

**‘No peace in the marriage’:  
Inheritance Disputes and Law Reform Possibilities**

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When Essa Zumbuku<sup>1</sup> married her husband, a teacher, in 1993, she did not foresee that her husband’s untimely death would cause a rift between her and her in-laws. Despite the fact that her late husband had drafted a will in which he nominated her and their children as the sole beneficiaries of his estate, her in-laws dispossessed her of all the property. They justified their action by stating that she was a ‘foreigner’(‘a person from another village’). The in-laws also wanted the children to live with them, but she refused. The magistrate to whom she turned for assistance did little to alleviate her plight. A traditional leader responded to her dilemma by stating that it is evident that there was ‘no peace in the marriage’, making it clear that, ultimately, she is to blame for her current position as she did not maintain good relations with her in-laws.

Inheritance primarily deals with the transfer of wealth and performs an important socio-economic function. Poverty, unemployment and the impact of HIV/AIDS all lead to the impoverishment of the family, and propel members into a downward spiral of increasing vulnerability. As a result of increasing competition over scarce resources, the growing number of inheritance disputes is becoming more obvious. Particularly vulnerable are surviving spouses and children. Property grabbing is more than just an act of theft but also an act of gender-based violence.

The fact that we still have outdated and racially discriminatory laws on our statute books dating back to 1928 exacerbate inheritance disputes for the majority of ‘black’ Namibians. Existing laws on inheritance create a dual system, so that either customary or the common law apply in a dispute with race being the determining factor. So for example, in respect of estates of white and coloured persons, the common law applies and the surviving spouse and children of the deceased will inherit his property. In respect of black persons, a complicated set of rules applies. Depending on where a black deceased person is resident, the property regime applicable if the person is married and whether the person contracted a civil or customary marriage, either customary or common law may apply. The purpose of these rules was to exclude blacks from the application of common law unless their lifestyle was considered ‘European’. In addition to being discriminatory on the basis of race, the current legislative regime also promotes discrimination on the basis of sex, status and birth by virtue of the application of customary law. Notions of patriarchy characterize customary law: it denies women property rights, thereby making them vulnerable to spousal abuse and HIV/AIDS. Notwithstanding, customary approaches to inheritance do provide positive aspects of flexibility, and in some cases spread assets amongst a wide range of family members. We too readily assume that all aspects of customary law are discriminatory, discounting its positive aspects in the process.

In 2003 the High Court of Namibia gave notice to government to review the entire area of inheritance and to bring these laws in line with the Constitution. It has until 31 December 2005 to do so. The tricky question of course is what to do with customary law?

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<sup>1</sup> Essa Zumbuku was a participant at the recent National Conference on Women’s Land and Property Rights held in Windhoek.

Customary law enjoys constitutional recognition on par with the common law. We could simply replicate the common law rules on inheritance and allow only the surviving spouse and children to inherit. But respect for culture and for customary law-insofar as these do not impinge on other Constitutional rights- is a constitutional imperative and one would hope that government will at least harness the positive aspects of customary law when developing new legislation. To simply discard customary law may exacerbate rather than reduce the conflict that often arises between the surviving spouses and children on the one hand and the customary law heirs on the other hand.

To the majority of Namibians, kinship and customary rules on inheritance continue to strongly influence the manner in which estates are distributed. We distinguish between patrilineal (Nama and Damara), matrilineal (Owambo and Kavango communities), double-descent (Herero) and 'cognatic' kinship systems (Caprivi). In especially matrilineal or double descent systems, the surviving spouse, daughters and sons may have limited or no right at all to inherit. In matrilineal communities, the customary successor (usually the nephew) appointed by the kin group takes control of the property as trustee and manages it for the benefit of the inheriting group. Because spouses are not members of each other's matrilineage, a surviving spouse does not inherit from her husband if he dies intestate under customary law in matrilineal and double descent systems. In addition, because children in matrilineal communities belong to their mother's lineage, they also have no right to inherit from their father's estate. In patrilineal systems the spouse fulfills a similar role, and acts as trustee of the estate for the benefit of the children, especially the youngest son. Pre-mortals inheritance often takes place in patrilineal systems.

Attempts to secure the rights of surviving spouses and children, should not necessarily be at the expense of the customary law heirs, as the latter cannot completely be disregarded if incidences of property-grabbing and conflict are to be minimized. More often now we hear statements such as "women are the real perpetrators/instigators of property-grabbing", suggesting that male perpetrators are merely acting on the instructions of women, the 'real' beneficiaries. As these statements are made without the backing of any empirical evidence, it suggests that already there is a backlash in respect of attempts to secure the inheritance rights of women in particular.

Even though the common law approach of catering only for the surviving spouse and children is available to law reformers, an approach which departs too radically from customary law is most likely to be ignored. It is for this reason that the Legal Assistance Centre recommends 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.

What would such a compromise approach encompass? If a person dies without leaving a valid will (intestate), we suggest allowing for fragmentation of the estate so that the surviving spouse(s) and children inherit a portion of the estate, with the primary customary law heir(s) inheriting another portion. The customary law heir should be defined carefully so that only the key persons who have traditionally taken on family assets coupled with family responsibilities are recognized.

As a practical approach, to ensure equitable economic protection of vulnerable women and children, we also recommend transforming some inheritance issues into issues of maintenance. Provision should be made for dependants of the deceased to apply

for reasonable maintenance from the estate within a specified period of time. We believe that this option should be available irrespective of whether the deceased died with or without a will. Dependants need not only be the surviving spouse and children, but could also include, for example, partners in informal relationships, minor children informally adopted in terms of customary law or a parent who was maintained by the deceased. Providing maintenance for dependants in this way will ensure that the most needy family members are provided for, and would most likely avert many disputes about inheritance.

The term 'surviving spouse' needs an inclusive definition in any proposed law so as not to exclude deserving partners. In polygamous marriages, failure to divide the estate equitably between the various spouses may lead to disputes or may prejudice certain children. Customary law provides a solution to an otherwise potentially complicated issue. 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. It is therefore recommended that house property be excluded from immediate distribution so that all surviving spouses retain their home and household effects. The residue of the estate should devolve in accordance with the chosen distribution scheme, with multiple spouses taking equal shares of the spouse's portion of the estate. If equity so dictates and if there is a concern that the children may be prejudiced, administrators should consider such factors as the educational needs and economic means of the various children instead of following the chosen distribution scheme strictly.

The option to allow surviving spouses and minor children who were residing in a house at the time of the death of the deceased a continued right of residence as tenants in common should not only be available to spouses in polygamous marriages, but should serve as an additional option for protecting the most vulnerable family members. The right to reside in the house should cease when the spouse re-marries or when the children attain the age of majority, with the effect that distribution is deferred. Rent for occupation and/or consensual buy-out could be provided as mechanisms for adjustments. This approach may admittedly disadvantage other heirs if the house is the main component of the estate, but we believe that the advantages of this approach would outweigh the disadvantages.

Customary law distinguishes between house, family and personal property. Family property belongs collectively to family members and carries with it an emotional attachment. Personal property is property of an 'intimate nature' which serves the interests of the individual only, such as clothing and similar personal items. It is recommended that both family property 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. This exclusion should apply irrespective of the marital regime applicable to a marriage. Often, a woman's contribution to the amassing of the estate is not recognized and she is generally perceived as incapable of owning property. However, far-reaching reforms to the division of marital property under customary law should be addressed in a separate initiative, rather than as part of law reforms on inheritance. We also recommend that the proposed law should make property grabbing a criminal offence with stiff penalties and provide restitution or compensation for the victim.

These recommendations attempt to harness some of the more positive aspects of customary law, whilst still providing a unified framework for all persons in Namibia. We believe above all, that law reforms on inheritance delve into complex issues which are very important to people's lives. Whatever law reforms are considered, and despite the tight deadlines imposed by the court, we urge policy-makers to utilise as much public consultation as possible in this endeavour.

*The Legal Assistance Centre has just published a research report entitled Customary Laws on Inheritance: Issues and questions for consideration in developing new legislation. It is available for free on the LAC website: [www.lac.org.na](http://www.lac.org.na), or for N\$20 from Naomi Kisting at the LAC offices [NKisting@lac.org.na](mailto:NKisting@lac.org.na). A companion volume of essays by academics who have studied inheritance in different Namibian communities will be published by LAC later this month.*

*The Legal Assistance Centre will also be hosting a workshop in Windhoek on 17 August to discuss the pros and cons of various law reform options for inheritance. Space is limited, but interested persons may contact Naomi Kisting to see if it is possible for them to attend.*