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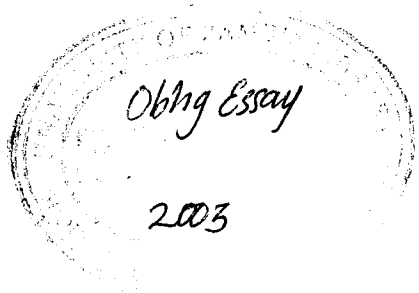

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THE EFFECTIVENESS OF THE ZAMBIA INTESTATE SUCCESSION ACT NO. 5 OF 1989 AND THE LAWS OF INHERITANCE IN ZAMBIA UNDER A DUAL LEGAL SYSTEM: A CRITICAL APPRAISAL

by

BANDA MIRIAM MISOZI

Being a paper submitted in partial fulfilment of the examination requirements for the degree of bachelor of laws of the university of Zambia

November, 2003

To my mum Martha Banda
and Dad Tony Banda
for all their sacrifices

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I am greatly indebted to Mwansa Kapeya who ensured that my script was typed. To you I say thank you very much for the support you gave even when I did not believe in myself.

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Misozi Mirriam Banda
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INTRODUCTION

"Man is mortal, but the objects of his property do not disappear with him. They are left behind him in this world and the community must see to it that they are allotted to a new owner. Such definite allotment is indispensable lest society be shaken by quarrel, fight or scuffle whenever one it's members depart-departs from life leaving property behind."*

The last ten years after the enactment of the Intestate Succession Act of 1989 has shown that although such a law be into existence, there are many problems that continue to exist with it. In the preamble of the Intestate Succession Act of 1989, the purpose of the Act os to provide financial provision to the beneficiaries. Even though this is so, the Act has proved to be ineffective.

This research paper gives a critical analysis of the Intestate Succession Act and the extent of application.

Chapter One examines the dual legal system in Zambia.
Chapter Two explains how the English laws and customary laws are ascertained in the Zambian legal syste.
Chapter Three gives an analysis of the inheritance laws in Zambia. These are customary laws of inheritance and those provided by Statute under the Intestate Succession Act.
Chapter Four gives a critique of previous analysis on the Intestate Succession Act of 1989, done by WLSA and the Intestate Succession Bill of 1996.
Chapter Five finally gives conclusion and recommendations based on analysis of previous chapters.

* Lisa Rowen, Death and the Community (1968). London: Sweet and Maxwell, at page 43

CHAPTER I

THE DUAL LEGAL SYSTEM IN ZAMBIA

Zambia became established as a British territory by the British South Africa Company before 1964. The British Colonial Office had direct control of the territory in 1924. In 1953, a federation of Northern Rhodesia, Southern Rhodesia and Nyasaland were formed[1]. This finally broke up in 1963 when the Africans wanted independence. Each separated and became Zambia, Zimbabwe and Malawi respectively.

The indigenous people of Zambia practiced traditional and rules of customary law which they enforced through their traditional elders, leaders and chiefs and these varied from one tribe to another.

When Britain colonized parts of Africa, it passed legislation under which the crown exercised authority over them. The colonies become subjected to the common law of England. The Foreign Jurisdiction Act of 1890 gave the crown unfettered legislative powers over the protectorate[2]. The Order in Council made Northern Rhodesia a protectorate in 1924 and remained as such until independence

[1] The BSA Company was an incorporated entity, which focused on exploration of minerals. It had a royal charter from the British Crown and entered into a concession, treaties

[2] Pally, the constitutional History and law os southern Rhodesia 1888 - 1965, Oxford University press 1965 at p.55

The introduction of English law in Zambia

English law in Zambia was introduced after the British South African Company (BSA) ruled this territory. Before the arrival of the BSA Company, the people they found in the territories were governed by the rulers of African customary law. These laws varied from one locality to another. This brought about a system of dualism in which English law existed side by side with customary law[3].

At the time of the "Scramble for Africa", a conference was held and attended by many European countries. This conference resulted in the BSA charter. This charter provided that the administration of justice by courts set up by the charter should have regard for African local custom and customary law. The charter reads:

" In the administration of justice to the said people (Tribe) or inhabitants, regard should be always be to the customs and laws of the class or tribe or nation to which the parties respectively belong especially to holding, possession, transfer and disposition of land s and good[4]*.s....*

However, English law has extended to the Republic of Zambia by two statutes. These are the English law (Extent of application) Act, Chapter 11 of the laws of Zambia,. The Subordinate Court, the High Courts and Supreme Court enforce statutory law and on appeal from local courts, customary law.

[3] Mrs Mushota 2003). How Zambia Acquired a Dual Legal System. Lusaka: UNZA. P.26
[4] Article 14 of BSA Charter

CHAPTER II

CUSTOMARY LAW IN ZAMBIA

The Zambian legal system is composed of the High Court and Supreme Court. The law administered in these courts includes:

a) Zambian statutory law:- These are Acts of Parliament which are enacted in conformity with the Republican Constitution.
b) Statutes which were enforced in England on 17th August 1911 and any English statutes of later date but expressly appreciated to Zambia
c) English common law and doctrine of equity.

However, customary law is not applied as a question of law but merely as a question of fact. This author has made reference to the importance of customary law in a legal system.. There has been no standard definition that has been adopted as a definition of custom. However, Henry Black defines custom as:

" A usage or practice of the people which by common adoption and acquit and by long and in varying habits, has become compulsory and has acquired the force of law with respect to a place or subject matter to which it relates[5]"

[5] Black. H. Law Dictionary. (1968) 4th ed. London : Sweet & Maxwel P.461

Essentially, what is referred to as custom are the rules followed by society at large or some parts of it, as members interact with each other. Custom has often been declared to be the principle source of all law and in trying to support this proposition, Blackstone state that," this unwritten law is properly distinguishable into three kinds:

1. General customs which are the universal rules of all kingdom,
2. Particular custom as that which for the most part affect only inhabitants of particular districts,
3. Certain particular laws, which by custom are adopted and used by some particular courts of general jurisdiction[6].

The above doctrines are not written in any statute but emanate from usage. However, one must know that not all custom is law. This is because there is a wide range of human conduct, which the law takes no notice of. A great form of human conflict falls under the control of moral rules, which are in force mainly by public opinion. In order for custom to be enforced and observed, it has to be law. The custom must have a character, which should be recognized, by the courts. One jurist, Austin, said custom is no sense "law" until a court has ratified it.

The ascertainment of custom in the English legal system.

In England, custom is sanctioned by the courts and given legal patent after it satisfies that it is precise and certain. The custom must have been observed continuously too.

The ascertainment of African customary law in Zambia

It is true to say that each nation has indigenous law. In pre-colonial Zambia, law was essentially customary in character. This law was written and had its source in the practices and customs of the people. It is important to note that custom does not apply in general to citizens but to only a particular class of persons or to a particular place[7].

Before the British colonialists come to Zambia custom was law itself but the British brought common law, doctrine of equity and statutes of general application from England, which were enforced on 17th August 1911. The European laws were not to set oust customary law, even though customary law was isolated from the European law. Customary law was regard as secondary. Statutes have a general application while African customary law applied to exceptional cases[8]. For example, African customary law would could not be applied in criminal cases but could apply in civil cases involving natives. However, the introduction of English law was not con consistent to the continued operations of customary law in indigenous communities. The British encouraged the use of customary law but this seemed to be more of permission than encouragement. This is because early judges saw customary law as a temporary expedient. This however necessitated a dual legal system in some instances. The English legal system give legal sanction to custom after the test of reasonableness and antiquity as stated earlier. In the Zambian legal system , rules of ascertainment declared

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[6] Allen. (1964) Law in the making (7th ed) London Oxford University Press at P.31
[7] Eric silwambwa (1982). The role of Zambian Legal system in ascertaining customary law and clause. "In legality Journal. Lusaka: Unza Print. P.58
[8] Ibid, P61

that African native customs must be such in accordance to the principles of English jurisprudence before they are regarded as legal custom.

There has been no express provision for the application of customary law in the Supreme Court and the High Court. However, the High Court Act can apply customary law in the appellant jurisdictions. Subordinate Courts have jurisdiction to apply to African Customary law. The Subordinate Court Act provides:

'... *nothing shall deprive a subordinate court of the right to enforce the observance of any customary law... not repugnant to justice, equity... or incompatible to written law...*'[9]

The local courts have also been empowered to administer African customary law as long as the law is not repugnant to natural justice or incompatible with any written law.

Therefore, for African Customary law to apply, it must satisfy three conditions. These are:

1. it must be applicable
2. it must not be repugnant to natural justice and must be reasonable before application.
3. It must not be incompatible to any legislation.

Customary law must be proved as a fact to the court because it is a living organism, which evolves in relation to changing conditions. Thus in the case

of *Frank Chitambala V The Queen*,[10] the court held that custom must be a matter of proof in all cases it is claimed. In order to prove custom, the native people must be called as witnesses because they are well acquainted with custom. Other methods have been used to prove custom such as textbooks, judicial decisions and assessors.

One very important point to note is that the application of customary law is subjected to a repugnancy clause. The effect of this clause is that it declares certain customary law contrary to English law[11]. For example, the Lamba custom of killing during a mourning ceremony was regarded as repugnant to British Justice[12]. No custom can be said to be reasonable if it results in death of members of the community.

Therefore, the Zambian legal system ascertains customary law based on the repugnancy clause. This clause was evolved by the colonial administrators in order to make the indigenous body of law subservient to imported English law.

This clause has been said to be unfitting to the dignity of the indigenous law of the people. This is because customary law proceeds directly from the people and expresses their legal thought. Customary law also regulates family life. Statutory law rarely embraces the needs of society and if statutory law takes superiority over custom, it truly points out that the needs

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[9] Section 16
[10] V I Northern Rhodesia Law Reports at P.29
[11] William T Mclain. Howard Law Journal: Recent changes in African Local Courts and customary law(1974). London: Oxford Press at P.210
[12] Ibid, P211

of the people are not been met. This is one of the many reasons why the repugnancy clause must be discarded.

In Zambia, if the people needs are to be met, the repugnancy clause must be discarded because it give an inferior status to customary law. Customary law should not be treated as a question of fact but as a question of law.
This should be done for Zambia if customary law is to play an important role in Zambian Society. Customary law plays an important role in solving disputes in marriages, inheritance problems and land holding. The inferior status of the customary law in Zambia has continued since attainment of independence. This status in relation to the repugnancy clause must be assessed in order to avoid a dual system that conflicts with each other and are providing to be superior to the others. The Superior law does not reflect the true needs of our society because it was borrowed from another jurisdiction. The law needs to reflect true values of society in order to develop economically and socially.

Therefore, Zambia must enact new rules for the ascertainment of customary law to substitute the repugnancy clause, which is a colonial legacy. The powers to Scrutinize customs that are injurious to public interest or contrary to legislation must be left to parliament and not the courts. If the court has doubts, the existence of a given custom must be left to investigators including assessors, textbooks, consultation with law reports or seeking advise from the chief or any person knowledgeable about customary law in question. Since most Zambians are regarded by customary law in spheres of marriage, customary law should not be modified by English law. Instead, English law should be modified by indigenous law to make it acceptable and

adopted. Therefore, African customary law will not be superior as long as an inferiority complex exists in its application.

CHAPTER III

INHERITANCE LAW IN ZAMBIA

Societies have different norms and values but a law is brought together to regulate the behavior of individuals in society. This law is known, as customary law as already stated which is a usage or practice of society which becomes compulsory and has acquired a force of law. This law involves from many norms of indigenous people. Customary law is a law that responds to the people are economic, political and social needs that are dynamic. Customary law seeks to reach a resolution for the parties rather than the judgement. This Chapter looks at the inheritance law of Zambia.

Patterns of Succession under Customary Law

Since there are 73 ethnic groups in Zambia, the patterns of customary law of inheritance vary. Under the customary law of inheritance, different goods are distributed differently among different categories of relatives[13]. Therefore, it is difficult to classify systems of inheritance and a succession as patrilineal, matrilineal or bilateral.

The groups of tribes that represent the general patterns of inheritance among the 73 ethnic groups are Ngoni who are patrilineal, Bemba who are matrilineal and Lozi who are bilateral.

[13] Women & Law in Southern Africa(1988). Inheritance in Zambia. Lusaka: at P.68

The Ngoni

The Ngoni have a patrilineal system of inheritance. This means that the descent is traced through the fathers line. This means that the only person who can claim a share of the estate belonging to the deceased must come from the male ancestors[14]. The Ngoni system of inheritance has some resemblance to the English system of inheritance. This is because in both, the first born son inherits the real and personal property of the deceased. To support this principle, the case of Re estate of Mekelani Mphanza[15], in which the deceased had nine children and a widow. The issue was who among the children qualified to be a heir. The court held that the eldest son qualified to be the successor and was appointed administrator. Where there are no sons, the eldest daughter inherits. This preference is given to the direct children of the deceased before the most remote male issue can be considered. If the decreased had no brother, his eldest blood sister inherits and in the absences of the father, the mother inherits. The widow is not on the list of the possible heirs but she is allowed to continue occupying the home as long as she remains unmarried. Under customary law, there are no heirs but simply successors. [16] This is because a widow can be remarried even when a relative takes her as a wife. He assumes all her responsibilities and the welfare of her children. A successor therefore takes social responsibilities of the decease plus his property unlike in English law of inheritance where real and personal property are the only things the heir takes over. A heir can dispose off his property as he likes but a successor holds the property on behave of

[14] Mvunga, (1979). Law and social changes: A case study in customary law of Inheritance in Zambia. University of Zambia, Institue for Africa studies. No 28, P642
[15] Mpezeni local court (B Grade) case no- 5 of 1975

the family[17]. However, if the first-born son is unsuitable they can choose a younger son.

The Bemba

The Bembas have a matrilineal system of inheritance. The line of descent is traced through the mother's line. Upon the death of a Bemba man, his brothers, sisters, nephews and nieces benefit from his estate. The deceased's children belong to the mother's kingship and are not entitled to a share of their father's property. The successor selected by members of the kingship take over the widow as his wife and he keeps the deceased's estate on behalf of the family. He keeps a larger share of the estate on behalf of the deceased family and assumes all the responsibilities of the deceased. The widow's share is limited to the share in the growing of crops, cloth and cooking utensils.

The Lozi

The Lozi people have a bilateral system of inheritance. A successor to the deceased person is appointed. Those who inherit property are the children of the deceased, who get an equal share of the property. If there are no children, the deceased's brother inherits the property equally. A widow has no right in the husband's property but she can be permitted to stay in the village. The

[16] This is ngoni customary law as restated by 7 panels consisting with persons conversant with customary law in their daily life. The panel were constituted by Mvunga during his research in chipata.
[17] A successor can be given property which he can use personally and does not have to consult other members of the family to dispose it. If it is not given to him personally he needs to consult before disposal

widow can only be given cooking utensils and cloths. She has no right to the children because of payment of lobola[18]

Inheritance Under statutory Law

The statutory law of inheritance which applies in Zambia after independence by virtual of the English law (Extent of application) Act and British Acts (Extension Act) include the Inheritance (Family Provisions) Act 1938[19]. The Inheritance (Family Provision Act) 1938 made provision for maintenance to be made from the testators estate for spouses, children and dependants if he did not make provision for them in the will

The current statute on inheritance is the intestate Succession Act of 1989. This statute limited the number of people who could benefit from an estate. Most people were subjected to customary law and the strong link of a family in custom entailed that all should benefit from the estate left by the deceased depending on which type of custom one comes from. According to Himonga, the English law of inheritance has not achieved their purpose because English laws of inheritance have not been significant to the extent of customary law on inheritance[20]. In order to achieve the purposes of justice, the Interstate Succession Act was consolidated to solve inheritance problems. This law was meant to provide comprehensive and simplified law of succession. The current act of property grabbing was an inhuman treatment to the widow and children so there was need for a law, which

[18] Interview with a research Associate a Matero Local court.
[19] WLSA Research Project 1989 at P. 75
[20] (1989)" The law of Succession and Inheritance in Zambia" International Journal of law and the family, Vol 3 P. 160 - 176.

would limit, certain customary practices[21]. This saw the Intestate Succession Act No. 5 of 1989 enacted.

Many people in Zambia die without leaving a will. Their estates are governed by the Intestate Succession Act. This Act applies to all persons living in Zambia at their time of death and only in circumstance were customary law would have applied if this was passed[22]. This law as stated in the preamble is meant to provide adequate financial and other provisions for the surviving spouse, children, dependants and relative of the person who has died. This Act has made provision for how succession should take place. This Act does not apply to land held under customary law[23].

Basically, when a spouse dies, the property is shared as follows:

i). 20% to the surviving spouse;
ii). 50% to the children born in or out of marriage;
iii). 10% to dependants.
iv) 20% to deceased's parents[24]

|An administrator appointed by the court does the distribution of the property. The most important effects of the Act is that the Act has effectively replaced customary laws of succession, subject to the express exceptions relating to customary land and tenure and chieftainship property.

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[21] Law Development Commission working paper on Customary Law of Succession December 1976.
[22] Section 23 of Intestate Succession Act 1989
[23] Section 2, Act No. of 1989
[24] Section of the Act

This new law of inheritance has made a break through for women's rights. However, the benefit cannot out weigh the problems this Act has brought. These will be discussed in the last chapter of this essay.

Inheritance Laws, The Intestate Succession Act and Property Grabbing.

Property grabbing means taking of property without the consent of the surviving spouse or children. The source of property grabbing is the inheritance laws that exist in Zambia. Both customary and statutory law governs inheritance in Zambia. The pre – colonial laws in Zambia were essentially customary in character. The source of such character emanated from practices and customs of the people[25]. Inheritance is an institutional act of apportioning and receiving the property of a deceased person. Most Inheritance laws affect women and the primary complaint is that when a husband dies, the relatives of the deceased husband grab the property.

The Justification for this is that according to customary law, all property belongs to the husband but statute also provides that all property such as the matrimonial home belong to the spouse and property which does not fall under personal or business property. In 1989, in response to the complaints by women and women's organisation the government of Zambia decided to enact the Intestate Succession Act Nº 5 of 1989.

[25] Ndulo,M (1985) Widows under Zambia customary Law and Response of the courts comparative and international Law of Southern Africa Vol. 1 pages 90 - 102

However, even though this Law exists, many have chosen to ignore it and continue with property grabbing. In some areas, a woman cannot own property. If she has any property, only the Kitchen utensils and her own clothes belong to her. One must note that it does not only happen in rural areas but also in urban areas.

Usually problems of property grabbing are let to drag on because even though the Intestate Succession Act exists, People who are victims of property grabbing do not sue the relatives who grab the deceased wife's property. Most widows say they fail to sue such relatives because they want peace. One widow interviewed said she could not sue her dead husband's relatives for purposes of having peace with them[26]. She said in her culture, the husband's relatives are important because they play a role when it comes to marriage of the children left by the deceased relative. This is one reason among many, why property grabbing still exists.

Another such reason is fear of witchcraft. Another widow interviewed said she could not sue her dead husband's relatives for property grabbing because she feared witchcraft[27]. She said she had seen her sister suffer the same consequences of losing a husband. She sued her dead husband's relatives and she ended up having one leg. She said for fear of further calamity it was better to leave things as they are rather than involving the law. However, even though the law of Inheritance is found in the intestate Succession Act Cap 59 of the Laws of Zambia, Many people are not knowledgeable about it.

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[26] Lwendo Lundu at YWCA in Livingstone.

[27] 6th July 2003 in Lusaka. He said most of the people at mpango basic School in February where the sensitisation workshop was held said the new Act was the towns and not the villagers. They refused to adapt to the new law because it stained their cultural values.

In order to deal with many cases of property grabbing, the Police under Victim Support Unit have done a number of research programmes in rural areas. An interview by Mr. Moonga under Victim Support unit revealed that many rural areas around Lusaka province have been sensitised. The communities are brought together and told about the Intestate Succession Act. The Non Governmental Organisations such as women for Change and Women and Law in Southern Africa also sensitise communities on their rights and duties under the Intestate Succession Act. Most of these sensitisation workshops only benefit urban areas. An interview by one of the workers at the Women for Change says the rural areas are reached by holding sensitisation discussions with the chiefs in rural areas who talk to their people.[28]

The Act has further taken a step in making property grabbing a criminal offence because it involves taking of property without intentions of bringing back to the true owners. The Police feel that the Society has wrongly taken cases of property grabbing to Local Courts. The local courts treat property grabbing as a civil case instead of a Criminal offence if taken to the Police. The property grabbers if taken to the police are first treated as criminal offenders with a charge of permanently depriving a beneficiary of their interests under section 14 of Intestate Succession Act cap 59 of the Laws of Zambia.

The Police feel that in order to make their research and sensitisation workshops most effective, the non Governmental Organisations need to focus on sensitisation of persons in rural areas rather than only focus on

[28] Chilufya Chilufya at Women for Change on 16th July 2003.

urban areas. Further if the community can be involved in educating those who are not aware of the rights and duties provided by the Intestate Succession Act.

The Government should also fund the departments that go in the rural areas to sensitise the community because most of such departments lack resources.

CHAPTER IV

CRITIQUE OF PREVIOUS ANALYSIS ON THE INTESTATE SUCCESSION ACT NO. 5 OF 1989 BY WLSA'S RESEARCH ON INHERITANCE LAWS AND THE INTESTATE SUCCESSION BILL OF 1996

Introduction

This chapter critically examines some views and recommendations put across by **Women and Law in Southern Africa (WLSA)** a research project regarding the utility of laws pertaining to inheritance and succession conducted in 1993. This book is entitled Inheritance in Zambia, published in May 1994. I have deliberately picked on WLSA because there work symbolises the most comprehensive research projects in Zambia, Botswana, Mozambique, Swaziland and Zimbabwe in this area of Law. The research findings have helped to enlighten widows on women's rights. The following have been some of their views and recommendations, which I have found to be problematic.

Analysis of WLSA's Report

The report by WLSA provides that the police are reluctant to deal with members of the community who have complaints regarding property grabbing. The report goes on further implying that the police deal with cases of property grabbing as domestic issues which should be sorted out at home

or refer the complaints to court.[29] According to Inspector Kasala,[30]the police do not encourage complaints to be classified as domestic. The police issue a date when the parties can appear in the office of the inspector general to discuss the problem. Where either of the parties does not appear the police give warning to that party so that he can appear on the new date set. If that party does not appear, he/she is arrested. He is then forced to give back the property, which he unlawfully acquired, without looking at the Intestate Succession Act. If the police are unable to handle the case, they assist the complainant in taking the matter to court. Police Inspector, Mr.sakala encourages such matters to be taken to the High court and not to the Local Court.[31]

The research by WLSA has also given us a picture that there is a limitation on statutory laws of inheritance to ones own children. This simply means that some groups of people have been left out especially if one looks at it under the perspective of customary law. WLSA intends for the law to include the other groups of people under customary law[32].

It is not true that the Act has limited inheritance to one's own children. It has provided for children, dependants, relatives and parents. These are beneficiaries to the intestate's estate.[33]One should, note that the term dependants can mean any relative of the deceased or surviving spouse who was a direct beneficiary to the deceased. These can be cousins or nephews or

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[29] Inheritance Laws in Zambia at page 330

[30] Interview with him at victim support unit on 6th July 2003 at Lusaka

[31] It is wrong for cases to be reported to the Local Court because these courts do not have Jurisdiction to handle criminal cases.

[32] **WLSA p.330 (1994)**

[33] Section 5 of the Intestate succession Act

nephews. According to Sharon Williams,[34] the word children and dependant has been extended to persons living outside the matrimonial home. This means that statutory Law has not limited inheritance to one's own children but also to persons living outside the matrimonial home who are not even children of both spouses. Because the definition of child and dependant has proven to be so wide, we call for these two words to be further defined so that conflict can be avoided when applying the Intestate Succession Act today.

WLSA's research pertaining to who an administrator is, has proved to be ineffective because only the spouse, children, relatives, parents and dependants are allowed to be beneficiaries of the deceased's estate. The report says that the rules of an administrator under statutory law and customary law are in conflict. Statutory law should allow an administrator to be a beneficiary.[35] Under customary law, an administrator benefits from the estate while under statutory law the administrator does not benefit from the estate. WLSA's research recommends that the Act be amended to allow an administrator to be a beneficiary.

There is no way the Act should be amended allowing the administrator to benefit in the estate of the deceased. This is because the act defines an administrator as any interested person. Once any interested person is allowed to be a beneficiary, there will be a lot of conflicts between the deserving widow and children and the administrator on the other hand. According to the way administrators are defined in the act there is no protection that has

[34] Interview with her from law Development Commission on 7th July in Lusaka
[35] Inheritance laws in Zambia by WLSA at p. 331.

been guaranteed by the Act towards the widow and children. The Act should not give on one hand and take on the other hand. The administrator's duties are basically to:

(a) Pay the debts and funeral expenses

(b) Effect distribution of the estate in accordance with the rights of the person interested in the estate.[36]

This whole idea of making an administrator a beneficiary is retrogressive. If one looks at the way administrators behave, most of them behave as though they were heirs to the deceased persons estate. Most of them know that this is wrong but they continue to misapply the deceased's estate. This is because the punishment for the offence is not tough enough.

Further there is the Intestate Succession Bill of 1996, which has gone through its first reading and is likely to be enacted into the Law. The bill has a number of provisions, which I find inadequate and questionable. This bill if made into Law will not solve many of the problems attributed to the Intestate Succession Act.

The major changes are as follows;

Section 7 of the bill provides that 25% of the estate shall devolve to the widow instead of the previous 20%. If enacted, I strongly feel that the widow deserves 50% of the estate. This is because a widow contributes towards the matrimonial home as much as house wives or a wife who works. There are situations where a widow buys most of the property in the house

or where both spouses agree to put the costs together to buy property for the matrimonial home. It would be therefore unfair to allow the widow to part with only 20% of the family property when a husband dies intestate. If 25% is given to the widow the remaining 25% which would be allocated to relatives who did not even make any contribution towards acquiring any of the property in the matrimonial home is unfair. The intention of the Act must be to protect the widow and children living in the matrimonial home. This is because the property rightfully belongs to them. The property in the home must be seen as a joint community owned by both husband and wife. This is to ensure that each owns 50% of the property in the house.

Section 10 (2) of the billprovides that where the Intestate is survived by a spouse and children among whom include non biological children of the surviving spouse, the house if any shall be sold and the proceed of the sale distributed as follows;

(a) 90% among all children in equal shares

(b) 10% to the surviving spouse

The provision above is objectional because there is nothing positive for the widow. The difference in percentages between the children and the widow's entitlement is too wide. In a situation where the widow has no biological children of her own, it would mean that 90% goes to the children outside marriage while the widow remains with almost nothing. The question one may ask is to what extent children can hold a major than a widow who has contributed towards the acquisition of the family property. This is very unfair on the part of the widow because family law recognises the

[36] Section 19 of the Interstate Succession Act of 1989

contributions a wife makes in a home and entitles her to the major share of property in the matrimonial home.

Section 10(3) of the bill further provides that where the estate includes more than one house the administrator and not the surviving spouse determines which of the houses shall devolve upon the surviving spouse and that of the spouse's biological children. The administrator decides what forms what part of the estate and distributes according to the provisions in section 7 afore said.

This is simply going back to traditional notions of succession and inheritance where a woman was perceived as not owning anything, which the husband bought. This provision also promotes male dominance and defeats the whole purpose of having the Intestate Succession Act in as far as a widow's benefit are concerned.

Section 11 provides that where the Intestate lives in a house separate from his spouse and his children, the house shall be let out and money distributed as follows;

(a) 80% among the children

(b) 20% among the widows proportional to the duration of their respective marriages to the deceased and to any direct or indirect

Contributions made by any of the widow towards the acquisition Of the house.

The problem with this provision is that no method of calculating the duration has been applied. It is also impossible to know the direct and indirect contributions each widow has made towards the house, further it is most inappropriate to allocate 10% to the widow and 80% to the children.

Section 14 (b) of the bill provides that the court may on application grant letters of administration of the estate provided that: -

> The surviving spouse or any other beneficiary not being a near relative shall not be appointed as administrator under the Act and the consent of the surviving spouse shall not be required for the appointment of any person as administrator under the Act.

This provision is retrogressive. It has always been the need that a widow should be appointed as administrator or alternatively where necessary a child to the widow who has reached the age of maturity. This is because anything will be done in the best interest of the family.

Section 34 of the bill provides that: -

An administrator shall be entitled to two and half percent of the value of the Intestate estate as his remuneration for administering the estate.

This statement is a contradiction towards the duties an administrator may have. The duties of the administrator entail effecting distribution of the deceased person's estate as highlighted by section 18 of the Bill.

I would like to argue that the legislatures have failed to take into account the interests of the people in particular widows, by giving too much power to the

administrator. In my view, the Intestate succession Act needs to be reviewed as per recommendations, which I have outlined in the last chapter.

CHAPTER V

CONCLUSION AND RECOMMENDATION

Introduction

" Man is mortal, but the objects of his property do not disappear with him. They are left behind him in this world and the community must see to it that they are allotted to a new owner. Such definite allotment is indispensable lest society be shaken by quarrel, fight or scuffle whenever one it's members depart from life leaving property behind.[37]"This Chapter Identifies the weaknesses of the Act and makes Recommendations. A conclusion will then be drawn

The research findings in this paper have shown that although the Interstate Succession Act provides the rights and the duties which the surviving spouse, children, dependants and relatives have , the number of problems related to inheritance and succession are on the increase. The law in many cases is enforced by the Local Court justices who are often ill equipped to deal with inheritance problems and property grabbing matters failing under written laws. Local courts have ignored, misinterpreted and totally misapplied provisions of Interstate succession Act in many cases they have dealt with. This was seen in the case *of Elliness Chilala v Joseph Mizinga*' and the case of Fanny *Chongo vs Bornwell Chabi*, [38] in which the local court justice allowed the administrators of the estates to procure from the estate of

[37] Lisa Rowen, Death the Community
[38] Article in the Post Newspaper, Friday, March 8th 1996 Pg17

the deceased simply because the were blood relative to the deceased. This author feels that these were clear cases in which the local court should have applied section 5 of the Interstate Succession Act in distributing the estate to the surviving beneficiaries and the court should have further stressed that the administrators duty was merely to ensure that the property was distributed according to the said Act and not draw any benefit from the said estates.

The existence of the dual legal system in family law is basically due to cultural heritage which is customary law amounting to various tribes in Zambia and is also a result of the introduction of English law in Zambia. This has created many unnecessary conflicts and problems in the proper administration of justice. The approach of the court in matters of family property has sometimes caused uncertainties, which are far from being clear.

Since there are more than fifty three languages in Zambia, it means there are many different customs in Zambia. The dual legal system in Zambia implies that where customary law applies statutory law also applies. A complaint on how customary law under section 36 of the Local Court Act can apply in the administration of estate instead of the Interstate Succession Act which has already laid down procedures has caused conflict in the determination of which law is superior to the other. One wonders how the Local Court Act ensures a fair provision for the distribution of an estate more than the Intestate Succession Act.

What needs to be done?

1. There is need to either administer customary law only or statutory law only. It should also be stated which law is superior to the other.
2. There is also need to raise the burden of Local Courts because as at now, Grade A Local Courts administers estates worth 3 million while grade B 2.5 million Kwacha., as stated by Lusaka Local Court Magistrate at Lusaka on 14th July 2003.This simply shows that Local Courts have no jurisdiction.

According to section 38 of the Local Court Act the administration of the estate should be transferred to the high court. This simply shows that Local Courts have no jurisdiction..

In the case of *The People v Phiri*[39], the Local Court administered customary law while the administration of the estate is also provided for by the Interstate Succession Act .

However, what needs to be done is that Local Courts should have no business interfering with enforcement of the act through the administration of customary law. This is because of the Intestate Succession Act clearly lays down how an estate should be administered. Open ended meanings in the Act should be avoided so that all loop holes are sealed. For example, section 36 of the Local Court Act provides that one can apply customary law but this conflicts with statutory law.

Further, this research finding has shown that the law contained in the Intestate Succession Act has not fully been appreciated and understood to date because many people are ignorant of the provisions of the Act.. One such example is the case of *Adah Miles V Joseph Nelson*,[40] in which the administrator, Joseph Nelson, the brother to the deceased had totally ignored the Act and instead, together with his other members of his family took away all property left by the deceased on a flimsy reason that the widow had found most of the property when she married the late husband. However, the court should be commended in having used section 35 of the Interstate Succession Act and ordered the administrator to pay the widow.

This research has also shown that the Act has weakened by the attitude of widows who fear invoking the law. The fear for their lives and being hated by their dead husbands relatives. For example, a widow, Beatrice Nkwabilo[41], said she had been stripped of all her property by her husband's relatives because no woman was said to own property under customary law. After telling her about the Intestate Succession Act, she could not take the matter to court for fear of witchcraft.

The foregoing attitudes are retrogressive although there is fear of witchcraft. In this authors view, women should be sensitised and assisted by others who are psychologically prepared to handle inheritance problems.

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[39] Unreported High Court 1995/hp/3405
[40] LC/08/2003
[41] A widow intervied on 4th July in Lusaka

Lastly, it has been revealed that some provisions in the Intestate Succession Act of 1989 are unsatisfactory, inadequate and unfair to the protection of rights of widows and children .

In view of the foregoing, this author would like to give the following views and recommendations:

Definition

There are some definitions in the act that need to be clarified in order to establish their scope of application. These would make the Act more effective and more applicable to our Zambia Society.

(A). Child

By definition, child includes a child born outside marriage and the Intestate Succession Act provides for distribution of the estate in relation to the child of the intestate outside marriage as well[42]. An adopted child is a child born in marriage and a child not yet born but conceived, under the Act is a child as well. The problem comes in only on the woman's part. A woman appears to have no privilege to have a child elsewhere. A husband is the one who appears to have such privileges to go out of the recognised marriage and have children elsewhere who are recognised under the Act as beneficiaries. At his death, declared or undeclared children of his legally participate in the

[42] Max rgheinstein, case on Descendant Estate pp1-20 on extract from njenga, F.X Law of Succession in east Africa Faculty of law, University of Dares Salam 1966 p.1

sharing of the estate. Society would not allow such behaviour on the part of the women and this is discriminatory.

The definition given above raises questions on the status quo and rights of children of either spouse, who are not biological children of the deceased.

Within the present meaning of the Intestate Succession Act, interpretation of the definition of children means that non-biological children of the deceased are dependents. Even though these children maybe regarded as family children, they cannot be beneficiaries of the provision relating to the benefits accorded to the category for children provided for in section 5 of the Act. Therefore, if there are many step children in a family who are not adopted by the deceased as his or her own, they are deemed to be dependants by the Act . The danger is that normal family life is disrupted and excludes direct beneficiaries.

Preliminary research carried out uncovered one such case, where the parties to a marriage each had children but non together as the biological children. They owned a house jointly and on the death of the husband, the wife assumed sole ownership. She subsequently died intestate and the administrator of her estate, following the interpretation of the provisions of the Act decided the house belong to the administrators son as beneficiary, but excluded the children of the deceased's late husband because they were deemed dependants under strict interpretation of the Intestate Succession Act.[43]. .

[43] Interview with inspector Kasala of victim support Unit at Lusaka central police on 15th July 2003 said that in a recent unreported case, four gurdians who cliamed to have taken of the deceased sued

Part iv of the Intestate Succession Act proposes that the definitions stated need to be examined and defined further so that children's interest are arrived at regardless of them being step children. The Act needs to protect the children living in the home who are the direct beneficiaries of the deceased whether they are dependents or step children born outside marriage, within marriage or adopted children. The Act should put direct beneficiaries interests before allowing undeclared children who do not even live in the matrimonial home to benefit from the estate.

(b) Age Limit

The Act's definition imposes no age limit on the concept of child'. There are many alleged cases in which the deceased's offspring who are over the age of maturity and are self reliant claiming a stake in the estate to the detriment of younger and more deserving siblings or dependants who are genuinely in need. For example, in the case of *Catherine Chilanwa v Bridget Chilanda*[44] The dependant was a child to the deceased and the plaintiff was her stepmother. She had no child with the deceased. The defendant claimed the house and most of the property saying she needed more property because she was eldest and could take care of the younger brothers less than half of what they deserved. The court ruled that they all needed on equal share of the estate left by the deceased.

This author proposes that the younger children of the family should be given more than the older children of the family because younger children have more needs than the older children. The Act should have an age limit

involving distribution of property. This is because it is unfair to have a child who can take care of himself be given equal shares with the one who cannot practically take care of himself.

(c)Parents

By definition, a parent is a guardian who has been responsible for the welfare and education of the deceased.

The problem with this definition is that due to the sense of community inherent in child rearing practices, many guardians or people who look after the deceased to an extent and forever, short a period of time may come forth and claim as hare of the estate[45]

This author would propose that the term 'Parent' be defined further and clarified to avoid unnecessary conflict. where any person who book part of the raring of the deceased claims to be a beneficiary as a parent.

(D) Marriage

Marriage is defined as a voluntary Union between one man and one woman for life[46]. This is an English law definition. Due to the dual legal system we have in Zambia, a polygamous marriage is recognised as marriage under customary law. However, marriage in Zambia can either be statutory or

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[44] LC/07/2002 (Unreported)
[45] the administrator because the wanted a share of benefits for parent. This case awaits hearing in Ndola Local Court.
[46] Fowler (1984) Family law: London: Sweet & Maxwel. At P 81

customary and the Act takes this into account in the definition of marriage. There is no problem with this definition because both polygamous and monogamous are permitted and recognised as marriage.

There is only one problem with the definition. At the time the legislators were making the Act, cohabitation was not occurring at the rate it is today. Cohabitation is situation were a man and a woman live together on a bonafide domestic basis, but are not yet married to one another. In order to qualify a situation cohabitation, the community the one living in it must see the couple as married

Today, most marriages in Zambia emanate from merely living together as husband and wife without going through the formalities of marriage. One may wonder as to whether cohabitation gives rise to property right for either parties in particular women.

This author would propose that the Act should be one, which responds to the needs of society since the law and society are not static. Since society is dynamic, the law needs to respond to the dynamic society by changing the law to fit the society. This would benefit the women mostly because women's rights are at stake. A woman by cohabitation may make contributions towards family property. Does this mean that she should not get any rights to property after her so called husband dies in a marriage which results into cohabitation? In order to make the law equitable, the woman has the right to property so there is need to clarify the definition of marriage to include cohabitation as a form of marriage in the Act.

Distribution of personal chattels

According to a research done in rural areas, there is a problem with the distinction of personal chattels and what constitute an estate. Section 8 of the Act provides that

"Notwithstanding section five, where the intestate in the case of monogamous marriage is survived by a spouse or child or both, the spouse or child or both, the spouse or child or both of them , as the case may be, shall be entitled equally and absolutely to the personal chattels of the testator ."

Personal chattels are defined under the Act as:

"...clothing , articles of personal use , furniture, appliances , utensils , and other articles of household use , simple agricultural equipment , hunting equipment , books and motor vehicles but dose not include money or securities for money."

Estate is defined as:

... all assets and liabilities of a deceased , including those accruing to him by virtue of death or after his death and for the purposes of administration of the estate under Part I I I include personal chattels . "

However, Part III refers to administration of estates. The above definitions conflict one another .On one hand, the spouse and the children is given the personal chattels of the interstate, which they have probably relied on for their day to day living. On the other hand , the same chattels form part of what is to be apportioned among the various beneficiaries .

This author proposes that a distinction should be drawn between what constitutes personal chattels and what form part of the estate.

Distribution of the estates section 5

The 20 % entitlement to the widow is not gender equitable. If the principles of equity were followed, a widow would be entitled to 50% of the deceased's estate. Family law considers that any contributions made by a wife whether she works or not, makes her a beneficiary towards the matrimonial home and the other property acquired in the house. The most unfortunate thing is that although a surviving spouse is entitled to the matrimonial home, she is only entitled to this if she does not remarry. Statistics carried out in rural area show that men whose wives die continue occupying the matrimonial home even when they remarry. This shows how ineffective the Act is in its application especially in rural areas where customary law is highly followed.

This author proposes that a surviving spouse should have 50 % while the other 50% goes to the children whose interests are to be put first. The only relatives that should benefit if it is discovered that there are no children or surviving spouse are those who were directly beneficiaries to the deceased.

This means that they should have been living in the same house as the deceased person. The Interstate Succession Act should aim at only protecting the interests of the persons who are directly affected by the death of the deceased and not any person who took part in raising the deceased or a spouse who is unknown to the relatives or children who are not known to the relatives and has been living outside the matrimonial home.

Matrimonial home

Section 9 of the Act has crated controversy regarding the house left by the deceased. It reads:

"...where the estate includes a house , the surviving spouse or the child or both shall be entitled to the house :

Provided that: -

(a) Where there is more than one surviving spouse, or child or both, they shall hold the house as tenants in common; and

(b) The surviving spouse shall have a life tenancy in that house which determines when the spouse re marries.

In the present meaning of the Act, this threatens to disrupt the status quo of the family already affected by the death of the Intestate. The Act tends to introduce people to the home who had no claim to the home but by the misadventure of the home, it opens the doors to anyone who falls within the definition of the parties mentioned.

The concept of tenancy in common for spouses is not practical. This is because no age limit of children has been given and the situation of having adult children claiming a share to the property is most unfortunate. In most cases, where the surviving spouse is not the biological mother of the children or where the children unknown to the persons living in the matrimonial home are brought together, conflicts arise and this disrupts family unity. For example, in the case of Bridget Chilanda, the surviving spouse was suddenly told that there were two surviving spouses and not one. This brought conflict between the two surviving spouses. One who knew she had a right to the matrimonial home wanted the home to be sold? This was detrimental to the other spouse who had no place else to go .The step children also wanted the home to be rented because they were as much entitled to the home as the two surviving spouses as tenants in common.

This author proposes that the spouse and children should not be tenants in common .The matrimonial home should be held jointly instead of being tenants in common. This should only apply to the surviving spouse and the children in the matrimonial home. This prevents a situation were unknown children and the spouses claim to be part of the benefits to the matrimonial home.

Further section 9 (2) of the Interstate Succession Act provides that:

"Where the estate includes more than one house, the surviving spouse or child or both shall determine which of the houses shall devolve upon them and the remainder shall form part of the estate."

This is seen as disruptive because if the other house has provided an income and will probably be the only source of the revenue for the remnant family to live on. For example, if a couple own two homes and one is used as a source of income, it is unfair to have one of the homes sold when one of them dies because there will be no source of income. Further, section 19(2) has empowered the administrator to sell the property which forms part of the estate .The Interstate Succession Act under section 19 provides,

"Where an administrator considers the sale of any of the estates of the deceased person or seen as desirable to carry out his duties, he may do so with the authority of the court..."

It is clear from the above that the administrator has been given power to sell property that form part of the estate. This author proposes that if there is anything forming part of the estate, which is a source of income to the widow and children, it should not be sold and these unlimited powers given to the administrator should be taken away. Such unlimited powers should be given to the court to do everything in the best interests of the children.

Administratorship

Section 15 provides for the appointment of administrators. The administrators under the Act are "any interested person. "This definition is too wide and is subject to abuse. This is because any person who is not even a relative of the deceased con be an administrator. Most Zambians today rush to be administrators because they see it as a source of income. The penalty is not so stiff to afford society a fear for such punishment. The

duration for administratorship has not been defined and the administrators tend to delay the distribution of the estate to the detriment of the beneficiaries.

This author proposes that the criteria for administratorship should be examined and should consider criteria for those who more conversant with aspects of the estate to be administrators. Further, due to the research carried out in rural areas, the author thinks best to only consider that the administrator should include:

(a) The widow,

(b) The children above 18 years old,

(c) One relative from the wife's side and one relative from the husband's side.

Such as a combination prevents any unnecessary selfishness but looks at the interests of the widow and the children. The author further proposes that the Laws in Zambia should be amended frequently so that the punishment fits the offence it seeks to prevent in response to the dynamic societal needs.

Distribution

Section 5 of the Intestate Succession Act makes provisions for what should be looked at when distributing property. This looks at the aspect of percentage allocation to the surviving spouse and children. However, no

problems arise where there is a spouse. Problems have arisen were the marriage is polygamous.

Further, the Act has clearly made provision for distribution according to the respective duration of marriage. The means to ascertain the duration are not provided for and so any person who is not even a wife can claim to be a wife. This provision is subject to abuse and so there is need to clarify this subjective definition of marriage, which could be a secretive marriage.

This author proposes that proper guidelines as to should be made as to how this will be determined to avoid controversy and procedural difficulties.

Application to customary Land

The Interstate Succession Act has excluded from its application the scope of the land acquired under customary law. On the death of a landholder, the surviving spouse and the children loose there home, which was held under customary law. In turn , the lose of the house could also mean a lose of livelihood if the land was used for cultivation .

This author proposes that the Intestate Succession Act should make a provision for the right of survivorship for customary land. Further, women should stop being discriminated against in relation to customary land. Tenure of customary land needs to be addressed by sensitising the chiefs on how it is important today to ensure that the rights of people are respected especially the rights of the children and the children. .

Enforcement

Enforcement to the provisions of the Act has been attributed to cultural beliefs and to some degree, personal grievances.
Section 14 provides a term of only two years for unlawfully depriving entitled persons to the property. This is usually done by the administrator or the person who has been chose n to distribute the property. The public will always have such problems as long as they are not aware of the provision of the Act that shows how property should be distributed. Further, statutes do not state that property grabbing is an offence and the sanction that exists is not known by the public.

The cultural practices are deterrent for persons who have suffered loses through property grabbing to pursue cases up to court because of an unwillingness to testify against relatives.

This author proposes that the re should be sensitisation seminars which should be held to educate the public on the penalties of property grabbing and other aspects of the Interstate Succession Act both in urban and rural areas. The penalty for the offences in the Act should be stiffened and an independent prosecution of complaints by the Law enforcement agency without withdraw should be encouraged. The discretion by the Magistrates to impose a lesser penalty or suspended sentence should be avoided because this weakens the efficiency of the Act.

Statistics

Police Inspector Kazala of Victim Support Unit in Lusaka Central Police gave a satisfactory statistical report on property grabbing. Statistics complied by the Victim Support Unit (VSU)in 2002 reveal a rampant disregard of the statutory provisions . The statistics compiled are:

641 reported cases of property grabbing or depriving beneficiaries
255 arrests
75 cases withdrawn from police
124 withdrawn from court
9 acquittals
188 cases pending

The V S U attributes the state of affairs to the delays in the legal system encouraging unsatisfactory compromise. The factors that encourage such cases to be sorted out of court is for purposes of protecting relatives. However, as stated above the public should be encouraged to report cases to court ant these case must be decided in a manner that makes the penalty suit the offence and will set precedent.

Conclusion

While some of the problems associated with the Act seem to come from cultural attitudes, there are some that come out due to the omissions in the

Act . These need to be revisited to meet the needs of the changing society they seek to protect.

- The definitions stated need to be examined and the defined further.
- The Act creates problems with regard to the matrimonial home and who is particularly entitled to it where there is more than one spouse. This provision should be re –evaluated as to how it can equitqbly maintain the status quo and not discriminate against children born outside the home.
- The provision for the distribution of personal chattels needs to be differentiated from the rest of the estate.
- Tenure of customary land addressed with the consultation of the chief being primary.
- The criteria for the determination of administrators should be revisited so that those who are conversant with the estate are included.

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