INHERITANCE ISSUES

Information and feedback from community consultations on inheritance law reforms

Legal Assistance Centre 2005

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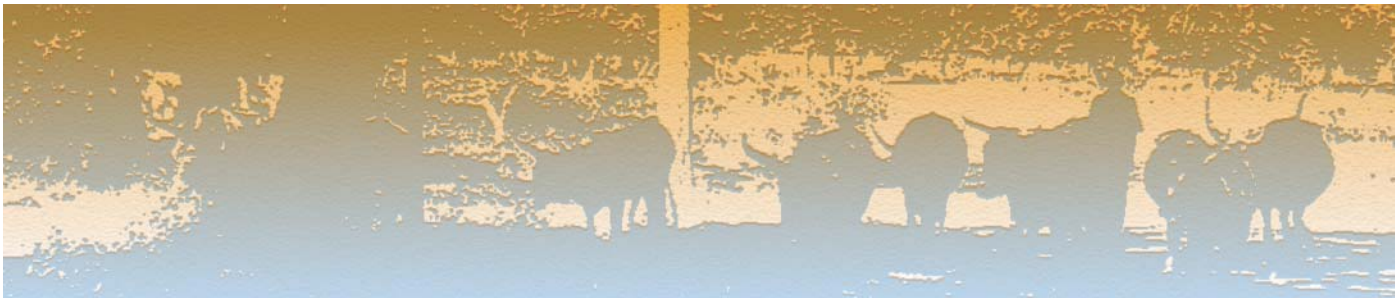

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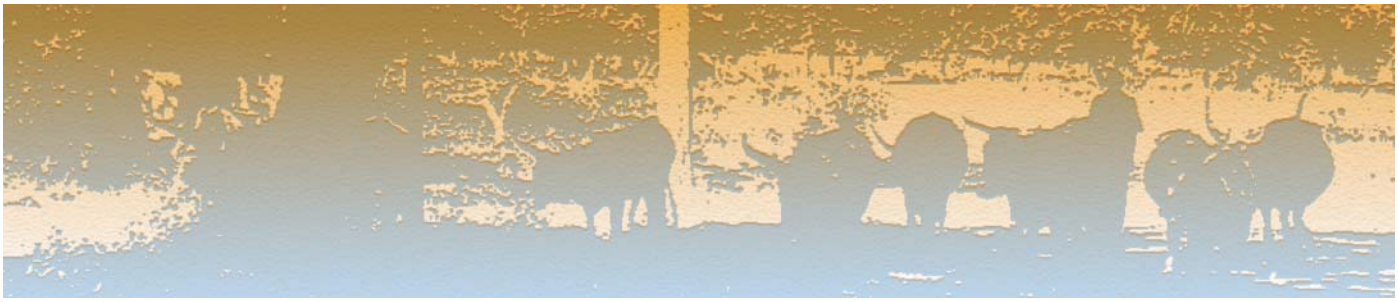


Acknowledgements

We are grateful to all those who contributed their expertise and opinions on the issue of inheritance law reform. Among those who we would like to thank are the delegates who travelled from all parts of the country to attend the workshop in Windhoek. Our gratitude also goes to those who made presentations at the Windhoek workshop, namely Dr Rob Gordon as well as Rev. Philip Strydom of the Council of Churches in Namibia. We need to thank those from the Legal Assistance Centre (LAC) who made presentations as well, namely Evelyn Zimba-Naris and Amon Ngavetene.

Thanks to the dedication and enthusiasm of the LAC's Dianne Hubbard and the tireless work of her assistant Naomi Kisting, the Windhoek workshop became a reality. We are grateful to Dianne for her efforts as host and facilitator of the workshop on the LAC's behalf.

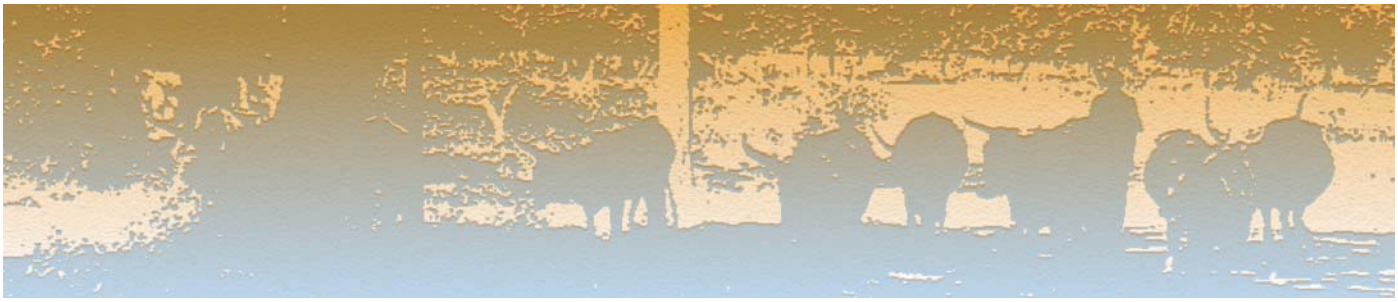
With regard to the supplementary consultations in various Regions, the LAC's Anne Rimmer and Wairimu Munyinyi deserve thanks for facilitating the discussions held with community members at Ongwediva in August 2005. Our gratitude is also due to the 22 women who contributed their views in the Ongwediva consultations. We would also like to acknowledge Mercedes Ovis, one of the key LAC staff members who has worked on the topic of inheritance over the last few months.

In respect of the rural consultations, our thanks go to Dr Rob Gordon and his assistant, Basilia Ngairo, for their fieldwork in the field, as well as to Dr Maria Fisch for her knowledge and insight. Our gratitude is also extended to Sandie Fitchat for her rapporteuring services, to Conference Communications Namibia for providing a professional interpreting service, and to the many staff members at the LAC who devoted their time to this project.

Of course, these essential consultations would not have been possible without the valued assistance of the Austrian Development Cooperation through the North-South Institute.

Finally, we would like to thank all the participants for attending the workshop at such short notice, and from so far away. We urge them to debate these issues in their communities as well. Law reform on inheritance will be addressed by Parliament very soon, so we encourage everyone with an interest in these issues to stimulate debate by speaking out on the radio, writing letters to newspapers, contacting their MPs, and so on. Your ideas and opinions on these matters are vital to drafting the new legislation.

Norman Tjombe
Director
Legal Assistance Centre



Terminology

administration of an estate Appointing the executor of the estate and supervising the distribution of the estate to the heirs.

estate The money and property of a deceased person.

- If the deceased was married in community of property, the spouse takes his or her half of the property first. Then the remaining half is the deceased's estate.
- If the deceased was married out of community of property, then the spouses' property stayed separate. The property that belonged to the deceased is the deceased's estate.
- If the deceased was married in a customary marriage, then the customary laws on marital property apply. The property that belonged to the deceased in terms of customary law is the deceased's estate.

intestate When a person dies without leaving a will.

Master of the High Court A specialised office in Windhoek that administers estates.

native Apartheid-era term still used in current legislation; quoted in inverted commas when reference made to it in this context.

testate When the person who dies has left a will.

will An oral or written statement saying who should get your property when you die.

Legislation referred to in this publication

Administration of Estates (Rehoboth Gebiet) Proclamation, 1941 (No. 36 of 1941) (used for the estates of Rehoboth Basters)

Administration of Estates Act, 1965 (No. 66 of 1965) (used for white estates)

Communal Land Reform Act, 2002 (No. 5 of 2002)

Intestate Succession Ordinance, 1946 (No. 12 of 1946)

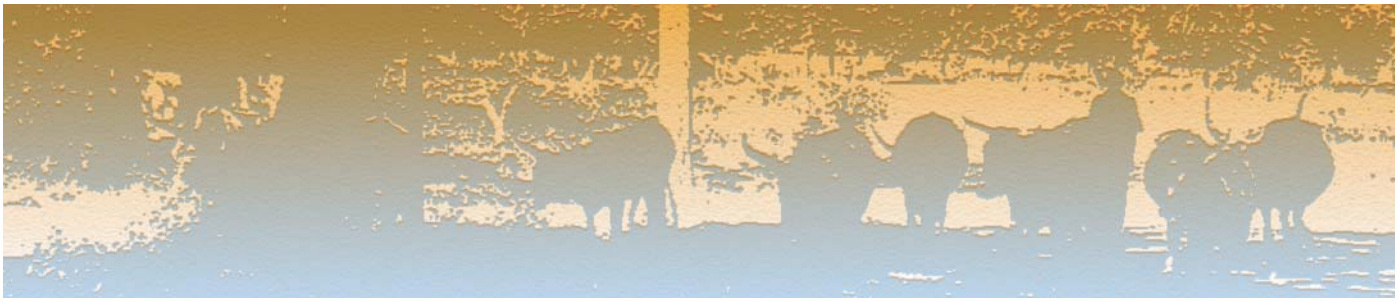
Native Administration Proclamation, 1928 (No. 15 of 1928) (used for black or so-called "native" estates)

Traditional Authorities Act, 2000 (No. 25 of 2000)

Basic principles

The Law Reform and Development Commission and the Ministry of Justice have considered a range of options for reforming inheritance laws. The LAC has also put forward some recommendations based on its research in several regions of the country. Most of the options for a new law have some principles in common:

1. Unconstitutional aspects of the law on inheritance must be changed.
2. Where people make wills, their wishes should generally be respected – although it would be possible to apply part of the estate to provide maintenance for the deceased's dependents before looking to the will.
3. The laws on inheritance should make sure that the deceased's spouse and children are provided for in some way.
4. Where the deceased was a man in a polygamous marriage who died intestate, all of the wives should share in the estate. (Even if polygamy is outlawed in the future, there will still be wives in polygamous marriages from the past.)
5. Property-grabbing should be stopped.



Some myths about inheritance

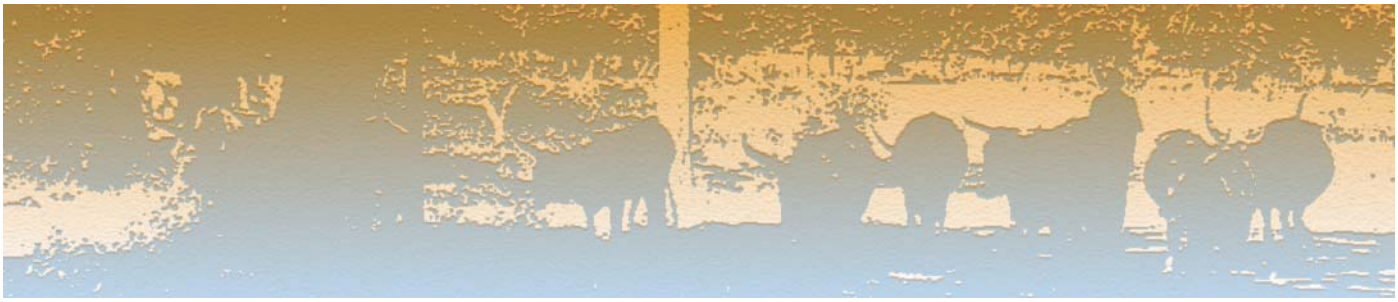
MYTH: Inheritance rights begin at death.
The reality is that the rights and duties of family members before death takes place will condition what happens upon death. If women are not viewed as being capable of owning and controlling property during a marriage, then they are more likely to face discrimination as widows. Also, the entire group of people who were dependent on the deceased during his or her lifetime will have some interest in what happens to the property and the responsibilities of the deceased.

MYTH: Inheritance is a private matter.
Inheritance is governed by laws and the Constitution, and it is the Government's duty to see that the legal rules are followed and that no one is discriminated against or treated unfairly or left without adequate support. It is the State's duty to give content to rights within the parameters of the Constitution, and then to see that these rights are respected. This also means that Parliament should not enact a law which it does not have the capacity and the intent to enforce; to do so would simply engender disrespect for the law which could spill over into other areas of life as well.

MYTH: Widows are denied inheritance rights only because of customary law.
When women are not allowed to inherit property, there are usually complex factors at work – including custom, distortions of custom by people who hope to gain from the estate, gender stereotypes arising from a number of sources, peoples' fears about the future and a host of other intertwined issues. Gender discrimination must be tackled on a number of fronts. Customary approaches to inheritance have many positive values, and culture can be transformed to provide equality for women.

Informal settlement, Omaruru

MYTH: Inheritance is an avenue for enrichment.
The primary function of inheritance under all legal systems in Namibia is to minimise the disruptive effect of the death on the family unit. Rules that once worked well to accomplish this in practice work less well now that concepts of family have changed over time, and now that different kinds of property form part of the family assets. It also seems that some individuals have turned death into a personal financial opportunity, thereby giving 'inheritance' a bad name that is not necessarily deserved. The fundamental purpose of succession and inheritance rules should still be to minimise disruption and hardship for the family, and this goal should guide policy formulation.



Introduction

This publication has been compiled as an information tool for lawmakers and other interested persons in evaluating the issues involved in reforming the current law on inheritance in Namibia.

The existing laws on inheritance violate the Namibian Constitution because of race. This is because under the old law there are different rules about inheritance for people of different races, depending on what part of Namibia they live in and what kind of marriage they have.

The estates of white people and coloured people who die intestate follow a law called the Intestate Succession Ordinance, 1946 (No. 12 of 1946). These estates are administered by the Master of the High Court in terms of the Administration of Estates Act, 1965 (No. 66 of 1965).

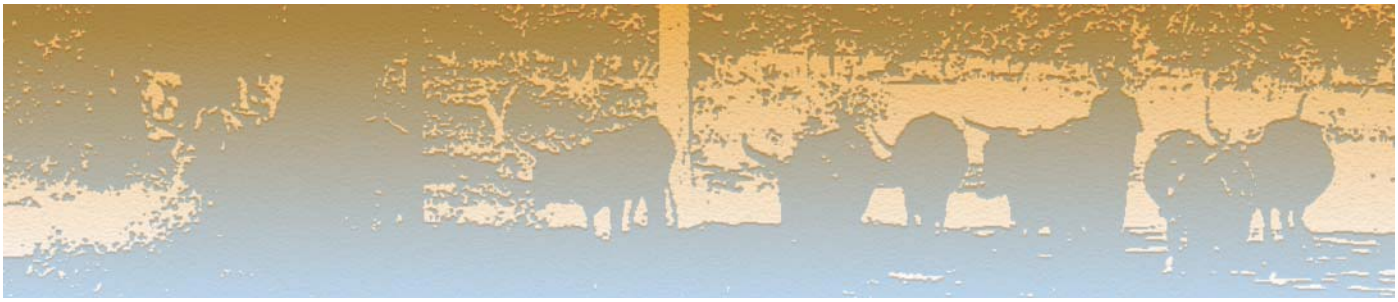
In terms of the Native Administration Proclamation, 1928 (No. 15 of 1928), the estates of black people in some parts of Namibia and black people who have some types of marriages follow the same rules as the estates of white people and are administered by the Master of the High Court. The estates of black people in other parts of Namibia follow customary law. These estates are administered by magistrates.

The estates of people who are members of the Rehoboth Baster community are administered under a different system and by different officials, in terms of the Administration of Estates (Rehoboth Gebiet) Proclamation, 1941 (No. 36 of 1941).

In 2003, the *Berendt* case ruled that several sections of the Native Administration Proclamation, 1928 (No. 15 of 1928) were violations of the prohibition on racial discrimination in Article 10 of the Constitution of the Republic of Namibia. These complicated provisions treated the estates of deceased blacks as if they were "Europeans" (whites) in some circumstances, while requiring in other circumstances that they should be distributed according to "native law and custom". The *Berendt* case also struck down the legal provision that gives magistrates power to administer "native" (black) estates while other estates go to the more specialised jurisdiction of the Master of the High Court. This effectively allows Namibians affected by this law two options in the interim period before the new law comes into effect: they can have an estate administered by a magistrate or request that it be administered by the Master of the High Court. The *Berendt* case did not deal with the separate system for Rehoboth Basters, but this is probably also unconstitutional.

Parliament was given a deadline of 30 June 2005 to replace these offensive sections with a new system. This deadline was extended to 30 December 2005. Because there is only a short time for public discussion and debate, the LAC wanted to stimulate discussion on some of the possible options for inheritance law reform before Parliament considers this issue. We believe that public input will help our policymakers to enact the best possible law on inheritance.

For these reasons, the LAC arranged a workshop for relevant stakeholders in Windhoek on 17 August 2005 at the Nampower Convention Centre, allowing space and time for discussion and debate on these urgent topics. Invitees included Ministers and other Government representatives, Members of Parliament, traditional leaders, church leaders, lawyers, and people from non-governmental organisations who work at grass-roots level in a range of rural locations. Every effort was made to ensure the widest possible party-political and cultural representation amongst the invitees – while keeping within the limited budget available.



Dr Rob Gordon, a renowned, Namibian-born social anthropologist and historian who now lives in the United States of America, gave his perspective as an 'outsider' on the key issues, namely the concept of inheritance and some of the positive and negative aspects of customary law on inheritance. Rev. Philip Strydom, representing the Council of Churches in Namibia, informed participants of the various Churches' experience with inheritance issues. LAC staff supplemented this input with presentations on the *Berendt* case, which has prompted inheritance law reform; and on the LAC's experience with the use of wills.

Shortly before and after the Windhoek workshop, LAC staff were dispatched to various Regions in Namibia to hold group discussions in rural areas about the options for law reform. The feedback from those discussions is incorporated into this publication.

In order to focus the various discussions on possible law reforms on inheritance, the LAC set out the following main topics for debate, with specific reference to intestate estates.

Option 1: Divide intestate estates into two classes

- Customary law estates, where customary law is followed with the exception of aspects that are unconstitutional because they discriminate against girls or women, younger children as opposed to older children, or children born outside of marriage.
- Other estates, where the line of succession is as follows: (1) spouse; (2) failing a spouse, to the children of the deceased; (3) failing them, to the parents of the deceased; (4) failing them, to siblings and half-siblings; (4) failing them, to other blood relatives.

Option 2: One path for all

- All intestate estates go to spouses and children.

Option 3: Compromise approach, being to divide intestate estates between –

- spouses and children, and
- customary heirs.

Issue 1: Maintenance for the deceased's dependents

- Whether family members and/or dependents of the deceased should be allowed to claim maintenance from the estate before the remainder is distributed amongst the heirs.

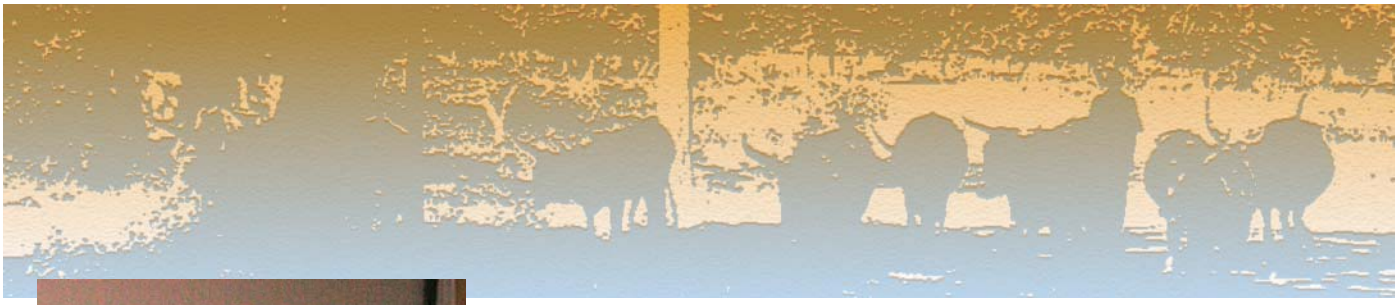
Issue 2: The marital home

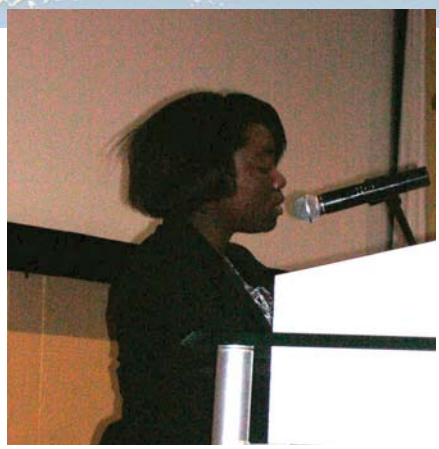
- Whether spouses and children living in the household of the deceased at the time of his/her death should be allowed to continue living there.
- If this approach were adopted, the house could eventually go to the usual heirs – as is done elsewhere in the world.

Issue 3: The administration of estates

- Whether estates should be administered by the Master of the High Court, magistrates, or someone else such as traditional leaders or community courts.
- If more than one administrator were approved, whether one could have a choice between them.

A Government representative who attended the Windhoek workshop confirmed that a new inheritance bill had been drafted, but that it was not yet ready for circulation and comment. Therefore, the workshop considered various options which could be adopted to deal with inheritance.





Presentations

Explanation of the *Berendt* case and how the court order sets a deadline for law reform on inheritance

Linda Dumba (edited and presented by Evelyn Zimba-Naris)
Land, Environment and Development Project, LAC

Before I start with my presentation, I think it is important for us to keep in the back of our minds that fact that the law as it stands has three different pieces of legislation that regulate one's estate upon death. These laws are divided on racial lines. They are the following:

- The Administration of Estates Act, 1965 (No. 66 of 1965), used for white estates
- The Native Administration Proclamation No. 15 of 1928, used for black or so-called "natives", and
- The Administration of Estates (Rehoboth Gebiet) Proclamation No. 36 of 1941, used for Rehoboth Basters.

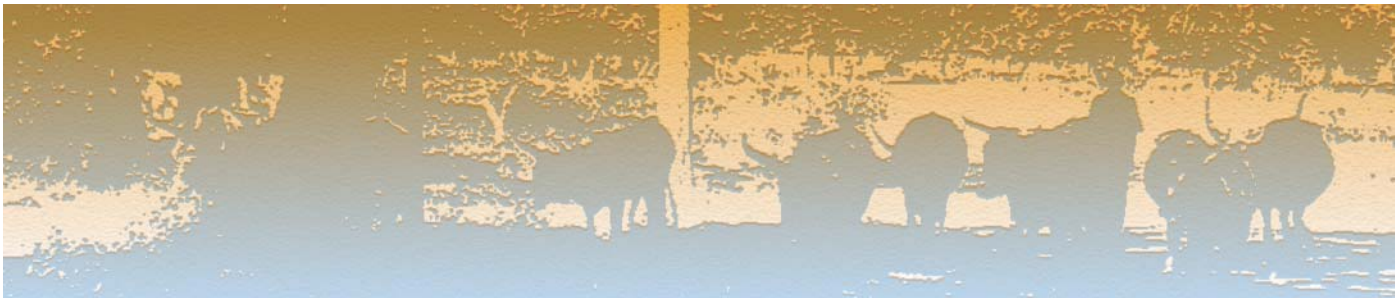
Facts of the case

In 2003, Magrietha and Aron Berendt sought an application in the High Court of Namibia, declaring certain provision of the Native Administration Proclamation No. 15 of 1928 as unconstitutional. The facts of this case are briefly set out below.

Magrietha, Aron and Naftalie Berendt were the biological children and natural heirs of the late Martha Berendt (the deceased), who died unmarried and intestate on 20 March 1999. The deceased was from the Bondelswart tribal community.

Martha Berendt owned immovable property (a house) in Windhoek. Before her death she had lived in the house with her three children. Upon her death the heirs had a meeting and thereafter went to the Windhoek Magistrates Court on 25 March 1999, where the Magistrate appointed Naftalie Berendt as the executor of his mother's estate in agreement with the family. It followed that the estate would be administered and distributed according to the customary law of the Bondelswart community in terms of the provisions of the Native Administration Proclamation, as the deceased was from the Bondelswart community.

On 31 May 2002, acting alone and in the absence of his siblings Magrietha and Aron, Naftalie Berendt entered into a deed of sale with Claudius Stuurman, in terms of which the immovable property situated on Erf 977, Kinshasa Street, Windhoek was sold to Stuurman. In this step, Naftalie purported to be acting in his capacity as executor of the deceased estate. The applicants were dissatisfied with the sale of the house and thus brought an application to the High Court calling into question Naftalie's appointment as executor.



This case principally sought the following orders against the President of the Republic of Namibia, i.e. the Government of the Republic of Namibia, as the person responsible for making regulations under section 18 (9) of the Native Administration Proclamation:

1. Declaring sections 18 (1) and (2) of the Native Administration Proclamation, as well as the regulations made under section 18 (9) thereof, to be unconstitutional and invalid since they were in conflict with the provisions of the Namibian Constitution
2. Setting aside the appointment of Naftalie Berendt as executor in the estate of the late Martha Berendt as unlawful, and null and void
3. Declaring that the Administration of Estates Act, 1965 (No. 66 of 1965), as amended, should apply to the estate of the late Martha Berendt
4. Directing the Master of the High Court to supervise the administration of the estate of the late Martha Berendt in terms of the provisions of the Administration of Estates Act, and
5. Setting aside the deed of sale entered into between Claudius Stuurman and Naftalie Berendt as null and void.

Challenge to the constitutionality of sections 18(1), 18(2) and 18(9) of the Native Administrative Proclamation, No. 15 of 1928

The applicants contended that sections 18 (1), (2) and (9) of the Native Administration Proclamation should be set aside as discriminatory, racist and outdated because the provisions subjected the estates of black persons (defined by the Proclamation as "natives") to a legislative regime which discriminates against them on the ground of race.

This attack was founded on Article 10 of the Namibian Constitution.

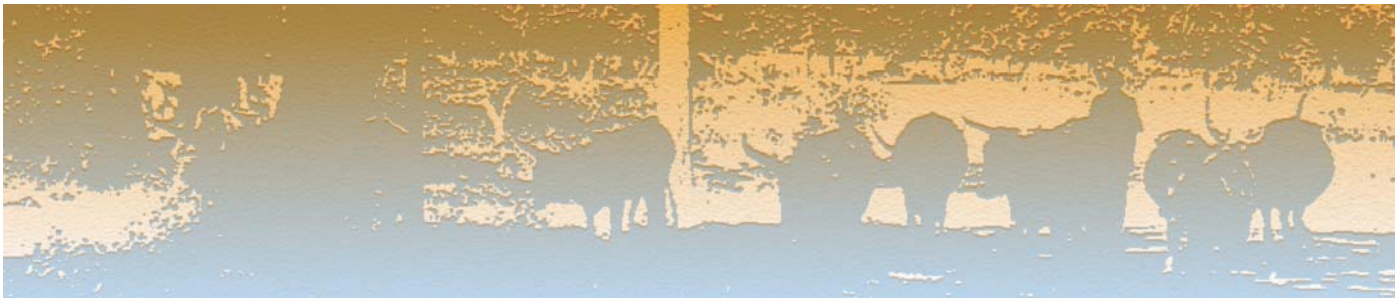
The relevant sections of the Proclamation provide as follows:

> 18 (1) All movable property belonging to a native and allotted by him or accruing under native law or custom to any woman with whom he lived in a customary union, or to any house, shall upon his death devolve and be administered under native law and custom.
> (2) All other property of whatsoever kind belonging to a native shall be capable of being devised by will. Any such property not so devised shall devolve and be administered according to native law and custom.
> (9) The Administrator may make regulations not inconsistent with this Proclamation – prescribing the manner in which the estate of deceased natives shall be administered and distributed …

In a nutshell, these provisions provide that –

- if the deceased was a widow, divorced or married, the estate is to devolve as if the deceased were a 'European' (white person), and
- if the deceased was single or married by customary law, the estate is to devolve in terms of 'native' law and custom.

Section 18 of the Proclamation basically imposes customary law or 'native' law on black people by subjecting them to different treatment with regard to their estates, compared with white or coloured persons.



Legal validity of the appointment of second respondent as executor of the estate

Regulation 3 of the regulations made under section 18(9) of the Proclamation provides as follows:

> All the property in any estate failing within the purview of paragraph (a) of regulation 2 shall be administered under the supervision of the Native Commissioner of the district or area in which the deceased ordinarily resided and such Native Commissioner shall give such directions in regard to the distribution thereof as shall deem to him fit and shall take all steps necessary to ensure that the provisions of the Proclamation and of these regulation are complied with …

Regulation 2(a) relates to the estates of so-called 'natives' devolving as if the deceased were a 'European'. Since the Regulations were enacted, magistrates have replaced Native Commissioners, and so magistrates now exercise the power to appoint executors to these estates. But there is-no provision that deals with magistrates' powers to administer a black person's estate that is to devolve in terms of customary law. The court took note of this gap in the regulations and concluded that "it is … by necessary implication that magistrates have assumed the power to administer such estates and to appoint executors therein".

The statement by the court basically meant that there was no source of authority for the practice by magistrates of issuing letters of executorship in the estates of black persons who died intestate: it had simply been a practical measure of giving effect to the wishes and decisions of the deceased's family. Therefore, the Court decided that the appointment of Naftalie Berendt as executor and the sale agreement he concluded with Claudius Stuurmann should be set aside.

Supervision of the deceased's estate by the Master of the High Court

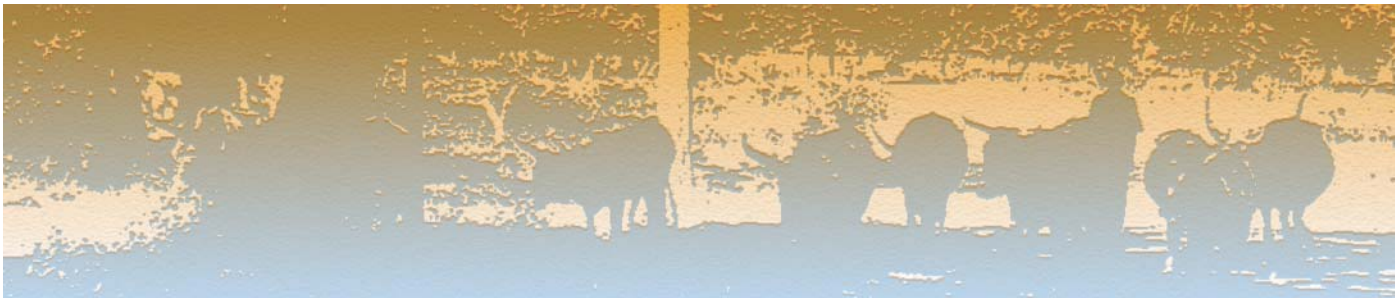
Section 18(6) of the Native Administrative Proclamation that prohibited the Master of the High Court from administering the estates of "natives" was repealed by section 7 of the Native Administration Proclamation Amendment Act, 1985 (No. 27 of 1985). Therefore, the court held that there was nothing to prevent the Master from supervising the estate of the deceased in this and similar instances.

This means that, following the ruling made in the *Berendt* case on 14 July 2003, black Namibians have been able to choose to have intestate estates administered by either a magistrate or the Master of the High Court.

How the court order sets a deadline for law reform on inheritance

When the case was before the High Court, Government requested that, should the court make an order to invalidate the impugned provisions of the Native Administrative Proclamation, the invalidation should be suspended for a period of three years to give Parliament a reasonable opportunity to carry out its undertaking to review the whole field of succession and the administration of deceased estates in a harmonious and effective manner.

In response to the Government request, the court stated that the period of three years was too long as seven years had already passed since Namibia signed the United Nations Convention on the Elimination of all Forms of Racial Discrimination. As a result, the court decided that a shorter period



of suspension would meet the justice of the case. Therefore, the court set the deadline for law reform on inheritance (to remedy the constitutional defect in the law) at 30 June 2005.

The court further decided that, until the defect was remedied or until the expiry of the time set by the court's order, whichever was the shorter, subsections 18(1) and 18(2) of the Proclamation and the regulations made under section 18(9) of the Proclamation were deemed to be valid.

On 21 June 2005, the Government approached the court in a separate application for –

- an order to condone its inability to comply with the deadline set by the court in the *Berendt* matter, and
- an extension of the time limit set by the court in the *Berendt* matter to 30 December 2005.

The request for the extension was based on the grounds that it would take an additional six months from the set deadline of 30 June 2005 to come up with a uniform law on succession and administration of deceased estates in Namibia for the following reasons:

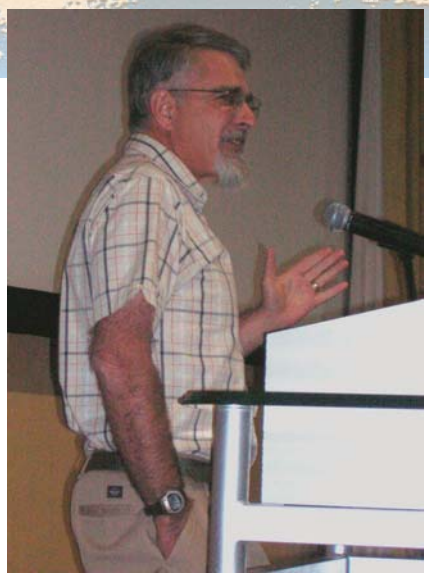
- Research and review of the law of succession was a complex task.
- Different laws of succession and administration of deceased estates applied for blacks, whites, coloureds and Basters.
- The Law Reform and Development Commission had to consult widely with stakeholders such as traditional authorities, the Master of the High Court, the LAC, and the Law Society of Namibia, amongst others, to draft a uniform law on succession and administration of deceased estates that would be in compliance with the Constitution.
- The drafting of the law took a considerable amount to time to complete.
- There were still some inputs from relevant stakeholders that were outstanding, and
- Consultations and inputs from stakeholders would take three months and the legislative process a few months more.

The Government also stated that if the court did not grant the extension as requested, there would be disastrous consequences in the sense that –

- there would be no regulatory framework to deal with estates of persons who wanted their estates to devolve in terms of customary law
- magistrates would no longer be able to assist people with the administration of their estates, and
- since the Master did not have regional offices, this would create difficulties for the many people who could not afford to travel to the Master or instruct lawyers to act on their behalf.

The court granted the Government an extension until 30 December 2005 to review the whole field of succession and the administration of deceased estates in a harmonious and effective manner, and to finally come up with a new law on inheritance.

You don't own this property, you just drink its milk.



Positive and negative aspects of customary law on inheritance

Dr Rob Gordon
Social anthropologist and historian

Inheritance fascinates

Probably the most widely-read page in a certain Windhoek newspaper deals with the distribution of deceased estates, which is evidence of the high level of public interest in inheritance.

Many years ago a lawyer told me that, in his experience, inheritance disputes created the most emotional feelings and bitterness and would split relatives from each other. Inheritance disputes are part of the human condition. Just look at the Bible: even Jesus, when asked, wisely said he would not deal with inheritance and told a parable instead.

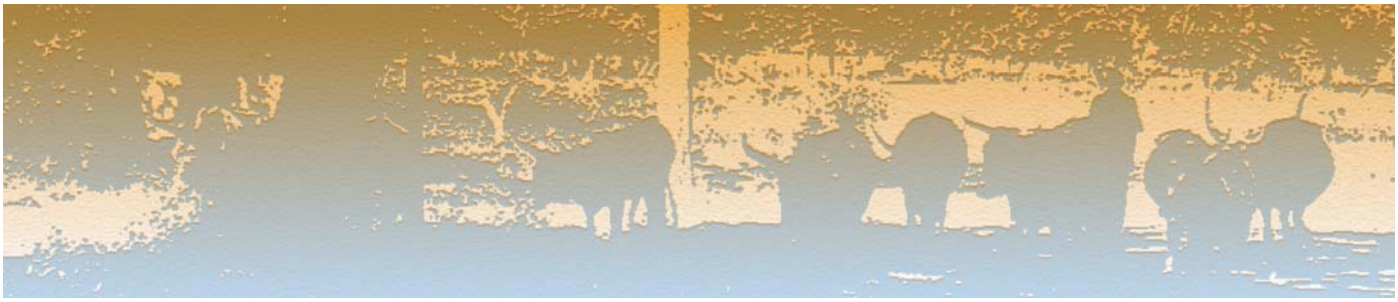
What is inheritance? In many languages the term means "to eat". In the Biblical sense it refers to the enjoyment by a rightful title of that which is not the fruit of personal exertion. Inheritance is like winning the lottery, one youth claimed. But inheritance entails not only rights to material objects and goods, but also kinship ties and obligations. Clearly, though, the concern is largely with property. But property is a complex matter. There are many different definitions of what property is, this stuff that has to be inherited. An Uukwanyama teacher from the 1930s could have been speaking for most Namibians when he claimed the following:

> When a person is in this world, he is seeking property. He is seeking it because of his honour, so that people will not laugh at him when he is dead for not having anything to be inherited. If a person does not leave any property to be inherited, he is laughed at and he is said to have been measly and good-for-nothing (Miettinen 2005:41).

Honour is not a personal quality, but is rather a collective obligation that belongs to the individual.

Who should inherit? This is an obvious source of our fascination. Obviously, relatives should inherit from intestate estates, but which relatives?

Here we get into the thorny problem of kinship. Unlike South Africa where one has only two types of ways of reckoning kinship, in Namibia we have at least four. Most Namibians reckon relatives matrilineally, i.e. people who share the same womb. Thus, the relatives who count are not your offspring, but your siblings or your mother's brother. Among other people one finds patrilineal inheritance, i.e. descent is reckoned through the father's line. Some people in Namibia, namely the Herero-speakers, have a system of double descent: certain rights and obligations (principally economic) are inherited matrilineally, while others (principally political and religious) are inherited patrilineally. To complicate matters further we also have cognatic descent systems, where people can inherit from both their father and mother's relatives. In all these systems of allocation, I regret to say, women



frequently get the short end of the stick. The world changes and we have new challenges to confront. The AIDS pandemic has resulted in life expectancies plummeting by more than 13 years over the last decade and this has had important consequences for inheritance, not least that maintenance for spouses (typically younger widows than ever before) and young children (typically schoolgoing) has been thrust to the forefront.

In praise of customary law

A few years ago I was an avowed opponent of customary law. I thought it was being cynically developed by the South African authorities in a scheme to strengthen their rule. Now I am not so sure.

Local attempts made by traditional authorities to deal with pressing social issues and injustices including 'widow dispossession' have been noteworthy, but it is clear that these authorities' legitimacy has eroded massively and frequently people simply ignore their orders. Certainly, that body of practices known as customary law – especially in the patrilineal areas (southern parts of the country), but also to some extent in matrilineal areas (in the north) – impresses with its flexibility: its ability to shape itself to meet the needs of those made most vulnerable by the death of their relative.

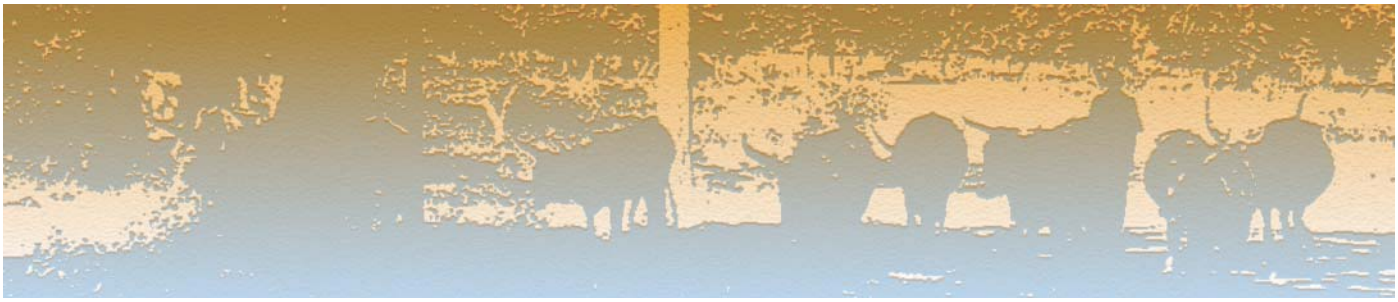
While lawyers might wish away 'customary' or 'vernacular law', the brute fact of the matter is that it will survive. To ignore it is to act rather like Idi Amin who famously solved the unemployment problems in Uganda by simply making unemployment illegal! For all its faults, 'customary law' is reasonably effective. Its problem lies more in the issue of location. Most women when they marry move to their husband's areas and thus are placed under the jurisdiction of their husband's customary authorities and as outsiders in such circumstances are at a decided disadvantage. Magistrates and other officials in the judicial services are already overburdened and do not have the requisite sensitivity to deal fairly with many inheritance problems. Thus, for example, the Judge President recently criticised magistrates for frequently appointing executors simply "because the family want it", without examining the issues too closely.

A central problem is that the Western legal tradition treats the individual like a billiard ball – a hardy individual who is more or less independent. In Africa, as one of my friends put it, an individual is like a honeycomb: you take away the support and the individual collapses. This is also seen in property concepts.

As Dr Jekura Kavari points out in an important essay on this topic, there are at least three types of property among Herero-speakers: matrilineal, patrilineal and 'individual' or 'private' property. Most of it is administered by individuals on behalf of the group – the extended family or lineage. Most inheritance conflicts arise, he maintains, not from the fact that they do not know who the rightful heir is, but how to properly categorise these items into these three categories.

> In the Ndonga tradition, *property* was synonymous with *cattle ...*

Try as they might, officials simply will not have the sensitivity to deal with such cultural nuances which arise out of long and almost total immersion in the local milieu.



Stripping widows of their assets

This has been in the news lately. Only last month, for example, the First Lady made an appeal on this subject. Judging from the media it appears to be a recent phenomenon. Undoubtedly a significant factor here is the increasing and irreversible global consciousness of women's rights. Explanations for asset-stripping range from a simplistic attribution of 'custom' to increasingly grinding poverty – aggravated, importantly, by the AIDS pandemic. It is perhaps significant that most parts of Africa where it is found, especially in Central Africa, are also characterised by matrilineal kinship. Perhaps the problem is a structural one located in the kinship system? Already over a hundred years ago there were reports in the north of stripping widows of their assets. There has in fact been a long history in this country of trying to deal with this problem, and many of the proposed solutions by both traditional authorities, Government and Churches, such as wills to protect spouses and children, have been tried before and found wanting. Indeed, there is now mounting recent evidence from Zambia that their attempt to legislate changes, initially hailed by various women's movements as a major victory, have actually exacerbated the plight of widows and increased 'stripping'.

> Inheritance is like winning the lottery, one youth claimed.

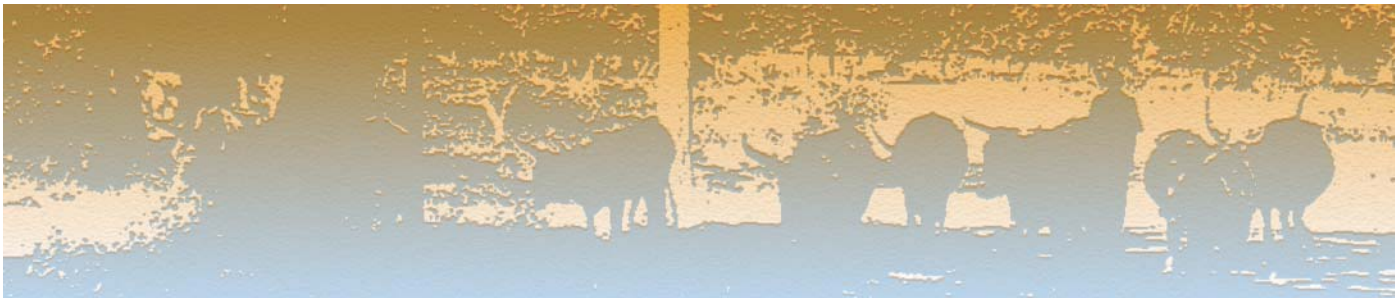
In our experience, the same few cases of 'widow dispossession', atrocious as they are, are recycled time and again. Many long-term researchers in the north for example, do not find it so prevalent in their field areas. This is not to deny or even negate 'widow dispossession', but simply to state that it does not occur to the degree which hearsay evidence suggests. Factors which in all likelihood contributed to its being pushed to the forefront include the current concern about land rights, the push for gender rights, a sympathetic ear in the press, etc.

The important question, then, is why do these stories enjoy such a high circulation? Widow dispossession stories can be analysed as moral panics. In essence they are morality tales that stress the importance of proper kinship behaviour, especially of the potential widow. One must be 'nice' to the potential deceased or suffer the consequences in the court of local public opinion, an especially difficult task for wives since they have generally moved to their husband's area away from their own natural kinship support network. They are a mode of narrative social control dedicated to keeping unruly females in line in a patriarchal social order that is starting to buckle under the onslaught of a variety of factors, including gender-sensitive legislation.

To sum up

This debate and attempts at inheritance reform must be seen within the longer trajectory of history. This is not the first time a State has attempted to change inheritance practices. Indeed, history is littered with past failures. Joseph Stalin abolished private inheritance, legislating that all of a deceased person's private property had to be given up to the central government to be used for the public system.

In the United States, only people who fall in the top 1% income bracket had to pay taxes on their estates. This has since been repealed. In South Africa, only estates valued at more than R2 million are taxed, and then at 20%.



Namibian history also shows many attempts that have failed. These attempts can be seen as part of the classic struggle of the State versus kinship. Let it not be forgotten that a favoured relative in inheritance in most kinship systems is the nephew. This term is derived from the Latin nepos, which is also the root of the term nepotism. It forms part of the ongoing efforts by the (Western) State, which is gradually taking over the functions of the family or kin groups until the family is reduced to simply being a voluntary association. Some foresee a dark scenario where the State becomes the only security for the individual. This does of course promote capitalism as well. As one anthropologist noted (as cited in Bellow 2004:545), –

> The state, despite its persecution of the individual from time to time, is much happier dealing with individuals as units rather than with kinship groups for the simple reason that they are easier to control. … Thus it comes easily to the nation-state to promote the values of individualism while remaining totally suspicious of the claims of kinship.

However, as Namibians realise only to well, if slave can be defined as a person without kin, then a person without kin is nothing but a potential or an actual slave. Despite all efforts to abolish the family, its resilience is there for all to see. When the chips are down it is the family or relatives one seeks out.

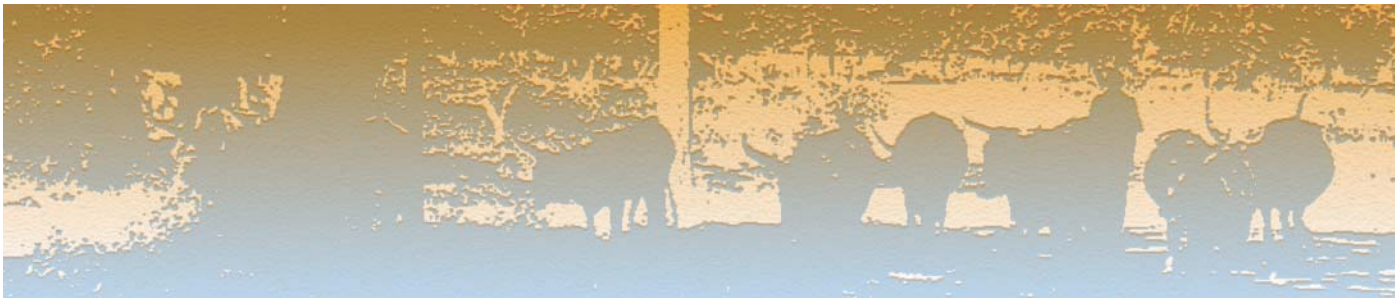
Discussion on Dr Gordon's presentation

A representative of the Ndonga Traditional Authority reported that solving cases of inheritance had proved very difficult because these were sensitive issues. He explained that, in the Ndonga tradition, property was synonymous with cattle. Their custom was to make a distinction between property a deceased man had inherited from his family, and property that the deceased and his spouse had accumulated since their marriage. The latter type of property was inherited by the widow and the surviving children. However, any cattle the deceased inherited from his uncle or other members of his family would not be inherited by his widow or children. He added that State courts sometimes erred in their judgements when it came to these issues, whereas resolving such issues was straightforward for a traditional court.

Dr Gordon related that, in the 1950s and 1960s, the Kwanyama Traditional Authority inherited the cattle, while a widow inherited cash – which was a Western influence. An important issue in this respect was the moral obligation evident: the group was liable for looking after a widow. When one person killed another, the family – and not only the person who perpetrated the crime – would be obliged to make reparations to the victim's family.

A National Assembly MP from the Ndonga tribe stressed that Namibia needed to have a law that would incorporate the positive aspects of customary law, e.g. the law should make provision for a grandmother to inherit from her deceased grandson if he was rich, but his widow and children should also be provided for.

A lawyer in private practice in Otjiwarongo stated that customary law was here to stay. For example, customary law in Roman times had been codified and became civil law. However, customs passed down through the generations could be distorted for personal gain. For example, the law of succession also



determined what rights and duties the beneficiary inherited. Thus, the uncle who inherited also then was obliged to look after the deceased's widow. The lawyer went on to say that traditional leaders, as the custodians of customary law, needed to be guided by the principles underlying the customs.

Dr Gordon responded that Roman-Dutch law had also become distorted and abused over time, and cited how it had formed the basis of apartheid laws in Namibia. He reiterated that Namibia needed to ensure that justice prevailed, i.e. people needed to be on their guard against distortions of the law.

In response to a related enquiry by a member of the San community, Dr Gordon stressed that gender equity was a global problem and that others usually exploited disadvantaged groups. He reminded the conference that the constitutional principles needed to be stressed and underlined in all traditional practices.

A Herero-speaking woman representing Women's Action for Development in the Omaheke Region stated that her Owambo-speaking father had been married to another woman for 20 years, and that the latter had murdered him. The speaker had also lived with her father for 20 years. The speaker's mother had had seven children. When it came to inheritance, because she spoke Herero, the Owambo community sent her back to her mother. Her father's second wife had had no children, so his cattle simply remained in that community.

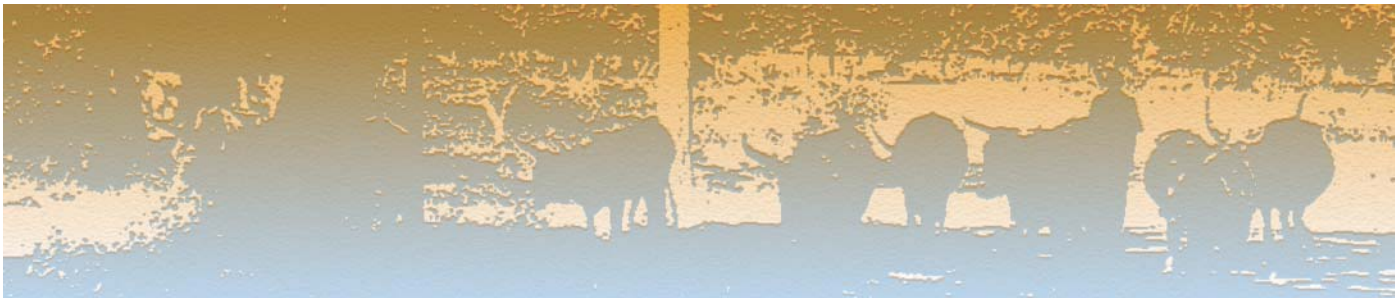
Ms Hubbard commented that marriages between members of different ethnic groups also needed to be taken into account in the law.

A man from the Otjozondjupa Region, who represented his traditional authority, stated that the Women's Action for Development representative clearly had not gone to the relevant traditional authority, the relevant Ministry or a magistrate. If she had approached the traditional authority they would have resolved the issue for her.

The Otjozondjupa Traditional Authority representative went on to say that the terms and conditions of traditional marriages should be standardised for everyone so that all traditional inheritance issues would be the same. In an intertribal marriage, the newcomer needs to accept the jurisdiction of her new traditional authority and the customs that prevail in her adopted community. The Traditional Authorities Act, 2000 (No. 25 of 2000), which sets out the duties and responsibilities of TAs, stated that TAs were to act in accordance with the traditions in their respective communities. Thus, if there was a uniform law dealing with inheritance matters, everyone would be the same and the unique traditions and culture of various communities would be lost.

Another man in the audience explained that, in his tradition, a widow was 'given' to another man when her husband died. No one was 'thrown away' or not looked after properly, therefore. It was also customary for cattle that had been inherited by a deceased man did not form part of the widow's inheritance. If this law were to be changed, he said, it would be like stealing other people's laws. With regard to wills, he agreed that they were a positive measure, but that a person could only deal with his/her own individual property and not that of the family.

Dr Gordon agreed that inheritance was a complex issue. He referred to a certain Dr Kavari, who made a distinction between family property and individual property. Dr Gordon expressed his doubts as



regards magistrates being able to deal with the various cultural nuances that existed regarding the classification of property.

A Namibian Men for Change representative from the Kavango Region stated that, in some cultures, it was believed that the spouse should not inherit the deceased person's entire estate because some of the property in the estate belonged to the deceased's family. In cases where the deceased was married under civil law, this was usually prompted by the person's religious belief rather than a desire to inherit all of the spouse's property one day. It was not fair, therefore, that civil law forced the estate to be inherited by the surviving spouse in a civil marriage.

In Dr Gordon's opinion, history had shown that many attempts to eradicate customary law had failed. As customs changed, so did customary law. Under the Roman Empire, the early Church introduced the notion of a testament. People were led to believe that they would only go to heaven if they donated all their property to the Church in their wills (which explains the Roman Catholic Church's wealth today). In other words, children were entirely ignored when it came to inheritance. The Church eventually learnt to step in, suggesting only a percentage of the estate should be donated to them.

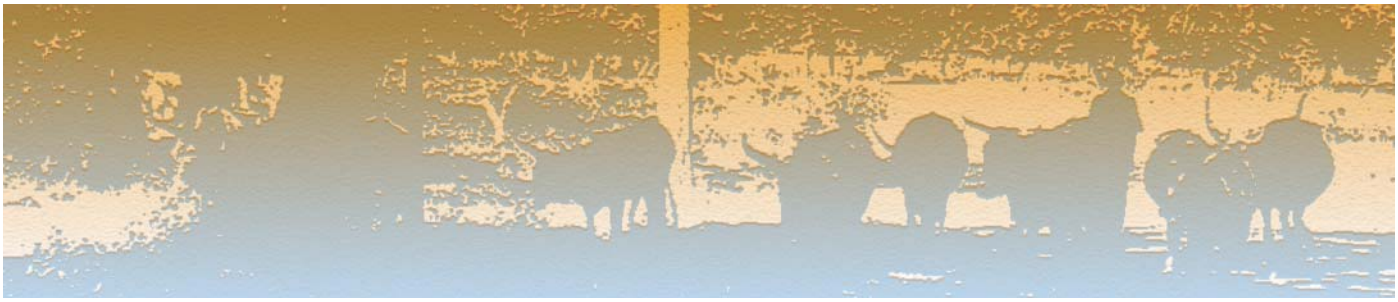
Ms Hubbard stressed the importance of protecting the surviving spouse and children while allowing customary law to continue to exist.

Responding to a request from a National Council MP, Dr Gordon stated that it was not possible to offer practical rules on how to draft the new law, and deal constructively with the positive and negative aspects of customary law. This was because customs changed: what was regarded as positive today could be seen as negative tomorrow, and vice versa. It was rather like herding cats, he said: one could not abolish customary law because it was part of people's norms, their culture. It was very difficult, therefore, to decide on a hard and fast strategy with regard to customary law and inheritance issues.

In response to a question about moral obligations regarding inheritance, Dr Gordon responded that these obligations led directly to maintenance issues. In Namibia, as elsewhere, moral obligations did not die, e.g. feuds carried on because moral obligations had not been met. He stated that Namibia needed more research on this.

A social worker for the MHSS in the Kavango Region, stating that she spoke on behalf of Coloureds, reported that she saw clients daily that had been victims of widow asset-stripping. In her opinion, the Government should take responsibility for the children. Families took everything and the children suffered, so social grants should be paid.

A male participant from Omaheke stressed that there was no obligation to have others inherit from one's estate, and no obligation towards wives and children. To him, "Inheriting something is indeed like winning the lottery". These practices were brought about by European laws on inheritance, where family property became individual property. He asked whether there was instead a way to have a uniform system of inheritance in Namibia. He also asked Dr Gordon whether he thought workshops on inheritance were time-wasting if there was no solution anyway. Finally, he added that every Namibian should be obliged by law to have a will.



Dr Gordon emphasised that he did not feel such workshops were a waste of time, and recommended that they continue to be held. He felt we had a moral obligation to improve the quality of life for all and to ensure that justice was done.

Dr Gordon mentioned that the notion of property the speaker had referred to was more capitalist than Western. He agreed that there were different ways of looking at property, e.g. as rights of entitlement rather than rights of ownership.

The Church's experience with inheritance issues

Rev. Philip Strydom
Council of Churches in Namibia

This is the workshop rapporteur's report of the presentation, as no hard copy of the presentation could be provided.

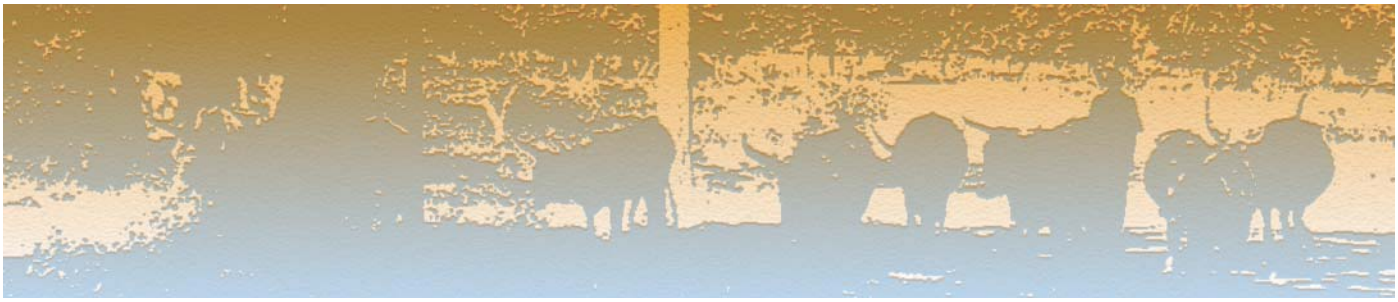
Rev. Strydom stated that he had consulted various pastors and bishops in the Council of Churches in Namibia in compiling his presentation, and expressed his gratitude for the opportunity to share the Churches' perspective on the law reform on inheritance.

The first question posed and answered in the affirmative by Rev. Strydom, was whether people brought their inheritance problems to the Church. The Church was expected to be neutral. This neutrality could be useful with respect to inheritance law. Pastors were sometimes merely expected to be included in a discussion only as an observer. However, the Church was also often called in to save a situation. In fact, the Church was only called in when people were experiencing difficulties. This was not the preferred state of affairs: the Church should rather be brought in at the start of the discussions about inheritance.

Thus, paralegal training would be helpful for pastors because very few people had wills. Rev. Strydom revealed he had the impression that people were being discouraged from writing wills; this was supposedly because there were no legal costs when a person died intestate. However, one Bishop had informed the Reverend that the marriage certificate had become an important issue, especially in cases where the woman was married in community of property. Showing her marriage certificate to the family, i.e. her in-laws, had solved the inheritance issue for a certain woman.

The second issue raised concerned the conflict between Church doctrine and customary law on inheritance. As far as the Council of Churches in Namibia could ascertain, there were no serious conflicts. But the interpretation and application of customary law left much to be desired. For example, the family member that spoke the loudest was often the one to decide everything for everyone else. But justice, in Rev. Strydom's opinion, had to prevail: if there were no justice, there would be no peace.

The third issue that was important to the Church was equity. It was the Church's experience, Rev. Strydom related, that women and children got the short end of the stick when it came to inheritance matters.



The fourth point made by the Reverend was that, for the Church, it was also important to appreciate the value of a 'live and let live' approach. When greed and selfishness entered the equation it compounded the problem of a fair distribution of a deceased estate. Reports from grass-roots churches stated that resources in the rural areas were scarcer and fewer. Life was more about surviving than anything else. For the poor and the marginalised, the struggle continues. For others, the looting continues. A luta continua! So when someone died they would look for an opportunity to get something from the estate at the expense of a widow and her children.

The Church has a responsibility to care for the vulnerable, the weak, the helpless. Often, it was the strongest that got the most through inheritance.

In respect of stewardship, a fifth issue brought up by the Reverend, he stressed that the owner of everything was God, and that we are simply his stewards. God had entrusted us with the land in Namibia to work on it for the sake of our families. Nonetheless, families tended to cling to land by all means at their disposal. As the Reverend pointed out, however, borders had changed throughout history. So it was no use to try to preserve a little piece of land for one family for life. Such an approach was simply not viable.

For the poor and the marginalised, the struggle continues. For others, the looting continues. *A luta continua*!

The Reverend then referred to Genesis 2, which related to the institution of marriage. He reminded the conference that, according to the Bible, marriage was between two people. When he got married, a man had to leave his mother and father and cling to his wife, and the two would become one. However, according to the Reverend, the experience of many wives is that they are not accepted by their spouse's family.

He related that the Council of Churches in Namibia sometimes received interesting queries. One pastor had said to a woman church member of his that he only acknowledged two Churches; since her husband did not belong to either of them she could not get married in the pastor's church. So women were being excluded from their rightful claims in this respect as well.

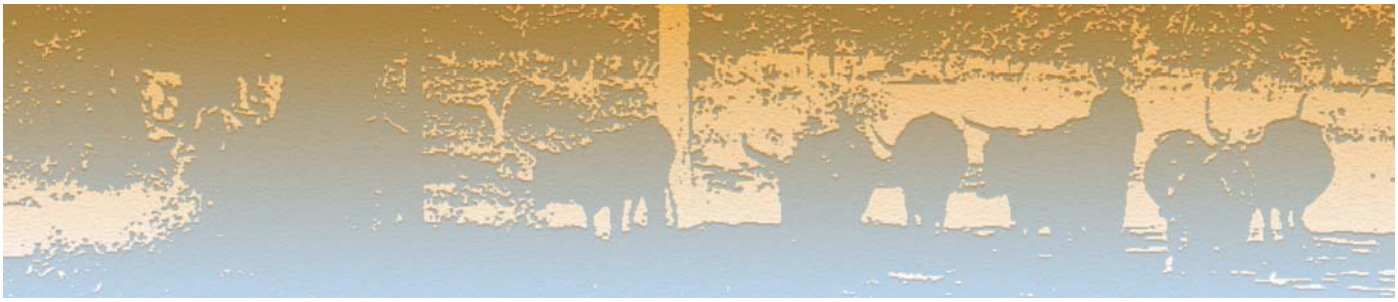
Rev. Strydom explained that a woman did not get married to her spouse's family. It was often said that one married one's spouse's family; but this only added to the problem. From the Church's side, he reiterated, marriage could only take place between one woman and one man.

The Reverend asked the conference whether there were any customs that provided specifically for the widow and children of the deceased. In the Council of Churches in Namibia's experience, those who already had enough inherited more.

Some problematic areas

The following needed to be brought into any discussion regarding inheritance:

1. Illegitimate children: When a man dies, lots of children come forward to claim a share of his estate. The law should provide for all of them, not only some.



2. The house: An example of problems here is where a house in town had to be sold and the money divided, in which case the family living in it were forced to move out.
3. Cross-cultural unions: These are becoming more common, so an inheritance law had to take them into account. Often, a widow who has married into another tribe is regarded as a foreigner when her husband dies. This makes it easier to chase the widow away from her home and property.
4. Flexibility of customary law: Its flexibility, which was often used in a negative way, should rather be applied in a positive sense.

Some suggestions

1. The law on inheritance needs to protect everyone, and should favour the weak and the vulnerable. It should provide security for those who survive the deceased.
2. The law needs to be compatible with the Constitution.
3. The role of customary courts in inheritance issues should be explored.
4. Inheritance issues should be dealt with more speedily than is currently the case. Customary courts would be good in this respect.
5. It needs to be established whether traditional authorities are part of the problem in perpetuating unfair practices when it comes to inheritance. Again, in respect of the exercise of authority in traditional matters, customary courts should prove effective.

Discussion on Rev. Strydom's presentation

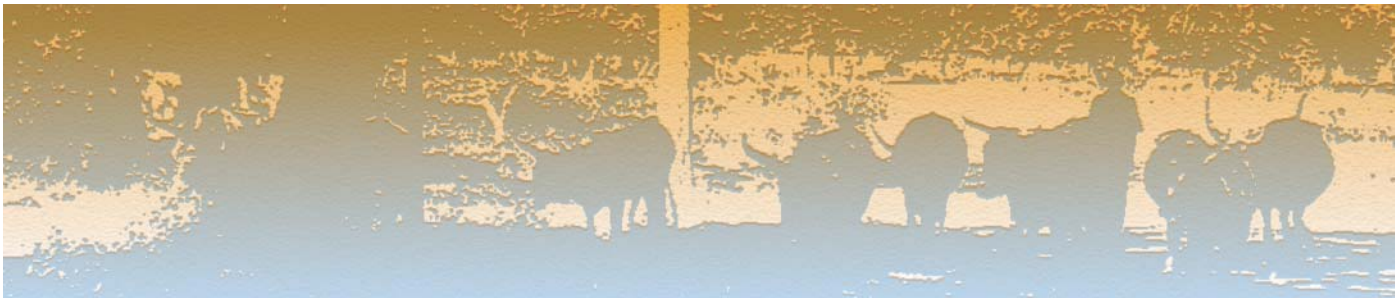
A man from the Ministry of Health and Social Services (MHSS) referred to the Bible, saying that when a man married he would leave his family and cling to his wife. This was the ideal, but certainly not the reality in Namibia. Some people were married both under customary law and under civil law. He agreed with Rev. Strydom that the Churches should include inheritance issues when they offered premarital counselling. He disagreed with Dr Gordon, stating that the Bible was very clear on the issue of disadvantaged groups: all Christians were responsible for strangers, widows, and orphans. Both the customary and Christian perspectives were important to include when discussing matters of inheritance, therefore.

Participants, Windhoek Workshop

A male participant from Omaheke then questioned whether the Bible dealt with intestate estates.

A woman in the audience also asked what advice Rev. Strydom would give to young people concerning customary and church marriages, considering all the problems involved.

Rev. Strydom stated that customary marriages had a particular advantage in that one's acceptance into another family was formalised by way of a cultural ceremony. The value of customary marriages could not be ignored, he felt, and people should be made aware of



their significance. A church marriage ceremony was performed simply to receive God's blessing, he explained; the State had assigned certain legal powers to the Church, whereby a couple was publicly acknowledged as such and made public vows.

As regards premarital counselling, in a particular community where Rev. Strydom had served as a pastor, he had made a special arrangement with the local magistrate to send couples to their church pastors for marriage counselling. The Reverend acknowledged that young couples did not take certain issues seriously enough because they were perhaps too in love. In his view, therefore, the challenge for the Church was to bring in inheritance issues as well as cross-cultural issues. Couples should be enlightened and empowered to solve their own problems.

Regarding the Bible and inheritance, Rev. Strydom said that the Bible had come from a particular context. Many of the customary laws in the Old and New Testaments came from the Jewish tradition. However, there were many similarities between Jewish and African customs. More specifically, the Bible provided guiding principles as regards justice, equity, and caring for widows, children and the vulnerable.

LAC experience on will-writing

Amon Ngavetene
Legal Educator, AIDS Law Unit, LAC

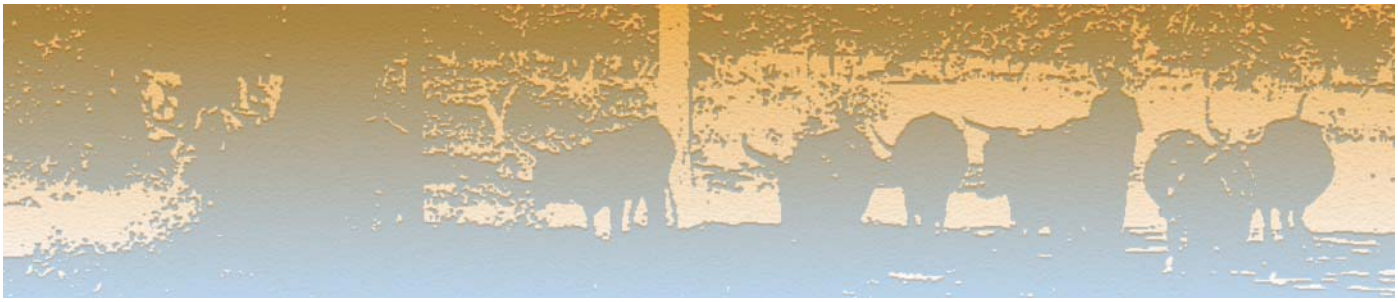
Background

Historically, most African communities have relied heavily on an informal system that guided the whole community on the distribution of properties. This is the use of institutionalised traditional norms and customs that guide them to identify heirs and beneficiaries and distribute properties. For example, in Herero communities, the double descent kinship system determines which rights accrue to whom and to what extent; the Owambo and Kavango use a matrilineal descent system; and the patrilineal descent system is found among Khoekhoe- and Tswana-speakers. As a result of this informal system, the aspects of will-writing are quite new to most rural communities.

In recent years, however, the community has become more materialistic. People have developed grudges against those who have amassed property and other assets. In most instances, the traditional system is overruled and those who are powerful become the sole and universal heirs and beneficiaries of an entire estate. The weak in society tend to be stripped of their rightful properties.

Inculcating a culture of will-writing in Namibia

The AIDS Law Unit within the LAC has developed a training manual on will-writing. This manual has been distributed to various non-governmental, community-based and faith-based organisations in most parts of the country. This manual is used to educate trainers who in turn train their colleagues in their respective organisations. The manual has been structured as a handy guide to drafting a will.



The material has been simplified and is, therefore, easy to comprehend.

The AIDS Law Unit and the University's Northern Campus in Oshakati are also involved in training so-called Will-writing Local Coordinators for the Omusati Region. These coordinators, drawn from various constituencies in the Region, have undergone a week's training in will-writing skills. Their main task will be to host information sessions for home-based caregivers in their respective constituencies. In addition, they have to carry out a certain number of information sessions for the general public. They also have to assist the community with writing wills.

Besides the week's training, various additional sessions were held in different villages in the Omusati Region. This was to make the communities more receptive towards the coordinators and to the concept of will-writing.

In terms of other sectors, there are frequently requests from some Government institutions for the AIDS Law Unit to make presentations on will-writing. The Unit also renders a service to members of the public who need assistance with writing their wills. In fact, the Unit has already helped numerous – mostly bedridden – clients draft their wills. The necessary legal advice and litigation is also rendered in cases where wills are ignored and the potential heirs or beneficiaries need a legal remedy or recourse.

Are written wills becoming more popular in Namibia?

Currently, in the absence of qualitative and quantitative research, it is very difficult to ascertain authoritatively whether the written will is becoming a popular instrument in regulating property bequests. The general perception from various communities is that the majority of them do not necessarily object to the idea of writing a will, but wills are uncommon in most communities because –

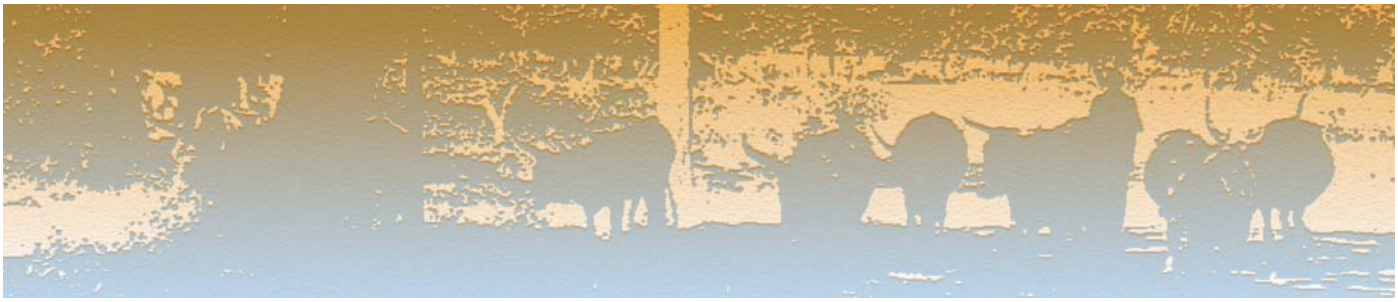
- they are unaware that such written statements exist, or
- those who are aware of wills lack the know-how or skill to write one.

An analysis of the community information sessions that were held in various constituencies throughout the Omusati Region showed that community members did not object outright to will-writing. Indeed, most appeared to prefer written wills to oral ones, but their writing skills limited their options.

On the other hand, some preferred not to have a will – whether oral or written. This opinion relied on the traditional system of inheritance: the guidance it provided was considered fair, so drafting a will was unjustified. In yet other cases, mythical, theological, social and cultural norms were associated with will-writing. For these respondents, will-writing was like forecasting or professing one's own death.

As regards testate estates, current inheritance disputes reported to the AIDS Law Unit as well as feedback from various consultations with the Unit's clients across the country have shown that most testators list their spouses and children as beneficiaries.

The question of whether or not people tend to respect wills depends on a range of circumstances, including –



- whether or not the will mentions the surviving spouse as a sole and universal heir, and
- whether the testator's wishes run contrary to customary law.

The issue of a will contradicting customary law should be understood in a very specific context. Firstly, some communities prefer the matrilineal or patrilineal kinship rules of inheritance to be followed. Thus, the surviving spouse has no inheritance rights as s/he does not belong to either a matrilineal or patrilineal inheritance group. An exceptional case is where the deceased is the surviving spouse's cousin.

Secondly, the community might want the surviving spouse to inherit, but they are against the content of the will. The will might bequeath family property such as land and holy cattle to the surviving spouse, which contravenes customary law. In most communities, of late disputes arise not so much about the line of inheritance, but about the type of property bequeathed. The factors determining whether or not the community will respect the will are –

- the nature of the property concerned, and
- the extent to which certain types of property are bequeathed.

Finally, however, it bears repeating that the lack of empirical research hinders one from painting an accurate picture of this issue.

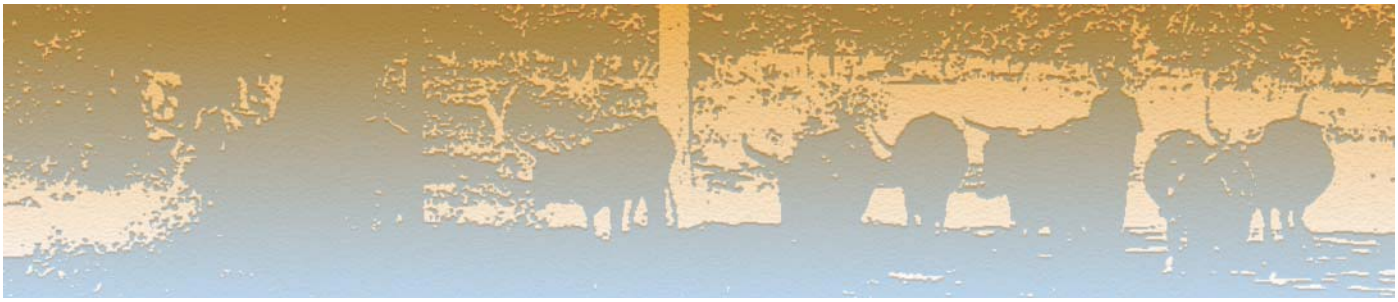
Do there tend to be more property disputes where there is a will?

The issue of gender versus power and influence makes it impossible to determine the exact extent of property disputes. One side of the coin shows that there appear to be more disputes when there is a will than when there is not. This does not mean that wills create disputes; rather, the fact that there is a will makes it a force to be reckoned with against the power of men. Hence, a female surviving spouse is in a better position to claim what is due to her. In such a case a dispute will ensue between the male relatives of the deceased and his wife, who derives much of her power from the legal instrument. But in cases where there is no will, a dispute is unlikely to ensue: women feel they are too weak to claim anything. Instead of claiming what is due to her, a surviving spouse will be stripped of everything and suffer in silence unless she is made aware of her rights and has the means to seek legal recourse.

Is inheritance affected in any way if the deceased died of AIDS?

The short answer to this question is "Yes". If the deceased drew up a will before s/he became bedridden, there is not much – if anything – that changes the inheritance at the time of the testator's death. However, in some cases where the testator has already drafted his/her will and some relatives know its content, the testator is constantly harassed to amend it. There are also cases when a person realises that s/he is dying and feel the need to draft a will. In the majority of these cases, testators are in their last stages of AIDS and are very fragile. Some have serious infections that affect their mental capacity. It has already happened that unscrupulous family members have taken advantage of the situation and have tricked the testator into writing a will. In the end, such a document expresses anything but the will of the deceased person, who is by then not of sound mind.

If there is no will, however, and since it is very easy for people to predict the person's death, the issue of property grabbing and disputes begin even before that person dies. Also, the majority of spouses



have been disinherited as punishment for having infected and caused the death of their husbands. Some have also argued that, even in terms of civil law, one cannot reap the fruit from an illegal act – in this case the purportedly illegal act of having infected one's partner.

In my view, more research is needed on the whole issue of wills, particularly as regards how effective the will is, and whether it minimises or maximises disputes. Much research has so far focused on understanding customary laws of inheritance; however, there is also a need to assess how those using civil law have fared, and what hurdles they have faced.

Discussion on Mr Ngavetene's presentation

An MHSS staff member expressed the opinion that, in respect of writing wills, it was important that they be regarded as the right of an individual to exercise his/her last wishes. Thus, the testator had the sole right to state what s/he felt belonged to their spouse or child, and that inheritance was not a family exercise.

A participant from Omaheke contended that writing a will should be compulsory. If one died intestate, one's property should go to the State.

In respect of a woman being found guilty of killing her husband by means of witchcraft, the speaker asked Dr Gordon how this would be treated in a court of law, where one could not argue such cases. In a customary court, however, the matter could be dealt with. Ms Hubbard mentioned that there was in fact an Ordinance on witchcraft, but that the conference did not allow sufficient time to explore this topic thoroughly.

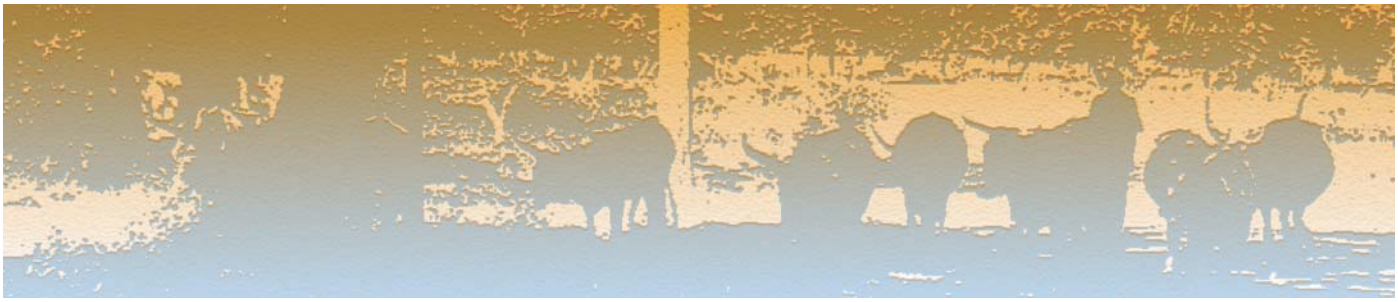
Mr Ngavetene stated that, in an intestate estate, women did not stand up for their rights, whereas in testate estates they did. He referred to the comment from a headman who complained that the discussion was only addressing property transfers from husband to wife, since gender equality should prevail. Mr Ngavetene stated that there should rather be gender equality in disinheritance – since community customs were still skewed to impact negatively only on women and children, not men. Where the deceased was a rich woman, her cattle immediately went to her surviving spouse; however, if her husband had been the one to die, she would have been disinherited.

Feedback from consultations

Windhoek Workshop

The Windhoek Workshop hosted around 80 delegates. After the formal presentations, delegates were split into six smaller discussion groups to debate the various options and issues set out for the workshop.

The purpose of the Windhoek Workshop was to bring out the pros and cons of various options that could be considered by Parliamentarians, to help facilitate an informed debate by lawmakers. There



was, therefore, no effort to agree on a workshop resolution recommending one specific approach to inheritance law reform.

This report does not for the most part identify the people who made contributions by name. The LAC feels that the ideas put forward are more important than the identity of the persons who raised them.

Supplementary consultations

In addition to the discussion that took place at the Windhoek Workshop on inheritance law reform, supplementary consultations took place as follows:

- First Ongwediva Workshop 22 participants (all women)
- Second Ongwediva Workshop: 9 participants (4 women, 5 men), and
- Omaruru Workshop: 25 participants (20 women, 5 men).

The LAC had hoped to organise additional regional consultations, but this proved impossible because of the short time frame before inheritance law reforms will be considered by Parliament.

Option 1: Divide intestate estates into customary law estates and other estates

How to identify customary law estates

- Follow the deceased's wishes, if they are known.
- Otherwise, look at factors such as the lifestyle of the deceased, whether the deceased was in a customary marriage, and whether the deceased lived in a communal area, and the nature and value of the deceased's property.

Pros of Option 1

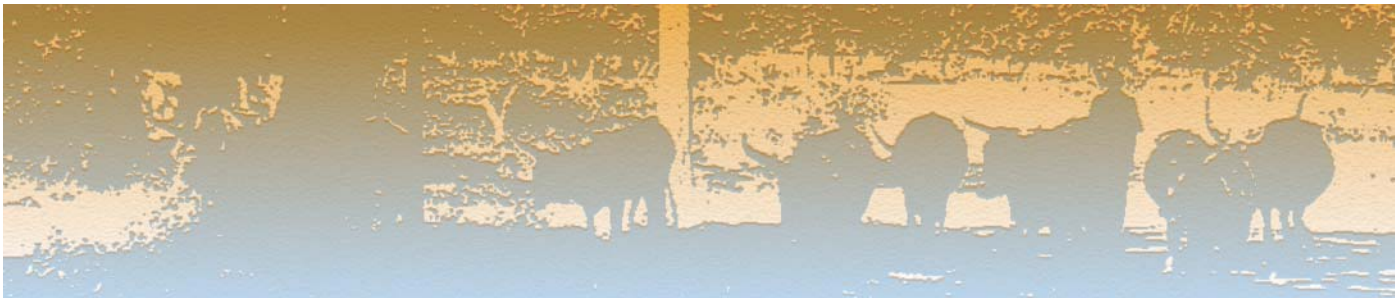
- This option tries to dispose of property in the way that the deceased would most likely have chosen if he or she had made a will.
- This option respects culture by preserving customary law more than any of the other options.
- This option stays closest to current practice, and so would be likely to be followed in practice.

Cons of Option 1

- This option does not provide a strong mechanism for preventing unconstitutional practices under customary law.
- This option does not appear to give sufficient protection to spouses and children in the case of customary law estates.
- It might be difficult to identify customary law estates.

Issues for discussion

1. Would this approach give enough protection to women and children?
2. How would people be prevented from applying discriminatory aspects of customary law? Would the affected women and children have to bring court cases to protect their rights?



Namibia needs to have a law that would incorporate the positive aspects of customary law.

Group 1 at the Windhoek Workshop discussed Options 1 and 3 in some detail. They expressed a significant preference for Option 1, although it was recognised that there needed to be clarity about the application of customary law.

This group felt that current customary laws were very diverse and might be unconstitutional. Nonetheless, they agreed that it would be good to divide customary law estates and other kinds of estates, but that the distinction had to be clear. They felt it might be better to consider giving certain percentages of the estate to the surviving spouse, the children, the deceased's parents, etc., as in the other options discussed.

Other respondents in this group felt that there should not be specific categories of beneficiaries, but that a percentage should be allocated to some or all of the types of relatives listed (see Option 2: half to spouse(s) and half to children; failing them, to parents of deceased; failing them, to siblings and half-siblings; failing them, to other blood relatives).

It was suggested that couples should decide when they got married whether they wanted customary or civil law to prevail when it came to their inheritance. Another suggestion was to have the spouse inherit a proportion first in a small estate before any other distribution were made.

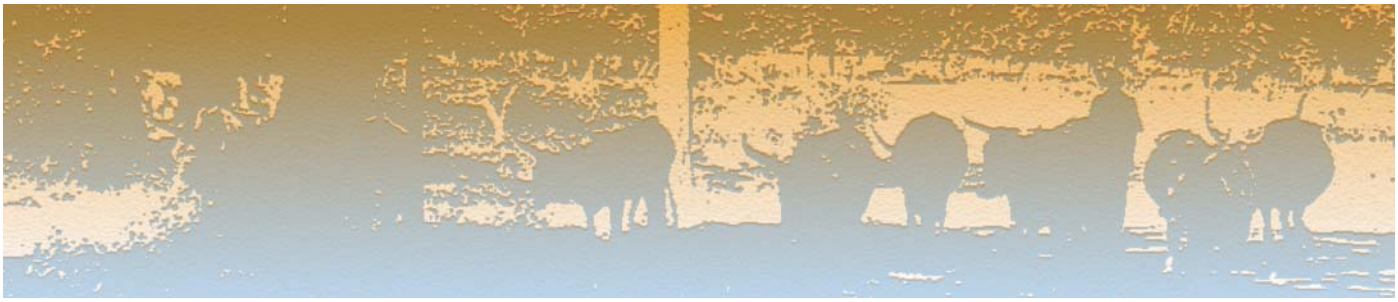
Group 2 at the Windhoek Workshop felt that a strict application of customary law would still discriminate against women and children so it should be modified to adapt to a modern way of life and be brought in line with the Constitution. It was also suggested that statutory law take cognisance of customary law, in the sense that similarities between the various customary laws should be written into one unifying piece of legislation. Such a law needed to have specific provisions that dealt with discriminatory and unconstitutional aspects of customary law, and should provide for arbitration, mediation and negotiation procedures. Identified stakeholders such as traditional authorities should receive training on gender issues.

Another aspect brought out by this group was that blood relative and dependent needed to be defined in respect of inheritance issues. They also suggested there be a uniform formula for distributing the estate among the various heirs.

Group 3 at the Windhoek Workshop gave no feedback on this option.

Group 4 at the Windhoek Workshop agreed that Option 1 would benefit both women and children, but pointed out that customary law would not protect them. To prevent discrimination in the distribution of estates, it was suggested that the Government speak to traditional authorities about the issue. Awareness needed to be raised about what discrimination was so that people would know it was unlawful. In such an information campaign, people in the area who were knowledgeable about estate rights could be asked to assist.

With regard to accusations of witchcraft in connection with the deceased's death, the group felt that evidence of witchcraft had to be brought before such claims were believed or acted upon.



The group also recommended that any discriminatory practices needed to be brought to the attention of the court (any court).

Group 5 at the Windhoek Workshop also gave no feedback on this option.

Group 6 at the Windhoek Workshop felt that customary law would not give enough protection to wives and children. They also asked whether, if customary law were contained in a statute, it would still be regarded as customary law.

The group suggested that an individual's estate could be split up into "customary" and "other" portion (as in Option 3).

This group felt that customary law would not guarantee protection to vulnerable parties under an estate classified as "other" unless the Master of the High Court supervised its administration as well. Yet they queried how the Master would be able to ascertain whether the law was being applied or implemented correctly in rural areas in respect of "other" estates.

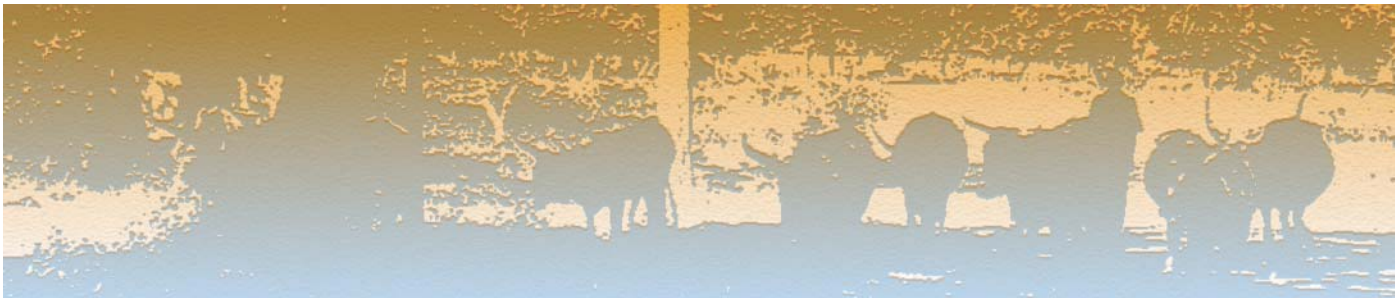
The group also asked what the role of community courts was in this context, and whether they had jurisdiction as regards inheritance issues. For example, if women and children in a given situation were not being protected, they could approach the High Court. However, owing to the costs involved, it would be better if community courts could be approached on such issues.

Informal settlement, Omaruru

Participants at the first Ongwediva Workshop felt that, if Option 1 were chosen, customary law needed to be tightened to prevent property grabbing, and all such laws needed to be brought in line with the Constitution in all respects. In addition, it should be borne in mind that customary law accumulated over time and was usually not written down; therefore, it was easy to manipulate it.

If Option 1 were chosen, the customary law system needed to have proper avenues for recourse. For example, the cultural practice of parents nominating only one of their children as heir to their house had often caused acrimony because the other children felt discriminated against.

A participant at the second Ongwediva Workshop stressed that property belonged to



one's extended family because one inherited it from an uncle. There is no way a surviving spouse could inherit this property, e.g. firearms that belonged to her deceased husband. Certain items like beads and necklaces were also inherited through the father's line. It was felt that all property that one had inherited from family had to be returned to the family. As one respondent put it, "You don't own this property, you just drink its milk."

No feedback was recorded for Option 1 from the Omaruru Workshop participants.

Option 2: All intestate estates go to spouses and children

Priority of heirs

- Half to spouse(s) and half to children
- Failing them, to parents of deceased
- Failing them, to siblings and half-siblings
- Failing them, to other blood relatives

Pros of Option 2

- It does away with all sex discrimination in inheritance laws.
- It gives strong protection to spouses and children.
- It treats all people in Namibia exactly the same.

Cons of Option 2

- This option would overrule much of customary law and therefore might not be well-accepted by communities.
- If people are unhappy with the law, increased property-grabbing might take place.
- This approach might not protect all persons who were dependent on the deceased in practice.

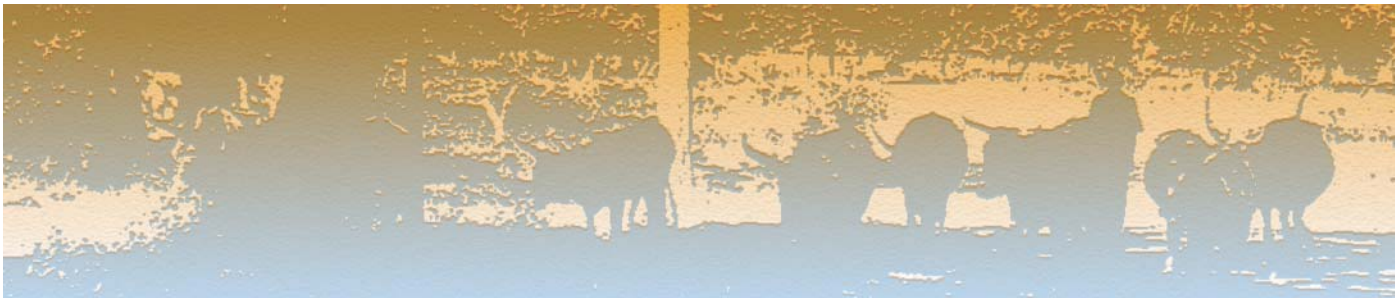
Issues for discussion

1. Would this radical change from customary law be respected in practice?
2. Do you agree with the position of the different heirs on the list of who receives the deceased's estate?

After Dr Gordon's presentation, a man from Otjiwarongo expressed the opinion that a widow who had lived with her husband and contributed to their joint estate over many years had a right to inherit from it. Dr Gordon said his research amongst women in Omaruru supported this view, even as far as all wives in a polygamous marriage should benefit from their deceased spouse's estate.

Group 1 at the Windhoek Workshop felt that, if this option were implemented, 50% of the estate should go to the surviving spouse, and 50% to the children. Next in line to inherit would be the deceased's siblings, followed by other blood relatives

Because this option excluded certain dependents, Group 2 at the Windhoek Workshop felt it would not work. Also, the option did not define which children were to inherit. If this option were adopted,



however, the group suggested that the surviving spouse's 50% should exclude any donations or properties that belonged to the deceased's family.

Other problems foreseen with this option were that it needed a strong monitoring system or penalties for failure to implement it, and it would leave some potential heirs dissatisfied.

One participant in Group 3 at the Windhoek Workshop expressed a preference for this option out of the three suggested. However, the group expressed concern about what would happen to children under this option when a surviving spouse remarried. It was suggested that the extended family address the problem if it arose. Nonetheless, it was argued, spouses might begin to see successive marriages as avenues to property accumulation. Some participants felt that a person should not be able to take assets from one marriage to another. In other words, the assets of the first marriage should be left to the children of that marriage, while asset accumulation should start afresh in a second marriage. A stronger version of this view was that any person who had not lived with their spouse for a significant period should be barred from inheriting property from that spouse's deceased estate, even if the couple was not formally divorced.

Group 3 also felt that this option was unfair if it applied to property that one inherited under customary law to use for caring for others. Another point stressed was that no distinction should be made between the deceased estate of a man as opposed to a woman.

Ms Mercedes Ovis, LAC

Group 4 at the Windhoek Workshop believed Option 2 would be respected in practice because the change from customary law would be imposed by civil law. They also agreed with the sequence of inheritance proposed.

Group 5 at the Windhoek Workshop questioned whether, under this option, a house inherited by a deceased man fro his family would go to his surviving spouse. One solution proposed was to draft an antenuptial contract excluding the house from the estate because it was imperative to specify who owned what in a marriage.

Under this option, Group 5 also felt clarity was needed in cases where there were no children, i.e. whether the surviving spouse would inherit the entire estate in such a case. In respect of children born outside marriage, there needed to be a definition of and distinction made between biological and 'social' children. The notion of illegitimate children was regarded as foreign.

With regard to a distinction being made between children and offspring/heirs, issues that needed to be considered included their age, their degree of vulnerability after a parent's death, their needs, and the equity of any distribution made. The issue of premortal inheritance was also raised as a means of preventing disputes after one's death.

Ms Dianne Hubbard and Ms Anne Rimmer of the Legal Assistance Centre during a break at the Windhoek Workshop

The new law would need to address what was to be done with items of sentimental value as well. The group felt that the timeframe relating to the distribution of an estate was also important.

Another alternative put forward by the group was to have parents inherit their child's estate. In such cases, it would be up to the parents' discretion to distribute the estate amongst the extended family.

Group 5 believed that continuous education would be essential if Option 2 were to be adopted. Traditional authorities would need to be involved in drafting the new law, and there would need to be public hearings by means of which input could be gained from the grass roots.

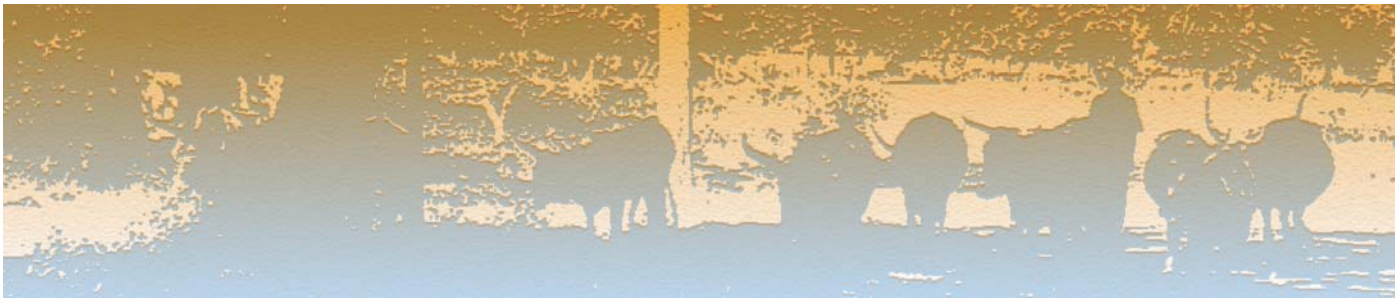
Group 6 at the Windhoek Workshop stated that, for the law to have credibility, it had to come from the people: ownership was important. They proposed that one law regulate intestate estates, but that provision be made to protect the vulnerable, e.g. widows and children. The positive aspects of customary law needed to be retained without prejudicing dependents, for example.

Where the deceased left only a surviving spouse and no children, or vice versa, it was proposed that the surviving parties concerned inherit the entire estate. The group agreed with the current order of inheritance, but added that any mention of children should automatically include children born out of marriage, and that the word illegitimate was too negative a description for such children.

In respect of polygamous marriages, if customary law provided for fair distribution of a deceased man's estate to all his wives, then the custom should be codified. However, the issue of polygamy should recognise the equality principle in line with the Constitution.

In Ms Hubbard's summary of the group sessions, one man noted that his discussion group had suggested the deceased's children should inherit 50% of the estate, the surviving spouse 25%, and the deceased's parents 25%. He added that the issue of marriages that were either in or out of community of property also needed to be taken into account, particularly since more people were tending to get married by antenuptial contract. People also needed to remember that part of the point of getting married was to take care of one's children. He stated that it was a burden for the Government to support the surviving children: this should be the surviving spouse's duty.

In addition, as a woman from the MHSS noted, when the surviving spouse linked up with a new partner, the deceased's children suffered. In cases where the children are neglected by the surviving spouse, they should have the right to claim the entire estate. Children often have more responsibility than the surviving spouse, she claimed.



Participants at the first Ongwediva Workshop felt that, if Option 2 were adopted, dependents needed to be included in the distribution as well, and that provision should be made for parents and siblings to get something. In effect, this states a preference for Option 3.

Many husbands are impoverished when the wife dies … Gender discrimination is now working against the husband as well, here in Owambo … The estate should go to the surviving spouse.

The Owambo-speaking group at this workshop noted that people had extended families (nephews, etc.) who depended on them. For those dependents, therefore, Option 2 would not work unless maintenance was included for them. The group also felt that the deceased's parents and siblings, including half-siblings, should inherit from the estate. For example, 40% could go to the surviving spouse and children, while the rest could be distributed to dependents.

However, participants at this Workshop also believed new laws were needed to make sure that women and children – as well as men – were not discriminated against. Property-grabbing occurred from either family – the wife's or the husband's. The sharing of property that originally derived from a maternal or paternal relative was always a volatile and sensitive issue and had led to disputes in some cases.

Rev. Magdalena Ya Shalongo, the Hospital Chaplain at Oshakati, made the following proposal, which was seconded by Henock Haindobo, at the second Ongwediva Workshop:

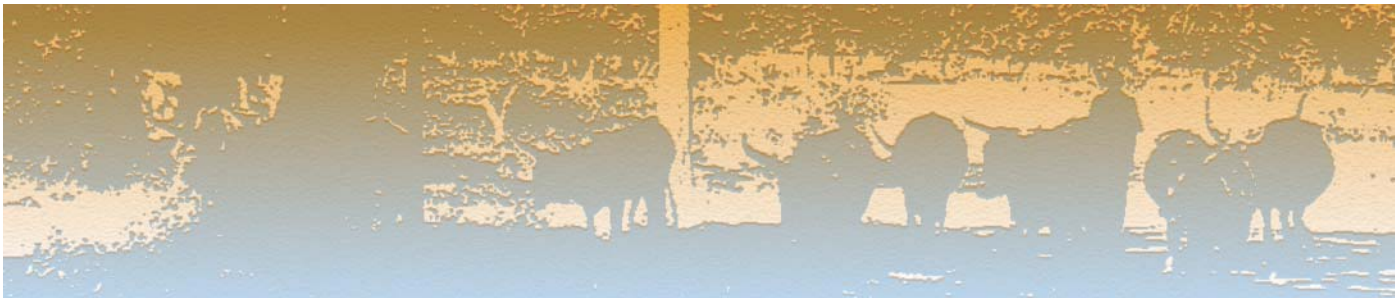
> Many husbands are impoverished when the wife dies …Gender discrimination is now working against the husband as well, here in Owambo … The estate should go to the surviving spouse. Lots of women are increasingly becoming wealthy through cattle and decent jobs. The husband looks after this livestock, but the wife's relatives claim it.

Pointing out that notions of property changed over time, the Reverend told the meeting about her own father's death. He had bought a gun, but her father's relatives had defined it as family property and claimed it as theirs. She and her siblings had to protest that they had also contributed to its purchase, and that the gun therefore belonged to them. Frequently, she said, family property – like a car – was registered in an individual's name, making it difficult to determine later who was entitled to inherit it.

The issue of remarriage was also addressed, with the group agreeing that the children of both marriages needed protection.

Participants at this Workshop felt that parents should be next in line to inherit after the surviving spouse. This was important because, in an AIDS-related death, the deceased was often a young person whose children would be looked after by his/her own parents. Overall, the group felt Option 2 could work if it were properly monitored.

No feedback was recorded for Option 1 from the Omaruru Workshop participants.



Option 3: A compromise approach

Priority of heirs

- Fixed percentage of intestate estate to spouse(s) and children, percentage to heirs under customary law – provided that no provisions of customary law that involve unconstitutional discrimination would be enforced by the State.
- Failing spouses and children, their portion would be distributed as in Option 2.

Additional measures

This approach is intended to be combined with –

- provision for maintenance of the dependents of the deceased, and
- a law reform allowing the spouse(s) and children to remain in the marital home, with this asset being distributed amongst the heirs at a later stage.

Pros of Option 3

- This option attempts to protect spouses and children whilst still respecting the right to culture.
- The refusal of the State to enforce any unconstitutional aspects of customary law would allow for gradual evolution of customary law in these areas.

Cons of Option 3

- A compromise approach might end up not satisfying anyone.

Issues for discussion

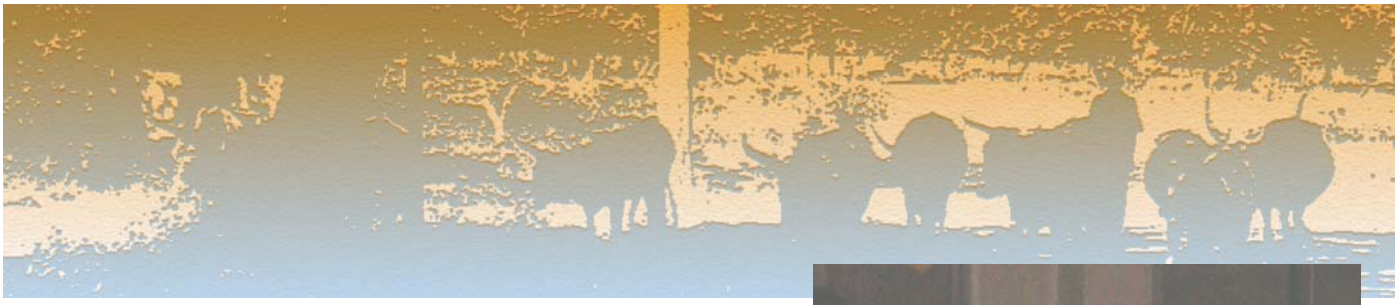
2. Would such a compromise approach be workable in practice?
3. Would this approach – together with maintenance and special treatment of the marital home – be sufficient to protect women and children?

Some members of the Group 1 at the Windhoek Workshop felt Option 3 was a bad approach because it would confuse people. Moreover, one would need to determine whether the deceased had led a customary lifestyle: customary law did not apply to a white Afrikaner, for example. There needed to be one, clear law for all so that the facts of an estate matter could be settled according to one system. If the customary law approach were used, it would be acceptable if it stated that surviving spouses and children should inherit first.

Group 1 expressed concern regarding how a lawyer would know whether or not customary law applied in a particular case. If it did, would the lawyer approach the headman for guidance on the law, or would it need to be codified?

Other members of the group felt that, in an intestate estate, the current customary laws should apply – provided they were not discriminatory.
Group 2 at the Windhoek Workshop gave no feedback on this option.

As far as Group 3 at the Windhoek Workshop was concerned, Namibians living in the north would



accept Option 3. It was inclusive because everyone benefited and it would give rise to fewer disputes. Moreover, it resembled current practice rather closely in many communities.

The group accepted that, if there were no customary law heirs, the entire estate would be inherited by the surviving spouse and children under this option. If at least 75% went to the surviving spouse and children, it would protect the estate against claims by greedy relatives.

Some members of Group 4 at the Windhoek Workshop felt that Option 3 was not workable because it would give rise to disputes. Others believed distributing proportions of the estate would instead prevent disputes and property-grabbing, and that it empowered all parties involved in an estate.

Group 4 agreed that, with maintenance and the marital home, women and children would be sufficiently protected if this option were implemented.

Contributing to the Windhoek Workshop

Group 5 at the Windhoek Workshop gave no feedback on Option 3.

The members of Group 6 at the Windhoek Workshop questioned the apparent assumption behind this option, namely that spouses and children were not heirs under customary law in an intestate estate.

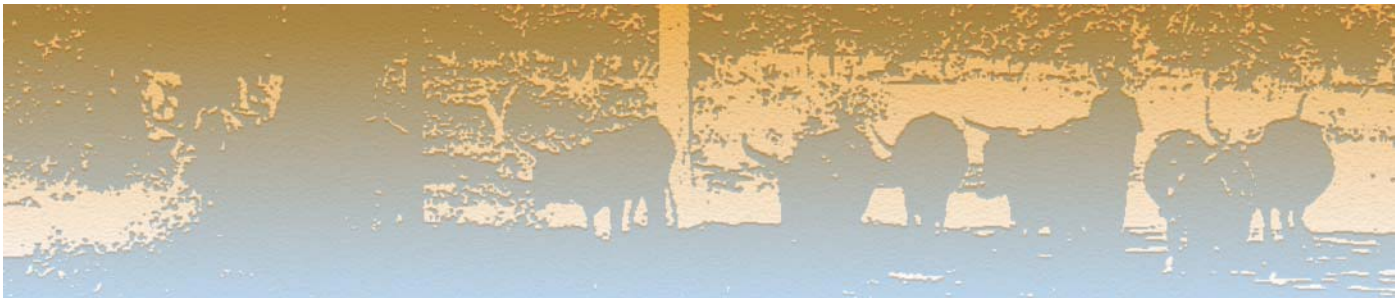
In terms of implementing Option 3, they felt that a compromise was difficult in the case of administering communal land issues. It needed to be clear what proportion of the deceased estate would be considered for distribution to (a) the family, and (b) the surviving spouse and children.

If this option were indeed workable, it would definitely be sufficient to protect women and children. Some in the group felt strongly that any option first needed to provide sufficient protection for widows and children. If this condition were met, then maintenance issues fell away.

Participants at the first Ongwediva Workshop found Option 3 definitely workable. They suggested 80% of the estate be apportioned to the surviving spouse and children, while 20% should be distributed amongst the deceased's parents and other relatives.

There was a proviso to this view, however; property such as cattle that belonged to an uncle, for example, was not to be regarded as part of the deceased's estate. Nonetheless, there was disagreement about whether it was always 100% clear who had a right to which cattle.

The discussion about the percentage to be apportioned to the spouse and children on the one hand and customary heirs on the other started out at 50/50 before shifting to the final figure of 80/20. The



group also felt that, if the estate was very small, the new bill should include a clause to say that customary heirs would not inherit.

The group believed it was essential to include maintenance for all dependents.

Some respondents related that certain married men deliberately did not make a will because they knew their relatives would take everything when the men died. In effect, therefore, these men were leaving everything to their relatives. This practice confirmed the view that the wife was a 'foreigner' to her husband's family.

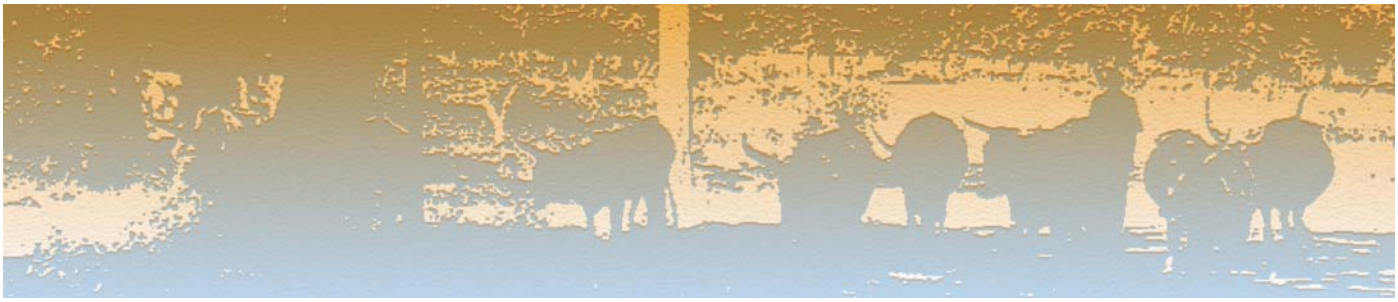
Property such as cattle that belonged to an uncle ... was not to be regarded as part of the deceased's estate.

In respect of cattle, the family who had placed them in a deceased man's custody will reclaim the animals. However, the family might also take more cattle than they are entitled to. A surviving spouse's family might, in this situation, simply permit this claim to the cattle because of the belief that to get them back could bring very bad luck.

Cattle were branded with the mark of the head of the household. Sometimes, goats and sheep had a coloured clip on one of their ears to identify their owners – who need not be the head of the household. Usually, the calves belonged to the person who owned the cattle. It could also happen that a calf was given to someone else by the person looking after the cattle.

Participants at the Windhoek Workshop

One person in the group stated the common belief that "Cattle belong to the men". One woman claimed, "If I give my husband money to buy cattle, everyone thinks the cattle are his. Even I think the cattle are his!". Other views expressed included the belief that "a woman cannot leave [bequeath] cattle". Conversely, as someone else in the group suggested, "If a man gives a woman some cattle, she should give them to a friend to look after and not leave them at the homestead." One of the group



members confirmed she owned "about 15 cattle", and related that it was traditional to buy a head of cattle when one got one's first job.

Participants at the second Ongwediva Workshop felt it would be very difficult to allocate a specific percentage to the potential heirs involved. Also, implementation of the chosen procedures would need to be monitored very closely. Another consideration was who would calculate the percentages to be applied. Overall, the group felt this option was perhaps simply too complicated to implement. They suggested it could work in respect of cash, but not for land or omba (a traditional item of jewellery).

The Omaruru Workshop group gave no feedback on this option.

Issue 1: Maintenance for the deceased's dependents

Pros of allowing maintenance claims prior to distribution

- It is fair that assets of the deceased should be applied to meet the basic needs of the deceased's dependents before anything else, so that the death does not create financial hardship for anyone.
- Providing basic maintenance to all dependents might reduce inheritance disputes.

Cons of allowing maintenance claims prior to distribution

- In small estates, maintenance might eat up most of the assets.
- The envisaged system of maintenance would require dependents to make application to the agency administering the estate, which might be hard for some people in rural areas.

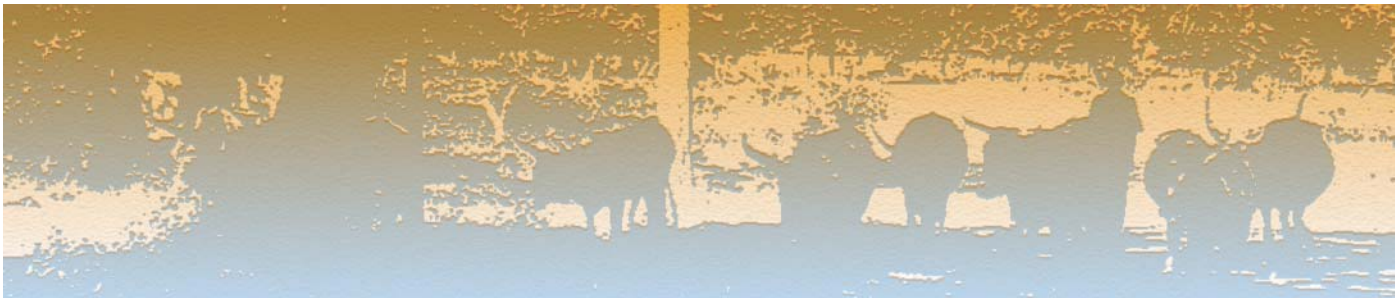
Issues for discussion

3. If maintenance is provided, who should be eligible to claim maintenance?
4. Would the provision of maintenance for dependents of the deceased reduce disputes about inheritance?
5. Would it be a problem in small estates if most of the estate went to maintenance?
6. Should maintenance be provided only in intestate estates, or even if there is a will (if the will does not provide for all the dependents)?
7. How could the application process be made more accessible for people in rural areas? Could community courts help?

Group 1 at the Windhoek Workshop felt that maintenance for dependents needed to be considered before the estate was distributed amongst heirs. Firstly, specific provision needs to be made for surviving spouses. As regards who else would qualify as a dependent, they suggested possibly only legal dependents be considered, with some special provision made for de facto dependents, e.g. elderly family members, persons with disabilities, minors, and others who cannot help themselves.

Group 2 at the Windhoek Workshop gave no feedback on this issue.

The members of Group 3 at the Windhoek Workshop noted that, under customary law, some dependents would be taken care of. In the new bill, actual dependents should be provided for – at least



for a limited time. Maintenance should also be available to children born outside marriage, who would otherwise be unlikely to benefit from the deceased estate. A new law should ideally cover maintenance issues in testate as well as intestate estates.

In respect of maintenance, Group 4 at the Windhoek Workshop proposed that such support should be available only to the children or only to the spouse – but not both. They also believed that providing maintenance for dependents would reduce disputes. As regards small estates, the group worried that maintenance allocations would drain the estate. They proposed that family members should instead assist with caring for surviving children. Alternatively, children would need to go to orphanages. In the case of testate estates, maintenance should be considered only for those not specifically nominated as beneficiaries in the will.

The group also felt that community courts would ensure that there was increased awareness about inheritance issues. The Government and non-governmental organisations also had a role to play in facilitating applications for maintenance from a deceased estate.

Group 5 at the Windhoek Workshop regarded it as imperative to define who could be classified as dependent. They also felt that the timing of a maintenance claim needed to be taken into account, since someone who did not qualify for maintenance at the time of the deceased's death may become eligible for maintenance later, if their circumstances change.

The view of Group 6 at the Windhoek Workshop regarding maintenance was that only the dependents should be entitled to it. They also felt that providing for maintenance would reduce disputes if they involved livelihood issues. However, in terms of dependents who had a right to maintenance, the group questioned whether they should have inheritance rights as well.

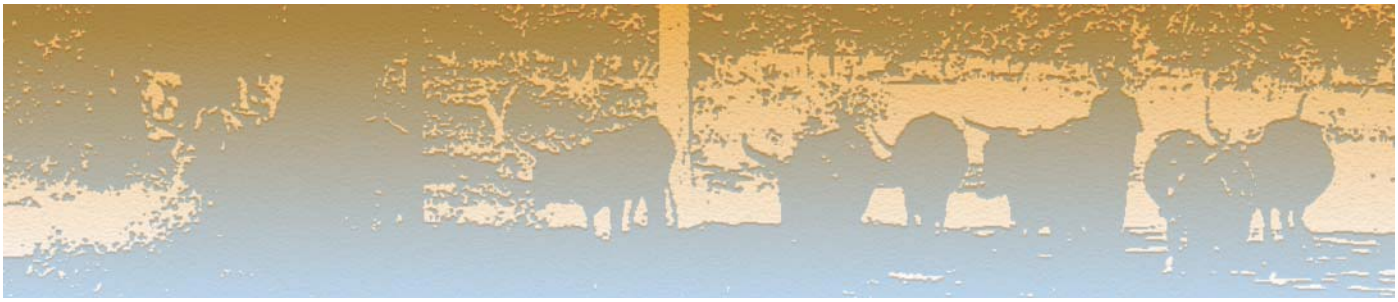
In respect of small estates, Group 6 cautioned against using the entire estate for maintaining dependents because disputes would certainly ensure.

The group pointed out that the Master already had wide powers to protect minor children if they were not provided for in a will. Nonetheless, having to provide for all dependents might compromise one's right of testation (writing a will).

The group called for the urgent institution of community courts because they needed to be involved in facilitating maintenance claims in rural areas. It was also felt that these courts needed to have law enforcement powers, which would allow communities to have direct and close access to such facilities.

In Ms Hubbard's summary of the group sessions, she noted that most workshop participants had agreed on potential maintenance recipients being considered during the administration of an intestate estate. There were also some reservations expressed about who such recipients would be and how the allocations would be determined. For example, possible maintenance recipients might only be people who would not otherwise benefit from the estate. It was obvious also that Namibia's diversity would make it hard for Parliament to draft this law.

A freelance researcher stressed the need to define dependent because all genuine dependents needed to be regarded as beneficiaries in an intestate estate.



A representative from Namibian Men for Change was concerned about the fact that people forgot about the deceased's mother when it came to an estate. Men got rich because of their mothers, he said. It was not fair if, for example, a man's surviving spouse received 50% of his estate and his children received the rest: what about the man's mother?

Maintenance is becoming important now because of the AIDS crisis.

An MP expressed the opinion that if a man died childless, his widow should be entitled to half his estate. The remaining half could go to his mother. It could be left to his mother's discretion to distribute her share to whomever she wished. The deceased's parents should be taken into account if they needed support.

Ms Hubbard noted that, in Zambia, a percentage of an intestate estate went to the surviving spouse; a further percentage went to the deceased's children, and a percentage went to his parents. There was, however, some debate as to the fairness of the proportions allocated to each such beneficiary.

A male member of one of the discussion groups related that their group had had a lawyer among them, which had enhanced their group's contribution. He felt that certain specific persons should inherit, namely the surviving spouse, the children, and the deceased's parents. However, he wanted it specifically recorded that each such party had an obligation towards the marriage itself as well. Wives or husbands were sometimes simply abandoned, especially when they became sick. The sick person was simply given over to his/her family to look after. When that person died, it was ironic that those same people who had deserted their partners were there to claim a share of the deceased's estate. It should be emphasised that marital benefits were associated with marital obligations.

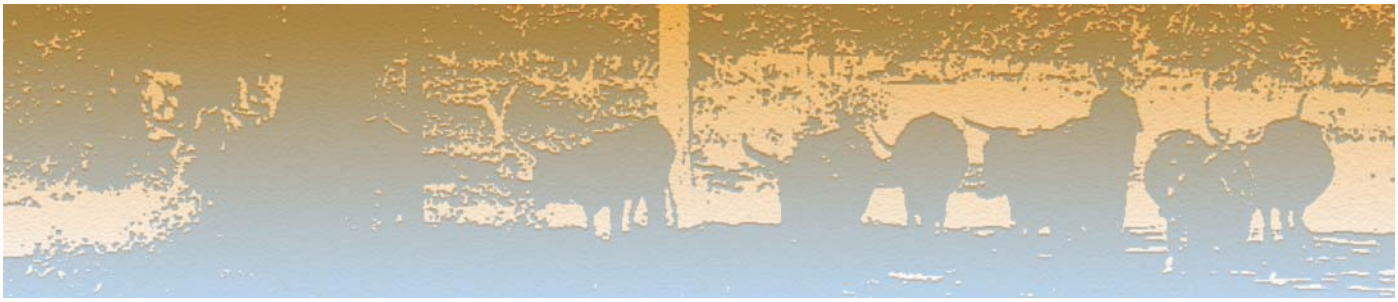
A male member of the Gibeon Village Council in Hardap stated that the surviving spouse should be given a chance to claim from her husband's estate. With regard to those affected by HIV/AIDS, sometimes people welcomed orphans into their homes without officially adopting them. These caregivers should also be granted the legal right to claim maintenance from the deceased parent's/ parents' estate.

Another man stated that a definition of dependent was essential. He also put forward that bona fide dependents should inherit a maximum of 50% of an intestate estate.

In response to a question on maintenance for persons who are informally cohabiting as husband and wife, Ms Hubbard explained that such persons have at present no right to inherit or to claim maintenance from their partner's estate. However, a new law on maintenance could include such informal partners.

Participants at the first Ongwediva Workshop believed maintenance should be provided for dependents, even if there was a will excluding them.

Those who attended the second Ongwediva Workshop suggested that maintenance should cover not only the deceased's biological dependents, but also those who had been living in the deceased's household prior to his/her death. The group also felt that the estate had to provide for those who had collectively contributed to the deceased's welfare during his/her life.



Another factor to consider in respect of the maintenance issue was that, as they themselves aged, people would look after their biological mothers and not their 'social' or foster mothers.

The Omaruru Workshop participants felt strongly that widows and orphans needed to be protected. They felt customary law was not effective in this regard, although not all households mistreated widows. Widows were rarely taken care of, however. As one participant said, "Maintenance is a tough issue because Hereros send their children to their grandparents. Where kinship ties are strong, it [maintenance] is not an issue; but maintenance is becoming important now because of the AIDS crisis."

Another said, "Sometimes children are inherited but they are neglected because the heirs want the property that goes with the children."

Many old people depended on their children for support. They should be entitled to claim maintenance if their child died.

Issue 2: The marital home

- Should spouses and children living in the household of the deceased at the time of the deceased's death be allowed to continue living there?
- If this approach were adopted, the house could eventually go to the usual heirs.

Pros of allowing the spouse and children to continue living in the deceased's household

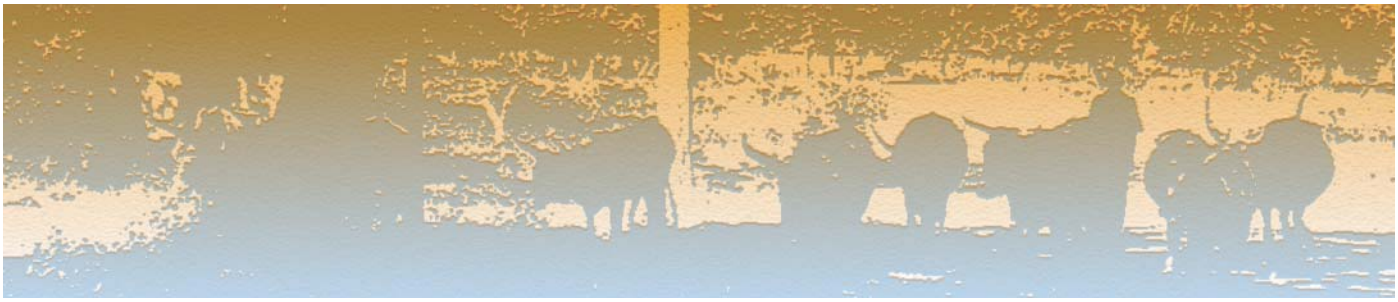
This would make the death less disruptive for the household of the deceased.
The Communal Land Reform Act already allows the surviving spouse to remain on the deceased's communal land. If no provision is made for households elsewhere, then it could be argued that spouses outside communal areas are being discriminated against as compared to spouses inside communal areas.

Cons of allowing the spouse and children to continue living in the deceased's household

The house might be the primary asset in the estate, with the result that the ultimate heirs might feel unhappy that their inheritance was deferred.
This might create conflicts of interest between children of the deceased who were living in the household and children of the deceased who are living elsewhere – especially, for example, where a male deceased has children by several different women.

Issues for discussion

1. Should this approach be adopted?
2. If so, should it apply as long as the spouse is alive, or just until all the children are adults?
3. What if the spouse remarries?
4. What if there is more than one spouse?
5. Would other children of the deceased who were not living in the household complain about this?
6. Would other heirs complain about this if the house were the most valuable part of the estate?
7. If this rule is used, should it apply only in intestate estates, or even if there is a will?



In the opinion of Group 1 at the Windhoek Workshop, dependents should be allowed to stay on in the marital home until they reached majority or the surviving spouse remarried. This was especially important in the village context. In urban areas, people needed to be aware that home loans needed to be settled before other claims were made on an estate, and all heirs needed to agree on who was responsible for paying accounts relating to the estate.

Participants at the Ongwediva Workshop

Group 2 at the Windhoek Workshop gave no feedback on this issue.

As regards the marital home, most of the members in Group 3 at the Windhoek Workshop believed that the surviving spouse and children should be allowed a continued right of occupation until such time as the spouse remarried or the children reached majority. Some reservations were expressed in this regard, however. For example, it was pointed out that problems could arise in Herero communities because of the customs surrounding the Holy Fire. In addition, if a widow did not wish to marry her late husband's brother, as was the custom in some Namibian communities, there would be objections to her staying in the marital home with her children.

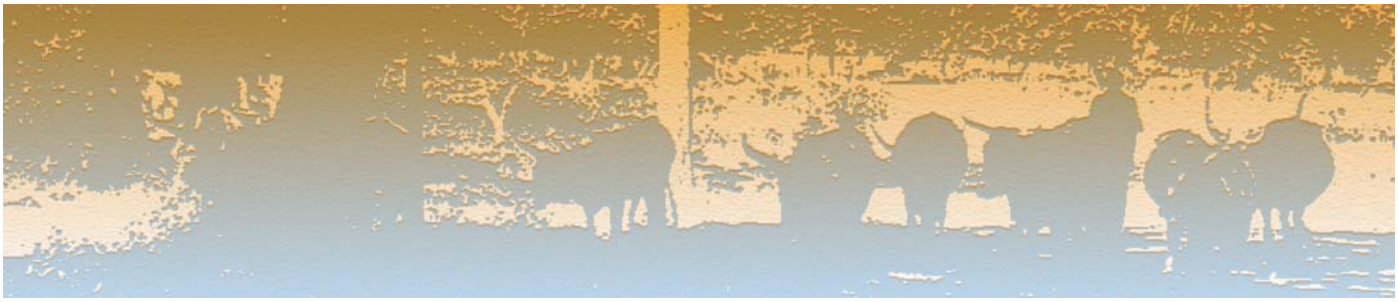
Group 4 at the Windhoek Workshop also felt the surviving spouse and children should have the right to continue living in the marital home until the spouse's own death. The group added that the home should also not be stripped of any assets within it. However, the right to occupy should cease if the surviving spouse remarried. In this case, the house should be sold and the proceeds divided.

Group 5 at the Windhoek Workshop gave no feedback on this issue.

Group 6 at the Windhoek Workshop agreed that the surviving spouse and children should continue to live in the deceased's household. However, cognisance should be given to the fact that the home sometimes had to be sold to defray debts, expenses, home loans, etc. They also suggested that the period of residence should last only until the spouse remarried or died.

In Ms Hubbard's summary of the group sessions, she noted that one of the issues that seemed to be coming out of the group discussions concerned different kinds of property. The law needs to make a distinction between property that is inherited with a duty to satisfy family obligations and property which wives and husbands acquire together during their marriage.

During the plenary discussions, a male participant from Omaheke felt it would cause problems if a man's widow remained in their marital home, especially if there was a Holy Fire and if she was not willing to marry a brother or uncle of her late husband. The lawmakers need to guard against subtle changes to customary law. However, it would be advisable to have a uniform inheritance law because



of cross-cultural marriages, so that everyone would be sure of being treated fairly. Such uniformity would eliminate many problems.

> Sometimes children are inherited but they are neglected because the heirs want the property that goes with the children.

The first Ongwediva Workshop group did not give any specific feedback on this issue, although some said it was better for the children to share the house after a parent's death.

Those attending the second Ongwediva Workshop said it was difficult to determine who the owner of the marital home was. They also pointed out that magistrates did not know much about the various communities' customs, especially the role of uncles, in relation to the inheritance of the marital home. One participant felt that the marital home was no longer much of an issue because the Communal Land Reform Act regulated it.

Concerning children, another member of the group related that when a man died, resentment often simmered between children born within and outside his marriage. In fact, it was the children who suffered most from a parent's death as they were frequently forced to leave the marital home.

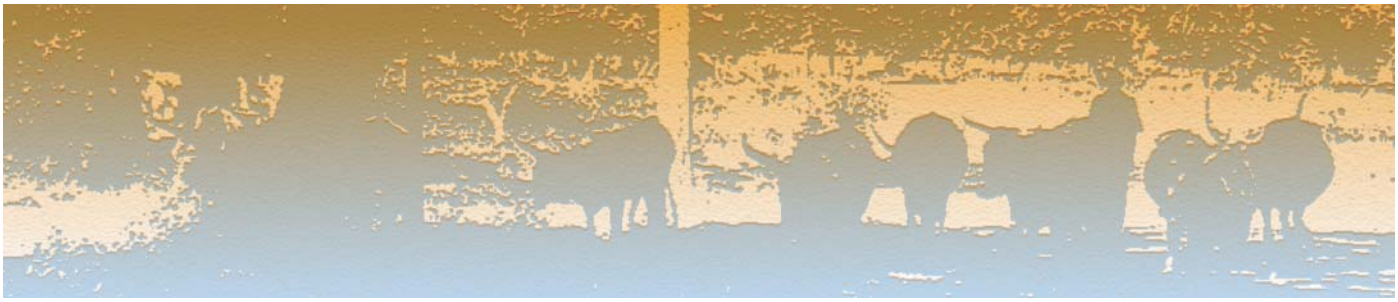
Another point of conflict concerned the payment of life insurance claims. It was not clear who was entitled to claim the proceeds of these policies, for example. The group also mentioned that some mothers would stay on in the marital home only in order to access these proceeds through the children.

One participant from the Omaruru Workshop stated that, when someone's husband died, relatives would arrive in groups – often already on the second day of mourning – to take everything, leaving the widow penniless. They reportedly claimed to be coming to take "remembrances". The participants felt that assets should not be stripped from a widow while the home was still occupied by her.

The group also felt the issue of whether the surviving spouse and children should occupy the marital home was problematic because the notion family home encompassed more than just one's household. However, if the married couple had owned their own home together independently, the widow should be entitled to keep it. The group also felt that one needed to encourage people to keep their children at home rather than have relatives look after them.

Another participant noted that what happened to a widow depended on her age: if she was young, she needed to go back to her family community and remarry. One of the group members related how one man, who had committed suicide, stipulated that his widow should go back to her family, but that his own family had to take care of her. His wishes were hotly disputed, however.

Another point raised was that men should be encouraged to start their own homes rather than move to their father's house. One of the respondents also mentioned that, "In the past, cross-cousin marriages within the same clan meant that the couple lived in the uncle's house and, thus, you were not forced to move upon widowhood." In other words, marrying one's cousin granted one protection as regards the marital home. Another member of the group confirmed the practice of widows having to return to their families: "When outsiders get married, they must go back."



Issue 3: Administration of estates

Pros regarding administration by the Master of the High Court

- The Master's Office has specialised skill in the administration of estates.
- Many people complain that magistrates appoint inappropriate people as executors of the estate, and allow executors to administer estates for their own benefit.

Cons regarding administration by the Master of the High Court

- The Master's Office would need to set up branches throughout the country to become accessible to everyone, which would be expensive.

Issues for discussion

1. What administrative authority would be most accessible?
2. What administrative authority would have the necessary knowledge and experience to do the job well?
3. What are other pros and cons of the different options?

During the plenary discussion after Dr Rob Gordon's presentation, he responded to a question from a National Council MP on what advice he had for Namibian lawmakers. Dr Gordon stated that local political scientists often spoke of the 'weak' State in Namibia. In his view, the State should rather be seen as inefficient. He gave an example from Papua New Guinea, where because of their efficiency in dealing with legal matters quickly and effectively, traditional courts had more legitimacy than the State – even if some of these courts' judgements were wrong. He felt the point was to provide people with alternatives.

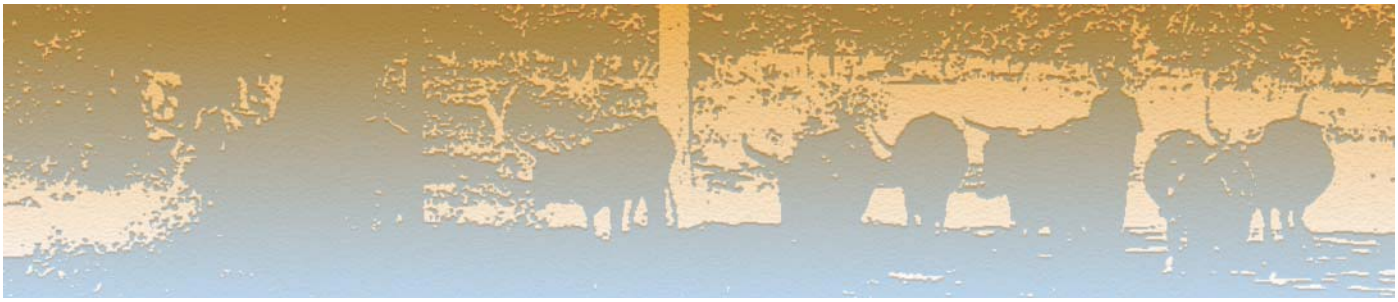
Probably due to time constraints, Groups 1, 2, 4 and 5 at the Windhoek Workshop gave no feedback on this issue.

Feedback from Group 3 at the Windhoek Workshop included a suggestion that traditional leaders be involved in the administration of estates in their areas of jurisdiction. This suggestion drew strong support from the group.

Group 6 at the Windhoek Workshop felt that the office of the Master of the High Court should be decentralised as the only workable solution to making the administration of estates more efficient. They would expressly exclude magistrates from being involved in estate administration. They also stressed that liaison between community leaders and community courts was vital.

In Ms Hubbard's summary of the group sessions, she stated that supervision was very important. It was also important to know what government body would be responsible for appointing the executor and supervises the estate administration. She noted that one of the discussion groups felt very strongly that traditional authorities should have a role, albeit not an exclusive one.

During the plenary discussions, a male participant felt that the Master of the High Court should appoint executors and supervise their administration of estates. He also suggested that the Office of



the Master should be decentralised and brought physically closer to the people it served. He also urged liaison with local traditional authorities. He proposed that members of local traditional authorities serve on regionalised branches of the Office.

A man from the MGECW noted that the Master of the High Court was a qualified person that controlled and monitored the administration of estates and appointed executors. In practice, of course, magistrates were authorised to issue letters appointing executors. However, disputes often arose regarding a magistrate's appointment of an executor. The speaker therefore suggested that it needed to be very clear who should supervise the administration of an estate. In respect of small estates, executors could not expect anything more than a small token of thanks – sometimes, in communal areas, only a plate of food.

Ms Hubbard referred to LAC research that had found there was often a race to get to the magistrate first with the death certificate. The question was how the Master would know for sure whom the family had chosen as the executor.

One man suggested that, because magistrates' offices had always administered estates, it would be appropriate to let them continue doing so.

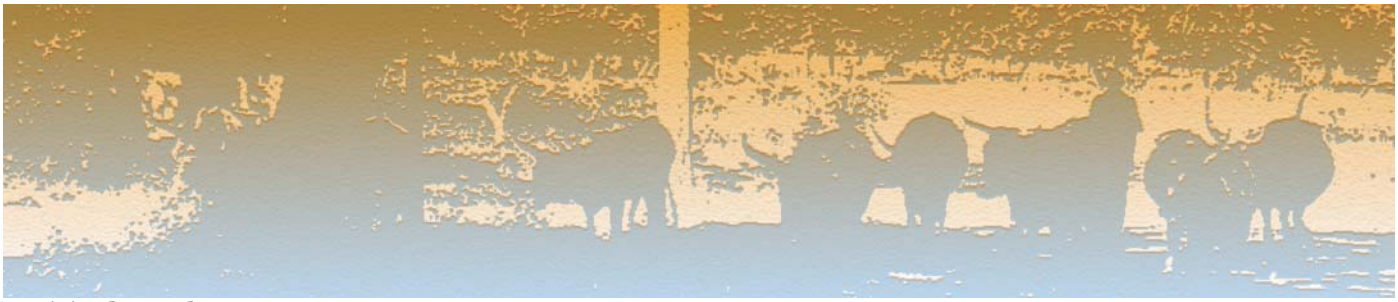
Ms Zimba-Naris mentioned that, in respect of inheritance disputes, the inclusion of traditional authorities should be considered. The new law could require that one first approached one's traditional authority to resolve a dispute. If they were unable to solve the problem, one went further on up the line to seek assistance. Traditional authorities, as custodians of customary law, should at least be first in the hierarchy of whom to approach to resolve an inheritance dispute.

A representative of the Kambazembi Royal House reported that he had been able to resolve an inheritance dispute at rural level. Sometimes the magistrate's court was too far from the village, or the person did not have the money to get there. It would be a good idea to empower traditional authorities to deal with such disputes, therefore.

A representative from the MHSS agreed that the Master of the High Court should continue to supervise the administration of estates. For example, social workers had to submit reports to the Master. On the strength of those reports, the Master was able to appoint suitable guardians for the surviving children. However, owing to the slowness of estate administration, the speaker agreed that the Office of the Master should be decentralised. However, magistrates should retain their current powers in respect of estate administration because they could be objective.

Ephesians 4:31
"For this reason a man will leave his father and mother and be united to his wife and the two will become one flesh."

A man representing the ELCRN in Windhoek stated that most of the problems relating to estate administration took place in rural areas. Thus, traditional authorities should not be forgotten in terms of carrying out the law. They should be empowered with skills and education to contribute



positively to the estate administration process, and should assist others with understanding local customs.

A freelance researcher stressed the need to bring Government to the people, but agreed that it would be a difficult process in the case of decentralising the Office of the Master of the High Court.

Establish Local Inheritance Boards made up of councillors, Chief's representatives, a social worker, and a magistrate. These proposed boards should also employ the services of a full-time investigator.

One participant stated that, since the Government did not assist people in living their lives, it was not reasonable to expect it to help people solve inheritance problems.

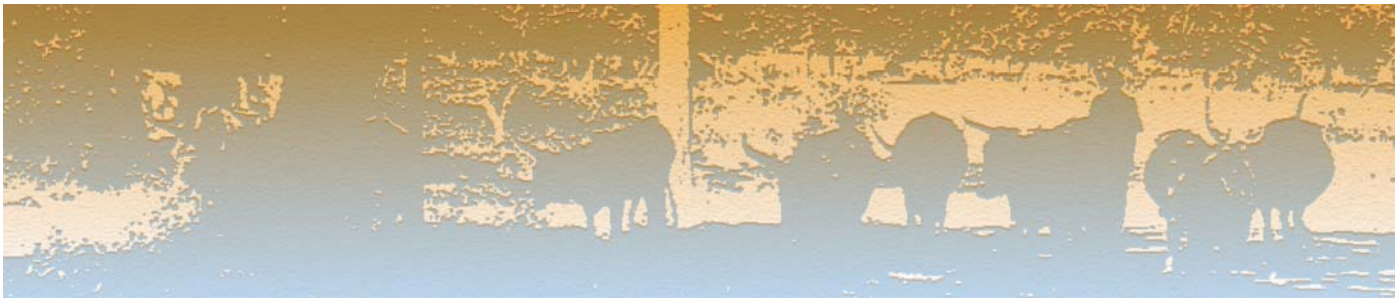
A representative of the Otjozondjupa Traditional Authority suggested that social workers report to a traditional authority rather than the Master. He stressed that there should be no loopholes in the law because inheritance and the issues that related to it were sensitive matters. Stating that he spoke on behalf of all traditional leaders in Namibia, he reminded the audience that some of the things that such leaders did were not part of customary law.

A woman who represented Women's Action for Development felt that, when one spoke of traditional leaders, one was always respectful. However, when it came to something as personal as writing a will, one could not always trust one's leaders. For example, local magistrates gossiped about other people's estates in the social arena. She also stressed that, although each community had traditional leaders, they did not have the experience or education to deal with certain matters. Moreover, their presence had not stopped the suffering of women. She added that Herero women could not stand up to their traditional leaders because they were all men.

Traditional leader, Ongwediva

Participants at the first Ongwediva Workshop gave no feedback on this issue.

One of the members of the second Ongwediva Workshop served as a Prosecutor at the Oshakati Magistrate's Office. He suggested that a Local Inheritance Board be established in areas where there were grave or disruptive inheritance disputes. The members serving on such a board should consist of councillors, Chief's representatives, a social worker, and a magistrate. The proposed Board should also employ the services of a full-time investigator. All estates would then need to be processed by the Board at some point. Where a Board member had an interest



in a particular estate, s/he would need to recuse him-/herself. One option to consider was whether or not the Minister should be empowered to establish such Boards in areas where inheritance disputes were problematic.

Another participant felt that, before an estate was finally distributed, that fact should be advertised on the local radio, etc.

With regard to wills, one participant stated the following: "Everyone says people should draw up wills, but none of us in this room have. Maybe a will should only be to appoint an executor."

> Customary law is here to stay. ... However, customs passed down through the generations could be distorted for personal gain.

A participant at the second Ongwediva Workshop stated that headmen did not really get personally involved in estates; they simply sent a representative as an observer.

At the Omaruru Workshop, it was stated that an elderly uncle was usually appointed as executor of the deceased's estate. In some communities, the deceased's mother's brother was a very powerful person, especially at an older age. Such an uncle was protected by tradition. For this reason, the new law needed to supervise the uncle's administration of his nephew's estate.

General comments

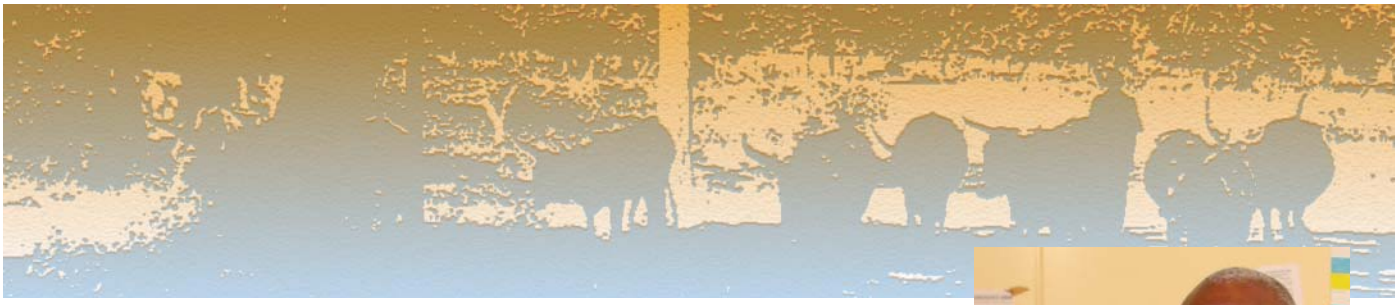
Group discussions, Windhoek Workshop

Marriage and divorce

Ms Hubbard pointed out that there were currently two areas of law reform involved in issues of inheritance: the laws of marriage, which determined what was in an estate, and the laws of inheritance. Thus, the law of marital property and inheritance have to be seen together.

An LAC representative added that it was also vital to define blood relative. For example, upon marriage, a woman was regarded as part of her husband's family. The couple might amass property together for the duration of a 20-year marriage. However, when the woman's husband died, she was suddenly no longer regarded as part of his family.

One of the Omaruru Workshop group members related that bitterness prevailed in cases of divorce where the wife had contributed to the marital home. Problems were caused where a man remarried before he died: the group thought consideration should be given to the divorced wife, who could be entitled to part of the deceased's estate.



Types of property

Ms Hubbard stated that the various kinds of property needed to be defined. Clear definitions could do away with a number of problems.

It came up repeatedly in the discussion of various issues that the inheritance of cattle presented special problems that are difficult to address.

A man from the MGECW suggested that donations should be excluded from an estate. What should also be taken into account was how to deal with family members who had worked for one and had enriched one's estate during one's lifetime.

One man suggested that, before getting married, one should declare any family property or donation. This would help when one of the spouses died.

An LAC representative suggested that if a widow inherited the bulk of her husband's intestate estate, one possible route to protect the extended family was to exclude from the estate any property that had come into the marriage from the husband's family.

Owambo Senior Headman

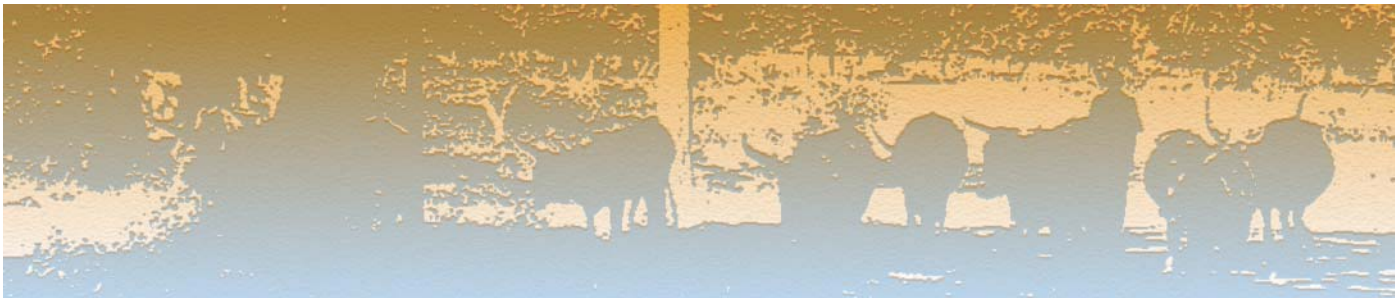
Property-grabbing

A number of Omaruru Workshop participants explained that Damaras did not believe in property-grabbing. One's children inherited one's property, although some flexibility in this custom was noted. For example, one of the respondents had inherited his shop from his uncle. This was because his own children born out of wedlock had been regarded as incompetent.

One member stated that those who stole from a deceased estate were mostly "brothers". The group agreed that a clear message was needed so that what was left in an estate had to be inherited by the deceased's children.

All Omaruru Workshop participants were single parents. There was a common belief in the community that men died because they had been bewitched. As regards grabbing the deceased's property, it was thought that this was done to force a widow to leave her late husband's community. In terms of the community's kinship system, if a husband had contributed much to a particular family and his wife died, he was entitled to marry her younger sister. The matrilineal line had extra power, because people would only take those in their own matrilineage into account.

Everyone in the community knew who was guilty of property-grabbing, but nothing was done about it. The group felt they needed an 'informed outsider' like a Member of Parliament or community leader to assist beneficiaries with distributing an estate.



Wills

Group 3 at the Windhoek Workshop added the following general comments on wills to the debate:

- Will-writing needed to be more accessible so people could 'opt out' of the chosen option by will.
- More local people (e.g. pastors) should be trained to help write wills.
- Wills made the deceased's wishes clearer, and many people used them.
- There needed to be a mechanism in place to make sure that, if there was a will, it was respected.
- Wills would be contested if they applied to inherited property meant for other family members.
- People should be encouraged to make their wills early in life, before they fell ill.

The Omaruru Workshop group noted that even if there was a will, serious conflict often arose if the will went against one's culture.

The difficulties of dealing with inheritance

During the group discussions at the Windhoek Workshop, it was clear that no one felt they had 'the answer'. One man from the MGECW stated that it was up to Namibia's lawmakers to find out which was the best option. The process would need time, but the workshop was a good achievement towards this end. He noted that all of the groups had done their best and their contributions were all valuable because these were sensitive issues.

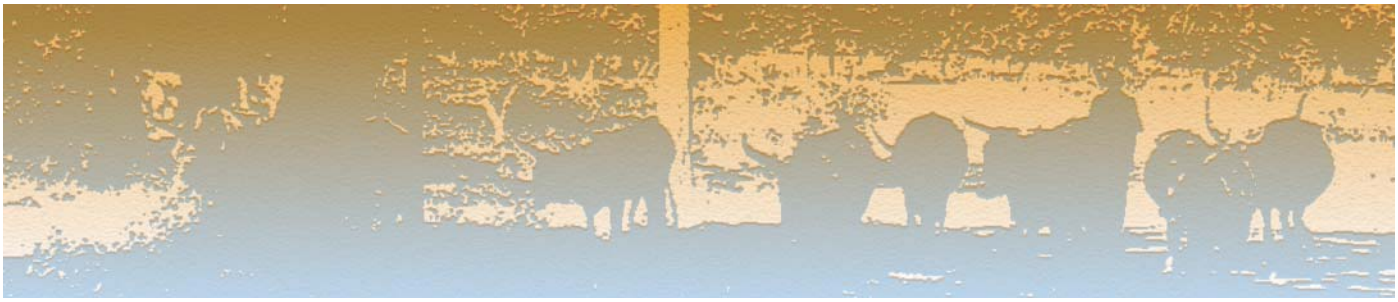
An MP stated that the inheritance issue as a whole was very complex and had to be recognised as such. It needed to be understood thoroughly by everybody, and the draft bill had to be sent to all beneficiaries for their blessing and concurrence.

Another woman remarked that people did not like change. However, change was necessary and we had to accept and trust that the Government was there to protect every one of its citizens.

A representative of the Kambazembi Royal House stressed that the draft bill on inheritance should be referred back to the communities to see how it fitted in with customary laws in the various communities. He also suggested that similar workshop discussions be held in the rural areas for people who had been unable to attend the Windhoek Workshop.

Participants at the first Ongwediva Workshop stressed that none of the proposed options would work without a big public education campaign.

Traditional rural Herero home



Experiences of other countries

The LAC has compiled here a range of sources on inheritance issues in other countries in southern Africa. The experiences of other countries can give insight to Namibia on effective and ineffective law reforms, and on pitfalls to avoid. All of the material quoted in this section comes from sources within the countries in question or from international studies.

South Africa

LAW REFORM COMMISSION RECOMMENDATIONS ON INHERITANCE

The purpose and nature of rules of succession

Rules of succession are designed to counteract the disruptive effect of death on the integrity of a family unit. The law therefore seeks to secure the material needs of those who were most closely related to the deceased. Given the profound changes that have occurred in the society and economy of South Africa, a major concern of this Discussion Paper is to amend the customary law of succession so that it can cater more effectively for modern family forms.

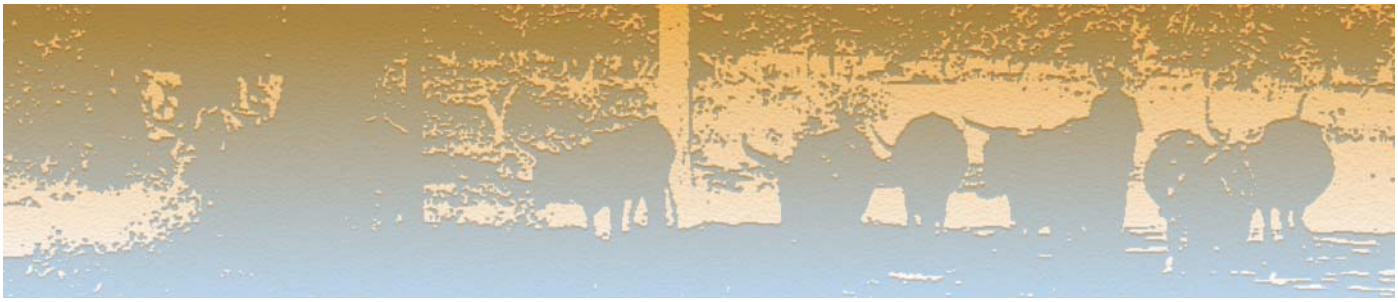
Customary law and the bill of rights

While the Constitution requires respect for the African legal heritage, it also stipulates that the right to culture, and hence customary law, is subordinate to the right to equal treatment. Moreover, because the right to equal treatment is applicable to the private relationships of individuals, any rules of the customary law of succession that discriminate unfairly on the grounds of sex, gender, age or birth must be changed.

The dual laws of succession

South Africa currently recognises at least two different systems of succession: the common law (together with the statutes amending it) and various closely related customary laws. Many of the customary rules currently used by the courts are not only in conflict with the principle of equal treatment but are also out of step with social practice. Instead of attempting to reform customary law, the common law could be substituted. While this solution would have the advantage of providing a single law of succession for the whole country, it should not be adopted without careful consideration, for different cultural groups may be unwilling to surrender their legal heritages. Maintaining a policy of dualism accepts the fact of South Africa's legal and cultural diversity, a reality that the Constitution demands we respect.

For as long as different laws of succession are retained, rules will be required to specify when customary law or the common law should be applied to the facts of particular cases... [T]he Law Commission made recommendations for reforming the existing choice of law rules. The Commission felt that they are unnecessarily complicated and are based on criteria that are no longer relevant. One of these criteria - the form of a deceased's marriage - may be kept as a rough guide to the applicable



law, because it is simple and easy to apply, but the form of a marriage is not a completely reliable indication of a person's cultural orientation; nor, of course, is it of any use where someone was unmarried. Flexibility is therefore necessary to ensure that whichever law is applied will reflect a deceased person's cultural orientation.

Intestate succession

The customary law of succession, in its official version at least, discriminates against women and young men. [T]he law is no longer effective to achieve its major social purpose, which is to provide a material basis of support for the deceased's surviving spouse and immediate descendants. The time has therefore come to amend customary rules that discriminate on grounds of gender, age or birth and to give the deceased's immediate family more secure rights.

This goal can be realized by applying the Intestate Succession Act to all estates, even if a deceased was subject to customary law… [T]he following sections will operate to determine the order of succession in cases of total or partial intestacy: s 1(1), which secures the inheritance of surviving spouses and children and, failing them, parents, siblings and more remote kin; s 1(2), which provides that illegitimacy does not affect the capacity of one blood relation to inherit the estate of another blood relation; and s 1(4)(e)(i), which provides that an adoptive child is deemed to be a descendant of its adoptive parents.

(South African Law Reform Commission, Succession under Customary Law, Discussion Paper, Project 90)

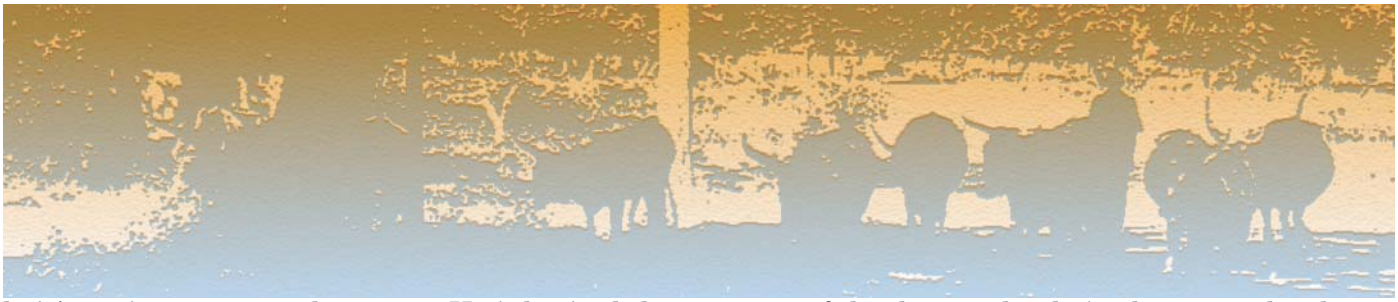
People do not like change. However, change is necessary and we have to accept and trust that the Government is there to protect every one of its citizens.

THE *BHE* CASE

The customary law of succession

[75] It is important to examine the context in which the rules of customary law, particularly in relation to succession, operated and the kind of society served by them. The rules did not operate in isolation. They were part of a system which fitted in with the community's way of life. The system had its own safeguards to ensure fairness in the context of entitlements, duties and responsibilities. It was designed to preserve the cohesion and stability of the extended family unit and ultimately the entire community. This served various purposes, not least of which was the maintenance of discipline within the clan or extended family. Everyone, man, woman and child had a role and each role, directly or indirectly, was designed to contribute to the communal good and welfare.

[76] The heir did not merely succeed to the assets of the deceased; succession was not primarily concerned with the distribution of the estate of the deceased, but with the preservation and perpetuation of the family unit. Property was collectively owned and the family head, who was the nominal owner of the property, administered it for the benefit of the family unit as a whole. The heir stepped into the shoes of the family head and acquired all the rights and became subject to all the obligations of the family head. The members of the family under the guardianship of the deceased fell under the guardianship of his heir. The latter, in turn, acquired the duty to maintain and support all the members of the family who were assured of his protection and enjoyed the benefit of the



heir's maintenance and support. He inherited the property of the deceased only in the sense that he assumed control and administration of the property subject to his rights and obligations as head of the family unit. The rules of the customary law of succession were consequently mainly concerned with succession to the position and status of the deceased family head rather than the distribution of his personal assets …

The setting has however changed. Modern urban communities and families are structured and organised differently and no longer purely along traditional lines. The customary law rules of succession simply determine succession to the deceased's estate without the accompanying social implications which they traditionally had. Nuclear families have largely replaced traditional extended families. The heir does not necessarily live together with the whole extended family which would include the spouse of the deceased as well as other dependants and descendants. He often simply acquires the estate without assuming, or even being in a position to assume, any of the deceased's responsibilities.

97 In the changed circumstances, therefore, the succession of the heir to the assets of the deceased does not necessarily correspond in practice with an enforceable responsibility to provide support and maintenance to the family and dependants of the deceased.

South African *BHE* case, Constitutional Court, 2004; (majority judgment by Deputy Chief Justice Langa)

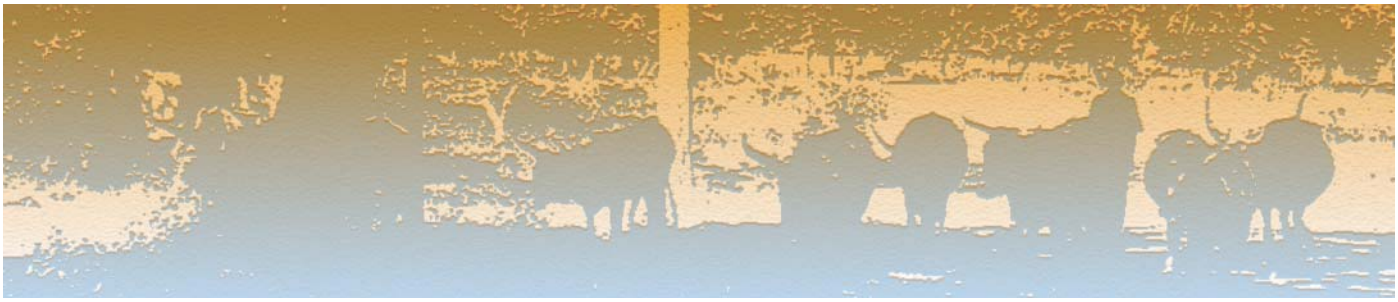
The problem with primogeniture

The exclusion of women from inheritance on the grounds of gender is a clear violation … of the Constitution. It is a form of discrimination that entrenches past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality under this constitutional order.

The principle of primogeniture also violates the right of women to human dignity as guaranteed in… the Constitution as, in one sense, it implies that women are not fit or competent to own and administer property. Its effect is also to subject these women to a status of perpetual minority, placing them automatically under the control of male heirs, simply by virtue of their sex and gender. Their dignity is further affronted by the fact that as women, they are also excluded from intestate succession and denied the right, which other members of the population have, to be holders of, and to control property.

To the extent that the primogeniture rule prevents all female children and significantly curtails the rights of male extra-marital children from inheriting, it discriminates against them too. These are particularly vulnerable groups in our society which correctly places much store in the well-being and protection of children who are ordinarily not in a position to protect themselves. In denying female and extra-marital children the ability and the opportunity to inherit from their deceased fathers, the application of the principle of primogeniture is also in violation … of the Constitution.

(South African *BHE* case, Constitutional Court, 2004; (majority judgment by Deputy Chief Justice Langa)



The remedy

The objection against resorting to the Intestate Succession Act was that its provisions would be inadequate to cater for the various factual situations that arise in customary law succession as the Intestate Succession Act was premised on the nuclear family model. The suggestion was that it would, for instance, not naturally accommodate extended families which are a feature of the customary environment, nor would it have regard to polygynous unions. It was contended that the provisions of the Intestate Succession Act would also have a negative impact upon vulnerable groups such as poor rural women.

A further concern was the fear that the utilisation of the Intestate Succession Act would amount to an obliteration of the customary law of succession, a development that would be undesirable, having regard to the status customary law enjoys under the Constitution. In considering the views above, I must also have regard to the proposals contained in the report of the Law Reform Commission … .

The Law Reform Commission's proposals in this regard are based on the assumption that the Intestate Succession Act, suitably adjusted, is capable of accommodating much of the customary law of succession. In addition, the proposals suggest changes to other statutes, apart from the Act and the Intestate Succession Act, that have an impact on succession as a whole. What the proposals amount to is that provisions of other legislation should be taken into account, together with the Intestate Succession Act, in fashioning appropriate legislation to replace the current legislative framework. The report recommends that the provisions should ensure that spouses and children should enjoy preference over other dependants of the deceased. It further recommends the extension of the application of the Intestate Succession Act to enable it to accommodate categories of Africans who are presently subject to the customary law of succession.

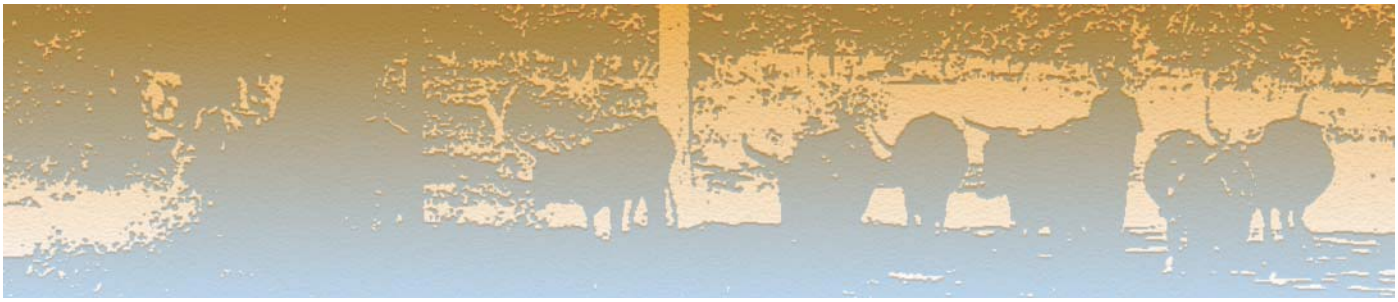
(South African *BHE* case, Constitutional Court, 2004; (majority judgment by Deputy Chief Justice Langa)

Dissenting view on remedies

One option is to direct, as the High Courts did and the main judgment proposes, that all intestate estates shall be governed by the Intestate Succession Act in its amended form. This will bring about uniformity in the administration of intestate estates for all races. No doubt, this option recognises that African communities have been transformed from their traditional settings in which the indigenous law developed into modern and urban communities. But that is not true of all communities. And even within this transformative process, a majority of Africans have not forsaken their traditional cultures. These have been adapted to meet the changing circumstances. The law must recognise this.

In my view, there are factors that militate against the application of the Intestate Succession Act only. First, the Intestate Succession Act is premised on a nuclear family system. By contrast, indigenous law is premised on the extended family system. The provisions of this statute are therefore inadequate to cater for the social setting that indigenous law of succession was designed to cater for. For example, it was not designed to cater for polygynous unions.

Second, as pointed out earlier, the primary objective of indigenous law of succession is the preservation and perpetuation of the family unit and succession to the status and position of the family head. This system ensures the preservation of the family unity and that there is always someone to assume the



obligation of the family head to maintain and support the minor children and other dependants of the deceased. That is not the object of the Intestate Succession Act. Its application may well lead to the disintegration of the family unit that indigenous law seeks to preserve and perpetrate.

Third, it does not take sufficient account of indigenous law as part of our law…The application of common law and the Intestate Succession Act only, may well lead to the obliteration of indigenous law. Yet our Constitution recognises its existence, and contemplates that there are situations where it will be applicable… And, as the Deputy Chief Justice acknowledges, there is a substantial number of people whose lives are governed by indigenous law and who would wish to have their affairs to be governed by indigenous law. People who live by indigenous law and custom are entitled to be governed by indigenous law. The Constitution accords them that right.

(South African *BHE* case, Constitutional Court, 2004; (dissenting judgment by Justice Ngcobo)

Zimbabwe

ZIMBABWE'S LAWS ON SUCCESSION

Deceased Persons Family Maintenance Act

The Deceased Persons Family Maintenance Act provides that the dependant of an estate can apply for an award from that estate. This must be done within "three months of the date of the grant of the letters of administration to the executor of the deceased estate concerned."

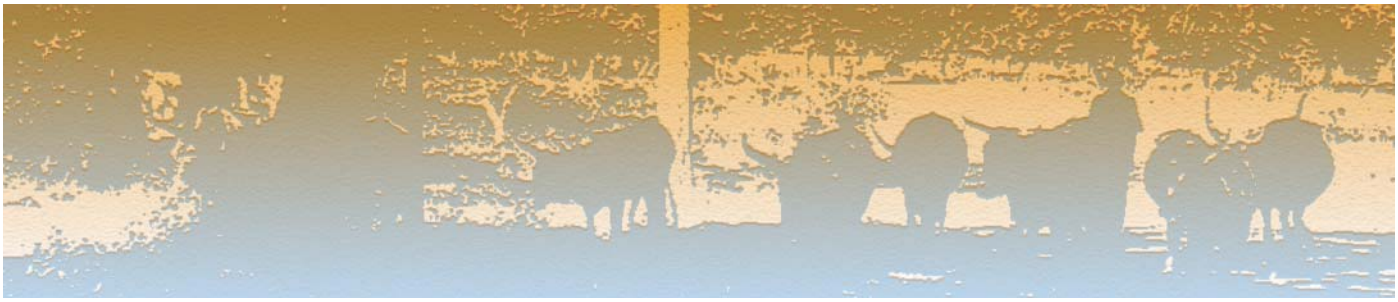
If the deceased has left a will, but the applicant is not mentioned in it, the potential reasons for this omission are to be reviewed by the Master of the Court.

The Act provides that if the applicant is the deceased 's spouse, she/he should receive the "Provision the applicant might reasonably have expected to receive if, on the day on which the deceased died, the marriage instead of being terminated by death, had been terminated by a decree of divorce." The Court takes into consideration the age of the applicant and the contribution made by her/him to the welfare of the deceased 's family, including contributions made in "looking after the home or caring for the family." This recognition of the widow 's labour is rare and laudable.

Article 10 of the Act protects the deceased person 's family and property. It protects the rights of the surviving spouse (whether married under customary or civil law)and child(ren) to occupy housing that the deceased had the right to occupy and in which the spouse and the child(ren) were living. It also protects usufructuary rights of household goods and animals, and benefit from the harvest of the land. It is important to note that these are not ownership rights.

Article 10 goes on to prohibit any interfering in or depriving of these rights of the spouse/child, establishing that such offences are punishable through a fine and/or imprisonment. This is an important tool in protecting against 'property-grabbing ' by in-laws and others.

Any person who steals inherited property from the spouse and/or child must return the property and even pay compensation. This sanction is important as it again applies irrespective of any law,



including customary law. Thus, in-laws may no longer use the pretext of customary law when laying claim to or actually stealing property from the widow and/or child.

Article 12 further protects the spouse and/or child by allowing the Court to reject the disposition of property made by the deceased up to two years before her/his death, if it can be shown that the intention of such disposition was to deprive the dependant(s)of maintenance.

Administration of Estates Amendment Act

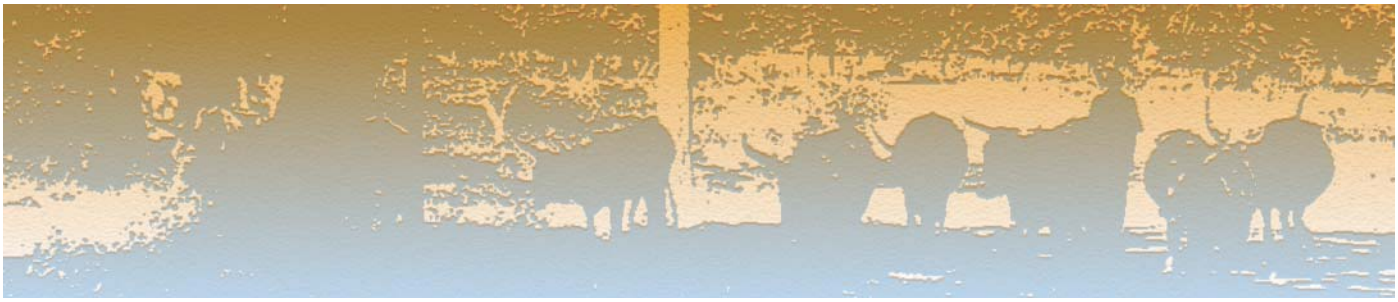
In 1997, the face of Zimbabwean inheritance rights law was drastically changed when the vitally important Administration of Estates Amendment Act repealed provisions of the prior Administration of Estates Act, which had delegated the distribution of intestate property in accordance with customs and usage of the tribe or people to which the deceased belonged.

The 1997 Amendment sought to ensure that the immediate family of a person who dies intestate be better provided for than under the old law. The main aim was to give women in customary law marriages, whether registered or not, the right to inherit from their deceased husband.

The amended Act states that the heir, as stipulated by customary law (normally the firstborn male under patrilineal customary law), should receive the name and/or traditional articles that he would normally receive. However, unless he is a direct beneficiary of the estate (as determined by law), the heir is not automatically entitled to the rest of the property. Rather, the amended Act, addressing civil and customary marriages, sets out a system of devolution unique to Zimbabwe.

If the deceased was married under civil law, the estate is distributed as follows:

- If the deceased died after November 1997, then the surviving spouse is automatically entitled to ownership of the matrimonial home. If the deceased died before November 1997 (the date the Act came into force),this automatic entitlement does not apply.
- In addition to the home, the value of the estate is divided by the number of children plus surviving spouse. If the deceased left two children, the estate would be added, the liabilities paid, and the remainder divided by three; the surviving spouse taking a third or 200 000 Zimbabwean dollars, whichever is greater, and the remaining two-thirds going to the children. If the estate is worth 200 000 Zimbabwean dollars or less, the surviving spouse receives the full amount.
- If no children survive the deceased, the surviving spouse takes 500 000 Zimbabwean dollars or half the entire estate, whichever is larger, and the remainder is split between the parents of the deceased and their children.
- If the deceased was married under customary law:
- The Amendment allows for often complicated family arrangements by providing for the making of a 'Master Plan 'of how the estate is to be administered. This Plan is overseen by the Master of the High Court or the magistrate, who determines whether or not the needs of the family will be met, according to a series of guidelines for the administration of an estate under customary law. For example, in polygamous marriages, the law states that, if possible, each wife should become the owner of the home in which she is living.
- If a number of wives are sharing a home, that arrangement should continue after their spouse's death, if possible. The first wife receives two-thirds of the first third of the estate 's liquid assets, for she is presumed to have made the biggest contribution to the estate. The remaining wives share equally the remainder of the first third of the estate, and the children of the various



marriages share the remaining two-thirds.

- The above applies if the deceased died after 1 November 1997 (the date the Amendment came into force).If the deceased died before 1 November 1997 and was married under customary law, her/his estate is still distributed according to customary law and tradition.
- The amended Act makes it illegal to take the bequeathed land and property from the deceased 's immediate family and/or to stop them occupying and using that land and property. This provision is crucial in combating 'property-grabbing' by in-laws.

Reality of the law

The difficulties that Zimbabwean women encounter in acquiring land and housing are not confined to the area of inheritance. Issues of property acquisition and ownership plague women throughout their lives. Despite laws to the contrary, women –especially married women –rarely gain access to property of their own.

WLSA Zimbabwe has found several reasons why women do not or cannot claim their rights:

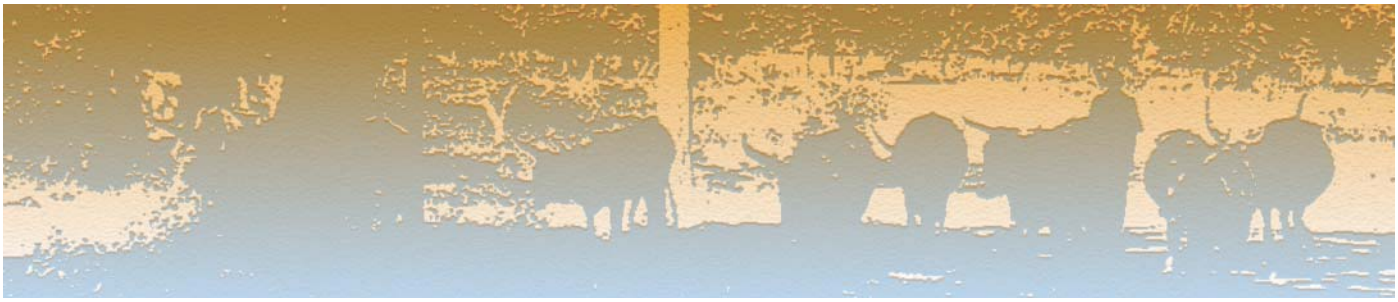
- Lack of resources —women lack time and/or money to bring their cases either to the formal court system or even to the informal dispute-resolution mechanism; heavy workloads keep women too busy to claim their rights;
- Often, fear is also involved: not only do women fear the systems themselves, they also fear 'venturing out into the unknown 'and the potentially negative consequences that may result from interference by other family members;
- Widows are often accused of having caused their husband 's death —a superstition that does nothing to assuage the fear that 'avenging spirits 'of the deceased will punish them if they try to 'gain 'from their husband 's death;
- Access to justice is limited; the patriarchal courts discriminate against women;
- There is a strong culture of silence, mystification and stigmatisation of sexuality and gender-roles (women are coerced into and kept in traditional caring roles);
- There is a huge disparity between the law in books and the law in practice, mainly due to persistent negative attitudes towards women. These are manifest in practices such as polygyny, son preference in education, and payment of lobola (bride price).Such practices keep women in subordinate social positions.

(Centre on Housing Rights and Evictions; Bringing Equality Home, Promoting and Protecting a the Inheritance Rights of Women: A Survey of Law and Practice in Sub Saharan Africa, 2004)

CALLS FOR REVIEW OF INHERITANCE LAWS

Inheritance laws passed in 1997 were meant to provide protection for widows married under customary law, whose husbands had died without leaving a will. The Administration of Estates Act made the surviving spouse and children the primary beneficiaries of the deceased's estate, to stop abuses under the old system where the eldest son usually inherited everything and could 'throw out' his mother and siblings …

But the law does not offer women and children complete security. In polygamous marriages, each wife keeps the home she was living in at the time of the husband's death, with its household contents. The



wives share a third of the remaining property, with the senior wife getting the largest share and all the children sharing the remaining two-thirds. "But the senior wife's house may be less valuable than the others and sometimes the remaining estate is so small that there is little to share, and children might end up with nothing", [Eleia Myuchawa, director of the Zimbabwe Lawyers' Association] told IRIN.

She said there was a need to reform the law, so that the most valuable property could be administered to the benefit of all.

The law allows the deceased's siblings and parents a share of the estate only if he had no offspring, raising the risks of property grabbing and blackmail by relatives who lose out.
Women are reluctant to take legal action in such situations because of the allegedly unsympathetic attitude of police and/or threats from the deceased's relatives, whose cooperation is needed for confirmation of unregistered unions and birth registration…
The Deceased Persons' Family Maintenance Act allows children of a customary marriage to claim maintenance from the deceased's estate, but rights activist say women are often unaware of their entitlements under this law and benefits depend on the size of the estate....

(IRINNEWS.ORG, UN Office for the Coordination of Humanitarian Affairs, 28 January 2005)

Zambia

LAW REFORM TO ADDRESS PROPERTY-GRABBING

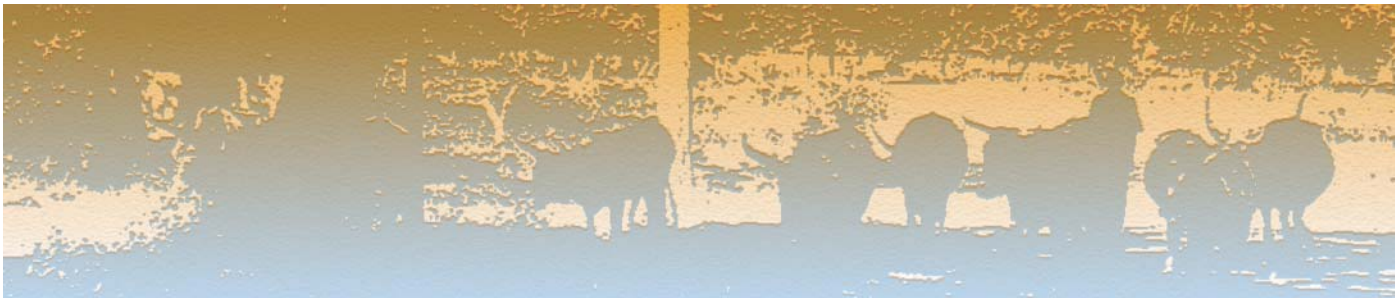
…The Succession Act was an attempt by Government to deal with the problem of property grabbing by providing the mechanism for a fair distribution of the property of the deceased. It took into account the tradition custom by including in the list of beneficiaries of the estate of the deceased not only spouse and children but also other dependants and relatives. Section 5 of the Act states that the property of the deceased should be shared as follows:

- 20 percent of the property goes to the widow;
- 50 percent of the property goes to the children of the deceased regardless of whether there were born in or out of marriage;
- 20 percent of the property goes to the deceased's parents;
- 10 percent of the property goes to the deceased's other dependants.

[Theologian Damien Musonda] explains that, "like the Wills Act, this law has not been used much. It is rarely appealed to to redress the situation of property grabbing. The customary law usually prevails simply because most Zambians are still not convinced that customary law should be changed."

"For indeed, even before passing of the law, research revealed that many men were opposed to the bill on the grounds that women might kill their husbands in order to inherent property," observed Musonda.

Other research revealed that majority of traditional rulers along with the advisors and village headmen were also against changing the customary law on succession.



As Musonda explains "the people who are often involved in enforcing the customary law, are also in property-grabbing as heads of the clan."

The above outlined situation in Zambia explains the strength of the beliefs of the people concerning property grabbing. The introduction of the law concerning the inheritance of property deals more with the consequences of property grabbing than with tackling the roots of the problem.

"I think that the root of the problem is the application of the customary law of succession and inheritance in present day," observed Musonda. …Musonda is also of the view that urbanisation and the money economy had led to the distortion of the customary law to the disadvantage of the weaker sectors, especially the women.

"I suggest here that the key to the understanding of the meaning of property is its connection to the meaning of life," says Musonda.

But according Mary Kagoma, a law student, the best approach to overcoming the problem of property grabbing and bringing about justice in society, is to take note of the concerns of the legal approach… But Kagoma is of the view that, in order to change the attitudes of people, the legal approach is not enough alone. One needs to go beyond it and aim at convincing people about the need to change the practice."And this involves giving reasons why a particular way of acting is not compatible with proper human conduct," summed up Kagoma.

(The Legal Resources Foundation News, June 2004)

THE LAW ON PAPER VERSUS THE LAW IN PRACTICE

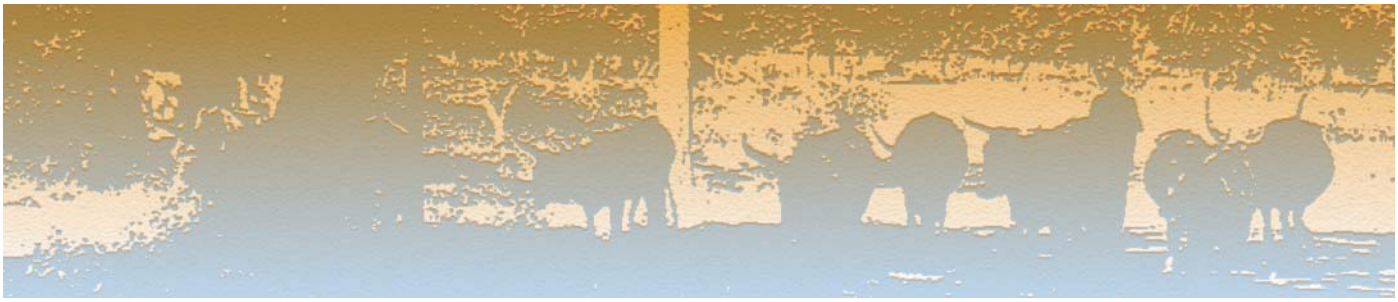
On paper, the new law of inheritance has been a wonderful breakthrough for women's rights. In practice, though, the five years since the enactment of the Act have witnessed a very different picture. The earlier resentment at the passing of a law which usurps customary rights has blossomed into a blatant disregard of statutory law and a perpetuation of the distorted and evil practice of 'property grabbing.'. . . . The law is weakened first and foremost by the lack of conviction among women themselves that they have a legal right to their deceased husband's property, and secondly, by their fear of reprisals should they invoke the law. Furthermore, even the lawyers and the law enforcement agencies such as the police and Local Courts may have failed to give the new law the respect it deserves and encourage its use.

(Women and Law in Southern Africa Research Project, "Inheritance in Zambia: Law and Practice")

PROPERTY-GRABBING CONTINUES

In practice, 'property grabbing' by relatives of the deceased man continues to be rampant, particularly when local customary courts have jurisdiction. These courts often use the Local Courts Act to distribute inheritances without reference to the percentages mandated by the Intestate Succession Act, and the fines mandated by the latter for property grabbing are extraordinarily low. As a result, many widows receive little or nothing from the estate.

(United Nations Common Country Assessment: Zambia, 2000)



CRITICISMS OF ZAMBIA'S INTESTATE SUCCESSION ACT

One notable reform of the past few decades was the Intestate Succession Act of 1989, which was introduced to end 'property-grabbing ' in cases where a deceased spouse has not left a written will. This Act establishes a standard scheme for distribution of the property in an intestate estate, both in civil and customary marriages…

The property distribution scheme is as follows:

- Twenty percent of the estate passes to the surviving spouse. If there is more than one widow, the 20 percent is shared among them, in proportion to the duration of their respective marriages to the deceased. When dividing the property among multiple widows, a number of other factors may be taken into account, including each widow 's contribution to the estate.
- Fifty percent passes to the deceased 's children in such "proportions as are commensurate with a child 's age or educational needs or both";
- Twenty percent goes to the parents of the deceased;
- Ten percent goes to the dependents, in equal shares.

… The Intestate Succession Act was initially regarded as a victory for most Zambian women. Now, almost 15 years later, the Act has proven to be seriously flawed…

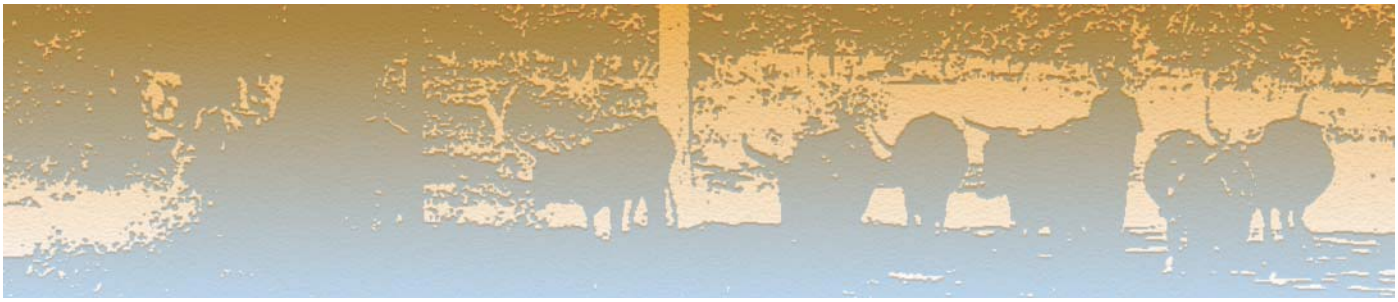
Many women, especially those whose sons are married, do not believe that widows should be allowed to inherit such a large share of property. As they themselves grow older, they rely increasingly on their sons to provide for their care and well-being. These mothers argue that they are the ones who raised their sons, put them through school, and invested in them. Therefore, in the event of a son's death, his estate should repay and provide for his mother, not his widow.

On the one hand, many women feel that the Intestate Succession Act does not adequately protect them: 20 percent of an estate for and on which they worked hard cannot satisfy their needs; in reality, they are often left with little to nothing. On the other hand, many family members complain that this widow 's share is too large. A wife, they claim, does not contribute to the husband 's development or growth; that task is performed by his parents and siblings, and they should therefore be paid back substantially for their efforts. Many Zambians see the education of their children, and especially of their sons, as an investment, the eventual return being that they themselves are looked after when they are old.

Many men also expressed concern about the Act, worrying that if their wives knew they could inherit such a large share, particularly the 70 percent they stood to gain if their children were still minors, they would "get smart and kill us!" However ridiculous or paranoid this may sound, men in several communities did raise this as a serious concern.

Another criticism of the Act is that it places no age limit on the definition of children. Thus, even if the children of a marriage are grown up and have started their own families, they can take their 50 percent share and leave the widow, who may be old and in need of extra assistance, with nothing.

(Centre on Housing Rights and Evictions, Bringing Equality Home, Promoting and Protecting a the Inheritance Rights of Women: A Survey of Law and Practice in Sub Saharan Africa, 2004)



Ghana

GHANA'S INTESTATE SUCCESSION LAW

Under pressure from women 's rights groups, religious organisations and other interested parties, and desiring to comply with international standards in order to end discrimination against women, the military government passed in the 70 s and 80s, by decree, a series of personal laws related to women. These provided a framework for a more equitable division of property on the death of an intestate spouse. This division was not dependent on the type of marriage entered into. These reforms rise to the Intestate Succession Law of 1985.
In Ghana, only about 20 percent of all deaths are covered by wills, so intestate succession is a major issue. The Intestate Succession Law of 1985 (PNDC Law 111) significantly altered the system of intestate succession.

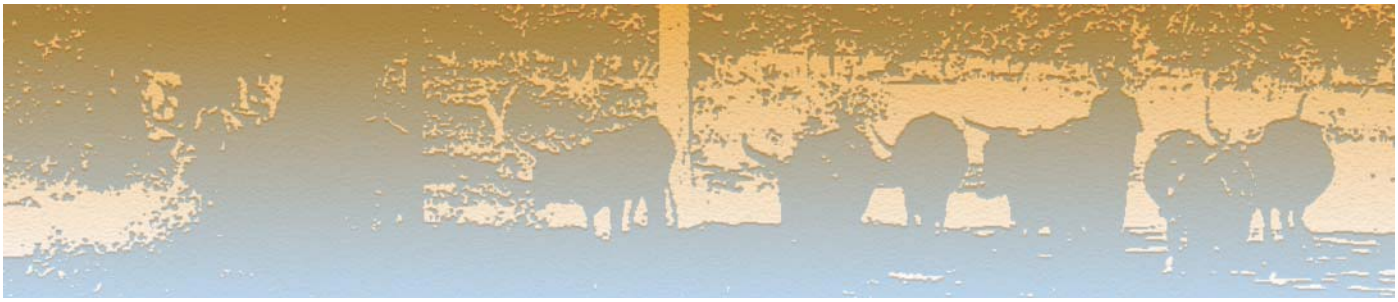
Recognising the contradictory interests that often plague the extended family, the Intestate Succession Law was passed with the primary purpose of ensuring that the spouse and the children receive the bulk of the estate. The nuclear family was seen as emerging stronger than the traditional extended family, and its needs required attention.

The Intestate Succession Law governs the property of all persons subject to Ghanaian law and dying without disposing of the property in a will (that is, dying 'intestate ').It replaces customary law, which previously governed the devolution of the estate in most cases of intestacy. The Intestate Succession Law repealed sections of the older marriage acts, though they still govern estates distributed before the law came into force.

Sections 3 and 4 of the Intestate Succession Law provide that if the estate only includes one house, the surviving spouse and/or child shall be entitled to that house and the household chattels. The spouse and child should hold the house as tenants in common. If the estate has two or more houses, then the spouse and the child shall together determine which of the houses the other shall take. If they cannot decide, a High Court is to decide for them…

Devolve to:	Ordinance [old law]	Intestate Succession Law [new law]
Spouse (female)	1/3	3/16
Children	1/3	5/8
Family	1/3	1/8
Customary Law	—	1/8

As the chart above shows, Section 5(11) of the Intestate Succession Law sets forth a complicated formula for the division of the residue of the estate. If there are children, three-sixteenths is to devolve to the spouse, five-eighths to the surviving child(ren),one eighth to the surviving parent(s)and one eighth will devolve in accordance with customary law.
If the value of the estate is considered small under the law (equal to or less than 50,000 cedis, later amended to 10 million cedis in 1998) then the estate should devolve entirely to the spouse or the child, or if there is no spouse or child, to the parent.



Experience has shown that the incremental divisions actually used rarely conform exactly with the Intestate Succession Act. Rather, the estate is devolved in lump sums roughly conforming with the stipulated fractions.

It is vital that the house is devolved to the surviving spouse and child, separately from the rest of the estate. This guarantees them a place to live after the death of the other spouse. Women are no longer forced to marry the customary successor if they wish to remain in the house.

Although the Intestate Succession Law is one of sub-Saharan Africa 's most comprehensive pieces of succession legislation, adequately addressing many issues of estate devolution, It is flawed in some respects, especially those related to its application and implementation. There was minimal consultation with women 's groups in drafting the law, and therefore it does not address all the necessary issues.

Many men also felt that they had not been consulted and therefore resented the law when it came in. Initially, men frequently refused to register their marriages as the law required. A major flaw of the Intestate Succession Law is that it pertains only to non-lineage property, which often excludes land. Land and housing is often considered as coming from the lineage, and thus cannot be passed on according to this law. Instead, it remains in the lineage, usually through the male, and will not pass to the female spouse.

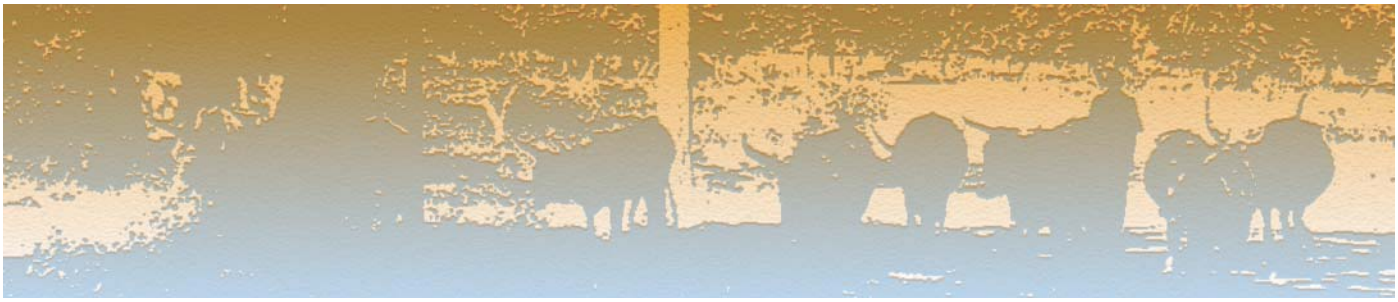
Another drawback is that because the term 'spouse ' is used in the singular, polygamous marriages are not addressed. This creates serious problems when a man has multiple wives. As only men can have more than one spouse, the law is discriminatory by default, in that women are the only ones affected by this failure to address multiple spouses.

Furthermore, the Intestate Succession Law does not cover non-formalised unions, thereby prejudicing some women who may have depended on a male partner for support; because they were not formally married, they receive nothing from his estate. Neither does the law provide adequately for aged or needy parents who may have depended on the deceased male 's estate. In the case of small estates as defined in Section 12 of the Law, aged parents are completely excluded from benefiting.

As we have already seen, a serious shortcoming of this law is that it is complicated and the scheme of residual estate distribution is difficult to manage. Moreover, the stipulated fractions rarely correspond to the actual needs of the surviving family members. For example, if there were two wives, the house would technically have to be sold to satisfy the law, which is often inconvenient or even impossible.

The situation is especially egregious if the wife must share the home with her own children and others who are not her natural children and who may have only recently moved in, after the death of their father, to obtain support. Under the Intestate Succession Law, they too can inherit. This can be problematical for the children as well as the widow, who must now look after these children. The difficulties of dividing a single house between parties with disparate interests are obvious.

(Centre on Housing Rights and Evictions, Bringing Equality Home, Promoting and Protecting a the Inheritance Rights of Women: A Survey of Law and Practice in Sub Saharan Africa, 2004)



Appendix 1

Sample of customary law on inheritance

OFFICE OF THE SWARTBOOI TRADITIONAL AUTHORITY
P.O BOX 416 KHORIXAS NAMIBIA TEL. NO: (067) 331194

REGULATIONS
ANNEXURE 3

REGULATIONS made in terms of the Customary law of the Swartbooi Traditional Community // Khau-/Gôan of Fransfontein.

The Captain of the Swartbooi Traditional Community has under Section 11(eleven) of the Customary Law made the Regulation set out in the Schedule.

Signed by the Captain.....

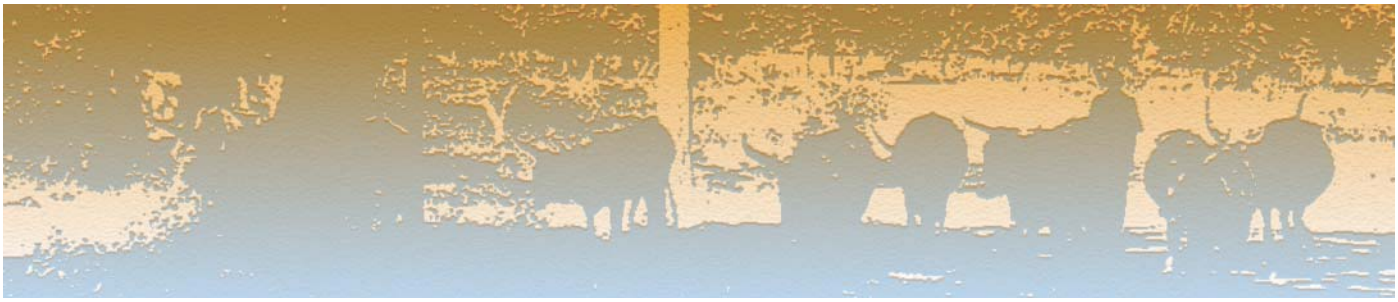
CAPTAIN D. LUIPERT
P.O. Box 416 Khorixas
Tel: 067331194
30 APR 2005
Tel/Fax: 061-233598 Windhoek
Swartbooi Traditional Authority

SWARTBOOI LAW OF INHERITANCE
"/UMIS"

1. Swartbooi traditional Community are deeply Religions and all their Laws are deeply rooted in the word of God, namely the Bible and the Church.

2. Therefore the marriage ceremony is always in the Church and priest marries them.

3. This Law contains the Rules and the procedures that the Swartbooi Traditional Community of Fransfontein and its surrounding villages follow when the mother or father dies. It will also cover who inherit what and from who?



4. If the deceased left the a will, the husband or the wife has to make sure that he/she administers the estate as the Will states.

5. To ensure that the word of the Will be followed, the Headman/ Traditional leader is also involved in the process of administering the estate of the deceased. Although the Traditional leader is part of the administration, he does not get anything from the estate. His work is just to overlook the whole process and make sure that the correct procedures are followed.

6. In the case where the other spouse is predeceased the estate is administered by the first born of the family.

7. An oral will is also there and acceptable in the Swartbooi Tradition. A dying person can express her/his wish about the disposition of the property. What happens is that the dying person can tell an elder member of the family or the Headman who gets what out of his/her estate.

8. When the deceased was not married, elders normally administer the estate.

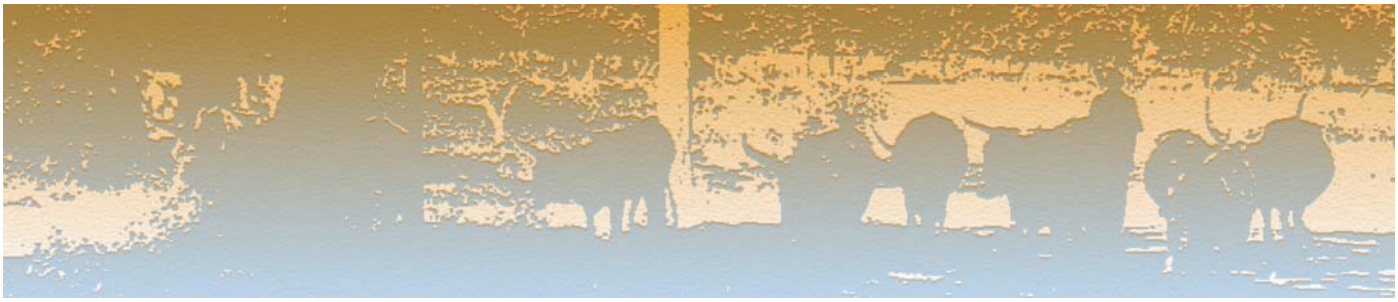
9. **Administration of Estate after Death**

9.1 DECEASED MAN'S ESTATE:

In the Swartbooi Traditional Community in a situation where a Husband or father dies, and he leaves behind his wife and his children, the widow will then
Normally inherit everything, meaning she will be in charge of her Deceased husband's estate,
or she will in legal terms administer it. The husband's relatives do not Remove any property after he dies.

9.2 DECEASED WOMAN'S ESTATE:

In the Swartbooi Traditional Community when the wife dies, her widower husband is then left in charge of her estate and of their children.



A Swartbooi husband and wife usually marry in community of property, this sums up to the fact that in the case of either spouse dying, the surviving spouse become the ultimate heir. The wife's relatives do not remove any property after she dies.

9.3 BOTH HUSBAND AND WIFE DIED

In the case where both the father and the mother died, the property is shared among all the surviving children. How ever children born out of wedlock do not have any right to the property. Inheritance is gender neutral- meaning that it is not according to sex. Children can only succeed to their own father's estate. They are right full heirs to their own father and cannot lay claims to their uncle's estate.

9.4 TESTAMENT OR WILL-''XOA-//GUIB"

In the past most of the Swartbooi Traditional Community members could not read or write, with the result that they could not draft a written will.

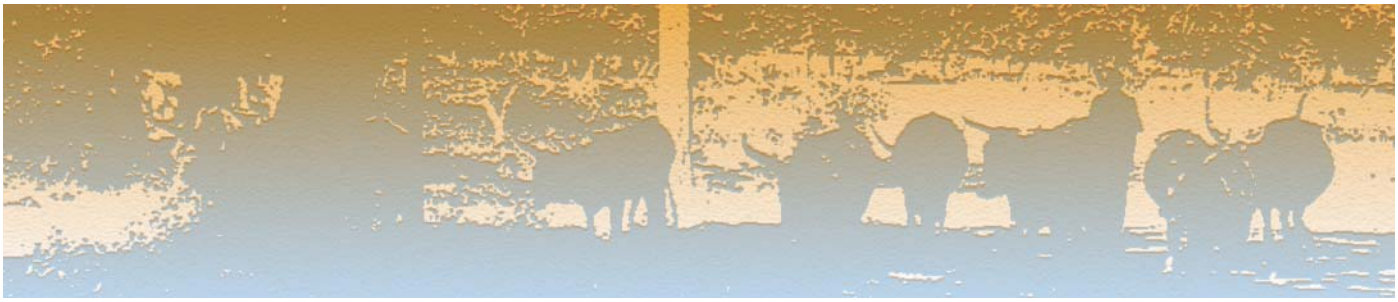
They usually did it orally, by telling an elder or " higher person in their community who will inherit what and how they wanted their property to be distributed among their children.

Today, the majority of the Swartbooi Community can read and write. Therefore they do "Xoa-//guib meaning an written will.

Signed: _____
Captain: Daniel Luiperdt
Swartbooi Traditional Authourity

CAPT[illegible]N D. LUIPERT
[illegible]ox 416 Khorixas
Tel: 067-331194
30 APR 2005
[illegible]061-233598 Windhoek
[illegible]ditional Authority

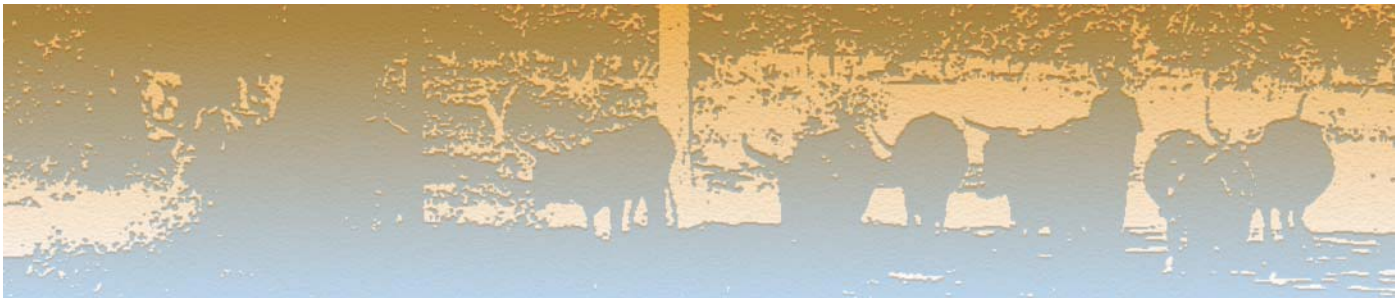
Date 30 / April / 2005
Place Windhoek
Time 12h00.



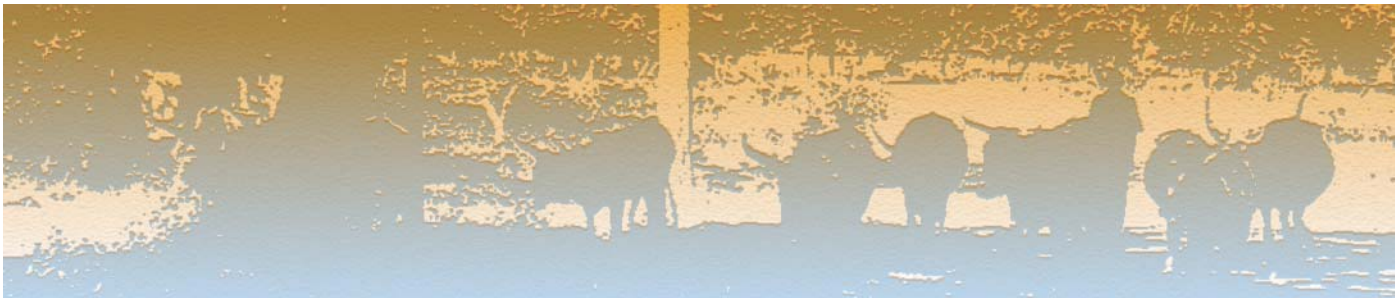
Appendix 2

Participants in the Windhoek consultations

!Goases, Marianna	Sister Namibia	Windhoek
!XiXae, Hans	Omaheke San Trust	Korridor
//Gowaseb, I	Afrikaner Traditional Authority	Windhoek
|Gâses, Sandra	Women's Action for Development	Swakopmund
Aib, Johnie	Women's Action for Development	Outjo
Angula, Elizabeth	Catholic AIDS Action	Endola, Oshana
Appollus, WR	MP, National Council	Windhoek
Benz, Lizelle	Sister Namibia	Windhoek
Brand, L	Gibeon Village Council	Gibeon
Christian, H	MP, National Assembly	Windhoek
Doeseb, Petrus S	Omaheke San Trust (Chairman)	Gobabis
Elifas, King IK	Ondonga Traditional Authority	Rundu
Fitchat, Sandie	The Word Factory	Windhoek
Gordon, Rob	Legal Assistance Centre	Windhoek
Gowases, Sheron	Women's Action for Development	Not stated
Hamukwaya, N	Namibia Women's Leadership Centre	Windhoek
Harmse, Adv. P	Harmse Legal Practitioners	Okahandja
Hauuanga, Festus	Namibian Men for Change	Ongenga
Hubbard, Dianne	Legal Assistance Centre	Windhoek
Isaak, Anna	Gibeon Village Council	Gibeon
Jacob, Sophy	Traditional Authority	Aminuis
Jacobs, Manfred	Omaheke San Trust	Gobabis
Jacobs, Paulina	Gibeon Village Council	Gibeon
Jacobs, Simon	Witbooi Traditional Authority	Gibeon
Johannes, Elizabeth	Women's Action for Development	Arandis
Kahuika, Joseph	Legal Assistance Centre	Windhoek
Karigub, Samuel E	Witbooi Traditional Authority	Gibeon
Karuhumba, Sophia	Not stated	Gobabis
Karupu, Sebastiaan	National Council	Not stated
Kauandara, Ebenezer	Women's Action for Development	Otjinene
Kaukuma PS	Ondonga Traditional Authority	Rundu
Kavaongelwa S	Ministry of Gender Equality and Child Welfare	Windhoek
Kauari, Edward Chief	Kambathedi Tranditional Authority	Okakarara
Kavetuna, FF	Member of Parliament, National Council	Otjiwarongo
Kisenje, E	Private individual	Windhoek
Kisting, Naomi	Legal Assistance Centre	Windhoek
Kizza, Margaret	Ministry of Gender Equality and Child Welfare	Windhoek
Kanyina Geraldine	Ministry of Health and Social Services	Nyangana
Kupembona Magdalena	Community Development	Nyangana



Kupembona, Elisabeth	Community Development	Nyangana
Kuzatjike Lorenst (Rev)	Namibian Men for Change	Okakarara
Luanda, Escher	Law Reform and Development Commission	Windhoek
Luipert, D	Swartbooi Traditional Authority	Windhoek
Markgraaff, K	Women's Action for Development	Rehoboth
Mchombu, Chiku	University of Namibia	Windhoek
Mujazu, Urika	Kambathedi Traditional Authority	Okakarara
Mukondeli, Rebbeka	Women's Action for Development	Omusati Region
Muranda Susana S	Community Development	Nyangana
Murangi, Joe	Private individual	Windhoek
Muruko, Damoline	Legal Assistance Centre	Windhoek
Murundu, Frankhilde	OCAA	Nyangana
Mwambu , Elizabeth	Community Development	Nyangana
Namiseb, Tousy	Law Society of Namibia	Otjiwarongo
Nandigolo	Namibia Women's Leadership Centre	Windhoek
Ndara, Clothilde	Community Development	Nyangana
Ndara, Reginald	Namibian Men for Change	Rundu
Ndjamba, Protasius	Community Development	Nyangana
Ngavatene, Amon	Legal Assistance Centre	Windhoek
Odendaal, Willem	Legal Assistance Centre	Windhoek
Okupa, E	University of Namibia	Windhoek
Orr, Tracy	Legal Assistance Centre	Windhoek
Pereira, Isaac	Community Development	Nyangana
Rimmer, Anne	Legal Assistance Centre	Windhoek
Rooinasie, LJ	Women's Action for Development	Rehoboth
Rukambe, Zelda	Ministry of Gender Equality and Child Welfare	Windhoek
Sasman, Catherine	The Big Issue	Windhoek
Schroeder, D	Evangelical Luth. Church in the Rep. of Namibia	Windhoek
Shipoh, Victor	Ministry of Gender Equality and Child Welfare	Windhoek
Shonga, Raynholdt	Community Development	Nyangana
Siambango, Mwala	Law Reform and Development Commission	Windhoek
Siambango Nanzala	University of Namibia	Windhoek
Sikerete, Mutero E	Sambyu Traditional Authority	Rundu
Skrywer, Morris	Witbooi Traditional Authority	Gibeon
Strydom, Rev. Philip	Council of Churches in Namibia	Windhoek
Tjiueza, Doreen	Women's Action for Development	Otjinene
Tjombe, Norman	Director, Legal Assistance Centre	Windhoek
Uariua, Immanuel	Private individual	Walvis Bay
/Uirab, Esegiel M	Swartbooi Traditional Authority	Fransfontein
Unaeb Engelhardt	Evangelical Luth. Church in the Rep. of Namibia	Windhoek
Van der Merwe, AJ	Law Society of Namibia	Windhoek
Van Staden, Purdey P	Premier Accounting Services	Aroab
Weidlich, Brigitte	Journalist	Windhoek
Witbooi, Salomon J	Gibeon Village Council	Gibeon
Zimba-Naris, Evelyn	Legal Assistance Centre	Windhoek



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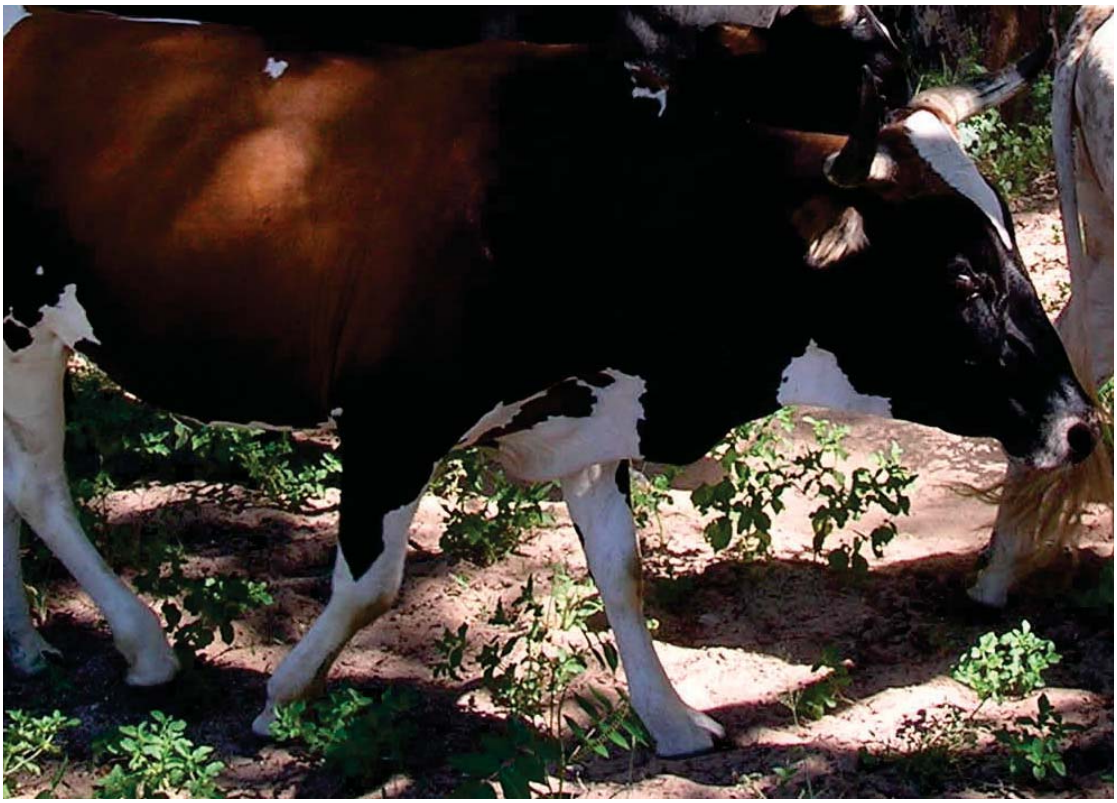
Participants in the Ongwediva consultations

First Ongwediva Workshop: This group comprised 22 women, who had roots in and/or frequent contact with rural communities. The group included a regional social worker, a pastor, a peer educator on HIV, a nun, and a number of participants working with disability issues. They were all Owambo-speaking, from at least the following different clans: Kwambi, Kwanyama, Mbalantu, and Ndonga.

Second Ongwediva workshop: These discussions featured nine people, four of whom were women. They came from various areas, including Kwambi, Kwanyama, Ndonga and Ngandjera. All were Owambo-speakers. The group reflected a range of expertise, and included a Public Prosecutor who had studied in the United Kingdom; a female pastor who was the chaplain at the Oshakati Hospital; and social workers, teachers and traditional councillors.

Participants in the Omaruru consultations

Omaruru Workshop: Young and middle-aged women constituted 11 of the 25 participants, who were all residents of an informal settlement at Omaruru. These women made most of the contributions. The group included one old man, four younger men – who were silent most of the time – and nine older women. No traditional leaders were present.




Austrian
Development Cooperation