

10. Recommendations

SOME PRELIMINARY OBSERVATIONS AND QUALIFICATIONS

10.1 The recently completed authoritative United Nations Common Country Assessment argues that Namibia is facing a major triple threat. First there are the multiple impacts of HIV and AIDS; second, the necessity of ensuring household food security; and third, the need to strengthen capacities for governance. Issues concerning inheritance impact directly on each segment of the triple threat.

10.2 In a nutshell, inheritance disputes can be expected to increase and be exacerbated by the fact that life expectancy has plummeted from 63 and 59 for males and females respectively in 1991 to 50 and 48 a bare ten years later. Already the downward spiral for the poor majority in rural areas in terms of food security can be plotted. As a result of increasing competition for scarce resources, the growing number of inheritance disputes is becoming obvious as more and more Namibians approach magistrates for the appointment of executors or take disputes about estates to traditional authorities.

10.3 Inheritance problems and attempts to deal with them, as this report has shown, have a long history in Namibia. Earlier anthropologists, including government ethnologists in Namibia, argued that these problems were the result of economic changes that knocked the original system “out of balance”. In particular a major thrust of argument has been that with the development of pastoralism and “private property”, matrilineal systems of inheritance became unsatisfactory, so there was a gradual transition towards patrilineal systems, especially in the northern regions and among Herero-speakers. Inheritance disputes are believed to result from trying to deal with these conflicting principles. In the 1960s Africanists were debating whether or not matriliney was doomed in Africa, and indeed many experts felt that it was an impediment to development. Apparently one needed to be able to leave one’s estate to one’s own progeny to be really enthused about development and property accumulation. Current indications are, however, that matriliney has shown remarkable resilience and that it is simplistic to see it as an impediment to development.

10.4 Perhaps counter-intuitively, there is some merit in having uncertainty about inheritance. If no one knows who is going to inherit, all the potential heirs tend to be nice to you. In short, in situations where there is no or minimal state-provided social security, the possibility that any number of people might inherit can ensure the care and maintenance of an elderly person. On the other hand, if people know exactly who is going to inherit, there is a fear that the heirs might engage in witchcraft or other forms of foul play to get rid of the person in question.

10.5 Inheritance disputes are part of the human condition. Grief becomes grievance – indeed they have the same semantic root. It is more than simply greed or aggrandisement which propels inheritance disputes (even though no one will ever admit that such base motives play any role in their claims); claims for entitlement to inheritance are also crucial for establishing identity. This becomes clear when one looks at the grammar of acceptable motives for justifying such claims. In addition to blood ties or kinship one can make such claims or try to bolster them with pleas for “compensation” or “deservingness” on the basis of reparations for past injustices, or services rendered. Such motivations implicitly posit a pre-existing social relationship which is out of balance and needs to be redressed.

10.6 In claiming a legacy, potential beneficiaries must do a number of things. They must identify their interests in the property, they must stake a claim, and they must ensure that their entitlement is recognised. Similarly the forum in which their claim is being heard – be it a family meeting, traditional court or formal court – must go through a parallel process. It must identify its interests in the rights of the claimants by asserting its authority, thus acquiring legitimacy and ensuring that its decisions will be respected.

10.7 Inheritance disputes should be seen not as static events but rather as processes. As anthropologist Sally Falk Moore has pointed out, there are two basic processes: processes of regularisation and processes of situational adjustment. Regularisation produces rules and organisation while situational adjustment re-arranges the immediate environment or generates indeterminacy to achieve immediate situational ends. The quest for inheritance rights contains both, and it is the recognition of such processes that gives the law, and the forum in which it is applied, their legitimacy.

10.8 Modern democratic governments are generally uneasy about using custom as a basis for property law: Custom-based property regimes can be rigidly hierarchical, xenophobic, conservative and misogynistic. Indeed customary law’s capacity to deny property rights to women has been cited as a factor in their vulnerability to spousal abuse and even to AIDS. Modern state systems are not designed to handle legal pluralism with its normative multiplicity and fluidity, preferring regulation in terms of unequivocal rules. This leads quite readily to the rise of formalism that is supposedly aimed at “simplifying” claims-clearing practices. The means of choice here is the use of wills, supplemented by clear and uniform statutory rules for intestate estates.

10.9 However, experiences in other countries show that an approach which departs too radically from existing customary law is likely to be ignored. Moreover, customary law approaches to inheritance provide positive aspects of flexibility, and in some cases spread assets amongst a wide range of family members. Policy-makers too readily assume that all aspects of customary are discriminatory, discounting its positive aspects in the process. Respect for culture and for customary law – insofar as these do not impinge on other constitutional rights – is a constitutional imperative. **Therefore, we recommend that Namibia’s approach to inheritance should be to retain a dual system which incorporates the positive aspects of customary law whilst at the same time ensuring respect for all constitutional rights.**

10.10 The current position of women and children under customary law, as far as inheritance is concerned, remains precarious and violates constitutional guarantees against discrimination on the basis of sex, birth and social status. In terms of customary law, women have limited rights to inherit. Especially vulnerable are younger widows. Not only are they still in the development stage of the household, but typically have not become established members of their husband's community and thus cannot expect much local support. They are frequently accused of killing their husbands with witchcraft and dismissed with the argument "You are young, you can easily remarry". In addition, current civil and customary laws on inheritance do not attach any significant legal status to couples who are cohabiting outside of formal marriages, even if they have been in such a relationship for many years. Such informal relationships are increasing in Namibia, creating a new class of vulnerable "spouses" who need to be protected. Extramarital children are barred from inheriting in terms of our civil law, and enjoy limited inheritance rights in terms of customary law. The number of "illegitimate" children in Namibia is high – and yet even if the fathers are reasonably affluent, such progeny generally do not inherit anything. This situation would be addressed to some extent by provisions in the Children's Status Bill which has already been before the National Assembly, but the bare removal of discrimination contemplated in that Bill is unlikely to be sufficient on its own to give meaningful protection to extramarital children. **Any approach to inheritance which is adopted must keep in mind the need to protect these vulnerable parties.**

10.11 To make meaningful improvements to the position of these vulnerable persons, and to bring customary inheritance practices in line with the Constitution, practical and workable approaches must be adopted. **As a practical approach to ensure equitable economic protection of vulnerable women and children, we propose transforming some inheritance issues into issues of maintenance.**

10.12 The history of administrative attempts to deal with inheritance problems should make one hesitate to recommend anything. Many of the options one would like to suggest have been tried before, without significant success. Nevertheless, the recommendations below are offered for consideration and debate.

RECOMMENDATIONS

Distribution of intestate estates

10.13 The following options are possible.

Option 1: Allow customary law which is consistent with the Constitution to apply in the devolution of estates. Such an approach will validate the constitutional recognition that customary law enjoys.

The advantages and disadvantages of recording customary laws in a written but accessible form has a long history of debate, and it is obvious that there is considerable variation and change even within a single

language group. However, given the small number of kinship systems which form the basis for deciding how estates should be allocated, one approach to consider might be to allow the stakeholders to decide how the estate should be divided – by patrilineal, matrilineal or cognatic principles – and for the magistrate or the Master (or their delegates) then to apply or at least be sensitive to the relevant principles. The state legal system also has to be sensitive to the fact that customary property concepts might be more complex than Roman-Dutch ones. As an example, Herero are adamant that holy cattle cannot go into the wife's line. There is no precedent for this kind of culturally-important property restriction in Namibia's civil law.

Unconstitutional practices or those practices that discriminate against women and children may still be applied under this approach, with the result that those that are aggrieved will have to make court applications to challenge unconstitutional practices. This would allow for gradual changes to customary law rules. However, women – especially in rural areas – may not have the resources to challenge unconstitutional customary practices in courts. Also, given the fact that most wives move to their husband's domicile on marriage, local community courts will in all likelihood have a built-in bias against these women because of their "outsider" status. The status quo would most likely be maintained.

Option 2: Allow the Intestate Succession Ordinance 12 of 1946, appropriately amended, to apply to the devolution of all intestate estates. This approach was recommended in South Africa, but was met with great resistance from those who felt that customary law was being subjugated to the common law. Namibia's Intestate Succession Ordinance in its current form provides protection to surviving spouses and children, but discriminates against extramarital children. However, the Children's Status Bill, if enacted, will amend this unfavourable position under both civil and customary law.

An advantage of this approach would be the statute's clear-cut rules and uniformity.

However, the Intestate Succession Ordinance may be inadequate in addressing certain aspects of inheritance under customary law. It fails to make provision for members of a deceased's extended family who may otherwise have been entitled to inherit, based on their status within a particular kinship system. Thus, surviving spouses and children are more likely to be victims of property grabbing under this system. This approach also lacks the flexibility which is a positive characteristic of many customary law systems of inheritance in Namibia.

Option 3: Allow for fragmentation of the estate, to make provision not only for the surviving spouse and children to inherit, but also members of a deceased's family who may have been entitled to inherit in terms of customary law. It may be difficult to implement such a system in practice. It may also be widely resisted if people are of the opinion that it is too far removed from customary practices, especially where the inheriting group excludes certain categories of beneficiaries who would otherwise have enjoyed preference under customary law. Therefore, it is important

that the category of customary law heirs who will receive a portion of the estate be defined in a way which allows for flexible interpretation – as opposed to the rigid percentages applied in Zambia – to ensure that conflict and property grabbing will be minimised and that Namibia’s different kinship systems are adequately provided for. This third option is in a way a compromise between the discretionary flexibility of option 1 and the rule-bound nature of option 2.

It is important to ensure that a sufficient portion of the estate goes to the surviving spouse and children. But the portion of the estate allocated to the customary law heirs must not be so limited that it exacerbates conflict with the surviving spouse and children of the deceased – keeping in mind the obligations of such heirs under customary law.

Recommendation:

DISTRIBUTION SCHEME FOR INTESTATE ESTATES

Allow for fragmentation of the estate, to make provision for inheritance by the surviving spouse(s) and children, and also the primary customary law heir or heirs (ie the person or persons who would otherwise have enjoyed preference based on their status within a particular kinship system).

The definition of ‘customary law heir(s)’ must be worded in a broad and general manner to allow for differential application in different kinship systems. This definition should not cover all potential customary law heirs who receive remembrances, but only the key person(s) who have traditionally taken on family assets coupled with family responsibilities. If there is no customary law heir (as in the case of families who do not follow customary law), then this portion of the statute would simply fall away.

The customary law heir(s) should not only be entitled to inherit the name and/or traditional articles that they would have become entitled to in terms of customary law, but also a portion of the estate. The portion of the estate allocated to the customary law heir(s) should not be greater than the portion which goes to the surviving spouse and children.

Other potential beneficiaries to whom the deceased would have owed a duty of support should *not* be included in the distribution scheme, but should claim maintenance, as discussed in more detail below. This wider pool of potential beneficiaries should be eligible to receive portions of the estate as heirs only in the absence of a surviving spouse and/or children.

One advantage of this option is that it provides a uniform approach for all persons in Namibia, but still provides an avenue to respect the different customs of different communities.

It might, however, be necessary to qualify such an approach by stating in the law that no discriminatory rules of customary law will be enforced by the state.

Maintenance from the deceased's estate

10.14 One practical approach to ensure equitable economic protection of vulnerable women and children is to transform some inheritance issues into issues of maintenance. Special legislative provision should be made to provide maintenance for those who were dependents of the deceased, and who were made vulnerable or had their vulnerability increased by the death of their main source of maintenance. Given the declining life expectancies of Namibians, this is obviously a matter requiring urgent and immediate attention

10.15 If the deceased had been supporting any extended family members (such as elderly parents), a portion of the estate (especially money) should go to these dependent family members, much like any debts would have to be paid up before any property can be distributed amongst heirs. Making continued maintenance a priority would provide for the least disruption to needy family members, and would likely avert many disputes about succession. Estates may not be adequate to address all maintenance claims, but it makes sense that basic maintenance needs of genuine dependents should take priority. Such priority should not be at the expense of minor children, however.

10.16 One question, which arises in this context, is whether provision for maintenance of dependants from the deceased estate would apply only to intestate estates or also to estates which devolve by will. Freedom of testation, based on the principle of absolute ownership, is strictly guarded under our common law as a matter of public policy.¹ Yet as a matter of public policy, freedom of testation should not override the duty of all persons to make provision for the basic needs of their dependants. It is for this reason that countries such as South Africa, Zimbabwe and Zambia have made provision for the maintenance of the deceased's dependants in situations where a testator has not made adequate provision for their reasonable needs. Zambia and Zimbabwe allow claims of maintenance even where there is a will. Namibia currently has no general maintenance scheme for dependents, as only children of the deceased may claim maintenance from the estate as the law now stands.

10.17 The balance between freedom of testation and the obligation to make provision for dependants is achieved in some jurisdictions through the application of a reasonable needs test, and in other jurisdictions through the apportionment of a percentage of the estate to the dependant.² A percentage of the estate, or minimum share, is sometimes referred to as 'legitimate portion', 'reserve', '*jus relictæ*' or 'widow's share'. In many countries, such as South Africa, 'dependents' are defined in relation to the existence of a marriage, and consequently exclude extended

¹ *Bydewell v Chapman* 1953 (3) SA 514 (A) at 531.

² See in general SA Law Reform Commission *Review of the Law of Succession: The Introduction of a Legitimate Portion or the Granting of a Right to Maintenance to the Surviving Spouse*, Working Paper 13 (May 1986) and Report 22 (August 1987).

classes of dependants such as parents, aunts, nieces, nephews, brothers or sisters. In contrast, Zimbabwe and Zambia define dependants broadly to include a broader range of family members.

10.18 It is trite law in South Africa that children, including extramarital and adopted children, may not only inherit intestate, but can also claim maintenance when left destitute as a result of not being provided for in the deceased's will. The maintenance and education of a testator's minor children, whether extramarital or not, constitute a claim against the testate estate³ where no provision have been made for a child in a will.⁴ Even though such a claim is subordinate to that of creditors,⁵ it has precedence above those of heirs and legatees.⁶

10.19 A surviving spouse had no claim for maintenance under the common law,⁷ until South Africa's Maintenance of Surviving Spouse Act 27 of 1990 was passed. This Act provides the surviving spouse with a claim against the estate of the first-dying spouse for the provision of reasonable maintenance needs in so far as he or she is unable to provide therefore from his or her own means.⁸ A spouse is entitled to maintenance only until re-marriage or death. The South African Law Commission rejected the view that the court be empowered to award an 'equitable portion' of a deceased estate.⁹

10.20 In terms of the South African Act, three factors have to be taken into account when determining the reasonable needs of a spouse:¹⁰ the amount in the deceased's estate available for distribution; the existing and expected means, earning capacity, financial needs and obligations of the survivor; and the standard of living of the survivor during the marriage and the survivor's age at the time of death of the predeceasing spouse. The SALC recommended that the conduct of the spouse during the marriage should *not* be taken into account.¹¹

³ *Glazer v Glazer* 1963 4 SA 694 (A) 706, 707; *Hoffmann v Herden* 1982 2 SA 274; *Ex parte Jacobs* 1982 2 SA 276 (O).

⁴ Even though this imposes on the testator's freedom of testation, such a limitation is justifiable in terms of the 1996 Constitution.

⁵ *Lotz v Boedel van der Merwe* 1958 (2) PHM16 (O).

⁶ *Ritchken's Executors v Ritchken* 1924 WLD 17; *In re Estate Visser* 1948 3 SA 1129 (C).

⁷ *Glazer* case (op cit n3). Under the Roman Dutch Law most marriages were-in community of property, with the result that the surviving spouse automatically had a share in the joint estate which the deceased could not deprive him or her of. But persons married out of community of property had no such protection.

⁸ Section 2(1).

⁹ Had it been accepted, this proposal would have been incorporated into the Matrimonial Property Bill.

¹⁰ Section 3.

¹¹ SALC 2004 (op cit s9 n17).

10.21 The surviving spouse's 'own means' is defined by the Act as 'any money or property or other financial benefit' which accrues to a survivor in terms of the 'matrimonial property law or the law of succession or otherwise at the death of the deceased's spouse'.¹² This definition is not exhaustive, and capital as well as income may be considered.¹³ The term 'survivor' covers only a surviving spouse in a marriage dissolved by death.¹⁴

10.22 In Zimbabwe and Zambia dependants are broadly defined to include family members other than wives and children. Persons who were in fact dependent on the deceased for their reasonable maintenance needs at the time of the deceased's death are included. A variety of factors are taken into account prior to an award for maintenance being made, including: the size and nature of the estate; the period for which maintenance is required; the ability of the dependant to maintain himself or herself; and the number of dependants to be maintained from the estate.

10.23 Three options for maintenance could be considered:

Option 1: Any proposed legislation could guard the principle of freedom of testacy and provide **no maintenance to widows and dependants from a testate estate**. Such an approach would not be in compliance with Namibia's constitutional and international obligations, and would in particular prejudice women and other vulnerable family members to whom the deceased may have owed a duty of support in terms of customary law.

Option 2: Proposed legislation could opt for a legitimate portion system using a **fixed percentage**, to be provided to the widow (and/or the deceased's children) from a testate or intestate estate. This system is used in Ireland. Using a fixed percentage system would have the effect that the surviving spouse will receive a fixed amount from the estate irrespective of his or her maintenance requirements, age or her earning capacity. The advantage of such a system is that surviving spouses would automatically be entitled to a fixed amount without having to incur the expense and difficulty of applying to court for maintenance from the deceased's estate. The disadvantage is that this approach excludes other dependents and is not consonant with need.

Option 3: Proposed legislation could incorporate **maintenance from a testate or intestate estate by means of an application process that is initiated by the widow or other dependants of the deceased**. This approach is followed in South Africa, Zambia and Zimbabwe. This approach would appear to be the most workable, as only those in need would be provided with support from the estate, without compromising the freedom

¹² Section 1.

¹³ MM Corbett, Gys Hofmeyer & E Khan, "The law of succession in South Africa", Lansdowne Juta Law 2001.

¹⁴ *Volks* case (op cit s9 n40).

of testacy principle or intestacy rules. Dependants other than widows should also be allowed to apply for support from the deceased's estate. Since such a maintenance system would be based on need, as opposed to a fixed formula or percentage, it would make it more likely that those in the most need would receive adequate support. Such an approach would, in a way, institutionalise the duty of support which has always been part of succession under customary law. The primary disadvantage is the greater administrative burden involved in assessing needs-based claims. Another disadvantage of this approach is the fear that persons in need might not have the requisite knowledge or ability to assert their claims.

Recommendation:
MAINTENANCE FROM THE DECEASED'S ESTATE

Provision should be made for dependants, based on their reasonable maintenance needs, to apply for maintenance within a prescribed period. Maintenance should be available to all dependents of the deceased whose reasonable maintenance needs are not adequately provided for by will or in terms of intestate succession rules. For example, if the spouse and children receive an adequate portion of the estate as a result of a will or through application of the rules for intestate inheritance, then they would not need to apply for maintenance from the estate.

Dependants should be defined broadly to include a surviving spouse; a divorced spouse who was entitled to maintenance; partners in informal relationships; minor children (including extramarital children, formally-adopted children and children informally adopted in terms of customary law); major children who have a mental or physical disability or educational needs, are incapable of maintaining themselves and were maintained by the deceased at the time of the deceased's death; a parent who was being maintained by the deceased; or any other person who was dependant on the deceased at the time of the deceased's death.

A grant for maintenance should be in the form of a single lump sum payment, periodical payments, or a grant of an interest in an immovable property for life or a lesser period.

Providing maintenance for dependents in this way would ensure that the most needy family members are provided for, and would probably avert many disputes about inheritance.

Definition of 'surviving spouse'

10.24 According to the Demographic and Health Survey conducted by the Ministry of Health and Social Services in 1992, 12,5% of marriages in Namibia are polygamous. A similar survey in 2000 indicated that the percentage of polygamous marriages had dropped by only 0,5%. The women who reported that their husbands had other wives were mainly rural women from the Caprivi, Ohangwena, Kavango and Omusati Regions.

10.25 Even if polygamous marriages are declining, there is a rise in informal relationships. According to Vision 2030, "Polygamous marriages are declining in number, while informal relationships and adultery remain common, and are thought to be rising". The 2001 census however indicates that since 1991 there has been a decrease, from 12% to 7%, in couples identifying themselves as 'married consensually' (considered themselves married without having formalised the union). On the other hand, 16% of the national sample of women interviewed for the Namibia Demographic and Health Survey 2000 reported that they were "living together" with a partner in an informal marriage. It seems that the informal relationships which may be to some extent replacing polygamy are hard to measure, precisely because of their informality. However, it can be assumed as a conservative estimate that at least 12% to 15% of Namibians are involved in informal relationships.¹⁵

10.26 The Recognition of Customary Law Marriages Bill¹⁶ in its present form regulates only customary marriages, and does not take into account other forms of relationships, such as informal partnerships. This Bill also proposes to outlaw future polygamous marriages. Parties who have in good faith entered into a polygamous marriage after the Bill becomes law may be prejudiced. By failing to accommodate future polygamous marriages, the Bill if enacted in its current form, will operate in a discriminatory fashion. It is mainly women who are negatively affected by polygamy and the Bill therefore raises issues of gender equality. The outlawing of polygamy may also give rise to more parties cohabiting informally, without any legal protection.

10.27 There is a real possibility that any proposed law on inheritance will exclude deserving partners from its application if a narrow definition is afforded to the term 'surviving spouse'. Any law on inheritance, to be effective in ensuring the financial security of all women in the position of widows, needs to give the term 'surviving spouse' a more inclusive definition.

¹⁵ LeBeau et al (op cit s1 n6), 17.

¹⁶ LRDC 12, Report on Customary Law Marriages, Project 7 (October 2004).

Recommendation:
DEFINITION OF 'SURVIVING SPOUSE

It is recommended that the term 'surviving spouse' be defined broadly to include surviving partners in long-standing informal relationships (ie of at least three years' duration) and surviving partners in past or future polygamous marriages.

Polygamous marriages

10.28 In terms of The Recognition of Customary Law Marriages Bill, as stated above, existing polygamous marriages will enjoy legal recognition. Any proposed law on inheritance will consequently have to make provision for the manner in which these estates are distributed. Here we briefly re-cap the approaches used in some other countries.

10.29 In Zimbabwe, the senior wife receives preferential treatment as she is presumed to have made the biggest contribution to the amassing of the estate. As a consequence, she becomes entitled to two-thirds of the first-third of the estate's liquidated estate, while the remaining wives share equally the remainder of the first third of the estate.

10.30 In South Africa, the interim regime provides that if there is more than one surviving spouse, sections 1(1)(c)(1) and 1(4)(f) of the Intestate Succession Act apply, subject to certain qualifications. These sections deal with portions of the estate which a single surviving spouse is entitled to, equivalent to a child's share, a rule which is to be similarly applied to multiple wives.

10.31 In Zambia, if there is more than one spouse, the twenty percent of the estate that devolves upon the surviving spouses is divided amongst them proportional to the duration of their respective marriages.

10.32 The following options could be considered:

Option 1: Divide the estate into fractions, with the senior wife receiving a larger proportion than the remaining wives. This approach was followed in Zimbabwe, but has been criticised for not ensuring an equitable distribution between the various spouses, especially in cases where the senior wife's house property is regarded as less valuable than the property of the others. The scheme also potentially prejudices the interests of children.

Option 2: Take the portion of the estate that would go to a single surviving spouse in terms of the distribution scheme recommended above, and divide it proportionally to the duration of the marriages amongst the various spouses. This approach was followed in Zambia.

Option 3: If the Intestate Succession Ordinance is made applicable in the devolution of the estate, allow each spouse to receive a child's share or an amount which together with her half share by virtue of the marriage does not exceed N\$50 000, whichever is the greater. This approach is followed in South Africa. It has been suggested there that the following factors should be taken into account in calculating a child's share in this situation: (a) a child's share will be determined by taking into account that there is more than one surviving spouse; (b) provision will be made for each surviving spouse to inherit the minimum if there is not enough in the estate (c) in the event that the estate does not provide for the minimum, the surviving spouses will share in the estate equally.

Option 4: Exclude the house property of each spouse from immediate distribution, and leave it in the possession of the relevant spouse, with the spouse's share of the estate under the basis distribution scheme being otherwise shared equitably amongst all the spouses. In polygamous households each wife establishes a separate house when she marries, with the result that property accruing to her house is kept strictly separate from other house property. Any proposed law should recognise house property so that spouses in polygamous marriages each retain a right of use in their homes and household effects. Only the residue of the estate should be distributed immediately amongst the multiple wives and/or children and other beneficiaries identified by statute. The house property could be distributed as part of the estate if the relevant surviving spouse remarries or if the children who were residing in that house at the time of the deceased's death all become majors. This idea is simply a variation of the proposed treatment of the marital home and its contents in monogamous marriage, discussed in more detail below.

**Recommendation:
POLYGAMOUS MARRIAGES**

Exclude house property from immediately distribution so that all surviving spouses, including multiple spouses, retain their home and household effects. Such an approach will not only best serve the interests of the wives and children in polygamous customary marriages but would better reflect the economic contribution that each surviving spouse has made to a particular house. Under this approach, heirs other than children will not be unjustifiably enriched.

The residue of the estate should devolve in accordance with the chosen distribution scheme, with multiple spouses taking equal shares of the portion of the estate designated for the surviving spouse. Duration of marriage should not determine the amount to be received by each spouse, as this does not take into account their actual contributions or the particular needs of their children.

Administrators should have regard to equity and take into account the age, educational needs and economic means of the various children when dividing the spousal portion of the estate amongst multiple spouses. It is consequently recommended that administrators should not be required to distribute this portion of the estate according to any prescribed fractions, but may depart from the basic premise of equal shares if equity so dictates.

In respect of communal land (which is owned by the state and cannot form part of the estate of the deceased), we suggest an amendment to the Communal Land Reform Act to clarify the position of multiple wives.

The marital home and household contents

10.33 An additional option for protecting vulnerable family members would be to legislate that the marital home and its essential furnishings should go to the surviving spouse and dependent children (if any). One option would be to give the surviving spouse and minor children a right of use until all the children reach the age of majority, at which stage the marital home could be dispersed in the same manner as the other assets in the estate.

10.34 Legislation in Ghana, Zambia and Zimbabwe makes special provision for the deceased spouse to be guaranteed rights to the marital home and its contents, such as the household goods. There is an international trend towards securing at least a right of occupation to surviving spouses and children.

10.35 In Zambia¹⁷ the deceased's surviving spouse or spouses and children are entitled to the house (if any) as tenants in common. This right terminates upon remarriage. As long as the surviving spouse remains unmarried, she or he enjoys a life interest in the common property and all the rights of a co-owner. Even though the surviving spouse's interest in the common property (as a tenant in common) is real property, she or he cannot, on that basis alone, force the other co-owners to dissolve the tenancy in common. A demand to dissolve the tenancy in common in these circumstances would undermine the interest of the children (the other co-owners) whose ownership is not limited in the same way as that of the spouse, and would also seem to be contrary to the tenor of the provision as a whole. Problems arise in practice between children of the deceased spouse by another partner (ie children of the deceased who are not also children of the surviving spouse) and between surviving co-wives.

10.36 In Zambia, the only way the surviving spouse or any other beneficiary can have a separate individual share of the estate is by the partition of the property, by sale in lieu of partition and the distribution of the proceeds of sale, by rent for occupation or by consensual buy out.

¹⁷ See discussion of Zambian law in section 9 of this report.

Partition – refers to the division of the common property and the allocation of the divided parts to the co-owners. Partition puts an end to community of ownership between some or all of the co-owners. However, partition is only feasible and appropriate where the property subject to the tenancy in common is large. As few people in Zambia own large houses, the house or matrimonial home of an average person would be too small for partition.

Sale in lieu of partition – any co-owner, including a tenant for life, may apply to the court for the sale of the property in lieu of partition and a distribution of the sales thereof. Upon such an application, the court must order a sale unless it sees good reason to the contrary. The burden of showing good reason rests upon the party who opposes the sale. The burden will be discharged by proving that great hardship would be inflicted on one of the parties, especially when the court considers that the party requesting a sale is actuated by vindictive motives and that the property has temporarily much depreciated in value. Nevertheless the court retains a discretion to order a sale if it appears to the court that it would be more beneficial to the interested parties to order a sale than a partition. This is determined on the basis of an examination of the nature of the property, the absence of disability of some of the parties, the number of parties interested in the sale and any other circumstances. The disadvantage of such a sale is that the shared proceeds of the sale will, in most cases, never be enough to enable the individual family members to buy their own houses to live in.

Rent for occupation – A party in exclusive occupation of the common property may be charged a reasonable rent for its occupation, while an allowance is made for the costs incurred by him or her in repairs to the property. In the Zambian High Court decision of *Estate of Lungu and others v Lungu*¹⁸ rent for occupation was deemed to be the best solution to the conflict between the deceased's children from his previous marriage and the widow and her children. Only so far as this method allows the retention of the house in the family is it a better solution than the sale of the house.

Consensual buy out – co-owners may buy shares in the common property of the parties wishing to sell the property. Problems arise where there is lack of consensus. Himonga¹⁹ recommends that the court should force a buy-out on unwilling parties, in order to ensure the retention of the matrimonial home for the benefit of the needy members of the deceased's family. In the case of *Kamwi v. Masiye*²⁰ the court ordered a

¹⁸ 1997 HP/1695.

¹⁹ Chuma Himonga, "Zambia: Inheritance conflicts over the matrimonial home: Safeguarding the family against homelessness", *International Survey of Family Law*, at 467.

²⁰ 1999/HP/492. The deceased was survived by six children from his previous marriage and a widow. He had no children with the widow. The deceased's ex-wife made the widow's continued stay unbearable. It was held that the wife was the surviving spouse of the deceased and therefore entitled to the matrimonial home as a tenant in common. The court refused an application for sale and instead

buy-out in order to secure the house for the benefit of the minor children of the deceased.

Recommendation:

SPECIAL TREATMENT OF THE MARITAL HOME AND CONTENTS

Allow the surviving spouse and any minor children who were residing in the house at the time of the death of the deceased to retain a right of residence as tenants in common, which would cease in respect of the spouse upon remarriage or in respect of the children upon attaining the age of majority. The basic household furnishings should remain with the marital home during the period of continued residence by the spouse and/or children.

The value of the house (if any) should form part of the estate along with all other property and ultimately be distributed in the same way as the rest of the estate – the distribution should merely be deferred. Rent for occupation and/or consensual buy-out could be provided as mechanisms for adjustment, as in the case of Zambia. If the surviving spouse and children did not wish to remain in the home at any stage during their entitlement to it, the deferred distribution could then proceed.

This approach may admittedly disadvantage other heirs if the house is the main component of the estate. However, in a small estate, the distribution of percentages to a wide range of heirs is unlikely to satisfy the needs of all of these family members even if the house is included. It would seem better to at least allow the household of the deceased to remain intact in such cases.

Proof of customary marriages

10.37 Currently in Namibia, the law does not require the registration of customary marriages, which makes it difficult to establish proof of marriage. The Recognition of Customary Law Marriages Bill, once enacted, will alleviate some of the problems associated with proving the existence of valid customary marriages. However, experiences in South Africa and Ghana have shown that even if the law requires registration of customary marriages, parties may be frustrated in doing so or may simply fail to register their marriages. Both widows and widowers may be prejudiced if the family denies their marital status. The consequences for women under such scenarios may be more severe if account is taken of the fact that women under customary law generally find it difficult to establish ownership over property

made an order to have the interest of the widow in the house extinguished by a cash payment, reasoning that selling the house would deprive the children of a future home.

acquired through their own efforts. If they are excluded from intestate inheritance, they may be left without access to property which they have helped to amass.

10.38 The Recognition of Customary Law Marriages Bill provides that if one party refuses to consent to the registration of the marriage, then consent to registration will be deemed to exist if it is clear that the person has tacitly given his or her free and voluntary consent to the marriage or voluntarily ratified the marriage. Customary law marriage officers based in the community will be tasked with registration of marriages. Registration is therefore accessible.

10.39 In terms of the Bill, the minister responsible for regional government is tasked with making regulations prescribing the procedure for application for the registration of a customary marriage.²¹ Experiences in South Africa have shown that that prescribed forms and procedures may operate to the disadvantage of spouses seeking registration of customary marriages. Regulations therefore need to be lenient to facilitate as opposed to frustrating registration. For example, witnesses from each side of the family need not necessarily be present.

Recommendation:

PROOF OF CUSTOMARY MARRIAGES

The Recognition of Customary Marriages Bill should ensure that the requirements for registration do not serve as a bar to the recognition of valid customary marriages for purposes of succession.

'Incomplete' customary rites

10.40 Problems of proof will not arise in contexts where the couples have registered their customary marriages. It is envisaged that there are two instances under which parties to customary marriages may find it difficult to establish proof of marriage, in the absence of registration. Firstly, family members of the deceased may claim that the widow was not a valid customary law wife despite their knowledge that the customary marital rights were fully or partially performed. Secondly, a man and woman may have lived together as husband and wife and held themselves out to the community as such, even though the customary law rites were not fully performed.

10.41 The judiciary's approach in *Essilfie v Quarcoo*²² is useful in this regard. The court in this instance, unlike in South Africa,²³ looked beyond whether customary

²¹ See section 13(1) in general. Regulations may also differ from community to community. See section 13(3)(a).

²² *Essilfie v Quarcoo* [1992] 2 Ghana L. Report.

²³ Discussion in L Mbhatha "Reforming the customary law of succession" (2002) 18 *SAJHR* 259.

rites were completed or not, and considered collectively a broad spectrum of factors. The court held that although the customary law marriage rites had not been performed, the requirements for a *de facto* customary marriage had been met: the parties had cohabited as husband and wife for seven years and had children together; the women's family visited the home of the partners during their cohabitation; the widower had performed customary funeral rites of a son-in-law at the death of the deceased woman's father; had sent drinks to the deceased woman's family as an admission of pregnancy and had provided the grave in his capacity as the deceased woman's husband. This approach, although useful, may appear to convert all informal relationships into customary marriages.

**Recommendation:
'INCOMPLETE' CUSTOMARY RITES**

Where *incomplete* customary rites have been performed, but where there have been an implied or actual agreement to perform customary rights, the surviving spouse of such marriages should be included in the term 'surviving spouse'.

Where *no* rites have been performed, the surviving partner should be treated as a party to an informal partnership, provided the term 'surviving spouse' is extended to partners in informal relationships.

In the event that the law does not afford protection to surviving partners in informal partnerships, it is recommended that the term 'surviving spouse' should include a partner of a customary marriage where the customary rites were not performed but where the parties lived together as husband and wife and obtained the actual or implied consent of their families to the marriage. The parties in such circumstances may have performed other customary rites which are not necessarily related to rites required to be performed *before* the marriage is concluded but which married couples are expected, by the community or each other's family members, to perform *during the subsistence of a marriage*. The relationship so established would be treated as a putative marriage.

Related and supporting 'marital' unions

10.42 Under customary law there are related and supporting customary unions which are not strictly regarded as marriages – particularly the levirate and sororate, which are both still practised in Namibia. In these practices, the widow or widower is 'inherited' by the deceased's brother or sister, along with responsibility for the deceased's children. The South African Law Commission has indicated that even though these practices are 'primitive' and 'degrading' they are 'realities' and

consequently should enjoy protection.²⁴ The impact of HIV/AIDS makes it difficult to justify the practice, but its persistence cannot be ignored. The question therefore is whether or not such widows/widowers and their children should have any claim on the estate of the person who 'inherited' them.

Option 1: Allow spouses and children born from these unions to be deemed the spouses and children of the deceased who was notionally their 'husband' and 'father', with a right to inherit intestate.

Option 2: Do not allow spouses and children born from these unions to be deemed spouses and children of the deceased who was notionally their 'husband' and 'father', and provide no access to the assets of the deceased.

Option 3: Allow spouses and children born from these unions to claim maintenance from the deceased who was notionally their 'husband' and 'father'. A claim for maintenance is justified in that the notional 'husband' and 'father' had a duty of support in terms of customary law to such spouses and children.

Recommendation:

RELATED AND SUPPORTING 'MARITAL' UNIONS

Allow spouses and children born from these unions to claim maintenance from the deceased who was notionally their 'husband' and 'father', as dependents of the deceased.

Children informally adopted in terms of customary law

10.43 The Children's Act 33 of 1960 regulates formal adoption in Namibia. Formal adoption is said to have been conceived in the interests of parentless children, by placing them in a home with the primary aim of protecting their welfare. Formal adoption, unlike fostering²⁵, is not common in Southern Africa.²⁶

10.44 Under customary law, perpetuation of the bloodline takes precedence.²⁷ Informal, non-statutory adoptions may be becoming much more common, particularly with the impact of HIV/AIDS.²⁸

²⁴ SALC 2004 (op cit s9 n17), 78.

²⁵ With fostering the intention is not to sever all ties with the biological parents.

²⁶ Bennett 1991 (op cit s5 n7), 377.

²⁷ Bennett 1991 (op cit s5 n7), 375-378. Bennett argues that the customary law institution of 'adoption' resembles early Roman law adoption.

10.45 Children who have been formally adopted in terms of the Children's Act inherit from their adoptive parents in the same way as biological children – because the adoptive parents have stepped into the shoes of the biological parents in every way. The question to be addressed is inheritance by children adopted informally under customary law.

Option 1: Do not allow children informally adopted in terms of customary law to inherit. If children informally adopted in terms of customary law are not allowed to inherit, this would arguably raise a question of unfair discrimination, on the grounds that non-statutorily adopted children are being treated less favourably than statutorily adopted children. On the other hand, it can be convincingly argued that these two classes of children are not similarly situated.

Option 2: Allow children informally adopted in terms of customary law to inherit. In South Africa, the South African Law Commission recommended that children adopted by customary law should not be precluded from inheriting. However, the state should not be seen as encouraging informal adoptions which may not always be in the best interest of the children.²⁹

Recommendation:

CHILDREN INFORMALLY ADOPTED UNDER CUSTOMARY LAW

Do not allow children informally adopted in terms of customary law to inherit, but permit them to claim maintenance from the estate of a deceased adoptive parent as dependents.

Should any property be excluded from the estate?

10.46 Customary law distinguishes between house, family and personal property.³⁰ **House property** may include items such as household effects or property allotted by the head of the household to a particular house, property acquired by a minor, bridewealth received for daughters in a house, and fines and damages.

²⁸ It should be noted that the line between fostering and informal adoption under customary law is blurred. The forthcoming Child Care and Protection Act is expected to make provision for long-term foster care by extended family members which could provide increased protection to children in such circumstances.

²⁹ The government has indicated that it has to take into account the best interest of children in respect of informal adoptions and that they “have to work out something in that area”. See Final Report on an Eastern and Southern African Workshop on Children affected by HIV/AIDS held in Windhoek on 30 November 2002 and available at <http://www.fhi.org>. See also Bennett 1991 (op cit s5 n7), 377.

³⁰ Bennett 1991 (op cit s5 n7), 229-242.

House property is utilised for the common good of the family.³¹ The Native Administration Proclamation 15 of 1928 defines a house as the family and property, rights and status, which commence with, attach to, and arise out of, the customary union of each native woman.³² **Family property** is property which belongs collectively to family members. It may include the earnings of the family head together with his inheritance, or property bought with such earnings or inheritance, property of a house without an heir or bridewealth.³³ **Personal property** is property which is regarded as of an 'intimate nature' and which serves the interests of the individual only.³⁴

10.47 The distinction between house, family and personal property is not always clear, particularly under the influence of commercial dealings in capital assets, the enhanced earning power of family members³⁵ and competition over resources.

10.48 The distinction between family property and personal property depends on the function that the property serves and the family status of the person who was allocated the property.³⁶ In respect of inherited property, the heir merely acts as trustee of the property to the benefit of dependants. Such property not only serves the interests of the heir, but also provides for the support of the deceased's wife and children.

10.49 In Ghana and Zambia, family property has been excluded from the estate to be devolved. We envisage that disputes will arise if property classified as either family or personal property is excluded from the proposed intestate succession scheme. The Law Reform and Development Commission's Report on Customary Law Marriages proposes that the marital property regime for future customary marriages will be 'in community of property', while existing customary marriages will be regulated by the applicable customary law. It is generally assumed that under customary law the husband and wife each retain the separate property they own prior to marriage and own separately as individuals any property acquired during marriage. If the proposed Bill is enacted, the 'in community of property regime' that will be applied to future customary marriages will have the effect that family property will be considered part of the joint estate. This may lead to a situation where women enter into marriages with the sole purpose of accessing inherited property to which they would not otherwise have been entitled. For this reason it has been suggested in South Africa that family property should be excluded from the joint estate.³⁷

³¹ Ibid, 235.

³² Section 25.

³³ Bennett 1991 (op cit s5 n7), 237-238.

³⁴ Ibid, 238.

³⁵ Ibid.

³⁶ Mbhatha (op cit n25).

³⁷ Ibid, 286.

10.50 Where disputes arise as to the classification of family property, courts should consider under such circumstances the registration documents available, whether the deceased had the means to acquire property and the nature and extent of the family's assistance. If the family made only a minimal contribution to the accumulation of the property, such property should not be excluded from the estate.

10.51 It may be difficult for a spouse to contest the nature and scope of the family's contribution to the disputed property. Couples seldom keep records of the acquisitions they have made. Also, the gendered roles of spouses may have the effect that the widow may have little direct knowledge about the acquisition of certain property or her husband's business affairs. The burden of proof should be on the family members who allege that the disputed property is family property.

10.52 Under customary law, property which was acquired with the sole efforts of the wife may be regarded as the husband's property. In Namibia, such notions affect rural and urban women alike:

Example 1:

"I am the only one who works. I bought a vehicle. With that vehicle he visited his mistress. When the mistress' husband caught him at the house in bed with his wife, he had to flee. My husband had to flee like the day he was born [meaning he was naked]. He had no time to get the vehicle. That vehicle is regarded as my husband's. I could not claim it, but it was my vehicle."³⁸

Example 2:

"When I was working, I contributed to the purchase of several homes that we now own. I spent my salary on taking care of our daily needs. Now that I am not working, my husband does not want to provide me with any money to take care of our daily needs – not even money generated from the income of those homes. I am unable to buy sanitary towels for myself or food for the children. They keep asking me why there is no food in the house. I do not tell them that it is because their father does not want to give me any money. I do not want to talk badly of my husband to my children."³⁹

10.53 Women generally find it difficult to establish ownership of property, even where they are in a position to do so. This is mainly due to cultural presumptions or norms which operate against women. Women who are illiterate may be particularly prejudiced. There is also considerable social pressure on women to register personal property in the names of their husbands.

³⁸ Interview with middle-aged rural woman 2005.

³⁹ Interview with middle-aged urban woman 2004.

10.54 In Namibia there is a tendency amongst wives to mark their livestock, even if the husband's permission to do so is still required. The marking of livestock by wives in these communities is a recent development. During the course of the marriage a husband may under certain circumstances acknowledge a wife's ownership to certain forms of property. For example, if a husband needs to sell a 'tollie' (a young ox) – to pay school fees or taxes for example – he may ask the wife for permission to sell one of her oxen and then compensate her by replacing the ox with a heifer. But this does not guarantee in the case of unmarked livestock that the family will similarly recognise the wife's title to the livestock, once the husband is deceased. In one case, a widow removed from her deceased husband's estate her unmarked livestock before anyone could lay claim to it. If widows are secure in the knowledge that their property will be excluded from the intestate's estate, they may not be forced to resort to practices which may expose them to criminal liability.

10.55 Admittedly, problems may arise with the interpretation of personal property. When disputes arise, regard should be had to the length of the marriage, whether the wife is employed, how much she earned compared with her husband, and the nature of the wife's contribution to the economic unit of the family.

10.56 Personal property, as illustrated in our examples above, may take many forms. Women's contribution to the accumulation of property may be either pecuniary or non-pecuniary. Giving recognition to non-pecuniary contributions to the accumulation of property (such as reproduction and labour in the fields) is particularly relevant to rural women.

10.57 In Kenya, such non-pecuniary contributions are recognised. In *Kivuitu v Kivuitu*⁴⁰ contributions were extended to encompass non-financial forms such as the work of an urban housewife and a wife of a rural home, with Justice Omollo stating that "these women do definitely contribute to the acquisition of property even though their contribution is not quantified in monetary terms."⁴¹ In Tanzania, the Law of Marriage 1971 integrated the law on marital property for all forms of marriage. This law established a system of separation of property. Section 114(2) B provides that the "contribution made by each party in money, or work towards acquiring of assets" will be considered by the courts, which have reportedly begun to "incline towards equality of division."⁴² As in Kenya, caring for the children and home has also been recognised by the courts as a relevant contribution.⁴³

⁴⁰ 1991 2 Kenyan Appeal Reports 241.

⁴¹ Celestine, Nyamua Musembi, 2002, "Sitting on her husband's back with her hands in his pockets': Commentary on Judicial Decision-Making in Marital Property Cases in Kenya", *The International Survey of Family Law*, 235.

⁴² JS Read, "Milestone in the integration of personal laws: the new law of marriage and divorce in Tanzania" [1972] 16 (1) *JAL* 19.

⁴³ A Armstrong et al (op cit s3 n14), 345. See the discussion of the case of *Bi Hava Mohamed v. Ally Sefu*.

10.58 Against this background of property issues, there are two ways to conceptualise the issue of what property should be included in the estate of the deceased:

Option 1: One approach would be to **address the issue through law reforms on marital property**. The estate of the deceased comprises only the property which belonged to the deceased – half of the joint estate in a marriage ‘in community of property’, or the property that was individually owned by the deceased in a marriage ‘out of community of property’.

If the question is addressed through marital property reforms, it is not a succession question per se. The division of marital property might take place in the context of divorce, in deciding how to divide the property of the couple, or in the case of death, in determining what property formed part of the estate of the deceased.

One advantage to this approach is that the question of which property belongs to whom could in theory be addressed during the subsistence of the marriage, or while both spouses are still alive – if the marital property regimes made applicable to customary marriage are well-understood and applied by the public. However, most people do not plan for the future in this way, so there might still be disputes about what property rightfully belongs in the estate of the deceased even under this approach.

A disadvantage to this approach is that the marital property approach obviously applies only to married couples. It would not exclude family property from the estate of the deceased in the case of the death of a single person or a widow/widower who had inherited family property.

Option 2: Family property in Namibia is of sentimental value. As stated by LeBeau,⁴⁴ “How do you tell people they have to give a woman (who is considered not related to them) a piece of their ancestral land?” The second option would therefore be to **exclude (a) family property and (b) personal property of the surviving spouse from the estate of the deceased, regardless of the marital property regime which applies**. The exclusion of family property would apply in all cases, not just to married persons.

It is recommended that these two exclusions should be applied together – if family property is excluded from the intestate and testate estate, then the personal property acquired by a spouse, whether through pecuniary or non-pecuniary contributions, should be similarly excluded. In Ghana for example, only family property has been excluded with the effect that surviving spouses’ claims to personal property have been disregarded specifically *because* such property has not been excluded from the deceased’s estate.

⁴⁴ LeBeau et al (op cit s1 n6), 55.

Recommendation:

PROPERTY TO BE EXCLUDED FROM THE ESTATE

It is recommended that both family and the personal property of the surviving spouse, whether acquired through pecuniary or non-pecuniary means, be excluded from the deceased's estate to be devolved. Such an exclusion should apply both in respect of testate and intestate inheritance, and irrespective of the marital regime applicable to the marriage.

This approach respects the fact that property ownership under customary law is different from that under the Roman-Dutch common law, and may involve multiple family members. It also gives additional protection to a surviving spouse, especially a wife who may have contributed to the acquisition of property, in light of customary law's reluctance to recognise women's entitlements to property.

A potential disadvantage of this approach is that it may give rise to disputes about the nature of various items of property.

Recommendations on the treatment of house property have been made above in the section on polygamous marriages.

Debts of the estate

10.59 Inheritance under customary law, as stated earlier, is onerous and universal in that the heir succeeds not only to the property of the deceased, but also to his obligations, past and future.⁴⁵ Unlike heirs under the civil law, customary law heirs have the burden of extinguishing the debts of the deceased. A possible reason why the heir will assume this burden is an obligation to 'preserve' or keep intact the estate for future generations. As explained by residents in Vaalgras, the estate is symbolic of the Holy Fire and has to be passed on to future generations. As suggested in South Africa, once the material needs of the deceased's surviving family are secured, equity dictates that the customary law heir's responsibility for the deceased's debts should cease.⁴⁶

⁴⁵ See in general SALC 2004 (op cit s9 n17), 4.8.2.

⁴⁶ Ibid, 4.9.3.4.

Recommendation:
DEBTS OF THE ESTATE

It is recommended that customary law heirs should not be burdened with a personal obligation to extinguish the debts of the deceased. Debts should be dealt with in the course of the administration of the estate, before distribution, as in the case of civil law. The provision of maintenance from the estate for dependents will also relieve the customary law heir of personal responsibility for this traditional obligation. It would be good to formalise such responsibilities, as nowadays not all customary law heirs shoulder their traditional responsibilities reliably.

Small estates

10.60 Along the lines of what has been suggested in Ghana, Zambia and Zimbabwe, any proposed law should make provision for estates of a certain value to be exempted from any distribution mechanism. The Administration of Estates Act already makes provision for the Master to dispense with the appointment of an executor in respect of estates below a certain value.⁴⁷

Recommendation:
SMALL ESTATES

It is recommended that estates below a certain value should automatically devolve upon the surviving spouse. If there is no surviving spouse, then the entire estate should go to the deceased's children. Failing both spouse and children, other potential recipients could be ranked in order of priority. The objective should be to avoid the fragmentation of small estates to the point that no one receives any meaningful benefit.

Administration of estates

10.61 This study has focused mainly on substantive issues related to inheritance under customary law, and will therefore make recommendations on only some aspects of the administration of estates.

10.62 The administration of black deceased estates is currently overseen by magistrates. Parties are however free to decide that the Master of the High Court should oversee the administration of estates in terms of the Administration of Estates Act 66

⁴⁷ Section 18(3) of the Administration of Estates Act 66 of 1967.

of 1965.⁴⁸ There is a possibility that community courts could in theory also serve this function.

10.63 A major complaint heard throughout this study was how ill-prepared and ill-suited magistrates were to appoint executors. Frequently the executor appointed was simply the first person who applied, without due consideration of other potentially better qualified candidates. There was little concern or consideration for the customary law implications of the choice. In one particularly notorious case four different executors were appointed. People strongly urged that all executors be registered at the Master's Office to avoid duplication and fraud.

10.64 Another source of complaints centres on magistrates' alleged lack of concern about debts which the deceased might have incurred. There was much support for the notion that the Master's Office should be decentralised, or at least regionalised, and that specially trained officials should have oversight in such matters.

Option 1: Allow **community courts** to oversee the administration of customary estates. Community courts are easily accessible. However, justices appointed by the Minister and adjudicators may be more familiar with customary law, and may continue applying discriminatory customary rules as opposed to those prescribed by the proposed law. This has been the experience in Zambia's Local Courts. Unless specialised training is provided, it is difficult to envisage that such an option will be workable. It is recommended that if community courts are to have some jurisdiction in respect of inheritance matters, such jurisdiction should be limited to small estates.

Option 2: Assuming an inheritance dispute, traditional authorities are often the first port of call. Therefore, estates could be administered by **traditional authorities**. People are familiar with them and believe they will not cost as much as having to brief a lawyer to appear in a magistrate's court.

Recognised traditional authorities are part of the reality in contemporary Namibia and their numbers appear set to increase. Generally we found traditional authorities to be more tolerant and sensitive to issues of gender equity than some of the younger tertiary-educated elected officials. Rather than being reactionary colonial holdovers, they impressed with their pragmatism and insights. The history of inheritance disputes in Owambo areas shows that they have been important innovators. The question one should ask is why they failed to address problems with customary law inheritance systems successfully.

In many of the contemporary cases noted in Owambo areas, the problem was not "customary law" per se, but rather local interpretations of what was right, aggravated by people's refusal to obey injunctions issued by traditional authorities. The simplistic model of traditional authorities and

⁴⁸ Berendt case (op cit s1 n3).

the modern state competing for legitimacy simply does not hold. Both are apparently losing legitimacy simultaneously, and both have used one another to bolster credibility

People have time and again in Namibia been able to re-imagine “tradition” and adapt it to contemporary realities. One issue which needs to be reinterpreted concerns the role of females in traditional authorities. The historical record shows that there were female rulers in Namibia, and royal females were frequently heavily involved in political intrigue and decision-making. There were even cases of noblewomen being appointed as headmen. Among the Kwambi since 1993 each ward has a female representative who is charged with looking after female interests. Indeed in some areas of Owambo, female traditional councilors now outnumber their male counterparts. And it is not only matrilineal kinship groups who are open to promoting gender equity among traditional authorities. At least two Nama groups have female Chiefs, and Chief Immanuel Gaseb of the /Oe-#gan recently acknowledged the crucial role the Chief’s mother has played in Damara society. Namibia should encourage the trend of recognising and enhancing the role of women in traditional authorities. Not only would this promote more gender equity in general, but it would also work both directly and indirectly towards more equity in inheritance disputes.

Option 3: Allow **magistrates** to administer customary estates. Since 30 June 2003, magistrates enjoy some judicial independence,⁴⁹ and to ‘subject’ them to the authority of the Master may undermine their independence.⁵⁰ Notwithstanding, it is noteworthy to mention that magistrates’ offices in Namibia currently do serve as ‘service points’. The main complaint from beneficiaries is that there are no regulations in place to ensure that estates are administered fairly.⁵¹ There is also nothing to compel magistrates to ‘report’ to the Master.⁵²

Option 4: Allow the **Master of the High Court** to administer deceased estates in terms of the Administration of Estates Act 66 of 1965, appropriately amended. The Master’s Office is currently located in Windhoek, and is inaccessible to the majority of Namibians. Thus, without some form of decentralisation, the status quo is likely to be maintained, with families opting to distribute estates privately.

⁴⁹ Magistrates Act 3 of 2003.

⁵⁰ LRDC, *Consultation: Succession and Estates*, Project 6, February 2005.

⁵¹ Malan, the government ethnologist, for example reported in 1977 that in Owambo “There are also cases where Estates given by the Magistrate’s Court to the wife of the deceased were later redistributed under supervision of the tribal court so that matrilineal relatives of the deceased can also get a share.” (NAN J6/4/2 1977, our translation)

⁵² Interview with Administrator of Estates, 15 February 2005.

**Recommendation:
ADMINISTRATION OF ESTATES**

We recommend that the Master's Office be decentralised, as suggested by the Law Reform and Development Commission,⁵³ and that the Administration of Estates Act 66 of 1965, appropriately amended, be made applicable to all estates.

Property grabbing

10.65 Property grabbing, which is the grabbing, seizing, diverting or disposing the property of deceased person,⁵⁴ is not a new phenomenon in Namibia. It has roots going back at least a hundred years, but it has been exacerbated in recent years by a number of factors including plummeting life expectancy caused by the AIDS pandemic and crass consumerism promoted by globalisation.⁵⁵ White⁵⁶ argues that the term 'property grabbing' is inadequate, as it is a term used for 'circumventing' the act of theft and fails to describe aspects of gender-based violence. The term 'property dispossession' is therefore preferred as it refers to the 'permanent taking of property', irrespective of claims of ownership, from the spouse and/or children of a deceased upon his or her death.⁵⁷ Property grabbing may also take on more subtle forms, as frequently happens in Namibia. For example, a surviving spouse may, under pressure from the family, be compelled to withdraw large amounts of cash under the pretext that the cash will be utilised for funeral expenses.

10.66 In countries such as Zambia and Ghana, the practice of property grabbing has been addressed under inheritance laws. But the sanctions prescribed under these laws may be inadequate in deterring incidences of property grabbing. For example, in Zambia sanctions have been criticised for being too lenient and for failing to provide for compensation to the victims of property grabbing.

10.67 In Namibia, another alternative will be to deal with incidences of property grabbing under the Combating of Domestic Violence Act 4 of 2003. A person in a domestic relationship who is a victim of property grabbing could on the basis of economic abuse apply for a protection order.⁵⁸ However, the Act in its present

⁵³ LRDC (op cit n50).

⁵⁴ S Venekai-Rudo White et al, 2002, *Dispossessing the Widow in Malawi: Gender Based Violence in Malawi*, 24.

⁵⁵ LeBeau (op cit s1 n6), 54.

⁵⁶ White et al (op cit n54), 24.

⁵⁷ Ibid, 25.

⁵⁸ Section 14. A protection order granted in terms of the Act has the effect of restraining a person against whom it was granted not to subject the complainant to domestic violence. A protection order may contain provisions directing that one party retain possession of specified personal property,

form may be too narrowly construed to address instances of property grabbing adequately. A complainant in a domestic relationship can only seek a protection order against another person in that domestic relationship.⁵⁹ Remedies afforded in terms of the Act may also not be adequate.⁶⁰

Recommendation:
PROPERTY GRABBING

While recognising the potential relevance of the provisions on economic abuse in the Combating of Domestic Violence Act, we recommend that Namibia also make property grabbing a criminal offence with stiff penalties, and provide restitution or compensation for the victim.

CONCLUDING REMARKS

Burial arrangements

10.68 A testator may make provision in a will for the manner in which he or she wishes to be buried. In Namibia the practice is that the testator will make specific provision as to how he should be buried. In some instances specific money is set aside for funeral arrangements and directions are given as to the type of coffin that has to be purchased.⁶¹ In the absence of any specific provision, the heir usually determines the time and place of the funeral.

10.69 In South Africa, some women requested that burial arrangements be addressed in proposed legislation on succession. The problem in South Africa seems to be that heirs sometimes utilise estate assets to defray funeral costs, rather than for maintenance of the deceased's dependents. This concern did not emerge in our research in Namibia. The problem here seems to be rather that people feel that deceased persons do not get proper burials anymore (cheap coffins being used, funeral insurance funds being used for other purposes, etc). However, this concern

including but not limited to transport, agricultural implements, livestock and other personal effects. A person who breaches a protection order commits an offence and is liable on conviction to a fine which does not exceed N\$8000 or imprisonment not exceeding two years or both.

⁵⁹ Section 4(1). A domestic relationship includes persons who are in a relationship of marriage, including a customary marriage; persons of the opposite sex who are in informal relationships; persons who have or are expecting a child together; parents and biological or adoptive children; family members related by consanguinity, affinity or adoption, provided that they have some additional nexus such as the sharing of a residency or financial dependency; and persons who *would* be family members if a cohabiting couple were married.

⁶⁰ See Section 14.

⁶¹ Interview with Administrator of Estates, 15 February 2005.

does not seem to affect inheritance rights, and so we offer no recommendation on burial arrangements in this report.

Appointment of guardianship

10.70 The Matrimonial Affairs Act 37 of 1953 prevents a parent of a minor from appointing any person as guardian of a minor by will, unless such parent was the sole natural guardian immediately prior to death.⁶² The issue of guardianship for children born both inside and outside marriage is currently being addressed by the Children's Status Bill, and so need not be covered in law reform on succession.

Traditional leaders: succession and property

10.71 Succession to the position of traditional leader is currently regulated by the Traditional Authorities Act 25 of 2000, and need not be addressed in any proposed law on inheritance. The succession process has now been democratised. Sections 4 and 8 deal with the designation, and removal and succession of traditional leaders respectively. Property which a traditional leader controls and possesses in his capacity as traditional leader should also be excluded from the operation of any law. This approach was followed in South Africa and is recommended for Namibia.

Is a will the way?

10.72 Wills, as shown, have a long history in Namibia. There are apparently some cases (although we never managed to locate them) where the deceased had drawn up a will but where the traditional authorities intervened and allocated the estate according to traditional principles and exigencies.

10.73 This study, as well as LAC field research on marital property regimes (publication forthcoming), points to the following recommendations on wills:

- (1) **The race and gender based restrictions on the power to make wills imposed by the Native Administration Proclamation 15 of 1928 must be repealed.** The patchwork of overlapping regulations issued in terms of that proclamation have the result that a black person in Kavango, Eastern Caprivi or Owambo has full power to bequeath his or her estate by will – but a black man in any other part of Namibia does not have full testamentary freedom. He does not have the legal power to leave by will (a) movable property allotted to or accruing under customary law to any woman with whom he lived in a customary union or (b) any movable property accruing under customary law to a particular “house”. Property which falls into these two categories must be distributed according to

⁶² Section 5(3)(b).

customary law. If these provisions were repealed, other non-discriminatory measures in the form of maintenance from the estate of a deceased and the exclusion of certain property from the estates of deceased persons (both discussed above) could be used to protect spouses in customary law marriages.

- (2) An **intensive education campaign** needs to be launched so that all Namibians are aware of their rights to write a written will and their responsibility to see that any will of a deceased relative is respected. Despite the sterling work done by a number of NGOs on educating the public about wills and the meaning of being married in or out of community of property, general knowledge about these subjects, even amongst the educated strata, is abysmal. There are several cultural characteristics which mitigate against people writing wills and one must be sensitive to these

Perhaps a useful strategy here might be to run workshops for church officials and perhaps more importantly to negotiate with the Department of Basic Education about the feasibility of incorporating pertinent materials about wills (and human rights) into the school curricula. Officials at the Namibian Institute for Educational Development in Okahandja were strongly supportive of the idea to consider incorporating such knowledge and issues under the rubric of “life skills”.

- (3) As has been attempted in South Africa, “**will writing days**” could be tried out where a specific venue is chosen and a specific date and people are invited to come and write their wills with the support of volunteer paralegals and lawyers.
- (4) Another possibility to increase the number of written wills would be to pass a law that **anyone opening a savings account must write a will** with the help of the savings institution. Similarly anyone buying a house could be required to write a will.
- (5) As a method of reducing the incidence of fraudulent wills, or wills that are not respected, there could be an **official depository of written wills at the Master’s Office**.



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