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# *Pro* **Bono**

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## **WHEN SOMEONE DIES WITHOUT A WILL**

When someone dies without a will, we say that person has died “intestate”. This column is about the rules that apply to intestate inheritance.

The existing laws on intestate inheritance violate the Namibian Constitution because they discriminate on the grounds of race and ethnic origin. There are different rules for people of different races, depending on what part of Namibia they live in and what kind of marriage they had (customary or civil, and in or out of community of property). These apartheid-era laws were technically repealed in 2005, but the repeal was not effective because it states that the repealed rules will continue to apply to the same people as they did before they were repealed. So the repeals technically complied with a High Court decision interpreting the Namibian Constitution on inheritance, without really making any meaningful changes.

Where there is no will, the estates of White, Coloured or Asian persons and some Black persons follow a law called the *Intestate Succession Ordinance 12 of 1946*. This Ordinance applies to Black persons in civil marriages, with the *exception* of Black persons in northern Namibia who had civil marriages which were out of community of property and without an antenuptial contract. The intestate estates of Blacks which do not fall under this Ordinance, including all those who were in customary marriages rather than civil marriages, are divided in terms of customary law. The intestate estates of people who are members of the Rehoboth Baster community are divided in accordance with the rules in the repealed *Administration of Estates (Rehoboth Gebiet) Proclamation 36 of 1941*.

There are differences in who administers deceased estates, depending on whether there was a will. All estates where the deceased left a written will are administered by the Office of the Master of the High Court. Estates where there was no will are handled by magistrates if the total value of the estate is estimated to be no more than N\$100 000. Larger intestate estates and insolvent estates of any size (where the liabilities of the deceased exceed his or her assets) are handled by the Master's Office.

Where a deceased estate falls under the *Intestate Succession Ordinance*, it is generally divided between the surviving spouse and the children of the deceased after the debts of the deceased are all paid. Everything will go to the surviving spouse in a very small estate, as the spouse's half of the joint estate of a marriage in community of property *plus* the spouse's share of the deceased's portion of the joint estate

must be at least N\$50 000 before anything will go to the children of the deceased. The same is true of a small estate in a marriage which was out of community of property, as the surviving spouse must inherit at least N\$50 000 before anything goes to the children of the deceased. If the estate is sufficiently large to provide an amount which goes over this N\$50 000 threshold, the assets will be shared out equally between the spouse and the children.

If the deceased had no children, the parent or brother or sister of the deceased may inherit something along with the surviving spouse if the estate is large enough. If the deceased has no surviving spouse, the estate will be divided between the children of the deceased.

The law no longer makes any distinction between children born inside and outside of marriage when it comes to inheritance. But note that the concept of “spouse” is limited to persons who are formally married; a cohabiting partner in an informal relationship will not inherit anything at all in the absence of a will.

The rules of intestate succession which apply to Rehoboth Basters on the basis of the *Administration of Estates (Rehoboth Gebiet) Proclamation* are somewhat different, but they also give priority to the surviving spouse and children.

The customary law on intestate inheritance which applies to some deceased black persons is different in different communities.

The confusing patchwork of rules is one factor which opens the door to property-grabbing, where the relatives of a deceased will appropriate all of the assets of the deceased person without waiting for proper procedures, sometimes leaving the widow destitute.

Any minor children of a deceased (whether born inside or outside marriage or formally adopted) may claim maintenance from the deceased estate before it is distributed to the heirs, regardless of whether or not the deceased left a will. Divorced spouses can claim maintenance from the estate of a deceased husband or wife IF there was a divorce order in place that provides for spousal maintenance. However, there is no other provision for maintenance for a surviving spouse.

The fact that there are different rules on intestate succession for persons of different races so long past Independence is shocking. The Law Reform and Development Commission has prepared a draft bill which would apply a single set of rules to intestate, The rules in this draft bill would give priority to the surviving spouse and children of a deceased, while still incorporating some aspects of customary law for persons to whom customary law applies.

It is not possible to cover all the details of intestate succession in a short newspaper column. You can address specific questions to the magistrate or the official in the Office of the Master of the High Court who is administering the estate of a particular deceased person.

Remember that if you want to choose what happens to your assets, you should make a written will. (A ProBono column on will-writing was published in *The Namibian* on 30 November 2017 and can be accessed online if you missed it.)

*ProBono is a monthly column by the Legal Assistance Centre designed to inform the public about Namibian law on various topics. You can request information on a specific legal topic by sending an SMS to 081-600-0098. Note that we will not be able to give advice on specific cases in this column, only general legal information.*