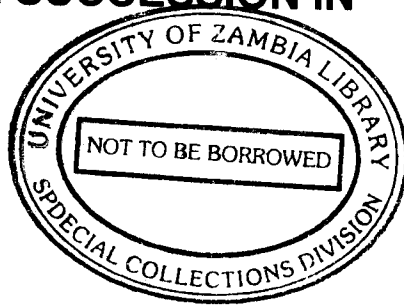


**TESTAMENTARY AND INTESTATE SUCCESSION IN
ZAMBIA**



A Critical Review

***A DIRECTED RESEARCH SUBMITTED TO THE SCHOOL
OF LAW OF THE UNIVERSITY OF ZAMBIA AS PARTIAL
FULFILMENT OF THE AWARD OF THE DEGREE OF
BACHELOR OF LAWS (LL.B)***

BY

LLOYD SAMSON THOLE

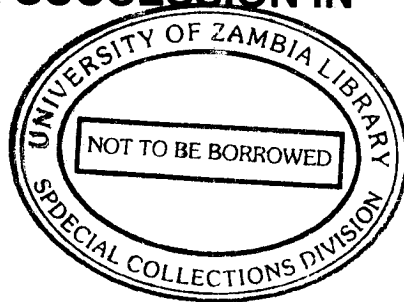
UNIVERSITY OF ZAMBIA, LUSAKA

DECEMBER 2006

PREFACE

Each and every one of us experiences a time when we are faced with a problem of succession at one time or another. This may be brought about by different circumstances. It could be that a member of the family has passed away and we have been appointed administrator or executor of the estate of the deceased depending on whether the person has died intestate or otherwise or we are beneficiaries of the estate in question. When this happens, people find themselves in an awkward position because they do not know what is expected of them as they may not understand how to dispose of the estate or how the law on succession operates in this country. This has been observed in many families including mine. This being the case, it is important to educate the public on the law of succession in Zambia. There is also need to discuss what experiences people have gone through in resolving succession problems. This will make us understand the problems people are facing so that appropriate measures can be taken to redress these problems. This study is therefore very important for a number of reasons. Firstly, this study will help in reviewing the legislation on succession in Zambia with a view to coming up with amendments where necessary. Secondly, as regards persons who die intestate, there are concerns from people who have experienced problems in their families after a bereavement that the devolution of the deceased's estate is not done fairly because it is thought that although the spouse of the deceased gets 20% of the estate, he or she in fact gets 70% because he or she is in charge of the 50% which is given to the children. Most surviving spouses usually end up using this

**TESTAMENTARY AND INTESTATE SUCCESSION IN
ZAMBIA**



A Critical Review

***A DIRECTED RESEARCH SUBMITTED TO THE SCHOOL
OF LAW OF THE UNIVERSITY OF ZAMBIA AS PARTIAL
FULFILMENT OF THE AWARD OF THE DEGREE OF
BACHELOR OF LAWS (LL.B)***

BY

LLOYD SAMSON THOLE

UNIVERSITY OF ZAMBIA, LUSAKA

DECEMBER 2006

PREFACE

Each and every one of us experiences a time when we are faced with a problem of succession at one time or another. This may be brought about by different circumstances. It could be that a member of the family has passed away and we have been appointed administrator or executor of the estate of the deceased depending on whether the person has died intestate or otherwise or we are beneficiaries of the estate in question. When this happens, people find themselves in an awkward position because they do not know what is expected of them as they may not understand how to dispose of the estate or how the law on succession operates in this country. This has been observed in many families including mine. This being the case, it is important to educate the public on the law of succession in Zambia. There is also need to discuss what experiences people have gone through in resolving succession problems. This will make us understand the problems people are facing so that appropriate measures can be taken to redress these problems. This study is therefore very important for a number of reasons. Firstly, this study will help in reviewing the legislation on succession in Zambia with a view to coming up with amendments where necessary. Secondly, as regards persons who die intestate, there are concerns from people who have experienced problems in their families after a bereavement that the devolution of the deceased's estate is not done fairly because it is thought that although the spouse of the deceased gets 20% of the estate, he or she in fact gets 70% because he or she is in charge of the 50% which is given to the children. Most surviving spouses usually end up using this

part of the estate as if it were their own. It has also been pointed out by some people in the Zambian society that most members of the extended family are excluded from the estate leaving it only to the nuclear family. The proponents of this notion perceive this as being unfair because they feel that it is a fact that African families are made up of a very large extended family. This being the case, this extended family should benefit from the deceased's estate. Thirdly, given the situation that many ordinary people do not fully understand the meaning and impact of a will, there is usually some misunderstanding by some families in the way wills function. This leads to disputes and litigation which cause delays in the administration of estates.

For as long as information on intestate and testamentary succession is not made available to the people, there will always be problems in the way legislation on succession will be applied.

Measures must be put in place so that the law on succession is always up to date and fulfills the aspirations of the people at all times. The review of the current legislation has shown that many years have passed since most of the legislation on succession was passed and many things have changed in the country since then. For this reason, many Acts need to be amended. For instance Acts like the Witchcraft Act are no longer relevant to Zambia. This Act, which was enacted in 1913, needs to be amended or completely repealed for it does not serve any purpose in modern Zambia. The same goes for other pieces of legislation as this study has shown.

THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

I recommend that the Obligatory Essay prepared under my supervision by Lloyd Samson Thole entitled:

**TESTAMENTARY AND INTESTATE SUCCESSION IN
ZAMBIA:
A Critical Review**

Be accepted for examination. I have carefully checked it and I am satisfied that it fulfils the requirements relating to the format laid down in the regulations governing Obligatory Essays.

26. 01. 07

DATE



.....

**Mrs. L. Mushota
(Supervisor).**

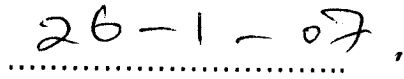
DECLARATION

I, **Lloyd Samson Thole** Computer Number **77092007** do hereby declare that the contents of this dissertation are based on my own findings. I further declare that the information used herein that is not my own I have endeavored to acknowledge.

I, therefore declare that all errors and other shortcomings contained herein are my own.



Signature



Date

Table of Contents

PREFACE.....	iii
CHAPTER 1	1
TESTAMENTARY AND INTESTATE SUCCESSION IN ZAMBIA.....	1
1.0 INTRODUCTION	1
1.1 History of Succession in Zambia.	4
1.2 Testamentary Succession	8
1.3 Intestate Succession.....	13
CHAPTER 2	17
STATUS OF ZAMBIAN LAWS ON SUCCESSION	17
2.0 Zambian Acts on Succession.....	17
CHAPTER 3	30
PERFORMANCE OF SUCCESSION LAWS.....	30
3.0 PROPORTIONS OF DISTRIBUTION OF THE ESTATE IN THE INTESTATE SUCCESSION ACT.....	30
3.1 BENEFICIARIES IN THE INTESTATE SUCCESSION ACT	31
3.2 PROVISIONS OF THE WILLS AND ADMINISTRATION OF TESTATE ESTATES ACT	32
3.3 WILLS OR INTESTATE SUCCESSION?	33
3.4 IMPACT OF SUCCESSION ACTS	34
3.4.1 The Intestate succession Act	34
3.4.2 The Wills and Administration of Testate Estates Act.....	35
4.0 DECIDED CASES ON LAW OF SUCCESSION IN ZAMBIA	36
CHAPTER 4	45
CONCLUSION AND RECOMMENDATIONS.....	45
5.0 Conclusion.....	45
6.0 Recommendations	53
7.0 References.....	56
8.0 ZAMBIAN LEGISLATION ON SUCCESSION CONSULTED.....	57
9.0 CASES CITED.....	58

ACKNOWLEDGEMENTS

This work would not have been possible without the input which I received from many people. First of all I would like to pay my tribute to all the respondents who responded to the questionnaires which were administered to them and those who had personal interviews with me. These include members of staff from Kabulonga Basic School, the National Science and Technology Council, the Foods and Drugs Control Laboratory, the Zambia National Commission for UNESCO, and the International Development Agency. I would also like to pay tribute to the Coordinator of the Directed Research Course Mr. Mumba Malila for having coordinated the course in such a straight forward and professional manner which made it very easy for me to carry out this study. I would also like to extend my gratitude to my Course Supervisor, Mrs. Lillian Mushota for having supervised my research. My gratitude also goes to my mother who has been an inspiration to me and has always encouraged me to study hard and get the best out of life.

To my class mates at UNZA in the fourth year class of 2006, I pay tribute to my friends and colleagues, Peter Zulu, Derrick Sokoni, Ronald Hatoongo, the late John Chile Ng'uni, the late G.K. Mulenga, the late Angela Mbonge , Francis Chanda, Greenwell Sitwala, Fred Lubemba, McDonald Mulongoti and others too numerous to mention. To you all I say thank you very much for having given me

the drive and inspiration to study for the LL.B degree. Without your help, studying would have been difficult.

I also say thanks to my children, Nicholas, Felistas, and Lloyd Jr. for having given me the courage to soldier on in my studies at all times.

Lastly but not the least, to my wife, Pamela Thole who gave me great inspiration and contributed considerably to the final document through invaluable in-depth discussions on this challenging subject of testamentary and testate succession in Zambia. Pamela, this is my dedication to you and I hope this document will make you proud when you read it.

CHAPTER 1

TESTAMENTARY AND INTESTATE SUCCESSION IN ZAMBIA

1.0 INTRODUCTION

In Zambia, the law on succession is based on the two Acts that were passed in 1989 to govern how estates of deceased persons are to be administered. These are the Intestate Succession Act and the Wills and Administration of testate Estates Act. There is also other legislation which impacts on succession. Some of this legislation is outdated as has been shown in this document. Some of this legislation has continued to be in the Zambian statute books. In Zambia, despite the fact that we have been independent for over 42 years, many people still do not understand laws relating to succession. Many people are still ignorant of the Intestate Succession Act and the Wills and Administration of Testate Act. This is evidenced from the way such people behave when there is bereavement in a family.

Misunderstandings arise as to how the estate will be divided or who will get what property. I have personally experienced this in my family during three occasions. Firstly when I lost my younger brother and secondly when I lost my elder brother.

On both occasions, no will was left behind. Some family members, especially those who came from the village refused to follow the provisions of the intestate law to distribute the estate. They insisted that traditional methods should be used since by the 'modern' ways, they would be left out. On the third occasion, when I lost my brother-in-law a will was left behind. In this instance, problems arose when some family members felt that they had been given very small portions of the estate or were left out altogether from the will. They advocated that the will should be put aside and the estate be divided according to how the family members saw fit. In other words, they did not believe in the laws put in place by government. This is very undesirable. If we have to solve the problem of succession, the starting point should be to educate the people on issues of succession or have a critical review of the testate, testamentary and associated laws to ascertain if there are any weaknesses in the laws. Testamentary succession is governed by the Wills and Administration of Testate Estates Act¹. This Act does not however apply to:

- (a) Land which at the death of the testator had been acquired and was held under customary law and which under that law could not have been disposed of by will.
- (b) Property which at the death of the testator was institutionalized property of a chieftainship and had been acquired and was being held as part of a chieftainship property.²

¹ Cap 60 of the Laws of Zambia 1989

² Ibid, Section 2.

In situations where a priority dependant (wife, husband, child or parent) is given an unreasonably small portion having regard to his degree of dependence on the deceased, the person shall have the right to apply to a court for adjustment to be made to the portions inherited and in that case part III of the Wills and Administrative of Testate Act shall apply with the necessary changes.³ Testamentary succession is also governed by the Trusts Restriction Act⁴. This is in a situation where the testator attaches any terms and conditions in relation to the disposition of any part of his estate.

The Intestate Succession Act, Chapter 59 of the Laws of Zambia governs the distribution of an estate of the deceased person who has not left a will. This Act does not apply to the following property:

- (a) Land which at the death of the intestate had been acquired and was held under customary law;
- (b) Property which immediately before the death of the intestate was institutionalized property of a chieftainship and had been acquired and was being held as part of a chieftainship property.
- (c) Family property.⁵

³ Wills and Administration of Testate Estates Act, Section 20 (1) and (2)

⁴ Cap 63 of the Laws of Zambia 1970

⁵ Ibid, section 2 (2)

The non inclusion of customary land and family property in the estate of the deceased in both the Intestate Succession Act and the Wills and Administration of Testate Estates Act is disadvantageous in that land is very important for survival. Leaving it out of the estate means that the remaining spouse and children cannot benefit from this land even if it had been substantially developed by the deceased. As the law stands, all the investment which may have been put into the development of a particular piece of traditional land would be lost as it would go back to the chief. Additionally, the non inclusion of family in the deceased's estate is disadvantage. The deceased may have contributed a lot to the acquisition or development of this family property. It may be fair if a portion of this family property was made part of his estate so that his widow and children could also benefit from his family property.

1.1 History of Succession in Zambia.

Prior to 1989, customary laws of inheritance were applied by Zambians. During this period, inheritance depended on the kinship system to which people belonged. Tribes either belonged to the patrilineal or the matrilineal system. In tribes which follow the former system, succession was through the mother's lineage whereas tribes which followed the latter system, succession was through the father's lineage. Under the matrilineal system, children did not inherit from the

father and they had to look to the mother for care. The estate of the father was inherited by the mother, brothers and sisters, maternal uncles and his sister's children. There was no provision for inheritance by the man's own children. The majority of Zambians practice matrilineal system. Tribes that practice the patrilineal system which has a provision for children to inherit from their father are in the minority.

Urbanization brought conflict to people's lifestyles and values changed; people began agitating for their children's rights to inherit and those who were 'disinherited' by this development resorted to using force and threats to take what was otherwise rightfully theirs. This property grabbing became so rife that the government mandated the Law Development Commission to collect views from members of the public on customary laws of inheritance, which culminated in the codification of the testate and intestate Succession laws of 1989. By the Intestate Succession Act and Wills and Administration of Testate Estates Act, children and widows became priority beneficiaries. Because of this situation, most of the beneficiaries in many families especially the wife and the children were disadvantaged. The people who benefited from the father's estate were the brothers and sisters of the father. The children and the widow were left to fend for themselves. A law was therefore sought to change this situation. Because of urbanization, families started looking at life in a different perspective. Relatives who were not ordinarily included as beneficiaries in inheritance issues, such as uncles or aunties started taking an interest in family inheritance issues.

Urbanization brought conflict to people's lifestyles and values changed; people began agitating for their children's rights to inherit and those who were 'disinherited' by this development resorted to using force and threats to take what was otherwise rightfully theirs. This property grabbing became so rife that the government mandated the Law Development Commission to collect views from members of the public on customary laws of inheritance, which culminated in the codification of the testate ad intestate Succession laws of 1989. By the Intestate Succession Act and Wills and Administration of Testate Estates Act, children and widows became priority beneficiaries.⁶ After the enactment of these Acts, the traditional ways of succession have been modified or abandoned to take into consideration the needs of the immediate family, especially the children and dependants of the deceased.⁷ Prior to 1989, it was the view of the colonial masters that Africans should continue to use their own customary laws to govern inheritance. When Zambia became independent in 1964, some laws did not change accordingly to address issue of inheritance which was no longer applicable. For instance, the exclusionary clause which was in colonial statutes entrenched itself in the constitution in article 23(4) (c) and (d). This exclusionary clause states that a law shall not make any provision that is discriminatory either of itself or in its effect. However, Section 4 (c) states that this clause shall not apply to any law so far as that law makes provision with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of

⁶ L. Mushota, *Family Law in Zambia*, (1995) University of Zambia, pp 421

⁷ *Ibid.*

personal law and (d) for the application of in the case of members of a particular race or tribe, of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons. This means that the intestate succession law cannot fully be applied to Zambian people without infringing the constitution. There is therefore need to amend the constitution so that the intestate succession law does not infringe the constitution. As it stands, this clause can be used to challenge the new law on the basis that it is in conflict with the supreme law.

With the enactment of the Intestate Succession Act and the Wills and Administration of testate Estates Act, some pieces of legislation have become redundant. Some of these are Acts such as the Deceased Brother's Widow's Marriage Act⁸. The preamble of this Act states that this Act was meant to amend the law relating to marriage with a deceased brother's widow; and to provide for matters incidental thereto. Section 3 of the Act states that no marriage contracted between a man and his deceased brother's widow within Zambia or without would be deemed to have been void or voidable, as a civil contract, by reason only of such affinity. This marriage would only be voidable if the brother divorces the wife and his brother marries her whilst the ex-husband is alive. This is stated in section 5 of the Act. Section 4 of the Act allows the existing rights and interests to continue applying even for those marriages which were contracted before the commencement of the Act. This Act protects those people who got married to

⁸ Chapter 57 Of The Laws Of Zambia

their deceased's brother's widow before the enactment of this Act. This means that their interests as regards succession are protected. However the Act seems vague as to the real reason it was enacted as our traditions allow a person to marry a widow of a deceased brother. This Act was enacted on 12th October 1926 and amended by Government Notice 72 of 1964 Statutory Instrument 497 of 1964. The Act has never been amended since then and a lot of changes regarding marriage to a deceased's brother's widow have taken place since then. The issues which were meant to be addressed by this Act are now covered by the Intestate Succession Act of 1989. The relevance of the Deceased Brother's Widow's Marriage Act is therefore no longer tenable in modern Zambia.

1.2 Testamentary Succession

Testamentary succession takes place where a person has left a will to dispose of their property after their death. In the strictest sense, "will" is a general term; while "testament" applies only to dispositions of personal property (this distinction is seldom observed)⁹

Sir J.P. Wilde defines a will as follows:

⁹ Collier's Encyclopedia, 1996 Vol 13

*"The will of a man is the aggregate of his testamentary intentions so far as they are manifested in writing duly executed according to statute"*¹⁰

Another authority, Jarman defines a will in the following terms:

*"a will is an instrument by which a person makes a disposition of his property to take effect after his decease and which is in its own nature ambulatory and revocable during his life time".*¹¹

The conception of freedom of disposition by will, familiar as it is in modern England and the United States, both generally considered common law systems, is by no means universal. In fact, complete freedom is the exception rather than the rule. A will is also used as the instrument in a trust.¹² It has been observed in Zambia that many people do not write wills. This information has been obtained from discussions I have had with many people. Various reasons are advanced for this. Some feel that the concept is foreign while others see no need for this as they consider themselves to have few possessions not warranting a will for their disposal. These views were confirmed by a number of respondents who were interviewed during the survey.

¹⁰ Ternage v Goodman (1865)

¹¹ Re Berger & Baird v Baird (1990) in Jarman on Wills, page 1

¹² Website - Wikipedia – Internet Encyclopedia

Testamentary succession in Zambia is governed by the **Wills and Administration of Testate Estates Act**¹³ which aims to simplify the law governing the making of wills and to provide for adequate financial and other provisions to be made for dependants in a will. It also provides for the administration of estates of persons dying having made a valid will. As in the case of the Intestate Succession Act, this act shall not apply to land which at the death of the testator had been acquired and was held under customary law and which under that law could not be disposed of by will; and to property which at the death of the testator was institutionalized property of a chieftainship and had been acquired and was being held as part of chieftainship property.¹⁴ The Act states that any person who is not a minor and is of sound mind may make a will¹⁵. Under section 66, the High Court shall have original and unlimited jurisdiction in all matters relating to will meaning that all issues pertaining to wills will be addressed by the High Court. From 13th May 1989, the Wills Act, 1837, of the United Kingdom ceased to apply to Zambia. Prior to independence in 1964, the Wills Act did not apply to the indigenous people.Zambians feel that the Act on wills has some shortcomings. For instance, the requirements necessary to make a valid will make it difficult for an ordinary Zambian to do so and It is generally felt that the six months limitation period within which an application to contest a will can be made does not take into account the fact that the law allows

¹³ Chapter 60 of the Laws of Zambia.

¹⁴ Ibid, Section 2 (a) and (b).

¹⁵ Ibid Section 4

up to a maximum of six months to obtain probate and also a will can only be contested after probate has been granted.¹⁶

In addition to this, the Act does not give a time frame within which the executor can apply for probate. This means that an executor can take one or even more years to apply for probate and could in the meantime be plundering the estate, because even the procedural steps which should be taken to have his appointment revoked are too lax. The Act under section 26 states that:

An executor may expressly renounce the right to probate orally on the hearing of any application to the court or in writing signed by the executor and attested by a person before whom an affidavit may be sworn.

Under section 27, the Act goes further to state that:

(1) A person claiming an interest in the estate of a deceased person or a creditor of a deceased person may cause to be issued by the court a citation directed to an executor appointed by the will of the deceased calling upon the executor to accept or renounce the executorships, and

(2) an executor shall be deemed to have renounced his executorship if he is served with a citation but does not enter an appearance, and

¹⁶ Ibid Section 22

(3) Where an executor does enter an appearance but does not proceed to apply for probate, the court may specify a time within which the application is to be made and if the application for probate is not made within that time the executor in default shall be deemed to have renounced his right to probate.

These provisions which are meant to keep the executor in check are not strict enough. If no one comes up who has an interest in the estate of the deceased, or a creditor, the executor can take any time up to six months to apply for probate. Additionally, the offence for meddling in an estate is very inadequate as the penalty for defaulting personal representative of a minor¹⁷

One interviewee in the survey felt that wills are meant for Europeans since they are the ones with money and a lot of property. However despite this, she felt that it was better to leave a will than depend on the intestate succession law for the devolution of property since a will gives a chance to the testator to direct the executor on how he or she needs the estate to be distributed after his or her death.¹⁸

A common feature of most Zambian customary laws of inheritance is the fact that oral wills are recognized as valid. Oral wills consist of instructions given by a person, usually in ill-health or advanced in years in the presence of relatives as to how he wants his property distributed after his death the person calls his

¹⁷ Ibid, (section 58).

¹⁸ Interview with Mayando Purity Mushonabanji, Teacher, Kabulonga Boys Secondary School

relatives and states how he wants his property distributed after his death.¹⁹ However with the enactment of the Wills and Administration of Testate estates Act, wills have to be in writing and courts will find it difficult to recognize wills which are oral.

1.3 Intestate Succession.

Intestate succession refers to the law of the state providing for the inheritance of property from a person who dies without leaving a will. Thus, to carry out an "intestate succession" simply means to transfer something after the owner has died and in accordance with the national law of intestate succession. Intestacy is the condition of the estate of a person who dies owning property greater than the sum of his or her enforceable debts and funeral expenses without having made a valid will or other binding declaration. Alternatively where such a will or declaration has been made, intestacy only applies to part of the estate remaining outside the will. This could arise in a situation where the testator acquires addition property after he has already written a will or some property comes into his possession by virtue of his death and he did not include it in his will. Intestacy law is also referred to as the law of descent and distribution.²⁰

¹⁹ WLSA, Inheritance in Zambia (1994) WLSA Project.

²⁰ Website - Wikipedia – Internet Encyclopedia

In Zambia, despite having the intestate law in place, there are still people who do not follow what the law says in the distribution of an estate. For example, people may bring in issues of witchcraft or foul play and accuse the remaining spouse of having killed the deceased. They go to the extent of denying the remaining spouse access to the estate of the deceased.

Such an event happened in Mozambique when a woman lost a husband. In this case in Mozambique, one woman made the following statement following her husband's death:-

*"The problem that I have is the lack of understanding from my husband's family; they say I killed their son...."*²¹

This was after the relatives of the man's family accused her of having killed her husband. They said she did this so that she could inherit the husband's wealth. In Zambia in a similar case, the widow was subjected to rituals which included covering her body with a blanket as part of the process of cleansing. Failure to doing this, she was told, she would not inherit any of her husband's estate. These practices seem to confirm that despite the legislation on succession being passed, some people still rely on traditional ways to devolve estates. Some families still have old ways of thinking which put women in a disadvantaged position when it comes to the distribution of an estate of a spouse. This kind of

²¹ Welshman Ncube and Julie Stewart (Eds) (1995), Women and Law in Southern Africa Research Project.. It is stated that a death of a man is not treated as natural in many Southern African countries. It is believed that a man's death is always caused by someone.

thinking should change, especially with the enactment of the new laws on succession.²²

When a death has occurred, an administrator is appointed. This is usually from family members although non-family members can also be chosen though this is rare. Under customary laws the duties of an administrator included other issues other than those of distributing the estate of the deceased. It is believed that the concept of administratorship is foreign and came into being with the introduction of western laws. For this reason, there is confusion between the role of an administrator stipulated in the Intestate Succession Act and that of successor under the customary law provisions. In some customs like the Bemba custom, the administrator is expected to enjoy a conjugal relationship with the widow, among his duties. Because of this, it is believed that what is labeled as property grabbing is a manifestation of the resentment of the Intestate Succession Act.²³ Some people feel that the beneficiaries in the Act should not only include the nuclear family, but should be extended to other family members like uncles, nieces, etc. They are of the view that uncles, aunties and other relatives should be made beneficiaries under the Intestate Succession Act. This is because in the African set up, children are brought up by the whole extended family which includes uncles and aunties, etc. These should therefore also benefit from their sweat.²⁴ The other reason is that if the uncles and aunties benefit from the estate, they will be willing to assist the children and the widow or widower when they need help. This will not happen if they are left out from the estate. However,

²² Women and Law in Southern Africa (1995) (WLSA)

²³ Inheritance in Zambia – Law and Practice (1995), WLSA.

²⁴ Interview with Mr. B. Chilolo – Manager, National Science and Technology Council

some said, in the African set up, due to poverty, the estates are very small and increasing the number of beneficiaries would only reduce the proportion to be given to the immediate family.²⁵

²⁵ Interview with respondents in the study, October – December , 2006

CHAPTER 2

STATUS OF ZAMBIAN LAWS ON SUCCESSION

2.0 Zambian Acts on Succession

In the Zambian legal system, the main pieces of legislation that govern both intestate and testate succession are the Intestate Act and the Wills and Administration of Estates Act. The Intestate Succession Act²⁶ which is one of the two Acts passed in 1989 to address issues of inheritance in Zambia. This Act makes adequate financial and other provisions for the surviving spouse, children, dependants and other relatives of an intestate to provide for the administration of the estates of persons dying not having made a will. The Act stipulates who the beneficiaries of the deceased's estate are and what proportions they are entitled to on devolution of the property.²⁷ This Act does not apply to land which at the time of death of the intestate had been acquired and was held under customary law; property which immediately before the death of the intestate was institutionalized property of a chieftainship and had been acquired and was being held as part of Chieftainship property; and family property.²⁸ The Act also has provisions for resolving inheritance issues involving polygamous marriages.

²⁶ Chapter 59 of the Laws of Zambia.

²⁷ Ibid, Section 5 (1) (a) to (d).

²⁸ Ibid, Section 2 (2) (a), (b), and (c).

Where the intestate is survived by more than one widow or a child from any of them, then, each widow or her child or both of them shall be entitled absolutely to the homestead property of the intestate; and in equal shares to the common property of the intestate.²⁹ Where the deceased has died intestate the court may, on the application of any interested person, grant letters of administration of the estate to that interested person. Letters of administration shall not be granted to more than four persons in respect of the same estate. The Act stipulates the duties of an administrator which include payment of debts and funeral expenses of the deceased and payment of estate duty if estate duty is payable and effect distribution of the estate in accordance with the rights of the persons interested in the estate under this Act. Where there are several administrators, their powers may, in the absence of any direction to the contrary contained in the letters of administration, be exercised by the majority of them. Where letters of administration were obtained fraudulently, they may be revoked in accordance with section 29 of the Act.

Some discrepancies have been observed in the constitution in relation to the Intestate Succession Act. The constitution states that traditional ways of inheritance, adoption, marriage or devolution of an estate should not be interfered with in the application of the constitution.³⁰ This seems to contradict the provisions of the intestate Succession Act. If the provisions of the Intestate Succession Act have to be effective, this provision in the constitution has to be

²⁹ Ibid, Section 10 (a) and (b).

³⁰ The Constitution of Zambia Article 23 (4) (1) (c) and (d).

amended. Other issues identified in relation to the Act are the lack of conviction in the women that they have a legal right to their husband's property and because of the weak punishment prescribed in the Act for breach; people do not fear the sanctions in the Act. Additionally, law enforcement agencies such as the police and the courts have failed to give the Act respect and encourage its use. The other weakness of the Act is that it does not include inheritance of land despite the fact that land is central to the survival of society and that on remarriage a person loses all the benefits that were given to him or her under the Act. Finally section 2 which deals the extent of the application of the Act seems to suggest that some people are not covered by the Act since it talks about being applicable only to those people who are members of a community to which customary law would have applied if this Act had not been passed. If this were followed strictly, some people may find themselves not being covered by this Act. The penalty stated in section 35 is inadequate. It needs to be increased so that people start respecting the law.

Probates (Resealing) Act³¹ provides for the recognition in Zambia of probate and letters of administration granted in Her Britannic Majesty's dominions or by British courts in foreign countries. This deals with the resealing of probates or letters of administration which have been granted outside Zambia. Section 3 of the Act states that the court of probate in any part of Her Britannic Majesty's dominions, or a British court in a foreign country, has, either before or after the commencement of this Act, granted probate or letters of administration in respect

³¹ Chapter 61 of the Laws of Zambia

of the estate of a deceased person, the probate or letters so granted may, on being produced to, and a copy thereof deposited with, the High Court, be sealed with the seal of that Court, and thereupon shall be of the like force and effect, and have the same operation in Zambia as if granted by that Court. This Act is accompanied by rules for regulating the procedure and practice.³² This Act was first enacted on 13th November 1936. It was last amended by Statutory Instrument 152 of 1965. Although the Act is old, it has adequate provisions to address probate resealing issues.

There are instances where a corporation needs to be appointed as an executor of a will or administrator of an intestate estate. The **Administration of Estates (Trust Corporations) Act**³³ has provisions for this in such a situation. According to the interpretation section of the Act, a "trust corporation" means any incorporated banking or insurance or guarantee or trust company which has a capital. It also means any body corporate which has a capital (in stock or shares) for the time being issued of not less than five hundred thousand kwacha, of which not less than two hundred thousand kwacha shall have been paid up in cash. Notwithstanding these requirements, a company or body corporate which does not meet these conditions for the time being, may, with the leave of the High Court, be deemed to be and to have the rights, powers and duties of a trust corporation under this Act. On penalties, section 9 of the Act states that any corporation, in the exercise of any power conferred by this Act, commits any such

³² Ibid, Sections 7 and 8-The Probates (Resealing) Rules of Court

³³ Chapter 62 of the Laws of Zambia

act, or is in such default, as would render an individual liable to attachment and imprisonment, such corporation may be ordered by the court to pay a fine not exceeding fifteen thousand penalty units. This penalty is inadequate given that a corporation is involved. Such a penalty is inadequate because a corporation is expected to be above board in its operations. So the penalty should be similar to the penalty passed on an individual who commits the same offence. The Act was first passed on 17th August 1956 and was last amended by Statutory Instrument 72 of 1964. For this reason, it needs to be amended to bring it in line with present day Zambia.

The Trusts Restriction Act³⁴ restricts the creation of settlements, trusts and future interests. Under section 3 of this Act no person shall settle any property; or limit any property in trust for another; or make any disposition whereunder property vests in possession at a future date. Exceptions are however made in cases where a disposition under property is limited to, or in trust for, a minor on his attaining a specified age not exceeding twenty-one years; and a disposition whereunder property is limited to, or in trust for, a widow, either for her life or for some other period, with a gift over in favour of children, if such disposition contains a provision that on the re-marriage of the widow the property shall forthwith vest beneficially in such children. This is one of the Acts which were passed after independence. This Act was passed on 24th December 1970. The provisions of the Act are adequate.

³⁴ Chapter 63 of the Laws of Zambia.

The Witchcraft Act³⁵ provides for penalties for the practice of witchcraft. At the moment, there is high level of belief by many people in witchcraft and what influence it plays in peoples' lives regarding inheritance. The Act states that whoever names or indicates or accuses or threatens to accuse any person as being a wizard or witch; or imputes to any person the use of non-natural means in causing any death, injury, damage or calamity; or asserts that any person has, by committing adultery, caused in some non-natural way death, injury, damage or calamity shall be liable upon conviction to a fine not exceeding seven hundred and fifty penalty units or to imprisonment with or without hard labour for any term not exceeding one year, or to both.³⁶ The Act also prohibits any person from practicing as a witchdoctor. Whoever shall be proved to be by habit or profession a witch doctor or witch -finder shall be liable upon conviction to a fine of not more than one thousand five hundred penalty units or to imprisonment with or without hard labour for any term not exceeding two years, or to both.³⁷ The Act further provides that whoever shall by the exercise of any witchcraft or any non-natural means whatsoever, pretend or attempt to discover where and in what manner any property supposed or alleged to have been stolen or lost may be found or to name or indicate any person as a thief or as the perpetrator of any crime or any other act complained of shall be liable to two years imprisonment.

The Act covers a lot other issues to do with witchcraft. However the Act does not seem to distinguish between the witchdoctors who treat sick people and those who practice witchcraft or sorcery. In addition, the Act is very old (was

³⁵Chapter 90 of the Laws of Zambia.

³⁶ Ibid, Section 3

³⁷ Ibid, Section 4

promulgated in 1913). It was enacted by the colonial masters for their own protection. They did not believe that African medicine, apart from killing, can also cure diseases. This Act seems to contradict the practice of organizations like the Traditional Healers and Practitioners Association of Zambia (THPAZ) or the N'ganga Association of Zambia. See section 4 of the Act. These two organizations have membership of 5000 traditional healers. As the Act stands at the moment, the practice of these two organizations contravenes what is contained in the Witchcraft Act. The case of witchcraft which has been reported in this study,³⁸ would have taken a different turn if the victim had had a chance to accuse the father-in-law of witchcraft. The deaths which took place could have been averted through intervention by a court of law. The Act does not allow any person to accuse another person of witchcraft.³⁹ The Act was first passed on 9th May 1914 and was last amended by Act No. 13 of 1994 when section 3 which pertains to penalty for naming or imputing witchcraft. However, the Act as it stands does not serve any useful purpose and should be repealed.

Worker's Compensation Fund Act, No. 10, makes provision for the establishment and administration of a Fund for the compensation of Workers disabled by accidents , or diseases contracted by, such Workers in the course of their employment, and for the payment of compensation to dependants of Workers who die as a result of such accidents or diseases. It also provides for the payment of contributions to such Fund by employers and for the grant of

³⁸ See *infra*, Conclusions and Recommendations

³⁹ Witchcraft Act, Section 3 (a), (b), and (c).

pensions and allowances to certain dependants of Workers who, being in receipt of pensions for such disablement, die from causes not connected with such accidents or diseases. The Act also provides for the appointment and powers of a Workers' Compensation Commissioner and the establishment and powers of a Workers' Compensation Board and an Appeal Tribunal. Section 41 (1) of the Act provides that if an accident to a worker arising out of and in the course of his employment happens after the date of commencement and results in such worker's disablement or death, he, or if he dies, his dependants, shall become entitled to compensation in accordance with the provisions of the Act. Section 61 (1) (a) and (b) seem to be discriminatory in the giving of compensation as it talks about a widow or an invalid widower. In other words, if the widower is not invalid he may not benefit from his late wife's contribution to the Fund. It is not clear why the Act refers to an invalid widower. The Act seems to be stating that the widow will get compensation whether she is invalid or not. The Act should be revised in this regard to eliminate this apparent discrimination.

The Zambia National Provident Fund Act⁴⁰ provides for the establishment a National Provident Fund and for its administration and payment of contributions for workers who have reached the retirement age. The retirement age in Zambia is fifty five. The Act also provides under section 2 (1) for the payment of earnings to a dependant who was wholly or in part dependent upon the earnings of that Member at the time of the Member's death. Section 28 (1) of the Act provides that the benefits in relation to a Member shall be payable on that Member's

⁴⁰ Chapter 273 of the Laws of Zambia

death. Subsection(2) provides that a Member may at any time, by notice in writing delivered to the Director, nominate any members of his family to receive such proportions of the benefit payable on his death as he may specify. The Act further states under subsection(4) that on the death of a Member, the benefit in relation to that Member shall not be a part of the estate of that Member but shall be paid to any person nominated by the Member under sub-section (2). This section has a proviso that if the person nominated to receive the earnings is not found within three months from the time the death was reported, the money may be paid to the widow or widower at the discretion of the director. It is not clear why the payment from the Fund is not made part of the estate of the deceased. If this money was included in the estate of the deceased, it would contribute to the size of the estate. This would in turn benefit the beneficiaries.

The Legitimacy Act⁴¹ amends the law relating to children born out of wedlock. This in order to allow children who are born out of wedlock to able to benefit from their deceased 's estate after the death of their parent or parents. A legitimated person and his spouse, children or more remote issue shall be entitled to take any interest in the estate of an intestate dying after the date of legitimation or under any disposition coming into operation after the date of legitimation or by descent under an entailed interest created after the date of legitimation in like manner as if the legitimated person had been born legitimate.⁴² Where a legitimated person or a child or remoter issue of a legitimated person dies

⁴¹ Chapter 52 of the Laws of Zambia,

⁴² Ibid, Section 7 (1) (a), (b) and (c),

intestate in respect of all or any of his real or personal property, the same persons shall be entitled to take the same interests therein as they would have been entitled to take if the legitimated person had been born legitimate.⁴³ Section 10 of the Act gives the legitimated person the same rights and the same obligations as regards maintenance and other claims as if he was born a legitimate child. In this regard, if the parent of such a child died intestate, he would be included as one of the children of the deceased. Section 13 (1) of the Act states that where, after the commencement of this Act, the mother of an illegitimate child, such child not being a legitimated person, dies intestate as respects all or any of her real or personal property, and does not leave any legitimate issue surviving, the illegitimate child, or, if he is dead, his issue, shall be entitled to take any interest therein to which he or such issue would have been entitled if he had been born legitimate. This Act therefore makes it possible for an illegitimate child to benefit from his deceased parent's estate after being legitimized by this Act. This Act was passed in 1929 and was last amended by Statutory Instrument 152 of 1965.

The Adoption Act⁴⁴ provides for the making and registration of adoption orders and for the registration and control of adoption societies. The Act also regulates the making of arrangements by adoption societies and other persons in connection with the adoption of children and provides for the supervision of adopted children by the Commissioner for Juvenile Welfare in certain cases. The

⁴³ Ibid, Section 8

⁴⁴ Chapter 54 of the Laws of Zambia

Act also restricts the making and receipt of payments in connection with the adoption of children. This provision protects adopted children from being mistreated by the adopted parents. Section 14 (1) of the Act states that all rights, duties, obligations and liabilities of the parents or guardians of the infant are extinguished on adoption and all such rights, duties, obligations and liabilities become vested in and become exercisable by and enforceable against the adopter as if the infant were a child born to the adopter in lawful wedlock. Section 15 deals with issues of Intestacies, wills and settlements. Subsection (1) stipulates that where, at any time after the making of an adoption order, the adopter or the adopted person or any other person dies intestate in respect of any real or personal property other than property subject to an entailed interest under a disposition made before the date of the adoption order, that property shall devolve in all respects as if the adopted person were the child of the adopter born in lawful wedlock and were not the child of any other person. The penalties for the offence under the provisions of this Act in section 36 (three thousand penalty units or six months in prison) seem to be inadequate given the prevalence of trafficking in children worldwide. This Act was passed in 1956 and was last amended Statutory Instrument 53 of 1965. However, the Act has adequate provisions for the adopted child regarding being a beneficiary after the parents' death.

The inheritance (Family Provisions) Act (1938). This Act was amended by the Intestate Succession Act of 1989 and is applicable to Zambia by virtue of the

British Act (the Extent of Application Act). This Act enables the court to provide for maintenance of dependants of a testator out of his estate notwithstanding his will. This is illustrated in the case of *Dorothy Mwananshiku and seven others v David Harrold Kemp*.⁴⁵ In this case brothers and sisters brought a claim that they were dependants and as such it was wrong for their deceased brother to leave them out of his will. The court held that they were not covered under the definition of 'dependant' and as such were not entitled to maintenance under this Act. The case illustrates that only those who are directly dependent on the testator are defined as dependants and legible for benefits in a will.

The Deceased Brother's Widow's Marriage Act.⁴⁶ The preamble of this Act states that this Act was meant to amend the law relating to marriage with a deceased brother's widow; and to provide for matters incidental thereto. The Act was meant to prohibit degrees of marriage by setting conditions on how distantly related partners should be to get married to each other. Section 3 of the Act states that no marriage contracted between a man and his deceased brother's widow within Zambia or without would be deemed to have been void or voidable, as a civil contract, by reason only of such affinity. This marriage would only be voidable if the brother divorces the wife and his brother marries her whilst the ex-husband is alive. This is stated in section 5 of the Act. Section 4 of the Act allows the existing rights and interests to continue applying even for those marriages which were contracted before the commencement of the Act. This Act protects

⁴⁵ *Infra*.

⁴⁶ Chapter 57 Of The Laws Of Zambia

those people who got married to their deceased's brother's widow before the enactment of this Act. This means that their interests as regards succession are protected. This Act was enacted on 12th October 1926 and amended by Government Notice 72 of 1964 Statutory Instrument 497 of 1964. Act has never been amended since then and a lot of changes regarding marriage to a deceased's brother's widow have taken place since then. The issues which were meant to be addressed by this Act are now covered by the Intestate Succession Act of 1989. This Act is no longer relevant to Zambia.

CHAPTER 3

PERFORMANCE OF SUCCESSION LAWS

After the enactment of the two acts on succession in 1989, there still seems to be areas in these pieces of legislation which have not satisfied some people. These include the proportions of how the estate is divided in the Intestate Succession Act, the people who are included in Act as beneficiaries and the highly technical nature of the Wills Act. The views which are stated in this chapter were obtained from the respondents who took part in the study.

3.0 PROPORTIONS OF DISTRIBUTION OF THE ESTATE IN THE INTESTATE SUCCESSION ACT

What came out from the study was that although this Act has been in existence since 1989, only about one third of the sixty people who were involved in the survey knew about the existence of this Act. These felt that the proportions for the distribution of the estate as stated in the Act is appropriate. The remaining two thirds said the surviving spouse should get higher than the twenty percent because he or she worked hard for the estate together with the deceased. They felt that the dependant should not be given the 10% as he or she can continue getting support from other relatives. On the percentage given to the parent of parents of the deceased, they felt that it should be raised because the parent

puts in a lot to raise and educate the child. It was also proposed that the administration of the Intestate Succession Act should be governed by courts of law. In other words, there should be no fixed proportions for the sharing of the estate. The remaining spouse should get a figure which has to be determined by a court of law based on the status of the surviving spouse. This will bring about equity because a surviving spouse who can look after himself or herself won't need as much as one who has no means of survival. In addition, widows usually get married soon after losing their partner taking with them a big chunk of the estate at the expense of the children or other dependants.⁴⁷

3.1 BENEFICIARIES IN THE INTESTATE SUCCESSION ACT

Uncles, aunties and other relatives should be made beneficiaries under the Intestate Succession Act. This is because in the African set up, children are brought up by the whole extended family which includes uncles and aunties, etc. they should therefore also benefit from their sweat. Most of the respondents who wanted the proportions to change were sympathetic with the surviving spouse but were not very happy with the dependants benefiting from the estate as they can be looked after by other relatives or their parents if they were still alive. They felt a higher percentage should be given to the surviving spouse. As seen from the higher percentage of respondents who wanted the status quo to remain, the

⁴⁷ Interview with Mr. B. Chilolo – Manager, Admin. and Finance, National Science and Technology Council, October – December 2006.

Intestate Succession Act's percentages are fairly distributed and it seems the legislators took all the relevant social factors in arriving at these figures.

The other reason is that if the uncles and aunties benefit from the estate, they will not be willing to assist the children and the widow or widower when they need help. This will not happen if they are left out from the estate. In the African set up, due to poverty, the estates are very small and increasing the number of beneficiaries would only reduce the proportion to be given to the immediate family. Others said that inclusion of the extended family would increase the dependency syndrome.

3.2 PROVISIONS OF THE WILLS AND ADMINISTRATION OF TESTATE ESTATES ACT

The provisions in this Act are too technical and most people with average education find it difficult to use this Act. In its present form the Act has some shortcomings. These are:

- a) The requirements necessary to make a valid will make it difficult for an ordinary Zambian to do so, thus the objective of simplifying the law governing the making of wills has not been met
- b) The six months limitation period within which an application to contest a will can be made does not take into account the fact that it takes a long time to obtain probate and also a will can only be contested after probate has been granted (S 22).

- c) The Act does not give a time frame within which the executor can apply for probate. This means that an executor can take one or even more years to apply for probate and could in the meantime be plundering the estate, because even the procedural steps which should be taken to have his appointment revoked are not very strict (Ss 26 & 27)
- d) The Act is too technical and is not suited to the Zambian way of life because it places too much emphasis on the courts to resolve or see to it that the will is adhered to, while most Zambians organize or resolve most of their life situations within the family.
- e) The offence for meddling in an estate is very inadequate as is the penalty for defaulting personal representative of a minor (section 58).

Unless and until these shortcomings are removed or modified, many Zambians will find it difficult to choose to dispose of their estate by way of a will.

3.3 WILLS OR INTESTATE SUCCESSION?

When asked on which mode of devolving the estate after their death, people have different views. Two thirds of the respondents prefer the use of the Intestate Succession Act to distribute their estate upon their death while the remaining one third prefers to use a will. The reasons advanced for the use of the Intestate Act were that since this Act stated the percentages for distribution, it would be easy for the administrator to follow what was stated in the Act. In the case of a will, they felt that since wills are not common in Zambia, it would be difficult for the

family members to follow strictly what is contained in the will. Others however felt that it was better to leave a will because the testator would at least have 'control' on how his or her estate was to be distributed after his death.

3.4 IMPACT OF SUCCESSION ACTS

3.4.1 The Intestate succession Act

The Intestate succession Act has assisted in solving succession problems in Zambia. People fear legal action and the Act has removed ignorance from people who did not have an idea of the provisions of the law. Another reason given was that since the law states the proportions to be given to each individual, everyone knows what is due to them. Where there is no will left by the deceased, families find it easy to distribute the estate by following the provisions of the will. They feel that there is more discontent now as some people think the Act interferes with what they would have liked to do. Some feel that some families still want to follow the traditional way of sharing the estate. For these reasons, they still resist to follow what is stipulated in the Act. Widows have been found to be reluctant to apply what is in the Act because of lack of confidence in themselves. This is more common in women who are full-time housewives. They feel that the relatives of the husband's family would not allow them to take any property because they did not 'contribute' to its acquisition. More awareness should be embarked upon to educate such widows on their rights.

3.4.2 The Wills and Administration of Testate Estates Act.

Only about 16 of the 60 respondents had ever heard of the Wills and Administration of Testate Estates Act. The remainder stated that they were hearing of this Act for the first time. In the survey, the respondents' views were sought on the issue of ignoring wills by families. The general response was that some families have a tendency of disregarding wills because they have been left out of a will or the share given to them is not adequate.⁴⁸ 48 of the respondents felt that it was not right for families to disregard a will. The reasons given were that a will should be respected as what is contained in it is the deceased's wish. They said that disregarding a will causes confusion and encourages greedy family members to take advantage of the situation. However others supported the disregarding of a will because some wills were unrealistic in the way they are framed leading to problems in their implementation. Wills should be rejected because there is always a possibility that the will was written when a person was very ill and could have written something which did not really reflect what he or she wanted because of his state of mind at the time. They felt some wills could be manipulated by family members who had links with lawyers so that they are altered in their favour.⁴⁹

⁴⁸ Interview with Willie Kalunga, Senior Inspector, Environmental Council of Zambia, October to December 2006.

⁴⁹ Interview with 10 respondents in the study, October – December 2006.

4.0 DECIDED CASES ON LAW OF SUCCESSION IN ZAMBIA

Because of the problems which still exist in Zambia regarding testamentary and intestate succession, aggrieved people have gone to court for redress on conflicts in the way estates have been shared. Some cases have involved people being left out of wills, administrators working out of their mandate and people not accepting the contents of a will. However, not all cases are taken to court. Some families resolve their problems at home through family discussions.

a) Charity Oparaocha v Winfrida Murambiwa SCZ Judgment No. 15/2004.

This case deals with a situation in which one does not leave a will upon their death. This means that their estate is administered under the Intestate Succession Act of 1989. In this case, the widow was appointed administrator and obtained letters of administration from the local court. She went to distribute the estate under the said Act. Later it was discovered by her that there was another woman her late husband had married with whom she had three children. The second wife claimed to be paid 10% of the estate as she was a dependant. The widow refused to oblige, forcing the second woman to take legal action. The lower court ordered that the second woman should be paid her dues and that the Letters of Administration should be withdrawn and the estate be redistributed. The widow appealed to the high court for redress. The higher court agreed with

the lower court and ordered that the second woman be paid the 10% as she was considered to have been a dependant of the deceased and the deceased had been looking after her at the time of his death. This case illustrates the point that the courts can intervene in a situation where, in its view, it feels that there has been an unfair distribution of the estate. The court's intervention can be for situations where no will has been left or other wise. In this case no will was left behind by the deceased. In the court's view it was decided that the second woman should also be catered for as she was also a dependant of the deceased. This was despite the fact that the widow did not know about the second wife. This is in conformity with the customary law in Zambia which allows polygamous marriages. The intestate Act has taken this into consideration. In this case, it can be assumed that the man married the first wife under customary law for, if the deceased had married under statutory law, the second woman would not have been considered as a dependant since statutory marriage does not allow polygamous marriages. The Intestate succession Act should be revised in order to protect the widow from loosing some of the estate because of the secret marriages which may be entered into by the husband. The Act must be amended in such a way that no part of the estate should go any other woman apart from the validly married woman. This will also prevent women from getting married to men whom they know are already married. This will call for the amendment of the Act so that it is in line with the marriage Act which only allows marriage between one man and one woman.

b) Dorothy Mwananshiku and seven (7) Others v Derek Harold Kemp and Beatrice Kakungu Mwananshiku Appeal No. 11 of 1991

This case involves the appeal by the eight appellants against a ruling of the High Court on a preliminary issue dismissing the appellant's whole action with costs wherein they had prayed for orders for provision of 25% of the net estate to be made out of the estate of Frederick Arthur Mwananshiku for their maintenance and for discover of documents with a view to ascertaining whether the true value of the deceased's estate had been correctly stated. The court noted that the testator's will specifically exclude the appellants. The 1938 Act had this provision. The essence of making a will is to enable the testator to include some of the extended family members. The appellants prayed that they should be added to the will as they were brothers, sisters, and uncles to the deceased. The court ruled that there was no provision in the wills Act to include persons who were not mentioned as beneficiaries. This would be interfering with the desires of the testator. In as much as in the Bemba tradition one needs to look after his dependants and should ideally include them in the will as they were his dependants, there is no provision for this in the law. The inheritance (Family Provision) Act, 1938 is not common law but statute law. The court dismissed the appeal.

This case illustrates that the wills Act protects the testator's estate in that no beneficiaries can benefit from a will other than those who have been mentioned in it unless there is very valid reason to do this. The court can only intervene in a

situation where the immediate dependants such as wife and children are excluded. See the case of Wills and Administration of Testate Estates Act in Re: s 209(1) of Act of 1989 between Isaac Tantameni Chali (executor of the will of the late Mwala) v Liseli Mwala⁵⁰

c) Anthony Kanyama Makumba, Getrude Makumba v Abel Stephen Makumba, John Mubanga Mulwila.

This case deals with an appeal for the removal of administrators from administration of the estate according to section 29 (2) of the Intestate Succession Act of 1989. The court found that there was no basis on which the administrators should be removed from the administration of the estate. The court, at the end of the submissions, concluded that the applicants were moved by fear of the unknown as regards the administration of the estate. The fear was not good reason to remove the co-administrators who had committed no wrong. Additionally, the court found that there were a lot of inconsistencies and inaccuracies in certain paragraphs in the affidavits of the appellants. The court found no merit in the appeal and dismissed it. This case illustrates that the courts are alive to the fact that whether one leaves a will or not, the executors or administrators have a protected tenure as long as they carry out their work according to the law. If one intends to remove an executor or administrator for ulterior reasons, the courts are there to protect them. At the same time, if an

⁵⁰ Infra.

executor or administrator maladministers the estate, the courts have the power to strip such an administrator or executor of his or her responsibilities.

d) Elsie M. Moobola v Harry M.N. Muwezwa (1991) SJ (SC).

In this case, the appellant claimed that she was the lawful widow and relict of one Dr Saul Moobola. The deceased died intestate and being indigenous, the customary law should apply to his estate unless it was caught by the Intestate Succession Act of 1989. The court ordered that the case be taken back to the High court to determine whether the Intestate Succession Act should apply even the deceased died before the act came into operation. The court stated as follows:

Except as is expressly provided, nothing in this Act shall affect-

- (a) any rights, duties or obligations of an administrator under any law relating to the administration of estates existing immediately before the commencement of this Act; or
- (b) the rights, duties or obligations of beneficiaries in respect of any person who died before the commencement of this Act.⁵¹

The case illustrates that the Intestate Act applies to persons who died before the Intestate Succession Act came into being whose estate had not been distributed

⁵¹ S 48 of the Intestate Succession Act of 1989.

at the time of the death. The estate can be distributed under the Intestate Succession Act even if the death occurred before this Act came into being.

e. Wills and Administration of Testate Estates Act in Re: s 209(1) of Act of 1989 between Isaac Tantameni Chali (executor of the will of the late Mwala) v Liseli Mwala

In this case, the applicant was left out of a will of her late brother. The trial judge varied the will and included her in the will because she had no means of livelihood. On appeal, the decision was overturned by the higher court. The court stated that the trial judge was legally and effectively precluded from considering the integration of non parties. The orders made by her in relation to the respondent's child and brother were wrong. Wills can only be varied when the court is of the view that the dependants of the deceased have not been given a reasonable provision in the will.⁵² The trial judge made reference to a decided case to arrive at her decision.⁵³ The higher court found that he had wrongly construed the facts of this case. In this case, the testator had left provision for the widow and children but the widow challenged the adequacy of the provision. This

⁵² S20 of Act 6 of 1989 is a departure from the long standing recognition of the unfettered right of disposition by the testator of his property. This departure is a limited one as it only confers on the court 'jurisdiction' to depart from the disposition of a testator by providing reasonable provision for the dependent only if it is the opinion of the court that he had not done so himself.

⁵³ *Diamond v The Standard Bank of South Africa Ltd. (Executor) and others* (1965) ZR 6.

contrasted sharply with what was provided in the Mwala case. This case shows that the courts do not normally interfere with wills except in very limited instances where it is the opinion of the court that the testator did not provide adequately for the dependant(s). This is meant to safeguard the interests of the testator and prevent people who are not beneficiaries from benefiting from the will.

f. Davidson Mweendo v Rodwell Maiya Case No. 622 of 1991

This case dealt with the issue of how an administrator should conduct himself or herself in carrying out his or her duties. If an administrator acts contrary to his mandate, the court may revoke his Letters of Administration upon an application by a plaintiff. In this case, the administrator of an estate attempted to change the names on the title deeds of a family property into his own name because according to him, the property belonged to his deceased brother. The children challenged this decision on the premise that if this were allowed, the family property would become part of the administrator's estate in case of the administrator's death. The children would not benefit from their father's property if this were to happen. The duties of an administrator under the Act differ from the duties of an administrator under the customary law.⁵⁴ The administrator wanted

⁵⁴ Inheritance in Zambia, Law and Practice (1994) WLSA Project. Pg 162. Here the authors make reference to the duties of an administrator and they make a comparison between the duties under the statute and the duties under the traditional set up. Under the statute, the duties are confined to the estate whereas under the traditional set up, the duties include looking after the family of the deceased. For instance, under the Bemba tradition, a 'Kangalilia' (caretaker) is chosen immediately someone has died. His job is to see to it that all the activities at the funeral are in

to change the name of the family house so that he could look after it on behalf of the family. This would have worked very well under the customary law set up where the administrator also takes over the property of the deceased including marrying the widow if he wanted to. The set up is different under the Intestate Succession Act. Family property may not be part of the deceased's estate. It was going to be an anomaly for the administrator to change the name of the Deeds of Title because the property in question was family property which was not part of the estate of the deceased. Family property is defined in the interpretation section of the intestate Succession Act⁵⁵.

These cases show that both the Intestate Succession Act and the Wills and Administration of Testate Estates Act have provisions which protect the estate of the deceased. This is because it has been experienced that some people take advantage of the ignorance of less educated or less enlightened family members to illegally benefit from an estate. In one case, a family member died leaving a wife of one year and a six month's old baby. He previously had a wife with whom he had been for twelve years whom he had divorced. After he died, it was discovered that he had not left anything for the divorced wife and her but indicated in the will that a house should be bought from his estate for the new

order. Later, an person called 'impyani' is chosen. This is the equivalent of an administrator but his duties will be broader than the administrator under the statutory concept. His duties will include looking after the well being of the deceased family.

⁵⁵ Section 3 of the Intestate Succession Act - "family property" means any property, whether movable or immovable, which belongs to the members collectively of a particular family or is held for the benefit of such members and any receipts or proceeds from such property...

wife to live in until she remarried if she wanted. At this point she was to leave the house. However, the new wife refused to stay in the house which was to be bought and instead challenged the will for not having made adequate provision for her. She demanded that she be given her 20% of the estate as stipulated in the Intestate Succession Act and her child should be given their 50% of the estate. This was despite the fact that the child was catered for in the will. When it was explained to her that this could not be done, she threatened to go to court for redress. Later it came to be revealed that one member of the family had misdirected her and told her to demand for these things since that is what the Intestate Succession Act stipulates. This unscrupulous member of the family wanted to benefit from the estate through the widow. This is a clear example of how people take advantage of the ignorance of some widows when they are faced with such a situation.⁵⁶

⁵⁶ Interview with Margaret Mazhamo – Director, Foods and Drugs Control Laboratory, October – December 2006.

CHAPTER 4

CONCLUSION AND RECOMMENDATIONS

5.0 Conclusion

Intestate Succession Act

In Zambia, the enactment of the two pieces of legislation on succession which were passed in 1989 has done a lot to assist the citizens of Zambia address succession problems. Family disagreements on the distribution of estates have somehow been reduced following a death in a family. The nuclear family which was disadvantaged as beneficiaries before the succession laws were enacted can now benefit from the estate of the deceased. Despite these facts, there are still a large proportion of the people who do not know of the existence of the succession laws. For this reason, they are not able to solve succession problems correctly. As regards widows, it seems many have still not asserted themselves that they are entitled to estates of their deceased's husbands. Some are still unable to have a fair share of the estate because of fear. Some fear that the husband's relatives may bewitch them if they made a claim on their husband's estate.

In this survey, 60 respondents were interviewed through questionnaires. The survey brought out information that only about 35% of the respondents knew of the existence of the Intestate Succession Act. This is an unfortunate situation given the fact that these Acts came into existence in 1989 and one would have thought that by now people would have had a good knowledge of the existence of these Acts. This situation was even more surprising given the fact that most if not all the respondents had a reasonable education. One would easily conclude that if the people who are in this category do not know of the existence of these Acts, it would be worse for the people in the rural areas who have no education and no access to such information. The lack of knowledge on the Intestate Succession Act and the Wills and administration of Testate Estates Act affects both genders equally. A possible reason for this could be that most people are uninterested in this type of information until something occurs which makes them realize that such a law exists.

On the issue of the proportions of the percentages of devolution of property in the Intestate Succession Act, it was found that the percentage of the people who wanted changes to be made to the proportions was equally split. 55% of the respondents thought the proportions in the Intestate Succession Act were inappropriate while the remainder of the respondents wanted the figures to remain the same.

The majority of the respondents i.e. 80% of did not agree with the proposition that the larger extended family should be included in the Intestate Succession Act. This shows that people have come to understand that the Act was designed to first and foremost safeguard the interests of the nuclear family. Despite the desire by some respondents to include uncles as they also 'helped' in looking after children, in certain instances, the majority of the respondents advocated for the status quo. Only 15% of the respondents wanted to have uncles, aunties and other relatives included as beneficiaries under the Intestate Succession Act.

About 50% of the respondents stated that the Intestate Succession Act has assisted in resolving succession issues. However, despite this statement, there have been instances where some families have continued to cause problems amongst themselves through witchcraft and other vices. There was an unfortunate case which happened in Kasama in which the administrator of the estate invested the 20% of the estate which was to be given to her father in law. When the father in law came to fetch it, he was told that she had invested it in a business and would give it to him at a later stage. The lady who was the administrator narrated the following story:

"He then cursed the children and said 'Mukenda mu nchombo pakunkonka" (you will move in a boat to come and get me)" 'He then returned to Mbala his home area on 4th September 1992. Moses my young son fell ill on 5th September 1992 at 11: 00hrs. He was dead by 14:

00hrs. The following day, Kayula, my other son, fell ill and died complaining of a headache. He said "nabampika infuti" (I have been shot). The same day another of my children, Chisanga, got malaria and died. Things happened so quickly that my last two sons died before reaching the hospital'.⁵⁷

This was an unfortunate situation especially that the family had agreed to distribute the estate according to the Intestate Succession Act, but just due to the delay in disbursing the estate by the administrator, a number of lives were lost. Witchcraft still seems to be playing a very big role in succession issues especially in the rural areas.

The same situation took place in Swaziland where a widow had to flee from her late husband's chiefdom to go and live at chiefdom for fear of witchcraft.⁵⁸

Wills and Administration of Testate estates Act.

As regards information on wills, 85% of the respondents had adequate knowledge on what a will was. This is despite the fact that not many Zambians are accustomed to the idea of writing a will prior to their death. However, despite not having enough information on wills, for some reason or another, some Zambians do not seem to think that they should write wills before they die. One of the

⁵⁷ Widowhood, Inheritance, Laws, Customs and Practices, (1994) page 70

⁵⁸ Inheritance in Swaziland, Law and Practice WLSA Research and Educational (1994) Trust page 89

reasons could be that these Zambians still think the will is not meant for Zambians or they regard themselves not to have a lot of property to warrant them drawing up a will. This is despite the fact that Wills and Administration of Testate Estates Act was enacted to allow Zambians write wills. However, with more awareness and education, it appears more people will understand the importance of writing a will for the administration of their estate after their death.

The study revealed that the Wills and Administration of Testate Estates Act is not widely known. Only 16% respondents had ever heard of it. The remainder had no idea at all of the existence of this Act. On the issue regarding ignoring a will by some families, most of the respondents stated that families should respect the wishes of the dead through a will. 80% of the respondents felt that it was not right for families to disregard a will. In the study undertaken by the WLSA a case of Joan Kambikambi regarding a will is reported. It was narrated that after the will was read, the family of the late husband came to the widow's house the following day to collect property bequeathed on her. When she asked them to leave the stove so that she could continue cooking for the children, her mother-in-law retorted:-

*'I have never known a woman who does not keep charcoal and a brazier in the home and if she does not have these items, she should go and get them at the market'*⁵⁹

⁵⁹ WLSA, Inheritance in Zambia (1994) WLSA Project. Page 273

This is a clear case of ignoring the contents of a will and interference from the man's family. The executor failed to execute the will. Luckily, this type of cases seems to be rare. So despite still having some Zambians not using a will, it seems they feel that once a will is written, it should be respected. A few respondents who have beliefs in witchcraft, felt that in Africa people respect what the dead person wished for since not following his or her wishes to prevail would cast a bad spell on the person who goes contrary to these wishes.

As regards common problems faced by people in the application of legislation on succession, the general response was that problems sometimes arise when some components of a will or the Intestate Act are ignored for one reason or another. This would cause suspicion as other family members would accuse the executor or administrator of the estate of cheating. Other problems pointed out were related to the distribution of the estate. There are also instances where what is written in the will is not realistic and questionable. In this case, Family members would ignore the will and distribute the property in another way.

As regards the intestate succession Act, the respondents felt that problems in administering this Act emanate from not fully disclosing the estate of the deceased as some family members may wish to benefit more than others. But generally speaking the respondents felt that there are not many problems which are experienced when administering the Intestate Succession Act.

Despite having some shortcomings as pointed out earlier, it seems that since the enactment of the Intestate Succession Act and the Wills and Administration of Testate Estates Act, problems of property grabbing have somehow reduced. Many reasons could be attributed to this. One could be that people are now more enlightened and cannot be cheated by others. Another reason could be that people are afraid of the law and cannot interfere with the law in the distribution of estates. This is in contrast with the past when people had no recourse to the law and depended on traditional ways of distributing the estate. But another reason could be that many people do not go to court when they have a dispute. They prefer to resolve problems at the family level thus portraying a picture that intestate problems have gone down.

However, despite the strides that have been achieved through the enactment of the intestate legislation in Zambia, there is still need to modify some Acts and articles in the in the Zambian constitution. As stated earlier, prior to 1989 inheritance laws that applied to Africans and indigenous peoples were customary laws. This was as a result of the colonial system of non-interference with the Africans' ways of life and the exclusory clause entrenched itself in the constitution in article 23(4) (c) and (d). Up to this date, these provisions still apply. In order to fully benefit from theses succession Acts, these clauses should be amended. As the constitution stands now, the implementation of the two Acts can be challenged on the basis that they are in conflict with the supreme law ie the constitution.

Another fact which came out was that most of the legislation which has a bearing on succession in Zambia is outdated and is of no use especially after the enactment of the succession laws of 1989. Some of these are the **Administration of Estates (Trust Corporations) Act**⁶⁰, and the **Trusts Restriction Act**.⁶¹ This Act was passed on 24th December 1970.

Another Act which is outdated is the **Witchcraft Act**.⁶² The Act was first passed on 9th May 1914 and was last amended by Act No. 13 of 1994 when section 3 which pertains to penalty for naming or imputing witchcraft was changed. However, the Act as it stands does not serve any useful purpose and should be repealed. Another is the **Legitimacy Act**.⁶³ This Act was passed in 1929 and was last amended by Statutory Instrument 152 of 1965. With the enactment of the succession Acts of 1989, the usefulness of this Act has been superseded

As for the **inheritance (Family Provisions) Act (1938)**, it was amended by the Intestate Succession Act of 1989 and is applicable to Zambia by virtue of the British Act (the Extent of Application Act). This Act enables the court to provide for maintenance of dependants of a testator out of his estate notwithstanding his will. This is illustrated in the case of *Dorothy Mwananshiku and seven others v*

⁶⁰ Chapter 62 of the Laws of Zambia

⁶¹ Chapter 63 of the Laws of Zambia.

⁶² Chapter 90 of the Laws of Zambia.

⁶³ Chapter 52 of the Laws of Zambia,

David Harrold Kemp.⁶⁴ In this case brothers and sisters brought a claim that they were dependants and as such it was wrong for their deceased brother to leave them out of his will. The court held that they were not covered under the definition of 'dependant' and as such were not entitled to maintenance under this Act. The case illustrates that only those who are directly dependent on the testator are defined as dependants and legible for benefits in a will. If a dependant is genuinely left out of a will, the court, using this Act can make an order to have this dependant included as one of the beneficiaries in the will.

The Deceased Brother's Widow's Marriage Act. ⁶⁵ This Act protects those people who got married to their deceased's brother's widow before the enactment of this Act. This means that their interests as regards succession are protected. However the Act seems vague as to the real reason it was enacted as our traditions allow a person to marry a widow of a deceased brother. This Act was enacted on 12th October 1926 and amended by Government Notice 72 of 1964 Statutory Instrument 497 of 1964. Act has never been amended since then and a lot of changes regarding marriage to a deceased's brother's widow have taken place since then. The issues which were meant to be addressed by this Act are now covered by the Intestate Succession Act of 1989. This Act is not relevant to modern Zambia.

6.0 Recommendations

⁶⁴ *Infra.*

⁶⁵ Chapter 57 Of The Laws Of Zambia

From the study, a number of issues came out which need to be addressed to improve the effectiveness of our succession laws. Although the general observation is that the provision of the laws are adequate, there is need to make some amendments in certain sections of the intestate Act and the Wills Act. The specific recommendations are as follows:

- a) Percentages in the Intestate Succession Act should be amended so that the parents of the deceased get a higher percentage than what is currently provided for in the legislation.
- b) More members of the extended family should be included in Intestate Succession Act. This is in view of the fact that the people who look after or raise the children in Zambia are not parents alone. The children belong to the whole family and each member plays a part in raising or educating the children. In some instances children are raised and educated by uncles and aunties. For this reason, uncles and aunties should be included on the list of beneficiaries in the Act. This will bring about fairness.
- c) The 50% which is given to the children should be given to the parents of the deceased in a situation where there were no children in the marriage.
- d) As cases of people who do not want to abide with the provisions of the law in administering succession issues fairly, the Intestate Succession Act should stiffen the punishment of people who do not abide with the requirements of the Act

- e) Family property should be allowed to be part of the estate of the deceased person. The person may have contributed to the family property and as such he or she should have his contribution be made part of his estate.
- f) The six months limitation period within which an application to contest a will can be revised to take into account the fact that it takes a long time to obtain probate.
- g) The Wills Act should give a time frame within which the executor can apply for probate.
- h) The Wills Act should be made less technical to suit the Zambian way of life and not place too much emphasis on the courts to resolve.
- i) The offence for meddling in an estate is very inadequate as is the penalty for defaulting personal representative of a minor.
- j) Traditional land and family property should be included as part of the estate of the deceased in Wills Act and the Intestate Succession Act.
- k) There should be a government programme through the Ministry of Justice and the Ministry of Community Development and Social Services to enhance peoples' awareness on succession laws in Zambia.
- l) The syllabus in the secondary schools should include issues of succession especially in subjects like civics. This will in the long term produce a nation which is enlightened in succession issues.
- m) Article 23 (4) (c) and (d) of the Constitution of the Republic of Zambia should be amended to remove the derogations on customary laws found under these provisions.

7.0 REFERENCES

1. Andrew Ewobi Essential Succession, (1961) Cavendish Publishing Ltd.
2. Chanock M Law, Custom and Social Order: The colonial experience in Malawi and Zambia, (1985) Cambridge University Press, Cambridge.
3. Himoonga C.N. (1985) Widows and Administration of Customary estates in Zambian Court before the Intestate Succession Act of 1989.
4. Lillian Mushota, Family Law in Zambia, (2005), University of Zambia, pp 421 – 522.
5. McCainn, W. T. The Rights of Widows under Customary Law in Women's rights in Zambia. Report of the consultations, (1970) Mindolo Ecumenical Foundation, Conferences and Consultations Programme.
6. Sir David Hughes Parry The Law of Succession, Testate and Intestate, 6th Edition, (1972) Sweet and Maxwell Ltd.
7. T.M. Renwick A Guide to the Administration of Estates in Zambia, (1985) Neczam
8. WLSA, Widowhood, Inheritance laws, Customs and Practices in Southern Africa, (1995) WLSA.
9. WLSA, Inheritance in Zambia (1994) WLSA Project.

8.0 ZAMBIAN LEGISLATION ON SUCCESSION

CONSULTED

1. Intestate Succession Act Chapter 59 of 1989
2. Wills and Administration of Testate Estates Act Chapter 60 of 1989
3. Zambia National Provident Fund Act, Chapter 273
4. Worker's Compensation Fund Act, No. 10
5. Witchcraft Act Chapter 90
6. Administrator-General Act: Chapter 58
7. Probates (Resealing) Act Chapter 61
8. Administration of Estates (Trust Corporations) Act Chapter 62
9. Trusts Restriction Act Chapter 63.
10. The Legitimacy Act, Chapter 52
11. The Adoption Act, Chapter 54
12. The Deceased Brother's Widow's Marriage Act, Chapter 57.
13. Administration of Estates (Trust Corporations) Act⁶⁶.
14. The inheritance (Family Provisions) Act (1938)
15. Estate Duty Act⁶⁷

⁶⁶ Chapter 62 of the Laws of Zambia

⁶⁷ Chapter 660 of the Laws of Zambia

9.0 CASES CITED

1. Re: The will of Hwalima v Hwalima and Hwalima (1968) ZR 164 (HC).
2. Charity Oparaocha v Winfrida Murambiwa SCZ Judgment No. 15/2004.
3. Dorothy Mwananshiku and seven (7) Others v Derek Harold Kemp and Beatrice Kakungu Mwananshiku Appeal No. 11 of 1991
4. Anthony Kanyama Makumba, Getrude Makumba v Abel Stephen Makumba, John Mubanga Mulwila.
5. Elsie M. Moobola v Harry M.N. Muwezwa (1991) SJ (SC).
6. Wills and Administration of Testate Estates Act in Re: s 209(1) of Act of 1989 between Isaac Tantameni Chali (executor of the will of the late Mwala) v Liseli Mwala
7. Davidson Mweendo v Rodwell Maiya case no. 622 of 1991
8. Diamond v The Standard Bank of South Africa Ltd. (Executor) and others (1965) ZR 6.