# SOUTH AFRICA

# ISLAMIC LAW MODE OF ESTATE DISTRIBUTION IN SOUTH AFRICA

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**Résumé**

Cette étude porte sur l'application, en matière successorale, de la loi islamique en Afrique du sud. Si la législation nationale ne prescrit aucunement le recours à la loi islamique, cette dernière peut néanmoins devenir efficiente, par exemple lorsqu'un testateur le prévoit. De même, les héritiers régime juridique découlant de l'application de cette loi est rendu difficile par de succession ab intestat peuvent consentir à l'application de loi islamique. Un examen approfondi du l'existence d'écoles de pensée différentes. L'analyse montre qu'il y existe des situations dans lesquelles les droits successoraux reconnus aux femmes, le sont de façon moins favorable que s'il s'agissait d'hommes. L'on peut même dire que ceci est la règle générale. Mais cette étude montre aussi que la loi n'est pas cohérente et qu'il y a des cas où les femmes et les hommes de même rang héritent de façon égalitaire, voire, parfois, où les femmes sont favorisées.

## I INTRODUCTION

It has been argued by some academics that the Islamic law of intestate succession discriminates against females due to its unequal distribution of shares in favour of males.[1] The general example used in this regard is when a son inherits double the share of a daughter.[2] The question as to whether the unequal distribution is consistent throughout the Islamic law of intestate succession is an important one and is further investigated herein. This chapter examines the mode of distribution of deceased estates in terms of Islamic law as currently applied in South Africa. Estate liability claims are first looked at by

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1 C Rautenbach, NMI Goolam and N Moosa, 'Religious Legal Systems: Constitutional Analysis' in C Rautenbach, JC Bekker and NMI Goolam, *Introduction to Legal Pluralism in South Africa* (3rd edn, LexisNexis, Durban, 2010) 211.

2 See MT Al Hilali and MM Khan, *Translation of the meanings of the Noble Qur'an in the English Language* (King Fahd Complex for the printing of the Holy Qur'an, Madeenah, 1417) 4: 11. The number before the colon refers to the chapter number in the Quraan. The number after the colon refers to the verse.

way of introduction.[3] The law of testate succession is thereafter looked at with a focus on the limitations placed on freedom of testation. The law of intestate succession is then investigated with a specific focus on the position of females. The findings of this chapter are briefly examined and concluding remarks are then made.

The scenario that is looked at throughout this chapter is when a South African Muslim dies leaving behind a gross estate located wholly within the South African borders. This chapter looks at various examples of how the estate could devolve. It only looks at the position of natural persons within the laws of estate distribution. The position of juristic persons is not discussed. This is done for practical reasons.

The religion of Islaam was introduced into South Africa in the seventeenth century AD. The first Muslim recorded to have stepped onto the South African shores was in 1654.[4] There are approximately over three-quarter of a million Muslims living in South Africa today.[5] South African Muslims do not generally deduce fiqh opinions directly from the Sharee'ah but rather follow the schools of thought that were introduced into South Africa.[6] There are generally two classes of jurists who deduce fiqh opinions from the Sharee'ah. These jurists could be referred to as Sunnee and Shee'ee. This chapter primarily focuses on the fiqh opinions of Sunnee jurists as those opinions are dominantly followed within the South African borders. It should be noted that there are two dominant Sunnee Schools of thought found within the South African context.[7] These Schools could be referred to as the Shaafi'ee and Hanafee Schools of thought.[8] The other less dominant Schools of thought found within the South African context would be the Maalikee and Shee'ee.[9] It should be noted that the Islamic laws of estate distribution have to date not been incorporated into the South African legal system and thus has no legal recognition. These rules do however apply when a testator or testatrix incorporates this in a will based on the notion of freedom of testation.

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3 This refers to the gross estate of the deceased prior to any deductions.

4 The first recorded Muslim said to have stepped foot on South African soil was in 1654. See EM Mahida, *History of Muslims in South Africa: A chronology* (Arabic Study Circle, Durban, 1993) 1.

5 Statistics South Africa 'Census 2001 Primary Tables South Africa 96 and 2001 compared' available at 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.

6 See N Moosa, *Unveiling the Mind – The legal position of women in Islam – A South African context* (2nd edn, Juta, Cape Town, 2011) 151 where the author states that the South Muslim population essentially follows two of the four Sunnee based schools called the Shaafi'ee and Ḥanafee schools.

7 The founder of Shaafi'ee School is known as Imaam Al-Shaafi'ee. His name was Muḥammad bin Idrees Ash-Shaafi'ee. See M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee 'Alaa Madh-hab Al-Imaam Ash-Shaafi'ee* vol 2 (Daar-ul-Qalam, Damascus, 2000) 276–277.

8 N Moosa, *Unveiling the Mind – The legal position of women in Islam – A South African context* (2nd edn, Juta, Cape Town, 2011) 151.

9 W Amien, 'Overcoming the conflict between the right to freedom of religion and women's rights to equality: A South African case study of Muslim marriages' (2006) 28 *Human Rights Quarterly* 731.

This chapter examines the religion of Islaam as revealed to the Prophet Muhammad PBUH and primarily examines the fiqh opinions as provided in the Sunnee based Shaafi'ee and Hanafee Schools of thought. Other Schools are referred to only where relevant and the founders of these opinions are clearly stated. The fiqh opinions referred to are taken from reliable primary and secondary written sources that confirm the accepted opinions within the said schools of thought.

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 'Sharee'ah' is used to refer to 'Sharee'ah provisions'. The term 'opinion' is used to refer to a 'fiqh opinion'. The term 'school' is used to refer to a 'school of thought'. The term 'both schools' is used to refer to the Shaafi'ee and the Ḥanafee Schools. This is done to avoid repetition. The opinions that are referred to are according to both schools except where expressly mentioned otherwise. Opinions within other schools are referred to only where relevant.

This chapter analyses Islamic law fiqh opinions as found within the Shaafi'ee and Ḥanafee Sunnee based Schools of law as these opinions are dominantly followed within South Africa.[10] The term 'both Schools' is used hereafter to refer to these two Schools. The provisions referred to are in terms of both Schools unless the contrary is clearly indicated. The opinions found within other Schools are referred to only when relevant. The founders of these opinions are then clearly stated.[11] It should be noted that the beneficiaries referred to in this chapter are in relation to the deceased. The words 'of the deceased' is therefore implied but not repeated hereafter.

## II ISLAMIC LAW MODE OF ESTATE DISTRIBUTION

### (a) Claims against the gross estate

The estate left behind by a deceased prior to any deductions is referred to hereafter as the gross estate (tarikah).[12] The order of priority of claims against this estate is estate liability claims, testate succession claims (al-waṣiyyah), and then intestate succession claims (meeraath).[13] The last two claims form the

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[10] See N Moosa, *Unveiling the Mind – The legal position of women in Islam – A South African context* (2nd edn, Juta, Cape Town, 2011) 151 where the author states that the South Muslim population essentially follows two of the four Sunnee based schools called the Shaafi'ee and Ḥanafee schools.

[11] Examples of these Schools would be the Maalikee and Ḥanbalee Schools of law.

[12] Both the Shaafi'ee and Ḥanafee Schools are of the opinion that the gross estate must only be administered after its owner had died or had been declared dead by a religious court. M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee 'Alaa Madh-hab Al-Imaam Ash-Shaafi'ee* vol 2 (Daar-ul-Qalam, Damascus, 2000) 274. See also MS Omar, *The Islamic Law of Succession and its Application in South Africa* (Butterworths, Durban, 1988) 11–12.

[13] I Al-Ḥakamee, *Tahdheeb Al-Aḥaadeeth Fee 'Ilm Al-Mawaareeth: Sharḥ limandHoomah Ar-Raḥbiyyah Al-Musammaah: Bughyah Al-Baaḥitheen 'An Jumal Al-Mawaareeth* (Maktabah Malik Fahad, Riyadh, 2004) 67–68.

main focus of this chapter. The first claim is mentioned for the sake of completeness.[14] Estate liability claims comprise funeral expenses (muan-at-tajheez) and debt (dayn).[15] These claims constitute the first claims against the gross estate. Funeral expenses are restricted to those expenses that are reasonably necessary in order to have the deceased buried. This would include the shroud and the grave plot that is required to bury the deceased in.

The Schools differ in their opinions as to who is liable to pay for the burial expenses of a deceased female.[16] The Shaafi'ee School is of the opinion that the widower must (from his own wealth) settle the funeral expenses of his deceased spouse if he has the means to do so (moosir). The aforementioned obligation does not apply when the widower does not have the means (mu'sir).[17] The funeral expenses should then be deducted from the gross estate. The Ḥanafee School is of the opinion that both classes of widowers must settle the funeral expenses irrespective of their financial position. It should be noted that the funeral expenses of a deceased male are always deducted from the gross estate.

Debt is divided into secured debt (ad-dayn-al-muta'alliqah-bi'ayn-at-tarikah) and unsecured debt (ad-dayn-al-mursalah). A mortgaged bond that is registered against property in the gross estate would be an example of a secured debt. This debt takes priority over unsecured debt. Unsecured is divided into debt owing to God Almighty (ḥuqooq-ul-laah) and debt owing to individuals (huqooq-ul-'ibaad). Unpaid Islamic tax (zakaah) is an example of a debt owing to God Almighty. An unpaid dower (mahr) is an example of a debt owing to an individual.[18] The Shaafi'ee School is of the opinion that unsecured debt owing to God Almighty takes priority over debt owing to individuals. The Ḥanafee School however is of the opinion that unsecured debt owing to individuals takes priority over debt owing to God Almighty.

It is interesting to note that the Ḥanafee School is of the opinion that a widow is entitled to remain in the house that she is staying at (free accommodation) for

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[14] It is quite interesting to note that the proceeds of a pension fund do not form part of the gross estate. 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 www.muftitaqiusmani.com/index.php?option=com_contentandview=articleandid=54:entitlement-to-death-benefits-payable-by-pension-fundsandcatid=10:economicsandItemid=17 (accessed 11 January 2015). See also s 37C of the Pension Funds Act 24 of 1956 that specifically provides that the death benefits in favour of the dependants of the deceased does not form part of a deceased's estate.

[15] I Al-Ḥakamee, *Tahdheeb Al-Aḥaadeeth Fee 'Ilm Al-Mawaareeth: Sharḥ limandHoomah Ar-Raḥbiyyah Al-Musammaah: Bughyah Al-Baaḥitheen 'An Jumal Al-Mawaareeth* (Maktabah Malik Fahad, Riyadh, 2004) 67–68.

[16] These claims are briefly looked at as they have a bearing on the value of the estate that would remain for testacy and inheritance distribution.

[17] See S Al-Fawzaan, *At-Taḥqeeqaat Al-Marḍiyyah Fil Mabaaḥith Al-Farḍiyyah* (Al-Ma'aarif, Riyadh, 1999) 19–28. See also M Al-Khin and M Al Bughaa, *Al-Fiqh Al-Manhajee 'Alaa Madh-hab Al-Imaam Al-Shaafi'ee* vol 2 (Daar-ul-Qalam, Damascus, 2000) 272–273.

[18] M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee Alaa Madh-hab Al-Imaam Al-Shaafi'ee* vol 2 (Daar-ul-Qalam, Damascus, 2000) 273.

the duration of her waiting period ('iddah) if the house forms part of the gross estate.[19] She would also be entitled to remain in the house (free accommodation) if it was leased by her deceased spouse and rent for the duration of her waiting period has already been paid in full. She would not be entitled to free accommodation if any of the aforementioned conditions were not met.[20]

## III ISLAMIC LAW OF TESTATE SUCCESSION

Testate succession claims are deducted from the remainder of the gross estate after all estate liability claims have been satisfied. This residue is hereafter referred to as the net estate and up to a limited portion thereof may be distributed in terms of a will (if any).[21] Drafting a will is optional and the net estate must be distributed in terms of the Islamic law of intestate succession when a person dies intestate (without a will).[22] There are a number of requirements that must be met in order for a will to be valid. It should be noted that the provisions referred to in this section (testate succession) apply to the estates of both male and female deceased. A will must be executed orally or in writing by a testator (male) or testatrix (female). An oral will must be witnessed by at least two males or one male and two females.[23] These witnesses are required for evidentiary purposes to confirm that the will is that of the deceased. There are no witnesses required when executing a handwritten will.[24] Confirming the handwriting would be sufficient evidence in proving that a document is the will of the deceased.

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[19] This is the period in which she undergoes mourning of her deceased husband and is inter alia not allowed to enter into a marriage contract. The waiting period is normally 4 months and 10 days.

[20] The widow would be entitled to remain in the house for the remainder of her life if her deceased spouse registered a lifelong usufruct as a gift ('umraa) in her favour prior to his death. The usufruct may not be registered in her favour as a testate succession benefit. The usufruct may be registered in favour of any person being a testate/intestate beneficiary or non-testate/intestate beneficiary as long as these conditions are met. A widower would thus be entitled to remain in the house for the remainder of his life if his deceased spouse registered a usufruct in his favour. The usufruct is allowed in terms of the Maalikee School of law.

[21] A Muslim person is only allowed to bequeath up to one-third of the net estate. A person dies partly intestate when he or she bequeaths less than one-third of the net estate in a will. The remaining two-thirds must be distributed in terms of the laws of intestate succession. The complete three-thirds of net estate is distributed in terms of the laws of intestate succession when there is no will.

[22] This means that the deceased died without executing a will.

[23] See MT Al Hilali and MM Khan, *Translation of the meanings of the Noble Qur'an in the English Language* (King Fahd Complex for the printing of the Holy Qur'an, Madeenah, 1417) 4: 11 and 12; A Al-Bukhaaree, *Ṣaḥeeḥ Al-Bukhaaree* (Resaalah Publishers, Beirut, 2008) 489 ḥadeeth 2744; A Muslim, *Ṣaḥeeḥ Muslim* (Darussalam, Riyadh, 2000) 714 ḥadeeth 4209.

[24] A Muslim, *Ṣaḥeeḥ Muslim* (Darussalam, Riyadh, 2000) 713 ḥadeeth 4205; A Al-Bukhaaree, *Ṣaḥeeḥ Al-Bukhaaree* (Resaalah Publishers, 2008) 488 ḥadeeth 2738. It should be noted that computer printed documents containing the will of a testator were not present at the time when the primary sources were revealed as computers and printers were not yet invented. There is thus no indication in the primary sources as to the validity of an unsigned computer printed will. It would almost be impossible to prove that the said document contains the will of the

Each of the persons involved in executing a will must have legal capacity (takleef).[25] These persons are the testator or testatrix and the witnesses.[26] The person appointed to administer the terms of a will is referred to as an executor (male) or executrix (female). The appointment could be made by the testator or testatrix prior to his or her demise. The appointment could also be made by a judge when no appointment was made by the testator or testatrix. The appointed person must be Muslim.[27] The beneficiaries that are appointed to inherit in terms of a will are referred to hereafter as testate beneficiaries.

## (a) Adiation, repudiation, disqualification, and collation

A testate beneficiary becomes the owner of a benefit upon adiation (acceptance) thereof. The adiation must take place subsequent to the death of the testator or testatrix for ownership to pass. The Shaafi'ee School is of the opinion that ownership only passes upon express adiation. An example of this would be when a testate beneficiary says that he accepts the benefit. The Ḥanafee School is of the opinion that ownership also passes upon implied adiation. An example of this would be when a testator bequeaths a car in favour of X. X does not orally accept the benefit but he drives the car as if it is his. Non-adiation is not equivalent to implied adiation. An example of this would be when a testator bequeaths a car in favour or X. X is unaware of the bequest and dies 2 days later. There would neither be express nor implied adiation on the part of X. The testate benefit must be redirected into the deceased's original estate and distributed in terms of the laws of intestate succession. The same would apply when a testator or testatrix repudiates the benefit.

A testate beneficiary is not entitled to inherit when he or she is disqualified. The testate benefit of a disqualified testate beneficiary must be redirected into the deceased estate and distributed in terms of the Islamic law of succession. Testate beneficiaries must have been conceived prior to the death of the testator or testatrix in order to be entitled to a testate benefit. A testate beneficiary would be disqualified from inheriting if he or she was conceived after the death of the testator or testatrix. He or she would also be disqualified if he or she predeceased the testator or testatrix. Killing the testator or testatrix (qatl) is an

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deceased. A signature by the testator or testatrix at the end of the document should (in the opinion of the author of this chapter) be sufficient evidence as to the execution of the will. Attestation by witnesses would constitute extra confirmation.

[25] The requirements are that they should each have reached the age of puberty and should also be of sound mind. See Aṣ-Ṣubaa'ee *Sharḥ Al Qaanoon Al Aḥwaal Al Shakhshiyyah* vol 2 (Daar ul-Waraq, Riyadh, 2000) 65–66.

[26] See Aṣ-Ṣubaa'ee *Sharḥ Al Qaanoon Al-Aḥwaal Ash-Shakhshiyyah* M vol 2 (Daar ul-Waraq, Riyadh, 2000) 81.

[27] The appointment may be done orally, in writing, or by a court of law. The executor of a Muslim must be a Muslim person, whereas that of a non-Muslim may be Muslim or non-Muslim. See M Aṣ-Ṣubaa'ee, *Sharḥ Al Qaanoon Al-Aḥwaal Ash-Shakhshiyyah* vol 2 (Daar ul-Waraq, Riyadh, 2000) 35–36.

example of a disqualification in terms of the Ḥanafee School.[28] It is however not a disqualification in terms of the Shaafi'ee School.[29]

Collation does not apply in terms of the Islamic law of testate succession. A testate beneficiary would always inherit the complete inheritance even if he or she received a gift from the deceased prior to his or her death. An example of this would be when a deceased leaves behind a net estate of R6,000.00, and bequeaths one-third of this estate in favour of his full brother and full sister to be inherited in equal shares. The deceased bought his full brother a car worth R50,000.00 a few days prior to his death. The full sister is not entitled to call for collation to apply and the full brother and sister would each inherit R100,000.00. The full brother would have inherited R50,000.00 and the full sister would have inherit R150,000.00 if collation had applied.

## (b) Limitations within the law of testate succession

There are two limitations placed on freedom of testation in terms of Islamic law. A testator or testatrix may not execute a will in excess of one-third of the net estate. He or she may also not execute a will in favour of his or her intestate beneficiaries.[30] Provisions found in a will that are in contravention of either of these limitations have no binding effect.[31] A non-Muslim spouse is not an intestate beneficiary and may therefore inherit as a testate beneficiary.[32] There are however some exceptions to these limitations.

The Ḥanafee School is of the opinion that the one-third limitation does not apply when there are no intestate beneficiaries. The testator or testatrix may then bequeath the complete net estate in favour his or her testate beneficiaries.[33] Intestate beneficiaries may also consent to the lifting of the one-third limitation.

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[28] See M Aṣ-Ṣubaa'ee, *Sharḥ Al-Qaanoon Al-Aḥwaal Ash-Shakhshiyyah* vol 2 (Daar ul-Waraq, Riyadh, 2000) 75–76.

[29] This is the opinion within the Shaafi'ee School. See Aṣ-Ṣubaa'ee *Sharḥ Al-Qaanoon Al-Aḥwaal Ash-Shakhṣiyyah* vol 2 (Daar ul-Waraq, Riyadh, 2000) 75–77.

[30] A son may therefore not inherit as a testate beneficiary as he is already an intestate beneficiary.

[31] N Goolam, 'Muslim law' in C Rautenbach, JC Bekker and NMI Goolam, *Introduction to Legal Pluralism* (3rd edn, LexisNexis, Durban, 2010) 343. See also M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee 'Alaa Madh-hab Al-Imaam Ash-Shaafi'ee* vol 2 (Daar ul-Waraq, Damascus, 2000) 261–265 for a detailed discussion on the Islamic law that concerns the executor.

[32] See N Goolam, 'Muslim Law' in C Rautenbach, JC Bekker and NMI Goolam, *Introduction to Legal Pluralism* (3rd edn, Lexis Nexis, Durban, 2010) 343 for a discussion of this issue. The question as to whether a non-Muslim spouse should be entitled to a bequest exceeding one-third is also discussed in the said section.

[33] The Ḥanafee School is of the opinion that a bequest could possibly exceed one-third of the net estate when there are no sharer heirs (aṣḥaab-ul-furoodh), no residuary heirs ('asabah), and no distant kindred heirs (*dhawil-arḥaam*). The recipient of the bequest would then be regarded as a universal legatee. The universal legatee concept does not apply in terms of the Shaafi'ee School. See W Az-Zuḥaylee, *Al-Fiqhul Al-Islaamee Wa Adillatuhoo* vol 8 (Daar-ul-Fikr, Damascus, 1989) 15–16.

The consent must be given subsequent to the testator or testatrix having died.[34] Prior consent is neither valid nor enforceable.[35]

## IV ISLAMIC LAW OF INTESTATE SUCCESSION

Intestate succession claims are deducted from the remainder of the net estate after all testate succession claims have been satisfied. The residue is referred to hereafter as the gross inheritance.[36] The recipients of this inheritance are referred to hereafter as intestate beneficiaries. These beneficiaries are related to the deceased through intestate inheritance tie. An intestate beneficiary only inherits when he or she is neither disqualified through a disqualification (ḥajb-awṣaaf) nor totally excluded through a total exclusion (ḥajab-ḥirmaan). Intestate beneficiaries comprise males and females and may not be disinherited through testacy.[37] It is for this reason that these beneficiaries could be referred to as compulsory beneficiaries. It should be noted that the rules referred to in this section (intestate succession) apply to the estates of both male and female deceased.

It has been stated earlier that some academics argue that the Islamic law of intestate succession discriminates against females due to the unequal distribution of shares.[38] A practical example of this would be when a deceased leaves behind a gross inheritance of R600,000.00 and a son and a daughter as the only intestate beneficiaries. The son would inherit R400,000.00 and the daughter would inherit R200,000.00.[39] The question as to whether the

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[34] See Aṣ-Ṣubaa'ee *Sharḥ Al Qaanoon Al-Aḥwaal Ash-Shakhshiyyah* M vol 2 (Daar ul-Waraq, Riyadh, 2000) 74–75.

[35] The Maalikee School provides that consent given prior to the demise of the testator is valid and enforceable in the event where the consent was given by the heir on his death bed (terminal illness). See Aṣ-Ṣubaa'ee *Sharḥ Al Qaanoon Al-Aḥwaal Ash-Shakhshiyyah* M vol 2 (Daar ul-Waraq, Riyadh, 2000) 75.

[36] M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee 'Alaa Madh-hab Al-Imaam Ash-Shaafi'ee* vol 2 (Daar ul-Waraq, Damascus, Riyadh, 2000) 268. There are 35 Quranic verses that refer to succession. See MT Al Hilali and MM Khan, *Translation of the meanings of the Noble Qur'an in the English Language* (King Fahd Complex for the printing of the Holy Qur'an, Madeenah, 1417) 4: 11, 12 and 176. See also A Hussain, *The Islamic Law of Succession* (Darussalam, Riyadh, 2005) 29. However, only three of these verses provide specific details of intestate succession laws. The prophetic traditions elaborate and clarify how the verses should be interpreted and applied. See A Hussain, *The Islamic Law of Succession* (Darussalam, Riyadh, 2005) 29.

[37] See MT Al Hilali and MM Khan, *Translation of the meanings of the Noble Qur'an in the English Language* (King Fahd Complex for the printing of the Holy Qur'an, Madeenah, 1417) 4: 11 mentions the laws that govern the inheritance of the son, daughter, mother and father, and 4:12 mentions the laws that govern the inheritance of the widow, widower and uterine siblings. 4: 176 mentions the laws that governs the inheritance of full and consanguine siblings.

[38] C Rautenbach, NMI Goolam and N Moosa, 'Religious Legal Systems: Constitutional Analysis' in C Rautenbach, JC Bekker and NMI Goolam, *Introduction to Legal Pluralism* 3 ed (LexisNexis, Durban, 2010) 211. It should be noted that sex is biological whereas gender is cultural.

[39] This would apply in the example when a deceased leaves behind a son and daughter as the only intestate beneficiaries. See MT Al Hilali and MM Khan, *Translation of the meanings of the*

discrimination is constant throughout the Islamic law of intestate succession is important and is investigated in the following sections.

It should be noted that the shares of intestate beneficiaries are prescribed by law. There is however nothing that prevents these beneficiaries from consenting to a redistribution of the gross inheritance. The consent must be given after the person (from whom the beneficiaries are inheriting) has died. Consent given prior to this moment is neither valid nor enforceable. An example of the consent rule would be when a deceased leaves behind a gross inheritance of R600,000.00, and a son, and a daughter as the only intestate beneficiaries. The son would inherit double the share of the daughter. The son would inherit R400,000.00 and the daughter would inherit R200,000.00. There is nothing that prevents the son and daughter from consenting to a redistribution of the gross inheritance that has the effect of each of them inheriting equal shares. This would mean that the son and daughter would each inherit R300,000.00.

## (a) Intestate inheritance tie

The Schools differ in their opinions as to what constitutes intestate inheritance tie. Both Schools recognise consanguinity and affinity as inheritance tie.[40] A son inherits from his deceased father through consanguinity whereas a widower inherits from his deceased spouse through affinity. The Shaafi'ee School further recognises an intestate inheritance tie based on common religion. The inheritance would be deposited into and administered by the public treasury (bayt-ul-maal) in this instance for the benefit of Muslims.[41] The Ḥanafee School further recognises an intestate inheritance tie based on contract ('aqd).[42] It is interesting to note that an intestate inheritance tie exists between a child conceived as a result of adultery and the person who was the husband of the adulteress at the time when the child was conceived.[43] This tie would cease to

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*Noble Qur'an in the English Language* (King Fahd Complex for the printing of the Holy Qur'an, Madeenah, 1417) 4: 11 and 176 for an example of where this rule finds application. The number in the brackets refers to the chapter number. The numbers outside the brackets refer to the verses.

40 M Ar-Raḥbee, *Bughyah Al-Baaḥith* (2nd edn, Daar-ul-Fikr, Damascus, 1988) 6. See also M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee 'Alaa Madh-hab Al-Imaam Ash-Shaafi'ee* vol 2 (Daar-ul-Qalam, Damascus, 2000) 275–276.

41 This is an inheritance tie according to the Shaafi'ee School but not according to the Ḥanafee School. The property would be distributed to an established public treasury for the benefit of Muslims based on the said intestate inheritance tie. The property should not be given to a public treasury that is not an established one. See M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee 'Alaa Madh-hab Al-Imaam Ash-Shaafi'ee* vol 2 (Daar-ul-Qalam, Damascus, 2000) 276. See also N Al-Ghaamidee, *Al-Khulaaṣah Fee' Ilm Al-Faraaiḍ* (4th edn, Daarut-Tayyibah, Makkah, 1426 H) 120.

42 An example of such a contract would be when the parties enter into an agreement to inherit from each other. The contract would only be valid if no sharer heirs, no residuary heirs, and no distant kindred heirs are present.

43 See M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee 'Alaa Madh-hab Al-Imaam Ash-Shaafi'ee* vol 2 (Daar-ul-Qalam, Damascus, 2000) 145–146. See also A Al-Nafaaḍ *Al Jaami Fee Ahkaam Al Abnaa Ghair Al Shar'iyeen* (Daar Muayyid, Riyadh 2007) 75–76.

exist if the child is disqualified from inheriting due to imprecation. This issue is further discussed in the next section where disqualifications are looked at in more detail.

Both Schools recognise emancipation (freeing a slave) as an intestate inheritance tie. This specific tie and all laws related to it are not discussed any further as they are not applicable within the South African context. This chapter focuses on affinity and consanguinity as it is in this context that the unequal distribution applies.

## (b) Adiation, repudiation, disqualification, exclusion, and collation

An intestate beneficiary automatically becomes the owner of the inheritance at the moment when the person from whom he or she would inherit dies. An example of this would be when a person dies on 1 January 2015 at 10 am and leaves behind a gross inheritance 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 and must then be distributed in terms of the Islamic law of estate distribution. Ownership would pass even if the son was not aware of the death of his father. Adiation is therefore not a requirement for ownership to pass. It is for this reason that repudiation does not apply in terms of Islamic law of intestate succession as an intestate beneficiary automatically becomes the owner of the property.

It has been alluded to earlier that intestate beneficiaries are not entitled to inherit when disqualified or totally excluded from inheriting. This section analyses the various forms of disqualification and exclusion. It should be noted that there is a distinct difference between how disqualification and exclusion affect the distribution of inheritance. The difference is discussed below. The five classes of disqualification that are looked at in this section are divorce, imprecation, illegitimacy, religion, and killing.

A spouse would be disqualified from inheriting subsequent to the moment when an irrevocable divorce (ṭalaaq-baa-in) is issued by her husband or subsequent to the moment when a judicial divorce (tafreeq) in the form of a faskh is issued by a religious tribunal.[44] The Ḥanafee School is of the opinion that an irrevocable divorce issued by a husband during his terminal illness does not immediately disqualify his divorced spouse from inheriting as an intestate beneficiary.[45] She would however be disqualified upon expiration of her waiting period ('iddah).[46]

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[44] A ṭalaaq is issued by a husband whereas a faskh is issued by a religious tribunal. The tribunal is competent to issue a judicial ṭalaaq according to the Maalikee School. The term 'divorce' is used here as a general term to refer to both the ṭalaaq and/or faskh.

[45] A terminal illness is the illness that caused his death.

[46] A waiting period (in this context) is the period of time subsequent to a divorce that a wife may not (among other things) enter into a marriage contract.

A spouse is disqualified from inheriting when imprecation (li'aan) has been performed. This is a unique judicial procedure when a husband accuses his wife of having committed adultery. He alleges that the child that his wife is carrying is a product of an adulterous act. Completion of the procedure results in an irrevocable divorce between the couple. It should be noted that the child in this scenario would then be disqualified from inheriting from his alleged 'non-biological father' and vice versa.

A biological child is disqualified from inheriting when conceived out of wedlock. The disqualification only applies to the biological father but not to the biological mother. The Ḥanafee School is of the opinion that the child would not be disqualified if the biological father acknowledges paternity and marries the biological mother at least 6 months prior to the child's birth.[47] The Shaafi'ee School provides a rebuttable presumption in favour of a child having been conceived in wedlock when two conditions are met. It is required that both biological parents must have married each other prior to the birth of the child. It is further required that the child must have been born at least 6 months subsequent to the moment when actual consummation of their marriage was possible.[48] The presumption may be rebutted through evidence that proves illegitimacy.

An example of the difference between the Shaafi'ee and Ḥanafee position would be when a man (X who is living in South Africa) appoints an agent (Y who is living in Germany) to conclude a marriage contract in Germany with a woman (Z who is living in Germany) on his behalf. The marriage is successfully concluded in Germany in terms of Islamic law on 1 January 2015.[49] X and Y meet for the first time (after conclusion of the marriage contract) on 1 July 2015 and X dies a few days later. Y gives birth to a son on 1 August 2015. The son would be entitled to inherit from X in terms of the Ḥanafee School as he was born at least 6 months after 1 January 2015 (date of marriage contract). He would not be entitled to inherit from the deceased in terms of the Shaafi'ee School as he was not born at least 6 months after 1 July 2015 (date of possible consummation). It is further required by the Ḥanafee School that the father acknowledged paternity. This is not a requirement in terms of the Shaafi'ee School as there would be a rebuttable presumption present.

An intestate beneficiary is disqualified from inheriting if he or she observes a different religion to that of the deceased.[50] It has already been mentioned that a widow is not entitled to inherit from her deceased husband if she observes a different religion to him. It should be noted that this rule only applies to

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47 N Al-Ghaamidee, *Al-Khulaaṣah Fee' Ilm Al-Faraaiḍ* (4th edn, Daarut-Tayyibah, Makkah, 1426 H) 583. See also A Al-Nafaaḍ, *Al-Jaami' Fee Aḥkaam Al-Abnaa Ghair Ash-Shar'iyeen* (Daar Muayyid, Riyadh, 2007) 84–90.

48 Ibid.

49 X and Y would be lawfully married even though X has not met Y as marriage by proxy is allowed in terms of Islamic law.

50 See M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee Alaa Madh-hab Al-Imaam Ash-Shaafi'ee* vol 2 (Daar-ul-Qalam, Damascus, 2000) 278–279.

widows (and not widowers) as Muslim females are not allowed to marry non-Muslim men.[51] An example of this disqualification would be when a deceased leaves behind a gross inheritance of R800,000.00, and a Muslim widow, a non-Muslim widow, and a son as the only intestate beneficiaries. The Muslim widow would inherit one-eighth and the son would inherit the remaining seven-eighths.[52] The Muslim widow would inherit R100,000.00 and the son would inherit R700,000.00. The disqualified widow (due to religion) may however inherit in terms of the laws of testacy if such provision was made by her deceased husband. The testate benefit would then be deducted from the net estate.

The Schools differ in their opinions as to which killings disqualify intestate beneficiaries from inheriting.[53] The Shaafi'ee School is of the opinion that all killings disqualify intestate beneficiaries from inheriting. The Ḥanafee School is of the opinion that only unlawful killings disqualify intestate beneficiaries from inheriting. An example of a lawful killing would be when an Islamic judge legally orders that the beneficiary's own father (biological father of the judge) be given the death penalty. This could be due to any crime committed by his father that requires the death penalty to be executed. The son (judge) would then be entitled to inherit from his deceased father in terms of the Ḥanafee School but not in terms of the Shaafi'ee School.

Exclusions (ḥajb-ashkhaaṣ) are divided into partial exclusion (ḥajab-nuqṣaan) and total exclusion (ḥajb-ḥirmaan).[54] Partial exclusion applies when an intestate beneficiary inherits a lesser share due to the presence of other intestate beneficiaries. An example of this would be when a widower inherits one-quarter instead of one-half due to the presence of a son.[55] Total exclusion applies when an intestate beneficiary does not inherit at all due to the presence of other intestate beneficiaries. An example of this would be when a brother does not inherit (totally excluded) due to the presence of a son.

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[51] This raises the issue of discrimination based on religion.

[52] This also raises the issue of discrimination based on religion.

[53] The rules regarding this disqualification are quite complicated. There will be no further investigation of this issue as it does not form part of the main theme of this chapter. For further reading on this disqualification see M Al-Raḥbee, *Bughyah Al-Baaḥith* (2nd edn, Daar-ul-Fikr, Damascus, 1988) 30 and M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee Alaa Madh-hab Al-Imaam Ash-Shaafi'ee* vol 2 (Daar-ul-Qalam, Damascus, 2000) 278. A Muslim cannot inherit from a non-Muslim and vice versa. M Ar-Raḥbee, *Bughyah Al-Baaḥith* (2nd edn, Daar-ul-Fikr, Damascus, 1988) 6. See also M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee 'Alaa Madh-hab Al-Imaam Ash-Shaafi'ee* vol 2 (Daar-ul-Qalam, Damascus, 2000) 277–279. All forms of killing are disqualifications in terms of the Shaafi'ee School. This would include intentional, unintentional, and accidental killings. See M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee 'Alaa Madh-hab Al-Imaam Ash-Shaafi'ee* vol 2 (Daar-ul-Qalam, Damascus, 2000) 278; A Aboo Daawood, *Sunan-Aboo-Daawood* vol 4 ḥadeeth 4564 (Daar-ul-Ḥadeeth, Riyadh 1999) 1956.

[54] See M Al-Raḥbee, *Bughyah Al-Baaḥith* (2nd edn, Daar-ul-Fikr, Damascus, 1988) 17–20 for the rules of exclusion.

[55] See MT Al Hilali and MM Khan, *Translation of the meanings of the Noble Qur'an in the English Language* (King Fahd Complex for the printing of the Holy Qur'an, Madeenah, 1417) 4: 12. See also M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee 'Alaa Madh-hab Al-Imaam Ash-Shaafi'ee* vol 2 (Daar-ul-Qalam, Damascus, 2000) 306.

Disqualification and total exclusion have the same effect of preventing intestate beneficiaries from inheriting. An intestate beneficiary subject to disqualification does not affect the inheritance shares of the remaining intestate beneficiaries.[56] An intestate beneficiary subjected to total exclusion could however affect the inheritance shares of the remaining intestate beneficiaries. This could be illustrated by way of an example when a deceased leaves behind a mother, a son, and two full brothers as the only intestate beneficiaries. The two brothers would partially exclude the mother from inheriting one-third if they are totally excluded from inheriting.[57] They would however not partially exclude the mother from inheriting one-third if they are disqualified from inheriting.[58] The mother would inherit the complete one-third in the latter situation and one-sixth in the former situation.

Collation does not apply in terms of the Islamic law of intestate succession. An intestate beneficiary would inherit the complete inheritance even if he or she received a gift from the deceased prior to his or her death. An example of this would be when a deceased leaves behind a gross inheritance of R600,000.00, and a son, and daughter as the only intestate beneficiaries. The deceased bought his son a car worth R200,000.00 a few days prior to his death. The daughter is not entitled to call for collation to apply and the son would therefore inherit R400,000.00 and the daughter would inherit R200,000.00.

## (c) Classes of intestate beneficiaries and their shares

The Shaafi'ee School recognises four classes of intestate beneficiaries whereas the Ḥanafee School recognises seven.[59] This section analyses the three classes that are common to both Schools. These classes in order of priority are sharer beneficiaries, residuary beneficiaries, and distant kindred beneficiaries.[60] The unequal distribution of shares applies only within these three classes.

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[56] See M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee 'Alaa Madh-hab Al-Imaam Ash-Shaafi'ee* vol 2 (Daar-ul-Qalam, Damascus, 2000) 312.

[57] The mother would only inherit one-sixth.

[58] See MT Al Hilali and MM Khan, *Translation of the meanings of the Noble Qur'an in the English Language* (King Fahd Complex for the printing of the Holy Qur'an, Madeenah, 1417) 4: 11 for the verse that refers to the inheritance of a mother.

[59] The four classes of intestate beneficiaries according to the Shaafi'ee School are sharer beneficiaries, residuary beneficiaries, the government treasury as a beneficiary, and distant kindred beneficiaries. The Ḥanafee School further recognises contractual beneficiaries, acknowledged kinsmen beneficiaries, and universal legatee beneficiaries. The order of priority intestate claims according to the Shaafi'ee School are the sharer beneficiaries claims, the residuary beneficiary claims, the government treasury claim, the sharer beneficiary claims in terms of the doctrine of return, and then the distant kindred beneficiary claims. The order of priority intestate claims according to the Ḥanafee School are the sharer beneficiary claims, the residuary beneficiary claims, the sharer beneficiary claims in terms of the doctrine of return, the distant kindred distant beneficiary claims, the contractual beneficiary claims, the acknowledged kinsmen beneficiary claims, and then the universal legatee beneficiary claims. See MM Muhammad, 'Distribution of Heritage Sunni (*Ḥanafi*) Law' in MM Muhammad, *The Islamic Law of Inheritance – A New Approach* (Fine Art Press, New Delhi, 1989) 56–57.

[60] See M Al-Khin and M Al-Bughaa, *Al-Fiqh Al Manhajee 'Alaa Madh-hab Al-Imaam*

It should be noted that the inheritance share of an intestate beneficiary is not restricted to only one of these classes. An example of this would be when a deceased leaves behind a gross inheritance of R600,000.00, and a daughter, and both biological parents as the only intestate beneficiaries. The father would inherit one-sixth (as a sharer beneficiary), the mother would inherit one-sixth (as a sharer beneficiary), the daughter would three-sixths or one-half (as a sharer beneficiary), and the father would also inherit the remaining one-sixth (as a residuary beneficiary). The father would inherit R200,000.00, the mother would inherit R100,000.00, and the daughter would inherit R300,000.00.

There are six categories of beneficiaries within the three classes of intestate beneficiaries that always inherit unless they are disqualified. These beneficiaries are referred to hereafter as primary beneficiaries and comprise three of males and three of females.[61] Five of the six categories are sharer beneficiaries and the remaining one is a residuary beneficiary. An example of where the primary beneficiaries inherit collectively would be when a deceased leaves behind a gross inheritance of R720,000.00 and a mother, a father, a widower, a son, and a daughter as the only intestate beneficiaries. The mother would inherit one-sixth ($^{12}/_{72}$), the father would inherit one-sixth ($^{12}/_{72}$), the widow would inherit one-eighth ($^{9}/_{72}$) and the remainder of $^{39}/_{72}$ would be inherited by the son and daughter. The son would inherit double the share of the daughter. The son would therefore inherit $^{26}/_{72}$ and the daughter would inherit $^{13}/_{72}$. The mother would inherit R120,0000.00, the father would inherit R120,000.00, the widow would inherit R90,000.00, the son would inherit R260,000.00, and the daughter would inherit R130,000.00.

There are two doctrines that find application within the three classes of intestate beneficiaries. They are referred to as the doctrine of increase ('awl) and the doctrine of return (radd). These doctrines do not apply to residuary beneficiaries but do apply to sharer beneficiaries and/or distant kindred beneficiaries. The doctrine of increase (when applied) reduces the fixed inheritance share of an intestate beneficiary.[62] This would apply in situations when the shares of the entitled intestate beneficiaries add up to more than one unit.[63] An example of this would be when a deceased leaves behind a gross inheritance of R800,000.00, and a mother, a widower, and a full sister as the only intestate beneficiaries. The mother would inherit one-third or two-sixths, the widower would inherit one-half or three-sixths, and the full sister would inherit one-half or three-sixths. The total would be eight-sixths. The denominator would now have to be increased to 8. The shares of all three sharer beneficiaries would then be reduced accordingly. The mother would now

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*Ash-Shaafi'ee* vol 2 (Daar-ul-Qalam, Damascus, 2000) 282–284. See also M Ar-Raḥbee, *Bughyah Al-Baaḥith* (2nd edn, Muassasah Fuad, Riyadh, 1988) 7–8 for the classes of sharer beneficiaries and residuary beneficiaries.

61 See M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee 'Alaa Madh-hab Al-Imaam Ash-Shaafi'ee* volume 2 (Daar-ul-Qalam, Damascus, 2000) 306.

62 See M Az-Zuḥaylee, *Al Mu'tamad Fee Al-Fiqh Al-Shaafi'ee* vol 4 (Daar-ul-Qalam, Damascus, 2010) 435–442 for a detailed discussion of the doctrine of increase.

63 See M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee Alaa Madh-hab Al-Imaam Ash-Shaafi'ee* vol 2 (Daar-ul-Qalam, Damascus, 2000) 282.

inherit two-eighths, the widower would inherit three-eighths, and the full sister would inherit three-eighths. It should be noted that the doctrine is gender neutral. The mother would inherit R200,000.00, the widower would inherit R300,000.00, and the full sister would inherit R300,000.00.

The doctrine of return (when applied) increases the fixed share of a sharer beneficiary. An example of this would be when a deceased leaves behind a gross inheritance of R800,000.00, and a daughter as the only intestate beneficiary.[64] The daughter would inherit one-half as a sharer beneficiary, and would also inherit the remaining one-half through the application of the doctrine. She would inherit the complete R800,000.00. It should be noted that the doctrine of return does not apply to surviving spouses. An example of this would be when a deceased leaves behind a gross inheritance of R800,000.00, and a widow and a daughter as the only intestate beneficiaries. The widow would inherit one-eighth and the daughter would inherit one-half or four-eighths. The daughter (but not the widow) would inherit the remaining three-eighths due to the application of the doctrine of return. The widow would inherit R100,000.00 and the daughter would inherit R700,000.00.

There are certain terminologies that must be understood before reading the next section. The first set of terminology applies to descendants whereas the second set applies to siblings. An agnate descendant is related to the deceased through males only. An agnate grandson (son's son) would be an example of such a descendant. A cognate descendant is related to the deceased through males and/or females. A cognate granddaughter (daughter's 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.

## (d) An analysis of the sharer beneficiaries

Sharer beneficiaries are first in line to inherit from the gross inheritance. They constitute 12 categories of intestate beneficiaries of which eight are of females.[65] Five of these categories are primary beneficiaries. These beneficiaries constitute two of males and three of females.[66] A beneficiary within any of the 12 categories is only entitled to inherit one of the seven shares when neither

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[64] The daughter would then inherit one-half as a sharer heir and the remaining one-half through the application of the doctrine of return. The doctrine applies to all the classes of sharer heirs with the exception of spouses. It should be noted that the doctrine is also gender neutral. The Shaafi'ee School is of the opinion that the doctrine of return would only apply in the absence of an established public treasury.

[65] The 12 classes of sharer beneficiaries are the husband, the wife, the father, the mother, the true grandfather, the true grandmother, the daughter, the agnate female descendants, the full sister, the consanguine sister, the uterine sister, and the uterine brother. It should be noted that the word 'true' is put in front of certain intestate beneficiaries to denote that certain requirements need to be met before the said beneficiary can inherit. A cognate granddaughter would not constitute a true granddaughter but an agnate granddaughter would.

[66] These heirs comprise the mother, father, widower, widow(s), and the daughter.

disqualified nor totally excluded from inheriting.[67] It should be noted that the inheritance share of a sharer beneficiary changes when the doctrine of increase or the doctrine of return finds application.

This section focuses on the position of female sharer beneficiaries in relation to their male counterparts. Three situations will now be looked at. The first situation is when a female sharer beneficiary indirectly inherits more favourably than her male counterpart. The second situation is when a female sharer beneficiary and her male counterpart inherit equally. The third situation is when a female sharer beneficiary inherits less favourably than her male counterpart. The situations are also briefly discussed herein.

The first situation is when a female sharer beneficiary indirectly inherits more favourably than her male counterpart. This would apply in the example where a deceased leaves behind a gross inheritance of R240,000.00, and a full sister, a widower, and a mother as the only intestate beneficiaries. The full sister would inherit one-half, the widower would inherit one-half, and the mother would inherit one-third. The lowest common denominator would be six. The three shares would be one-half or three-sixths for the full sister, one-third or two-sixths for the mother, and one-half or three-sixths for the widower. The total adds up to eight-sixths. The doctrine of increase would apply in this example. Application of the doctrine would mean that the new lowest common denominator would be eight. The modified shares would be three-eighths for the widower, two-eighths for the mother, and three-eighths for the full sister. The widower would inherit $^{3}/_{8}$ x 240 000.00 = R90 000.00, the mother would inherit $^{2}/_{8}$ x R240,000.00 = R60,000.00, and $^{3}/_{8}$ x R240,000.00 = R90,000.00 for the full sister.

The same example will now be looked at save for the full sister being substituted by a full brother. The widower would inherit one-half, the mother would inherit one-third, and the full brother would inherit the remainder. The lowest common denominator would be six. The widower would inherit one-half or three-sixths, the mother would inherit one-third or two-sixths, and the full brother would inherit the remainder, which would be one-sixth. The total adds up to six-sixths.The doctrine of would not apply in this example. The widower would inherit $^{3}/_{6}$ x R240,000.00 = R120,000.00, the mother would inherit $^{2}/_{6}$ x R240,000.00 = R80,000.00, and the full brother would inherit the remainder which would be $^{1}/_{6}$ x R240,000.00 = R40,000.00. It should be noted

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[67] These shares are the one-eighth, one-sixth, one-quarter, one-half, one-third and the two-thirds shares. See MT Al Hilali and MM Khan, *Translation of the meanings of the Noble Qur'an in the English Language* (King Fahd Complex for the printing of the Holy Qur'an, Madeenah, 1417) 4: 11, 12 and 176. The seventh share was introduced into the Islamic law through deduction. The latter share constitutes one-third of the nett inheritance. See M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee 'Alaa Madh-hab Al-Imaam Ash-Shaafi'ee* vol 2 (Daar-ul-Qalam, Damascus, 2000) 282–283. The schools differ in their opinions regarding the legality of the seventh share. The Shaafi'ee School allows for its application. See M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee 'Alaa Madh-hab Al-Imaam Ash-Shaafi'ee* vol 2 (Daar-ul-Qalam, Damascus, 2000) 283.

that 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 the full brother.

The second situation is when a female sharer beneficiary and her male counterpart inherit equal shares. This would apply in the example where a deceased leaves behind a gross inheritance of R600,000.00, and a uterine sister, a uterine brother, and a son as the only intestate beneficiaries. Both uterine siblings would inherit one-sixth each, and the son would inherit the remaining four-sixths. The uterine sister would inherit R100,000.00, the uterine brother would inherit R100,000.00, and the son would inherit R400,000.00.

The third situation is when a female sharer beneficiary inherits less favourably than her male counterpart. This would apply in the example where a deceased leaves behind a gross inheritance of R600,000.00, a mother, and a father as the only intestate beneficiaries. The mother would inherit one-third, and the father would inherit the remaining two-thirds. The mother would inherit R200,000.00, and the father would inherit the remaining R400,000.00. It should however be noted that the father inherits as a residuary beneficiary in this example and not as a sharer beneficiary.

## (e) An analysis of the residuary beneficiaries

Residuary beneficiaries are second in line to inherit from the gross inheritance. They inherit the residue (if any) after the sharer beneficiary claims have been deducted.[68] The residue is hereafter referred to as the net inheritance. This inheritance is distributed amongst the most eligible beneficiaries within this category. A son is primary intestate beneficiary within this class. It should be noted that the doctrines of return and increase do not apply to these beneficiaries. There are three classes of residuary beneficiaries. They are referred to as residuary beneficiaries in their own right ('aṣabah-bin-nafs), residuary beneficiaries with another ('aṣabah-ma-al-ghair) and residuary beneficiaries through another ('aṣabah-bil-ghair). Residuary beneficiaries in their own right are all of males, whereas residuary beneficiaries with another and residuary beneficiaries through another are all of females.[69]

This section focuses on the position of female residuary beneficiaries. Four situations are looked at in this regard. The first situation is when a female residuary beneficiary inherits more favourably and to the exclusion of all other male intestate beneficiaries. This would apply in the example when a deceased leaves behind a gross estate of R100,000.00, and a daughter, a full sister, and a consanguine brother as the only intestate beneficiaries.[70] The daughter would

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[68] See M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee 'Alaa Madh-hab Al-Imaam Ash-Shaafi'ee* vol 2 (Daar-ul-Qalam, Damascus, 2000) 297.

[69] See M Ar-Raḥbee, *Bughyah Al-Baaḥith* (2nd edn, Muassasah Fuad, Riyadh, 1988) 17–18. See also M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee Alaa Madh-hab Al-Imaam Ash-Shaafi'ee* vol 2 (Daar-ul-Qalam, Damascus, 2000) 298.

[70] These relatives would be the full sisters and consanguine sisters. See M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee Alaa Madh-hab Al-Imaam Ash-Shaafi'ee* vol 2

inherit one-half, and the full sister would inherit the remaining one-half. The daughter would inherit R50,000.00, and the full sister would inherit the remaining R50,000.00. The consanguine brothers would not inherit at all as they are totally excluded by the full sister.[71]

The second situation is when a female residuary beneficiary and her male counterpart inherit equally. This would apply in the example when a deceased leaves behind a gross inheritance of R600,000.00, and 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 one-half or three-sixths, and the mother would inherit one-sixth. The widower would inherit R300,000.00 and the mother would inherit R100,000.00. The position of the siblings remains problematic. 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 one-third. Each of the four siblings would then inherit R50,000.00.[72] The Ḥanafee School is of the opinion that the uterine brother and uterine sister must equally share the one-third to the exclusion of the full siblings. Each of the uterine siblings would then inherit R100,000.00.

The third situation is when a female residuary beneficiary inherits less favourably than her male counterpart. This would apply in the example when a deceased leaves behind a gross inheritance of R600,000.00, and an agnate granddaughter, an agnate grandson, a cognate grandson, and a cognate granddaughter as the only intestate beneficiaries. The agnate granddaughter would inherit half the share of the agnate grandson.[73] The agnate granddaughter would inherit R200,000.00 and the agnate grandson would inherit R400,000.00. It is quite interesting to note that the cognate grandchildren do not inherit in this example as they are totally excluded by the agnate grandchildren. This is due to the fact that only agnate grandchildren (however remote) constitute residuary beneficiaries.

The fourth situation is when a male residuary beneficiary inherits to the exclusion of his female counterpart. This would apply in the example when a deceased leaves a gross inheritance of R500,000.00, and 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 net inheritance to the exclusion of the daughter of the full brother. The son of the full brother would inherit

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(Daar-ul-Qalam, Damascus, 2000) 301–302. See also S Al-Bukhaaree (Resaalah Publishers, Beirut, 2008) 1160 ḥadeeth 6736 for an example in this regard.

71 See M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee 'Alaa Madh-hab Al-Imaam Ash-Shaafi'ee* vol 2 (Daar-ul-Qalam, Damascus, 2000) 301–302 for an explanation of how residuary heirs with another inherit.

72 It should be noted that the opinion of the Shaafi'ee School is based on deduction. This question is referred to as the musharrakah case as the one-third is shared between the various classes of siblings. It should be noted that a full brother is generally a residuary beneficiary.

73 Residuary beneficiaries through another comprise the daughters, the female agnate descendants howsoever remote, the full sisters, and the consanguine sisters. See M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee 'Alaa Madh-hab Al-Imaam Ash-Shaafi'ee* vol 2 (Daar-ul-Qalam, Damascus, 2000) 300–301.

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.

## (f) An analysis of the distant kindred beneficiaries

Distant kindred beneficiaries are the remaining blood relatives who are neither sharer nor residuary beneficiaries.[74] The Shaafi'ee School is of the opinion that they would be fifth in line to inherit.[75] The Ḥanafee School is of the opinion that they are fourth in line to inherit.[76] A cognate (daughter's son) grandson is an example of a distant kindred beneficiary. This section focuses on the position of female distant kindred beneficiaries. It should be noted that the schools differ as to how they should inherit.

The Shaafi'ee School is of the opinion that distant kindred beneficiaries must inherit by way of representation.[77] The doctrine of increase and return (according to this School) would only apply to these beneficiaries if it would have been applicable to those whom they represent. The Ḥanafee School is of the opinion that they must inherit similar to the way residuary beneficiaries inherit. The doctrine of increase and return (according to this School) would not apply to these beneficiaries as it is not applicable to residuary beneficiaries.

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[74] See S Al-Fawzaan, *At-Taḥqeeqaat Al-Marḍiyyah Fee Al-Mabaaḥith Al-Farḍiyyah* (Al-Ma'aarif, Riyadh, 1999) 263–264; N Al-Ghaamidee, *Al-Khulaaṣah Fee 'Ilm Al-Faraaiḍ* (4th edn, Daarut-Tayyibah, Makkah, 1426 H) 532–546; M Aṣ-Ṣubaa'ee, vol 3 (Daar ul-Waraq, Riyadh, 2000) 52 and 115; MS Omar (Butterworths, Durban, 1988) 69; M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee 'Alaa Madh-hab Al-Imaam Ash-Shaafi'ee* vol 2 (Daar-ul-Qalam, Damascus, 2000) 390 for detailed discussion of distant kindred beneficiaries.

[75] The founder of the Shaafi'ee School was of the opinion that the estate should be deposited into a state department referred to as the public treasury (bayt-ul-maal) when there are neither sharer beneficiaries nor residuary beneficiaries. The funds would then be used for the benefit of the community in accordance with Islamic law provisions. The contemporary Shaafi'ee jurists are of the opinion that the estate should be inherited by the distant kindred beneficiaries in the event where the public treasury is properly established. See M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee 'Alaa Madh-hab Al-Imaam Ash-Shaafi'ee* vol 2 (Daar-ul-Qalam, Damascus, 2000) 276–277. See also S Al-Fawzaan, *At-Taḥqeeqaat Al-Marḍiyyah Fee Al-Mabaaḥith Al-Farḍiyyah* (Al-Ma'aarif, Riyadh, 1999) 263–264); N Al-Ghaamidee, *Al Khulaṣah Fee 'Ilm Al Faraaiḍ* (4th edn, Daarut-Tayyibah, Makkah, 1426 H) 535–546; M As-Subaa'ee, *Sharḥ Qaanoon Al-Aḥwaal Ash-Shakhshiyyah* vol 3 (7th edn, Daar ul-Waraq, Riyadh, 2000) 115–117.

[76] The Shaafi'ee School is of the opinion that the order of priority should be: first the sharer heirs (aṣḥaab-ul-furooḍ), then the residuary heirs ('aṣabah), then the public treasury (bayt-ul-maal), then application of the doctrine of return to the sharer heirs (radd), and then distant kindred heirs (dhawil-arḥaam). The Ḥanafee School is of the opinion that the order of priority should be: first the sharer heirs, then the residuary heirs, then application of the doctrine of return to the sharer heirs, then the distant kindred heirs, then the contractual heirs, then the acknowledged kinsmen, and then the universal legatees. See MM Muhammad, 'Distribution of Heritage Sunni (*Ḥanafi*) Law' in MM Muhammad, *The Islamic Law of Inheritance – A New Approach* (Fine Art Press, New Delhi, 1989) 56–57.

[77] N Al-Ghaamidee, *Al-Khulaaṣah Fee 'Ilm Al-Faraaiḍ* (4th edn, Daarut-Tayyibah, Makkah, 1426 H) 547–571.

Three situations are looked at within the Shaafi'ee School. This is followed by a further two situations within the Ḥanafee School. The first situation is within the Shaafi'ee School is when a female distant kindred beneficiary inherits to the exclusion of all other male distant kindred beneficiaries. This would apply in the example when a deceased leaves behind a gross inheritance of R500,000.00, and a cognate granddaughter and a cognate great-grandson as the only intestate beneficiaries. The granddaughter would inherit the entire gross of R500,000.00 estate to the exclusion of the cognate great-grandson. The second situation is when a female distant kindred beneficiary inherits less favourably than her male counterpart. This would apply in the example when a deceased leaves behind a gross inheritance of R600,000.00, and a cognate granddaughter and a cognate grandson as the only intestate beneficiaries. The granddaughter would inherit half the share of the grandson. The cognate granddaughter would inherit R200,000.00 and the cognate grandson would inherit R400,000.00. The third situation is when a female distant kindred beneficiary and her male counterpart inherit equally. This would apply in the example where a deceased leaves behind a gross inheritance of R600,000.00, and 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.

The first situation within the Ḥanafee School is when a female distant kindred beneficiary inherits to the exclusion of all other male distant kindred heirs. This would apply in the example when a deceased leaves behind a gross inheritance of R500,000.00, and a cognate granddaughter, and a cognate great-grandson as the only intestate beneficiaries. The cognate granddaughter would inherit the complete gross inheritance to the exclusion of the cognate great-grandson. The cognate granddaughter would inherit the complete R600,000.00 to the exclusion of the cognate great grandson. The second situation is when a female distant kindred beneficiary inherits less favourably than her male counterpart. This would apply in the example when a deceased leaves behind a gross estate of R600,000.00, and a cognate granddaughter, and a cognate grandson as the only intestate beneficiaries. The cognate granddaughter would inherit half the share of the cognate grandson. The cognate granddaughter would inherit R200,000.00, and the cognate grandson would inherit R400,000.00. It should be noted that there are no examples of cases within the Ḥanafee School when the male and female distant-kindred beneficiaries inherit equally.

## (g) Problematic intestate succession situations

There are four problematic intestate succession situations that are looked at in this section. These situations are looked at for the sake of completeness. It should be noted that the rules referred to in this section apply to the estates of both male and female deceased. The first problematic situation is when the sex of an unborn (ḥaml) intestate beneficiary cannot be confirmed. An example of this would be when a deceased leaves behind a gross inheritance of R240,000.00, a widow, a mother, a father, and an unborn child as the only intestate beneficiaries. The unborn child could be a son or daughter. The most

favourable share should be calculated in favour of the unborn child and kept in trust until he or she is born. The widow would inherit one-eighth or $^{3}/_{24}$, the mother would inherit one-sixth or $^{4}/_{24}$, the father would inherit one-sixth or $^{4}/_{24}$, and the unborn child would inherit the remaining $^{13}/_{24}$ if it is a male. The widow would inherit R30,000.00, the mother would inherit R40,000.00, the father would inherit R40,000.00, and the unborn child would inherit R130,000.00.

The shares would be different if the unborn is confirmed to be a female. The widow would inherit one-eighth or $^{3}/_{24}$, the mother would inherit one-sixth or $^{4}/_{24}$, the father would inherit one-sixth or $^{4}/_{24}$ as a sharer beneficiary and the remainder of $^{1}/_{24}$ as a residuary beneficiary. The widow would inherit R30,000.00, the mother would inherit R40,000.00, the father would inherit R50,000.00, and the unborn child would inherit R120,000.00. It can clearly be seen in this example that the share of a male would be more favourable. The R120,000.00 must therefore be kept in trust until the child is born.[78] The R10,000.00 must be redistributed to the father if it is a female. The unborn child would only inherit if ultimately born alive.[79] The inheritance share must be redirected to the remaining intestate beneficiaries if the child is born dead. The widow would then inherit one-quarter or $^{3}/_{12}$, the mother would inherit one-third or $^{4}/_{14}$, the father would inherit the remaining $^{5}/_{12}$. The widow would inherit R60,000.00, the mother would inherit R80,000.00, the father would inherit R100,000.00.

The second problematic situation is when an intestate beneficiary is a hermaphrodite (khunthaa). An example of this would be where a deceased leaves behind a gross inheritance of R600,000.00 and a father and a hermaphrodite as the only intestate beneficiaries. The most favourable inheritance share that the hermaphrodite could inherit must be calculated and kept in trust until his or her sex is confirmed.[80] The father would inherit one-sixth and the hermaphrodite would inherit the remaining five-sixths if it is confirmed that the child is a male. The father would inherit R100,000.00 and the son would then inherit R500,000.00. The shares would be different if the hermaphrodite is confirmed to be a female. The father would inherit one-sixth, the daughter would inherit one-half or three-sixths, and the father would inheriting the remaining two-sixths as a residuary beneficiary. The father would inherit R300,000.00 and the daughter would then inherit R300,000.00.

The third problematic situation is when the whereabouts of an intestate beneficiary is unknown (mafqood). The inheritance of this person must be kept in trust until he or she is found alive, the date of his or her death is confirmed,

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78 This is the more favourable share.

79 See M Ar-Raḥbee, *Bughyah Al-Baaḥith* (2nd edn, Daar-ul-Fikr, Damascus, 1988) 30.

80 Ibid. The various ways of confirming the sex of the child are not discussed in this thesis. See M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee 'Alaa Madh-hab Al-Imaam Ash-Shaafi'ee* vol 2 (Daar-ul-Qalam, Damascus, 2000) 327–330 for an explanation of how the sex is confirmed.

or he or she is declared to be dead by a religious tribunal.[81] An example of this would be when a deceased leaves behind a gross inheritance of R500,000.00, and a full brother and a missing daughter as the only intestate beneficiaries. The daughter would inherit one-half and the full brother would inherit the remainder. The daughter is therefore entitled to inherit R250,000.00 and the full brother is entitled to inherit the remaining R250,000.00. The R250,000.00 of the daughter must be kept in trust and given to her upon her return. The full brother would also inherit the remaining R250,000.00 if it is later confirmed that the daughter died before her deceased parent. The R250,000.00 must be deposited into the daughters estate and distributed in terms of the Islamic law of estate distribution if it is confirmed that she died after her deceased parent.

The fourth situation is when a group of persons entitled to inherit from one another die collectively (gharqaa or hadmaa). An example of how this would be is when a father (X) and a son (Y) die collectively in a car collision. Both persons are primary beneficiaries of each other. The estate of X would inherit from the estate of Y if it is confirmed that the Y predeceased X. The estate of Y would inherit from the estate of the X if it is confirmed that the X predeceased the Y. Neither of the deceased estates would benefit from the other if the moment of each person's death cannot be confirmed. There is a presumption in favour of simultaneous death if the moment of death cannot be confirmed.[82]

The estate of Y will now be looked at for purposes of this example. X leaves behind a gross inheritance of R600,000.00, and a mother, a father (X), and a son as the only intestate beneficiaries. The mother would inherit one-sixth, X would provisionally inherit one-sixth, and the son would inherit the remaining four-sixths. The mother would inherit R100,000.00, X would provisionally inherit R100,000.00, and the son would inherit R400,000.00. The inheritance of X must be kept in trust until the moment of his death is confirmed. The R100,000.00 must be deposited into X's deceased estate if it is confirmed that he died after Y. The R100,000.00 must be redirected into Y's estate if it is confirmed that X predeceased Y. The R100,000.00 must also be redirected into Y's if the moment of X's death cannot be confirmed as simultaneous death would be presumed.

## V CONCLUSION

The question posed at the beginning of this chapter was whether the discrimination against females is consistent throughout the Islamic law of inheritance. The analysis has shown that there are definitely situations where

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[81] The death may actual or by decree of court. M Ar-Raḥbee, *Bughyah Al-Baaḥith* (2nd edn, Daar-ul-Fikr, Damascus, 1988) 30. See also M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee 'Alaa Madh-hab Al-Imaam Ash-Shaafi'ee* vol 2 (Daar-ul-Qalam, Damascus, 2000) 327–332.

[82] M Al-Raḥbee, *Bughyah Al-Baaḥith* (2nd edn, Daar-ul-Fikr, Damascus, 1988) 30–31. See also N Al-Ghaamidee, *Al Khulaṣah Fee 'Ilm Al Faraaiḍ* (Daarut-Tayyibah, Makkah, 1426 H) 516–517.

females inherit less favourably than males. This could even be said to be the general rule. It has also been shown that the discrimination is not consistent throughout the Islamic law of intestate succession. The findings have shown that there are situations where females and their male counterparts inherit equally and also that there are situations where females inherit more favourably both directly and indirectly.