic law. The three relevant ties in this scenario are consanguinity ties, affinity ties, and quasi-consanguinity ties. X was conceived in wedlock. Both his parents (A and B) are related to him through blood. X has also concluded affinity ties with four women (C, D, E, and F). X further has consanguinity ties with his biological children (I and J), his biological grandchildren (K and M) and his siblings (N, O, and P). X also has a quasi-consanguinity tie with his son (L) who was born as a result of an adulterous act by one of his wives.

The adopted daughter (G) and the accepted son (H) do not have intestate ties with X. G is regarded as the child of X for all legal purposes in terms of South African law. G is not regarded as the daughter of X for any legal purposes in terms of Islamic law. Her rights and duties remain with her biological parents in terms of Islamic law. G could possibly challenge the constitutionality of the Islamic law position based on discrimination.⁴¹

The situation of the non-biological accepted son (H) is quite interesting. It could be argued that this child is the son of X as he satisfies the requirements in terms of the Reform of the Customary Law of Succession and Regulation of Related Matters Act.⁴² X was a cultural leader who practised aspects of African culture. He (H) is, however, not deemed a son of X in terms of Islamic law as there is no consanguinity tie present. He will not be listed as one of the intestate beneficiaries in the Islamic distribution certificate. This raises the question of discrimination based on birth.⁴³

5.6.2 Intestate succession disqualifications and substitution

The parents, children, grandchildren, and spouses of X have intestate succession ties. These persons would inherit only if they are neither disqualified nor totally excluded from inheriting. The father (B) is disqualified from inheriting due to him following a different

41 See s 9 of the Constitution of the Republic of South Africa, 1996 where it states that '(3) [t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3).'

42 See Chapter Three (3.6.1) of this thesis for a discussion on this issue.

43 See s 9 of the Constitution of the Republic of South Africa, 1996 where it states that '(3) [t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3).'

religion to that of X. This raises the question of discrimination based on religion.⁴⁴ The revocably divorced Jewish wife (E) would not inherit as she is disqualified from inheriting as a surviving spouse as she is of a different religion to X. She has also been disqualified from inheriting the testate benefit due to her having murdered X. It is interesting to note that she is eligible to inherit the 1/6 of the net estate ($1/6 \times R1968\ 000.00 = R328\ 000.00$) in terms of the Shaafi'ee school but not in terms of the Ḥanafee school. There would be no issue with a legal expert using the Ḥanafee school in this regard as the will does not require him to follow a specific school. It will be assumed for purposes of this scenario that the Ḥanafee school opinion was applied. The intestate succession disqualification of B and E raises the question of discrimination based on religion.⁴⁵ Discrimination on the basis of religion is automatically deemed unfair in terms of s 9(3) of the Constitution.⁴⁶

X married four wives during his lifetime. They included three Muslim women (C, D, and F) and one Jewish woman (E). C was the only wife who was not subject to a divorce. D obtained a judicial divorce in the form of a faskh nine months prior to X having died. The faskh brought the marriage to an end irrevocably even though the couple reconciled during the waiting period.⁴⁷ A new marriage was required if they wanted to live as husband and wife. D is disqualified from inheriting in her capacity as a surviving spouse in terms of Islamic law as they did not remarry. It is interesting to note that the Western Cape High Court incorrectly stated in the *Hassam v Jacobs* case that a faskh is revocable during the waiting period.⁴⁸ This case is looked at in more detail in Chapter Four (4.3.2) of this thesis. D's name would

44 See s 9 of the Constitution of the Republic of South Africa, 1996 where it states that '(3) [t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3).'

45 See s 9 of the Constitution of the Republic of South Africa, 1996 where it states that '(3) [t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3).'

46 See s 9(5) of the Constitution of the Republic of South Africa, 1996 where it states that '[d]iscrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'

47 See Chapter Two (2.6.2) of this thesis for a discussion on this issue.

48 Moosa N and Abduroaf M 'Faskh (Divorce) and Intestate Succession in Islamic and South African Law: Impact of the Watershed Judgment in *Hassam v Jacobs* and the Muslim Marriages Bill' in De Waal M and Paleker M *South African Law of Succession and Trusts - The Past Meeting the Present and Thoughts for the Future* (2014) 162 where it states that '...this article contends that the decision of the Cape Provincial Division of the High Court(now the Western Cape High Court) in that case may be criticised for misapplying the Islamic law (Shari'a)which regulates matters of MPL, particularly its provisions pertaining to the form of judicial divorce known as 'faskh'.

therefore not appear on the Islamic distribution certificate as she would have been disqualified from inheriting as a surviving spouse.

X issued F with an irrevocable divorce one hour prior to dying. The facts of the scenario state that his intention was to disinherit her. The divorce is disregarded due to his unlawful intention. This is an opinion within the Ḥanafee school. F would not inherit in terms of the Shaafi'ee school as the divorce was irrevocable.⁴⁹ The context of the will seems to indicate that the Shaafi'ee school was intended as it referred to deduction of religious liabilities claims against the estate. This is an opinion within the Shaafi'ee school. There is, however, no direct instruction in this regard that the Shaafi'ee school should apply. There is also nothing preventing the legal expert drafting the Islamic distribution certificate from using the opinion within the Ḥanafee school in this regard. It will be assumed for the purposes of this discussion that the Shaafi'ee school opinion was used.⁵⁰

The biological daughter (I) who was conceived out of wedlock and by artificial insemination is disqualified from inheriting. The biological daughter (J) who was conceived out of wedlock is also disqualified from inheriting.⁵¹ This raises the question of discrimination based on birth. Discrimination based on these grounds is automatically deemed unfair in terms of s 9(3) of the Constitution.⁵² The full brother (N) is disqualified from inheriting due to him following a different religion to that of X. This disqualification raises the constitutional question of discrimination based on religion.⁵³

5.6.3 Intestate succession exclusions

The remaining intestate beneficiaries who have not been disqualified are the mother (A), the first wife (C), the fourth wife (F), the cognate grandson (K), the daughter (L) who was conceived in wedlock as a result of adultery between the wife of X and another person, the

49 See Chapter Two (2.6.2) of this thesis for a discussion on this issue.

50 See Chapter Two (2.6.2) of this thesis for a discussion on this issue.

51 See Chapter Two (2.6.2) of this thesis for a discussion on this issue.

52 See s 9(3) of the Constitution of the Republic of South Africa, 1996 where it states that '[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3).'

53 See Chapter Two (2.6.2) of this thesis for a discussion on this issue.

agnate granddaughter (M), the full sister (O), and the consanguine brother (P). The provisions found within the law of exclusion could still apply to any of these persons.⁵⁴

The cognate grandson (K) is totally excluded from inheriting as an intestate beneficiary by the mother (A), by the daughter (L) who was conceived in wedlock but as a result of an adulterous act between the wife of X and another person, by the agnate granddaughter (M), by the full sister (O), and by the consanguine brother (P).⁵⁵ The cognate grandson (K) is a distant kindred beneficiary and would inherit only in the event where there are no residuary beneficiaries and no return beneficiaries present. The intestate beneficiaries in this scenario include both return beneficiaries as well as one residuary beneficiary. It should be noted that residuary beneficiaries take priority over return beneficiaries.⁵⁶

The consanguine brother (P) is totally excluded by the full sister (O). This is quite interesting to note as a female is totally excluding a male from inheriting. It is also interesting to note that the Islamic law position is more favourable for the female sibling in this regard. It should, however, be noted that the full sister has a stronger intestate tie to the deceased than the consanguine brother.⁵⁷ It could be argued that the full sister (female) inherits more favourably in this scenario because she has a stronger intestate succession tie to the deceased whereas the consanguine brother inherits less favourably because he has a weaker intestate succession tie to the deceased.

There is only one intestate beneficiary who is partially excluded in this scenario. The mother is partially excluded from inheriting 1/3 of the intestate inheritance ($1/3 \times R1\,968\,000.00 = R656\,000.00$) as a sharer beneficiary by the daughter (L). She now inherits 1/6 of the intestate inheritance ($1/6 \times R1\,968\,000.00 = R328\,000.00$) as a sharer beneficiary.⁵⁸ It should be noted that a mother is one of the primary beneficiaries that is never subject to total exclusion.⁵⁹

54 See Chapter Two (2.6.3) of this thesis for a discussion on this issue.

55 See Chapter Two (2.6.3) of this thesis for a discussion on this issue.

56 See Chapter Two (2.6.3) of this thesis for a discussion on this issue.

57 See Chapter Two (2.6.6) of this thesis for a discussion on this issue.

58 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that '... [f]or parents, a sixth share of inheritance to each if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased left brothers or (sisters), the mother has a sixth...'

59 See Chapter Two (2.6.3) of this thesis for a discussion on this issue.

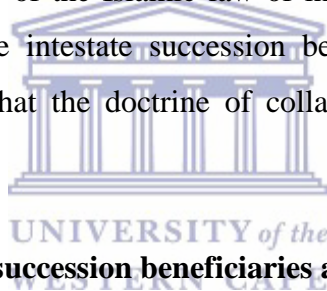
5.6.4 Intestate succession limitations

There are no direct limitations that apply in the Islamic law of intestate succession. There is, however, one indirect limitation. The law of intestate succession would apply only where the liabilities have not depleted the gross estate. The liabilities in this scenario have not depleted the gross estate. The remainder in this scenario is R1 968 000.00.

The remaining intestate beneficiaries who are neither disqualified nor totally excluded from inheriting as intestate beneficiaries are his mother (A), the first wife (C), the fourth wife (F), the cognate grandson (K), the biological daughter (L) who was conceived in wedlock but as a result of an adulterous act between the wife of X and another man, his agnate granddaughter (M), and his full sister (O).

5.6.5 Intestate succession adiation, repudiation, substitution and collation

Adiation is not required in terms of the Islamic law of intestate succession. Repudiation is also not possible.⁶⁰ None of the intestate succession beneficiaries in this example have repudiated. It should be noted that the doctrine of collation does not find application in Islamic law.⁶¹



5.6.6 Categories of intestate succession beneficiaries and their shares

The remaining intestate beneficiaries who are neither disqualified nor totally excluded from inheriting as intestate beneficiaries are the mother (A), the first wife (C), the fourth wife (F), the daughter (L) who was conceived in wedlock but as a result of an adulterous between the wife of X and another man, his agnate granddaughter (M), and the full sister (O).

The two classes of intestate beneficiaries in this scenario are sharer beneficiaries and a residuary beneficiary. The mother (A), first wife (C), fourth wife (F), daughter (L) who was conceived as a result of adultery between the wife of X and another man, and his agnate granddaughter (M) are sharer beneficiaries. The full sister is the only residuary beneficiary.⁶²

60 See Chapter Two (2.6.5) of this thesis for a discussion on this issue.

61 See Chapter Two (2.6.5) of this thesis for a discussion on this issue.

62 See Chapter Two (2.6.6) of this thesis for a discussion on this issue.

The mother would inherit $1/6 = 8/48$,⁶³ the first wife would inherit $1/16 = 3/48$,⁶⁴ the fourth wife would inherit $1/16 = 3/48$,⁶⁵ the daughter would inherit $1/2 = 24/48$,⁶⁶ the agnate granddaughter would inherit $1/6 = 8/48$,⁶⁷ and the full sister would inherit the remainder $2/48$.⁶⁸

The mother would inherit $8/48 \times R1\,968\,000.00 = R328\,000.00$, the first wife would inherit $3/48 \times R1\,968\,000.00 = R123\,000.00$, the fourth wife would inherit $3/48 \times R1\,968\,000.00 = R123\,000.00$, the daughter would inherit $24/48 \times R1\,968\,000.00 = R984\,000.00$, the agnate granddaughter would inherit $8/48 \times R1\,968\,000.00 = R328\,000.00$, and the full sister would inherit the remainder which is $2/48 \times R1\,968\,000.00 = R82\,000.00$.

5.6.7 Position of females in this example

The scenario that was looked at in this chapter was where X died and left a number of relatives behind. They are five males and 11 females. None of the five males inherited in this example, whereas six of the 11 females inherited.

The relatives in this example were subject to the law concerning inheritance ties, disqualifications, as well as exclusions. Both the adopted daughter (G) as well as the non-biological accepted son (H) did not inherit due to there being no intestate succession tie present. The father (B) and the Jewish wife (E) were both disqualified from inheriting due to being of a different religion to that of X. The mother (A) was the only intestate beneficiary who was partially excluded. It can clearly be seen that the Islamic law of succession favoured the females in this scenario.

63 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that '... [f]or parents, a sixth share of inheritance to each if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased left brothers or (sisters), the mother has a sixth...'

64 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 12 where it states that '... [i]n that which you leave, their (your wives) share is a fourth if you leave no child; but if you leave a child, they get an eighth of that which you leave after payment of legacies that you may have bequeathed or debts...'

65 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 12 where it states that '... [i]n that which you leave, their (your wives) share is a fourth if you leave no child; but if you leave a child, they get an eighth of that which you leave after payment of legacies that you may have bequeathed or debts...'

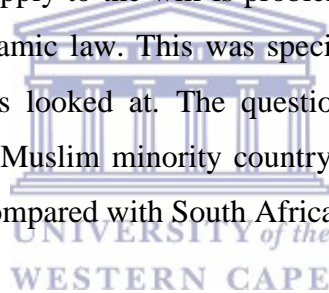
66 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that 'Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females; if (there are) only daughters, two or more, their share is two thirds of the inheritance; if only one, her share is half...'

67 See Chapter Two (2.6.6) of this thesis for a discussion on sharer beneficiaries.

68 See Chapter Two (2.6.6) of this thesis for a discussion on residuary beneficiaries with another.

5.7 Conclusion

This chapter has looked at the application of the Islamic law of succession within the South African context by means of a will. The findings have shown that the application is possible. It is generally argued that the Islamic law of succession discriminates against females. The findings of this chapter have shown that this is not necessarily the case. This scenario has shown that the females in this scenario would inherit the complete estate even though there are two males present who were not disqualified. It could therefore be argued that the grounds for the discrimination would be based on the strength of the intestate succession tie that lies between the deceased and the intestate beneficiary. It is for this reason that the full sister inherited the residue to the exclusion of the full brother. It is also for this reason that the cognate granddaughter inherited to the exclusion of the agnate grandson. It must, however, be noted that male intestate beneficiaries would inherit more favourably than females based on a different scenario. The chapter has shown that a general clause in a will stating that the Islamic law of succession must apply to the will is problematic in instances where there are differences of opinion within Islamic law. This was specifically seen when the irrevocable divorce during death illness was looked at. The question as to how the Islamic law of succession is applied in another Muslim minority country (Singapore) with regard to these types of issues is looked at and compared with South Africa in the next chapter.



CHAPTER SIX
COMPARING THE APPLICATION OF THE ISLAMIC LAW OF SUCCESSION
AND ADMINISTRATION OF ESTATES IN SINGAPORE WITH SOUTH AFRICA

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6.1 Introduction

Chapter Five of this thesis has shown that the application of the Islamic law of succession within the South African context can be quite complex. This was clearly seen in the instances where there were differences of opinion within the schools of law with regard to the specific claims. It was not certain as to which school of law should be applied. The consequences of repudiation and disqualification within the scenario were also problematic. It was not certain as to whether South African law consequences or Islamic law consequences should apply.

This chapter looks at how the Islamic law of succession and administration of estates is applied in Singapore. It compares the Singaporean model with the South African model with regard to the Islamic will that was looked at in Chapter Five. The Islamic distribution certificate within the Singaporean context is specifically compared with the Islamic distribution certificate within the South African context.¹ This chapter looks at whether features found within the Singaporean model can be applied within the South African context. Singapore has been chosen as a comparative country as it is quite similar to South Africa in many regards. South Africa and Singapore are both Muslim minority countries.² Both countries have a large group of Muslims who follow the Sunnee based Shaafi'ee school of law. Both countries are governed by constitutions that include equality provisions. Both countries have ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).³

An overview of the Muslim population in Singapore and South Africa is looked at by way of introduction. This is followed by looking at the constitutional and international obligations of the two countries regarding equality provisions. This is followed by a comparative analysis between the Islamic law of succession and administration of estates within the two countries.

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- 1 See Chapter Four (4.2.1) of this thesis where the Islamic distribution certificate is discussed in light of a South African court case.
 - 2 South Africa is a multi-cultural society that includes: Black Africans who constitute 80.7 percent of the population, Coloureds who constitute 8.8 percent of the population, Indians and Asians who constitute 2.5 percent of the population, and Whites who constitute 8 percent of the population. See Statistics South Africa 'Mid-year population estimates 2017' available at <http://www.statssa.gov.za/> (accessed 18 December 2017). Singapore is also a multi-cultural society that includes: Chinese who constitute 74.1 percent of the population, Malays who constitute 13.4 percent of the population, Indians who constitute 9.2 percent of the population and others who constitute 3.3 percent of the population. The others category constitutes Eurasians, Caucasians, Arabs and Japanese. See Steiner K 'Governing Islam: The State, the Administration of Muslim Law Act (AMLA) and Islam in Singapore' (2016) 16(1)(6) *Australian Journal of Asian Law* 1.
 - 3 CEDAW was adopted by the United Nations General Assembly Resolution 34/180 of 18 December 1979.

The focus areas looked at are: liability claims, testate succession claims, and intestate succession claims. A brief analysis of the findings and concluding remarks are made at the end of this chapter.

6.2 Muslim population

Singapore is a Muslim minority country where Muslims constitute 15 percent of the total population. The dominant school of law followed by Singaporean Muslims is the Sunnee based Shaafi'ee school of law.⁴ This is similar to the South African position where the Sunnee based Shaafi'ee school of law is one of the two dominant schools of law followed by the Muslims living in South Africa. South African Muslims constitute approximately 1.5 percent of the South African population.⁵

6.3 Constitutional obligations

Application of the Islamic law of intestate succession would be problematic within countries that promote equality and prohibit discrimination between males and females. A daughter would always inherit half the share of a son in terms of the Islamic law of intestate succession. Singapore and South Africa are bound by equality provisions in terms of their constitutional and international law obligations. Article 12(1) of the Singaporean Constitution states that '[a]ll persons are equal before the law and entitled to the equal protection of the law.'⁶ Section 9(1) of the South African Constitution states that '[e]veryone is equal before the law and has the right to equal protection and benefit of the law.'⁷ The provisions found within the two constitutions are almost identical in this regard. Article 12(2) of the Singaporean Constitution states that '[e]xcept as expressly authorised by this Constitution, there shall be no discrimination against citizens of Singapore on the ground only of religion, race, descent or place of birth in any law and guarantees equal protection of all before and of

4 See Musawah For Equality in Family Law 'Thematic Report on Article 16, Muslim family law and Muslim women's rights in Singapore - 68th CEDAW Session Geneva, Switzerland' (2017) available at <https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0ahUKEWjxhPucrenXAhWGXBokHctfCLkQFgg4MAE&url=http%3A%2F%2Fwww.musawah.org%2Fsites%2Fdefault%2Ffiles%2FSingapore%2520-%2520Musawah%2520Thematic%2520Report%2520for%252068th%2520CEDAW.compressed.pdf&usg=AOvVaw2KkkEJ0fjBALC6PmDj2Pgo> (accessed 01 December 2017).

5 Moosa N *Unveiling the Mind - The Legal Position of Women in Islam - A South African Context* 2 ed (2011) 146. These are the latest population census figures regarding religion. The Muslim Judicial Council (SA) based in the Western 'raised concerns regarding the exclusion of religious questions from the census [2011] questionnaire, they still pledged their support.' See Mangxamba S 'Stats SA meets Faith Based Organisations on Census 2011' (2011) available at http://www.statssa.gov.za/?page_id=3970 (accessed 18 December 2017).

6 See art 12(1) of the Constitution of the Republic of Singapore.

7 See s 9(1) of the Constitution of the Republic of South Africa, 1996.

the law and prohibits discrimination on the grounds of religion, race, descent or place of birth.’⁸ Section 9(3) of the South African Constitution prohibits unfair discrimination based on ‘race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.’⁹ The Singaporean Constitution does not specifically prohibit discrimination based on sex and/or gender whereas the South African Constitution, however, expressly prohibits discrimination based on sex and/or gender. The application of the Islamic law of intestate succession can therefore be constitutionally challenged in terms of the South African Constitution on the basis of discrimination on the grounds of sex and gender whereas it cannot be specifically challenged on these grounds in terms of the Singaporean Constitution. Section 36(1) of the South African Constitution states that ‘[t]he rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom...’¹⁰ The constitutionality of the Islamic law of intestate succession per se with regard to discrimination based on sex and gender is looked at in Chapter Seven (7.5) of this thesis.

The right to freedom of religion is expressly listed in the Singaporean Constitution. Article 15(1) states that ‘[e]very person has the right to profess and practise his religion and to propagate it.’¹¹ Section 15(1) of the South African Constitution states that ‘[e]veryone has the right to freedom of conscience, religion, thought, belief and opinion...’ The right to freedom of religion is expressly found within both the Singaporean and South African constitutions. It could be argued that the right to freedom of religion should include the right to execute an Islamic will. This has been confirmed with regard to Singaporean legislation where art 110 of AMLA states that ‘[n]othing in this Act shall be held to prevent any Muslim person directing by his or her will that his or her estate and effects shall be distributed according to the

8 See art 12(2) of the Constitution of the Republic of Singapore. See also Bin Abbas A ‘The Islamic Legal System in Singapore’ (2012) 21(1) *Pacific Rim Law & Policy Journal* 163.

9 Section 9(3) of the South African Constitution of the Republic of South Africa which prohibits unfair discrimination based on ‘...race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.’

10 Section 36 of the South African Constitution states that ‘(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom...taking into account all relevant factors, including - (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.’

11 See art 15(1) of the Constitution of the Republic of Singapore.

Muslim law.¹² There is no legislation regulating the Islamic law of succession in South Africa. The South African Law Reform Commission has advised that South African Muslims can execute wills in order to ensure that the Islamic law of succession applies to their estates.¹³

Article 153 of the Singaporean Constitution states that '[t]he Legislature shall by law make provision for regulating Muslim religious affairs...'¹⁴ It could therefore be said that there is an indirect constitutional obligation on the Singaporean legislature to enact legislation governing the Islamic law of succession in terms of art 153 as this would be included in the religious affairs.¹⁵ Article 12(3) of the Singaporean Constitution further permits different personal laws based on religious belief.¹⁶ The South African Constitution does not prevent the enactment of legislation governing religious law. The legislation must, however, be consistent with the Constitution of South Africa.¹⁷ The wording found in the South African Constitution is less demanding on the legislature than the wording found in the Singaporean Constitution with regard to the enactment of legislation regulating Muslim religious affairs. This could, however, be based on historical and political factors. The enactment of the Islamic law of succession within the South African context would be subject to the equality provisions found in s 9(3) of the South African Constitution which specifically prohibits unfair discrimination based on sex and/or gender.¹⁸ Discrimination based on the grounds of sex

12 See art 110 of AMLA. See also Bin Abbas A 'The Islamic Legal System in Singapore' (2012) 21(1) *Pacific Rim Law & Policy Journal* 177.

13 See 6.5 of this chapter for a further discussion on this issue.

14 See art 153 of the Constitution of the Republic of Singapore.

15 See Bin Abbas A 'The Islamic Legal System in Singapore' (2012) 21(1) *Pacific Rim Law & Policy Journal* 165.

16 See art 12(3) of the Constitution of the Republic of Singapore where it states that '[t]his Article does not invalidate or prohibit - (a) any provision regulating personal law; or (b) any provision or practice restricting office or employment connected with the affairs of any religion, or of an institution managed by a group professing any religion, to persons professing that religion.' See also Bin Abbas A 'The Islamic Legal System in Singapore' (2012) 21(1) *Pacific Rim Law & Policy Journal* 165.

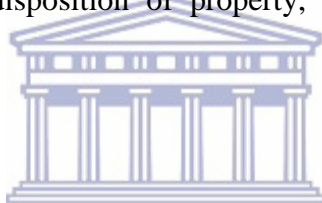
17 Section 15(3)(a) of the South African Constitution, 1996 states that '[t]his section does not prevent legislation recognizing - (i) marriages concluded under any tradition, or a system of religious, personal or family law; or (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.' Section 15(3)(b) states that '[r]ecognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.'

18 See s 9 of the Constitution of the Republic of South Africa, 1996 where it states that '... (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination...'

and/or gender is presumed to be unfair.¹⁹ The constitutionality of the Islamic law of intestate succession per se within the South African context is further investigated in Chapter Seven (7.5).

6.4 International law obligations

Singapore ratified CEDAW on 5 October 1995.²⁰ South Africa ratified CEDAW approximately two months later on 15 December 1995.²¹ Article 2 of CEDAW states that States Parties to the Convention ‘agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women...’²² Article 16(1) of CEDAW specifically provides that States Parties to the Convention ‘shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: ... (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.’²³



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- 19 See s 9(5) of the Constitution of the Republic of South Africa, 1996 where it states that ‘[d]iscrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.’
- 20 Singapore ratified CEDAW on 5 October 1995. See United Nations Treaty Collection available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mdsg_no=IV-8&chapter=4&lang=en#58 (accessed 21 November 2017).
- 21 CEDAW was adopted by the United Nations General Assembly Resolution 34/180 of 18 December 1979; signed by South Africa on 29 January 1993 and ratified on 15 December 1995. Article 16(1) states that ‘States parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women.’ on a number of grounds including 16(1)(h) which states ‘[t]he same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.’
- 22 Article 2 of CEDAW states that States Parties to the Convention ‘agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and to this end, undertake: (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle; (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination; (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation; (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise; (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; (g) To repeal all national penal provisions which constitute discrimination against women.’
- 23 Article 16(1)(h) of CEDAW adopted by the United Nations General Assembly Resolution 34/180 of 18 December 1979, signed by South Africa on 29 January 1993 and ratified on 15 December 1995.

The fact that a daughter inherits half the share of a son in terms of the Islamic law of intestate succession if they inherit collectively could be problematic with regard to arts 2 and 16 of CEDAW which prohibits discrimination against women.²⁴ Singapore made a few reservations regarding arts 2 and 16 of CEDAW. It made a reservation stating that '[i]n the context of Singapore's multi-racial and multi-religious society and the need to respect the freedom of minorities to practise their religious and personal laws, the Republic of Singapore reserves the right not to apply the provisions of arts 2 and 16 where compliance with these provisions would be contrary to their religious or personal laws.'²⁵ This is also the situation within many Muslim countries where Islamic reservations to Human Rights Conventions have been made.²⁶ South Africa did not make any reservations (to date) to CEDAW.

South African government ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African WR Protocol) on 17 December 2004.²⁷ Article 21(2) of the African WR Protocol states that '[w]omen and men shall have the right to inherit, in equitable shares, their parents' properties.'²⁸ South Africa has further enacted the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) which is in line with CEDAW and African WR Protocol.²⁹

It can be seen from the above that Singapore places more importance on the right to freedom of religion than on the right to equality. This can clearly be seen by the reservations made by the Singaporean government with regard to arts 2 and 16 of CEDAW. The South African government on the other hand enacted legislation that is in line with the human rights requirements in terms of CEDAW and the African WR Protocol. The South African

24 It should be noted that a daughter would indirectly inherit more favourably than a son in the event where, for example, X dies leaving behind a mother, a father, a widower, and a child as the only intestate beneficiaries. The child would inherit more favourably if female and less favourably if male. See Chapter Two (2.6.7) where the issue is looked at with reference to the position of a full brother and a full sister.

25 UN Women 'Declarations, Reservations and Objections to CEDAW' available at <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm> (accessed 8 January 2017). See also Steiner K 'Governing Islam: The State, the Administration of Muslim Law Act (AMLA) and Islam in Singapore' (2016) 16(1)(6) *Australian Journal of Asian Law* 11.

26 See Mayer AE 'Islamic Reservations to Human Rights Conventions' *Recht van de Islam* 15 (1998) 25-45 for a discussion on this issue.

27 South Africa has also ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. Ratified the protocol on 17 December 2004 and deposited the instrument of ratification on 14 January 2005.

28 South Africa has also ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. Ratified the protocol on 17 December 2004 and deposited the instrument of ratification on 14 January 2005.

29 See Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

government might have to make reservations to the international and regional treaties and amend PEPUDA if it intends enacting legislation that regulates the Islamic law of succession and administration of estates within the South African context.

6.5 Regulation of the Islamic law of succession and administration of estates

There are two acts that regulate the law of succession in Singapore. They are Administration of Muslim Law Act 27 of 1966 (AMLA) and the Intestate Succession Act 7 of 1967 (ISA).³⁰ AMLA governs the administration of the estates of deceased Muslims whereas the ISA governs the administration of the estates of deceased non-Muslims. It can be seen that Singaporean law has specific legislation that governs the Islamic law of succession.

There are also two Acts that regulate the law of succession in South Africa. They are the Intestate Succession Act 81 of 1987 and the Reform of Customary Law of Succession and Related Matters Act 11 of 2009.³¹ There has (to date) been no legislation enacted that governs the Islamic law within the South African context. There have been many attempts in the past to have legislation enacted that recognises aspects of Islamic law within the South African context.³² The most recent attempt was made in 1999 when the then Minister of Justice established a committee ‘...to investigate Islamic marriages and related matters...’³³ The committee was referred to as the Project 59 Committee (the Project Committee) and functioned under the re-named South African Law Reform Commission (the Commission).³⁴ The investigation started in 1999 and concluded in 2003.³⁵ The investigation led to the publication of an Islamic Marriages Bill in 2001 (2001 IMB) and a Muslim Marriages Bill in 2003 (2003 MMB). These marriage bills do not specifically deal with the ‘Islamic’ law of succession. The Commission was of the opinion that the issues concerning the Islamic law of

30 Administration of Muslim Law Act (AMLA) 27 of 1966; and Intestate Succession Act (ISA) 7 of 1967.

31 See Intestate Succession Act 81 of 1987; and the Reform of Customary Law of Succession and Related Matters Act 11 of 2009.

32 See Moosa N *Unveiling the Mind: The Legal Position of Women in Islam - A South African Context* (2011) 154.

33 The Project Committee was established in terms of section 7A(b)(ii) of the South African Law Commission Act 19 of 1973 which states that ‘(1) [t]he Commission may, if it deems it necessary for the proper performance of its functions ... (b) establish such other committees as it may deem necessary, and which shall consist of ... (ii) such members of the Commission as the Commission may designate and the other persons appointed by the Minister for the period determined by the Minister.’

34 The Commission was previously referred to as the South African Law Commission (SALC).

35 See Moosa N *Unveiling the Mind: The Legal Position of Women in Islam - A South African Context* (2011) 154.

succession are complex and manifold.³⁶ They were of the opinion that they cannot satisfactorily deal with the issues within the scope of their investigation. The commission noted that there was nothing preventing a Muslim person from ensuring that his or her estate would devolve in terms of Islamic law by executing an Islamic will.³⁷ This is exactly what was done by the testator in the fictitious scenario looked at in Chapter Five with regard to the Islamic will.

The position is quite similar to what is stated in art 110 of AMLA where it states that '[n]othing in this Act shall be held to prevent any Muslim person directing by his or her will that his or her estate and effects shall be distributed according to the Muslim law.'³⁸ The Commission made provision to amend the Intestate Succession Act 81 of 1987 by broadening the definition of a 'spouse' to include a spouse or spouses of a Muslim marriage in the event where the 2003 MMB is enacted. The Intestate Succession Act 81 of 1987 is not in conformity with Islamic law. The Commission was of the opinion that amendment of the Intestate Succession Act 81 of 1987 would alleviate the hardships endured by Muslim spouses who in the past had not enjoyed such recognition.³⁹ This is quite different to the provision found in AMLA where a surviving spouse or spouses would inherit in terms of the Islamic law of intestate succession and not in terms of the ISA. The definition of a spouse in terms of the Intestate Succession Act 81 of 1987 has since been developed as a result of case law. It now includes a spouse or spouses from a Muslim marriage.

The 2003 MMB was submitted to the Minister of Justice and Constitutional Development as part of the Commission's report on Islamic Marriages and Related Matters, during July

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- 36 The Institute of Islamic Shari'ah Studies avers that suggested to the Commission that '...paragraph (g) ... [should] be added to section 4 of the Intestate Succession Act [81 of 1987 and] should read as follows: An estate of a deceased Muslim, whether he or she left a written Will or not and if such a deceased person was married in terms of Islamic law, then such a deceased estate of such a deceased person shall devolve compulsorily upon his or her Muslim heirs and in such shares as prescribed in the Islamic law of Succession. The Master of the High Court is obliged to consult with a proven qualified Muslim Shari'ah jurist therein and obtain a written and duly dated and signed certificate of distribution of such a deceased estate and execute its instructions.' See South African Law Reform Commission Project 59 Islamic Marriages and Related Matters Report (2003) 88 available at www.justice.gov.za/salrc/reports/r_prj59_2003jul.pdf (accessed 23 December 2017).
- 37 See South African Law Reform Commission Project 59 Islamic Marriages and Related Matters Report (2003) 106 available at www.justice.gov.za/salrc/reports/r_prj59_2003jul.pdf (accessed 23 December 2017).
- 38 See art 110 of AMLA.
- 39 See South African Law Reform Commission Project 59 Islamic Marriages and Related Matters Report (2003) 106 available at www.justice.gov.za/salrc/reports/r_prj59_2003jul.pdf (accessed 23 December 2017).

2003.⁴⁰ The 2003 MMB was subsequently adapted by the Department of Justice and Constitutional Development. It was then served before Cabinet on 8 December 2010 (2010 MMB).⁴¹ The provisions in the adapted 2010 MMB regarding succession was no different from the 2003 MMB as both versions do not directly deal with the Islamic law of succession. The provisions found in the 2010 MMB do, however, deal with certain liability claims against the deceased estate. It should also be noted that there are a number of South African religious bodies who are pushing for the 2010 MMB to be enacted into legislation. The provisions are noted here for this reason.

6.6 Islamic law of succession and administration of estates

Article 112(1) of AMLA states that '[i]n the case of any Muslim person domiciled in Singapore dying intestate, the estate and effects shall be distributed according to the Muslim law as modified, where applicable, by Malay custom.'⁴² The wording of the section is broad enough to include a South African Muslim who is domiciled in Singapore. The person who will be administering the estate must apply to the civil courts (and not the Islamic courts) for probate or letters of administration. A grant for probate is 'a grant under the seal of the court issuing the same, authorising the executor or executors expressly or impliedly appointed by a testator's will, or one or more of them, to administer the testator's estate in compliance with the directions contained in his will, and in accordance with law.'⁴³ A grant for letters of administration 'means a grant under the seal of the court issuing the same, authorising the person or persons therein named to administer an intestate's estate in accordance with law.'⁴⁴ The grant for probate and grant for letters of administration could be compared to the letters of executorship and letters of authority issued by the Master of the High Court within the South African law context in the event where an Islamic will was executed in which persons were nominated as executors.

40 See SALRC Project 59 Islamic Marriages and Related Matters Report (2003) ii available at www.justice.gov.za/salrc/reports/r_prj59_2003jul.pdf (accessed 23 December 2017)

41 See Moosa N *Unveiling the Mind: The Legal Position of Women in Islam - A South African Context* (2011) 159.

42 See art 112(1) of the Constitution of the Republic of Singapore. See also Bin Abbas A 'The Islamic Legal System in Singapore' (2012) 21(1) *Pacific Rim Law & Policy Journal* 177. See also IRB Law LLP Advocates and Solicitors 'What you should know about Muslim Will in Singapore' available at <https://irblaw.com.sg/2017/08/08/what-you-should-know-about-muslim-will-in-singapore/> (accessed 8 January 2017).

43 See s 2 of the Probate and Administration Act 24 of 1934. See also Black A 'Replicating 'A Model of Mutual Respect': Could Singapore's Legal Pluralism work in Australia?' in *Journal of Legal Pluralism* (2012) 80.

44 See s 2 of the Probate and Administration Act 24 of 1934.

The majority of Muslims in Singapore follow the Shaafi'ee School of law. There are, however, other schools of law followed by Singaporean Muslims. Article 113 of AMLA states that '[i]n all applications for probate or letters of administration the affidavit supporting the application shall, in the case of a deceased Muslim, state the school of law (Mazhab) which the deceased professed in addition to the particulars required by any other written law.'⁴⁵ This is quite useful as there are a number of instances where the schools of law differ.⁴⁶ This was specifically the case in the fictitious scenario looked at in Chapter Five. Article 114 of AMLA lists a number of books that could be used by the courts in order to decide on matters of succession and inheritance.⁴⁷ This is a good approach as it could lead to legal certainty.

The Islamic will (within the South African context) requires an Islamic law expert to issue an Islamic distribution certificate. The Islamic law expert has quite wide powers as far as what opinions should be used when issuing the Islamic distribution certificate. The position of the Islamic law expert could be quite problematic, for example, where X dies leaving behind an intestate estate of R600 000.00. She also leaves behind a widower, a mother, a uterine brother, a uterine sister, a full brother, and a full sister as the only intestate beneficiaries. The widower would inherit $1/2 = 3/6$,⁴⁸ and the mother would inherit $1/6$.⁴⁹ The widower would inherit R300 000.00 and the mother would inherit R100 000.00. The position of the siblings in the above scenario is complicated.⁵⁰

45 See art 113 of AMLA.

46 This has been seen in Chapter Two of this thesis when Sunnee based Shaafi'ee school law was compared with the Sunnee based Hanafee school of law.

47 See art 114 of AMLA where it states that '(1) [i]n deciding questions of succession and inheritance in the Muslim law, the court shall be at liberty to accept as proof of the Muslim law any definite statement on the Muslim law made in all or any of the following books: (a) The English Translation of the Quran, by A. Yusuf Ali or Marmaduke Pickthall; (b) Mohammedan Law, by Syed Ameer Ali; (c) Minhaj et Talibin by Nawawi, translated by E. C. Howard from the French Translation of Van den Berg; (d) Digest of Moohummudan Law, by Neil B. E. Baillie; (e) Anglo-Muhammadan Law, by Sir Roland Knyvet Wilson, 6th Edition Revised by A. Yusuf Ali; (f) Outlines of Muhammadan Law, by A. A. Fyzee; (g) Muhammadan Law, by F. B. Tyabji. (2) The Minister may on the advice of the Majlis by notification in the Gazette vary or add to the list of books set out in subsection (1).'

48 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* (4) 12 where it states '[i]n that which your wives leave, your share is a half if they have no child; but if they leave a child, you get a fourth of that which they leave after payment of legacies that they may have bequeathed or debts...'

49 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* (4) 11 where it states '...[f]or parents, a sixth share of inheritance to each if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased left brothers or (sisters), the mother has a sixth. (The distribution in all cases is) after the payment of legacies he may have bequeathed or debts...'

50 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* (4) 12 where it states '...[i]f the man or woman whose inheritance is in question has left neither ascendants nor

The Shaafi'ee school is of the opinion that the uterine brother, the uterine sister, the full sister, and full brother must all equally share the 1/3. Each of the four siblings would then inherit R50 000.00.⁵¹ The Hanafee school is of the opinion that the uterine brother and uterine sister must equally share the 1/3 to the exclusion of the full siblings.⁵² Each of the uterine siblings would then inherit R100 000.00. I would suggest that a testator or testatrix (within the South African context) should indicate in his or her will (Islamic will) which school of law should be applied when the Islamic distribution certificate is drafted by the Islamic law expert. I would further suggest that the Islamic will should include a clause stating that the same school of law should be applied with regard to repudiation or disqualification of persons in terms of the will. This would ensure that Islamic law consequences would apply in these instances; not South African law consequences.

6.6.1 Liability claims

Article 112 of AMLA states that '[i]n the case of any Muslim person domiciled in Singapore dying intestate, the estate and effects shall be distributed according to the Muslim law as modified, where applicable, by Malay custom.'⁵³ The claims against the estate would therefore include the liability claims that should be deducted in terms of Islamic law. The default marital system for Muslims living in Singapore is that the parties to the marriage retain their separate estates. Article 124 of AMLA states that '[n]o Muslim person shall, by any marriage contracted in accordance with the provisions of the Muslim law, acquire any interest in the property of the person whom he or she marries nor become incapable of doing any act in respect of his or her own property which he or she could have done if unmarried.'⁵⁴

This is similar to the provision found in the 2010 MMB within the South African context where it states that '[a] Muslim marriage to which this Act applies is deemed to be a marriage out of community of property excluding the accrual system, unless the proprietary

descendants, but has left a brother or a sister, each one of the two gets a sixth; but if more than two, they share in a third; after payment of legacies he (or she) may have bequeathed or debts, so that no loss is caused (to anyone). This is a Commandment from Allah; and Allah is Ever All-Knowing, Most-Forbearing.'

51 The opinion of the Shaafi'ee school is based on independent reasoning. This question is referred to as the mushtarikah case as the one third is shared between the various classes of siblings. A full brother is generally a residuary beneficiary. See Al Khin M & Al Bughaa M *Al Fiqh Al Manhajee 'Alaa Madh hab Al Imaam Al Shaafi'ee* (2000) vol 2, 400-401.

52 See Al Fawzaan S *Al Tahqeeqaat Al Marḍiyyah Fil Mabaahith Al Farḍiyyah* (1999) 132-133.

53 See art 112 of AMLA. See also Bin Abbas A 'The Islamic Legal System in Singapore' (2012) 21(1) *Pacific Rim Law & Policy Journal* 177.

54 See art 124 of AMLA.

consequences governing the marriage are regulated by mutual agreement of the spouses, in an antenuptial contract which must be registered in the Deeds Registry...'⁵⁵ The exception to the marital system is found in Malay custom. Article 112(3) of AMLA states that '[i]n the case of a Malay dying intestate, the court may make an order for the division of the harta sepencarian or jointly acquired property in such proportions as to the court seems fit.'⁵⁶ A widow(s) or widower of a Malay deceased would be eligible to claim from the harta sepencarian and would also be eligible to inherit from the intestate estate in terms of the Islamic law of intestate succession.

The issue of harta sepencarian was raised in the South African context in *Ryland v Edros* (*Ryland*).⁵⁷ The case dealt with the claim of harta sepencarian subsequent to divorce. A share of the same joint property would be claimed subsequent to one of the parties dying. This is also how it applies in terms of art 112(3) of AMLA and where the case should be noted here.⁵⁸ The Court held that the evidence presented in the case 'falls far short of proving that a custom similar to the Malay adat relating to harta sepencarian prevails among the Islamic community in the Western Cape.'⁵⁹ The court held (in 1996) that the custom has not been incorporated into the practices of South African Muslims. It has not been confirmed as to whether the Malay custom prevails among the Muslim Community in the Western Cape today.⁶⁰ I would recommend that a testator or testatrix should clearly identify in his or her will (Islamic will) which items (if any) in the estate forms part of the joint property. This could alleviate any problems faced by South African Muslims who follow Malay custom in the event where a claim is made against the estate in this regard.

6.6.2 Testate succession claims

Article 110 of AMLA states that '[n]othing in this Act shall be held to prevent any Muslim person directing by his or her will that his or her estate and effects shall be distributed

55 See s 8(1) of the 2010 MMB where it states that '[a] Muslim marriage to which this Act applies is deemed to be a marriage out of community of property excluding the accrual system, unless the proprietary consequences governing the marriage are regulated by mutual agreement of the spouses, in an antenuptial contract which must be registered in the Deeds Registry...'

56 See art 112(3) of AMLA.

57 See *Ryland v Edros* 1997 (2) SA 690 (C).

58 See art 112(3) of AMLA.

59 See *Ryland v Edros* 1997 (2) SA 690 (C) 717.

60 Islaam was introduced into the Western Cape by Muslims from Indonesia. It is interesting to note that these Muslims were also referred to as Cape Malays. See Moosa N *Unveiling the Mind - The Legal Position of Women in Islam - A South African Context* 2 ed (2011) 146.

according to the Muslim law.⁶¹ Article 111(1) of AMLA states that the ‘will is subject to the restrictions imposed by the school of Muslim law professed’ by the testator or testatrix.⁶² The provision imposes a limitation on freedom of testation as a testator or testatrix is generally not allowed to bequeath more than 1/3 of his or her net estate in terms of the Islamic law of testate succession. This limitation is imposed in terms of legislation. It is interesting to note that a South African Muslim testator or testatrix who executes an Islamic will in terms of the Shaafi’ee or Ḥanafee (or any other) school of law does so as a matter of choice and not as a matter of compulsion as in terms of AMLA. A will of a South African Muslim is not restricted by Islamic law. It is for this reason that even clauses in a will that are not compliant with Islamic law would be enforceable. It should be noted that a testator or testatrix may not know what the Islamic law rules are. I therefore suggest that a testator or testatrix, within the South African context, should consult with an Islamic law expert in this regard. He or she can then incorporate provisions in his or her will that are compliant with Islamic law.

6.6.3 Intestate succession claims

Article 115 of AMLA states that a civil court may refer a set of facts to the Syariah Court for a legal opinion as to who the intestate beneficiaries of a deceased estate are.⁶³ The Syariah Court would then issue an Islamic distribution certificate.⁶⁴ The provision also permits the beneficiary of a deceased estate to make an application for an Islamic distribution certificate. There is a prescribed fee that must be paid.⁶⁵ South Africa has (to date) not enacted any

61 See art 110 of AMLA where it states that ‘[n]othing in this Act shall be held to prevent any Muslim person directing by his or her will that his or her estate and effects shall be distributed according to the Muslim law.’ See also Bin Abbas A ‘The Islamic Legal System in Singapore’ (2012) 21(1) *Pacific Rim Law & Policy Journal* 177.

62 See art 111(1) of AMLA where it states that ‘[n]otwithstanding anything in the provisions of the English law or in any other written law, no Muslim domiciled in Singapore shall, after 1st July 1968, dispose of his property by will except in accordance with the provisions of and subject to the restrictions imposed by the school of Muslim law professed by him.’

63 See art 115 of AMLA. The Syariah Court is one of the organs established in terms of AMLA. See art 34 of AMLA where it states that ‘The President of Singapore may by notification in the Gazette constitute a Syariah Court for Singapore...’ See also Steiner K ‘Governing Islam: The State, the Administration of Muslim Law Act (AMLA) and Islam in Singapore’ (2015) 16(1)(6) *Australian Journal of Asian Law* 12. See also Syariah Court Singapore ‘Inheritance Certificate’ available at <https://www.syariahcourt.gov.sg/Syariah/front-end/Default.aspx?pid=M03.01> (accessed 8 January 2018).

64 It should be noted that the term ‘Inheritance Certificate’ is used within the Singaporean context whereas the term ‘Islamic Distribution Certificate’ is used within the South African context.

65 See art 115 of AMLA where its states that ‘(1) [i]f, in the course of any proceedings relating to the administration or distribution of the estate of a deceased person whose estate is to be distributed according to the Muslim law, any court or authority shall be under the duty of determining the persons entitled to share in such estate or the shares to which such persons are respectively entitled, the Syariah Court may, on a request by the court or authority or on the application of any person claiming to be a beneficiary and on payment of the prescribed fee, certify upon any set of facts found by such court or

legislation that governs the Islamic law of intestate succession. A case concerning an Islamic distribution certificate was, recently heard in the Western Cape Division of the High Court of South Africa.⁶⁶ The certificate came about as a result of a clause found in an Islamic will that directed that the estate should devolve in terms of Islamic law and that an Islamic distribution certificate issued by the Muslim Judicial Council (SA) or any other recognised Muslim judicial authority shall be final and binding in this regard. The Muslim Judicial Council (SA) is based in the Western Cape, South Africa, and primarily follows the Shaafi'ee school of law. The Muslim Judicial Council (SA) issued the Islamic distribution certificate in terms of the clause. It should be noted that the South African law of intestate succession would have applied if the deceased had not left behind an Islamic will.

The process followed in order to obtain an Islamic distribution certificate by the Islamic Syariah Court in Singapore is quite similar to the process followed to obtain an Islamic distribution certificate issued by the Muslim Judicial Council (SA) based in the Western Cape.⁶⁷ The difference between Singapore and South Africa is that the inheritance certificate in Singapore is based on the AMLA and a request made to the Syariah court, whereas the Islamic distribution certificate in South Africa is based on freedom of testation and a clause in the will of the testator or testatrix requiring an organisation like the Muslim Judicial Council (SA) to issue an Islamic distribution certificate. The difference between the position in Singapore and South Africa is that Singapore requires that the school of law followed by the deceased should be followed. I would suggest that South Africa should follow the same approach as far as the Islamic will is concerned.

6.7 Conclusion

This chapter compared the application of the Islamic law of succession and administration of estates in Singapore with its application in South Africa. It looked at the constitutional and international law obligations of these two countries with regard to prohibition of discrimination. This was important to look at as the Islamic law of intestate succession states, for example, that a daughter inherits half the share of a son. The discussion has shown that

authority or on any hypothetical set of facts its opinion as to the persons who are, assuming such facts, whether as found or hypothetical, entitled to share in such estate and as to the shares to which they are respectively entitled. (2) The Syariah Court may, before certifying its opinion, require to hear the parties on any question of law, but shall not hear evidence or make findings on any question of fact.'

66 See Chapter Four (4.2.1) for a discussion on this case.

67 See Chapter Five (5.6) of this thesis for a further discussion on the distribution certificate issued by the Muslim Judicial Council (SA).

Singaporean law places more importance on the right to freedom of religion over the right to equality, whereas South African law places more importance on the right to equality over the right to freedom of religion. It could be argued that the former was the reason for the successful enactment of Islamic law of succession legislation (which includes the Islamic law of intestate succession) within the Singaporean context and that the latter is the reason as to why the Islamic law of succession has to date not been incorporated into South African legislation. The question as to whether the Islamic law of intestate succession satisfies the South African notion of equality is further looked at in Chapter Seven.

This chapter has shown that certain features found within the Singaporean model can be applied within the South African context in the absence of legislation regulating the Islamic law of succession. Suggestions have been made throughout this chapter in this regard but is, however, summarised here for purposes of completion. A testator or testatrix should approach an Islamic law expert if he or she intends bequeathing items in his or estate in terms of Islamic law. The bequest can then be inserted in an Islamic will. The will should state that the claims against his or her estate must be dealt with in terms of Islamic law and according to the school of law that he or she states in the will. These would be the liability claims, testate succession claims, and the intestate succession claims. The will should state that the liability claims against his or her estate (at the time of his or her death) must be ascertained by his or her executor or executrix in terms of Islamic law and in terms of the school of law stated in the will and should be deducted from the gross estate. The executor should approach an Islamic law expert in this regard in order to ascertain what these liabilities are. The testator or testatrix may then incorporate a bequest (if any) in the will as per the advice given by the Islamic law expert. The will should then state that the remainder of the estate must then be distributed in terms of the Islamic law of intestate succession. The will should also state that the executor or executrix must approach an Islamic law expert who should issue an Islamic distribution certificate in terms of the school of law that the testator or testatrix stated in his or her will. The will should further state that all aspects regarding repudiation and disqualification of beneficiaries shall be dealt with in terms of Islamic law and not in terms of South African law. A certificate issued by an Islamic law expert shall be final and binding in this regard. An example of a will that includes all of these provisions can be found in Appendix One of this thesis. The constitutionality of an Islamic will that discriminates between males and females with regard to the law of intestate succession is looked at in the next chapter.

CHAPTER SEVEN

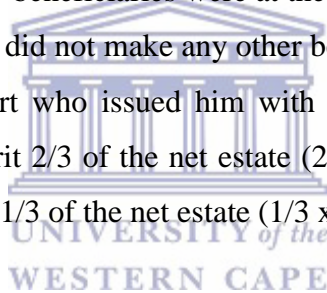
WILL THE ISLAMIC LAW OF INTESTATE SUCCESSION PASS CONSTITUTIONAL MUSTER IN SOUTH AFRICA?

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7.1 Introduction

A daughter inherits half the share of a son in terms of Al Quraan (4) 11.¹ The reason for the apparent discrimination against the daughter is not clearly stated in the primary sources of Islamic law. It has, however, been argued that the rationale behind why the son inherits more favourably than the daughter is due to the fact that more financial obligations are placed on the male in terms of Islamic law.² It could then be argued that the Islamic law of intestate succession discriminates against the daughter based on sex because of gender. This chapter investigates the constitutionality of the daughter inheriting less favourably than the son within the Islamic law of intestate succession. This is done by way of looking at a fictitious scenario where a deceased Muslim (X) dies leaving behind a net estate of R300 000.00. He also leaves behind a son (Y) and a daughter (Z) as his only relatives. X executed a will one month prior to his demise bequeathing his net estate in terms of the Islamic law of intestate succession (Islamic will). His will stated that an Islamic distribution certificate, issued by an Islamic law expert stating who his Islamic law beneficiaries were at the time of his death, shall be binding upon the executor of his estate. X did not make any other bequests. The executor of the estate approached an Islamic law expert who issued him with an Islamic distribution certificate stating that Y (male) would inherit 2/3 of the net estate ($\frac{2}{3} \times R300\,000.00 = R200\,000.00$) and that Z (female) would inherit 1/3 of the net estate ($\frac{1}{3} \times R300\,000.00 = R100\,000.00$).



This chapter first analyses the right to private property (the right upon which the Islamic will is based) and the right to equality (the ground on which Z can possibly challenge the Islamic will) in 7.2 of this chapter by way of introduction. Six South African court cases regarding discriminatory provisions found in wills are then looked at in 7.3 of this chapter. Four of these cases deal with discriminatory provisions found in public wills (wills that apply in the public sphere) whereas the remaining two cases deal with discriminatory provisions found in private wills (wills that apply in the private sphere). An analysis of the cases gives us an understanding of how the South African courts deal with discriminatory provisions found in wills in general. The constitutionality of the Islamic will (based on the common law right to freedom of testation) in the above scenario is looked at in 7.4 of this chapter. The customary law rule of male primogeniture was found to be unconstitutional in *Bhe and Others v*

1 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states 'Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females...'

2 See Dar Al Ifta Al-Misriyyah 'Do Women Take Unequal Shares of Inheritance in Islam?' (2017) available at <http://eng.dar-alifta.org/foreign/ViewArticle.aspx?ID=120&> (accessed 28 November 2017) for a discussion on this issue.

Magistrate Khayelitsha and Others [2005] (*Bhe*) based on discriminatory grounds.³ It was found to be inconsistent with the South African constitutional notion of equality. The Islamic law of intestate succession per se (not in terms of an Islamic will) is compared with the customary law rule of male primogeniture in light of the *Bhe* judgment, in 7.5 of this chapter. The three rules that govern the unequal distribution of shares within the Islamic law of intestate succession per se are also looked at in this section. The question as to whether the Islamic law of intestate succession per se would follow the same result as the customary law rule of male primogeniture is also looked at herein. The chapter concludes with an analysis of the findings and then concluding remarks are made.

7.2 The right to private property versus the right to equality

The Constitution has impacted upon the right to freedom of testation. Section 25(1) of the Constitution guarantees a person the right to private property.⁴ A person may dispose of property during his or her lifetime or after he or she has died. This would include the right to dispose of property in terms of an Islamic will. The right to dispose of property in terms of a will was noted by the Supreme Court of Appeal in *In re: BOE Trust*.⁵ It was argued in this case that s 25(1) of the Constitution guarantees the right to freedom of testation.⁶ The Court held in this case that freedom of testation is linked to the constitutionally guaranteed right to human dignity.⁷ It also held that a court must give effect to the wishes of a testator or testatrix unless it is prevented from doing so in terms of law.⁸ It could be argued that the wishes of X at the time of drafting his will was that the Islamic law of intestate succession would apply to his net estate upon his demise. This is clearly stated in the will that X drafted.

The Constitution and legislation that flows therefrom prohibits unfair discrimination. Section 1 of the Constitution states that our democratic State is founded on a number of values that includes the achievement of equality.⁹ It also includes the advancement of human rights and

3 *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA 580 (CC).

4 See s 25(1) of the Constitution of the Republic of South Africa, 1996.

5 *In Re BOE Trust Ltd* SCA 2013 (3) SA 236 (2013) para 26.

6 See De Waal MJ & Schoeman-Malan *Law of Succession* 5 ed (2015) 4.

7 *In Re BOE Trust Ltd* SCA 2013 (3) SA 236 (2013) para 27.

8 *King NO and Others v De Jager and Others* 2017 (4) All SA 57 (WCC) para 55.

9 See s 1 of the Constitution of the Republic of South Africa, 1996 where it states that '[t]he Republic of South Africa is one sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms. (b) Non-racialism and non-sexism. (c) Supremacy of the constitution and the rule of law. (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.'

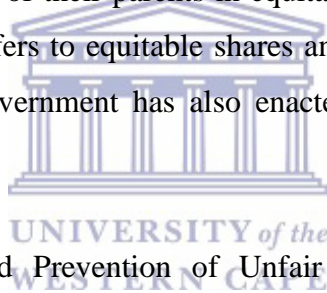
freedoms. Section 8(2) of the Constitution states that the provisions found in the Bill of Rights are binding on natural persons.¹⁰ It could therefore be applicable to X when he drafted the Islamic will. The provisions in the Bill of Rights prohibit unfair discrimination. It could be argued that the fact that Z inherits half the share of X is unfair discrimination. This question is further investigated in 7.4 hereunder.

The right to equality is guaranteed in terms of s 9 of the Constitution. Section 9(4) of the Constitution states that a 'person' may not unfairly discriminate directly or indirectly against anyone on one or more of the grounds listed in terms of s 9(3) of the Constitution which include 'race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.'¹¹ It could be argued that Z is partially disinherited based on sex because of gender.¹² These two grounds of discrimination are specifically prohibited in terms of s 9(3) of the Constitution.¹³

Section 39(1)(b) of the Constitution states that international law must be considered when interpreting the Bill of Rights.¹⁴ The South African government ratified international and regional human rights instruments that prohibit discrimination. These instruments are looked at in order to see what obligations the South African government has to fulfill regarding elimination of discriminatory practices.¹⁵ The South African government ratified the United Nation's Convention on the Elimination of All Forms of Discrimination Against Women

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- 10 See s 2 of the Constitution of the Republic of South Africa, 1996 where it states that '[a] provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.'
- 11 See s 9(3)-(4) of the Constitution of the Republic of South Africa, 1996 where it states that '(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.'
- 12 The term partial disinheritance is used in this chapter to refer to a situation where a female inherits less favourably than her male counterpart. An example of this would be where a daughter inherits less favourably than a son in the event where they inherit as intestate beneficiaries.
- 13 See s 9 of the Constitution of the Republic of South Africa, 1996.
- 14 See s 39(1)(b) of the Constitution of the Republic of South Africa, 1996 where it states that '[w]hen interpreting the Bill of Rights, a court, tribunal or forum - ... (b) must consider international law...'
- 15 See s 39(1) of the Constitution of the Republic of South Africa, 1996 where it states that '[w]hen interpreting the Bill of Rights, a court, tribunal or forum - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.'

(CEDAW) on 15 December 1995.¹⁶ Article 16(1) of CEDAW obliges States Parties to ‘take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations...’ Article 16(1)(h) of CEDAW states that States Parties are to ensure equal rights between men and women concerning the acquisition of property.¹⁷ The fact that Z inherits half the share of Y would be problematic as far as this provision is concerned. The South African government subsequently ratified the African Charter on Human and Peoples’ Rights (ACHPR) on 9 July 1996.¹⁸ Article 18(3) of the ACHPR states that ‘[t]he State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman...’ It could be argued that ‘every discrimination’ includes discrimination against Z based on sex because of gender. The South African government later ratified the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (African WR Protocol) on 17 December 2004. Article 21(2) of the African WR Protocol states, that both women and men shall have the right to inherit from the property of their parents in equitable shares.¹⁹ It is quite interesting that the wording in the article refers to equitable shares and not equal shares.²⁰ It should be noted that the South African government has also enacted legislation in order to prevent unfair discrimination.



The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) was enacted in accordance with s 9(4) of the Constitution.²¹ This is also in line with CEDAW, ACHPR, and the African WR Protocol. Section 8(c) of PEPUDA prohibits

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- 16 See CEDAW, 1989 United Nations General Assembly Resolution 34/180 (1979). Signed by South African Government on 29 January 1993 and ratified by the South African Government on 15 December 1995.
- 17 See art 16(1)(h) of CEDAW, 1979 United Nations General Assembly Resolution 34/180 (1979).
- 18 See ACHR. The Charter was ratified by the South African Government on 9 July 1996. The South African Government deposited the instrument of ratification on 9 July 1996. See African Commission on Human and Peoples’ Rights ‘Ratification Table: African Charter on Human and Peoples’ Rights’ available at <http://www.achpr.org/instruments/achpr/ratification/> (accessed 25 December 2017).
- 19 See African WR Protocol. The South African Government ratified the African WR Protocol on 17 December 2004 and deposited the instrument of ratification on 14 January 2005. See African Commission on Human and Peoples’ Rights ‘Ratification Table: African Charter on Human and Peoples’ Rights’ available at <http://www.achpr.org/instruments/achpr/ratification/> (accessed 25 December 2017).
- 20 It should be noted that equity refers to the quality of being fair; fairness, impartiality, and even-handed dealing, whereas equality refers to the quality of being equal in quantity, amount and value. See Herrera LM ‘Equity, Equality and Equivalence – A contribution in search for conceptual definitions and a comparative methodology’ 13 (2007) *Revista Española de Educación Comparada* 322. It could be argued that a son inheriting more favourably than a daughter would be equitable if he has more financial responsibilities than her.
- 21 See Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. See also s 9(4) of the Constitution of the Republic of South Africa, 1996 where it states that ‘[n]o person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.’

‘unfair’ discrimination based on a ‘system’ that ‘prevents’ women from inheriting family property.²² It could be argued that the discrimination against Z is not unfair as she has less financial obligations in terms of Islamic law. It could also be argued that Z has de facto more financial obligations than Y as she, for example, has more children than Y to financially support. It could also be argued that the financial obligations towards those children lie with the father of those children and not with Z.²³ There is nothing in Islamic law that prevents Y from ceding part of his inheritance in favour of Z in order to augment the share received by Z from the net estate. They could even both mutually agree to receive equal shares of the net estate. These points raised in this paragraph clearly show that there are a number of arguments that could be made regarding whether discrimination in inheritance is fair or not.

Section 8(c) of PEPUDA prohibits a ‘system’ of unfair discrimination. It could be argued that the Islamic will drafted by X is based on a system, as the clause in the will states that the net estate must be distributed in accordance with the ‘Islamic law of intestate succession’ when X dies. The situation would be different if X bequeathed 2/3 of his net estate in favour of his son and 1/3 of his net estate in favour of his daughter.²⁴ In this case no reference would be made to the ‘Islamic law of intestate succession’ even though the consequences would be the same. It would be difficult, if not impossible, to prove that the will is based on a ‘system’ of discrimination.

Section 8(c) of PEPUDA prohibits unfair discrimination that ‘prevents’ women from inheriting family property.²⁵ The unequal distribution of shares in terms of the Islamic law of intestate succession does not prevent Z from inheriting property from her father’s estate. Z is, however, partially disinherited as she inherits half the share of Y. An example of a ‘system’ where females are ‘prevented’ from inheriting family property is found in the rule of male primogeniture. The rule of male primogeniture was found to be unconstitutional in *Bhe* ‘to the extent that it excludes or hinders women and extra-marital children from inheriting

22 See s 8(c) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 where it states that ‘...no person may unfairly discriminate against any person on the ground of gender, including ... (c) the system of preventing women from inheriting family property...’

23 See Khan MM *The Noble Qur’an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that ‘[L]et the rich man spend according to his means, and the man whose resources are restricted, let him spend according to what Allah has given him. Allah puts no burden on any person beyond what He has given him. Allah will grant after hardship, ease.’

24 See s 8(c) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

25 See s 8(c) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

property.’²⁶ This was based on a system found in customary law. The rule of male primogeniture is looked at in more detail in 7.5 of this chapter where *Bhe* is discussed.

Section 8(3)(a) of the Constitution states that a court must develop the common law if it does not give effect to a right found in the Bill of Rights.²⁷ It must do so to the extent that legislation does not give effect thereto. Section 8(3)(b) of the Constitution states that a court may develop the common law to limit a right.²⁸ The common law principle of freedom of testation can technically be developed based on these constitutional provisions in order to prevent the enforceability of discriminatory provisions found in wills.²⁹ The development of the common law is subject to s 36(1) of the Constitution which states that ‘[t]he rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom...’³⁰ No challenges have (to date) been made regarding the constitutionality of the Islamic will, based on s 8 of the Constitution.

7.3 Case law on discriminatory provisions found in wills

Muslims in general are duty bound in terms of their religion to ensure that their estates devolve in terms of Islamic law after they die. This would include South African Muslims. One of the ways of doing this within the South African context is by executing an Islamic will. The Islamic will must comply with the provisions of the Wills Act 7 of 1953 in order to be valid.³¹ The principle of freedom of testation is a basic principle of the South African law

26 See *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA 580 (CC) para 36.

27 See s 8 of the Constitution of the Republic of South Africa, 1996 where it states that ‘(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court - (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right...’

28 See s 8 of the Constitution of the Republic of South Africa, 1996 where it states that ‘(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2) ... a court - (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).’

29 See 8(3) of the Constitution of the Republic of South Africa, 1996 where it states that ‘[w]hen applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court - (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and (b) may develop rules of the common law to limit the right, provided the limitation is in accordance with section 36(1).’

30 See s 36(1) of the Constitution of the Republic of South Africa, 1996 where it states that ‘[t]he rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including - (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.’

31 See Wills Act 7 of 1953.

of succession and enables a testator or testatrix to bequeath assets in a will as he or she pleases. The principle of freedom of testation is not completely unrestricted. There are limitations placed on the freedom. These limitations are based on social and economic considerations.³² The limitations are found in statutory and common law principles.³³ An example of a common law limitation is that a testator or testatrix may not incorporate a provision in a will that is contrary to public policy.³⁴

Section 9(4) read with s 9(3) of the Constitution prohibits ‘unfair’ discrimination based on ‘one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.’³⁵ Discriminatory provisions found in wills have been challenged in a number of court cases since the introduction of the new constitutional dispensation. There are six cases that are looked at in this regard. Four of these cases dealt with discriminatory provisions found in wills that applied in the public sphere (public wills) whereas the remaining two cases dealt with discriminatory provisions found in wills that applied in the private sphere (private wills). The first four cases (public wills) are looked at by way of introduction. They are important to note as they are the first cases within the South African context that challenged discriminative provisions found in wills. These cases are also looked at in order to highlight why the Islamic will is not bound by these judgments even though they deal with discriminatory provisions found in wills. The remaining two cases (private wills) are then looked at as the constitutionality of the partial disinheritance of Z in the scenario at hand could possibly be challenged in the South African courts on similar grounds.

The first case looked at is *Minister of Education v Syfrets Trust Ltd NO and Another* [2006] (*Syfrets Trust Ltd*).³⁶ The judgment was handed down by the Western Cape High Court. The judgment concerned discriminatory testamentary provisions found in a public charitable trust. The trust awarded bursaries to students. Eligibility for the bursaries was limited to persons of

32 See De Waal MJ & Schoeman-Malan *Law of Succession* 5 ed (2015) 3-4.

33 *King NO and Others v De Jager and Others* 2017 (4) All SA 57 (WCC) para 28.

34 Other provisions in a will that would not be carried out due to common law limitations include those that are unlawful, against public policy, impractically vague, or impossible. Minor children of a deceased would also have a common law maintenance claim against his or her estate. See De Waal MJ & Schoeman-Malan *Law of Succession* 5 ed (2015) 3-4.

35 Other statutory limitations are also found in the Maintenance of Surviving Spouses Act 27 of 1990; Pension Funds Act 24 of 1956; the Immovable Property Act 94 of 1965; and the Trust Property Control Act 57 of 1988.

36 *Minister of Education and Another v Syfrets Trust Ltd NO and Another* 2006 (4) SA 205 (C).

European descent.³⁷ The requirements excluded females as well as persons of Jewish descent.³⁸ An order was sought for the deletion of the discriminatory provisions from the trust deed. The order was sought on the basis of s 13 of the Trust Property Control Act (TPCA) that enables the court to vary provisions in a trust instrument,³⁹ the common law which prohibits bequests that are contrary to public policy, and direct application of the equality provisions found in the Constitution.⁴⁰ The Court upheld the challenge and dealt with the case on the basis of existing common law principles which prohibit bequests that are contrary to public policy with due regard to the spirit, purport, and objects of the Bill of Rights.⁴¹ The Court found that public policy was rooted in the Constitution and the values that are enshrined therein.⁴² The Court held that the public policy that was relevant was the one that prevailed at the time of the enquiry and not at the time when the trust deed was drafted.⁴³ The Court held that the testamentary provisions were contrary to public policy as they unfairly discriminate against persons on the basis of race, gender, and religion.⁴⁴

The relief sought in *Syfrets Trust Ltd* was simply to widen the pool of prospective applicants for the bursaries. It was not to take away benefits from particular persons. The bursaries applied in the public sphere and for an indefinite period of time. The Islamic will executed by X conferred rights on both Y and Z. Y would inherit R200 000.00 and Z would inherit R100 000.00. The Islamic will applies in the private sphere and does not apply for an indefinite period of time. Changing the consequences of the Islamic will would infringe on existing rights conferred on Y. This is quite different to what happened in *Syfrets Trust Ltd*.

37 *Minister of Education and Another v Syfrets Trust Ltd NO and Another* 2006 (4) SA 205 (C) para 6. See also Rautenbach C 'A Few Comments on the (Possible) Revival of the Customary Law Rule of Male Primogeniture: Can the Common-Law Principle of Freedom of Testation Come to Its Rescue?' in de Waal N & Paleker M *South African Law of Succession and Trusts: The Past Meeting the Present and Thoughts for the Future* (2014) 152.

38 *Minister of Education and Another v Syfrets Trust Ltd NO and Another* 2006 (4) SA 205 (C) para 1.

39 See s 13 of the Trust Property Control Act where it states that '[i]f a trust instrument contains any provision which brings about consequences which in the opinion of the court the founder of a trust did not contemplate or foresee and which - (a) hampers the achievement of the objects of the founder; or (b) prejudices the interests of beneficiaries; or (c) is in conflict with the public interest, the court may, on application of the trustee or any person who in the opinion of the court has a sufficient interest in the trust property, delete or vary any such provision or make in respect thereof any order which such court deems just, including an order whereby particular trust property is substituted for particular other property, or an order terminating the trust.'

40 *Minister of Education and Another v Syfrets Trust Ltd NO and Another* 2006 (4) SA 205 (C) para 9.

41 *Minister of Education and Another v Syfrets Trust Ltd NO and Another* 2006 (4) SA 205 (C) para 16.

42 *Minister of Education and Another v Syfrets Trust Ltd NO and Another* 2006 (4) SA 205 (C) para 24.

43 *Minister of Education and Another v Syfrets Trust Ltd NO and Another* 2006 (4) SA 205 (C) para 26.

44 *Minister of Education and Another v Syfrets Trust Ltd NO and Another* 2006 (4) SA 205 (C) para 47-48.

The second case looked at is *Ex Parte: BOE Trust Ltd* [2009 and 2012] (*BOE Trust Ltd*).⁴⁵ The matter was initially heard at the Western Cape High Court and later taken on appeal to the Supreme Court of Appeal (SCA). The case dealt with discriminatory testamentary provisions found in a public charitable trust. The trust awarded bursaries to students. Eligibility for the bursaries was limited to ‘White’ South Africans. An order was sought for the deletion of the discriminatory provisions from the trust deed. The order was sought on the basis of s 13 of the TPCA that allows the court to vary provisions in a trust instrument,⁴⁶ the common law which prohibits bequests that are contrary to public policy, and direct application of the equality provisions found in the Constitution.⁴⁷

The High Court looked at public policy and constitutional considerations. It held that it was ‘not satisfied that the provisions concerned are as clearly contrary to public policy as the trustees believe. Section 9(3) of the Constitution proscribes discrimination which is unfair. It is recognised that discrimination designed to achieve a legitimate objective is not unfair. Such legitimate objectives are, for example, the need to redress past injustices based on gender and race.’⁴⁸ The High Court stated that no one has a right to inherit a benefit (and thus the right not to be totally or partially disinherited) in terms of a will or trust. It further stated that freedom of testation includes the right to benefit some persons and not others.⁴⁹ In the scenario at hand it would mean that neither Y nor Z had a right to inherit from X prior to his execution of the Islamic will. X could therefore technically completely disinherit Y and Z or even partially disinherit Y and Z. The High Court held that conduct should be regarded as contrary to public policy only if it unfairly discriminates between persons.⁵⁰ The High Court held that the provisions were not contrary to public policy as they had a legitimate purpose.⁵¹

45 *Ex Parte BOE Trust Ltd and Others* 2009 (6) SA 470 (WCC).

46 See s 13 of the Trust Property Control Act where it states that ‘[i]f a trust instrument contains any provision which brings about consequences which in the opinion of the court the founder of a trust did not contemplate or foresee and which - (a) hampers the achievement of the objects of the founder; or (b) prejudices the interests of beneficiaries; or (c) is in conflict with the public interest, the court may, on application of the trustee or any person who in the opinion of the court has a sufficient interest in the trust property, delete or vary any such provision or make in respect thereof any order which such court deems just, including an order whereby particular trust property is substituted for particular other property, or an order terminating the trust.’

47 *Ex Parte BOE Trust Ltd and Others* 2009 (6) SA 470 (WCC) para 7.

48 *Ex Parte BOE Trust Ltd and Others* 2009 (6) SA 470 (WCC) para 14.

49 *Ex Parte BOE Trust Ltd and Others* 2009 (6) SA 470 (WCC) para 16.

50 *Ex Parte BOE Trust Ltd and Others* 2009 (6) SA 470 (WCC) para 16.

51 See *Ex Parte BOE Trust Ltd and Others* 2009 (6) SA 470 (WCC) para 2 where it states that ‘[t]he remaining income shall be applied by my trustees for the provision of small bursaries to assist White South African students who have completed an MSc degree in Organic Chemistry at a South African University and are planning to complete their studies with a doctorate degree at a University in Europe or in Britain. The selection of these students, and the size and duration of the bursaries shall, after

The testatrix ‘thought [it] fit to require beneficiaries of the bursary trust to return to South Africa for a period determined by the universities concerned after obtaining their doctorates. It seems at least possible that, in so doing, she was seeking to ameliorate this skills loss and indeed, to promote importation of skills obtained overseas.’⁵² The reliance on s 13 of the TPCA also failed. This section ‘allows a court to enter the mind of the testator by interpreting the trust instrument to determine if it ‘contains any provision which brings about consequences which in the opinion of the court’ the testator did not contemplate or foresee.’⁵³ The High Court held that the applicants did not ‘make out any case that circumstances unforeseen by the testatrix have had any effect on the implementation of the bursary bequest in order to justify ... interference by the court under the power conferred by s 13 of the Act.’⁵⁴ The matter was taken on appeal to the Supreme Court of Appeal. The appeal was, however, unsuccessful.⁵⁵

The relief sought in *BOE Trust Ltd* is similar to that sought in *Syfreys Trust Ltd*. It was simply to widen the pool of prospective applicants for the bursaries. It was not to take away benefits from particular persons. The bursaries applied in the public sphere and for an indefinite period of time. The difference between *BOE Trust Ltd* and *Syfreys Trust Ltd* is that the discrimination in *BOE Trust Ltd* had a legitimate purpose. It should be noted that the Islamic will applies in the private sphere and is not for an indefinite period of time. A Muslim testator or testatrix is also invoking his or her right to practice his or her religion in terms of the Constitution and which he or she is also duty-bound to do in terms of his or her religion.⁵⁶ The High Court held in *BOE Trust Ltd* that the provisions were not contrary to public policy as it also had a legitimate purpose. It could be argued that X, as a matter of choice, decided to execute an Islamic will on the basis that his son has more financial obligations than his

discussions between them, be the joint responsibility of the four Organic Chemistry Professors of the Universities of Cape Town, Stellenbosch, Bloemfontein and Pretoria in consultation with Syfreys Trust Limited. The only provisos in the selection of suitable candidates are that, in addition to a competence in Organic Chemistry, such students must exhibit both the desire and the ability to benefit culturally from a period spent at such a university and that they must return to South Africa for a period to be stipulated by the Professors listed.’

52 *Ex Parte BOE Trust Ltd and Others* 2009 (6) SA 470 (WCC) paras 14-16. See also *King NO and Others v De Jager and Others* 2017 (4) All SA 57 (WCC) para 33.

53 Rautenbach C ‘A Few Comments on the (Possible) Revival of the Customary Law Rule of Male Primogeniture: Can the Common Law Principle of Freedom of Testation Come to its Rescue?’ in De Waal M and Paleker M *South African law of Succession and Trusts* (2014) 149. See also *Ex Parte BOE Trust Ltd and Others* 2009 (6) SA 470 (WCC) para 20.

54 *Ex Parte BOE Trust Ltd and Others* 2009 (6) SA 470 (WCC) para 22.

55 See *Ex Parte BOE Trust Ltd* 2013 (3) SA 236 (SCA) para 33.

56 See s 15 of the Constitution of the Republic of South Africa, 1996 where it states that ‘(1) [e]veryone has the right to freedom of conscience, religion, thought, belief and opinion...’

daughter in terms of Islamic law. This issue is further discussed in 7.4 of this chapter where the constitutionality of the Islamic will is investigated.

The third case looked at is *Curators, Emma Smith Educational Fund v University of KwaZulu-Natal and others* [2010] (*Emma Smith Educational Fund*).⁵⁷ The judgment was handed down by the Supreme Court of Appeal (SCA). It dealt with discriminatory testamentary provisions in a public charitable trust. Eligibility for the bursary was limited to European girls who were born of British South African or Dutch South African parents. It was further required that they must have been resident in Durban for a period of at least three years immediately preceding the grant.⁵⁸ An order was sought for the deletion of the discriminatory provisions from the trust deed. The order was sought based on s 13 of the TPCA that allows the court to vary provisions in a trust instrument.⁵⁹ The Court held that the constitutional obligation to remove provisions that are in conflict with public policy takes precedence over freedom of testation.⁶⁰ The Court did not answer the question as to whether the Constitution can be applied directly to the law of succession.⁶¹ It must be noted that the Court placed considerable emphasis on the fact that the trust was a public charitable one which operated in the public sphere. It held that there can be no question that racially discriminatory testamentary dispositions in the public sphere will not pass constitutional muster.⁶² The Court noted that testamentary dispositions in the private sphere would require a totally different approach.⁶³ This is important to note as the Islamic will drafted by X applies in the private sphere and not in the public sphere.

The fourth case looked at is *In re: Heydenrych Testamentary Trust and Others* [2012] (*Heydenrych Testamentary Trust*).⁶⁴ The judgment was handed down by the Western Cape High Court. It dealt with discriminatory testamentary provisions in a number of public charitable trusts. It was argued that the trusts discriminated on the grounds of race, descent,

57 *Curators, Emma Smith Educational Fund v University of KwaZulu-Natal* 2010 (6) SA 518 (SCA).

58 *Curators, Emma Smith Educational Fund v University of KwaZulu-Natal* 2010 (6) SA 518 (SCA) para 8.

59 *Curators, Emma Smith Educational Fund v University of KwaZulu-Natal* 2010 (6) SA 518 (SCA) para 2.

60 *Curators, Emma Smith Educational Fund v University of KwaZulu-Natal* 2010 (6) SA 518 (SCA) para 42.

61 *King NO and Others v De Jager and Others* 2017 (4) All SA 57 (WCC) para 35.

62 *Curators, Emma Smith Educational Fund v University of KwaZulu-Natal* 2010 (6) SA 518 (SCA) para 38.

63 *Curators, Emma Smith Educational Fund v University of KwaZulu-Natal* 2010 (6) SA 518 (SCA) para 41.

64 *In re: Heydenrych Testamentary Trust and Others* 2012 (4) SA 103 (WCC).

and gender.⁶⁵ An order was sought for the deletion of the discriminatory provisions from the trust deeds. The order was sought on the basis of s 13 of the TPCA that allows the court to vary provisions in a trust instrument.⁶⁶ The Court held that the provisions constituted unfair discrimination on the grounds of race and gender and were in conflict with the Constitution and the public interest.⁶⁷ What makes this case different from the three previous cases is that it dealt with multiple charitable trusts.

The issue in *Heydenrych Testamentary Trust* was quite similar to that of *Syffrets Trust Ltd*. The relief sought in *Heydenrych Testamentary Trust* was simply to widen the pool of prospective applicants for the bursaries. It was not to take away benefits from particular beneficiaries. It applied in the public sphere and for an indefinite period of time. A beneficiary who inherits in terms of an Islamic will would have an existing right that flows from the Islamic will. Changing the consequences of an Islamic will in the scenario at hand would infringe upon the existing rights of Y. It would mean that the court would be re-writing the will of X and determining what should be inherited by Y and Z.

The fifth case looked at is *Harper and Others v Crawford NO and Others* [2017] (*Harper*).⁶⁸ The judgment was handed down by the Western Cape High Court. It dealt with discriminatory testamentary provisions in a private trust deed. It was argued that the trust discriminated on the basis of birth.⁶⁹ An order was sought for the amendment of the trust deed to include the excluded adopted children.⁷⁰ The order was sought on the basis of s 13 of the TPCA that allows the court to vary provisions in a trust instrument.⁷¹ The Court noted that the relief sought was quite far reaching as it would infringe the right to freedom of testation. It noted that relief granted in previous cases of this nature (the preceding four cases above) did nothing more than widen the pool of prospective applicants for bursaries. The relief that was granted did not take away benefits that were already conferred on specific beneficiaries nor did it confer benefits on other persons.⁷² The Court further noted that the relief granted in previous cases was regarding public wills. It concerned bursaries that were

65 *In re: Heydenrych Testamentary Trust and Others* 2012 (4) SA 103 (WCC) para 2-3.

66 *In re: Heydenrych Testamentary Trust and Others* 2012 (4) SA 103 (WCC) para 5.

67 *In re: Heydenrych Testamentary Trust and Others* 2012 (4) SA 103 (WCC) para 20.

68 *Harper and Others v Crawford NO and Others* 2017 (4) All SA 30 (WCC).

69 *Harper and Others v Crawford NO and Others* 2017 (4) All SA 30 (WCC) para 19.

70 *Harper and Others v Crawford NO and Others* 2017 (4) All SA 30 (WCC) para 5.

71 *Harper and Others v Crawford NO and Others* 2017 (4) All SA 30 (WCC) para 1.

72 *Harper and Others v Crawford NO and Others* 2017 (4) All SA 30 (WCC) para 22.

made available to applicants from the public. Public institutions were involved in administering the bursaries. The Court noted that the public element of discrimination in such cases would lead to the right to equality taking preference over the right to freedom of testation.⁷³ The Court held that it did not have the competency to amend the trust deed, in the same way that it does not have the authority to amend the will of a testator or testatrix.⁷⁴

The Islamic will executed by X would be comparable to the private trust deed in *Harper* as the Islamic will applies in the private sphere. The Court noted in *Harper* that it did not have the authority to amend the will of a testator or testatrix.⁷⁵ This is exactly what would be done if the Islamic will executed by X is amended by a South African court. The *Harper* case dealt with a complete disinheritance of adopted children. The Islamic law of intestate succession deals with complete disinheritance as well as partial disinheritance. An adopted son would also not inherit in terms of the Islamic law of intestate succession (complete disinheritance). There is nothing in Islamic law that prevents a testator or testatrix from bequeathing up to 1/3 of the net estate in favour of an adopted child. The example of Z inheriting half the share of Y in the scenario at hand is an example of partial disinheritance. There have (to date) been no cases heard in the South African courts that have dealt with discrimination on the basis of partial disinheritance. Based on the *Harper* case, it seems that courts would be more reluctant to amend private wills where persons are partially disinherited as they have already held that they do not have the competency to amend private wills where persons were completely disinherited.

The sixth case looked at is *King NO and Others v De Jager and Others* [2017] (*De Jager*).⁷⁶ The judgment was handed down by the Western Cape High Court. It dealt with discriminatory testamentary provisions in a private will.⁷⁷ It was argued that the will discriminated against certain persons on the ground of gender. An order was sought for the amendment of the will in order to include the excluded persons.⁷⁸ The order was sought based on the common law which prohibits bequests that are contrary to public policy, and on direct application of the equality provisions found in the Constitution.⁷⁹ The Court noted that

73 *Harper and Others v Crawford NO and Others* 2017 (4) All SA 30 (WCC) para 30.

74 *Harper and Others v Crawford NO and Others* 2017 (4) All SA 30 (WCC) para 34.

75 *Harper and Others v Crawford NO and Others* 2017 (4) All SA 30 (WCC) para 34.

76 *King NO and Others v De Jager and Others* 2017 (4) All SA 57 (WCC).

77 *King NO and Others v De Jager and Others* 2017 (4) All SA 57 (WCC) para 1.

78 *King NO and Others v De Jager and Others* 2017 (4) All SA 57 (WCC) para 14.

79 *King NO and Others v De Jager and Others* 2017 (4) All SA 57 (WCC) para 21.

there are a number of problems with granting the relief sought. It would mean that the Court would be the final arbiter in the choice of beneficiaries in testamentary dispositions of a non-public nature.⁸⁰ It would lead to situations where the last wishes of a testator or testatrix are second-guessed by a court by including excluded persons. This is quite different to ‘amending the terms’ of a charitable trust as discussed in the first five cases looked at in 7.3 above. Those cases involved ‘determining altered terms for how property that has been bequeathed should be administered’ by the trustees. This is quite different from determining whether property should be bequeathed to a particular person.⁸¹ It should be noted that the application in *De Jager* was dismissed and the will was not amended by the Court.⁸² The Islamic will is comparable to the facts of *De Jager*. Amending consequences of the Islamic will would mean that the court is second-guessing X. The court would be partially disinheriting Y by conferring additional rights on Z.

7.4 Constitutionality of an Islamic will

This section investigates whether Z can successfully challenge the constitutionality of her partial disinheritance in terms of the Islamic will based on unfair discrimination on the grounds of sex and gender. X applied his constitutional right to freedom of testation by executing the Islamic will.⁸³ The right to freedom of testation is, however, not absolute. X wanted the Islamic law of intestate succession to find application. This is also his religious duty in terms of Islamic law. The South African Constitution grants X the right to freedom of religion. The right to practice ones religion is also one of the fundamental rights entrenched in the Constitution.⁸⁴ It could be argued that this would include the right to draft an Islamic will. The question now remains as to whether the provision in the Islamic will that has the effect of Z inheriting half the share of Y would pass constitutional muster. It will be accepted for purposes of this enquiry that Z inherits half the share of Y based on sex because of gender. The first question that is needed to be answered is whether the Constitution applies to the provision in the Islamic will executed by X. Section 8(2) of the Constitution states that ‘[a] provision of the Bill of Rights binds a natural ... person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by

80 *King NO and Others v De Jager and Others* 2017 (4) All SA 57 (WCC) para 61.

81 *King NO and Others v De Jager and Others* 2017 (4) All SA 57 (WCC) para 61.

82 *King NO and Others v De Jager and Others* 2017 (4) All SA 57 (WCC) para 110.

83 See s 25(1) of the Constitution of the Republic of South Africa, 1996.

84 Currie I & De Waal J *The Bill of Rights Handbook* (2013) 316-317.

the right.’⁸⁵ This provision clearly states that a private person may not infringe the constitutional rights of another private person.⁸⁶

The first enquiry that is needed to be looked at is whether the Bill of Rights is capable of being applied to the provision in the Islamic will that partially disinherits Z.⁸⁷ It could be argued by Z that she is being discriminated against based on her sex because of gender and that her constitutional right to equality as found in s 9 of the Constitution is being infringed upon by X. The Bill of Rights would therefore be applicable to this scenario as it is capable of being applied.

The second enquiry that is needed to be looked at is whether the provision found in the Islamic will violates the equality provisions found in s 9 the Constitution. Section 9(4) of the Constitution states that ‘[n]o person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3).’⁸⁸ Section 9(3) of the Constitution includes both sex and gender as listed grounds.⁸⁹ Section 9(5) of the Constitution states that ‘[d]iscrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.’⁹⁰ The conclusion that must be reached in this regard is that the provision in the Islamic will would be presumed to be unfair discrimination unless it can be established that it is fair. Section 8(3) of the Constitution states that ‘when applying a provision of the Bill of Rights to a natural ... person in terms of subsection (2), a court ... (b) may develop rules of the common law to limit the right provided that the limitation is in accordance with section 36(1).’⁹¹

The third enquiry that is needed to be looked at is whether the Islamic will meets the requirements of s 36(1) of the Constitution which deals with limitations to rights. Section 36(1) of the Constitution states that ‘[t]he rights in the Bill of Rights may be limited only in terms of law of general application...’⁹² The Islamic will was executed based on the principle

85 See s 8(2) of the Constitution of the Republic of South Africa, 1996 where it states that ‘[a] provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.’

86 Rautenbach IM and Malherbe EFJ *Constitutional Law* 6 ed (2012) 295.

87 See Rautenbach IM and Malherbe EFJ *Constitutional Law* 6 ed (2012) 297.

88 See s 9(4) of the Constitution of the Republic of South Africa, 1996.

89 See s 9(3) of the Constitution of the Republic of South Africa, 1996.

90 See s 9(5) of the Constitution of the Republic of South Africa, 1996.

91 See s 8(3) of the Constitution of the Republic of South Africa, 1996.

92 See s 36(1) of the Constitution of the Republic of South Africa, 1996.

of freedom of testation which is established in terms of the common law. The principle of freedom of testation is also general in its application as all South Africans have the right to execute wills, based on this principle.

Section 36(1) of the Constitution further states that unfair discrimination would be justified if it is deemed 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.' These factors include '(a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) [whether there are] less restrictive means to achieve the purpose'⁹³ in question. The following points should be noted before continuing with the s 36 enquiry. A distinction must be made between a testamentary disposition that applies in the public sphere and a testamentary disposition that applies in the private sphere.⁹⁴ Four of the six court cases looked at in 7.2 above concerned testamentary dispositions that applied in the public sphere.⁹⁵ Those cases concerned discriminatory testamentary provisions in public charitable trusts. The relief sought in those cases was simply to widen the pool of prospective applicants for the bursaries. It was not to take away benefits from particular beneficiaries.⁹⁶

This is quite different to the consequences that flow from the Islamic will in the scenario at hand. Y inherits double the share of Z in terms of the Islamic will. Changing the consequences of the Islamic will would mean taking benefits away from Y and giving it to Z. This would render the principle of freedom of testation as guaranteed in the Bill of Rights to be meaningless.⁹⁷ It would also mean that the court would have the final say as to who the beneficiaries of X would be. This could lead to situations where a court would be second-guessing the testator or testatrix without having any knowledge as to why the testator or testatrix executed the private will in the way he or she did.⁹⁸ No person has a fundamental 'right' to inherit as a testate beneficiary in terms of South African law. The exclusion of a person as a testate beneficiary does not encroach upon or take away existing rights of a

93 See s 36(1) of the Constitution of South Africa, 1996. See also Currie I & De Waal J *The Bill of Rights Handbook* (2013) 216.

94 *Harper and Others v Crawford NO and Others* 2017 (4) All SA 30 (WCC) para 22.

95 See *Minister of Education and Another v Syfrets Trust Ltd NO and Another* 2006 (4) SA 205 (C); *Emma Smith Educational Fund v University of KwaZulu-Natal* 2010 (6) SA 518 (SCA); *Ex Parte BOE Trust Ltd* 2013 (3) SA 236 (SCA).

96 *Harper and Others v Crawford NO and Others* 2017 (4) All SA 30 (WCC) para 22.

97 See De Waal MJ & Schoeman-Malan *Law of Succession* 5 ed (2015) 5-6.

98 *King NO and Others v De Jager and Others* 2017 (4) All SA 57 (WCC) para 61.

person.⁹⁹ If Z were to succeed in her challenge, it would take away the existing right of Y to inherit the total amount of R200 000.00 in terms of the private will.¹⁰⁰ It could be argued that the wish of X was that the Islamic law of intestate succession must find application, and that his wishes should therefore be respected. There would be a number of difficult choices that a court would have to make if Z succeeds in her challenge. Should the court re-write the Islamic will of X in order to increase the share of Y? Should Y inherit the same share as Z even though Z inherited a larger amount in terms of the Islamic will? Should the Islamic will be declared invalid? Should the net estate of X now be distributed in terms of the South African law of intestate succession and not the Islamic law of intestate succession? Does this mean that persons who were excluded in terms of Islamic law can now also challenge the Islamic will?¹⁰¹ These are but a few of the difficult decisions that would have to be made.

When one looks at the nature of the rights in question it is noted that two of the three values stated in s 36 were engaged with by X when he executed his will in terms of his right to freedom of testation. The listed rights are human dignity and freedom. He also engaged his right to freedom of religion that is entrenched in s 15(1) of the Constitution.¹⁰² The right to equality is, however, broadly stated and should at times give way to competing rights.¹⁰³ When one looks at the importance of the limitation in question, it can be seen that X exercised his constitutional right to practice his religion based on the right to freedom of testation in terms of religious principles. If the daughter is successful in her application, then it would mean that the right to freedom of testation would be deemed meaningless.¹⁰⁴ When one looks at the nature and extent of the limitation in question it is noted that the discriminatory provisions apply in terms of a private will as well as in the private sphere. It affects only Y and Z. It does not apply for an indefinite period of time as was the case in four of the six cases looked at in 7.2 above. It does also not apply to an unknown amount of people. It is 'one thing to say that the Constitution with its values and rights reaches everywhere, but quite another to expect the courts to make rulings and orders regarding people's private lives and personal preference.'¹⁰⁵ It is quite clear that the purpose behind the

99 See De Waal MJ & Schoeman-Malan *Law of Succession* 5 ed (2015) 5-6.

100 *King NO and Others v De Jager and Others* 2017 (4) All SA 57 (WCC) para 63.

101 See De Waal MJ & Schoeman-Malan *Law of Succession* 5 ed (2015) 6.

102 See s 15(1) of the Constitution of South Africa, 1996.

103 *King NO and Others v De Jager and Others* 2017 (4) All SA 57 (WCC) para 73.

104 See *King NO and Others v De Jager and Others* 2017 (4) All SA 57 (WCC) para 74.

105 *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being and Another* 2016 (2) SA 1 (CC) 79.

limitation of the right to equality of Z is in order to give effect to a number of constitutionally entrenched rights that apply to X. It would be quite difficult to conceive a less restrictive means in order to achieve the same purpose. Based on the above, it would seem quite unlikely that Z would succeed in her quest to challenge the constitutionality of the Islamic will based on discriminatory grounds.

7.5 Constitutionality of the Islamic law of intestate succession per se

The customary law rule of male primogeniture was found to be unconstitutional in *Bhe* on the basis of it unfairly discriminating against females.¹⁰⁶ The Constitutional Court held that the rule of male primogeniture was inconsistent with the Constitution and invalid to the extent that it ‘excludes or hinders women...from inheriting property.’¹⁰⁷ This section compares the position of males and females in terms of the Islamic and the customary laws of intestate succession. The comparison is limited to the points referred to in *Bhe* with regard to how the customary law of male primogeniture discriminates against females.¹⁰⁸ The analysis would also give an idea as to whether the Islamic law of intestate succession per se would pass constitutional muster.

There are a number of cases that have gone to the South African courts challenging the constitutionality of intestate succession provisions. Some of the cases were directed towards ‘common law’ intestate succession provisions, whereas others were directed towards ‘customary law’ intestate succession provisions. Three cases were looked at in Chapter Four (4.3) of this thesis. Those cases primarily dealt with the exclusion of certain Muslim widows from inheriting as intestate beneficiaries in the context of the common law of intestate succession. The constitutionality of provisions found in the Intestate Succession Act 81 of 1987, were challenged in two of those cases.¹⁰⁹ The provisions were found to be

106 The rule of male primogeniture was defined in *Bhe*. The Constitutional Court noted that ‘[t]he general rule is that only a male who is related to the deceased qualifies as an intestate heir. Women do not participate in the intestate succession of deceased estates. In a monogamous family, the eldest son of the family head is his heir. If the deceased is not survived by any male descendants, his father succeeds him. If his father also does not survive him, an heir is sought among the father’s male descendants related to him through the male line.’ See *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA 580 (CC) para 77.

107 *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA 580 (CC) para 136.

108 *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA 580 (CC) para 136.

109 Intestate Succession Act 81 of 1987.

unconstitutional and extended in order to include surviving spouses who were married to their deceased husbands in terms of Islamic law.¹¹⁰

What makes *Bhe* different from the cases looked at in Chapter Four (4.3) is that *Bhe* concerned the constitutionality of ‘customary law’ intestate succession provisions and not the constitutionality of ‘common law’ intestate succession provisions. The second difference is that the Constitutional Court in *Bhe* did not only look into the constitutionality of statutory law intestate succession provisions but further looked into the constitutionality of intestate succession provisions found within the context of customary law. The same could be done in terms of Islamic law. The Islamic law of intestate succession per se can also be challenged on similar grounds. The *Bhe* judgment concerned three different cases. The applications were heard together because they collectively dealt with intestate succession within the context of customary law.¹¹¹ The first application was *Bhe and Others v The Magistrate, Khayelitsha and Others* (*Bhe* case). The *Bhe* case concerned two daughters who were prevented from inheriting from the intestate estate of their deceased father due to the application of the customary law rule of male primogeniture. The estate was inherited by the father of the deceased to the exclusion of his two daughters and their mother (widow).¹¹² The second application was *Charlotte Shibi v Mantabeni Freddy Sithole and Others* (*Shibi* case). The *Shibi* case concerned a sister who was prevented from inheriting from the estate of her deceased brother due to the application of the rule of male primogeniture. The third application was brought by the South African Human Rights Commission (SAHRC) and the Women’s Legal Centre Trust (WLCT). These institutions brought their application primarily based on public interest.¹¹³

The two main issues before the Court were the constitutional validity of s 23 of the Black Administration Act, and the constitutional validity of the customary law rule of male primogeniture in the context of customary law of succession.¹¹⁴ It had been argued in the case that the customary law rule of male primogeniture unfairly discriminates against females on

110 See *Daniels v Campbell NO & Others* 2004 (5) SA 331 (CC); *Hassam v Jacobs NO & Others* 2009 (5) SA 572 (CC).

111 *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA (CC) 4.

112 It will be accepted for purposes of this chapter that the mother of the two daughters was also the widow of the deceased.

113 *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA 580 (CC) para 6-7.

114 *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA 580 (CC) para 3.

the basis of gender and birth.¹¹⁵ The following discussion focuses on the gender discrimination as referred to in terms of the *Bhe* judgment.

A daughter, for example, inherits half the share of a son in terms of Al Quraan (4) 11.¹¹⁶ The reason why females (at times) inherit less favourably than males in terms of the Islamic law of intestate succession is not clearly stated in the primary sources of Islamic law.¹¹⁷ Some authors have identified three rules that generally govern the distribution of shares within the Islamic law of intestate succession.¹¹⁸ These three rules have been identified upon closer inspection of how the Islamic law of intestate succession operates. Descendant intestate beneficiaries would generally inherit more favourably than ascendant and collateral intestate beneficiaries. Intestate beneficiaries with stronger intestate succession ties would generally inherit more favourably than intestate beneficiaries with weaker intestate succession ties. Intestate succession beneficiaries who have more financial obligations in terms of Islamic law would generally inherit more favourably than intestate beneficiaries with less financial obligations in terms of Islamic law, in the event where they are of the same generation and have the same intestate succession tie. These rules apply to the distribution regardless of whether the intestate beneficiaries are male or female.¹¹⁹

A child belongs to the generation of 'descendants' whereas a parent belongs the generation of 'ascendants'. A daughter or daughters would therefore generally inherit more favourably than a father. This rule would apply, for example, where X dies leaving behind an intestate estate, and a father, a widow, and two daughters as the only intestate beneficiaries. The father would inherit $1/6 = 4/24$,¹²⁰ the widow would inherit $1/8 = 3/24$,¹²¹ and each of the two daughters

115 *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA (CC) 53-54.

116 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that 'Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females...'

117 See Chapter Two (2.6.7) for a discussion on the position of females within the Islamic law of intestate succession.

118 See Dar Al Ifta Al-Misriyyah 'Do Women Take Unequal Shares of Inheritance in Islam?' available at <http://eng.dar-alifta.org/foreign/ViewArticle.aspx?ID=120&> (accessed 28 November 2017) for a discussion on this issue.

119 See Dar Al Ifta Al-Misriyyah 'Do Women Take Unequal Shares of Inheritance in Islam?' available at <http://eng.dar-alifta.org/foreign/ViewArticle.aspx?ID=120&> (accessed 28 November 2017) for a discussion on this issue.

120 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that '... [f]or parents, a sixth share of inheritance to each if the deceased left children...'

121 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 12 where it states that '[i]n that which you leave, their (your wives) share is a fourth if you leave no child; but if you leave a child, they get an eighth of that which you leave after payment of legacies that you may have bequeathed or debts.'

would equally share $2/3 = 16/24$.¹²² Each daughter would inherit $8/24$ which is double the share that the father inherits. The father would also inherit the remaining $1/24$ as a residuary beneficiary. The distribution in this example can be compared with the facts of the *Bhe* case where the father inherited the entire intestate estate to the exclusion of the two daughters due to the application of the rule of male primogeniture.¹²³ The father would have inherited a less favourable share than the daughters within the Islamic law of intestate succession context.

A full sibling has a stronger intestate succession tie to the deceased than a half sibling. A full sister would therefore inherit more favourably than a consanguine brother. This rule would apply, for example, where X dies leaving behind an intestate estate, and a daughter, a full sister and a consanguine brother as the only intestate beneficiaries. The daughter would inherit $1/2$,¹²⁴ and the full sister would inherit the remainder.¹²⁵ The consanguine brother would not inherit as he has a weaker intestate succession tie to the deceased.

An intestate succession beneficiary who has more financial obligations in terms of Islamic law would generally (but not always) inherit more favourably than an intestate beneficiary with less financial obligations in terms of Islamic law, in the event where they are of the same generation and have the same intestate succession tie.¹²⁶ A son would inherit double the share of a daughter as he has more financial obligations in terms of Islamic law. This rule would apply, for example, where X dies leaving behind an intestate estate, and a son and a

122 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that '...if (there are) only daughters, two or more, their share is two thirds of the inheritance...'

123 *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA 580 (CC) 10.

124 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that '...if (there are) only daughters, two or more, their share is two thirds of the inheritance; if only one, her share is half...'

125 See Khan MM *The Translation of the Meanings of Sahih Al Bukhari* 2004 (728) vol 8, 480 where it states that 'Abu Musa was asked regarding (the inheritance of) a daughter, a son's daughter, and a sister. He said, "The daughter will take one-half and the sister will take one-half. If you go to Ibn Mas'ud, he will tell you the same." Ibn Mas'ud was asked and was told of Abu Musa's verdict. Ibn Mas'ud then said, "If I give the same verdict, I would stray and would not be of the rightly-guided. The verdict I will give in this case, will be the same as the Prophet did, i.e. one-half is for the daughter, and one-sixth for the son's daughter, i.e. both shares make two-thirds of the total property; and the rest is for the sister." Afterwards we cam[e] to Abu Musa and informed him of Ibn Mas'ud's verdict, whereupon he said, "So, do not ask me for verdicts, as long as this learned man is among you'''

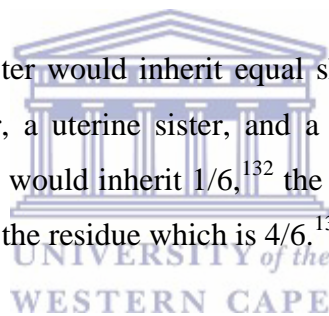
126 See Dar Al Ifta Al-Misriyyah 'Do Women Take Unequal Shares of Inheritance in Islam?' available at <http://eng.dar-alifta.org/foreign/ViewArticle.aspx?ID=120&> (accessed 28 November 2017) for a discussion on this issue.

daughter as the only intestate beneficiaries. The son would inherit $\frac{2}{3}$ and the daughter would inherit $\frac{1}{3}$.¹²⁷

There is no definitive evidence found in the primary sources of Islamic law to back up the assumption that the reason why the son inherits more favourably than the daughter is because of his financial obligations. There is no direct link found in Islamic law between the Islamic law of intestate succession and the financial responsibilities of males. The argument is weakened by the fact that there are instances within the Islamic law of intestate succession where males and females inherit equally.

A father and mother would inherit equal shares where, for example, X dies leaving behind a mother, a father, and a son as the only intestate beneficiaries.¹²⁸ The mother would inherit $\frac{1}{6}$,¹²⁹ the father would inherit $\frac{1}{6}$,¹³⁰ and the son would inherit the residue which is $\frac{4}{6}$.¹³¹

A uterine brother and uterine sister would inherit equal shares where, for example, X dies leaving behind a uterine brother, a uterine sister, and a full brother as the only intestate beneficiaries. The uterine brother would inherit $\frac{1}{6}$,¹³² the uterine sister would inherit $\frac{1}{6}$,¹³³ and the full brother would inherit the residue which is $\frac{4}{6}$.¹³⁴



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- 127 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that 'Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females...'
- 128 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that '... [f]or parents, a sixth share of inheritance to each if the deceased left children...'
- 129 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that '... [f]or parents, a sixth share of inheritance to each if the deceased left children...'
- 130 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that '... [f]or parents, a sixth share of inheritance to each if the deceased left children...'
- 131 See Khan MM *The Translation of the Meanings of Sahih Al Bukhari* 2004 (724) vol 8, 477 where it states that '[t]he Prophet said, "Give the Fara'id (the shares of the inheritance that are prescribed in the Qur'an) to those who are entitled to receive it. Then whatever remains, should be given to the closest male relative of the deceased."'
- 132 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 12 where it states that '...[i]f the man or woman whose inheritance is in question has left neither ascendants nor descendants, but has left a brother or a sister, each one of the two gets a sixth...'
- 133 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 12 where it states that '...[i]f the man or woman whose inheritance is in question has left neither ascendants nor descendants, but has left a brother or a sister, each one of the two gets a sixth...'
- 134 See Khan MM *The Translation of the Meanings of Sahih Al Bukhari* 2004 (724) vol 8, 477 where it states that '[t]he Prophet said, "Give the Fara'id (the shares of the inheritance that are prescribed in the Qur'an) to those who are entitled to receive it. Then whatever remains, should be given to the closest male relative of the deceased."'

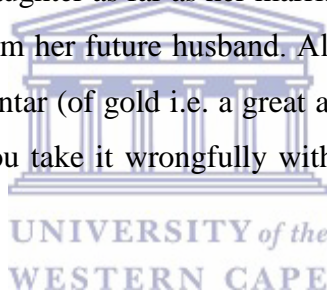
A daughter would indirectly inherit more favourably than a son where, for example X dies leaving behind a mother, father, widower and a child as the only intestate beneficiaries. The first calculation is based on the child being male and the second calculation is based on the child being female. The mother would inherit $1/6 = 4/24$,¹³⁵ the father would inherit $1/6 = 4/24$,¹³⁶ the widower would inherit $1/4 = 6/24$,¹³⁷ and the son would inherit the residue which is $10/24$.¹³⁸ The calculation is now based on the child being female. The mother would inherit $1/6 = 4/24$,¹³⁹ the father would inherit $1/6 = 4/24$,¹⁴⁰ the widower would inherit $1/4 = 6/24$,¹⁴¹ and the daughter would inherit $1/2 = 12/24$.¹⁴² The doctrine of increase would find application and the new denominator would be 26.¹⁴³ The mother would inherit $4/26$, the father would inherit $4/26$, the widower would inherit $6/26$, and the daughter would inherit $1/2 = 12/26$. It should be noted that $12/26$ is greater than $10/24$ that a son would inherit. It would therefore be favourable for the child to be female.

There is, however, a basis for the financial obligations argument when one examines Islamic law as a whole. Males have more financial obligations than females in terms of Islamic law. Al Quraan (4) 4 states: '[a]nd give to the women (whom you marry) their Mahr (obligatory bridal money given by the husband to his wife at the time of marriage) with a good heart, but if they, of their own good pleasure, remit any part of it to you, take it, and enjoy it without fear of any harm (as Allah has made it lawful)'.¹⁴⁴ Payment of a dower is a financial

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- 135 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that '... [f]or parents, a sixth share of inheritance to each if the deceased left children...'
- 136 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that '... [f]or parents, a sixth share of inheritance to each if the deceased left children...'
- 137 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 12 where it states that '... [i]n that which your wives leave, your share is a half if they have no child; but if they leave a child, you get a fourth of that which they leave after payment of legacies that they may have bequeathed or debts...'
- 138 See Khan MM *The Translation of the Meanings of Sahih Al Bukhari* 2004 (724) vol 8, 477 where it states that '[t]he Prophet said, "Give the Fara'id (the shares of the inheritance that are prescribed in the Qur'an) to those who are entitled to receive it. Then whatever remains, should be given to the closest male relative of the deceased."'
- 139 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that '... [f]or parents, a sixth share of inheritance to each if the deceased left children...'
- 140 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that '... [f]or parents, a sixth share of inheritance to each if the deceased left children...'
- 141 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 12 where it states that '... [i]n that which your wives leave, your share is a half if they have no child; but if they leave a child, you get a fourth of that which they leave after payment of legacies that they may have bequeathed or debts...'
- 142 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that '... if (there are) only daughters, two or more, their share is two thirds of the inheritance; if only one, her share is half...'
- 143 See Chapter Two (2.6.6) of this thesis for a discussion on the doctrine of increase.
- 144 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 4.

obligation upon a male and not a female in terms of Islamic law. It is stated in Al Quraan (4) 34 that '[m]en are the protectors and maintainers of women, because Allah has made one of them to excel the other, and because they spend (to support them) from their means...'¹⁴⁵ The responsibility of support does not lie with females in terms of Islamic law.

The financial obligation placed on males can be further explained by way of an example. X dies, leaving behind an intestate estate of R900 000.00. He also leaves behind a son and daughter who are both on the verge of marriage as his only relatives. The son would inherit R600 000.00 whereas the daughter would inherit R300 000.00.¹⁴⁶ The son is required, in terms of Islamic law, to pay a dower to his future wife.¹⁴⁷ There is no stipulation as to what the maximum amount that may be requested by his future wife may be. It could possibly be more than the R600 000.00 he inherited. Arrangements could even be made for the dower to be paid off in instalments in the event where he does not have the cash at hand. The obligation does not lie with the daughter as far as her marriage is concerned. She is entitled to request a dower of her choice from her future husband. Al Quraan (4) 20 states that '... and you have given one of them a Cantar (of gold i.e. a great amount) as Mahr [dower], take not the least bit of it back; would you take it wrongfully without a right and (with) a manifest sin?'¹⁴⁸



The son is further required in terms of Islamic law to maintain his wife (or wives) and his future children born from the marriage. The financial obligation does not lie with his wife (or wives).¹⁴⁹ The daughter in this scenario is not required to maintain herself, her husband, and/or her future children born from the marriage. She may even claim arrear maintenance from her husband in the event where he has not maintained her in the marriage if it subsequently ends in a divorce. This specific scenario has occurred at the Western Cape High Court in *Ryland v Edros* (*Ryland* case).¹⁵⁰ The divorced wife in the case successfully instituted a claim for arrear maintenance from her former husband. The claim was based on Islamic law principles. It could be argued that the Islamic law of dower and maintenance

145 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 34.

146 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states 'Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females...'

147 See Al Juzayree A *Al Fiqh 'Alaa Al Madhaahib Al Arba'ah* (2000) vol 4, 85-86. See also Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 4.

148 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 20.

149 See Al Juzayree A *Al Fiqh 'Alaa Al Madhaahib Al Arba'ah* (2000) vol 4, 497-498.

150 See *Ryland v Edros* 1997 (2) SA 690 (C) 718-719.

favours females while the law of intestate succession at times (but not always) favours males and that the balance is then restored.¹⁵¹

It could be argued that males (at times) do not fulfil their religious obligations regarding maintaining their dependants as is required in terms of Islamic law. This is what happened in the *Ryland* case.¹⁵² A possible solution to this would be to enforce the Islamic law provisions regarding maintenance. This is exactly what the purpose behind the 2010 MMB is where it states in s 11(2) that ‘... a husband is obliged to maintain his wife during the subsistence of a Muslim marriage according to his means and her reasonable needs; (b) that a father is obliged to maintain his - (i) female children until they are married; and (ii) male children until they reach the age of majority or otherwise for the period that they are in need of support; (c) in the case of the dissolution of a Muslim marriage by divorce - (i) that a husband is obliged to maintain his wife for the mandatory waiting period of ‘Iddah; (ii) where the wife has custody of any children as provided for in section 10, that the husband is, after the expiry of ‘Iddah, obliged to remunerate his wife, including for the provision of a separate residence for his wife if she is unable to provide a residence, for the period of custody only; (iii) that the wife is entitled to be remunerated (*ujrah al-hadimah*) separately in relation to a breastfeeding period not exceeding two years, calculated from the date of birth of an infant, provided she has in fact breast-fed the child; and (iv) that a husband’s duty to support a child born of the marriage includes the provision of food, clothing, separate accommodation, medical care and

151 See Khan MM *The Noble Qur’an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that ‘Allah commands you as regards your children’s (inheritance); to the male, a portion equal to that of two females; if (there are) only daughters, two or more, their share is two thirds of the inheritance; if only one, her share is half. For parents, a sixth share of inheritance to each if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased left brothers or (sisters), the mother has a sixth. (The distribution in all cases is) after the payment of legacies he may have bequeathed or debts. You know not which of them, whether your parents or your children, are nearest to you in benefit, (these fixed shares) are ordained by Allah. And Allah is Ever All-Knower, All-Wise.’; (4) 12 where it states ‘[i]n that which your wives leave, your share is a half if they have no child; but if they leave a child, you get a fourth of that which they leave after payment of legacies that they may have bequeathed or debts. In that which you leave, their (your wives) share is a fourth if you leave no child; but if you leave a child, they get an eighth of that which you leave after payment of legacies that you may have bequeathed or debts. If the man or woman whose inheritance is in question has left neither ascendants nor descendants, but has left a brother or a sister, each one of the two gets a sixth; but if more than two, they share in a third; after payment of legacies he (or she) may have bequeathed or debts, so that no loss is caused (to anyone). This is a Commandment from Allah; and Allah is Ever All-Knowing, Most-Forbearing.’; and (4) 176 where it states ‘[t]hey ask you for a legal verdict. Say: “Allah directs (thus) about Al-Kalalah (those who leave neither descendants nor ascendants as heirs). If it is a man that dies, leaving a sister, but no child, she shall have half the inheritance. If (such a deceased was) a woman, who left no child, her brother takes her inheritance. If there are two sisters, they shall have two-thirds of the inheritance; if there are brothers and sisters, the male will have twice the share of the female. (Thus) does Allah make clear to you (His Law) lest you go astray. And Allah is the All-Knower of everything.”’

152 See *Ryland v Edros* 1997 (2) SA 690 (C).

education...'¹⁵³ These provisions show that there are a number of financial obligations placed on males in terms of Islamic law that are not placed on females. Section 11(5) of the 2010 MMB also provides for arrear maintenance claims where it states that '[a]ny unpaid arrear maintenance, either mutually agreed to or in terms of a court order, which is due and payable to a wife may not be extinguished by prescription, notwithstanding the provisions of the Prescription Act, 1969 (Act No. 68 of 1969), or any other law.'¹⁵⁴

It can be seen from the above discussion that the basis for the son inheriting double the share of the daughter within the Islamic law of intestate succession per se cannot be confirmed with absolute certainty. It will be accepted for purposes of the following investigation that the daughter inherits half the share of the son because she has less financial obligations in terms of Islamic law. It could be argued that this is discrimination based on sex because of gender and these grounds will be accepted as the reasons for the discrimination for purposes of the investigation. Sex is a biological term whereas gender is a social term.¹⁵⁵ The argument that could be made is that the daughter (female sex) inherits less, as Islamic law places less financial obligations on her (gender role), whereas the son (male sex) inherits more, as Islamic law places more financial obligations on him (gender role).

The majority decision in *Bhe* was written by Deputy Chief Justice Pius Nkondo Langa. The Constitutional Court stated that the four problematic issues with regard to the application of the rule of male primogeniture are that: it prevents widows from inheriting from their deceased husbands, it prevents daughters from inheriting from their parents, it prevents extra-marital children from inheriting from their fathers, and it prevents younger sons from inheriting from their parents.¹⁵⁶ The following discussion focuses on the first two issues as this is where gender discrimination applies within the customary rule of male primogeniture. The customary law rule of male primogeniture states that only a male can inherit as an intestate beneficiary. The male would step into the shoes of the deceased and take control of the property. He would then be responsible to support the family of the deceased. This would include the immediate as well as the extended family.¹⁵⁷

153 See s 11(2) of the 2010 MMB, Government Notice 37 in *Government Gazette* 33946 of 21 January 2011 available at www.gov.za/sites/www.gov.za/files/33946_gen37.pdf (accessed 26 October 2017).

154 See s 11(5) of the 2010 MMB, Government Notice 37 in *Government Gazette* 33946 of 21 January 2011 available at www.gov.za/sites/www.gov.za/files/33946_gen37.pdf (accessed 26 October 2017).

155 Currie I & De Waal J *The Bill of Rights Handbook* (2013) 229-230.

156 *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA (CC) para 88.

157 *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA (CC) para 160.

The Islamic law position is quite different as both males and females would collectively inherit from the intestate estate.¹⁵⁸ There are instances where males and females inherit equal shares of the intestate estate. There are also instances where females inherit more favourably than males from the intestate estate. It has been argued that the reasoning behind why males (at times) inherit more favourably than females is because they have more financial obligations. This is where the customary law of intestate succession and the Islamic law of intestate succession are similar.

The Constitutional Court held that excluding women from inheriting on the ground of gender is a clear violation of s 9(3) of the Constitution.¹⁵⁹ It also held that excluding female children from inheriting from their parents is in violation of s 9(3) of the Constitution.¹⁶⁰ It should be noted that women and female children are not prevented from inheriting in terms of Islamic law.¹⁶¹ There are instances where males and females inherit equal shares. There are also instances where females inherit more favourably than males. It could be argued that the instance where a daughter inherits less favourably than a son based on sex because of gender is a clear violation of s 9(3) of the Constitution as both sex and gender are listed grounds in s 9(3) of the Constitution. It could also be argued that the instance where a son 'indirectly' inherits less favourably than a daughter, based on sex, is a clear violation of s 9(3) of the Constitution. It could be argued that the discrimination applies to both males and females. It could also be argued that it applies more to females than males as far as discrimination based on sex is concerned. The above situations are all regarded as unfair discrimination in terms of s 9(5) of the Constitution.¹⁶²

The Constitutional Court held that excluding women from inheriting on the grounds of gender is in violation of the right of women to human dignity as guaranteed in terms of s 10 of the Constitution.¹⁶³ It implied that women are not fit to own and administer property.¹⁶⁴ It should be noted that females do inherit in terms of Islamic law of intestate succession. They (at times) inherit more favourably than males. The instances where females inherit less than

158 See Chapter Two (2.6.7) of this thesis for a discussion on the position of females within the Islamic law of intestate succession.

159 *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA (CC) para 91.

160 *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA (CC) para 93.

161 See Chapter Two (2.6.7) of this thesis for a discussion on the position of females within the Islamic law of intestate succession.

162 See s 9(5) of the Constitution of South Africa, 1996.

163 See s 10 of the Constitution of South Africa, 1996.

164 *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA (CC) para 92.

males based on sex because of gender could be in violation of human dignity in terms of s 10 of the Constitution.¹⁶⁵ The same would apply in the instances where females indirectly inherit more favourably than males based on sex. It could be argued that the violation applies to both males and females.

The Constitutional Court looked into whether the rule of male primogeniture is justified under s 36 of the Constitution.¹⁶⁶ The Court noted that the duty of the male intestate beneficiary to support the dependants of the deceased is no longer satisfactory. This is due to the change in the family structure. The Court noted that the family is no longer structured purely along traditional lines. Nuclear families have largely replaced extended families. The male intestate beneficiary does not necessarily live with the entire extended family.¹⁶⁷ The male intestate beneficiary would often acquire the estate of the deceased without assuming any responsibilities.¹⁶⁸

It could be argued that the Muslims living in South Africa live in nuclear families and not extended families. The argument could be made that males and females should therefore always inherit equal shares. It could also be argued that the distribution of the intestate estate in terms of the Islamic law of intestate succession is quite different to the distribution in terms of the rule of male primogeniture. The intestate estate is not inherited by 'one' male intestate beneficiary as in the case of the rule of male primogeniture. The intestate estate is inherited by both males and females in terms of Islamic law of intestate succession. There are instances where the bulk of the intestate estate is inherited by females. There are also instances where the intestate estate is inherited by females to the exclusion of males who are present. The son, for example, would inherit more favourably than the daughter but would have more financial responsibilities irrespective of whether he lives in a nuclear or an extended family. This would be in terms of Islamic law. The Constitutional Court held that

165 See s 10 of the Constitution of South Africa, 1996.

166 See s 36 of the Constitution of South Africa, 1996.

167 *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA (CC) paras 80-82.

168 One of the three cases in *Bhe and Others v Magistrate Khayelitsha and Others*, concerned two daughters who were excluded from inheriting from their father. The male heir was the father of the deceased and resided in Berlin in the Eastern Cape. The deceased, his two daughters, and the mother of the two daughters resided in Cape Town in the Western Cape. They lived together as a family unit. The father was appointed as the representative and sole heir of the estate. The main asset in the estate was an immovable property where the family resided. The father made it quite clear that he intended selling the property in order to settle the funeral costs. The two daughters and mother would then have been rendered homeless. See *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA (CC) paras 16-17.

succession of the male intestate beneficiary to the assets of the deceased does not necessarily correspond in practice to an enforceable responsibility to provide support to, and maintain the family.¹⁶⁹ It could be argued that this is also the situation in terms of the Islamic law position. There is merit in this argument. This is also one of the main reasons as to why there is a need for the 2010 MMB to be enacted. Enactment of the 2010 MMB would mean that the son would be obliged to maintain his wife (or wives) and children in terms of the law. The daughter on the other hand would be supported by her husband in terms of the 2010 MMB. It could be argued that the daughter can choose not to marry and that she would then not have a husband to maintain her.

An example of this would be where a deceased leaves behind a widower, a son, and the daughter as the only relatives. The widower is also the father of the son and daughter. The widower would inherit 1/4,¹⁷⁰ the son would inherit 2/4,¹⁷¹ and the daughter would inherit 1/4.¹⁷² The father (widower in this example) would be liable to maintain the daughter until she marries, but would be liable to maintain the son only until he has reached the age of maturity. This is confirmed in s 11(2)(b) of the 2010 MMB where it states ‘that a father is obliged to maintain his - (i) female children until they are married; and (ii) male children until they reach the age of majority or otherwise for the period that they are in need of support...’¹⁷³ The daughter in this example would be provided for by her father, even if she chooses not to marry. It should, however, be noted that the religion of Islam encourages Muslims to marry as it is part of the prophetic tradition.¹⁷⁴

169 *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA (CC) para 80.

170 See Khan MM *The Noble Qur’an - English Translation of the Meanings and Commentary* 1404H (4) 12 where it states that ‘[i]n that which your wives leave, your share is a half if they have no child; but if they leave a child, you get a fourth of that which they leave after payment of legacies that they may have bequeathed or debts...’

171 See Khan MM *The Noble Qur’an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that ‘Allah commands you as regards your children’s (inheritance); to the male, a portion equal to that of two females...’

172 See Khan MM *The Noble Qur’an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that ‘Allah commands you as regards your children’s (inheritance); to the male, a portion equal to that of two females...’

173 See s 11(2)(b) of the 2010 MMB, Government Notice 37 in *Government Gazette* 33946 of 21 January 2011 available at www.gov.za/sites/www.gov.za/files/33946_gen37.pdf (accessed 26 October 2017).

174 See Khan MM *The Translation of the Meanings of Sahih Al Bukhari* 2004 (724) vol 7, 2 where it states that ‘[t]he Prophet said, “... By Allah, I am more submissive to Allah and more afraid of Him than you, yet I fast and break my fast, I do sleep and I do marry women. So he who does not follow my tradition in religion, is not from me (not from my followers).”

The Constitutional Court held that the rule of male primogeniture as currently applied in the customary law of succession cannot be reconciled with the current notions of equality and human dignity as contained in the Bill of Rights. It held that it cannot survive constitutional scrutiny in its present form.¹⁷⁵ It cannot be said that the Islamic law of intestate succession would have the same outcome as the customary law rule of male primogeniture as there are a number of differences between how the two systems operate. There is also a difference between the Islamic law of intestate succession per se and the customary law rule of male primogeniture with regard to constitutional obligations. Section 39(2) of the Constitution specifically states that the Bill of Rights must be promoted when developing customary law.¹⁷⁶ It was further noted in *Bhe* that the nature of customary law is that it evolves as the people who live by its norms change their way of life. Customary law has historically been developed in order to meet the changing needs of the community.¹⁷⁷

Al Quraan (4) 13 and 14 states that '[t]hese are the limits (set by) Allah (or ordinances as regards laws of inheritance), and whosoever obeys Allah and His Messenger (Muhammad [PBUH]) will be admitted to Gardens under which rivers flow (in Paradise), to abide therein, and that will be the great success. And whosoever disobeys Allah and His Messenger (Muhammad [PBUH]), and transgresses His limits, He will cast him into the Fire, to abide therein; and he shall have a disgraceful torment.'¹⁷⁸ Muslims are duty bound in terms of their religion to adhere to the Islamic law of intestate succession in terms of these verses. The Islamic law of intestate succession per se is also constitutionally protected in terms of right to freedom of religion. Section 15(1) of the Constitution grants all persons the right to freedom of religion.¹⁷⁹ It is not clear from the above investigation as to whether the Islamic law of intestate succession per se would satisfy the requirements of s 36 of the Constitution.¹⁸⁰ The question of whether it would pass constitutional muster in the final

175 *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA (CC) para 95-97.

176 See s 39(2) of the Constitution of South Africa, 1996.

177 *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA (CC) para 81.

178 See Khan MM *The Noble Qur'an - English Translation of the Meanings and Commentary* 1404H (4) 13-14.

179 See s 15(1) of the Constitution of South Africa where it states that '[e]veryone has the right to freedom of conscience, religion, thought, belief and opinion.'

180 See s 36 of the Constitution of South Africa where it states that '(1) [t]he rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including - (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.'

analysis is left up to the South African courts to decide if challenged on discriminatory grounds.

The minority judgment in *Bhe* was written by Justice Sandile Ngcobo. He noted that customary law is not a fixed body of rules. The nature of customary law is that it evolves as the people who live by its norms change their way of life. Customary law has historically been developed in order to meet the changing needs of the community. He further stated that the customary law rule of male primogeniture needs to be developed ‘to bring it in line with our Bill of Rights.’¹⁸¹ Development in the area of the Islamic law of intestate succession is not possible as can be seen in terms of Al Quraan (4) 13-14 as discussed above.¹⁸² It should be noted that there is nothing in Islamic law that prevents an inheriting intestate beneficiary from ceding his or her rights in the intestate estate in favour of other inheriting intestate beneficiaries in order to augment the shares inherited by them. A son could therefore cede R50 000.00 in favour of the daughter in the event where the deceased leaves behind an intestate estate of R300 000.00, and the son and the daughter as the only intestate beneficiaries. The son and daughter would each receive R150 000.00 of the intestate estate.

There is also a mechanism (1/3 bequest) found within the Islamic law of succession that could be used in order to augment the share received by a daughter and other intestate beneficiaries. An example of this would be where X dies leaving behind a net estate of R400 000.00. He also leaves behind a son (Y) and a daughter (Z) as his only relatives. X can bequeath a R100 000.00 in favour of Z on condition that both Y and Z consent to the bequest, after X dies. X can then bequeath the remainder of his estate in terms of the Islamic law of intestate succession. Z would inherit R100 000.00 as a testate beneficiary if consent is given subsequent to X’s death. She would also inherit 1/3 of the remaining R300 000.00 ($1/3 \times R300\ 000.00 = R100\ 000.00$) in terms of the Islamic law of intestate succession.¹⁸³ Y would inherit 2/3 of the remaining R300 000.00 ($2/3 \times R300\ 000.00 = R200\ 000.00$).¹⁸⁴ The daughter and son would therefore receive equal shares from the net estate. The daughter

181 *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA (CC) para 222.

182 See Khan MM *The Noble Qur’an - English Translation of the Meanings and Commentary* 1404H (4) 13-14.

183 See Khan MM *The Noble Qur’an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that ‘Allah commands you as regards your children’s (inheritance); to the male, a portion equal to that of two females...’

184 See Khan MM *The Noble Qur’an - English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that ‘Allah commands you as regards your children’s (inheritance); to the male, a portion equal to that of two females...’

would inherit R100 000.00 as a testate beneficiary and another R100 000.00 as an intestate beneficiary. The son on the other hand would inherit R200 000.00 as an intestate beneficiary.

The son and daughter would de facto inherit equal shares. It is possible that the son does not consent to the bequest. This would then be problematic as a son is not obliged to consent. There is a minority opinion stating that a bequest may be made in favour of the daughter without the condition that the remaining intestate beneficiaries consent. This opinion is also followed in Egypt.¹⁸⁵ The opinion is not found within the Shaafi'ee and Hanafee schools.¹⁸⁶ This opinion would be a viable option in the event where a real need exists.

7.6 Conclusion

This chapter investigated the constitutionality of the Islamic law of intestate succession with regard to sex and gender discrimination. It looked at applying the Islamic law of intestate succession in South Africa by means of a duly executed will that conforms to the South African law requirements for validity. The investigation has shown that private wills are much less open to constitutional invalidity than public wills. This has also been the opinion of the South African courts in more recent cases. It is therefore unlikely (at this time) that an Islamic will, which is also a private will, would not pass constitutional muster if challenged in the South African courts based on unfair discrimination. This chapter has looked at the constitutionality of the Islamic law of intestate succession per se. The customary law rule of male primogeniture was compared to the Islamic law of intestate succession per se with regard to discrimination based on sex and gender. What was quite apparent from the investigation was that the customary law rule of male primogeniture operates quite differently to the application of the Islamic law of intestate succession per se. It is not clear from the investigation as to whether the Islamic law of intestate succession per se satisfies the constitutional notion of equality. I am, however, of the opinion that if a case was brought to the South African courts where the son inherits double the share of the daughter, and the son (who inherits double the share of the daughter) has a large number of dependants to maintain whereas the daughter (who inherits half the share of the son) is married and has almost no financial obligations, that the Islamic law of intestate succession would pass constitutional muster. The outcome might be different in a different case depending on the factors involved.

185 See Chapter Two (2.5.4) of this thesis for a further discussion on this issue.

186 See Chapter Two (2.1) of this thesis for a discussion on the issue of following fiqh opinions found within various schools of law.

It has also been shown in this chapter that there is an available mechanism (1/3 bequest) found within the Islamic law of succession that could be used in order to augment the shares inherited by certain intestate beneficiaries from the estate of a deceased person. The mechanism could, however, be used as a viable option where a need exists.



CHAPTER EIGHT

GENERAL CONCLUSION AND RECOMMENDATIONS

There were two aims to this thesis. The first aim was to investigate a possible way in which the Islamic law of succession could be applied within the South African context. The research shows that certain provisions found within the South African law of succession have been developed in order to recognise surviving spouses who were married in terms of Islamic law, as well as children born from these marriages, for succession law purposes. An important point to note in this regard is that the surviving spouses and children in these instances would inherit in terms of South African law provisions and not in terms of the Islamic law provisions. The research shows that a South African Muslim has the option of applying the Islamic law of succession within the South African context by way of executing an Islamic will. The research highlights that there are two dominant schools of law followed by South African Muslims and that there are differences of opinion found within these schools with regard to the laws of succession. The research shows that it is not sufficient for a testator or testatrix to simply state in his or her will that his or her estate must devolve in terms of the Islamic law of succession. This has been highlighted in Chapter Five when the fictitious scenario was looked at where the husband (on his death bed) irrevocably divorced his wife with the intention to disinherit her. The schools of law differ as to whether the divorced wife in the example is disqualified from inheriting as an intestate beneficiary. The research shows that ascertaining the school of law followed by the deceased is a feature found within the Singaporean model of Islamic succession law. I recommend that a testator or testatrix must state in his or her will which school of law should apply to his or her estate in all matters concerning application and interpretation of the will. This would also establish legal certainty. An example of such a will can be found in Appendix One of this thesis.

The second aim of this thesis was to investigate whether the Islamic law of intestate succession would pass constitutional muster (in South Africa) with regard to discrimination against females. The research shows that there are instances where male and female intestate beneficiaries inherit equal shares. It also shows that there are instances where female intestate beneficiaries inherit more favourably, and at times, even to the exclusion of all other male intestate beneficiaries who are present. It further shows that there are instances where male intestate beneficiaries inherit more favourably than female intestate beneficiaries. The research shows that the rationale behind the unequal distribution of shares in terms of the Islamic law of intestate succession is not clearly stated within the primary sources of Islamic

law. The research shows that it is more likely than not that an Islamic will, (based on the principle of freedom of testation) which requires a distribution certificate to be issued by an Islamic law expert, would pass constitutional muster if challenged in the South African courts on the basis of discrimination against females. The research shows that the courts would be reluctant to amend private wills where persons are partially disinherited (as in the case of a daughter inheriting half the share of a son) as South African judges have already held that they do not have the competency to amend private wills where persons were completely disinherited. The research shows that there is a much higher possibility that a will stating that the son would inherit double the share of the daughter, without making reference to Islamic law, would pass constitutional muster.

The research highlights that the Islamic law of intestate succession per se is quite different to the customary law rule of male primogeniture that was found to be unconstitutional within the South African context on the basis of discrimination against females. The research shows that the position of females within the Islamic law of intestate succession per se is a much more favourable position than the position of females within the customary law rule of male primogeniture. This question as to whether the Islamic law of intestate succession per se is compliant with the constitutional notion of equality is in the final analysis left up to the South African courts to decide in the event where a matter of this nature is brought before it. I am of the opinion that it would pass constitutional muster if the Islamic law as a whole (including the Islamic law of dower and maintenance) is applied by the beneficiaries to the estate. The research shows that there is nothing in Islamic law that prevents an inheriting intestate beneficiary from ceding his or her rights in the intestate estate in favour of other inheriting intestate beneficiaries. The research shows that Islamic law permits a testator or testatrix to bequeath up to 1/3 of his or her net estate in favour of inheriting intestate beneficiaries on condition that the remaining inheriting intestate beneficiaries consent to the bequest subsequent to the testator or testatrix having died. The research shows that there is a minority opinion stating that prior consent can also be given in this regard. The research shows that there is a different minority opinion stating that consent of the remaining intestate beneficiaries is not required in the event where a testator or testatrix wishes to bequeath up to 1/3 of the net estate in favour of inheriting intestate beneficiaries. This mechanism (1/3 bequest) could be used in order to augment or even equalise the shares received by certain inheriting intestate beneficiaries from the estate. A testator or testatrix can, for example, make use of this mechanism in order to ensure that both his son and daughter inherit equal shares of

the net estate. It could be argued that this mechanism should be used where justified. The distribution would then be more in line with the South African notion of equality, and more importantly in line with Islamic law.



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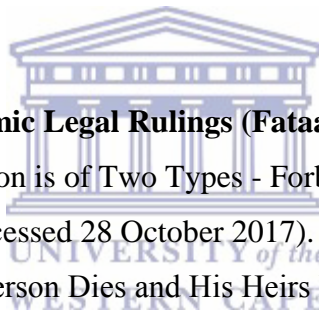
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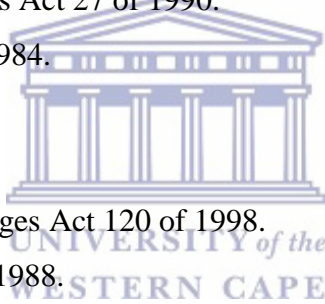
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APPENDIX ONE
'Example of an Islamic Will'



(EXAMPLE OF AN ISLAMIC WILL)¹

LAST WILL AND TESTAMENT

OF

MUNEER ABDUROAF

IDENTITY NUMBER

XXXXXXXX XXXX XXX



**UNIVERSITY of the
WESTERN CAPE**

.....
Testator

.....
Witness One

.....
Witness Two

1 This 'Example of an Islamic Will' is primarily based on the provisions found in the Sharee'ah Compliant Will published in Abduroaf K *Deceased Estates: Islamic Law Mode of Distribution* (2017) 210-215. Some additions were made to the Sharee'ah Compliant Will, based on the findings of this thesis.

LAST WILL AND TESTAMENT

I, the undersigned, Muneer Abduroaf, Identity Number XXXXXX XXXX XXX, residing in Cape Town, Western Cape, hereby declare this to be my last will.

1. Revocation

I hereby revoke, cancel and annul all former wills, codicils, and any other testamentary dispositions made by me.

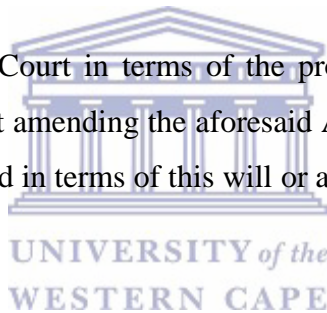
2. Appointment of executrix

I nominate the following person as executrix of this will:

- a) Zainab Salie Abduroaf, Identity Number XXXXXX XXXX XXX.

3. Security

I direct the Master of the High Court in terms of the provisions of the Administration of Estates Act 66 of 1965 or any Act amending the aforesaid Act to dispense with the finding of security by any executor appointed in terms of this will or assumed in terms of this will.



4. Powers of my executrix

I hereby give and grant to my executrix such power and authority as is required or allowed by law and especially that of the power of assumption.

5. Discharge liabilities

- a) My said executrix shall firstly pay all my lawful obligations, and all my lawful debts contracted by me during my lifetime, including expenses connected with the administration of my estate.

.....
Testator

.....
Witness One

.....
Witness Two

b) My executrix shall thereafter endeavor to ascertain what amount (if any) is due in respect of my liabilities in terms of Islamic law until the date of my death. I hereby direct that such amounts shall be paid as a first charge against my estate, before distribution to my beneficiaries, to such persons or institutions as my executrix, in her absolute discretion, shall determine to be entitled thereto according to Islamic law.

6. Bequests

I hereby bequeath 1/10 of the available cash in my net estate, after the claims in clause five in this will have been deducted, in favour of the Highlands Waqaf Trust, incorporating Masjidur-Raof and Madrasatur-Raof based in Highlands Estate, Cape Town.

7. Appointment of beneficiaries

a) I hereby direct that the entire net residue of my estate shall be distributed to my beneficiaries to be determined at the time of my death in accordance with the Islamic law of intestate (compulsory) succession.

b) For purposes of giving effect of this clause, my executrix shall file with the Master of the High Court a certificate executed and authorised by a qualified expert with a minimum qualification of a degree in Islamic law.

c) The said certificate shall set out the full names of my lawful beneficiaries at the time of my death, and their respective shares in accordance with the Islamic law of succession.

8. Minor beneficiaries

The share income or capital which may be payable to minors upon my death in terms of this will shall not be paid into the Guardians fund, but shall be held in trust by my executrix who shall have the right to invest such income or capital in such investments as she may in her sole discretion decide, and shall further have the right to apply the whole or portion of the income or capital for the maintenance, education or other benefit of the minor beneficiaries, provided that such investment is not in conflict with Islamic law.

.....
Testator **Witness One** **Witness Two**

The share of income or capital of such minor(s) shall be paid to such beneficiaries upon the latter attaining the age of 18 (eighteen) provided that my executrix shall be entitled to pay a portion or the whole of such share to such beneficiaries at any time before that, if they are of the opinion that such minor(s) has attained a degree of mental maturity which would enable such a minor to manage his or her own affairs without any detriment. My executrix shall keep full and proper accounting records relating to the trust and shall have annual financial statements prepared from the date of my death until the termination of the trust of such beneficiaries.

9. Exclusion of community of property and marital power

I direct that any inheritance, benefit or income accruing in terms of this will, shall neither form part of any existing or future community estate. The right of accrual as referred to in the Matrimonial Property Act 88 of 1984 is hereby specially excluded from any inheritance received in terms of this will. Such inheritance shall not be subject to the right of attachment or execution by any creditor or any spouse.

10. Disputes regarding application and interpretation of this will

All matters concerning the application and interpretation of this will must be dealt with strictly in terms of the most relied upon opinion found within the Shaafi'ee school of law. Any dispute regarding the application of this will or the interpretation thereof among the beneficiaries shall be taken to a recognised Islamic institution or a qualified Islamic law expert who has a minimum qualification of a degree in Islamic law for judgment in this regard. This would include matters concerning liability claims, testate succession claims, the Islamic distribution certificate, matters concerning repudiation, and matters concerning disqualification. The rules of collation shall not apply to the beneficiaries in terms of this will.

11. Attestation and Signature

Signed by the testator, Muneer Abduroaf, affixing my signature hereto at Cape Town on 16 January 2018, in the presence of the undersigned witnesses, all being present at the same time.

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Testator

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Witness One

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Witness Two