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ESTATE PLANNING WITH ISLAMIC INHERITANCE LAW

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Introduction

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- What is Islamic inheritance law?
 - ▣ Source
 - ▣ Primary Schools
- Key succession principles
- Comparison of Sunni and Shia inheritance law
- Shia law of inheritance
- Sunni law of inheritance
- Doctrine of return and increase
- Incorporating Sharia into client's estate plans
- Extract of trust language

Sources of Islamic Law - Sharia

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- Quran
- Precedent of the Prophet (*Sunnah*)
 - ▣ Verbal utterances (*Hadith or sunna qualia*)
 - ▣ Acts (*sunna filia*)
 - ▣ Tacit assent (*sunna taqririyya*)
- Consensus (*Ijma*) – of the Islamic community living within a certain era after the Prophet
- Analogy or reasoned inference (*qiyas*)

Primary Islamic Schools of Law

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- Sunni
 - ▣ Hanafi School
 - Turkey, Albania, the Balkans, Central Asian states, Afghanistan, Pakistan, China, India and Iraq
 - ▣ Maliki School
 - Egypt, Sudan, north and west Africa, eastern central part of Arabia
 - ▣ Shafii School
 - Widespread in Jordan, Palestine, Syria, Lebanon and Yemen; also in Egypt, Indonesia, Philippines, Brunei, Singapore, Malaysia, Thailand, Sri Lanka and the Maldives
 - ▣ Hanbali School
 - Saudi Arabia (Wahhabi)

Primary Islamic Schools of Law (cont'd)

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- Shia
 - ▣ Zaidia School
 - Yemen
 - ▣ Ithna-Ashari School (*largest*) – “the Twelvers”
 - State religion in Iran. Also in Iraq, Lebanon, Syria, Pakistan and Afghanistan
 - ▣ Ismailiyya School (*most important of minor sects*)
 - Agha Khan is the sect’s leader. Pakistan, eastern and southern Africa, and in parts of Middle East

Key Succession Principles

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- True lifetime gifts (other than deathbed bequests) of any amount permitted (no claw-back principle).
- Fixed shares under Sharia inheritance law may not be changed, as to two-thirds of the estate.
- Testamentary freedom as to one-third of estate (after payment of debts and expenses of estate) without consent of heirs-at-law, permissible recipients being.
 - Shia: heirs-at-law and non-heirs
 - Certain Sunni countries (including Egypt, Sudan and Iraq): heirs-at-law and non-heirs
 - Other Sunni countries: only non-heirs, *unless* heirs-at-law agree after death

Key Succession Principles (cont'd)

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- Testamentary bequests of more than one-third are not void *ab initio*, but may be validated by the consent of the heirs-at-law, and such consent:
 - Sunni: must be after the testator's death
 - Shia: may be before or after the testator's death
- Where only some heirs consent, the bequest will be paid from only the shares of the consenting heirs.
- Deathbed bequests are subject to the one-third restriction.
- Other means to leave additional inheritance to surviving spouse:
 - Deferred dower – payable upon death or divorce
 - In Malaysia, a surviving spouse has a discretionary elective share.
- Bequests to benefit objects opposed to Islam are invalid.

Key Succession Principles (cont'd)

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- Non-Muslims may not inherit from Muslims through intestate succession.
- Illegitimate children do not receive an inheritance share from father, but:
 - Sunni: but can inherit from mother
 - Shia: cannot inherit from mother
 - Definition of illegitimate varies between schools, particularly as to children born after termination of marriage by divorce.
- Cannot transfer inheritance right – but may be able to contract not to claim right.

Suni vs. Shia Inheritance Law

- Sunni law follows principles of pre-Islamic custom, changing those rules as specified in the Quran and by the Prophet.
 - ▣ Male lines inherit, unless fixed shares vary that result.
 - ▣ Male lines of descent and ascent favored over female lines.
- Shia law deduces principles from Quranic amendments and Prophet's sayings, fuse those with pre-existing law, and produce a new set of rules.
 - ▣ Those who are related through women are on equal footing (i.e., generally not excluded) with those who are related through men.
- Shia law applies per stirpes succession among descendants of a particular class (when there are no living children). Sunni law takes place per capita and may exclude female lines.

Suni vs. Shia Inheritance Law (cont'd)

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- Sunni law provides that true grandparents inherit shares of parents, along with the deceased's descendants. Shia law provides that grandparents are excluded if there are descendants.
- If a son or daughter predeceases the parent, the children of the deceased son or daughter will not receive an intestate inheritance if any son survives the parent. (*Sunni and Shia are the same on this point.*) Shia law goes further and disinherits grandchildren if any son or daughter survives.
 - ▣ Potential fix - mandatory will or obligatory bequest (within one-third bequest)

Shia Law of Inheritance

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- Fixed shares assigned to:
 - Husband and wife;
 - Group 1 blood heirs;
 - Group 2 blood heirs; and
 - Residuary heirs (some from Group 1 and 2, and all Group 3).
- Group 1:
 - Parents;
 - Children and other lineal descendants.
- Group 2:
 - Grandparents [unlike Sunni, without regard to 'true' or 'false'];
 - Siblings and their descendants.

Shia Law of Inheritance (cont'd)

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- Group 3:
 - Paternal and maternal uncles and aunts of the deceased;
 - Their descendants;
 - Paternal uncles and aunts of the parents of the deceased;
 - Their descendants;
 - More remote uncles and aunts, and their descendants, in like order.
- Do not proceed to a lower group, unless no members of higher group.
- Within Group 3, a tier must be exhausted before moving on to another tier - with one exception arising from religious history – if the only members of Group 3 are a son of a paternal uncle (tier ii), and a consanguine paternal uncle (tier i), the former excludes the latter.

General Application of Inheritance Shares (Shia)

	If there is a lineal descendant	If there is no lineal descendant:
Fixed Share Holders	Share	
Husband	1/4	1/2
Wife (or wives)	1/8	1/4
Father	1/6	no fixed share – residue heir
Mother	1/6	1/3 (most other cases)
Daughter	If no son: 1/2 2/3 if more than one If son – no fixed share (residue heir)	n/a
Son	no fixed share (residue heir)	n/a
Uterine brother or sister	n/a	if no parent: 1/6 1/3 if more than one
Full sister	n/a	If no parent: 1/2 2/3 if more than one No fixed share (residue heir) – if full brother, or father's father
Consanguine sister	n/a	If no parent or full siblings: 1/2 2/3 if more than one No fixed share (residue heir) – if consanguine brother, or father's father

Note:

- If there are only sons, each son gets an equal share of residue.
- If there are sons and daughters, each son gets twice the share of a daughter.
- If there is any child (son or daughter), and children (male or female) of a deceased child, everything goes to the surviving child(ren).
- When there is no lineal descendant, paternal grandparents are treated as a full/consanguine sibling (as appropriate), and maternal grandparents as uterine siblings.

Sunni Law of Inheritance

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- Class I – Quranic heirs (fixed shares)
- Class II – Residuary heirs, including:
 - ▣ All male agnates (direct male line):
 - Son (*primary residuary; excludes all fixed shares other than wife, husband, mother (true grandmother) and father (true grandfather)*)
 - Father (*if no child or descendant of a son*)
 - Paternal grandfather
 - Brother
 - Paternal uncle
 - Nephew (brother's son)

Sunni Law of Inheritance (cont'd)

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- Class II – Residuary heirs, including (cont'd):
 - Daughters (*if there is a son*)
 - Son's daughters
 - Full sister (*residuary with full brother*)
 - Consanguine sister (*residuary with consanguine brother*)
- Class III – Distant Kindred (uterine heirs)
 - All cognates (one or more females in the line) other than those females in the residuary category
 - (i) Descendants of the deceased through a female link
 - Daughter's children and their descendants
 - Children of the son's daughters and their descendants

Sunni Law of Inheritance (cont'd)

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- (ii) Ascendants of the deceased through a female link
 - False grandfather
 - False grandmother
 - (iii) Descendants of the parents of the deceased (not in Class I or II)
 - (iv) Descendants of the immediate grandparents (true or false) of the deceased
-
- Each of the numbered sub-classes (*i through iv*) must be exhausted before moving on to the next.
 - If the estate is not exhausted by Class I, the balance is received by Class II heirs. Only if there are no Class I and Class II heirs (other than the spouse) will Class III heirs inherit.

General Application of Inheritance Shares (Sunni)

Fixed Share Holders	Share if one	Share if more than one	Conditions for normal share	Variation of Share
Father	1/6	-	If a child, or son's descendant	Residuary heir as to any female descending heir, or if there is no descendant
True grandfather	1/6	-	(steps into shoes of father)	Generally, steps into shoes of father.
Husband	1/4	-	If a child, or son's descendant	1/2 if no child, or no descendant of a son
Wife (or wives)	1/8	1/8	If a child, or son's descendant	1/4 if no child, or son's descendant
Mother	1/6	-	If a child, or son's descendant; or If there are two or more siblings (whether full consanguine or uterine)	1/3 if no child or son's descendant, and no more than 1 sibling. If there is also a surviving spouse and father, then first deduct spouse's share.
True grandmother	1/6	1/6	(steps into shoes of mother)	Paternal true grandmother is entirely excluded by father or a grandfather through whom she is related through the deceased.
Daughter	1/2	2/3	If there is no son.	Residuary heir if there is a son.
Son's daughter	1/2	2/3	If there is no son, daughter, higher son's daughter, or equal son's son	No share at all if higher son's son. No share with two daughters, or two higher son's daughters, unless residuary share.
Full sister	1/2	2/3	If no child, or son's descendant, father, or full brother.	No share at all if male descendant or a father. Instead, a residuary heir (with full brother taking twice the share, sharing 1/3 with uterine siblings, and a residuary by a female descendant).

General Application of Inheritance Shares (Sunni) (cont'd)

Consanguine sister	1/2	1/2	If no child, son's descendant, father, full brother or sister, or consanguine brother	No share at all with the father, an inheriting male descendant, a full brother, or a full sister becoming residuary with daughters. No share in some other circumstances, too. Residuary heir with an inheriting female descendant.
Uterine brother or sister	1/6	1/3	If no child, son's descendant, father, or true grandfather	Male and female receive same share.

Once fixed shares determined, the residue is divided among the residuary heirs. In the residue:

A male son excludes all fixed shares other than wife, husband, mother (or true grandmother), and father (or true grandfather). A sister will share the residue with the son, receiving a half share.

In default of a son, if he leaves a male descendant, such male descendant becomes a residuary heir, and daughters do not share the residuary with such male grandson (or more remote descendant).

Children of a deceased daughter have no inheritance share (when there are other children).

If the deceased has no children, then the father will become the residuary heir (and prevent any other from sharing the residue, including the deceased's siblings). To a lesser degree a true grandfather (in lieu of the father) may block some of the father's descendants from inheriting.

There are more involved rules involving ancestors of the deceased, and descendants of the deceased's father or true grandfather.

"Distant kindred" is anyone who does not receive a share, or a part of the residuary under the above rules. They do not inherit if there is anyone of higher precedence. Generally, descendants of a deceased daughter or descendants of a son's daughter will be considered "distant kindred" and thus lose inheritance rights if there is any heir with a fixed share or a residuary heir.

Doctrine of Return and Increase

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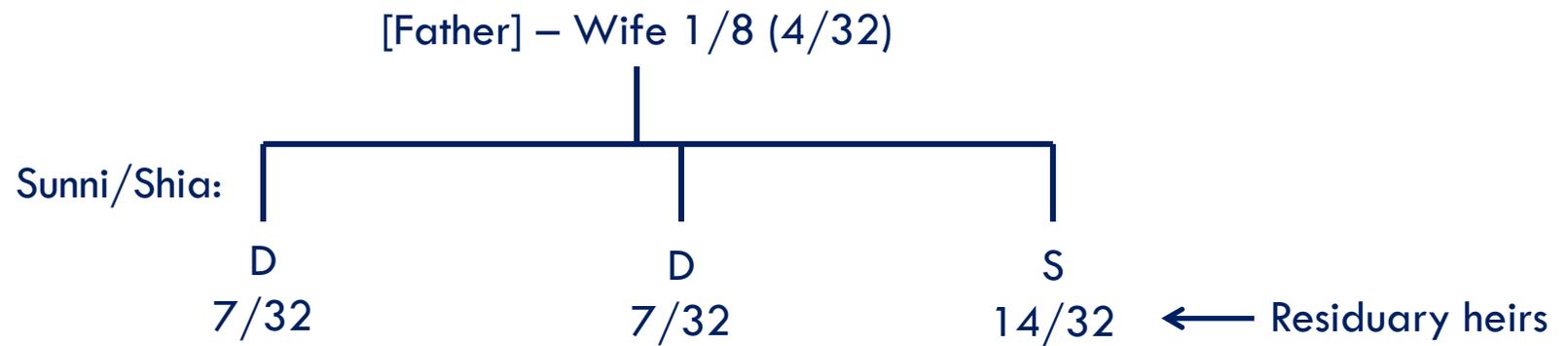
- **Doctrine of Return (*radd*)** - If after applying fixed shares there is a residue remaining and there is no residuary heir, then the residue is divided among fixed share holders in proportion to shares, provided that:
 - husband and wife do not participate in return if there is any other heir.
 - mother may be excluded from return in certain circumstances.
 - uterine brothers and sisters may not receive the return in certain circumstances.

Doctrine of Return and Increase (cont'd)

- Generally this is applied in a similar fashion under both Sunni and Shia law, except that the Maliki Sunni school does not recognize the doctrine of return (and instead provides that any excess should escheat for public good).
- **Doctrine of Increase (*awl*)** – Under Sunni law, if the sum of the fixed shares exceeds 100%, then the fixed shares (whether of male or female) are reduced proportionately. Shia law does not include this doctrine, but under a similar concept provides that if there is such an excess, then the excess is deducted from the shares of daughter(s), or full or consanguine sisters(s) (but not a uterine sister).

Example 1

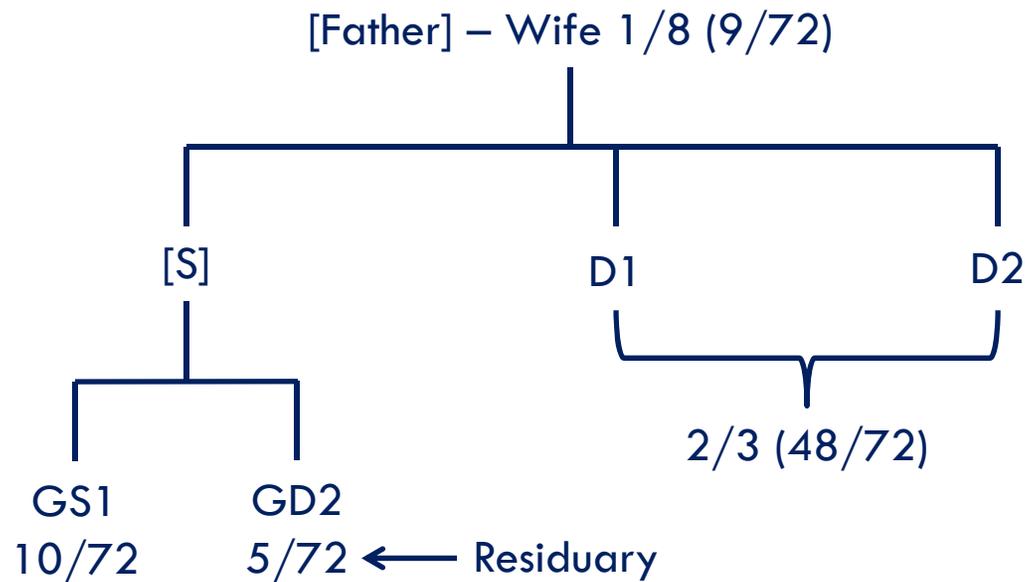
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Example 2

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Sunni:

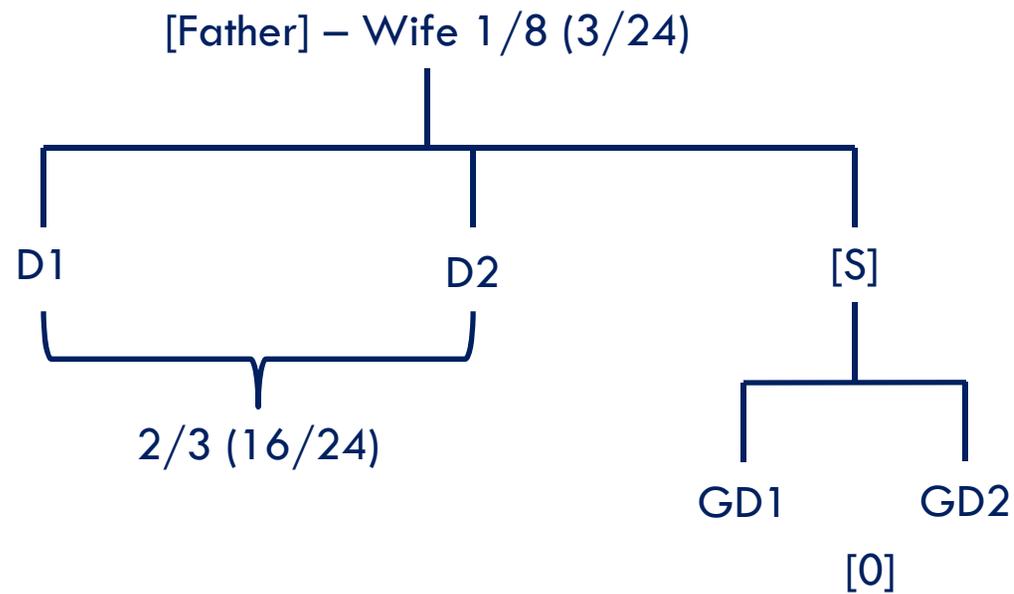


If both children of S were grand-daughters, both would be disinherited (since two daughters). If one daughter, D1 would get $\frac{1}{2}$ and GD1/GD2 would share $\frac{1}{6}$.

Shia: GS1 and GD1 would be disinherited.

Example 3

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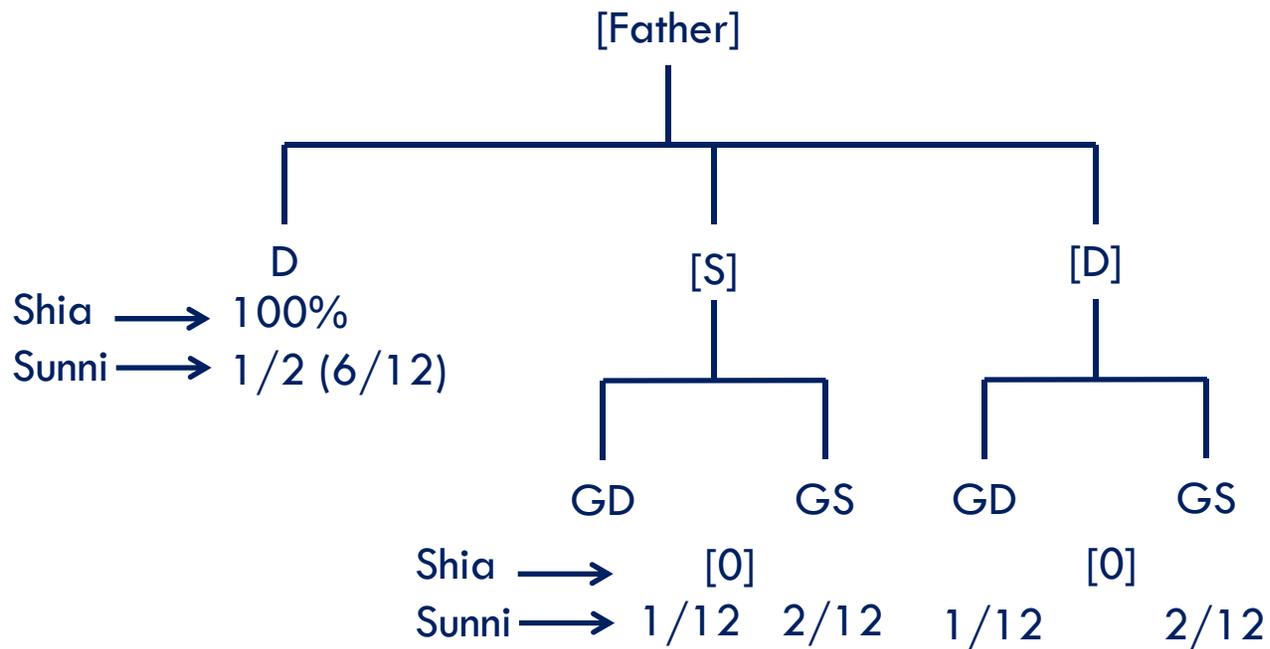


Shia: Residue of $5/24$ would increase share of D1 & D2.

Sunni: For most schools same result. Maliki school would have residue escheat to public treasury.

Example 4

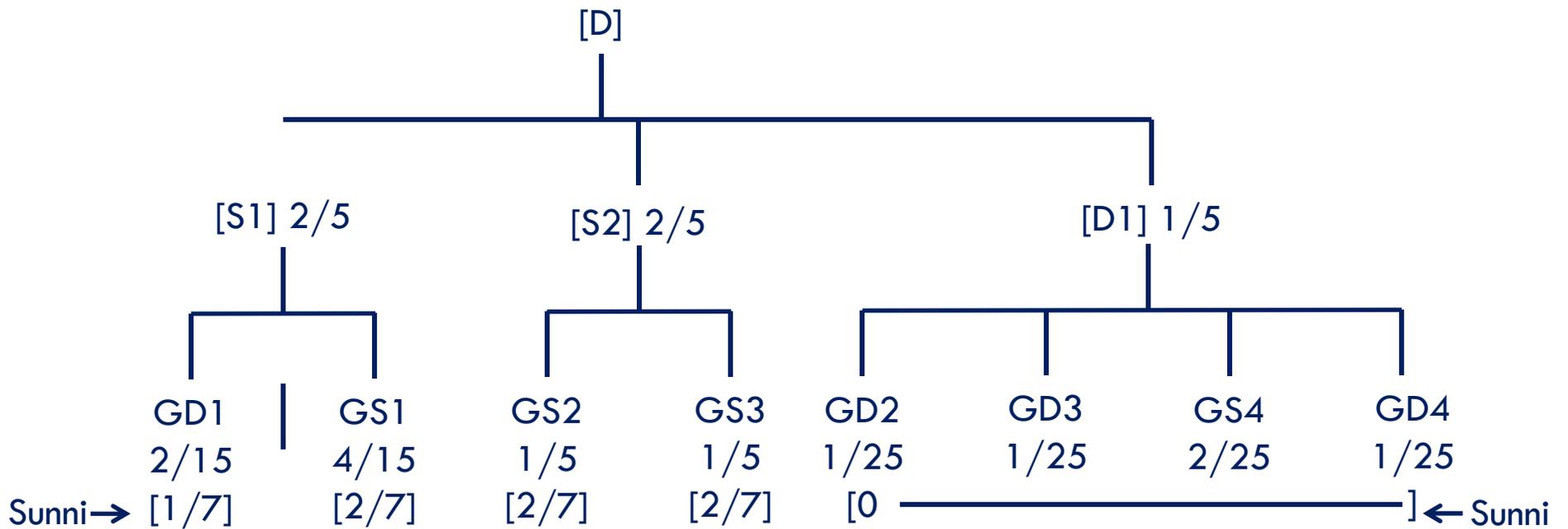
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Example 5

Example of Limited Per Stirpes

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Incorporating Sharia into Client Estate Plans

Client Attitudes

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- Determine which school of law
- Convert to change applicable inheritance law
- Incorporate full/traditional Sharia or limited version
- Consider modifications to Sharia – “Sharia light”, to address:
 - ▣ “Up and out” inheritance
 - ▣ Daughters only
 - ▣ Illegitimate children
 - ▣ Adopted children
 - ▣ Disinherited grandchildren
- Interpretation of document and forum shopping
- Dispute resolution

Trust Extract – Implementing Sharia

- **Sharia**. For purposes of this document, any reference to “Sharia” shall be considered to incorporate by reference principles of Islamic law and Sharia; provided however:
 - ▣ the application of Sharia shall be limited to the extent specified elsewhere in this document; and
 - ▣ in determining the Sharia heirs of an individual:
 - if such individual has any living descendant at the time in question then, for purposes of this division, the class of potential heirs under Sharia shall be limited to the individual’s surviving wives or husband and the individual’s descendants and the wives or husbands or surviving wives or husbands of those descendants;

Trust Extract – Implementing Sharia (cont'd)

[This ensures that if the deceased has any descendant that there is no “up and out” inheritance by application of Sharia rules to ancestors, aunts, uncles, siblings, etc. It also ensures that if the deceased has only daughters, that the daughters will not forfeit part of their inheritance to ancestors, aunts, uncles, etc.]

[As you will see below, “descendants” left deliberately vague.]

[This does not fix the issue of disinherited grandchildren.]

- that if an individual who otherwise would be considered a Sharia heir, or a parent or more remote ancestor of such an individual, has been removed through exercise of the power in Section 4, then such individual shall not be considered an heir for any purposes under this document.

Trust Extract – Implementing Sharia (cont'd)

- Any dispute arising out of or in connection with the application of Sharia under this document shall be referred to and finally resolved by arbitration under rules of arbitration to be selected by the Trustees, with the prior written consent of the Protector (or if they are unable to agree then the applicable rules shall be the London Court of International Arbitration Rules, which then will be deemed to be incorporated by reference into this provision, except where otherwise modified below). Regardless of the rules chosen, the following provisions shall apply to the arbitration.
 - The arbitral tribunal shall consist of three individuals, male or female, each of whom shall be at least 40 years of age.
 - The seat, or legal place, of arbitration shall be selected by the Trustees, with the prior written consent of the Protector, or if they are unable to agree then London, England.

Trust Extract – Implementing Sharia (cont'd)

[Important not to permit dispute on how to interpret Sharia to be resolved (in this case) in Saudi Arabia, as the Hanbali school is extremely rigid and would throw out any “Sharia light” approach.]

- ❑ In applying the principles of Sharia, the Hanbali school of thought shall apply. **[Important to identify relevant Islamic legal school.]**
- ❑ All decision makers shall be and remain at all times impartial and independent of the parties; and none shall act in the arbitration or dispute resolution process as advocates for any party. No decision maker, whether before or after appointment, shall advise any party separately on the merits or outcome of the dispute.
- ❑ The decision makers shall act fairly and impartially as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent.

Trust Extract – Implementing Sharia (cont'd)

- ❑ Any person may provide evidence without requiring their evidence to be supported by another person.
- ❑ If an arbitral tribunal is chosen, then at least one member of the arbitral tribunal shall have knowledge of Sharia and experience with resolving questions of its interpretation and application, and may (but need not) be nationals of The Kingdom of Saudi Arabia. At least one member of the arbitral tribunal must have knowledge of and experience with common law trust agreements.
- ❑ If an arbitral tribunal is chosen, then the arbitral tribunal shall adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay or expense, so as to provide fair and efficient means for the final resolution of the parties' dispute.

Trust Extract – Implementing Sharia (cont'd)

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- **Descendants.** All references in this document to a “descendant” of an individual mean those individuals who would be considered the individual’s descendants under Sharia (as defined above).

[This does not resolve status of illegitimate or adopted descendants – which in this case was a client decision.]

- **Governing Law.** This document, all trusts created under this document, and all matters arising under or relating to this document, shall be governed by and construed in accordance with the laws of Bermuda (excluding its choice of law rules); provided, however, that in applying Bermuda law the principles of Sharia will be incorporated to the extent this document incorporates such principles.

Additional Materials

- Khan, Hamid. The Islamic Law of Inheritance: A Comparative Study of Recent Reforms in Muslim Countries. Oxford University Press, 2007.
- Mughniyyah, Allama Muhammad Jawad. On Inheritance: A Textbook on Jurisprudence According to the Five Schools of Islamic Law: Hanafi, Hanbali, Shafii, Maliki, Jafari, Economic Issues. Great Books of the Islamic World, 1996.
- Fisabilillah Organization Authenticate Ulama's Organization. Mirath: The Laws of Islamic Inheritance. The Way of Islam, 2016.
- Hussaini, Sohail S. Inheritance: The Laws of Inheritance in Islam. Outskirts Press, Inc., 3rd Ed. 2011.

Note:

- The first two books include a description of both the Sunni and Shia schools of Islamic Law, with the first being the most comprehensive.
- The last two books focus primarily on the Sunni schools of Islamic law.

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