



Addressing Inheritance and Divorce Disputes in Deathbed Situations: A *Maslahah*-Based Study of South Africa's Muslim Minority

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Abstract

South Africa features a blend of legislative regulations, customary laws, and evolving legal principles. This dynamic becomes especially complex for the small Muslim community, which must also adhere to Islamic Law, particularly in matters of inheritance distribution. Currently, South African legal references regarding inheritance under Islamic law are limited. This article seeks to analyze a specific inheritance case in which a husband, on his deathbed, has two wives, a son, and a daughter. The first wife was divorced while he was on his deathbed, and during this period, he married another woman before ultimately passing away. In his will, the husband stipulated that the estate should be distributed according to Islamic law, thus entitling his legitimate wife to inheritance. This study employs descriptive qualitative research using scenario-thinking methods to explore potential future outcomes for which no legal precedent exists. In analyzing this case, the concept of public interest (*maslahah*) emerges as a relevant theory aligned with the principle of justice. Various scholarly opinions from Islamic legal schools were also utilized in the analysis. The article recommends that the South African Muslim Judicial Council prioritize *maslahah*, proposing that both wives share 3/24 of the estate, the son receive 14/24, and the daughter receive 7/24. Although this decision has not yet been formally recognized in Islamic law, it can be viewed as an act of independent reasoning (*ijtihad*) based on the principle of justice through the approach of public interest without specific textual evidence (*maslahah mursalah*). Additionally, rationalized public interest (*maslahah ma'qul al-ma'na*) was applied to allocate inheritance to the first wife, acknowledging her extended time with the deceased husband.

Keywords: Inheritance, *Maslahah*, Deathbed, Marriage, Divorce.

Abstrak

Afrika Selatan memiliki perpaduan antara peraturan legislasi, hukum adat, dan prinsip-prinsip hukum yang terus berkembang. Dinamika ini menjadi semakin kompleks bagi komunitas Muslim yang kecil, yang juga harus mematuhi hukum Islam, terutama dalam hal pembagian warisan. Saat ini, referensi hukum di Afrika Selatan mengenai warisan berdasarkan hukum Islam masih terbatas. Artikel ini bertujuan untuk menganalisis kasus warisan spesifik di mana seorang suami, di penghujung hayatnya, memiliki dua istri, seorang putra, dan seorang putri. Istri pertama diceraikan saat dia berada di tempat tidur sakit, dan selama periode ini, dia menikahi wanita lain sebelum akhirnya meninggal. Dalam wasiatnya, sang suami menyatakan bahwa harta warisannya harus dibagikan menurut hukum Islam, sehingga istri yang sah berhak mendapatkan warisan. Penelitian ini menggunakan metode penelitian kualitatif deskriptif dengan pendekatan pemikiran skenario untuk mengeksplorasi kemungkinan hasil di masa depan di mana tidak ada preseden hukum yang ada. Dalam menganalisis kasus ini, konsep *maslahah* (kepentingan publik) muncul sebagai teori relevan yang sejalan dengan prinsip keadilan. Berbagai pendapat dari para sarjana dari sekolah-sekolah hukum Islam juga digunakan dalam analisis ini. Artikel ini merekomendasikan agar Majelis Ulama Muslim Afrika Selatan mengutamakan *maslahah*, dengan mengusulkan agar kedua istri membagi 3/24 dari harta warisan, sang putra menerima 14/24, dan sang putri menerima 7/24. Meskipun keputusan ini belum secara formal diakui dalam hukum Islam, keputusan ini dapat dipandang sebagai tindakan *ijtihad* (penalaran independen) yang berdasarkan pada prinsip keadilan melalui pendekatan *maslahah mursalah* (kepentingan publik tanpa bukti teks tertentu). Selain itu, *maslahah ma'qul al-ma'na* (kepentingan publik yang dirasionalisasi) diterapkan untuk mengalokasikan warisan kepada istri pertama, mengakui waktu yang lebih lama yang dihabiskan bersama suami yang meninggal.

Kata Kunci: Harta Waris, Kemaslahatan, Menjelang Ajal, Pernikahan, Perceraian.



Introduction

The laws of inheritance and divorce in Islam are essential for upholding social justice and stability within family structures.¹ Decisions concerning the distribution of property and marital status not only influence individual rights but also significantly impact community harmony. Within Islamic law, the allocation of inheritance and determination of marital status are rigorously regulated to ensure that each family member's rights are honored according to religious guidelines.² However, complexities often arise during critical life events, such as marriage or divorce, particularly in end-of-life situations where emotional strain and time constraints can lead to conflicts among family members.³

In these situations, decisions about divorce or changes in marital status at the time of death can profoundly affect the inheritance rights of spouses or other family members. This issue is further complicated for Muslim minority communities, such as those in South Africa, who must navigate the intersection of Islamic law and national law, which may not align in areas of inheritance and divorce.⁴ Additionally, cultural and social factors within these minority communities add complexity to decision-making in critical situations such as end-of-life circumstances.⁵

Amidst this complexity, the principle of public interest (*maslahah*) offers a benefit-based approach that can be used to resolve conflicts by balancing the interests of individuals and families.⁶ In the specific case discussed, the husband divorced his first wife while he was seriously ill and married a second wife shortly before his death, with both events occurring just days apart. However, applying *maslahah* within the context of Muslim minorities in South Africa remains an underexplored area in the literature.

Recent research by Abduroaf (2023) analyzed Islamic inheritance or succession law (terms used interchangeably in this article) in South Africa, highlighting the disqualification of non-Muslim widows from inheriting intestate estates and raising constitutional concerns regarding religious discrimination.⁷ Gabru's (2022) research found that Islamic succession law in South Africa allows Muslims to apply inheritance rules through a valid will, with shares

¹ Zaini Nasohah, "Dynamics of Islamic Family Law in Facing Current Challenges in Southeast Asia," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 8, no. 1 (January 6, 2024): 1, <https://doi.org/10.22373/sjkh.v8i1.16553>; Syabbul Bachri et al., "Contextualizing Islamic Inheritance Law in Indonesia: Addressing Negative Stigma," *Ulul Albab: Jurnal Studi Dan Penelitian Hukum Islam* 7, no. 2 (May 3, 2024): 170, <https://doi.org/10.30659/jua.v7i2.35041>.

² Mohammad Fadel, "Shari'a, Justice and Legal Order . By Rudolph Peters," *Journal of Islamic Studies* 34, no. 1 (January 1, 2023): 98–100, <https://doi.org/10.1093/jis/etac049>.

³ Sita Hidayah, "From Unity in Diversity to Culture Wars? Aceh Women's Mastery over Adat, Islam, and the State Inheritance Laws," *Women's Studies International Forum* 103 (March 2024): 102881, <https://doi.org/10.1016/j.wsif.2024.102881>.

⁴ Wesahl Domingo, "Muslim Personal Law in South Africa: 'Until Two Legal Systems Do Us Part or Meet?,'" *Obiter* 32, no. 2 (September 8, 2021), <https://doi.org/10.17159/obiter.v32i2.12262>.

⁵ Xue-Ping Lu, Li Xu, and Jin-Jun Wang, "Mode of Inheritance for Pesticide Resistance, Importance and Prevalence: A Review," *Pesticide Biochemistry and Physiology* 202 (June 2024): 105964, <https://doi.org/10.1016/j.pestbp.2024.105964>; Bina Agarwal and Shruthi Naik, "Do Courts Grant Women Their Inheritance Shares? An Analysis of Case Law in India," *World Development* 182 (October 2024): 106688, <https://doi.org/10.1016/j.worlddev.2024.106688>.

⁶ Serdar Kurnaz, "The Search for Originality within Established Boundaries—Rereading Najm Al-Dīn Al-Tūfī (d. 716/1316) on Public Interest (Maṣlaḥa) and the Purpose of the Law," *Religions* 14, no. 12 (December 8, 2023): 1522, <https://doi.org/10.3390/rel14121522>.

⁷ Muneer Abduroaf, "An Analysis of Difference of Religion as A Disqualification from Inheriting in Terms of the Islamic Law of Succession: A South African Case Study," *Obiter* 44, no. 3 (October 10, 2023), <https://doi.org/10.17159/obiter.v44i3.16963>.

determined by the Qur'an, allowing for the bequest of one-third of the estate.⁸ Additionally, in 2022, Abduroaf explained that Islamic succession law in South Africa mandates estate distribution in accordance with Islamic principles, requiring a valid will that complies with the Wills Act 7 of 1953.⁹ In earlier research (2018), Abduroaf also addressed gender inequality in estate divisions in South Africa, finding that Islamic succession law generally mandates unequal shares, with sons receiving twice as much as daughters, raising concerns about gender discrimination within the framework of constitutional equality.¹⁰ Sungay (2023) further emphasized that Islamic succession law in South Africa adheres to sharia principles in the distribution of inheritance, ensuring compliance with both Islamic teachings and the local legal system.¹¹

This study aims to identify and analyze the dynamics of conflict related to divorce and inheritance in deathbed situations within minority Muslim communities in South Africa. By examining the patterns and underlying causes of these conflicts, this research seeks to provide comprehensive insights into the social, legal, and emotional factors that influence decision-making during critical periods. Additionally, it will investigate the application of the *maslahah* principle as a normative framework for resolving such conflicts, ensuring that decisions are not only in line with Islamic law but also consider the public good and justice for all involved parties.

This research seeks to deepen the understanding of the interaction between the two legal systems in South Africa, especially in scenarios requiring prompt legal decisions under emotional stress. Moreover, the findings are expected to benefit minority Muslim communities in South Africa and other nations with similar legal structures. By proposing practical, Islamic law-compliant solutions to address inheritance and divorce disputes, this research aims to empower the community with knowledge and tools to navigate challenging situations effectively. Ultimately, this research not only contributes to the field of Islamic law but also fosters social cohesion and the sustainability of family relationships within the community.

Method

This research employs a descriptive qualitative methodology, utilizing the scenario-thinking method as a forecasting tool to enhance understanding of complex social phenomena that may emerge in the future. These phenomena are particularly pertinent to Islamic law, specifically concerning inheritance law in South Africa, where the legal framework is well-defined. By applying the scenario-thinking method,¹² this study seeks to elucidate potential developments and examine how the law can be applied to achieve fair and harmonious

⁸ Naeema Gabru, "The Applicability of the Islamic Law of Succession in South Africa," *Obiter* 26, no. 2 (September 13, 2022), <https://doi.org/10.17159/obiter.v26i2.14755>.

⁹ Muneer Abduroaf, "An Analysis of the Application of S 4a of the Wills Act 7 of 1953 with Regard to Muslims Married Within the South African Context," *Obiter* 43, no. 2 (July 6, 2022), <https://doi.org/10.17159/obiter.v43i2.14279>.

¹⁰ Muneer Abduroaf, "The Impact of the South African Law of Succession and Administration of Estates on South African Muslims," *Jurnal Syariah* 27, no. 2 (August 30, 2019): 321–66, <https://doi.org/10.22452/js.vol27no2.6>.

¹¹ Mohamed Hoosain Sungay, "Do Women Face Discrimination under the Islamic Law of Succession? An Examination of the Male-Preferential 2:1 Rule of Inheritance," *Law, Democracy and Development* 27 (November 8, 2023): 450–69, <https://doi.org/10.17159/2077-4907/2023/ldd.v27.17>.

¹² Michael Stauffacher, "Scenario," in *Elgar Encyclopedia of Interdisciplinarity and Transdisciplinarity* (Edward Elgar Publishing, 2024), 450–54, <https://doi.org/10.4337/9781035317967.ch100>; David Sarpong, "Towards a Methodological Approach: Theorising Scenario Thinking as a Social Practice," ed. Senem Göl Beşer, *Foresight* 13, no. 2 (April 12, 2011): 4–17, <https://doi.org/10.1108/14636681111126210>.

decisions. The primary data sources for this research include existing South African laws, analyzed to identify potential legal gaps that may affect inheritance distribution in cases of death. Additionally, literature from classical *fiqh* texts, such as Wahbah Zuhaili's *Kitāb al-Fiqh al-Islāmī wa Adillatuhu*, is reviewed. The resulting data is then analyzed using *maslahah* theory to illustrate the concept of justice concerning family interests.

Inheritance distribution under South African law and Islamic law

The primary legal framework for inheritance in South Africa is established by the *Intestate Succession Act* (Act 81 of 1987), which governs the distribution of estates for individuals who die intestate.¹³ This Act outlines a hierarchy of heirs, prioritizing spouses and children, ensuring that the deceased's estate is equitably distributed among surviving family members. These provisions are further supported by the *Wills Act* (Act 7 of 1953), which specifies the formal requirements for creating a valid will, thus enabling individuals to determine the posthumous distribution of their assets. Additionally, customary law in South Africa is acknowledged by the Constitution, which mandates that customary law aligns with the principles of equality and human rights.

The division of inheritance in South Africa reflects a complex interplay between legislation, customary practices, and evolving legal principles. The country's inheritance laws are primarily influenced by Roman-Dutch law, which has been adapted to reflect the diverse cultural practices and rights of South Africa's communities. This adaptation is particularly notable within customary law, as the South African Constitution requires that such practices conform to constitutional principles, particularly regarding equality and human rights.¹⁴

One of the landmark cases influencing South African inheritance law was the Constitutional Court's decision in *Bhe v. Magistrate Khayelitsha and Others*, which challenged the male primogeniture rule that prioritized male heirs and thus conflicted with women's equality rights as enshrined in Section 9 of the South African Constitution. This ruling overturned the male primogeniture rule and underscored the need for inheritance laws that reflect contemporary values of equality and non-discrimination. This decision has facilitated a more equitable distribution of inheritance, enabling greater inclusion of women and marginalized groups.¹⁵

Inheritance disputes often arise within complex family structures, such as those involving multiple marriages or children from different relationships. A significant challenge in these cases is the perception of fairness among heirs. For instance, children from a first marriage may feel disadvantaged if they receive a smaller inheritance than children from a second marriage, potentially leading to family conflicts, especially where family relationships are strained. In addition, the legal system may not adequately protect the rights of wives in second marriages, leaving them vulnerable in inheritance disputes. Consequently, competition for inheritance shares among children from different marriages often necessitates mediation to resolve conflicts.¹⁶

¹³ EVADNÉ GRANT, "Human Rights, Cultural Diversity and Customary Law In South Africa," *Journal of African Law* 50, no. 1 (April 3, 2006): 2–23, <https://doi.org/10.1017/S0021855306000039>.

¹⁴ Dial Dayana Ndima, "The Shape and Content of Post-Apartheid African Law: Academic Scholars in Conversation," *Obiter* 38, no. 1 (April 1, 2017), <https://doi.org/10.17159/obiter.v38i1.11501>.

¹⁵ GRANT, "Human Rights, Cultural Diversity and Customary Law In South Africa"; Aninka Claassens, "Recent Changes in Women's Land Rights and Contested Customary Law in South Africa," *Journal of Agrarian Change* 13, no. 1 (January 12, 2013): 71–92, <https://doi.org/10.1111/joac.12007>.

¹⁶ Selamat Lumban Gaol, "Division of Inheritance and Will: First Marital Children, Second Marital Wife (Literature Legal Review)," *Journal of Law, Politic and Humanities* 4, no. 3 (April 15, 2024): 258–67,

Socio-economic factors also play a critical role in inheritance disputes. South Africa's history of inequality and persistent poverty continues to influence family dynamics and the challenges surrounding inheritance distribution. Economic pressures may heighten conflicts over inheritance, with some individuals prioritizing financial gain over family harmony.¹⁷ This context calls for a comprehensive approach to inheritance law that considers the socio-economic realities faced by South African families.

The implementation of inheritance distribution under Islamic law presents additional complexities due to the interaction between Islamic legal principles, South African statutory law, and the cultural context in which these laws operate. One of the primary challenges is the lack of a cohesive legal framework that fully addresses the nuances of Islamic inheritance within South Africa's broader legal system. While Islamic law provides clear guidelines on inheritance distribution, South African law, rooted in Roman-Dutch principles, often contradicts these guidelines, creating confusion and disputes among heirs.

A key issue is the recognition of Islamic wills and the validity of inheritance claims under Islamic law. The Wills Act (Act 7 of 1953) governs the creation and execution of wills in South Africa but does not specifically accommodate Islamic inheritance practices. As a result, wills that do not meet the formal requirements of the Wills Act may be invalidated, even if they are considered valid under Islamic law.¹⁸ Consequently, heirs may face legal uncertainty and may be unable to claim their rightful inheritance due to procedural inconsistencies.

Furthermore, Islamic inheritance principles, which emphasize equitable distribution among heirs, may conflict with customary practices that prioritize male heirs over female heirs. This tension is particularly evident in societies where traditional norms maintain strong influence. While the South African Constitution upholds gender equality, the application of Islamic inheritance law can sometimes perpetuate gender disparities, especially when customary law is also involved.¹⁹ The challenge lies in harmonizing these distinct legal frameworks to ensure that all heirs, regardless of gender, receive their rightful inheritance.

The treatment of non-Muslim heirs in Islamic inheritance cases also presents a significant challenge. Traditional Islamic law restricts the inheritance rights of non-Muslims, which can lead to conflicts when the deceased has both Muslim and non-Muslim heirs. The absence of clear legal guidelines for these cases often necessitates judicial intervention, further complicating the inheritance process. This issue is compounded by the growing prevalence of interfaith marriages, which introduces additional challenges in the practice of Islamic inheritance. In cases where a Muslim individual marries a non-Muslim, the inheritance rights of the non-Muslim spouse and children may become contentious. Without explicit legal provisions addressing these circumstances, families may face prolonged legal disputes and emotional strain. Accordingly, further research using scenario-based methods within an Islamic legal framework is essential to expand knowledge on inheritance practices in South

<https://doi.org/10.38035/jlph.v4i3.346>.

¹⁷ Karl von Holdt, "South Africa: The Transition to Violent Democracy," *Review of African Political Economy* 40, no. 138 (2013), <https://doi.org/10.1080/03056244.2013.854040>.

¹⁸ Riyadh Moosa and Ben Marx, "Customer Selection Criteria: Islamic Banks in South Africa," *International Journal of Professional Business Review* 8, no. 7 (July 25, 2023): e02387, <https://doi.org/10.26668/businessreview/2023.v8i7.2387>.

¹⁹ Muneer Abduroaaf, "A Constitutional Analysis of an Islamic Will within the South African Context," *De Jure Law Journal* 52, no. 1 (2019), <https://doi.org/http://dx.doi.org/10.17159/2225-7160/2019/v52a16>; Wondale Temesgen Tedla and Kasahun Desyalew Mekonen, "Inheritance-Induced Familial Disputes in North-West Ethiopia: The Role of Legal-Policy Gaps and Aggravating Socio-Economic Dynamics," *Humanities and Social Sciences Communications* 10, no. 1 (March 8, 2023): 92, <https://doi.org/10.1057/s41599-023-01558-5>.

Africa. This approach can enhance understanding of inheritance distribution, provide insights into potential legal developments, and support the equitable and harmonious application of inheritance law within South Africa's multicultural context.

Inheritance distribution in deathbed marriages and divorces in South Africa with the scenario thinking method

This article examines a hypothetical scenario in which X married Aamina in Cape Town according to Islamic law on 10 January 1990. The couple had two children: a son born in 1992 and a daughter born in 1993. On 10 January 2023, X was diagnosed with a terminal illness, with a medical professional estimating that he had approximately 20 days to live. Following this diagnosis, X had an altercation with Aamina, which resulted in him issuing a triple divorce. This divorce led to the immediate dissolution of their marriage on 20 January 2023, with X intending to disinherit Aamina. On 25 January 2023, X engaged in an extensive discussion with a close university friend, Faatima, who came to visit him. This visit concluded with X entering into an Islamic marriage with Faatima on the same day. However, this marriage was short-lived, as X passed away on 30 January 2023.

X executed an Islamic will on 1 January 2023. The will stipulates that his estate must be administered in accordance with the Islamic law of succession. It further states that an Islamic Distribution Certificate issued by the Muslim Judicial Council of South Africa (MJC-SA), indicating his Islamic law beneficiaries at the time of his death, shall be binding upon his estate. The MJC-SA, established in 1954, is one of the oldest Islamic institutions in the country. The Council comprises various departments, including the Fatwa Department, which is responsible for issuing Islamic Distribution Certificates.²⁰ X left behind a net estate valued at R240,000. At the time of his death, both of X's parents were deceased, and his beneficiaries included Aamina (the divorced wife), Faatima (the current wife), and his two children, all of whom are Muslim. X had no other relatives. This article addresses three key issues: (a) whether Aamina could inherit from X despite the Islamic divorce; (b) whether Faatima could inherit from X based on their Islamic marriage; and (c) the inheritance status of both Aamina and Faatima within the South African legal context. The article concludes with a comprehensive analysis of the findings and recommendations on how the Islamic law of succession can be integrated into the South African legal framework.

Aamina's inheritance from X despite the divorce

X married Aamina in accordance with Islamic law on January 10, 1990. It is noted that X issued Aamina a triple divorce (*talaq*) on January 20, 2023, following a diagnosis of a terminal illness, with a medical prognosis estimating a life expectancy of 20 days. The question that must be addressed is whether Aamina is disqualified from inheriting as a compulsory beneficiary due to the Islamic divorce. In this context, the estate of a deceased person, according to Islamic law, is categorized into three distinct parts: (1) the gross estate (the estate before any deductions); (2) the net estate (the estate after all liabilities have been deducted); and (3) the remainder of the net estate (the estate after all liabilities and optional bequests have been deducted). Optional bequests may be allocated to designated beneficiaries, but such bequests must not exceed one-third of the net estate. The remaining two-thirds (if the entire one-third is utilized for optional bequests) must be distributed in accordance with the law of

²⁰ MJC, "History of the Muslim Judiciary Council," 2023, <https://mjc.org.za/about-mjc/history/>.

compulsory succession to the compulsory beneficiaries.²¹

A divorce issued by a husband can be classified as either revocable or irrevocable under Islamic law. If the divorce was revocable at the time of the husband's death, the divorced wife is entitled to inherit a specified percentage of his estate as a compulsory beneficiary. Conversely, if the divorce was irrevocable at the time of his death, the divorced wife is disqualified from inheriting as a compulsory beneficiary. In cases where a husband has issued a divorce for the first or second time, the divorce remains revocable throughout the waiting period (*iddah*). Once this *iddah* concludes, the divorce becomes irrevocable. Furthermore, if a husband issues a triple divorce, or a third divorce, it is considered irrevocable from the moment it is issued. As previously mentioned, X issued Aamina a triple divorce, thereby rendering it irrevocable.

According to Islamic marriage law, a husband is permitted to issue a divorce to his wife a maximum of three times. Generally, the divorce may be revoked after the first and second occurrences, provided that the *iddah* has not elapsed. Once the *iddah* has passed, the divorce becomes irrevocable. A divorce issued by a husband becomes irrevocable immediately upon the third issuance. It is important to note that the *iddah* typically lasts for three menstrual cycles or three months. Further discussion on this matter is beyond the scope of this article.

In the chapter al-Imron [2]:229-232, as translated by Hilali and Khan, it is stated: "The divorce is twice; after that, either you retain her on reasonable terms or release her with kindness. It is not lawful for you (men) to take back any of your *mahr* (bridal money given by the husband to the wife at the time of marriage) that you have given them, except when both parties fear that they would be unable to maintain the limits ordained by Allah (e.g., to treat each other fairly). If you fear they cannot uphold these limits, there is no sin on either party if she returns the *mahr* or part of it in exchange for her divorce (*al-khul'*). These are the limits ordained by Allah; do not transgress them. Those who transgress the limits ordained by Allah are indeed wrongdoers. If he has divorced her for the third time, she is not lawful unto him thereafter until she has married another husband. If the other husband subsequently divorces her, there is no sin on both parties if they reunite, provided they feel they can uphold the limits ordained by Allah. These are the limits of Allah, which He clarifies for those who possess knowledge. When you have divorced women and they have fulfilled their prescribed *iddah*, either take them back on reasonable terms or set them free on reasonable terms. Do not take them back to harm them; whoever does so wrongs himself. Do not treat the Verses (Laws) of Allah as a jest. Remember Allah's favors upon you (i.e., Islam) and that which He has sent down to you in the Book (i.e., the *Qur'an*) and *al-Hikmah* (the Prophet's *sunnah* – legal ways – Islamic jurisprudence, etc.) through which He instructs you. Fear Allah and know that He is All-Aware of everything. When you have divorced women and they have completed their *iddah*, do not prevent them from marrying their (former) husbands if they mutually agree on reasonable terms. This instruction serves as an admonition for those among you who believe in Allah and the Last Day. It is more virtuous and purer for you. Allah knows, and you do not know."

It is important to note that X issued Aamina an irrevocable divorce after being informed by a physician that he had only 20 days left to live (referred to as a deathbed divorce). Islamic scholars have differing opinions on whether an irrevocably divorced wife is entitled to inherit from her ex-husband's estate if the divorce was issued during his final days. The first

²¹ Muneer Abduroaaf and Najma Moosa, "Islamic Mode of Estate Distribution in South Africa" (Jordan: Jordan Publishing LexisNexis, 2016), <https://uwcscholar.uwc.ac.za/items/8122b189-9208-4d69-b3e9-c6cd397b53ea>.

perspective is found within the Shafii school of law, which asserts that the divorced wife should not inherit as a surviving spouse due to the irrevocable nature of the divorce, even if it occurred during his terminal illness.²² Conversely, the Hanafi school of law argues that the divorced wife should inherit despite the issuance of an irrevocable divorce during his final days.²³ Consequently, Aamina would not be entitled to inherit according to the Shafii perspective but would be entitled to inherit according to the Hanafee perspective. The will executed by X states that the MJC-SA must issue an Islamic Distribution Certificate in accordance with Islamic law. The issue of which school of law should be adopted by the MJC-SA in this matter is explored later in this article.

Faatima's inheritance from X in accordance with Islamic marital laws

X married Faatima in accordance with Islamic law on January 25, 2023, following a diagnosis of terminal illness on January 10, 2023, with an estimated life expectancy of 20 days (referred to as a deathbed marriage). The marriage lasted for five days before X passed away. Islamic scholars have differing opinions regarding the validity of a deathbed marriage. The first perspective is found within the Shafii school of law, which asserts that a widow from a deathbed marriage should inherit as a surviving spouse. In contrast, the Maliki school of law holds that the widow of a deathbed marriage should not inherit as a surviving spouse. One justification provided by the Maliki school of law is that allowing the spouse to inherit would diminish the inheritance of the remaining beneficiaries of the estate.²⁴ Accordingly, Faatima would be entitled to inherit under the Shafii school of law but not under the Maliki school of law. This scenario, similar to the previous case involving Aamina, presents challenges for the MJC-SA in drafting an Islamic Distribution Certificate. The question of which school should be adopted by the MJC-SA in this context is addressed later in this article.

Aamina and Faatima's inheritance from X based on the distribution certificate

X's final will stipulates that his estate is to be distributed in accordance with Islamic law of succession and that an Islamic Distribution Certificate must be issued by the MJC-SA. In accordance with Islamic law, the certificate must identify X's beneficiaries. The MJC-SA faces a challenging situation regarding the issuance of the Islamic Distribution Certificate. Should they disqualify both Aamina and Faatima from inheriting as surviving spouses? Should they disqualify Aamina and qualify Faatima, or vice versa? Generally, the MJC-SA adopts opinions based on the Shafii school of law for all matters. In this case, that would imply that Aamina would not inherit while Faatima would. The MJC-SA may, however, consider opinions from other schools of law when circumstances warrant such an approach.²⁵

²² Wahbah al Zuhaili, *Al Fiqh Al Islaamee Wa Adillatuhu*, 3rd ed. (Damascus: Dar al-Fikr, 1989) Vol. 7, pp. 452-453.

²³ Zuhaili Vol. 7, pp. 452-453.

²⁴ Zuhaili Vol. 7, pp. 176-177.

²⁵ The following points should be noted regarding the Fatwa Committee of the MJC: "1.1 In principle, the MJC Fatwa Committee bases its decisions on the established position of the Shaafi'ee Madhhab; 1.2 When circumstances or the specific nature of a case warrants it, the committee may depart from the position of the Shaafi'ee Madhhab to consider the perspectives of any of the other Four Madhaahib; 1.3 In instances where the Shaafi'ee Madhhab does not provide a solution, the MJC will seek guidance from any of the Four Madhaahib; 1.4 Additionally, under specific circumstances, the MJC may advise the adoption of positions from outside the Four Madhaahib." The MJC Fatwa Committee notes in its fatwa regarding usufructs that "although the separation of usufruct from corpus in gifts that take effect posthumously is not supported by the Shaafi'ee, Hanafee, or Hanbalee schools, it is acknowledged that there is a social need to provide relief, particularly for widows." See Muslim Judicial Council Fatwa Department, "MJC Position of Succession Law and Related Matters" (2017), document on

If the Shafii school of law is strictly applied to the current scenario, Faatima would inherit 1/8, equivalent to 3/24 or R30,000; the son would inherit 14/24 or R140,000; and the daughter would inherit 7/24 or R70,000.²⁶ The disqualification of Aamina from inheriting appears unjust given the circumstances. In this instance, it is recommended that an alternative approach be taken regarding Aamina and Faatima's inheritance as surviving spouses of X. Based on the principle of "justice," which is integral to the broader objectives of Islamic law, it seems preferable for the MJC-SA to adopt the opinion found within the Hanafee school of law (among others), which would entitle Aamina to inherit as a surviving spouse, as well as the opinion within the Shafii school of law that would allow Faatima to inherit as a surviving spouse.²⁷ In this scenario, both surviving spouses would share the 1/8 of the net estate due to the polygynous nature of the situation.²⁸

If this approach is not pursued and a ruling is made according to the Shafii school of law concerning Aamina's disqualification from inheriting as a surviving spouse, it could result in Aamina challenging her disqualification in a South African secular court. A similar situation occurred in the 2019 case of *Faro v. Bingham*, which questioned the revocability of a divorce issued by a husband.²⁹ The MJC-SA opined that the divorce was not revoked, consistent with the Shafii school of law. The Master of the High Court accepted this ruling.³⁰ However, when

file with the author of this article.

²⁶ See Hilali, MT and Khan, MM 4:11-12 where it states that "Allah commands you as regard 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. 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."

²⁷ According to Imam Al Ghazali, Islamic law revolves around five objectives (*maqasid*), namely: the protection of faith, the protection of life, the protection of intellect, the protection of lineage and protection of property. See Kamali, MH 'Occasional Papers 13, Maqasid al-Shari'ah Made Simple' (2008) The International Institute of Islamic Thought: London, p. 11. Other scholars have expanded upon these objectives and included the objective of justice. Islamic rulings should therefore bring about justice. See Al-Qaradaawee, Y. *Madkhal li Dirasah al-Sharee'ah*. Maktabah Wahbah: Cairo. On p. 60 it discusses the expansion of the principles of shariah (*maqasid*). The objectives of Islamic law should be kept in mind when deciding upon the Islamic ruling applicable to a specific matter, based on the primary sources of Islamic law (the Qur'an and the Sunnah). This would be particularly important in the event where there is more than one opinion on a matter in terms of Islamic law. In the scenario at hand, it would not be deemed in the interest of justice that a surviving spouse who was the subject of a deathbed Islamic irrevocable divorce does inherit, whereas the surviving spouse who was subject to a deathbed Islamic marriage does not inherit. We therefore argue that both parties should inherit and share the 1/8 equally among them. This would be deemed more just.

²⁸ Multiple widows would equally share the 1/4 or 1/2 of the residue of the net estate in the event where they are all entitled to inherit

²⁹ Muneer Abduroaf, "The Consequences of an Islamic Divorce," *Without Prejudice* 19, no. 9 (2019), <https://www.withoutprejudice.co.za/free/article/6701/view>.

³⁰ See. *Faro v Bingham NO and Others* (4466/2013) [2013] ZAWCHC 159 (25 October 2013), paragraphs 4-7 where its states that "[4] It is common cause on the evidence before me, including expert evidence regarding the

the matter was subsequently appealed in the High Court, the Court followed the opinion that deemed the divorce to be revoked. Therefore, the ruling of a South African court remains uncertain regarding the disqualification of a person in Aamina's position. Ultimately, it is left to the South African courts to determine which opinion will be adopted based on the specific facts of the case.

Distribution of inheritance in deathbed cases viewed from a *maslahah* perspective

The marital relationship between X and Aamina, as the former wife, and Faatima, as the new wife, in a case involving marriage and divorce on the deathbed, reveals that Aamina lived with X in a marital bond for 33 years, while Faatima was married to X for only five days. The long-standing marriage between X and Aamina naturally resulted in shared marital property, recognized in Islamic jurisprudence as *syirkah abdan*—a marital partnership contract. The *syirkah abdan* contract occurs when two parties agree to enter into a partnership, either with equal shares or with differentiated portions between them.³¹ In this case, it could be argued that X and Aamina had established a *syirkah* or partnership in their marital assets for 33 years. This partnership implies that, upon divorce, the assets would need to be divided. Typically, shared property is split equally, following a 50:50 ratio. However, based on the principles of *syirkah abdan*, the division may not necessarily be equal, as there could be a differentiation in the shares allocated to the husband and wife.

In the hypothetical case of X, the inheritance distribution can proceed after the separation of shared marital assets between X and Aamina. Once the marital assets are divided, Aamina's share becomes her personal property, while X's share becomes part of his estate (*tirkah*) after

tenets of Islam, that the form of Talāq pronounced by Imam Saban was revocable during the so-called 'Iddah period. In the applicant's case, because she was pregnant the 'Iddah period expired when she gave birth to the child she was carrying. The predominant view in the Islamic religion is that the Talāq may be revoked not only by express words but by the resumption of sexual relations between the parties. The applicant avers that she and Moosa resumed intimacy shortly after 24 August 2009 and that no further Talāq was pronounced before Moosa died on 4 March 2010. [5] The fifth respondent in the present application is the Muslim Judicial Council ('the MJC'). The MJC is a private religious body. Its activities are not regulated by legislation. There is no evidence that it is vested with any special authority or jurisdiction under the tenets of Islam. It is nevertheless a body which among other things considers whether Islamic unions have been dissolved in accordance with Islamic rites. Naziema Bardien ('Bardien') is Moosa's adult daughter from an earlier marriage. She considered herself to have an interest in Moosa's estate. On 8 April 2010, and without the applicant's knowledge, Bardien obtained from the MJC a certificate declaring that the marriage between Moosa and the applicant had been annulled. This was presumably based on the Talāq pronounced by Imam Saban. [6] The applicant was appointed as executrix of Moosa's estate on 21 April 2010. She considered that she was Moosa's surviving spouse. In the light of the annulment certificate issued by the MJC, the Master (who is the seventh respondent) told the applicant that it would not be possible to wind up the estate until the dispute as to her marital status was resolved. During June 2010 the applicant made an affidavit concerning the post-Talāq reconciliation and also obtained corroborating affidavits from Tashrick and from a social worker, Esther Julius ('Julius'). These affidavits were presented to the MJC which on 29 July 2010 issued a letter stating that from new evidence it appeared that Moosa and the applicant were husband and wife at the time of his death. [7] After this development Bardien approached an attorney, Marjorie Bingham ('Bingham'), the first respondent in the present application. She wrote to the Master on 19 August 2010 attaching the annulment certificate of 8 April 2010 and asking for the removal of the applicant as executrix. Bingham was presumably unaware of the further letter issued by the MJC on 29 July 2010. Upon learning of this later development, Bingham approached Tashrick who made two further affidavits in which, among other things, he denied that there had been a reconciliation and stated that his previous 'affidavit' had been blank when he signed it and that he had been told it was needed to prove that Mujaid and Sharief were Moosa's children. Bingham presented Tashrick's further affidavits to the MJC which on 2 September 2010 issued a further letter withdrawing the letter of 8 April 2010 and confirming that the Talāq stood. Bingham forwarded the latest MJC letter to the Master."

³¹ Zakaria al Anshari, *Fath Al-Wahhab* (Beirut: Dar al-Fikr, 1993) pp. 255.

his death. This estate will be used to cover the expenses related to X's death, settle his debts, and fulfill his bequests. After all these obligations are fulfilled, the remaining assets from X's estate will become the inheritance to be distributed among his heirs.

From the perspective of public interest (*maslahah*) according to Al-Ghazali, there are benefits whose legitimacy or invalidity are not, or have not yet been, accommodated by Islamic law.³² The consideration of inheritance distribution between the two women involved in the marriage and divorce on the deathbed should be taken into account when deciding the inheritance distribution in the hypothetical case of X. Although religious texts (*nash*) may explicitly accommodate *maslahah* by prioritizing inheritance distribution solely to Faatima as the lawful wife at the time of X's death (*maslahah al-mu'tabarah*), it is essential to recognize that among the various forms of public interest (*maslahah*), there are those not explicitly addressed by Islamic law, referred to by scholars as *maslahah mursalah*. One example is the consideration of granting a share of the inheritance to Aamina. This reflects a *maslahah* that can be clearly understood by reason (*maslahah ma'qul al-ma'na*),³³ namely fair treatment toward Aamina, who had spent many years of her life as X's wife. This theory of *maslahah* should serve as the foundation for the decision to distribute the inheritance between the two women (Aamina and Faatima), acknowledging both as individuals who played active roles in the marriage and the divorce on the deathbed.

Conclusion

This article examined the hypothetical situation of X, who died leaving behind a net estate of R240,000, an Islamic will, two wives (one whom he divorced while on his deathbed with the intention to disinherit her, and the other whom he married while also on his deathbed), and two children. The findings show that the situation is quite complex regarding the distribution of the estate in terms of Islamic law. The MJC-SA would be put in a difficult position when drafting an Islamic Distribution Certificate in this regard. This paper suggests that the Islamic body should use, in this instance, the principle of justice, which forms part of the broader scheme of the objectives of *Sharia*. The end result would then mean that in this scenario, Aamina and Faatima would equally share $1/8 = 3/24 = R30,000$ (R15,000 each); X's son would inherit $14/24 = R140,000$; and his daughter would inherit $7/24 = R70,000$. This is quite a different approach and could be used in instances where the application of a specific opinion within a school of law would be problematic. This approach could also be utilized in other Muslim minority countries facing similar challenges. The distribution of this inheritance, when analyzed from the perspective of *maslahah*, is classified as *maslahah mursalah* due to the absence of an established rule in Islamic law. Faatima, as the legitimate wife, is the primary recipient; thus, Aamina should not be entitled to any portion. However, Aamina's longer duration of cohabitation with her husband warrants consideration in terms of *maslahah*. This situation necessitates *ijtihad* in the distribution of inheritance in deathbed cases, utilizing a *maslahah mursalah* approach. Consequently, Aamina is still allocated a share of the inheritance, which is referred to as *maslahah ma'qul al-ma'na*, or *maslahah* derived through reason and a sense of justice.

³² Abu Hamid Al-Ghazali, *Al Mustashfa Min 'Ilm Al-Ushul* (Beirut: Dar al Kutub al Ilmiyah, n.d.) pp. 481-482.

³³ Izzudin bin Abd As-Salam, *Al Qawaid Al Kubro* (Damskus: Darul Qalam, 2000) pp. 28.

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