THE EFFICACY OF THE INTESTATE LAWS IN
ZAMBIA

BY

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THE EFFICACY OF THE INTESTATE LAWS IN ZAMBIA

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A directed research paper submitted in partial fulfillment of the examination requirements for the degree of Bachelor of Laws of the University of Zambia.

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I recommend that the directed research paper under my supervision by JANE MAHUBA;

Entitled:

THE EFFICACY OF THE INTESTATE LAWS IN ZAMBIA.

Be accepted for the examination in partial fulfillment of the requirements of the award of the Bachelor of laws degree of the University of Zambia. I have checked it carefully and I am satisfied that it fulfills the requirements relating to the format as laid down in the regulations governing directed research essay.

MRS. L MUSHOTA
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26. 01. 07
DATE
DEDICATION

I thank the Almighty God for seeing me through up to this level. With God nothing is impossible.

To my Parents, Mr. Bothwell Mainza Mahuba and Grace Pumulo Mahuba for their Love and Care. I say thank you very much for your sacrifices and your dedications in ensuring that I reach this level.

To my darling, Gilbert Pindani thank you for the support and advice you gave me when writing this paper. I also thank you for your love which gives me strength in my daily life.
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Lastly, I want to thank the following people for making my stay on campus memorable; Anna Phiri, Audrey Situkali, Chimuka Manyepa, Kabanza Ndumba and to all my classmates for their support during my stay on campus.

God Bless
DECLARATION

I JANE MAHUBA (21046263) hereby declare that this paper is a product of my own research, of course with the reference to other useful materials on the topic. I therefore take full responsibility for any errors, omissions and mistakes appearing in it.

Signature: Mahuba Date: 24-01-07
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INTRODUCTION

If a person dies without leaving a will or the will that has been left behind is inoperative, his assets are inherited in accordance with the rules of the law of Intestate Succession. These rules are contained in the Intestate Succession Act Number 5 of 1989. The Intestate Succession Act determines who the deceased’s heirs are in as far as he did not do so himself/herself or in as much as it is not possible to execute his legally valid wishes.

In Zambia, before 1989, the customary pattern of inheritance presented challenges for many families when a spouse or both died without living a will. The most pressing challenge was with regard to how property was to be shared. This in most cases resulted to what is known as property grabbing.

Although the Intestate Succession Act has been in existence for 18 years it presents its own challenges as will be shown in the essay. The act has many provisions that lack in clarity on how property should be distributed. The Intestate Succession Act provides no guidelines on how property is to be distributed and this in many cases has resulted into practical difficulties when distributing the estate of the deceased.

This essay gives a critical analysis of the Intestate Succession Act and makes an inquiry into the factors that cause problems of implementing the Intestate Succession Act. Once these factors are identified then the problem of property grabbing will end.

Chapter one gives a critically analysis of the Intestate Succession Act and the problems of implementation.

Chapter two gives a critical analysis of the 1996 Intestate Bill, which was to amend the Intestate Succession Act of 1989.

Chapter three looks at Intestate Succession Laws of countries from Southern Africa.

Chapter four makes the necessary recommendations and concludes.

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1 Chapter 59 of the Laws of Zambia  
2 Number 5 of 1989, Chapter 59 of the Laws of Zambia
Chapter One

CRITICAL ANALYSIS OF THE INTESTATE SUCCESSION ACT:

PROBLEMS OF IMPLEMENTATION

Introduction

Every society faces its own challenges and a society with a formal legal system tries as much as possible to face these challenges by enacting some law which can restore the social equilibrium. In Zambia, before 1989, the customary pattern of inheritance presented a challenge for many families when a spouse or both died without leaving a will.¹ The most pressing challenge was with regard to how property was to be shared. This in most cases resulted to what is known as property grabbing. Because people were used to the customary way of inheritance they followed customs that allowed stripping of property from the children and the surviving spouse.

The following two cases will give a picture of what used to happen before the Act was enacted. In the case of Adinas Mkumba v Phiri² the deceased a Nsenga by tribe was survived by the widow, Adinas and seven minor children. The defendant, Phiri was the deceased’s brother who was appointed administrator of the estate by both the deceased’s family and the local court under customary law. Adinas sued Phiri in the local court under customary law. Adinas alleged that although Phiri was the one who had purified her he was not supporting her and the children. And that Phiri took all the property of her husband including buses from which income was generated for the support of the family during the lifetime of the deceased. She also

² Local Court 131/1981
alleged that the defendant had ordered her and the children to move out of the deceased's house, which they had been living since the husband's death. She refused to move and was now claiming a share of the money from the operation of the bus business to enable her to support the children. In cross examination, the defendant admitted all the allegations of the plaintiff and continued to demand that she moves out of the house because it belonged to his deceased brother and not her.

The court, however, upheld the plaintiff's claim and ordered the defendant to pay her some money from the deceased's estate for the maintenance of the children.

Another case which can be quoted to show the difficulties that widows and children faced is the case of **Emmy Tembo v Amos Muchimba**[^3] the deceased was survived by the widow Emmy and six children. It was contended that the defendant who was the deceased's brother took all the deceased's property, including benefits, from the deceased's former employers and was neither supporting the children nor the widow. The defendant admitted all the allegations. When the case was adjourned for a few days for judgment, during this time the defendant returned all the property of the deceased. The case was, therefore withdrawn and closed after the court admonished the defendant to support the widow and the children in future.

However, the Zambian Parliament enacted the Intestate Succession Act in 1989 to cure the ills that were inherent in the customary practices when a head of the family died without leaving a will as to how his or her property would be shared amongst his or her family. It must be mentioned that most members of parliament objected to the acts enactment arguing that if the intestate succession act is enacted, wives would

[^3]: Local Court 558/1981
start killing their husbands so that they could inherit property. However, the women's movement and concerned citizens advocated for the law's enactment by pressuring the government to enact a law that will curb property grabbing. The intestate succession act was enacted in 1989.

The preamble of the Intestate Succession Act states that

*It is an Act to provide a uniform Intestate Succession law that will be applicable throughout the country; to make adequate financial and other provisions for the surviving spouse, children, dependants and other relatives of an Intestate, to provide for the administration of the estate of persons dying not having made a will; and to provide for matters connected with or incidental to the foregoing.*

This chapter will look at whether the Intestate Succession Act has cured the ills it was enacted to solve and if it has not the paper will find out why it has not been able to attain it's objectives.

**Effectiveness of the Intestate Succession Act**

To deny that the Act has been a breakthrough especially in promoting women's rights in having a share in the property left behind by their deceased's husbands would be a lie. Many women and other beneficiaries have found recourse to the law in cases where they have been denied their benefits or where their custom does not allow them to benefit anything. The Intestate Succession Act applies to any Zambian
regardless of their tribe, provided at their death they were domiciled in Zambia and customary law would have applied to them had this Act not been passed. 4 The following cited cases were heard after the enactment of the Intestate Succession Act and decisions were based on the Act. In the case of Sausi Vwaywa v Patmore Siang’ombe 5 the plaintiff sued the defendant for misappropriation of the estate of her late mother. The plaintiff who was a student at Njase high school stated that her late mother left eight (8) heads of cattle which could have resolved the problem of raising tuition fees. The plaintiff alleged that the defendant who is the Administrator got away with the cattle. During cross-examination the defendant refused having taken any cattle.

The court upheld the plaintiff’s claim and revoked the letters of Administration. It ordered the defendant to hand over the cattle and pay costs to the plaintiff.

In another case of Christine Ngobola v Micheal Kamitondo 6 the plaintiff applied for the revocation of the letters of Administrator of the defendant. The plaintiff claimed that the defendant had mismanaged the estate and sold most of the property of her late husband. The plaintiff claimed that the defendant went away with the deceased’s repatriation, which he collected at Zambia Tele-Communications Company [Zamtel] where the deceased’s worked. When the plaintiff reported at the Police Victim Support Unit the repatriation was shared. The plaintiff stated that her

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4 Section 2 of the Intestate Succession Act, Chapter 59 of the Laws of Zambia
5 Choma local court 535/2006
6 Choma local court 478/2000
children were not able to continue with school because the defendant was reluctant to pursue benefits.

The Court ruled in favour of the plaintiff since the defendant had agreed that his appointment be revoked. The Court ordered the defendant to surrender the letters of appointment and to pay money equivalent to the property he had sold.

It must be born in mind that the applicability of the Intestate Succession Act\(^7\) is only limited to persons who at their death where domiciled in Zambia and to those to whom customary law would apply had the Act not been passed.

The Intestate Succession Act provides a uniform pattern of distribution of property. It is provided\(^8\) as follows

- 20% goes to the surviving spouse
- 50% goes to the children, whether born in the or out of marriage.
- 20% goes to the parents of the deceased
- 10% to the dependants, living with the deceased or a minor whose education was being provided for by the deceased and should be incapable of maintaining him or herself.

The proviso in section 5 provides that a priority dependant whose portion of the estate under the section is unreasonably small having regard to his/her degree of dependence on the deceased shall have the right to apply to the court for adjustment to be made to the portions inherited.

\(^7\) Section 2 (1)
\(^8\) Section 5
Although the Act can be said to be a breakthrough especially concerning women’s rights, it has its own shortcomings which are mainly as a result of the ambiguities found in the Act. A research conducted by Women in Law in Southern Africa (Wilsa) brings to light the following shortcomings. The question of which child is entitled to benefit has been controversial in the past and will continue to do so unless the Act is amended to clearly define whom a child is. The Intestate Succession Act should put direct beneficiaries interests before allowing undeclared children who do not even live in the matrimonial home to benefit under the estate. In terms of a child a direct beneficiary can be said to be a child whom the deceased acknowledged as his/her child in the Birth and Death Registry Act. A child is defined to mean a child born in, or out of marriage, an adopted child, a child who is conceived but not yet born. The research shows that many widows only get to hear about a deceased husband’s child or children announced at the graveyard. And that the most painful thing to most widows is that non-marital children inherit from the estate with the marital children. A complaint in the research brought by a widow named Mirriam shows that she was married for two years to her husband, who had been a widower at the time of their marriage. He had no children with his wife. Mirriam’s husband died and to her surprise, at the burial she heard that her husband had a fourteen-year-old daughter. Mirriam was further surprised when two months later, the Administrator who is her husband’s brother brought in the child to live in the home with them. And Mirriam was later on told that the house belonged to the child and that she can only

9 Inheritance in Zambia, Conflict at death (2001) p3
10 Section 3
continue to live there as a tenant. Mirriam also stated that this child was not even registered at the husband’s place of work.

In the case of **Svvia Banda v John Tembo**\(^{11}\) the plaintiff claimed 50% share of her son from the defendant John Tembo. The facts are that the plaintiff had a child with the deceased but was not married to him. The defendant who is the Administrator and a nephew of the deceased denies that the child is of the deceased.

The plaintiff in order to prove that the child was of the deceased had to request the court to pull a court record in which her mother had sued the deceased for damage as a result of the impregnation. The records showed that the deceased did not deny the allegations of impregnating and that he had agreed to pay for damages and take full responsibility of the child when born.

After hearing this evidence, the court ordered the defendant to give the plaintiff the 50% share of the estate for the child.

In another case of **Misali Chibove v Joshua Chanda Ngombe**\(^{12}\) the plaintiff brought an action that the letters of Administration for the defendant be revoked because he was refusing to sign for other benefits which had just come out and that he was including other children who were not on the record at the deceased’s work place. The defendant stated that the deceased had two wives and that the other children who were not registered at the work place were those of the other woman. The court upon hearing the evidence of both parties held in favour of the plaintiff and stated that the letters of Administration be revoked.

\(^{11}\) Choma local Court 934/2005  
\(^{12}\) Choma Local Court 212/2001
The above are among the many cases were there are conflicts of whether the child should benefit or not. The law should be amended to define a child as one who is registered at the work place of the parents or whom the relatives know because in certain cases children of concubines who are not the deceased’s inherit.

During an interview in pursuance of this study, one Mr Kanuka\textsuperscript{13} stated that the Act does not state the age limit of a child who is to benefit. The Act, however, provides that 50\% of the estate goes to the children and in such proportions as are commensurate with the child’s needs or both. With such loopholes in the Act the Administrator is left with such huge discretion of deciding the appropriate portions to share the benefits. This has caused problems especially in polygamous marriages where the Administrator favors children from a particular woman. This could mean that children of that particular woman would benefit more than those of the other woman even if they were in employment.

Another major source of concern is the issue of the life interest the surviving spouse has in the house left if any. The Act provides that the surviving spouse shall have a life interest in the house that shall determine upon that spouse’s death or remarriage. This provision acts negatively against women, because often the matrimonial home is registered in the husband’s name and should he die first, it would appear that the house belonged to him. In one of the cases at Wilsa a widow Mrs Kabumu complained that the relatives to her deceased husband were demanding that she moves out of the matrimonial house although both her husband and herself jointly

\textsuperscript{13} National Co-ordinator Victim Support Unit. Police Headquarters, interview on 19\textsuperscript{th} July, 2006
owned the house.\textsuperscript{14} The Intestate Succession Act\textsuperscript{15} does not state that the house must be registered in the deceased name in order for the surviving spouse to have an interest in the house.

In an interview with Justice Irene Mundia\textsuperscript{16} she reviewed that this provision acts negatively against women especially where the widow has no children of her own and the deceased left children. She stated that in most cases widows fail to cope with these children. Justice Mundia also stated that if the surviving spouse is a widower, they are allowed to remain in the matrimonial home even after they remarry. This has in some way been one of the causes of the high rise of street kids because often the stepmother chases these children out of the house or mistreats them to a point were they run away from the home. This is unfair because as the Act provides it does not matter whether the remaining spouse is male or female they have to move out of the house.

To state that the Act has not achieved it's intended objectives would be true. This can perhaps be supported by the increase in the number of cases of property grabbing. Statistics from the Victim Support Unit show that there were

\begin{itemize}
\item 374 reported cases where beneficiaries were denied of their benefits and
\item 88 arrests were made.
\item 101 carried forwards
\end{itemize}

\textsuperscript{14} Mrs Macmillan Programme Officer Wilsa
\textsuperscript{15} Section 9
\textsuperscript{16} Chelstone Local Court 8th August 16, 2006
♦ 39 counter references. Counter references are cases that are referred to other police stations where they will be dealt accordingly.

♦ 0 on withdrawn cases

♦ 31 pending

♦ 10 convictions\textsuperscript{17}

One could possibly argue that the reason for the increase in property grabbing is that the punishment provided for under the Intestate Succession Act is not adequate.

Women and Law in Southern Africa (Wilsa) did a research project regarding the utility of laws pertaining to inheritance and succession in 1993. The research provides that the police are reluctant to deal with members of the community who have complaints regarding property grabbing. The research shows that the police deal with cases of property grabbing as domestic issues, which should be sorted out at home or referred to court.\textsuperscript{18} However, during an interview with Mr Kanunka\textsuperscript{19}, he stated that the police do not encourage complaints to be classified as domestic. Instead they issue a date when the parties can appear in the office of the Inspector General to discuss the problem. Where either of the parties does not appear, then police give a warning to that party so that he/she can appear on a new date set. If that party does not appear, he/she is arrested. He is then forced to give back the property that he unlawfully acquired. If the police are unable to handle the case, they assist the complainant in taking the matter to court.

\textsuperscript{17} National Returns of 2005, Victim Support Unit, Police Headquarters
\textsuperscript{18} Inheritance Laws in Zambia, p 330
\textsuperscript{19} National Co-ordinator Victim Support Unit, on 19\textsuperscript{th} July, 2006
Under Section 14 the penalty for depriving a beneficially of his entitlements is imprisonment not exceeding two years or payment of a fine not exceeding seven hundred and fifty penalty units. Section 6 of the Fines and Fees Act provides that in any written law, unless the context otherwise requires, penalty unit means one hundred and eighty kwacha. Also the Local Court Act does not carry stiff punishments it is provided under section 36 (4) (a)

That were an Administrator administers contrary to Customary Law he shall be guilty of an offence and liable upon conviction to a fine not exceeding eighty penalty units or imprisonment for a term not exceeding six months, or to both and subsection 4(b) further go on to state that

In addition to any penalty units which may be imposed under this subsection, the court may order the restitution to any beneficiary of the property which he has been deprived off and shall revoke the appointment of the administrator.

This provision from the local court is supposed to be amended to be uniform with the Intestate Succession Act in that it states that the administrator should not administer the estate contrary to customary law.

Mr. Kanunka stated that poverty and greediness are the major contributions to the high rise in property grabbing.

20 Fees and Fines Unit act, chapter 45 of the Laws of Zambia
21 Chapter 29 of the Laws of Zambia
22 National Co-ordinator, Victim Support Police Headquarters
Problems of Implementation

The implementation of the Act is mainly done by the Courts especially the Local Court, the Magistrate Court, the Administrator General’s Office, the Police Victim Support Unit and other Non-Governmental Organisations that promote women’s rights such as Women in Law in Southern Africa (Wilsa).

A lawyer from the Administrator General’s Office\textsuperscript{23} stated that there are a number of cases brought to her office concerning disputes in property sharing of the deceased and that the major problems of implementation are lack of human resources and adequate financial resources to access the rural areas to sensitize the people about the Intestate Succession Act.

It was also brought to light that the major problem the Local Courts face in implementing the Intestate Succession Act is that most Administrators do not go back to the courts to account for how they administered the estate of the deceased,\textsuperscript{24} and as such it is difficult for the Local Courts to know how the estate was administered. Just like the Administrator General’s Office the Local court do not have sufficient funds to do follow ups and this creates a breakage between the Administrator and the Local court. And this could be more of a problem where the Administrator misapplies the benefits and were none of the beneficiaries is willing or rather not aware of the recourse that is available to them.\textsuperscript{25}

\textsuperscript{23} Ms T, Tembo Interview on 1\textsuperscript{st} August, 2006
\textsuperscript{24} Section 37 (6) of the Local court Act, Chapter 29 of the laws of Zambia.
\textsuperscript{25} Justice L, S Munyida, Choma Local Court. 12\textsuperscript{th} April, 2006
Mr.'s Macmillan\textsuperscript{26} enunciated that the major problem of implementing the Act is that it conflicts with customary law. The local courts which are mainly responsible for appointing Administrators and giving of orders on how to distribute the estate administer African Customary law\textsuperscript{27} and section 36 subsection (2)(b)\textsuperscript{28} which among the orders it gives to the Administrator provides that the court shall give orders as to the appropriate African Customary Law to be applied on the distribution of the estate. And under the customary law a widow does not normally inherit from the estate of the deceased husband but their heir looks after her and the children. The heir can marry the widow and literally take over the deceased. Even in instances where the heir does not inherit the children, he is under an obligation to look after her and the children left by the deceased. The law provides that when there is conflict between customary law and written law, the written law prevails.

This is the major draw back of implementing the Intestate Succession Act in that a widow will be told that the Courts gave orders on how the property was to be distributed and as such some widows feel they have no rights to inherit and sit back without taking steps of reporting to the Police or any support group for women.\textsuperscript{29}

The major cause of this is lack of sensitisation from the various organizations that are responsible for implementing the provisions of the intestate succession act.

\textsuperscript{26} Programme Officer, Wilsa, 10\textsuperscript{th} August, 2006
\textsuperscript{27} Section 12(1)(a) of the Local court Act provides that African Customary Law is applicable in any matter provided it is not repugnant to natural justice or morality or any written Law.
\textsuperscript{28} Local Court Act, Chapter 29 of the Laws of Zambia
\textsuperscript{29} Inheritance Laws in Zambia, (2001) p 331
In conclusion it can be stated that the ambiguities in the Intestate Succession Act mentioned above are the one’s causing problems in the way the deceased’s estate is to be distributed.
CHAPTER TWO

CRITICAL ANALYSIS OF THE 1996 INTESTATE BILL WHICH WAS TO AMEND THE INTESTATE SUCCESSION ACT OF 1989

INTRODUCTION

As we saw in the previous chapter, the Intestate Succession Act of 1989 has certain ambiguities, which have caused problems in the distribution of the deceased property that has died intestate. In 1996, a Bill was presented to parliament and only went through its first reading. This chapter will particularly look at the 1996 Bill that was to amend the Intestate Succession Act of 1989.

Much controversy has surrounded the way the deceased’s estate is to be distributed if he died or has died Intestate. According to the Intestate Act\textsuperscript{30} Intestate means a

\textit{person who dies without having made a will and includes a person who leaves a will but dies intestate as to some beneficial interest in his movable or immovable property.}

**Beneficiaries under the Bill and the Act**

There has been controversy regarding the percentages in which the property is shared and who the priority dependants are. To begin, we shall critically analyse the

\textsuperscript{30} Section 3
beneficiaries, that is, the people who are entitled to benefit under the estate of the deceased. According to section 5 subsection 1\textsuperscript{31} the following are the priority dependants, the surviving spouse or the surviving spouses, children, parents of the deceased and dependants.

Section 6 (d)\textsuperscript{32} provides for a situation where there is no spouse, children, parents or dependants, then the estate shall be distributed to near relatives in equal shares. Further Section 6 (e) goes on to state what would happen in a situation where there is no spouse, children, parents and dependants or near relatives then the estate shall be \textit{bona vacantia} and shall devolve upon the state.

In relation to who is entitled to benefit the 1996 Bill provides that the surviving spouse or spouses, children, parents to the deceased and dependants are the priority dependants. The Bill further goes on to provide for a situation where there is no spouse, children, parents or dependants then the estate shall devolve to near relatives. And in a situation where there are no near relatives than the estate shall be \textit{bona vacantia} and shall devolve upon the state.\textsuperscript{33}

The position of Administrators

The Bill in section 34 provides that the Administrator shall be entitled to benefit two and a half per centum of the value of the intestate’s estate as his remuneration for administering the estate. The current position is that an administrator or a guardian

\begin{footnotes}
\item\textsuperscript{31} Intestate Succession Act [1989] Chapter 59 of the Laws of Zambia
\item\textsuperscript{32} Ibid
\item\textsuperscript{33} Section 8 of the 1996 Bill
\end{footnotes}
shall not derive any pecuniary benefit from his office. According to the intestate succession act, an administrator is not entitled to benefit from the estate which he/she is administering except where such an administrator is a beneficiary under the act.

One can argue that an Administrator should not be allowed to benefit because this would conflict with his duties as laid down in the act which are:

- To pay the debts and funeral expenses of the deceased and pay estate duty if payable
- To effect distribution of the estate in accordance with the rights of the persons interested in the estate under this Act;
- When required to do so by the court, either on the application of an interested person or on motion-
  1. To produce on oath in court the full inventory of the estate of the deceased; and
  2. To render to the court an account of the administration of the estate.

The writer feels that the above provision is good and should be included in the Act. This is because in most cases administrators undergo a lot of suffering especially when arranging to get benefits from the pension schemes. During an interview, One Mr. Tembo who is from Chipata stated that he and other former LITCO employees had been waiting for over two months to collect their benefits and that in this period he has been spending nights in the cold outside the building. Mr. Tembo stated that

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34 Section 34 of the Intestate Succession Act, Chapter 59 of the Laws of Zambia
the Administrator’s Generals Office, which is the liquidator of LITCO, was delaying to give out cheques. When asked whether administrators should be remunerated or not Mr. Tembo stated that they should.\(^{35}\) His reason was that most administrators undergo a lot of suffering when arranging to get the financial benefits of the deceased in that most of the pension schemes are slow in releasing the benefits.

**Definition of a child under the Bill**

The 1996 Bill has redefined a child to mean a child born in or out of marriage, an adopted child, a stepchild, and a child who is conceived but not yet born at death or divorce. Whilst in the 1989 Act a child is defined to mean a child born in, or out of marriage, an adopted child, a child who is conceived but not yet born; this definition still continues to cause confusion as to whether a step child is entitled to benefit or not.

From the definition of a child in the Intestate Act it seems that stepchildren are excluded from inheriting. Mr. Geoffrey Mulenga\(^{36}\) stated in a case involving Anastasia Mulenga that the Intestate Act does not discriminate between step and biological children. Anastasia sued her stepmother’s cousin for depriving them of the benefit of a house that was left by her father who died in 1995.

Anastasia stated that her father had not finished paying for that house and that her stepmother finished paying off the debt. Anastasia also stated that the administrator of her father’s estate distributed the property well. All the beneficiaries were given their entitlements including her stepbrother. In 1999 Anastasia’s stepmother died and her cousin Kalaluka got all the household goods including the house her father had

\(^{35}\) Interview on 12\(^{th}\) August 2006 Kent Building, Administrator Generals Office.

\(^{36}\) Lawyer at the Legal Resources Foundation
left. She complained that Kalaluka does not allow her and her stepbrother to benefit from the house.

The above case is one among many where stepchildren are denied the right to benefit from the estate left behind by their fathers or mothers. The Oxford dictionary defines Stepchild to mean a child of your husband or wife by an earlier marriage to another person\(^\text{37}\). The provision in the Bill that defines a child is good and should be included in the Act.

Also in another case of \textbf{Mwalimu Beauty Nanvagwe Mbobola v Chasa Mbobola}\(^\text{38}\) this was an application made under the intestate Act of 1989 were the applicant sought for an order to be appointed as Administrator of the estate of her husband who died intestate in 1994. The applicant is the widow of the deceased and the respondent is the elder brother to the deceased who opposes the application made by the widow.

The brief facts are that the applicant was married to the deceased in 1986. She stated that since the death of her husband, the relatives to the deceased have threatened to forcibly remove her from the matrimonial home. The applicant also stated that she had three children with the deceased and that to her knowledge; the deceased had one child before they married. The reason why the respondent was refusing the

\(^{37}\) Oxford Advanced Learner’s Dictionary

\(^{38}\) (1994) HN 962
applicant to be appointed as Administrator is that she was denying that the deceased had other two children.

The evidence adduced by the applicant and the respondent was conflicting. The justice stated that according to the Act the widow was a priority dependant as opposed to the respondent who is not a dependant at all. However, it is quite obvious from the evidence that the applicant only acknowledged that the deceased had one child outside wedlock and yet it would appear that the deceased in fact had 3 children outside wedlock.

The justice further stated that if he appointed the applicant as sole Administrator she would not look after the interests of the other beneficiaries to the estate and that it would be necessary to appoint somebody to look at their interests. The justice appointed the applicant and the respondent as joint administrators according to section 16(1) of the Act.

From the above case one can have a picture of the problems that most widows face especially when it comes to children outside wedlock. The Act should be amended to define child as provided for in the Bill.

Extra marital children are defined to mean children born to a man or a woman who is married to someone else, or to an unmarried woman and a man married to another woman. Extra marital children cause problems when it comes to distribution of an estate especially in cases where they where not known by the surviving spouse.

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39 Mushota, L. Family Law in Zambia: Cases and materials p 416
Paternity may be established by a blood test or by the child’s birth register if the father acknowledged in writing that he is the father of the child at the time of registering for its birth.\textsuperscript{40}

The Act should provide that if the deceased did not register his name as parent of a child in the births and death registry, then such a child should not be allowed to benefit under the estate. Rule 18 of the Births and Dearth Act \textsuperscript{41} provides that if a child was illegitimate, the Registrar shall not complete space 6 (which is space for the particulars of the father of the child) unless the names and surname of a person acknowledging himself to be the father of the child have been entered in Space 5 pursuant to section 15 of the Act (which makes provision as to the father of an illegitimate child). Section 21 (2)\textsuperscript{42} provides that where a person acknowledges himself to be the father of an illegitimate person, the Registra shall require him to sign the register first before the mother. If they cannot sign, they are required to affix a mark in the register.\textsuperscript{43}

This rule should be included in the Act so as to prevent children who are not the deceased’s from inheriting with legitimate children.

Section 15 of the Legitimacy Act\textsuperscript{44}

\textit{No person shall be bound as a father to give notice of an illegitimate child}  
\textit{and no person shall be registered as a father of such a child except on the}

\textsuperscript{40} Ibid p416  
\textsuperscript{41} The Births and Dearth Registry Act, Chapter 51 of the Laws of Zambia  
\textsuperscript{42} The Births and Dearth Registry Act, Chapter 51 of the Laws of Zambia  
\textsuperscript{43} Ibid  
\textsuperscript{44} Chapter 52 of the Laws of Zambia
joint request of the mother and himself and upon his acknowledging himself in writing to be the father of the child in the presence of the registra.

Such rules as provided above should be in the intestate succession act so as to prevent non-biological children of the deceased from inheriting from the estate.

Distribution of the Estate

Another issue that has continued to cause controversy is that regarding the percentage of shares each beneficially is entitled to get. According to the 1996 Bill\textsuperscript{45} it is provided as follows

- 25\% of the estate shall devolve upon the surviving spouse; except that where more than one widow survives the intestate, then 25\% of the estate shall be distributed among them proportional to the duration of their respective marriages to the intestate and to any direct contribution made by any of the widows to the intestate’s estate.

- 50\% of the estate shall devolve upon the children;

Provided that-

(1) A step child who is not legally adopted by the other spouse shall only be entitled to 2\% of the total portion of the estate distributed to the children; and

(2) A child conceived, but not yet born, shall be entitled to a share in the intestate estate, unless any party having knowledge of the paternity of the child proves, to the

\textsuperscript{45} Section 8
• 20% of the estate shall devolve upon the parents of the intestate; and
• 5% of the estate shall be distributed to the dependants.

The changes that have been introduced are the increase in the percentages of the widow’s share and the decrease in the dependants share. I feel that the widow deserves more than the 25% of the estate because nowadays most women contribute to the acquiring of property. Chuma Himonga\textsuperscript{46} contends that inheritance law on the distribution of the estate of the spouse contradicts divorce law. The Matrimonial Causes Act\textsuperscript{47} provides that on dissolution of a marriage, a judge is required to distribute the matrimonial property according to the principle that both parties are the owners of the property. The assumption is that the matrimonial property should be divided equally between the two partners upon dissolution of the marriage. It does not make sense that at divorce a spouse is entitled to a larger or equal share while when inheriting under intestacy the surviving spouse is entitled only to 25% of the estate.

As for the decrease in the percentage regarding the dependant’s share the provision is alright because people should be encouraged to work for their own things rather than waiting to benefit from a relative who is to die intestate.

\textsuperscript{46} Property Dispute in Law and Practice; Dissolution of the Marriage in Zambia , p56
\textsuperscript{47} 1973
Another change that the Bill introduces is that a stepchild who is not legally adopted by the other spouse is only entitled to 2% of the 50% distributed to the children.

Devolution of the House in a Monogamous Marriage

Concerning the devolution of the house in a monogamous marriage the Bill provides in section 10 (1)(a) that if the intestate is survived by a spouse and children, they shall subject to subsections (2) and (3), be entitled equally and absolutely as joint tenants to that house; or

(b) Children, but no spouse, the children shall be entitled equally and absolutely to that house.

Subsection 2 of section 10 provides that where the intestate is survived by a spouse and children among who include, children that are not biological children of the surviving spouse, the house shall not devolve in accordance with subsection (1), but shall be sold and the proceeds of the sale distributed as follows:

(a) 90% amongst the children in equal shares; and

(b) 10% to the surviving spouse

The above is subject to an agreement between the surviving spouse and the children that the house shall be let out and the money realized from the rent distributed in accordance with paragraphs (a) and (b)
The above provision concerning the devolution of the house where there are non-biological children is objectional because there is nothing positive for the widow. The difference in percentages between children and the widow’s entitlement is too wide. In a situation where a widow has no biological children of her own, it would mean that 90% goes to the children outside marriage while the widow remains with almost nothing. The question one may ask is to what extent can children hold a major share than a widow who has contributed towards the acquisition of the family property. This is because family law recognizes the contribution a wife makes in a home and entitles her to the major share of the property in the matrimonial home.

Subsection (3) provides that where there is more than one house the Administrator is given the power to determine which house shall devolve upon the surviving spouse and the biological children and which house shall devolve upon the other groups of children and which houses, being the balance from the forgoing shall form part of the estate and shall devolve in accordance with section 7 of the Bill. The current position in the act is that where the estate includes more than one house, the surviving spouse or child or both shall devolve upon them and the remainder shall form part of the estate.\(^{48}\)

The provision in the bill is retrogressive because the Administrator is given too much power. The surviving spouse should be left with the choice of deciding which house shall devolve to her and her children. I feel this is going back to the traditional notions of succession and inheritance where a woman was perceived as not owning

\(^{48}\) Section 9 of the Intestate Succession Act, Chapter 59 of the Laws of Zambia
anything, which the husband bought. This provision also promotes male dominance and defeats the whole purpose of having the Intestate Succession Act in as far as a widow’s benefits are concerned.

**Devolution of a House in a Polygamous Marriage**

Section 11(3) of the Bill provides that where the deceased lived in a house separate from his spouses and children, the house shall be let out and the money realised shared amongst all the children as follows;

(a) 80% amongst children in equal shares; and

(b) 20% amongst the widows proportional to the duration of their respective marriages to the deceased and to any other contribution to the acquisition of the house.

The problem with this provision is that there is no method of calculating the duration that has been applied. It is also impossible to know the direct and indirect contributions each widow made towards the house, further it is most inappropriate to allocate 20% to the widow and 80% to the children.

**Offences against an entitled person**

Section 13 of the Bill stipulates the offences against an entitled person. It is provided that any person who unlawfully deprives another person of the use of

(1) any part of the property of the intestate to which that person is entitled under the Act; or

(2) any property shared with the intestate under this Act
shall be guilty of an offence and liable upon conviction to a fine not exceeding fifty thousand penalty units or to imprisonment for a period not exceeding five years, or to both. According to the fees and fines act penalty unit means one hundred and eighty kwacha. In the current terms it means that a person is liable to pay an amount not exceeding K9000000 (nine million).

The above provision is good because it increases the penalty to be paid and as such it will deter the would be beneficiaries from property grabbing Unlike under the intestate succession act the punishment provided for is not stiff and this could be one of the reasons why property grabbing is on the increase.

Appointment of administrators

An Administrator who is appointed by near relatives and granted letters of administration by the court usually does administration of the estate. However, section 14(1) (b) and (c) of the Bill provides that the surviving spouse or any other beneficially shall not be appointed as Administrator; and that the consent of the surviving spouse shall not be required as regarding the appointing of the Administrator. This provision is negative especially when it comes to the promotion of women’s rights in situations were the women is not working and is entirely depended on her husband. The provision does not make sense in that the priority dependants are denied the right to administer their own benefits. This provision should not allowed to amend the Act because it is provided under the Act that\(^{49}\)

\(^{49}\) Section 15 of the Intestate Succession Act of 1989
the application of any interested person the court shall grant letters of Administration to that interested person.

In conclusion one can say that the 1996 Bill has a number of provisions, which are inadequate and questionable. It is difficult to understand the rationale of how property is distributed in that in some sections the surviving spouse is given 10%, in other sections she is allocated 25% and in some 20%. The bill should have come up with a standard share for the widow such as 50%.

If this Bill is made into law it will not solve many of the problems attributed to the Intestate Succession Act, for example, the problem of property grabbing would continue because of the unfair distribution of property. How can a widow, for example, be given 10% of the proceeds of the house if there are non-biological children? The law of intestacy should not conflict with divorce law when it comes to the distribution of the estate to the widow.
CHAPTER THREE

INTESTATE SUCCESSION LAWS OF OTHER COUNTRIES IN SOUTHERN AFRICA

INTRODUCTION

If a person dies without leaving a valid will or an antenuptial contract containing provisions for inheritance, or the will that has been left is inoperative, his assets are to be inherited in accordance with the rules of the laws of intestate succession.\(^{50}\) Most countries in Southern Africa have a codified law of intestacy which determines who the deceased’s heirs are in as far as he did not do so himself or in as much as it is not possible to execute his legally valid wishes. This chapter will look at intestate succession laws of South Africa and Zimbabwe.

SOUTH AFRICA’S INTESTATE SUCCESSION LAWS

According to the definitions in the act blood relations can be divided into 3 categories. A person’s descendants are those who descend directly from him for example, his children, grandchildren and great-grandchildren. A person’s ancestors are those whom he descends, his parents and grandparents.\(^{51}\)

\(^{50}\) Schoeman, M Introduction to the Law of Succession, (2003) p26
\(^{51}\) Section 1 of the Intestate Succession Act number 81 of 1987
The category of relations who are not a person’s ancestors or descendants are called collaterals. The latter would include, for example, a person’s brothers, sisters, nieces, nephews, uncles and unties.\textsuperscript{52}

Section 1\textsuperscript{53} subsection (1) (a) –(f) of the Act contains provisions in terms of how a person’s intestate estate is to be divided. It is provided under section 1 subsection (1) that if after the commencement of this Act (herein after referred to as the deceased) dies intestate, either wholly or in part, and-

(a) Is survived by a spouse, but not a descendant, such spouse shall inherit the intestate estate;

(b) Is survived by a descendant, but not spouse, such descendant shall inherit the intestate estate;

(c) Is survived by a spouse as well as descendant

\begin{enumerate}
\item (1) Such spouse shall inherit a child’s share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister of Justice by notice in the Gazette, whichever is the greater; and
\item (2) Such descendant shall inherit the residue if any of the intestate estate.
\end{enumerate}

(d) Is not survived by a spouse or a descendant, but is survived-

\begin{enumerate}
\item by both his parents, his parents shall inherit the intestate estate in equal shares; or
\end{enumerate}

\textsuperscript{52} Section 1 of the Intestate Succession Act number 81 of 1987
\textsuperscript{53} Intestate Succession Act number 81 of 1987
(2) by one of his parents, the surviving parent shall inherit one half of
the estate and the descendant of the deceased parent the other half
; and if there are no such descendants who have survived the
deceased, the surviving parent shall inherit the intestate estate; or

(e) Is not survived by a spouse or a descendant or parents, but is survived by

(1)

(aa) descendants of his deceased mother who are related to the
deceased through her only, as well as by the descendants of his
deceased father who are related to the deceased through him only;
(bb) descendants of his deceased parents who are related to the
deceased through both such parents; or

(cc) any of the descendants mentioned in sub paragraph (aa), as well
as by any of the descendants mentioned in paragraph (bb), the
intestate estate shall be divided into two equal shares and the
descendants related to the deceased through the deceased mother shall
inherit on e half of the estate and the descendants related to the
deceased through the deceased father shall inherit the other half of the
other estate; or

(11) Only by the descendants of one of the deceased parents of the deceased
who are related to the deceased through such parent alone, such descendants
shall inherit the intestate estate;
(f) Is not survived by a spouse, descendants, parents, or a descendant of the parent, the other blood relations of the deceased who are related to him nearest in degree shall inherit the intestate estate in equal shares.

According to the section 1(a) of the intestate act of South Africa, if the deceased is survived by a spouse but not by descendants, the surviving spouse inherits the whole intestate estate. It is clear that only the descendants can compete with a surviving spouse for the intestate estate.

Under section 1 subsection (1) (b) it is clear that ancestors and collateral’s cannot compete with descendants for the intestate estate. Thus if the deceased is survived only by descendants but not by a spouse then the descendant inherits the entire intestate estate.

**Position of an Adopted Child**

An adopted child is allowed to inherit under the intestate succession act. It is provided in section 1 (4) in the application of this section

(e) an adopted child shall be deemed

(1) to be a descendant of his adoptive parent or parents;

(2) not to be a descendant of his natural parent or parents, except in the case of a natural parent, who is also the adoptive parent of that child or was, at the time of the adoption, married to the adoptive parent of the child

(5) If an adopted child in terms of subsection (4) (e) is deemed to be a descendant of his natural parent, the adoptive parent concerned shall be
deemed to be an ancestor of the child, or shall be deemed not to be an ancestor of the child, as the case may be.

According to the intestate succession act the adopted child can be an heir of the adoptive parents and their blood relations, and the adoptive parents and their blood relations can be the intestate heirs of the adopted child. On the other hand all the links between the adopted child and his/her natural parents and their blood relations are terminated by an adoption order. The adopted child can thus not be an heir of his natural parents and their blood relations and their blood relations cannot be the intestate heir of the adopted child. However, the link between the natural parent and the adopted child are not broken if the natural parent is also the adoptive parent of that child or is married to the adoptive parent of that child at the time of adoption. It is not clear from the act whether the links between the adopted child and the blood relations of the natural parents are also retained in the above-mentioned cases.

Extra-Marital Children

South African intestate succession act also addresses the issue of extra-marital children. It is provided in section 1(2) of the act that notwithstanding the provisions of any law or common law, but subject to the provisions of the this act, illegitimacy shall not affect the capacity of one blood relation to inherit the intestate estate of another blood relation.

An example of the application of section 1 (2) can be shown in the case of In re Moatsi se Boedel\(^{54}\). In this case the deceased died intestate and was survived by his

\(^{54}\) (2002) 4 SA 712
extra marital daughter. In view of the fact that black customary law was not applicable (the deceased was a divorced person from a marriage in the community of property and he was not survived by a party to a customary union that was concluded after the dissolution of the marriage) the estate of the deceased had to be distributed in accordance with section 1 subsection (1) (b) of the intestate succession act\textsuperscript{55}, according to which the descendant (his daughter) was the only heir. The fact that the daughter was an extra marital child did not disqualify her.

The provisions of the intestate succession act are consequently not applied in cases where the Black Administration Act is applicable. The system of Intestate Succession in the Act is different from the black customary law in that;

1. In the Intestate Succession Act the circle of potential intestate heirs has been drawn comparatively tightly which amounts to the narrow definition of the concept of family.

2. In the Intestate Act men and women receive equal treatment and

3. Unlike under black customary law, the Intestate Act of South Africa does not make first-born children to receive any advantages when it comes to inheritance.

According to black customary law, on the other hand, the concept of the ‘family’ is seen as having much wider application and both men and the first borns of a family enjoy precedence.

South Africa’s Law Commission’s Project 90, Discussion Paper 93 on Customary Law and Inheritance

\textsuperscript{55} Number 81 of 1987
Women’s Legal Center of South Africa made comments on Customary Law and Inheritance. The following are their comments;

Broader definition of surviving spouse

The Women’s Legal Center supports the recommendation of the Law Commission that the definition of surviving spouse should be broadened in the Intestate Succession Act. However, the issue at customary law is whether a valid customary marriage has been contracted. The Women’s Legal Center suggests that customary law needs to be developed in order to bring what constitutes a valid customary marriage into line with the constitution. The Center says that it has received cases where a woman was married under customary law but where full lobola was not paid. When the customary husband dies, his family claims that there had never had been a valid marriage as lobola had not been paid in full. This is an issue that needs to be clarified both in terms of recognition of customary marriages and for inheritance purposes.

Polygamous marriages

The paper also suggests that the Intestate Act should apply equally where both marriages are customary marriages or where one marriage is civil and the other is a customary marriage.

Extension of Intestate Succession to include dependants under Customary Law

The discussion paper supported the extension of Intestate Succession to include dependants under Customary Law such as parents and the siblings, provided that

their rights to maintenance from the deceased estate are secondary to the maintenance rights of the spouses and children who have a prior claim.

Administration of the Estate

The women's centre supports the repeal of section 1 subsection (4) (e) of the Intestate Succession Act which talks about adopted children and their right to inherit under the estate if they are properly adopted by both spouses. The women's center feels the repeal of section 1(4) b will result in section 1(2) of the act being made generally applicable and have no effect of non-discrimination on the grounds of birth, gender and sex. Section 1 subsection (2) of the act addresses the issue of extra marital children. It is provided that notwithstanding the provisions of any law or the common law, but subject to the provisions of this act, illegitimacy shall not affect the capacity of one blood relation to inherit the intestate estate of another blood relation. Illegitimacy is no longer a bar to inheritance under customary law.

Polygamous marriages

Section 4.9.2 of the draft paper recommends that in polygamous marriages all wives should share equally in the estate.

Devolution of the House

Section 3(b) of the paper suggest that if the deceased owned more than one house the surviving spouse should be allowed to inherit only one house, provided that the surviving spouse is entitled to choose which house.

And that in the case where the deceased is survived by a spouse but not by a descendant, the spouse should inherit the intestate estate as a whole regardless of
whether or not this contains two houses. There should be no limit on customary law spouses inheriting one or two houses.

ZIMBABWE’S INHERITANCE LAWS

In Zimbabwe the Roman Dutch Common Law as modified by statute determines how the estate of the deceased who died intestate will be administered.

Intestate Succession under General Law 57

General law applies to those estates registered at the High Court.

Appointment of the executor

An executor is a person appointed to carry out the obligation of the deceased. Upon the death of a person, the master will call upon the surviving spouse, if the person was married then the surviving spouse shall request five relatives of the deceased to an edict meting where the executor is chosen. If the relatives fail to appoint an executor then the master may appoint someone to be the executor.

Duties of the an Executor

The executor has the following duties;

- To list the property of the deceased in an inventory
- To publish the estate in the Government Gazette and the newspapers circulating in the place of residence where the deceased resided at the time of his death to inform debtors and creditors to enable him to pay creditors and to collect the debt for the estate

57 Deceased Estate Succession Act, Chapter 302
- Prepare an account, which shows what the deceased had and what he owed to creditors; and distribute the estate to the beneficiaries.

**Distribution of the estate property**

If the deceased had a spouse and children, then the spouse is entitled to the house and the household goods and the effects. In addition the spouse is entitled to $200 000.00 or a child’s share whichever is greater. All the legitimate children of the deceased will get an equal share from the residue of the estate after the spouse has been given her entitlements.

**Intestate Succession Under Customary Law**

This is regulated by the Administration of the Estate Amendment Act number 6 of 1997, which applies to the people to whom customary law would have applied at the time of their death.

**Mixed marriages**

All customary law marriages whether registered or unregistered, are valid for the purpose of inheritance except that if a person contracts a registered or unregistered customary law marriage when he is already married under the Marriage Act the customary marriage will not be valid.

If a person marries under the Marriage Act a man who is already married under customary law to someone else, then the last marriage will be treated as customary law marriage for the purposes of inheritance.

**Distribution of property**

If the deceased is survived by more than one wife and had more than one child then one of his net estate is shared among his wives of which the first wife gets two thirds
and the other wives get the remainder of the one third in equal shares. The remaining two thirds are shared equally amongst the deceased’s children or their descendants if any.

If the wives are living in different houses owned by the deceased person at the time of his death, then they each get ownership of the house and all household goods in the house in which they lived.

**INTESTATE SUCCESSION IN SWAZILAND**

In Swaziland the laws of succession are similar to those of Zimbabwe because they both administer Roman Dutch Law. The Intestate Succession Act of 1953 governs intestacy.

The principle heirs are the surviving spouse and the deceased children. Regardless of whether the deceased was married in a community or out of community of property, the formula for the distribution is the same where survived by descendants.

As long as descendants survive the deceased, the surviving spouse and the children share the free residue of the estate equally among themselves. There is a specified minimum share for the surviving spouse of E1, 200 (equivalent to rands). This means that the surviving spouse is entitled to a child’s share or to E1, 200 whichever seems greater.

Again in cases where the deceased is not survived by the descendants who are entitled to inherit ab intesto, the surviving spouse, where the deceased is survived by parents or brothers and sisters, is entitled to inherit half of the estate or E1, 200
whichever seems to be greater. The other half is shared among the parents and or brothers and sisters of the deceased.

In any case which is not covered by the above rules the surviving spouse inherits the whole estate. The main difference between Zimbabwe and Swaziland is that in Zimbabwe surviving spouse has the right to take over all the household goods and the effects in the deceased estate.

**INTESTATE SUCCESSION IN BOTSWANA**

The intestate estate of the deceased person to whom the general law applies is distributed as prescribed in the Roman Dutch Common Law as modified by the succession rights of the Surviving Spouse and Inheritance Family Provisions Act.

The rights of the children to inherit are provided for at common law, those of the surviving spouse are granted by the Act. The extent of inheritance of the surviving spouse depends on whether the deceased is survived by any children or parents, brothers and sisters who are entitled to inherit ab insteoto.

Where the spouses were married in community of property and the deceased left children, the surviving spouse is entitled to a half of the joint estate by virtue of the marriage in the community of property rights plus a child’s share or P5, 000 whichever is greater.

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Where the spouse was married out of community of property and the deceased spouse is survived by children, their being no joint estate, there is no automatic half share to which the surviving spouse will be entitled by virtue of the Act to a child’s share of the estate or to a share valued at P5, 000 whichever is greater.

Where the deceased’s spouse is not survived by parents, brothers and sisters, regardless of whether the spouses were married in or out of community of property, the surviving spouse is entitled to receive a half share of the estate or P10, 000 whichever is greater. The other half is shared among the parents and the siblings.

Where there are no children, parents, brothers and sisters the surviving spouse will be entitled to receive the entire estate as the sole heir/ess.

In summary it can be said that in the three countries which apply the Roman Dutch Common Law the heirs of the deceased are the surviving spouse, his/her children who are entitled to equal shares subject to a widow’s/widower’s right to a minimum share in those cases where his or her share would otherwise fall below that minimum.

In Zimbabwe the surviving spouse is entitled also to inherit the household goods and the effects. The countries have substantially similar general law founded in Roman Dutch Customary Law.

**Conclusion**

The purpose of studying other countries intestate succession laws was to see how property is distributed and who the beneficiaries are. It has been seen that in all the four countries studied, that is, South Africa, Zimbabwe, Botswana and Swaziland, the surviving spouse and the children of the deceased are the priority heirs of the
estate. These countries apply Roman Dutch Common Law and thus their laws on inheritance are almost similar.
CHAPTER FOUR

CONCLUSION AND RECOMMENDATIONS

Introduction

In the recent years, inheritance and succession in Zambia has become a complex issue. The customary patterns of inheritance presented a challenge. The reason being that there are 73 tribes in Zambia each with its own custom.

It has been stated in the previous chapters that the Intestate Succession Act has many ambiguities and thus this chapter seeks to point out the weaknesses of the Act and make recommendations. There are some definitions in the Act that need to be clarified in order to establish the scope of application. If the Intestate Succession Act is amended to redefine the terms as to be proposed in the next paragraphs, the Intestate Succession Act will become more effective and more applicable to our Zambian society.

Child

The Intestate Succession Act defines child to mean a child born in, or out of marriage, an adopted child, a child conceived but not yet born. This definition causes controversy in that it does not state whether stepchildren are entitled to benefit or not.

The definition given in the Intestate Succession Act of a child raises questions on the status quo of rights of children of either spouse, who are not biological children of the deceased. Within the present meaning of the Intestate Succession Act,
interpretation of the definition of a child means that step children or non biological children though they may be regarded as children of the family are not entitled to benefit as such but as dependants. This is because they do not fall within the ambit of the definition of child in the Intestate Succession Act.

The author recommends that the definition of a child should be broadened to include stepchildren. The Act needs to protect the children living in the home who are the direct beneficiaries of the deceased whether they are stepchildren born outside marriage, within marriage or adopted children. The Act should also provide that only children whom the deceased acknowledge to be his children in the Birth and Death Registry be the only ones to benefit as children with the exception of those who were not born at the time of his death.

The Intestate Succession Act should also provide that a stepchild who is not legally adopted by the other spouse should only be entitled to two per centum of the share of a child.

**Age Restrictions**

The Intestate Succession Act in section 5 provides that 50% of the estate shall devolve upon the children in such proportions as are commensurate to a child’s age and educational needs or both. This imposes no age restrictions on a child because in certain cases the deceased’s offspring who are mature and self reliant would want to
benefit in the same proportion as younger children who are below the age of 18 and still at school or college.

In the case of **Catherine Chilamwa v Bridget Chilanda**\(^{59}\), the defendant was a child of the deceased and the plaintiff was her stepmother. She had no child with the deceased. The defendant claimed the house and most of the property saying that she needed more property because she was the eldest and that she could take care of her younger brothers and sisters. The court ruled that they all needed an equal share of the estate left by the deceased.

This author proposes that the 50% share should be allocated according to the needs of the child. Where the needs are greater for example, where some children are over the age of 20 but are at university or where there are special circumstances, the share should be commensurate with those needs.

**Definition of a surviving spouse**

The Intestate Succession Act does not define who a surviving spouse is, but in section 3 it is stated that marriage includes a polygamous marriage and a ‘husband’ surviving ‘spouse’, ‘wife’ or ‘widow’ shall be construed accordingly.

The definition recognizes both polygamous and monogamous marriages. It is important that the Intestate Succession Act defines who a surviving spouse is. The recommendation is that in a case of a statutory marriage a spouse should be defined to mean one who has undergone all the legal formalities of marriage as provided in the Marriage Act. And in terms of a customary law marriage a spouse should be one

\(^{59}\text{LC/07/2002}\)
who should have been validly married according to the custom which the parties had chosen.

The problem with the definition of spouse in the Act comes about when the person claiming to have been married to the deceased is rejected by the relatives of the deceased as not having been married to the deceased. Nowadays, most people do not go through all the formalities of marriage. Cohabitation is increasing and at the time the legislators were making the Act cohabitation was not occurring at the rate it is today. Cohabitation is a situation where a man who may be married is living with a woman who is not married to him.

One would ask whether cohabitation gives right to property when one of the cohabitees dies. This author proposes that the Intestate Succession Act should clearly define who a surviving spouse is, so as to prevent cohabiters from inheriting with surviving spouses who were legally married. The definition of spouse in the Intestate Succession Act is broad to even encompass cohabitees.

Appointment of Administrators

The Intestate Succession Act in section 15 provides how administrators should be appointed. The Intestate Succession Act provides that on the application of any interested person, the court shall grant letters of administration.

The definition of any ‘interested person’ is too wide and is subject to abuse. This can result in any person who is not a relative to the deceased to apply for administratorship. Due to high unemployment levels in Zambia people rush to be administrators because they see it as a source of income. The courts when appointing
administrators should interview the ‘interested person’ and ask them why they are interested in becoming administrators.

Section 15 (3) provides that where no person applies for letters of administration, letters of administration may be granted to the Administrator General or to a creditor. The author proposes that the heirs who are 21 years of age and above and the surviving spouse should be eligible for appointment as administrators.

**Enhancing Implementation of the Intestate Succession Act**

Chapter One of this study looked at the problems of implementing the provisions of the Intestate Succession Act.

A research conducted by Women in Law in Southern Africa (Wilsa)\(^{60}\) shows that a majority of Zambians consider the Act to be in conflict with customary law of inheritance. This in itself is a threat to the proper implementation of the Intestate Succession Act. The research also points out that Local Courts are customary law courts, thus they never take an active role in the administration and distribution of the estate beyond the appointment of an administrator. Administrators do not submit their statement s of accounts as required in section 37 (6) of the Local Court Act. This makes implementation very difficult.

Other problems of implementation as brought out by the various institutions or law enforcement agents are that of lack of human resources and adequate financial resources to access rural areas to sensitize the people about the Intestate Succession Act and the consequences of breaching the provisions of the Act.

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\(^{60}\) Widowhood, Inheritance Law, Customs and Practices, (1995) p93
Lack of stiff punishment for the offence of depriving beneficiaries of their entitlements can be said to be one of the factors that has caused the increase in the cases of property grabbing.

The recommendation is that the punishment should be stiffened to imprisonment for a period not exceeding 5 years. The current position is that the offender who wrongfully deprives a beneficiary of his benefits is liable to imprisonment for a period not exceeding two years or to pay a fine not exceeding seven hundred and fifty penalty units. According to the Fees and Fines Act a penalty unit means one hundred and eighty kwacha. In current terms it means that one is liable to pay K135,000.

Devolution of the House

The Intestate Succession Act in section 9 subsection 1(b) provides that the surviving spouse shall have a life interest in a house (left by the deceased if any) which shall determine upon that spouse's remarriage or death.

This provision acts negatively against women, in that if a man were the surviving spouse they would be allowed to continue living in the house. However, if the surviving spouse were a woman, she would not be allowed to continue living in the house.

The author proposes that the Act should provide that the surviving spouse should jointly own the house with the children.

Scope of Application of the Intestate Succession Act

Section 2 subsection 2 (a) of the Intestate Succession Act provides that the act shall not apply to land which at the time of the death of the intestate had been acquired
and was held under customary law. Since most of the rural land in Zambia is held under customary law the act by excluding such land has failed to protect access for the widows and the nuclear family of the deceased to one of the most valuable assets in the African estate.\textsuperscript{61}

This author proposes that the surviving spouse should have the right to the use of the land left behind by the deceased.

**Distribution of the Estate**

The distribution of the estate in terms of percentages is governed by section 5 of the Intestate Succession Act subject to other sections of the Act. The intestate succession act provides that

- 20\% shall devolve upon the surviving spouse and if there is more than one surviving spouse it shall be distributed among them proportional to the duration of their respective marriage.
- 50\% shall devolve upon the children
- 20\% shall devolve upon the parents of the deceased
- 10\% of the estate shall devolve upon the dependants

The 20\% given to the surviving spouse is not enough. This is because the surviving spouse gives away a larger proportion of his/ her property to the children, dependants and the in-laws.

In a polygamous marriage, the 20\% given to the widows is nothing taking into account the realities of life. This is discriminatory against polygamous unions. Why should there be a difference in the treatment where you have a widow getting the

\textsuperscript{61} Ibid p 93
whole 20% while in a community of widows they share the 20% yet in both situations they remain surviving spouses/ widows. Sometimes the widow’s contribution to the deceased property outweighs the duration of their respective marriages.

In conclusion the following are the recommendations being submitted;

➤ The act should define who a surviving spouse is to avoid concubines from inheriting from the estate.

➤ The share of the surviving spouse should be raised from 20% to 40% and children’s share should remain 50%. The parents to the deceased and the dependants should share the remaining 10% in equal shares.

➤ The surviving spouse and the children should own the house as tenants in common.

➤ The definition of child to be changed to mean a child born in, or out of marriage, an adopted child, a stepchild, and a child who is conceived but not yet born at death or divorce.

➤ The act should come up with clear guidelines in devolution of property according to age of the children.

➤ Administratorship should be left only to the beneficiaries.

➤ As regards customary land, the surviving spouse should have the right to use of the land where she/he used to live with the deceased.

➤ The penalties under the intestate succession act should be stiffened.
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