

9. EXCLUSION CRITERIA

GENERAL RULES OF EXCLUSION

A potential heir can be either partially excluded (*Hajb Nuqṣān*) or totally excluded (*Hajb Hirmān*) from inheriting by the presence of another heir/potential heir based on the following main principles:

1. A person (e.g. brother) who is related to the deceased through another (i.e. father) is excluded by the presence of the latter. Thus, a father excludes full brother, consanguine brother, full sister, consanguine sister and true grandfather. The one exception to this rule is that the mother does not exclude a uterine brother or uterine sister, though her own share may be affected through their presence.
2. An individual nearer in degree (proximity) to the deceased excludes the one who is remoter within the same class of heirs.
 - ◆ It is important to note that this rule is applicable to heirs within the same class (this point is often omitted by many authors). Therefore, the son excludes grandson, the brother excludes brother's son and so on. However, the father does not exclude true maternal grandmothers and neither does the daughter exclude brother's son because they are in different classes of heirs. Another way to look at this is to say that a nearer sharer does not exclude a more remote residuary.
 - ◆ Exceptions to this rule are that uterine siblings are not excluded by the mother; one daughter by herself does not exclude son's daughter; and the father excludes all paternal true grandmothers according to the *Hanafi*,

Mālikī and Shāfi'ī Fiqh.

3. Full blood excludes half-blood through father.
 - ◆ A full blood residuary excludes a consanguine half-blood residuary of the same degree. Thus, a full brother excludes a consanguine brother and a full brother's son excludes a consanguine brother's son.
 - ◆ A full blood residuary excludes a half-blood sharer if the full blood residuary would convert a full blood sharer of the same class as the half-blood sharer into a residuary. This rule sounds complicated but in practical terms it means that a full brother excludes a consanguine sister because there is only one half-blood sharer by father and that is the consanguine sister.
 - ◆ A female full blood sharer inheriting in the capacity of residuary excludes a half-blood female of the same degree. In practical terms this means that a full sister when inheriting as a residuary excludes a consanguine sister.
 - ◆ A full blood sharer inheriting as a sharer does not exclude a half-blood residuary. In practical terms this means that a full sister inheriting as a sharer does not exclude a consanguine brother.
 - ◆ Uterine relations are not excluded by full blood on this ground because they are not related through father.
4. All collateral heirs are excluded by a lineal male (ascending or descending) inheriting as a residuary. Thus, a son, son's son h.l.s., father and father's father h.h.s. all individually exclude full brother, full sister, consanguine brother and consanguine sister according to *Hanafi Fiqh* (see chapter 11).
5. A person who is himself/herself excluded may exclude

other heirs; for example the presence of two or more siblings limit the share of the mother to 1/6 even though the siblings themselves may be excluded by the father.

6. A person who himself has been disqualified from inheriting (*Mahrūm*) cannot exclude other heirs from inheriting. However, according to 'Abdullāh bin Mas'ūd (رضي الله عنه) a *Mahrūm* can partially exclude other heirs. See chapter 10.

◆ Sharers who are partially excluded, effectively have their share reduced by the presence of other blood relatives. The sharers who can be partially excluded are:

- ▶ Husband
- ▶ Widow (wife)
- ▶ Mother
- ▶ Son's daughter h.l.s.
- ▶ Consanguine sister

◆ Some sharers can be totally excluded by the presence of other heirs, these sharers are:

- ▶ True grandfather
- ▶ True grandmother
- ▶ Son's daughter h.l.s.
- ▶ Full sister
- ▶ Consanguine sister
- ▶ Uterine brother
- ▶ Uterine sister

9.1 DISOWNING/ REPUDIATION ('AQ)

◆ Disowning or repudiation of a prospective or presumptive heir by the propositus with the intention of depriving the prospective or presumptive heir of his legal share of the inheritance is invalid and illegal according to *Shari'ah* law. Such disowning/ repudiation has no legal consequence in the context of inheritance.

◆ The legal share entitlement of an heir must not be tampered with as warned in the Qur'an, *Sūrah An-Nisā'* Verses 13-14.



10. IMPEDIMENTS TO SUCCESSION

Key points:

- ◆ The following are impediments to succession:
 1. Homicide
 2. Difference of religion
 3. Slavery
 4. Difference of domicile
- ◆ An individual who is disqualified from inheriting (*Mahrūm*) cannot exclude others from inheriting. He will be considered as if he does not exist.
- ◆ According to 'Abdullāh bin Mas'ūd رضي الله عنه, one who is disqualified from inheriting (*Mahrūm*) can partially exclude the remaining heirs.

For instance, a man who kills his father intentionally although disqualified from inheriting himself will still partially exclude the widow of the deceased and reduce her share to 1/8.

10.1 HOMICIDE (*Al-Qatl*)

Narrated Abu Hurayrah رضي الله عنه: Allāh's Messenger ﷺ said, "One who kills a man cannot inherit from him." (Tirmidhī and Ibn Mājah). Similar Hadith reported by Abū Dāwūd and Al-Bayhaqī.

- ◆ All Muslim jurists agree that a murderer or killer shall not inherit. If such people are allowed to kill and then benefit from the estate of the victim, it will encourage incidents of homicide.
- ◆ Intentional or unjustifiable killing according to *Shari'ah* is

- a bar to inheritance according to *Sunni* jurisprudence.
- ◆ The four main *Sunni Madhāhib* vary slightly in detail on other forms of killing.
- ◆ According to the *Hanafi Fiqh* any killing whatsoever will prevent the right to inherit with the following exceptions:
 1. Justifiable killing according to *Shari'ah*
 2. Killing as a result of self-defence
 3. Lawful killing
 4. Act of a mad man or minor
 5. Indirect killing (*Qatl Bi Al-Tasabbub*)
- ◆ Direct killing by a minor or lunatic is not a bar to inheritance under *Hanafi Fiqh*.
- ◆ According to the *Shāfi'i Fiqh*, all forms of killing including the act of a lunatic or a minor are an impediment to inheritance.
- ◆ According to the *Māliki Fiqh* killing is a bar to inheritance with the following exceptions:
 1. Justifiable killing according to *Shari'ah*
 2. Killing as a result of self-defence
 3. Killing in retaliation
 4. Unintentional killing
- ◆ Minors and lunatics are also barred from inheriting under *Māliki Fiqh* if the killing is deliberate although they are not liable for the penalty of retaliation.
- ◆ According to the *Hanbali Fiqh* any killing that is punishable (including monetary punishment) is an impediment to inheritance. The following forms of killing are not an impediment to inheritance:

1. Justifiable killing according to *Shari'ah*
 2. Killing as a result of self-defence and war
 3. Killing in retaliation
- ◆ The legal maxim for disqualifying a killer from inheriting is that whoever accelerates the process of gaining something before its actual/proper time is prohibited from gaining.

10.2 DIFFERENCE OF RELIGION

Narrated 'Usāma bin Zaid (رضي الله عنه): *The Prophet (ﷺ) said: "A Muslim cannot be the heir of a disbeliever, nor can a disbeliever be the heir of a Muslim."* (Ṣaḥīḥ Al-Bukhārī, Ṣaḥīḥ Muslim, Muwaṭṭa', Tirmidhī, Abū Dāwūd and Ibn Mājah)

- ◆ The religion of an individual as regards inheritance is his or her religion at the time of death of the propositus.
- ◆ A Muslim cannot inherit from a non-Muslim by birth under *Shari'ah*. Strictly speaking everyone is born a Muslim. The clause "by birth" is used here only to differentiate from an apostate, that is a Muslim who becomes a non-Muslim by choice.
- ◆ An individual who converts (or more accurately reverts) to Islām cannot inherit from his/her non-Muslim relatives and they cannot inherit from the Muslim revert. All the four main *Sunni Madhāhib* are in agreement on this point.

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- ◆ A non-Muslim cannot inherit from a Muslim under *Shari'ah*.
- ◆ According to *Hanbali Fiqh* if a non-Muslim becomes a Muslim after the death of a Muslim propositus but before the actual distribution of the estate he/she is entitled to inherit.
- ◆ A Christian or Jewish wife cannot inherit from her Muslim husband but she can be mentioned in the *Wasiyyah* (Islāmic will).
- ◆ Children born in a mixed marriage belong to the religion which is higher of the two religions concerned. Islām is above Christianity and Christianity is above Judaism. This means that children born to a Muslim man and Christian or Jewish wife are Muslims.

10.2.1 Apostate as heir

- ◆ A Muslim who changes his religion is called an apostate (*Murtadd*).
- ◆ An apostate is barred from inheriting from Muslims and non-Muslims.
- ◆ If a Muslim heir becomes a non-Muslim after the death of a relative from whom he is entitled to inherit, he is still entitled to inherit because when the inheritance devolved he was still a Muslim.
- ◆ According to the *Hanbali Fiqh* if the apostate returns to Islām before the actual distribution of the estate, he is entitled to inherit.
- ◆ If a man dies leaving behind a non-Muslim son and a son's son who is a Muslim the son would not inherit anything.

10.2.2 Inheriting from an apostate

- ◆ According to the *Mālikī*, *Shāfi'ī* and *Ḥanbalī Fiqh* the whole estate of an apostate goes to the *Baytul-Māl*. Muslim relatives including the spouse are not entitled to inherit from an apostate. This is consistent with the principle that a Muslim does not inherit from a non-Muslim.
- ◆ Under the *Ḥanafī Fiqh* the Muslim relatives of an apostate can inherit from him.
- ◆ Imām Abū Ḥanīfah (رضي الله عنه) differentiates between a male and a female apostate. In the case of a male apostate the estate that he acquired while he was a Muslim is inheritable by his Muslim relatives and the property which he acquired after apostatising goes to the *Baytul-Māl*. In the case of a female apostate the whole of her estate is inherited by her Muslim heirs. The basis for this is that the apostate was under *Sharī'ah* law until he became an apostate, at that point he became dead in the eyes of the law.
- ◆ Other *Ḥanafī* jurists including Imām Abū Yūsuf (رضي الله عنه) and Imām Muḥammad (رضي الله عنه) do not make a distinction between a male and a female apostate, they hold that the whole of the estate of an apostate (man or woman) is inheritable by his/her Muslim heirs. This is also the view of 'Alī bin Abī Ṭālib (رضي الله عنه).
- ◆ Under *Ḥanafī Fiqh* a Muslim widow inherits from her apostatised husband. If a man becomes an apostate his marriage to a Muslim woman automatically terminates and the situation is similar to a woman who is irrevocably divorced during the *Maradul-Mawt* of her husband on the principle that male apostasy is punishable by death. A wife is not entitled to inherit

from her apostatised husband if the marriage was never consummated. A husband cannot inherit from his apostatised wife if she apostatises during health even if she dies during her *'Iddah* period, but he can inherit from her if she apostatises during her *Maradul-Mawt* and she dies during her *'Iddah* period.

- ◆ Any child born to a woman whose husband apostatises is entitled to inherit if it is born within six months from the day of the apostasy.

10.3 SLAVERY

- ◆ All Muslim jurists agree that slavery is a bar to inheritance.
- ◆ A slave will not inherit and will not be inherited.
- ◆ Although slavery is not an issue in current modern times, Islām is a religion for all mankind for all times.

10.4 DIFFERENCE OF DOMICILE

- ◆ The difference of domicile refers to allegiance to different states/countries or kings where there is no alliance between them.
- ◆ This impediment is applicable to non-Muslims only; it is mentioned in this book for the sake of completeness. It does not have any practical significance for our purposes.
- ◆ Muslims though owing different allegiances are entitled to inherit from each other.