

An Analysis of the Islamic Law Based Developments in the South African Law of Succession

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Abstract: *South Africa is a secular state with a constitution that guarantees the right to freedom of religion and the right not be discriminated against on religious basis. Over three quarter of a million Muslims live in South Africa today. There has (to date) been no legislation enacted in South Africa that gives effect to Islamic personal law. This article analyses the accommodation of the right of South African Muslims married in terms of Islamic law to inherit in terms of South African law as a result of the developments in the case law and contextual interpretation of the existing statutes by the South African courts. This article first analyses the recent developments and the existing position with regard to the right to inherit under the law of testate succession. This is followed by an analysis of the right to inherit under the law of intestate succession. The developments are then compared to the position in Islamic law of testate and intestate succession. The article concludes with a finding that the developments are not consistent with Islamic law. A recommendation is made that South African Muslims should draft and execute Islamic wills in order to ensure that their estates devolve in terms of Islamic law upon their demise. A further recommendation is made that in line with Section 15(3) of the South African Constitution, the South African government should consider enacting legislation that gives effect to the Islamic law of succession.*

Keywords: Islamic Law; South African Law; Succession Law; Constitutional Law

I. INTRODUCTION

There are over three quarter of a million Muslims living in South Africa today.¹ Muslims have been living in South Africa for over 300 years.² Ever since, South African Muslims have continued to live their lives in accordance with their Islamic faith (*Shari'ah*) and some of them

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¹ Statistics South Africa, 'Census 2001 Primary Tables South Africa 96 and 2001 Compared' <www.statssa.gov.za/?page_id=5107> accessed 30 May 2020. It should be noted that religion has not formed part of the published censuses since 2001, and there is no data on the number of Muslims currently living in South Africa.

² The first Muslim is recorded to have stepped onto the South African shore in 1654. See EM Mahida, *History of Muslims in South Africa: A Chronology* (Arabic Study Circle 1993) 1.

solemnise Islamic marriages that do not normally come within the folds of South African law as there has (to date) been no legislation enacted in South Africa that gives effect to any form of Islamic law. This includes legislation governing Islamic marriages and the rights and obligations that stem from these marriages. It should be noted that South Africa is a secular constitutional democracy. Equality, non-discrimination, among other values are the cornerstones through which cases are determined by the courts. This is clearly seen when the cases in this article are analysed.

This article primarily investigates the right of a spouse who was married in terms of Islamic law to inherit from his or her deceased spouse under the South African law. The historical development concerning the legal status of a spouse married in terms of Islamic law is looked at by way of introduction. This is followed by looking at the right of a spouse married in terms of Islamic law to inherit in terms of South African law as a result of developments in the case law. In the absence of a specific legislation on the recognition of marriage solemnised under Islamic law and the consequences of such marriages on the death of a spouse, the South African courts have endeavoured to make accommodation to such marriages and their consequences with the help of contextual and expansive interpretations of the existing statutes.

One case (*Moosa v Harnaker*) is looked at in terms of the law of testate succession whereas three cases (*Daniels v Campbell*, *Hassam v Jacobs*, and *Faro v Bingham*) are looked at in terms of the law of intestate succession. These are currently the only cases in South Africa that dealt with the recognition of Islamic marriages for the purposes of the application of succession law and related matters. The article concludes with an overall analysis of the findings and makes recommendations as to a way forward.

II. RECOGNITION OF ISLAMIC MARRIAGES IN SOUTH AFRICA

A few of the most relevant cases that impacted upon the status of spouses married in terms of Islamic law within the South African context are looked at in this section.³ In 1983, in the case of *Ismail v Ismail* the Appellate Division (now referred to as the Supreme Court of Appeal) held that marriages under which polygamy is permitted are regarded as ‘*contra bona mores*’ in terms of South African Law and accordingly should not be recognized.⁴ This ruling encompassed all marriages, including Islamic marriages. This meant, *inter alia*, that the rights and obligations that flow from an Islamic marriage were not enforceable in the South African civil courts. It also meant that Islamic marriages should not be recognised for the purposes of legislation governing succession law. It would thus not make a difference if the couple was in a monogamous marriage or in a polygynous marriage. The basic fact that Islamic law allowed to marry more than one spouse was the problem.

In 1991, in the case of *Solomons v Abrams* the Court held that a marriage concluded in terms of Islamic law was not a putative marriage, and could not be recognized on that basis.⁵ It should be noted that the status of Islamic marriages has changed since South Africa’s transition from an apartheid state to a democracy. In 1993 South Africa enacted its Interim

³ See Muneer Abduroof, ‘Evolution of Muslim personal law in the South African constitutional dispensation’ (2013) 54 *Nederduitse Gereformeerde Teologiese Tydskrif* 6-11 for a discussion on this issue.

⁴ See *Ismail v Ismail* 1983 (1) SA 1006 (A) 1025.

⁵ *Solomons v Abrams* 1991 (4) SA 437 (W) 441.

Constitution, and in 1996 it enacted its Final Constitution.⁶ Section 2 of the Constitution of South Africa, 1996 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.” Both the Interim and Final Constitutions include the right to freedom of religion and explicitly prohibit discrimination based on religion. Muslims, whose religious rights such as the recognition of Islamic marriages were earlier not recognised under the South African laws, challenged the validity of those provisions found in the South African laws under the newly found rights within the 1993 and 1996 versions of the Constitution.

In 1996, in the case of *Ryland v Edros*, the Western Cape Division of the High Court (then Cape High Court) looked at the issue regarding the enforceability *inter partes* of a marriage contract concluded in terms of Islamic law. The Court held that a marriage concluded in terms of Islamic law generates a legal contractual duty to support the wife.⁷ In 1998, in the case of *Amod v Multilateral Motor Vehicle Accidents Fund*, the Supreme Court of Appeal held that public policy (as stated in the *Ismail v Ismail* case in 1983⁸) has since changed, and that there is now a requirement to recognize Islamic marriages. The Court gave recognition to a marriage concluded in terms of Islamic law for the purpose of duty of support.⁹ Likewise, in 2005, in the case of *Khan v Khan*, the Court held that marriages contracted in terms of Islamic law, whether monogamous or not, were covered by the Maintenance Act as valid marriages.¹⁰

The above cases clearly demonstrate the fact that Islamic marriages were being recognised on a case by case basis. There is, however, no full recognition. Another concern is that the rights obtained by the spouses in the above cases were in terms of South African law and not in terms of Islamic law. There is, therefore, an urgent need for the government to enact legislation that gives effect to the rights and obligations that flow from Islamic marriages in terms of Islamic law. Section 15(3)(a) of the South African Constitution, 1996 clearly states that there is nothing preventing government from enacting legislation that recognises personal laws.¹¹ This would include laws governing Islamic marriages and the rights and obligations that flow from such marriages. It should be noted that although the South African Constitution allows for the enactment of legislation that governs systems of personal laws, this is not mandatory upon the government.

There have been a number of attempts to enact legislation in South Africa to regulate Islamic marriages and the rights and obligations that flow there from. The most recent attempt led to the formulation of the 2010 Muslim Marriages Bill (2010 MMB).¹² The 2010 MMB proposed for the recognition of Islamic marriages as well as for the rights and obligations that

⁶ See Interim Constitution of South Africa Act 200 of 1993 and Final Constitution of South Africa Act 108 of 1996.

⁷ *Ryland v Edros* 1997 (2) SA 690 (C) 711.

⁸ See *Ismail v Ismail* (n 4).

⁹ *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA) 1329.

¹⁰ See *Khan v Khan* 2005 (2) SA 272 (T) 283.

¹¹ See the Final Constitution (n 6) s 15(3)(a) where it states that “[t]his section does not prevent legislation recognising - (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. (b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.”

¹² See MMB 2010 ‘Muslim Marriages Bill’ <<https://pmg.org.za/bill/235/>> accessed 18 May 2020.

flow from them in terms of Islamic law. It is interesting to note that the 2010 MMB did not deal with matters related to the Islamic law of succession. The project committee that worked on the 2010 MMB decided not to include Islamic law of succession because they considered that the issues concerning the Islamic law of succession were complex and manifold.¹³ One of the problematic issues within the Islamic law of succession that does not sit well with the South African constitutional framework is the fact that a son always inherits double the share of a daughter. This is problematic within the South African context where the Constitution of South Africa, 1996 prohibits discrimination based on sex and gender.¹⁴

However, the 2010 MMB project committee further noted that nothing prevents a Muslim person from ensuring that his or her estate would devolve in terms of Islamic law upon his or her demise, by executing an Islamic will.¹⁵ In the event where an Islamic will was not executed, the Intestate Succession Act 81 of 1987 would apply for the purposes of succession of spouses married in terms of Islamic law.¹⁶ The 2010 MMB has, to date, not been enacted. On 31 August 2018, the Western Division of the High Court handed down a judgment in a matter where three applications were heard jointly. The relief sought by the three applicants were similar in nature and essentially concerned the constitutionality of the non-recognition of marriages concluded in terms of Islamic law. The High Court declared that:

“the State is [constitutionally] obliged to respect, protect, promote and fulfil the rights ... [as provided in the] the Constitution by preparing, initiating, introducing, enacting and bringing into operation, diligently and without delay ... legislation to recognise marriages solemnised in accordance with the tenets of Sharia law (‘Muslim marriages’) as valid marriages and to regulate the consequences of such recognition.”¹⁷

The Court further declared that “the President and the Cabinet have failed to fulfil their respective constitutional obligations ... and [that] such conduct is invalid.”¹⁸ The President of the Republic of South Africa and the Cabinet were given 24 months, starting from 31 August 2018, to give effect to the order. The Court further held that in “the event that the contemplated legislation is referred to the Constitutional Court by the President in terms of section 79(4)(b) of the Constitution, or is referred by members of the National Assembly in terms of section 80

¹³ See South African Law Reform Commission ‘Project 59 Islamic Marriages and Related Matters Report (2003) 106’ <www.justice.gov.za/salrc/reports/r_prj59_2003jul.pdf> accessed 02 June 2020.

¹⁴ See Final Constitution (n 6) s 9 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 ... (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”

¹⁵ See (n 13).

¹⁶ See MMB 2010 (n 12) 26 where it states “1. Amendment of section 1 by the insertion after paragraph (f) of subsection (4) of the following paragraph: “(g) “spouse” includes a spouse of a Muslim marriage recognised in terms of the Muslim Marriages Act, 20..., and otherwise includes the spouse of a deceased person in a union recognised as a marriage in accordance with the tenets of any religion: Provided that in the event of a deceased man being survived by more than one spouse, the following applies- (i) for the purposes of subsection(1)(a), the surviving spouse or spouses inherit the intestate estate in equal shares; (ii) for the purposes of subsection (1)(c), the surviving spouse or spouses each inherits a child’s share of the intestate estate or so much of the intestate estate in equal shares as does not exceed in value the amount so fixed as provided for in this section.””

¹⁷ See *Women’s Legal Centre Trust v President of the Republic of South Africa, Faro v Bingham, Esau v Esau* (22481/2014, 4466/2013, 13877/2015) 2018 6 SA 598 (WCC) 252.1.

¹⁸ *ibid* 252.2.

of the Constitution, the relevant deadline will be suspended pending the final determination of the matter by the Constitutional Court...¹⁹ The Court also held that if the legislation is not enacted within the stipulated timeframe, then persons married in terms of Islamic law would be able to enforce rights and obligations in terms of existing South African law with some modifications made to it.²⁰

It should be highlighted here that, although Islamic marriages would be recognized in the absence of a specific legislation, the consequent rights and obligation of Islamic marriages would be based on existing South African law and not based on Islamic law. The South African Law Reform Commission Project 144 Committee has (subsequent to the 2018 judgement of the Western Division of the High Court) published an Issue Paper (Issue Paper 35) looking into the possibility of enacting a unified marriage statute that would regulate all religious marriages in South Africa.²¹ The closing date for public comment was 31 August 2019. Although the submissions have been made, it is uncertain if the Islamic law of succession provisions will be included in the proposed legislation.

III. DEVELOPMENTS IN THE LAW OF TESTATE SUCCESSION

The South African law of testate succession is primarily governed by the Wills Act 7 of 1953 and the common law principle of freedom of testation.²² In *Moosa v Harnaker*,²³ heard in the Western Cape Division of the High Court, addresses the consequences of renouncing a testate benefit in terms of an Islamic distribution certificate. The certificate was issued in terms of a clause in the will requiring the Muslim Judicial Council (SA)²⁴ to declare the beneficiaries of the testator are under Islamic law. This type of will is hereafter referred to as an Islamic will.

¹⁹ *ibid.*

²⁰ *ibid* 252.5 where it is stated that “[i]n the event that legislation as contemplated in paragraph 1 above is not enacted within 24 months from the date of this order or such later date as contemplated in paragraph 4 above, and until such time as the coming into force thereafter of such contemplated legislation, the following order shall come into effect: 5.1 It is declared that a union, validly concluded as a marriage in terms of Sharia law and which subsists at the time this order becomes operative, may (even after its dissolution in terms of Sharia law) be dissolved in accordance with the Divorce Act 70 of 1979 and all the provisions of that Act shall be applicable, provided that the provisions of section 7(3) shall apply to such a union regardless of when it was concluded; and 5.2 In the case of a husband who is a spouse in more than one Muslim marriage, the court shall: (a) take into consideration all relevant factors including any contract or agreement and must make any equitable order that it deems just; and (b) may order that any person who in the court’s opinion has a sufficient interest in the matter be joined in the proceedings. 5.3 If administrative or practical problems arise in the implementation of this order, any interested person may approach this Court for a variation of this order.”

²¹ See South African Law Reform Commission, ‘Issue Paper 35’ <www.justice.gov.za/salrc/ipapers/ip35_prj144_SingleMarriageStatute.pdf> accessed 18 May 2020, for the full contents of the Issue Paper.

²² MJ De Waal & MC Schoemann-Malan, *Law of Succession* (5 ed, Juta 2015) 2-3.

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

²⁴ The Muslim Judicial Council (SA) is one of the oldest Islamic institutions in South Africa which was established in the Western Cape in 1945. It should be noted that the rulings of Muslim Judicial Council (SA) are not binding on parties as they have no legal effect under the South African law. The author is currently a General Council Member of Muslim Judicial Council (SA). For further details, see MJC (SA) ‘Muslim Judicial Council SA’ <<https://mjc.org.za/>> accessed 05 May 2020.

The judgment was handed down on 14 September 2017.²⁵ The findings of the Court were essentially confirmed by the Constitutional Court. The facts of the case and the analysis of judgment are as follows.

The case concerned a deceased Muslim male (hereafter called “B”) who died testate on 9 June 2014. B was married to two wives when he died.²⁶ He married his first wife (hereafter called “C”) under Islamic law on 10 March 1957. He subsequently married his second wife (hereafter called “D”) under Islamic law on 31 May 1964. C consented to the marriage between B and D.²⁷ B subsequently married C in terms of South African law in August 1982 because the Islamic marriage was not recognised for purposes of applying for a bank loan that the family needed to buy a house. B was advised to conclude a marriage in terms of South African law in order for the bank loan to be approved. D consented to the civil marriage between B and C.²⁸ A total of nine children were born of the two marriages. Four of these children were male and five were female. B’s executed an Islamic will on 23 January 2011 and the will stated that his estate must devolve under Islamic law.²⁹ The Islamic will 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.³⁰

The Islamic distribution certificate was issued by the Muslim Judicial Council (SA) under the provisions of *Quran* (4) 11-12.³¹ The certificate stated that each widow must inherit $1/16 = 13/208$, each son must inherit $7/52 = 28/208$, and each daughter must inherit $7/104 = 14/208$.³²

²⁵ See (n 23).

²⁶ *ibid* para 4.

²⁷ *ibid* para 3.

²⁸ See *ibid* paras 3-7.

²⁹ This could also be referred to as an Islamic will. See Muneer Abduroaf, ‘A constitutional analysis of an Islamic will within the South African context’ (2019) 52(2) *De Jure Law Journal* 257 where I analyse the constitutionality of an Islamic will. I discuss the issue concerning a son inheriting double the share of a daughter. I analyse the question as to whether this type of discrimination is allowed in terms of the South African Constitution, 1996.

³⁰ See (n 23) paras 4-8. An Islamic Distribution Certificate is a document stating who the lawful intestate beneficiaries of the deceased are at the time of his or her death.

³¹ See MM Khan, *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.

³² See (n 23) para 7.

The nine children renounced (repudiated) the benefits due to them under the distribution certificate issued by the Muslim Judicial Council (SA) as they wanted C and D to inherit the renounced shares in terms of the South African law of succession.³³ Section 2C(1) of the Wills Act 7 of 1953 states:

“If 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.”³⁴

The benefits renounced by the nine children were testate benefits in terms of the South African law of succession (benefits that they are entitled to because of the will) but intestate succession benefits in terms of the Islamic law of succession (benefits that they are entitled to in terms of Islamic law, even if no will is present, also referred to as “compulsory intestate beneficiaries” or just “intestate beneficiaries”). It should be noted that the right to freedom of testation was used by B as a tool in order to apply the 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.”³⁵

Renunciation of intestate succession benefits is foreign to Islamic law. It should be noted that the nine children were all inheriting intestate beneficiaries in terms of Islamic law. They had vested and enforceable rights (in terms of Islamic law) to claim their intestate benefits from the estate the moment when B died. They were permitted (in terms of Islamic law) to cede their intestate benefits in favour of C and D. 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 [C] and Third [D] Applicants.”³⁶ However, the expression “agreement” used by the Court is not completely in conformity with Islamic law principles with regard to ceding of rights, as renunciation is foreign to Islamic law. They should technically have ceded their rights to C and D and not renounced their rights.³⁷ Ceding of rights would mean that they have accepted the benefits that they were entitled to in terms of Islamic law and then gifted it in favour of C and D. Renunciation, on the other hand, would mean that they have rejected the benefits due to them. The executor of the deceased estate considered both C and D to be surviving spouses for the purposes of Section 2C(1) of the Wills Act 7 of

³³ The renouncement was reduced to writing. The children stated that they wanted the surviving spouses to inherit the renounced benefits in equal shares. See *ibid* para 8.

³⁴ See Wills Act 7 of 1953, s 2C(1).

³⁵ The following should be noted with regard to testate and intestate benefits in terms of Islamic law. Testate beneficiaries do have the right to adiate or renounce benefits bequeathed to them in terms of a will. A renounced testate benefit would however devolve back into the deceased estate. It would not devolve in terms of s 2C(1) of the Wills Act 7 of 1953 in terms of Islamic law. Each of the nine children could have adiated their benefits and then gifted it to C and D in order to comply with Islamic law. The normal rules regarding gifting in terms of Islamic law would find application.

³⁶ See (n 23) *Moosa NO and Others v Harnaker and Others* 2017 (6) SA 425 (WCC) para 8.

³⁷ The author has argued elsewhere that s 2(C)(1) of the Wills Act 7 of 1953 should not have applied to the case at hand, and the matter should have been referred back to the Muslim Judicial Council (SA) and dealt with in terms of Islamic law principles. See Muneer Abduroaaf, ‘An Analysis of Renunciation in Terms of s 2(C)(1) of the Wills Act 7 of 1953 in Light of the *Moosa NO and Others v Harnaker and Others* Judgment’ (2019) 7 *Electronic Journal of Islamic and Middle Eastern Law* 15.

1953, and was of the opinion that the renounced benefits should therefore vest in them equally.³⁸ The liquidation and distribution account (which states how the estate of the deceased should devolve) recorded that C and D would each inherit an equal share of the renounced benefits. The liquidation and distribution account were accepted by the Master of the High Court (who oversees the administration of estates in South Africa).³⁹ Each of the widows, therefore, should have inherited 104/208 in terms of the account based on the renunciation by the children of C and the children of D.

However, the Registrar of Deeds (responsible for the registration, management and maintenance of the property registry of South Africa) was of the view that the benefits renounced by the descendants of B, who were born from his marriage to C, should vest in C as she was the only recognized surviving spouse for the purposes of Section 2C(1) due to her civil marriage with the deceased. The Registrar of Deeds was of the opinion that the benefits renounced by the descendants of D, who were born from his marriage to D, should vest in the children of those descendants in terms of Section 2C(2) as the Islamic marriage between B and D was not recognized for the purposes of Section 2C(1).⁴⁰ Section 2C(2) of the Wills Act 7 of 1953 states:

“If 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.”

The matter was taken to the Western Division of the Cape High Court where it was argued that Section 2C(1) unfairly discriminates against D on the grounds of religion and marital status.⁴¹ The High Court held that the constitutional defect in Section 2C(1) is manifest and that it constitutes an unjustifiable infringement of Section 9(3) of the Constitution which prohibits the state from discriminating against a person based on a number of factors, which include religion and marital status.⁴² The Court declared Section 2C(1) inconsistent with the Constitution as it does not recognise a husband or wife in a marriage that was concluded in terms of Islamic law.⁴³ Section 2C(1) was declared invalid insofar as it does not include multiple widows married to a deceased husband in terms of Islamic law.⁴⁴ The order of invalidity in this case was suspended subject to confirmation by the Constitutional Court as is required by the

³⁸ See (n 34) s 2C(1) where it 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.”

³⁹ See (n 23) para 9.

⁴⁰ *ibid* paras 12-13. See also (n 34) 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.”

⁴¹ See (n 23) para 17.

⁴² *ibid* para 35.

⁴³ *ibid* para 39(a)(i).

⁴⁴ *ibid* para 39(a)(ii).

Superior Courts Act 10 of 2013.⁴⁵ The Western Cape High Court judgment was confirmed by the Constitutional Court on 29 June 2018.⁴⁶ The reasoning of the High Court was endorsed by the Constitutional Court where it held that the defect in Section 2C(1) violates D's right to equality.⁴⁷ The Constitutional Court further held that Section 2C(1) infringes on D's right to dignity in a most fundamental way, and that this is a further ground for declaring that section 2C(1) is constitutionally invalid.⁴⁸

IV. DEVELOPMENTS IN THE 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 2009.⁴⁹ These statutes govern how the intestate estate 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 (estate after liabilities have been deducted) in terms of the law of testate succession.⁵⁰ Spouses married under Islamic law did not initially qualify to inherit from the estates of their deceased husbands and fathers who died intestate as Islamic marriages were not recognised for purposes of these acts. The position of surviving spouses in monogamous marriages changed in 2003 when the Constitutional Court handed down its judgement in *Daniels v Campbell NO*.⁵¹ The position of surviving spouses in polygynous marriages changed in 2009 when the *Hassam v Jacobs NO* Constitutional Court judgment was handed down.⁵²

A. *Daniels v Campbell NO* (2003)

This case concerned a deceased Muslim male (hereafter called "E") who died intestate on 27 November 1994.⁵³ E entered into two marriages during his lifetime. The first marriage ended in divorce. It should be noted that the facts of the judgment do not state whether the first marriage was concluded under civil law or Islamic law. The type of marriage is, however, very relevant for purposes of this discussion. The second marriage was concluded under Islamic law on 2 March 1977. No children were born from the second marriage. The second marriage was

⁴⁵ *ibid* para 39(g).

⁴⁶ See *Moosa NO and Others v Minister of Justice and Correctional Services and Others* 2018 (5) SA 13 (CC) where it states that in para 21 that "[t]he following order is made: 1. The declaration of constitutional invalidity of section 2C(1) of the Wills Act 7 of 1953 by the High Court of South Africa, Western Cape Division, Cape Town, is confirmed. 2. Section 2C(1) of the Wills Act 7 of 1953 is to be read as including the following underlined words: "If 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. For the purposes of this sub-section, a 'surviving spouse' includes every husband and wife of a monogamous and polygamous Muslim marriage solemnised under the religion of Islam.""

⁴⁷ *ibid* para 12.

⁴⁸ *ibid* para 16.

⁴⁹ See Intestate Succession Act 81 of 1987 and Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.

⁵⁰ *ibid*.

⁵¹ *Daniels v Campbell NO & Others* 2004 (5) SA 331 (CC).

⁵² *Hassam v Jacobs NO & Others* 2009 (5) SA 572 (CC).

⁵³ See (n 51) 2.

intact at the time E died. E was in a monogamous marriage at the time of his death.⁵⁴ E left behind a widow, two daughters and two sons.⁵⁵ The facts found in the judgment do not state whether the parents of E were alive at the time of his death. This is relevant as parents, spouses, and children inherit together under Islamic law, but parents do not inherit in the presence of a surviving spouse(s) and or child(ren) in terms of South African law. It will be assumed for the purposes of this discussion that the parents of E predeceased him. An executor was appointed by the Master of the High Court on the 25 January 2001 to administer the estate. The main asset in the deceased estate was a modest house (hereafter called the “property”).⁵⁶

The background to the property is important to note. E left behind a surviving spouse (hereafter called “F”) who resided at the property for nearly 30 years. It should be noted that F was previously married to (hereafter called “G”) under Islamic law and that the marriage ended in a divorce. On 7 July 1969 G submitted a written application to the City of Cape Town to rent a council dwelling.⁵⁷ On 15 October 1976 the City of Cape Town (after the Islamic divorce between F and G) allocated the property to F in her own name for tenancy purposes. F and her children (from her previous marriage) were in occupation of the property when she married E under Islamic law. F informed the City of Cape Town of her remarriage and furnished them with a copy of her marriage certificate. The facts of the case do not state who issued the marriage certificate. However, it should be noted that these certificates are generally issued by religious leaders in the community that are affiliated to Islamic institutions like the Muslim Judicial Council (SA). 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. It is interesting to note that the Islamic marriage was recognised for purposes of determining the principal breadwinner, but such marriage is not recognised in terms of South African legislation governing marriages. The tenancy of the property was transferred to E.⁵⁸ Tenants of council houses were later given the opportunity to purchase the houses. On 24 September 1990 E entered into an instalment sale agreement to purchase the house from the City of Cape Town for the amount of R3 915.50.⁵⁹

F contributed substantially towards the household expenses concerning the property. This included contributions towards the rent, service charges, and the purchase price of the property.⁶⁰ F was however 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 1987.⁶¹ The reason given was that she was not recognised as a surviving spouse due to her Islamic marriage not being recognised for purposes of the Intestate Succession Act.

F approached the Western Cape Division of the High Court for an order declaring that she was *inter alia* a “spouse” of the deceased in terms of the Intestate Succession Act. In the

⁵⁴ *ibid.*

⁵⁵ *ibid.*

⁵⁶ *ibid.*

⁵⁷ *ibid.*

⁵⁸ *ibid.*

⁵⁹ The judgment refers to the amount of R3 915.00 with a 10 percent discount. See *ibid.*

⁶⁰ *ibid* para 48.

⁶¹ See Intestate Succession Act (n 49).

alternative she asked for the provisions found in the legislation to be declared unconstitutional to the extent that they unfairly discriminated against marriages concluded in terms of Islamic law.⁶² On 24 June 2003 the Western Division of the 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 monogamous union.⁶³ The order was referred to the Constitutional Court for confirmation. The Constitutional Court held inter alia that F was a spouse of the deceased for purposes of the Intestate Succession Act 81 of 1987.⁶⁴ 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.

The question that could be asked is whether the share that F was entitled to (as a consequence of the judgment) in terms of South African law is in conformity with Islamic law. This issue is now looked at by comparing the Islamic and South African law positions. The main asset in the estate was a property that was sold to the deceased in 1990 for R3 915.50. E 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 000.00.⁶⁵ The judgment does not give an indication as to what the exact value of the estate was at the time E died.⁶⁶ It does, however, state that letters of authority were issued by the Master of the High Court in terms of Section 18 (3) of the Administration of Estates Act 66 of 1965.⁶⁷ 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) only when the gross estate was valued at less than R125 000.00.⁶⁸ It is questionable what the value of the property was at the time the judgment was delivered, which was 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 000.00.⁶⁹ 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.⁷⁰

⁶² See *Daniels v Campbell NO & Others* (n 51) 3-4.

⁶³ *ibid* 62-63.

⁶⁴ See (n 51) 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.”

⁶⁵ 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’ <www.justice.gov.za/master/m_docs/2015-03_chm-directive.pdf> (accessed 02 June 2020).

⁶⁶ See (n 62) 3.

⁶⁷ See Administration of Estates Act 66 of 1965, s 18(3).

⁶⁸ 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 *ibid*. 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 (n 65).

⁶⁹ 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.

⁷⁰ The calculation of a child’s share has changed subsequent to the *Hassam v Jacobs NO* case. See (n 65).

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. F would have been eligible to inherit the greater share which is R96 000.00. The four children are totally excluded by F. The facts of the judgment do not provide information as to whether the parents of the deceased were alive at the time E died. It will be assumed for purposes of the comparison that both parents predeceased E. Also, 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 as children conceived out of wedlock do not automatically inherit from their deceased father in terms of the Islamic law of intestate succession.

E died leaving behind a widow (F), two sons, and two daughters. F 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.⁷¹ This has also been observed in the Muslim Judicial Council (SA) Islamic distribution certificate in *Moosa v Harnaker* case where testate succession developments in terms of South African law are discussed.⁷² F 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.⁷³ There is nothing preventing the children in this example from ceding their rights in the inheritance in favour of F who is their stepmother. This ceding of rights would also be compliant with Islamic law. This was discussed above in case of *Moosa v Harnaker*.⁷⁴

There is a considerable difference between the R96 000.00 that the F 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 that both the male and female children inherit more favourably than the widow. It should be noted that Islamic law favours the children (male and female) whereas South African law favours the widow. It should also be noted that the children would be entitled to inherit in terms of Islamic law irrespective of whether they are affluent or destitute. The children in this scenario were not the children of F.

B. Hassam v Jacobs NO (2009)

This case concerns a deceased Muslim male (hereafter called "H") who died intestate on 22 August 2001. H entered into three marriages during his lifetime. H married his first wife (hereafter called "I") in terms of Islamic law during February 1966. One son and two daughters were born from this marriage.⁷⁵ I obtained a judicial divorce in the form of a *faskh* in 1976.

⁷¹ See (n 31) (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...".

⁷² See (n 23).

⁷³ See (n 31) (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...".

⁷⁴ See (n 23).

⁷⁵ See Najma Moosa and Muneer Abduroaf, '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

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 H and I. H subsequently married his second wife (hereafter called “J”) in terms of Islamic law on 3 December 1972. J bore him four daughters. J obtained a judicial divorce in the form of a *faskh* in June 1998. The *faskh* was also issued by the Muslim Judicial Council (SA). The *faskh* brought an end to the marriage of H and J. The *faskh* papers were presented to H who then destroyed them. H and J continued to live as husband and wife. The Muslim Judicial Council (SA) subsequently arranged a meeting with H in order to explain the consequences of a *faskh*. This was done in 1999. H then moved out of the matrimonial home that he shared with J and his daughters. H later married his third wife (K) in terms of Islamic law during February 2000. J was neither aware of the marriage nor did she consent to the marriage. K bore H two sons out of the wedlock and one daughter in the wedlock.⁷⁶ The death certificate of H 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.⁷⁷ This is quite different to the status of the marriage in view of the City of Cape Town in the *Daniels v Campbell* case discussed above, when the marriage certificate was recognised for purposes of tenancy. There is thus no legal certainty regarding exactly what the status of the Islamic marriage is.

The facts found in the judgment do not state whether the parents of H (or any other inheriting ascendants) were alive at the time of his death. It will be assumed that all his ascendants had predeceased him, for purposes of the following discussion. The presence of ascendants has an effect on how the intestate estate must devolve concerning these facts in terms of Islamic law. It does not have an effect on how the intestate estate must devolve concerning these facts in terms of South African law. As far as South African law is concerned, spouses, as well as children, totally exclude parents from inheriting.⁷⁸

H acquired an immovable property situated at 2 Heron Street, Pelican Park in Cape Town (hereafter referred to as the “property”) on 13 February 1990. The property served as the matrimonial home of H, J, and their children. This could also be seen as the main asset in the estate.⁷⁹ J, *inter alia*, submitted a claim against the estate in terms of the Intestate Succession Act.⁸⁰ The executor refused to recognise the claim for two reasons. The first reason was because he doubted whether the marriage between H and J was intact at the time of H’s death due to the *faskh* that that was granted.⁸¹ The second reason was that, even if he accepted that her marriage to H was intact at the time, it would have been a polygynous one.⁸² The Intestate Succession Act (at that time) did not recognise widows who were married to their deceased

M and Paleker M, *South African Law of Succession and Trusts - The Past Meeting the Present and Thoughts for the Future* (Juta 2014) 165.

⁷⁶ *ibid* 171-172.

⁷⁷ See (n 52) para 3.

⁷⁸ See Intestate Succession Act (n 49), s 1(1)(d).

⁷⁹ See *Hassam v Jacobs NO & Others* (n 52) para 2.

⁸⁰ See Intestate Succession Act (n 49).

⁸¹ See (n 79) para 6.

⁸² *ibid*.

husbands in terms of polygynous marriages.⁸³ It was therefore not possible to treat J as a spouse for purposes of the Intestate Succession Act.⁸⁴

J instituted proceedings in the Western Cape Division of the High Court for an order declaring that she was one of the surviving spouses of H at the time when he died. She also wanted, *inter alia*, an order declaring that the provisions in the Intestate Succession Act 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. J alternatively sought an order for the provisions of the Intestate Succession Act to be declared unconstitutional.⁸⁵ The executor did not provide any evidence to refute the facts on which J based her argument concerning 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.⁸⁶

J argued that the *faskh* was revoked when H tore up the *faskh* papers and reconciled with her. The reconciliation includes H taking J on a trip to India.⁸⁷ The Court held that J had succeeded in proving on a balance of probabilities that her marriage to H was intact at the time of H's death.⁸⁸ It must be noted here that the Court incorrectly applied Islamic law with regard to the *faskh*. It was not possible for the husband to have revoked as a *faskh* is irrevocable. H was therefore not married to J at the time of his death. J was therefore disqualified from inheriting as an intestate beneficiary in terms of Islamic law.⁸⁹ A further discussion on the issue of *faskh* is beyond the focus of this research.

H was also married to K at the time of his death. This caused the marriage between J and the H to be a polygynous one in terms of the judgment. This case is different to *Daniels v Campbell* where the Court held that the provisions of the Intestate Succession Act include a spouse to a monogamous marriage entered into in terms of Islamic law.⁹⁰ The Court in *Daniels v Campbell* specifically refrained from extending the operation of the Intestate Succession Act to polygynous marriages entered into in terms of Islamic law. This was also because the facts before the Court were regarding a monogamous marriage and not a polygynous one.

However, the Western Division of the Cape High Court held in *Hassam v Jacobs, inter alia*, that the continued exclusion of spouses married in polygynous Islamic marriages from the Intestate Succession Act would be unfairly discriminatory against them.⁹¹ The Western Cape Division of the High Court declared that the word "spouse" as used in the Intestate Succession Act includes a surviving partner to a polygamous Muslim marriage.⁹² Both J and K were declared spouses for purposes of the Intestate Succession Act. Section 1(4)(f) of the Intestate

⁸³ The Acts did however recognise surviving spouses who were married to their deceased husbands in terms of monogamous Muslim marriages. See (n 51).

⁸⁴ See (n 79) para 3.

⁸⁵ *ibid* para 4.

⁸⁶ *ibid* para 5.

⁸⁷ *ibid* para 2.

⁸⁸ *ibid* para 8.

⁸⁹ See (n 75) for a further discussion on this issue.

⁹⁰ See (n 62) and (n 51).

⁹¹ See (n 79) para 19.

⁹² *ibid* para 23.

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.⁹³ The order was referred to the Constitutional Court for confirmation,⁹⁴ which was confirmed by the Constitutional Court with minor variations.

H leaves behind two widows (in terms of this judgment), three sons, and seven daughters.⁹⁵ A comparison is now made of how the net estate of H would be distributed in terms of Islamic law and then how it would be distributed in terms of South African law. Two of the three sons in the scenario were conceived out of the wedlock.⁹⁶ 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. 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. 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 1987.⁹⁷ 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 the wedlock. They were, therefore, not disqualified.⁹⁸ The issue of the surviving spouses is also problematic as far as J is concerned. Even though J 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 H 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 H had predeceased him. This assumption is made in order to present a discussion as to how the estate must be distributed according to 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 Section 18(3) of the Administration of Estates Act 66 of 1965.⁹⁹ 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

⁹³ *ibid.*

⁹⁴ *ibid.*

⁹⁵ 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 H. It has however been confirmed that he had one son and two daughters born from his marriage with I. See (n 75) 187.

⁹⁶ See (n 79) para 23; *Hassam v Jacobs* (n 52) para 173; and (n 75) 173.

⁹⁷ Intestate Succession Act (n 49).

⁹⁸ See (n 75) 173.

⁹⁹ 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 (n 65).

R144000.00.¹⁰⁰ 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 $7/72$. K 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 $R14\ 000.00$.¹⁰¹ The two sons are disqualified 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 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.¹⁰² 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 $R144\ 000.00 \div 12 = R12\ 000.00$. J, K, 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 ($R144\ 000 \div 12 = R72\ 000.00$ in terms of the Intestate Succession Act 81 of 1987, if there are no other claims against the estate. It is interesting to note that the children are all totally excluded from inheriting in this example and that their situation is more favourable in terms of Islamic law as far as succession law is concerned. It is also interesting to note that that K (in her capacity of a surviving spouse) inherits more favourably in terms of South African law.

¹⁰⁰ 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.

¹⁰¹ See (n 31) (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-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."

¹⁰² 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 (n 65).

C. Faro v Bingham NO (2013)

This case concerned a deceased Muslim male (hereafter called “L”) who died intestate.¹⁰³ L married his wife (hereafter called “M”) in terms of Islamic law on 28 March 2008. The couple had problems and M wanted a divorce. L issued M with a revocable divorce in the form of a talaq on 24 August 2009.¹⁰⁴ L was diagnosed with lung cancer during 2009.¹⁰⁵ L died on 4 March 2010. N was appointed as the executrix of the deceased estate. A dispute arose concerning whether L was married to M when he died. M argued that she was married to L when he died. She argued that the divorce was revoked during the waiting period as she had sexual relations with L during that time. The Islamic scholars have differed in their opinion as to whether sexual relations would revoke a divorce in Islamic law. Sexual relations do not revoke a divorce in terms of, for example, the *Shaa fi’ee* school.¹⁰⁶ 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 L and M when M died. The Muslim Judicial Council (SA) issued a certificate and two subsequent letters regarding this matter. The last letter issued by the Muslim Judicial (SA) stated that the marriage had not been revoked during the waiting period. It could be argued that the opinion of the institution was based on the *Shaa fi’ee* school. M was therefore not a surviving spouse according to the Muslim Judicial Council (SA).¹⁰⁷ The Master of the High Court was also of the view that M was not married to L when he died.¹⁰⁸

The decision of the Master of the High Court was taken on appeal to the Western Cape Division 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.¹⁰⁹ The Western Cape Division of the High Court overruled the final decision of the Muslim Judicial (SA) as well as the decision of the Master of the High Court. It held that the marriage between L and M was intact at the time that L died. M was therefore declared to be the spouse of L for purposes of the Intestate Succession Act 81 of 1987.¹¹⁰

L died leaving behind M, a major son, a major daughter, a minor son conceived in wedlock, and a minor son conceived out of wedlock.¹¹¹ 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

¹⁰³ See *Faro v Bingham NO & Others* (ZAWHC) unreported case no 4466/13 (25 October 2013) para 4. See also Muneer Abduroaf, ‘An Analysis of the Consequences of an Islamic Divorce in Light of the Faro v Bingham and Others judgment’ (2019) *Without Prejudice*, 19 (9), 31 - 32 where I discuss the consequence of Islamic divorce in light of this case.

¹⁰⁴ See *ibid* paras 3-4.

¹⁰⁵ *ibid* para 4.

¹⁰⁶ See S Al Sharbeene, *Mughnee Al Muhtaaj Ilaa Ma’rifah Ma’aanee Alfaadh Al Minhaaj* (2nd ed, Daar Al Ma’rifah 2004) vol 3, 441; and W Al Zuhaylee, *Al Fiqh Al Islaamee Wa Adillatuhoo* (3rd ed, Daar Al Fikr 1989) vol 7, 465.

¹⁰⁷ See W Amien, ‘The Viability for Women’s Rights of Incorporating Islamic Inheritance Laws into the South African Legal System’ (2014) in M De Waal and M Paleker, *South African Law of Succession and Trusts - The Past Meeting the Present and Thoughts for the Future* (Juta 2014) 216.

¹⁰⁸ See (n 103) para 16.

¹⁰⁹ *ibid* para 4.

¹¹⁰ *ibid* para 47(a).

¹¹¹ *ibid* paras 2 and 5.

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 1965.¹¹² 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 000.00.¹¹³ The Islamic law beneficiaries in this scenario would be the two sons, a daughter and M. The minor son conceived out of wedlock would be disqualified from inheriting in terms of Islamic law. The widow (M) would inherit 1/8 and the remaining 7/8 would be shared between the two sons and one daughter.¹¹⁴ The sons would each inherit double the share of the daughter. M 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 (M) would inherit the greater of a child's share or R125 000.00.¹¹⁵ M 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. It can clearly be seen that the two legal systems operate quite differently in the event where intestate laws find application. It should be noted that the surviving spouse (M) in this scenario inherits more favourably in terms of South African law.

V. CONCLUSIONS

This article analysed the right of South African Muslims married in terms of Islamic law to inherit in terms of South African law as a result of the Constitutional developments and judicial interpretation of statutes. A marriage concluded in terms of Islamic law was not initially

¹¹² 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 (n 65) s 18(3). 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 (n 65).

¹¹³ 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.

¹¹⁴ See (n 31) (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. 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."

¹¹⁵ 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 (n 65).

recognised in South Africa. However, this position changed after the promulgation of the new Constitution in 1996, which recognised and enforced religious freedom in personal matters. As a result of the developments in the case law and contextual interpretation of the existing statutes by the South African courts, Islamic marriages (both monogamous and polygamous) are now recognised for the purpose of application of a number of South African laws that deal with the matrimonial consequences.

The analysis of South African law shows that the principle of freedom of testation can be used by a Muslim testator or testatrix to execute an Islamic will in order to ensure that his or her estate devolves in terms of the Islamic law of succession upon his or her demise. This would also ensure that a surviving spouse would inherit his or her share in terms of Islamic law. However, it does become complicated where the interpretation of the Islamic will is concerned. This has been seen in the case of *Moosa v Harnaker* and the issue concerning renunciation which is foreign to the Islamic law of succession. It is, therefore, recommended that an Islamic will should clearly state that the interpretation and application of the will should be in terms of Islamic law.

The analysis of decided cases also shows that there have been a number of judgments handed down by the South African civil courts that had the effect of recognising Islamic marriages for purposes of the Intestate Succession Act 81 of 1987. The analysis of the decided cases reveals that the South African law is more favourable for the surviving spouses in terms of their eligible share as compared to the Islamic law of succession. The problem with this current legal situation is that if a surviving spouse takes advantage of the current favourable share under the South African law, it means that he or she is depriving some other beneficiary from inheriting his or her share in terms of the Islamic law of succession. It is, therefore, recommended that South African Muslims should execute Islamic wills if they would want their estates to devolve in terms of the Islamic law of succession upon their demise. It should be noted that nothing in the South African law prevents a Muslim (or anyone for that matter) from making a gift in favour of his or her spouse (or anyone for that matter) during his or her lifetime. This could be used as option where a need present to favour a particular person. I would also suggest that the South African government should consider enacting legislation that gives effect to the Islamic law of succession as not all South African Muslims are in a position to draft and execute Islamic wills. This would also be in line with s 15(3) of the South African Constitution which allows for the enactment of legislation that governs “systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.” I would further recommend and encourage Islamic institutions within the South African context (in the absence of legislation that automatically gives effect to the Islamic law of succession) to make use of the weekly Friday sermons to educate the Muslim community of the various options available to them in order to ensure that their estates devolve in terms of the Islamic law of succession upon their demise.