

SUCCESSION

Political Ordinance of 1 April 1580, articles 19-29.

Summary: This Ordinance unified the law of intestate succession of in the provinces of North Holland and South Holland so that the whole of the Netherlands was governed by the “Skependomserfreg” (Southern Provinces System) principle of *per stirpes* inheritance. See a translation and summary of this law in English below.

Amendment and interpretation: The *Interpretation of 13 May 1594* and *Oktrooi of 10 January 1661* clarify and amend the 1580 Ordinance.

Applicability to SWA: The *Oktrooi of 10 January 1661* clarified that both the Ordinance and the 1594 Interpretation applied to the Cape Colony. (The Oktrooi applied the Political Ordinance to the “Indies”, which at the time included the Cape Colony.) They were subsequently made applicable to SWA by the *Administration of Justice Proclamation (SWA) 21 of 1919*, as interpreted by *Tittel v The Master of The High Court* 1921 SWA 58.

Cases: *Frans v Paschke* 2007 (2) NR 520 (HC) (citing the *Political Ordinance of 1580*, the *Interpretation of 13 May 1594* and the *Oktrooi of 1661*, explaining their historical background and the route by which they became applicable to SWA (at paragraphs 9-14, and finding the rule that children born outside marriage may not inherit intestate from their fathers to be unconstitutional).

Translation and summaries from

Howard, *The Administration of Estates, 1908*

See *Frans v Paschke* 2007 (2) NR 520 (HC), footnotes 10-11

Political Ordinance of 1 April 1580, articles 19-29

Art 19: Regarding inheritances, the States are hereby withdrawing and repealing all written rights, customs and laws applicable in the States and countries of Holland and Friesland concerned with intestate deaths or where a person dies without a last will. These regulations concern all movable and immovable properties. From now on only these new Articles that follow will be applicable.

Art. 20: Firstly, children and other direct descendants *ad infinitum* succeed by representation or *per stirpes*.

Art. 21: If both parents of the intestate be alive, they succeed absolutely upon failure of children and descendants of remoter degree.

Art 22: If one or both of the parents be dead, the succession must go absolutely to the intestate's brothers and sisters and their children and grandchildren *per stirpes* or by representation.

Art. 23: Half-brothers and half-sisters, their children and grand-children, and other collateral relations who were related to the intestate through one parent only, take with the "half-hand" and according to the degree of consanguinity in which they stood related to him.

Art. 24: Failing all descendants, father, mother, brothers and sisters and their children and grandchildren, the uncles and aunts, and their children, take *per stirpes*.

Art. 25: But, however, if grandfather and grandmother on the one side be both alive, they succeed, as regards property derived from that side, in preference to the uncles and aunts and their children

descended from these grandparents of the intestate; but these grandparents do not oust the intestate's brothers and sisters as regards such property.

Art 26: In the case of own parents or other ascendants when the bed has been severed and one alone survives, the latter does not participate in the succession.

Art. 27: "The estate of the deceased shall go to his next of kin on the father's and mother's side, and be divided into two equal parts, without any distinction being made whether the deceased inherited more from his father than from his mother, or vice versa." Now, the context clearly shows that this section was intended to apply to the case in which the deceased died without either descendants or parents him surviving. In such a case the general rule is laid down that the succession shall be *per lineas*, one-half of the estate going to the next of kin on the paternal side, and the other half to the next of kin on the maternal side.

Art. 28: "Representation shall not be admitted among collaterals, further than the grandchildren of brothers and sisters, and the children of uncles and aunts, inclusively, and all other collaterals, being the next of kin of the deceased, and in equal degrees, shall take per capita, to the exclusion of all who are in a more remote degree of consanguinity, the nearest excluding those more remote."

Art. 29: Children who have received from their parents any money or property given as a marriage gift or for the purpose of benefiting the children in business affair or otherwise in such matters, must collate or bring into the estate of their parents such money or property before sharing the estate with the other successors. the amount to be collated is the value of the donation at the time it was made, if the property had not had a valuation placed upon it; but if such was the case, the valuation must be followed in collating. The property must then be divided into equal parts, one half going to the surviving spouse, and the other half the heirs take: This will also take place in the first, second and third generations.. The foregoing rules regarding succession and collation rule when no contrary provisions exist by virtue of a "testament, antenuptial contract, deeds executed before the Orphan Chamber, or any other contracts;"

Interpretation of 13 May 1594

This Interpretation essayed to elucidate the difficult and doubtful points that arose in regard to the terms of the Political Ordinance: Half-brothers and half-sisters must succeed with the half-hand if both of the parents of the intestate predeceased him; that is, the full brothers and sisters or their children or grandchildren by representation must take one-half of the estate, whilst the other half they share equally with the half-brothers and half-sisters, or their children or grandchildren by representation, who are related to the intestate on the one side only. But if that parent alone is dead through whom the half-brothers and half-sisters have their claim upon the intestate, the other parent of the intestate being still living, they, or their children or grandchildren by representation, succeed with a full hand: not otherwise, however. The same applies to the case of other collaterals, in their various degrees, when related to the intestate on the one side only. [Compare, however, the rule stated below, regarding collaterals related through other ascendants.] Further descendants of brothers and sisters, in the fifth and remoter degrees, rank before grandparents and remoter ascendants, as also uncles and aunts, their children and grandchildren, and further descendants, and they succeed per capita, not per stirpes. If, on the one side, only one of the ascendants [as in Art 26, the application hereof to parents is nullified by the Charter of 1661] be alive, neither he, nor any persons, related to the intestate through the deceased spouse alone, will succeed to the intestate. The division of the intestate's estate *per lineas*, to the father's and the mother's side equally, occurs only when the parents are both dead. And the above rules must govern.

Oktrooi of 10 January 1661

In applying the above laws to the Indies, this Charter partially altered Art 26 of the Ordinance: When the marriage of the intestate's parents has been dissolved, and only one of them is living, he or she will succeed to the intestate along with the brothers and sisters, whether of the full or the half blood, or their children or grandchildren by representation. That is, the surviving parent takes one-half, and the brothers and sisters, or their children or grandchildren by representation, take the other half; but the half relations in order to succeed must be related to the intestate through his deceased parent. If there be neither brothers nor sisters alive, their children or grandchildren by representation will in like manner take one half, the parent taking the other. If there be neither, brothers, sisters, their children nor

grandchildren alive, the surviving parent of the intestate will succeed to the estate absolutely, and exclude all collaterals. Land, houses and other immovable property must follow the law and customs of the Provinces, Districts of places where it is situated.

Intestate Succession Ordinance 12 of 1946.

Summary: This Ordinance sets forth rules for intestate inheritance by surviving spouses and other relatives.

Amendments: The Ordinance is amended by Ord. 6/1963 and Act 15/1982, both of which simply substitute the amounts referred to in section 1. (The amounts which are currently applicable are all set at R50 000.)

Wills Act 7 of 1953, as amended in South Africa to November 1979.

Summary: This Act covers the execution of wills.

Applicability to SWA: Section 8 states “This Act and any amendment thereof which may be made from time to time shall apply also in the territory of South West Africa, including the Eastern Caprivi Zipfel referred to in section three of the South West Africa Affairs Amendment Act, 1951 (Act No. 55 of 1951).” Section 1 defines “Court” and “Master” accordingly.

Transfer of administration to SWA: The administration of this Act is transferred to SWA by the Executive Powers (Justice) Transfer Proclamation (AG 33/1979, as amended), dated 12 November 1979. There were no amendments to the Act in South Africa after that date and prior to Namibian independence.

Amendments: The definitions of “Court” and “Master” are amended by the Walvis Bay and Off-shore Islands Act 1 of 1994.

Cases: *Lerf v Nieft NO & Others* 2004 NR 183 (HC) (lack of testamentary capacity); *Hoveka NO & Others v The Master & Another* 2006 (1) NR 147 (HC) (factual dispute about compliance with section 2(1)(a); costs); ; *Kalomo v Master of the High Court & Others* 2008 (2) NR 693 (SC) (valid German will of German citizen residing in Namibia at time of death covered by section 3bis).

The following cases deal with the interpretation and construction of wills: *Beukes & Others v Engelbrecht & Others* 2005 NR 305 (HC); *Kuhlmann & Others v The Master & Others* 2007 (2) NR 611 (HC).

Articles: Namibia Institute for Democracy, *Wills, Testaments and Estates*, 2001, available at www.nid.org.na/pdf/publications/will_testament.pdf; Legal Assistance Centre, *Training Manual for Trainers on Will Writing and Inheritance in Namibia*, 2004, available at www.lac.org.na/projects/alu/Pdf/willwriting.pdf (languages: English, Afrikaans, Oshiwambo, Otjiherero, Khoekhoegowab, Silozi, Rukwangali).

SELECTED ARTICLES

D LeBeau, et al, *Women’s Property and Inheritance Rights in Namibia*, Windhoek: Gender Training and Research Programme and University of Namibia, 2004

- Legal Assistance Centre, *Inheritance Issues: Information and feedback from community consultations on inheritance law reforms*, 2005, available at www.lac.org.na/projects/grap/Pdf/inherit.pdf
- Legal Assistance Centre, *Customary Laws on Inheritance in Namibia: Issues and questions for consideration in developing new legislation*, 2005, available at www.lac.org.na/projects/grap/Pdf/custinh.pdf
- R Gordon, ed, *The Meanings of Inheritance: Perspectives on Namibian Inheritance Practices*, Legal Assistance Centre, 2005, available at www.lac.org.na/projects/grap/Pdf/inheripersoectives.pdf.
- K Buschbeck, "Methodological Aspects of Research and Main Features of Inheritance Tradition" in Manfred O Hinz and Helgard K Patemann, eds, *The Shade of New Leaves: Governance in Traditional Authority - A Southern African Perspective*, Windhoek: Centre for Applied Social Studies, 2006.

See also Native Administration Proclamation 15 of 1928 (**‘BLACKS’**).

See also Children’s Act 33 of 1960, section 74 (succession by adoptive children) and Children’s Status Act 6 of 2006, section 16 (succession by children born outside marriage)(**CHILDREN**).

See also **ESTATES**.

See also Communal Land Reform Act 5 of 2002 (re: rights of surviving spouses in respect of communal land) (**LAND**).