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MUDDLING IN THE QUICKSANDS OF TRADITION AND CUSTOM AND SKATING DOWN THE SLIPPERY SLOPES OF MODERNITY: THE REFORM OF MARRIAGE AND INHERITANCE LAWS IN ZIMBABWE

Welshman Ncube

Associate Professor, Department of Private Law, University of Zimbabwe

INTRODUCTION

In 1993 the Government of Zimbabwe published a White Paper on Marriage and Inheritance in Zimbabwe which invited debate on proposed law reforms to this area of the law. That white paper generated widespread and often heated debate. I had occasion to participate in that debate and dismissed much of the White Paper's proposals for law reform as largely an exercise in "superfluity" and "mischief making".¹ I categorised some of the "proposals" as superfluous because those "proposals" were in fact already the law. I wondered how the law officers of the Ministry of Justice, Legal and Parliamentary Affairs could have got so much of the present state of the law so completely wrong and hence some of their recommendations to reform the law to what it already was. The other proposed reforms, which were not superfluous I argued, were mischievous since they were apparently intended to facilitate either the conversion of monogamous civil marriages into potentially polygamous ones or were designed to allow the legal recognition of the co-existence of civil law and customary law widows.²

Those aspects of the White Paper's recommendations relating to inheritance issues, which were the only ones that were not superfluous, have now been incorporated into the provisions of the Administration of Estates Amendment Act No.6 of 1997, which came into force on 1 November, 1997. In terms of section 6 the provisions of the Amendment Act shall not affect the estate of any person who died before the date of its commencement.

The objective of this paper is to evaluate and analyse the new law as contained in the Administration of Estates Amendment Act within the context of existing law.

The Administration of Estates Amendment Act No.6 of 1997, ("the Administration of Estates Amendment Act") principally amends the Administration of Estates Act, [Cap 6:01] by repealing section 68 and then introducing a new Part IIIA comprising sections 68 through to 68K which provide a framework and substantive law principles for the administration and distribution of deceased estates which would otherwise be governed by customary law. It also amends the Deceased Estates Succession Act [Cap 6:02], the Customary Marriages Act, [Cap 5:07] and the Deceased Persons Family Maintenance Act, [Cap 6:03]. Discussed below are each of the principal amendments being made to the laws of marriage, inheritance, maintenance and rules governing the choice of law.

1 See W. Ncube, "The White Paper on Marriage and Inheritance in Zimbabwe: An Exercise in Superfluity and Mischief?" *Legal Forum* [1993] Vol.5, No.4, at p.9.

2 For further and fuller discussions of some of the issues raised by the White Paper see also J. Stewart *et al* "Some points to ponder arising from the White Paper" *Legal Forum* [1993] Vol. 5, No. 2, 1 and L. Madhuku, "Government White Paper Again: A Reply to a Reply", *Legal Forum* [1994] Vol.6, No.2, 20.

THE CHOICE OF LAW PROCESS

Before the Supreme Court judgement in *Mujawo v Chogugudza*,³ the deceased estates of all Africans regardless of whether they were married under customary law or general law were governed by customary law. This was because of the combined effects of the then section 69 (now 68) of the Administration of Estates Act, section 13 of the then African Marriages Act [Chapter 238] (now the Customary Marriages Act, [Cap 5:07]) and sections 3 and 7 of the Customary Law (Application) Act [Cap 8:05]. These provisions, which placed the intestate devolution of the property of Africans under the regulation of customary law, are all being repealed by the Administration of Estates Amendment Act. Section 13 of the Customary Marriages Act (formerly the African Marriages Act, Cap 238) stated that notwithstanding that Africans had contracted a civil law marriage their property rights, including at death, would be governed by customary law. Hence it did not matter which type of Zimbabwean marriage Africans contracted, their property rights were always to be governed by customary law.⁴ However, Africans married in accordance with some foreign monogamous system of law had their property rights governed by the general law because section 13 was applicable only to African marriages contracted in terms of Zimbabwe's Marriage Act, [Cap 5:11].⁵

Section 68 of the Administration of Estates Act provided that:

If any African who has contracted a marriage according to African law or custom or who being unmarried, is the offspring of parents married according to African law and custom, dies intestate his estate shall be administered and distributed according to the customs and usages of the tribe or people to which he belonged.

The significance of this section lay in that the estates of Africans who had customary marriages or being unmarried were the offsprings of such marriages, would not only be distributed/inherited in accordance with customary law, but would be administered in terms of that system of law and thereby placing those estates outside the jurisdiction of the Master of the High Court who has jurisdiction to administer or rather supervise the administration of deceased estates in accordance with the general law.

Section 6A of the Customary Law and Primary Courts Act (later section 7 of the Customary Law (Application) Act, [Cap 8:05]) provided that the heir at customary law of any deceased person to whom customary law applied would succeed, in his individual capacity, to that deceased person's immovable property. The context of this section was that in a long line of cases the colonial courts had held that the ownership of immovable property was unknown at customary law and hence immovable property rights could not be regulated by customary law.⁶ Thus, it became necessary to enact section 6A to allow the heir at customary law to succeed to a deceased African's immovable property which would otherwise have had to devolve in accordance with the general law.

3 1992 (2) ZLR 321. In this case, the Supreme Court held that the estates of those Africans married in accordance with the general law are governed by the general law since section 13 of the Customary Marriages Act has been repealed by implication by the Legal Age of Majority Act No. 15 of 1981 as read with section 3 of the Customary Law (Application) Act.

4 See, for example, *Jenah v Nyemba* 1986 [1] ZLR 136 [SC] and W. Ncube, *Family Law in Zimbabwe*, LRF, Harare, 1989, at pp 189-193.

5 See *Zvarewa v Zvarewa* 1979 AAC 37.

6 See, for example, *Dokotera v The Master and Others* 1957 R + N 697, *Matambo v Matambo* 1969 (3) SA 717 (RAD) and *Guzuzu v Chinamasa* NO. HC-H-246-83.

As already indicated the Administration of Estates Amendment Act repeals all these sections. Section 3 of the Amendment Act repeals section 68 of the Administration of Estates Act and substitutes in its place various provisions which we will discuss extensively later. Section 10(1) repeals the whole of the Customary Law (Application) Act including its section 7 referred to above. Section 10(2) brings into operation Part II of the Customary Law and Local Courts Act, Cap 7:05 which had not been brought into effect in 1993 when the rest of that statute became operational. The effect of this is to render superfluous the provisions of the Customary Law (Application) Act and hence its repeal by section 6(1).⁷ Section 7 formally repeals section 13 of the Customary Marriages Act, which as we have already indicated above was, in 1992, held by the Supreme Court in *Mujawo v Chogugudza* (*supra*) to have been repealed by implication by the Legal Age of Majority Act as read with section 3 of the Customary Law (Application) Act (then section 3 of the Customary Law and Primary Courts Act).⁸

The net effect of all these amendments is that the choice of law for the determination of which law applies to the property rights of Africans whether married or unmarried will now be determined entirely by the choice of law rules in section 3 of the Customary Law and Local Courts Act.⁹

In fact, in respect of inheritance issues and for the avoidance of doubt, the Administration of Estates Amendment Act introduces a new section 68G which states that:

Section 3 of the Customary Law and Local Courts Act, [Chapter 7:05] shall apply in determining the question of whether or not customary law applied to a deceased person for purposes of this Part:

Provided that it shall be presumed, unless the contrary is shown, that:

- (a) customary law applied to a person who, at the date of his death, was married in accordance with customary law; and
- (b) the general law of Zimbabwe applied to a person who, at the date of his death, was married in accordance with the Marriage Act [Chapter 5:11] or the law of a foreign country, even if he was also married to the same person under customary law.

This means no more than that the inheritance rights of those persons married under customary law shall be governed by customary law, while those married in terms of the general law whether under Zimbabwean law or some foreign law shall be governed by the general law. The provisions of Part IIIA of the Administration of Estates Act will apply only to those estates which would otherwise be governed by customary law and have not been disposed of by will because section 68A provides that:

- (1) Subject to subsection (2), this Part shall apply to the estate of any person to whom customary law applied at the date of his death.
- (2) This part other than section 68C [dealing with succession to a deceased African's name and inheritance of symbolic traditional articles such as a deceased person's spear] shall not apply to any part of any estate that is disposed of by will.

7 The Customary Law (Application) Act was always a transitional Act, which preserved the operation of Part II of the Customary Law and Primary Courts Act pending the coming into force of the equivalent Part II of the Customary Law and Local Courts Act which repealed and replaced the former.

8 The Legal Age of Majority Act no longer exists as a separate statute as a result of the Law Revisor's revisions of the statutes of Zimbabwe in 1986 in terms of his powers under the Statute Law Compilation and Revision Act Cap 1:03. Its provisions have, however, survived totally intact as part of the General Law Amendments Act, Cap 8:07.

9 For a full discussion of how these rules operate see W. Ncube, *Family Law in Zimbabwe*, Chapter 1.

The estates of all those persons to whom customary law applies which have not been disposed of by will, shall be administered and distributed in accordance with customary law and the provisions of Part IIIA of the Administration of Estates Act. Thus, an African, to whom customary law applies and who does not wish his estate to be distributed in accordance with the new principles, will have to make a will.

Section 68G (2) provides that in the event of there being a dispute among the beneficiaries of an estate, who are defined as the deceased's surviving spouse and children, as to whether or not customary law applied to the deceased person, the Master shall determine the dispute as speedily as he can. In terms of section 68J, should any of the parties be aggrieved by the decision of the Master, they have a right to appeal to the High Court.

APPOINTMENT OF EXECUTOR

Section 68B provides for the appointment of an executor to estates governed by customary law. Previously, such estates were administered in terms of customary law and there was no provision for the appointment of an executor. With this amendment, after the death of a person to whom customary law applies the "Master shall summon the deceased person's family, or such members of the family as are readily available, for the purpose of appointing a person to be the executor of the deceased person's estate".¹⁰ At such meeting the Master, with the concurrence of the relatives present, shall appoint any person to be the executor. If the relatives are unable to agree on a person to be appointed executor, the Master shall appoint the executor having regard to the order of ranking provided in section 26 which places the surviving spouse first, the next of kin second and creditors third. This simply means that where the members of the deceased's family agree on an executor, the Master shall appoint that person and where they are not agreed he shall appoint the surviving spouse or if she is not available, any of the next of kin interested and available and if none is available and willing any of the creditors willing and available. The heir at customary law is also eligible for appointment as executor, should the family prefer him.¹¹ The executor so appointed shall be responsible for discharging the claims of creditors and "administering and safeguarding" the estate pending its distribution in terms of a plan to be prepared by the executor and approved by the Master.¹²

The term "Master" as used in connection with customary law estates is being extended in its meaning to include any class of magistrates or any other person designated by the Minister of Justice, Legal and Parliamentary Affairs to be entitled to perform all or any of the functions of the Master.¹³ This means that it will now be possible, in relation to customary law estates, to decentralise the functions or some of the functions of the Master so that they may be performed at the local level by magistrates and assistant magistrates or even by Chiefs or other persons, if they are so designated by the Minister.

Note must also be made of the fact that the estate of a person governed by customary law will include that person's immovable property since the definition of "estate" in section 68(1) makes it clear that it "includes any immovable property forming part of the estate". The necessity for this specific inclusion of immovable property arises from the reasons

10 Section 68B(1). It may be noted that under the original draft Bill the heir at customary law was to perform all the functions of an executor. That provision was only changed after the first reading of the Bill following massive protest and lobbying by Women's organisations and other critics.

11 Section 68B(3).

12 Section 68B(4).

13 See the definition of "Master" in section 68 (1) as read with section 68I.

discussed in the introduction, namely that the colonial courts held that as the ownership of immovable property was unknown at customary law it (the immovable property) could not be regulated by customary law.

THE OLD CUSTOMARY LAW OF INHERITANCE

According to the courts' customary law, which is extensively contradicted by the living customary law (the customary law practised by people in their daily lives),¹⁴ there is a single heir at customary law who is, in the case of a deceased man, his eldest male child¹⁵ or failing male children, the eldest daughter,¹⁶ failing daughters, the eldest male grandson¹⁷ or failing grandsons presumably, the eldest granddaughter or on the failure of grandchildren, the deceased's eldest brother.¹⁸ According to this customary law a widow can never be the heir to her husband's estate.¹⁹

The net result of this version of customary law has been the complete exclusion of women as wives, daughters, mothers and sisters from the inheritance process. This has caused serious problems for women, particularly widows who have often been disposed of property they would have accumulated jointly with their husbands during the subsistence of the marriage.²⁰ The changes being effected by the Administration of Estates Amendment Act to the laws of inheritance are directed at mainly addressing the iniquities of the courts' version of customary law which excluded widows and daughters from inheriting from their husbands and fathers respectively.

RECOGNITION OF MARRIAGES

Zimbabwe is one of very few countries in Eastern and Southern Africa which requires the registration of customary law marriages before they can be fully recognised by the law as valid marriages. The provision requiring such registration was enacted by the colonial government and inherited at independence.²¹ To date it has remained intact except that by piecemeal legislative interventions and judicial interpretations, recognition of unregistered customary marriages has been extended to more and more areas of the law.²² The Administration of Estates Amendment Act extends further recognition to unregistered

14 For a presentation of some of the evidence of this living customary law, see K. Dengu-Zvobgo, B. Donzwa, E. Gwaunza, J. Kazembe, W. Ncube and J. Stewart, *Inheritance in Zimbabwe: Law, Customs and Practices*, Sapes Trust, Harare, 1994 hereinafter cited as K. Dengu-Zvobgo *et al.*

15 See *Duma v Madidi* 1918 SR 559 and *Jamu v Jim Takaziweyi* 1939 SRN 49.

16 See *Mangwende v Chihowa* 1987 (1) ZLR 228 (SC).

17 See note 6 above.

18 *Ibid.*

19 *Murisa v Murisa* 1992 (1) ZLR 167 (SC).

20 See generally K. Dengu-Zvobgo *et al* *Inheritance in Zimbabwe: Law, Custom and Practices*, Sapes Trust, Harare, 1994.

21 This is section 3(1) of the Customary Marriages Act. However, even the colonial state did give partial recognition to unregistered customary marriages in the interests of the children and hence subsection 5 of section 3 extended recognition for the "purposes of customary law and custom relating to the status, guardianship, custody and rights of succession of the children of such marriage ...". For a fuller discussion of how the colonial and post colonial courts have interpreted this provision see W. Ncube, "Magic and Mysticism as Aids to Statutory Interpretation: The Case of Judicial Recognition of Customary Unions in Zimbabwe" *ZLRev* 1995 Vol.12.

22 See *Carmichael v Moyo* 1994 (2) ZLR 176 (SC), *Zimnat Insurance Co. v Chawanda* 1990 (2) ZLR 143 (SC) and W. Ncube, note 21 above.

customary marriages for purposes of inheritance. The new section 68(3) of the Administration of Estates Act reads:

A marriage contracted according to customary law shall be regarded as a valid marriage for the purposes of this Part notwithstanding that it has not been solemnized in terms of the Customary Marriages Act [Chapter 5:07], . . .

This means that for purposes of the new inheritance principles and rules introduced by the Amendment Act, a customary law union will be treated as if it were a fully valid marriage. Where the husband had only one wife this presents no problems (other than those of proof). It also presents very few problems where the husband had two or more wives all of whom were associated with him in customary unions. Serious problems begin where the husband had married one or more of the wives in a registered marriage and one or more in unregistered customary unions. For example, as often happens in Zimbabwe, the husband may have a registered customary marriage with one wife and "secretly" (often with the knowledge of his family but without the knowledge of his wife) contracts a customary union with another woman with whom he proceeds to have children. In such situations the first wife often discovers the existence of the other woman at the time of the husband's death or soon thereafter. Under the new rules of recognition the two widows in this example, together with all their children would have to share the estate as discussed below. The justice and desirability of this approach is at best doubtful. The difficulties are caused by the fact that many men continuously mix customary practices and values with Western values. In a true traditional setting it was impossible for a man to have a secret customary marriage and father children without the knowledge of his first wife. The issue of taking a second and subsequent wives was a family matter which involved the sitting wife or wives who had to consent to the marriage. There were traditional ways of securing this consent. The husband could give a reluctant sitting wife cows, for example, to sweeten her to the idea. The important point, though, is that it was not possible for a woman to discover that she was in a polygynous marriage only after the death of her husband. Today, this happens quite frequently, particularly in urban areas.

This mix of tradition and modernity goes even further. A man may marry the first wife in accordance with the general law in terms of the Marriage Act, [Cap 5:11] which prohibits polygamy, and thereafter enter into an unregistered customary union with another woman. Fortunately, recognition has not been extended to this type of customary union by the Administration of Estates Amendment Act. In this situation the customary union entered into by a man already married in a monogamous marriage is treated as a legal nullity, even for purposes of inheritance in so far as the "widow" in the customary union is concerned.²³

This is due to the proviso to subsection 3 of section 68 quoted above which proviso states:

Provided that such a marriage [unregistered customary marriage] shall not be regarded as valid for the purposes of this Part if, when it was contracted, either of the parties was married to someone else in accordance with the Marriage Act [Chapter 5:11] or the law of a foreign country under which persons are not permitted to have more than one spouse.

23 The children in such a union should be in the same position as all the other children since it appears that both customary law (at least as applied by the courts) and the Amendment Act do not make a distinction between "illegitimate" and "legitimate" children. The Amendment Act, although it does not define child, defines "beneficiary" as any child of the deceased person and proceeds to use the word child in its various provisions in a manner which does not suggest that the reference is to legitimate children only.

This effectively means a customary law union cannot, in law, co-exist with a monogamous marriage where it was preceded by that monogamous marriage.

However, for purposes of inheritance, a customary law union can legally co-exist with a monogamous marriage which was contracted after the customary law union because the provisions of the new subsection 4 of section 68 state that:

(4) A marriage contracted according to the Marriage Act [Chapter 5:11] or the law of a foreign country under which persons are not permitted to have more than one spouse shall be regarded as a valid marriage for the purposes of this Part even if, when it was contracted, either of the parties was married to someone else in accordance with customary law, whether or not that customary law marriage was solemnized in terms of the Customary Marriages Act [Chapter 5:07].²⁴

This particular problem arises mainly because of the government's inability or reluctance to take a firm and decisive legislative decision on the recognition or non-recognition of customary law unions. The approach taken is not only often confusing, but it is as if the government wants to have its cake and eat it too. Section 3(1) of the Customary Marriages Act provides that an unregistered customary law marriage shall be invalid. If the marriage is invalid it follows that any of the parties can terminate the "social" relationship at anytime and marry another person. It is because of this unlimited capacity to marry anybody else enjoyed by persons associated with each other in a customary union that makes it possible for a person in a customary union to contract a monogamous marriage at anytime with another person. To say the unregistered customary marriage is invalid must and does mean that either of the parties is free, at anytime, to contract a valid monogamous marriage with any other person. To then say in the same breadth that, if one of such persons does contract a monogamous marriage, that marriage shall be treated as a polygamous marriage for purposes of inheritance is surely attempting to have and eat one's cake at the same time. The state has to make a choice; either to give full recognition to unregistered customary marriages as do many of the countries in the region; or to treat it as an invalid marriage, at least as between the parties, and live with all the consequences of that invalidity. To muddle, huff and puff over the issue without making a clear choice is not only complicating the law unnecessarily, but in the long run, it will cause more hardship to those intended to receive the law's protection. A person who contracts a monogamous marriage with a person whom the law recognises to be competent to do so, surely has a right to expect the law to consistently recognise the monogamous nature of that marriage. It is neither realistic nor fair for the law to tell her or him after the death of her or his spouse that, although she/he had a monogamous marriage, for purposes of inheritance she/he would be treated as if she/he was in a polygynous relationship.

Let us explain for a moment the meaning of section 68(4) as quoted above. It means that where, for example, a man who has a customary law union marries another woman monogamously, that monogamous marriage shall be treated as a polygynous marriage at

24 The original version of this provision or subsection as presented to Parliament during its first reading simply invalidated a monogamous civil law marriage contracted by a person who was, at the time of the contracting of the monogamous marriage, married to another person in terms of customary law, including a customary law union. The provision was then changed to its present form after heavy protests and lobbying from women's organisations. Had the clearly ridiculous original version gone through Parliament, it would have meant that a validly married person for all other purposes would have been treated as unmarried for purposes of inheritance and therefore not entitled to inherit anything from his wife or husband's estate. However, he would still have been able to claim maintenance under the provisions of the Deceased Persons Family Maintenance Act, [Cap 6:03].

the time of his death for purposes of the inheritance rights of the parties.²⁵ This means that the monogamously married wife would have to share the estate with the other wife or wives. What is worse, as we will see later, is that the first wife, who in this case would be the customary law union wife, would get a bigger share of the portion of the estate set aside for the surviving spouses.

The problem with this aspect of the provision is the difficulty of determining when a customary union can be considered dissolved. In justifying this approach the Minister of Justice, Legal and Parliamentary Affairs used an example which was not only simplistic but also designed to appeal to the emotions of Parliamentarians and others. This example was intended to justify why it was necessary to recognise the civil marriage as a polygamous one for purposes of inheritance. The Minister said there are many cases where a man marries, in an unregistered union, a woman who resides in the rural areas, establishes a home with her there, and leaves her to farm and look after the children at that rural home. After several years of such unregistered marriage, say 20 years or more, the husband while working in town meets a young woman who persuades him to marry her in a monogamous marriage. They enter into a monogamous marriage and establish a home in town. The first wife remains in the rural home as before. The husband occasionally goes there as before. Should she, the Minister rhetorically asked, lose the right to inherit from the husband upon his death? Essentially, therefore, the argument was that the rural widow in this hypothetical case should have a right to inherit from her husband. If all was as simple as suggested by the hypothetical case few difficult questions would arise. Unfortunately, the hypothetical scenario is only but a small example of the situations covered by the provision.

What of the situation where the husband, even though customarily married at the time of his monogamous marriage, had taken clear steps to bring the customary union relationship to an end after his monogamous marriage? Let us say in the same hypothetical case, after monogamously marrying the young woman the husband removes the rural wife and formally takes her to her natal home. After several years or even a few months, he dies. Read literally the provision suggests that the first wife would still be regarded as the deceased's widow and would inherit from him together with the monogamously married widow.

What of the hypothetical situation where, without following traditional "divorce" procedures (whatever they may be) the husband and the wife simply separate or the husband deserts their common home and goes on, after several years, to monogamously marry another woman? Would it be considered that the customary union would have been terminated by the separation or would it be considered that the customary union was still in existence at the time of the man's marriage as he would not have complied with traditional divorce procedures? In any event, why should traditional divorce procedures be relevant at all considering the fact that the parties are not lawfully married to each other and therefore cannot divorce each other?²⁶ Assuming that in the light of this new law customarily married couples have now to follow the traditional divorce procedures, what are those procedures? They seem to vary quite considerably from ethnic group to ethnic group and indeed from family to family. Among some groups the man who is "rejecting" his wife must give her a token coin and that's it. In others not only must he give the token coin, but he must physically deliver her to her natal family. In still other groups the two

25 For all other purposes, such as pension rights, insurance rights and burial the marriage will obviously remain a monogamous one.

26 See generally *Joseph Tinga v Joshua Shekede* 1970 AAC 30 and W. Ncube, note 4 above, at pp. 134-135.

families must meet, discuss and agree on the "divorce". In some of these groups the giving of token coins is irrelevant. Further still, in other families, particularly among the Ndebele, there are no coins given to the wife at all. Divorce can be achieved or effected simply by expelling the wife from the matrimonial home or delivering her to her aunt. In these circumstances how can anyone reasonably know whether the person he or she is marrying has validly terminated the customary union?²⁷

The above difficulties pale into insignificance against the fact that as formulated section 68(4) and its proviso also mean that a person who has a registered customary marriage can enter into a clearly bigamous civil and monogamous marriage with another person and that bigamous marriage will be treated as if it were a customary marriage for purposes of inheritance. Literally, that is the meaning of the section, otherwise the words "whether or not that customary law marriage was solemnized in terms of the Customary Marriages Act . . ." would be superfluous and meaningless.²⁸ Until this amendment, it was always clear that a person who has contracted a registered customary marriage suffers from absolute incompetency to marry another person under a monogamous system of law.²⁹ Even though the words used are clear and unambiguous, it is doubtful that the Legislature in fact intended this result. As already indicated, the original formulation of subsection 4 when introduced in Parliament simply invalidated a civil law marriage for purposes of inheritance if it was contracted when one or other of the parties was married to another person in a customary law union. That provision read:

A marriage contracted according to the Marriage Act [Chapter 5:11] or the law of a foreign country under which persons are not permitted to have more than one spouse shall not be regarded as a valid marriage for purposes of this Part if, when it was contracted, either of the parties was married to someone else in accordance with customary law, whether or *not* that customary law marriage was solemnized in terms of the Customary Marriages Act [Chapter 5:07]. [my emphasis].

After women's organisations protested against this clause they reached a compromise with the Minister of Justice, Legal and Parliamentary Affairs which would have the law recognise, for purposes of inheritance, both the preceding customary union and the subsequent civil marriage. Instead of completely redrafting the provision to reflect this agreement, the Minister's Law Officers took the apparently easier approach of simply deleting the word "not" highlighted above in the quotation and inserting the word "even" after the word "Part". The effect of this easy approach was to achieve a meaning which could not have been intended, namely to give recognition to a bigamous civil law marriage contracted at a time when one of the persons was validly married under a registered customary marriage.

27 This problem will also particularly affect issues relating to a claim for adultery damages by a husband associated with a woman in a customary union, following the Supreme Court ruling in *Carmichael v Moyo* (supra) which extended recognition to customary unions for purposes of the husband's right to claim adultery damages against the lover of his "wife". For a fuller discussion of this issue see W. Ncube, note 21 above and W. Ncube, note 2 above.

28 Paraphrased for this issue and to demonstrate this point subsection 4 would read in part "A marriage contracted according to the Marriage Act ... shall be regarded as a valid marriage for the purposes of this Part, even if when it was contracted, either of the parties was married to someone else in accordance with customary law, whether or not that customary law marriage was solemnized in terms of the Customary Marriages Act ... Provided that, for the purposes of this Part, the first-mentioned marriage shall be regarded as a customary law marriage".

29 See generally W. Ncube, note 3 above at p. 137-139.

DISTRIBUTION PLAN AND THE NEW INHERITANCE LAW

Once the executor has discharged or settled all the claims against the estate of the deceased person he is required to draw up a distribution plan for the net residue of the estate.³⁰ The distribution plan, which may deal with the conservation and application of the net estate for the benefit of the beneficiaries, the distribution of all or any part of the estate to the beneficiaries; the sale or disposal of any property in the net estate for the benefit of the beneficiaries; and the maintenance of any beneficiary;³¹ must be submitted to the Master by the executor for approval.³² Before approving the distribution plan, the Master is required to take such reasonable steps as are necessary to satisfy himself that, in drawing up the plan, the executor consulted all the members of the deceased's family and the beneficiaries and that the beneficiaries have agreed to the distribution plan in full knowledge and understanding of their rights.³³ Where any member of the deceased's family or beneficiary has not been consulted the Master is required to decline to approve the executor's distribution plan until the consultation has been made and in the case of a beneficiary that beneficiary has also agreed to the distribution plan.³⁴

The effect of these provisions is that while the executor has to consult the members of the deceased's family he need not obtain their agreement to the distribution plan, whereas in respect of the beneficiaries (the surviving spouse and/or children) he/she must not only consult them but must also obtain their consent or agreement to the plan in the full knowledge of their rights as heirs of the deceased. Thus the executor has a duty to explain what each beneficiary is entitled to in terms of the Act.

There is the problem of who the executor should consider to be a member of the deceased's family. The definition of family provided in section 68(1) is unhelpful. It simply states that "family, in relation to a deceased person . . . means the persons who are recognized under customary law as constituting the deceased person's family". This means we are back to the unwritten customary law with all its flexibility, malleability and negotiability as to what is or is not a family and who is or is not a member of a particular family. As has been demonstrated elsewhere,³⁵ at customary law, membership of a family is highly flexible and negotiable depending on who is asking and on the purpose for which the family is being defined. For example, in Ndebele custom the membership of a family for purposes of inheritance is called *abosendo* (family council) and includes the deceased's parents, paternal and maternal uncles and aunts, brothers and sisters, the surviving spouse, children and cousins. The absence of any one or even more members of *abosendo* does not affect the

30 Section 68D.

31 Note that the distribution can only be to a beneficiary and that the disposal of any property can only be for the benefit of a beneficiary. Similarly, maintenance arrangements can only be for a beneficiary. A beneficiary is defined as "a surviving spouse or child of the deceased person; or where the deceased person left no surviving spouse or child, any person who is entitled to inherit any property in the estate in terms of this part" [section 68(1)(a) and (b)]. The effect of this is that the distribution plan can only benefit the surviving spouse and/or children except where the deceased is not survived by any spouse or child, in which case the other relatives who are entitled to inherit in terms of the Act, namely parents, brothers and sisters of the deceased, must inherit in terms of whatever distribution plan is drawn up by the executor.

32 See section 68E(1) as read with section 68D(1).

33 Section 68E(2) as read with 68D(2)(b). The later section states that when drawing up a distribution plan the executor shall "... consult the deceased person's family and the beneficiaries and endeavour to obtain the beneficiaries' agreement to it".

34 Section 68E(3)(b).

35 See generally W. Ncube, *et al*, *Continuity and Change: The Family in Zimbabwe*, WLSA, 1997, Harare.

validity of the decisions that may be made on the inheritance issues.³⁶ In other words, there are no permanently fixed persons who are defined as members of a deceased person's family for purposes of inheritance in all cases.

Notwithstanding these difficulties it could be said that the executor ought to consult the deceased's parents, brothers, sisters, uncles and aunts, at least in Ndebele custom. Legally, all that the executor needs do is consult them and seriously consider their representations and views on the distribution plan. It appears that, as long as they have been consulted, they have no further rights and hence would have no remedy against an executor who has drawn up a distribution plan with which they are not in agreement. However, a beneficiary has a remedy against any executor who draws up a plan with which he/she is in disagreement. Section 68E(3)(c) provides that where a beneficiary has not agreed to a plan submitted to the Master for approval, the Master shall "proceed to determine, in accordance with section 68F, any issues in dispute between the executor and the beneficiary or beneficiaries, and shall direct the executor to distribute or administer the estate in accordance with his determination".

This means that beneficiaries are entitled to insist that the estate be distributed in accordance with the formula or rules contained in section 68E and where there is a deviation they may decline to give their agreement to the distribution plan thereby necessitating the Master's intervention, who in turn is required to resolve the dispute in accordance with the formula in section 68E. In practice, these provisions are likely to ensure that the principles in section 68E are adhered to strictly as if they are rigid and inflexible and yet it is clear from section 68D(2)(a) that they are intended to be flexible. Section 68D(2)(a) provides that when drawing up a distribution plan the executor shall:

pay due regard to the principles set out in subsection (2) of section 68F to the extent that they are applicable.

If the principles were intended to be rigidly adhered to this section would have required the executor, not to "pay due regard to" but to comply with them.

Where the Master is satisfied that the distribution plan placed before him has been agreed to by all the beneficiaries he shall approve the plan and "authorize the executor to distribute or administer the estate in accordance" with that plan.³⁷ Clearly, it is always best for an executor to submit a plan which has received the consent of the beneficiaries or at least which complies with the principles or guidelines set out in section 68F(2) which are discussed next hereunder.

THE DISTRIBUTION PRINCIPLES/FORMULA

As earlier indicated the deceased's heir at customary law will succeed to the deceased's name and *tsvimbo* (in Shona) or *intonga* or more appropriately *umkhonto* (in Ndebele), which items symbolize the deceased's name and position in the family.³⁸ In traditional families, the heir stands at the head of the deceased's grave during the burial ceremony, while holding the deceased's *tsvimbo* or *umkhonto* (spear). This symbolises that he has stepped into the shoes of the deceased in the family organisation and in that way has assumed headship of the deceased's family.³⁹ The customary law heir also inherits all such traditional articles

³⁶ See generally K. Dengu-Zvobgo *et al*, above 14 above.

³⁷ Section 68E(3)(a).

³⁸ Section 68C.

³⁹ See generally K. Dengu-Zvobgo *et al op cit* note 14.

which at customary law pass to him upon the death of the deceased.⁴⁰ Also devolving in accordance with customary law are any personal articles which, under customary law, devolve upon a member of the deceased person's family. Such articles are inherited by the member who is entitled to receive them at customary law and their value is excluded from the net estate which forms the subject matter of the executor's distribution plan.⁴¹ In general this means that, for example, the deceased's personal clothing or his traditional weapons and tools, are to be distributed in accordance with each family's customs and practices.

MONOGAMOUS CUSTOMARY MARRIAGES

Even though all customary marriages are potentially polygamous the great majority of them remain monogamous in practice until their dissolution by divorce or death. In the event of their dissolution by the death of the man section 68F(2)(d) provides that:

- (d) where the deceased person is survived by one spouse and one or more children, the surviving spouse should get —
 - (i) ownership of or, if that is impracticable, a usufruct over, the house in which the spouse lived at the time of the deceased person's death, together with all the household goods; and
 - (ii) a share in the remainder of the net estate determined in accordance with the Deceased Estates Succession Act [Chapter 6:02].

It is clear from this provision that a surviving spouse in a monogamous customary marriage is entitled to inherit the matrimonial home and the household goods in that house. However, the formulation of this provision raises several difficulties. Firstly, it appears that the surviving spouse will be entitled to the matrimonial house only if she resided in it at the time of the deceased's death. What if the parties lived in rented accommodation while leasing out the deceased's house or their house? What if the deceased died while the parties were living apart and the deceased occupied the matrimonial home while the surviving spouse lived elsewhere? What about the situation where a surviving wife may have been residing in a rural communal or resettlement area while the deceased husband lived in the parties' urban house where he might have been working? What if, at the time of the death, the parties resided abroad where they could have been working and renting accommodation while the matrimonial home in Zimbabwe was rented or for that matter vacant?

It is difficult to understand what the rationale for formulating this provision in this manner was. It should simply have been formulated without reference to whether or not the surviving spouse resided in the matrimonial home or house at the time of the death of the deceased.

Secondly, what is meant by the term "house" as used, not only in this particular provision, but in others discussed later? In an urban area it is clear that the term house will include the matrimonial home as a unit and a whole. But what if the parties lived in and owned a commercial farm? Is the intention that the surviving spouse will inherit only the house in which she lived and not the farm itself? Considering that the matrimonial house on a farm is indivisible from the rest of the farm is it intended that this should be one of those situations where it is impracticable for the surviving spouse to get ownership of the house and hence

40 Section 68C. Section 68C applies to all African estates, including testate ones, which would otherwise be governed by customary law. Only those estates of Africans governed by the general law are excluded from the application of the provisions of section 68C which requires that the heir at customary law inherits the deceased's name and traditional symbolic items such as the spear.

41 Section 68F(2)(a).

will be entitled to a usufruct over only the house and not the rest of the farm? The formulation suggests that this is the intention. If so, then the new law hardly advances the rights of surviving spouses, particularly widows, who may be residing in commercial farming areas.

What of communal and resettlement areas where clearly the state owns the land and the occupants only have use rights? Clearly, these are some of the situations where it is impracticable for the surviving spouse to receive or get ownership of the house as the land does not belong to the deceased. The surviving spouse would get a usufruct over the house. But, even in communal and resettlement areas, the question of what is meant by house is ambiguous. In communal and resettlement areas the family would normally have several huts or small houses or a large house with huts or other smaller houses. Very rarely does one find a home with just a house as is the case in urban areas. How then is the provision (section 68F(2)(d)) to be interpreted? In the context of communal and resettlement areas should the term "house" be read to mean the homestead together with the agricultural fields? Or should it be read to include only the homestead? Or still read more narrowly to mean only the particular house or hut the surviving spouse occupied? A more sensible approach would be that the intention of the Legislature was to ensure that the surviving spouse should remain at the matrimonial home as before and that therefore the usufruct over the "house" extends to the homestead together with the fields. However, this approach is not consistent with the ordinary grammatical meaning of the term "house".

That this provision and others, in so far as they use the term "house", raise more questions than others is obvious. It remains to be seen how the courts will deal with all the questions which arise.

In addition to the "house", and its household contents the surviving spouse is also entitled to receive a child's share or \$200 000,00 whichever is the greater, from the remaining free residue of the estate. A child's share or \$200 000,00 is the share fixed by the Deceased Estates Succession Act referred to in subparagraph (ii) of paragraph (d) of subsection (2) of section 68F quoted above as read with regulations made thereunder.⁴² Basically, this means that the inheritance principles in monogamous customary marriages are now substantially similar to those under the general law except that under the general law the surviving spouse gets all the household goods and effects (which includes the family car), regardless of whether or not those goods are in the matrimonial house.⁴³

The Administration of Estates Amendment Act also amends the Deceased Estates Succession Act by inserting a new section 3A which reads:

The surviving spouse of every person who on or after the date of commencement of the Administration of Estates Amendment Act, 1997, dies wholly or partly intestate shall be entitled to receive from the free residue of the estate —

- a) the house or other domestic premises in which the spouses or the surviving spouse, as the case may be, lived immediately before the person's death; and
- b) the household goods and effects which, immediately before the person's death, were used in relation to the house or domestic premises referred to in paragraph (a); where such house, premises, goods and effects form part of the deceased person's estate.

42 For an explanation of how this determination is made and generally for a fuller discussion of the provisions of the Deceased Estates Succession Act, see K. Dengu-Zvobgo *et al*, above, note 14 at pp. 56-59.

43 See section 3(a)(i) which speaks of "the household goods and effects in such estate" and not of "household goods in that house" as does the Administration of Estates Act.

It is difficult to understand why it was felt necessary to include paragraph (b) since section 3(a)(i) and (b)(i) of the Deceased Estates Succession Act already allowed the surviving spouse to inherit the household goods and effects in the estate. There seems to be no point in further providing that such spouse shall be entitled to the household goods and effects which were used in connection with the matrimonial home as such goods are already included in the wider formulation of "household goods and effects in such estate" already provided for in the above referred paragraphs (a)(i) and (b)(i) of section 3 of the Act. In the circumstances, what is really new is the aspect of the provision allowing the surviving spouse to inherit the matrimonial home.⁴⁴ The old provisions, namely section 3 of the Deceased Estates Succession Act, only guaranteed the surviving spouse the household goods and effects, although she/he could indirectly be guaranteed the matrimonial home if the remaining free residue of the estate constituted only a matrimonial home whose value did not exceed her/his guaranteed minimum share of \$200 000,00.

In respect of monogamous customary law marriages, it remains to discuss the situation where the deceased person is not survived by any child but by a spouse. In that event the surviving spouse should get "ownership of or, if that is impracticable, a usufruct over, the house in which the spouse lived at the time of the deceased person's death, together with all the household goods in that house" and half of the remainder of the net estate.⁴⁵ The balance of the net estate (that is the remaining half of the remainder) devolves upon the deceased person's surviving parents, brothers and sisters in equal shares.⁴⁶ These principles are fundamentally the same as those which apply to general law estates where, in the absence of the deceased's descendants, the surviving spouse inherits the matrimonial home, the household goods and effects and a 50% share in the remaining balance with the surviving parents, brothers and sisters sharing equally the other 50% share.⁴⁷

ESTATES OF UNMARRIED, DIVORCED AND WIDOWED PERSONS

A single or divorced or widowed deceased person may be survived by a child or children only or by a child or children and parents or by parents only or by parents, brothers and sisters. Where the deceased person was unmarried, divorced or widowed and is not survived by any child his or her estate simply devolves upon his/her "surviving parents, brothers and sisters, if any, in equal shares."⁴⁸ Where, however, the unmarried, divorced or widowed deceased person is survived by a child or children his/her estate devolves upon

44 In K. Dengu-Zvobgo *et al*, note 14 above, we in fact recommended that a surviving spouse be guaranteed retention of the matrimonial home regardless of the type of marriage. The Amendment Act effectively adopts our recommendation in that study. Indeed, the idea of a usufruct, where it is impracticable for the surviving spouse to inherit the matrimonial home, such as in communal and resettlement areas, was one other recommendation we made in that study, which has been implemented by the Administration of Estates Amendment Act. See at pp. 294-298 for a summary of the recommendations we made in that study and also pp. 274-301 for the arguments underpinning those recommendations and in particular for the surviving spouses's absolute need to remain in occupation of the matrimonial home and also to retain the household goods and effects.

45 Section 68F(2)(g)(i).

46 Section 68(2)(g)(ii).

47 See section 3(c) of the Deceased Estates Succession Act.

48 Section 68F(2)(f). At general law where there are no descendants, the parents of the deceased take a half share of the estate each or failing either or both parents, the siblings of the deceased take through the parent through whom they are related to the deceased. See generally J. Stewart, "Who gets the Money? Some Aspects of Testate and Intestate Succession in Zimbabwe", 1989-90 *Zimbabwe Law Review*, Vol.7-8, 85.

that child or those children in equal shares, and "any of their descendants *per stirpes*".⁴⁹ It may be noted that the later situation is no more than an incorporation of the Roman-Dutch common law principles⁵⁰ into customary law estates. As a result, the devolution of customary law estates of unmarried persons who are survived by children is now the same regardless of whether the general law or customary law is applicable to the estate since Roman-Dutch common law principles have been superimposed on customary law estates.

POLYGAMOUS MARRIAGES

Elsewhere we strongly argued against the law's continued recognition of polygyny and recommended that, on a prescribed future date, recognition be withdrawn from all future polygynous marriages. This, we argued, would make it easier to formulate a sensible, logical and consistent law of inheritance for the country. The complexities brought upon the law of inheritance by the law's continued recognition of polygyny is well illustrated by the muddle and confusion of the new provisions dealing with polygynous situations. The only uncomplicated situation is where one of the wives in a polygynous marriage dies. In that event, the new law as contained in section 68F(2)(e) provides that if the deceased wife is survived by her husband and one or more children one-third of her estate should devolve upon her husband and the balance should devolve upon her own child or children in equal shares, as the case may be, and where any of the children have predeceased their deceased mother, their descendants *per stirpes*.⁵¹

WHERE THE DECEASED IS THE MAN

If a man who has a polygynous marriage dies intestate his property is shared among his surviving wives and his children. The actual provisions, namely section 68F(2)(b) and (c) setting out the sharing principles are extremely muddled, confused and border on the meaningless mainly because of clumsy and poor drafting. They read:

(2)(b) where the deceased person was a man and is survived by two or more wives and had one or more children —

- (i) one-third of the net estate should be divided between the surviving wives in the proportions two shares to the first wife and one share to the other wife or each of the other wives, as the case may be; and
- (ii) the remainder of the estate should devolve upon —
 - (a). his child; or
 - (b). his children in equal shares; as the case may be, and any of their descendants *per stirpes*;
- (c) where the deceased person was a man and is survived by two or more wives, whether or not there are any surviving children, the wives should receive the following property, in addition to anything they are entitled to under paragraph (b) —
 - (i) where they live in separate houses, each wife should get ownership of or, if that is impracticable, a usufruct over, the house she lived in at the time of the deceased person's death, together with all the household goods in that house;

49 Section 68F(2)(h).

50 See generally J. Stewart, note 48 above and K. Dengu-Zvobgo *et al* note 14 above at pp. 56-59.

51 By representing through the branches of the deceased's family tree.

- (ii) where the wives lived together in one house at the time of the deceased person's death, they should get joint ownership of or, if that is impracticable, a joint usufruct over the house and the household goods in that house".

The fundamental problem with paragraphs (b) and (c) of this subsection is that grammatically and logically they are very difficult to interpret. Paragraph (b) suggests that in a polygynous situation the surviving wives will share among themselves one-third of the net estate and the remaining two-thirds should devolve upon the deceased man's children. If that was all, there would be no difficulty. However, paragraph (c) goes on to give an entitlement to the surviving spouses to inherit the houses they occupied together with the household goods therein. But then a literal and grammatical application of the provisions of paragraph (b) would have exhausted all the net estate and there would be nothing left to devolve in terms of the provisions of paragraph (c) as one-third of the estate would have gone to the wives and another two-thirds to the children. And yet paragraph (c) says that "in addition to anything" the wives are entitled to under paragraph (b) they should get the houses they occupied and their contents. How does one share one-third and then two-thirds of the net estate and still remain with "houses" and "household goods" to distribute to the wives? Clearly, this is impossible. However, in spite of the difficulties involved in terms of the rules of statutory interpretation some sensible meaning has to be found and given to the provisions even where they are very badly drafted, since the Legislature must have intended them to mean something when read together. Even though this does violence to the ordinary grammatical meaning of the words used and the style of their presentation, it is submitted that the intention of the Legislature was the following:

- a) that where a polygamist is survived by two or more wives whether or not he is also survived by any child or children, the wives should inherit the respective houses they occupied together with their contents or a usufruct thereof in cases where it is impracticable for them to get ownership.
- b) where the deceased is survived by children, in addition to the houses and household goods, a third of the net value of the estate should be set aside for the surviving spouses to share among themselves in the proportions specified. The difficulty, though, lies in whether the third referred to is a third of the net estate prior to taking out the household goods and effects or it is a third of the balance after removing the value of the houses and household goods. One interpretation would be that the wives share among themselves one third of the remainder of the net estate after the value of the house or houses and household goods have been removed. However, such an interpretation would do extreme violence to the language used, since paragraph (b) clearly speaks of "one-third of the net estate"⁵² and not one-third of the remainder of the net estate. The other interpretation would be that the widows' share is a third of the net estate prior to taking out the houses and household goods. Taken literally the provision must be taken to mean the latter interpretation. The latter interpretation would mean that in some estates, particularly those where the value of the houses and household goods constitute a larger proportion of the net value of the estate, the other beneficiaries may receive nothing or very little. I will illustrate this point a little later.
- c) the remaining balance of the estate, after the wives have taken the houses they lived in, the household goods therein and their guaranteed one third, should then be shared

52 "Net estate" is defined in section 68(1) as the "residue of an estate remaining after the discharge or settlement of the claims of creditors". Clearly, a defined term cannot be read in the context of the statute to mean the remainder of the estate after taking off the value of the houses and household goods.

equally among the deceased's children in terms of subparagraph (ii) of paragraph (b). As already observed, if my preferred interpretation of the provisions outlined in paragraph (b) above is correct, the surviving children may infact receive nothing as there may be no remainder after the wives have received the guaranteed houses and household goods together with one-third of the net estate, if the term net estate is given its defined meaning.

For example, imagine a situation where the deceased owned two houses both valued at \$300 000,00 and each occupied by one of his two widows. In each of the houses there are household goods worth \$60 000,00. The deceased had \$60 000,00 cash at the bank and also owned an undeveloped plot worth \$120 000,00. In this example, the wives would receive the houses and their contents which together are valued at \$720 000,00. In addition, they will share among themselves one-third of the net estate which is one-third of \$900 000,00 which equals \$300 000,00. But then the remaining balance of the estate after taking out \$720 000,00 is \$180 000,00 which means the wives would share this amount which is already less than the one-third share they are entitled to. The children would then receive nothing. Only in those estates in which the value of the houses and household goods constitute a relatively modest share of the net estate would the children be able to participate. For example, where the value of houses and household goods is \$250 000,00 while the rest of the property is say \$200 000,00 the children would share the \$45 000,00 not going to the wives.

However, in many respects, even this interpretation I have preferred seems strenuous and even far fetched. The alternative interpretation though, is more far fetched and would do extreme violence to the language used as it would give the words "net estate" a meaning which is contrary to the definition given. If this alternative meaning is to be preferred, in the first example given above, the widows would receive the houses and household goods valued at a total of \$720 000,00 and then share among themselves in the proportions specified one third of the balance of \$180 000,00 which is \$60 000,00. The senior widow will receive two thirds of \$60 000,00 which is \$40 000,00. The children will then share among themselves the balance of \$120 000,00. This is obviously neater and more logical, but it is not supported by the language of the statute.

It is clear that paragraphs (b) and (c) of section 68F(2) need to be rethought and redrafted to achieve clarity and greater sense. A simpler way of doing it would be to grant the surviving wives the houses they occupied together with the household goods. Thereafter, the remainder of the estate should be shared among the spouses and children in such a way that the senior wife receives two shares and the other wife or wives and children each receive a share, subject to minimum amounts for the senior wife and the other wife or wives, which amounts would be designated by statutory instrument.

The intention of the Legislature is to grant the senior wife a greater share of the one-third of the estate than the junior wife or wives and hence the instruction that she should receive two shares compared to the single share of the other wife or wives.

MAINTENANCE FROM DECEASED ESTATES

The new inheritance rules to govern customary estates would still be subject to any claims and adjustments that might be sought and granted under the provisions of the Deceased Persons Family Maintenance Act [Chapter 6:03] which statute gives certain categories of a deceased person's dependents the right to claim maintenance from the estate. Such maintenance when awarded becomes a prior ranking charge on the estate as against the

inheritance rights of the heirs, be they testate or intestate heirs⁵³ and hence must be paid first or provision for its payment must be secured prior to the distribution of the estate. For the avoidance of doubt the Administration of Estates Amendment Act specifically states that its provisions "shall not be construed as limiting the right of any person to apply for, receive or enjoy any benefit under the Deceased Persons Family Maintenance Act."⁵⁴

While the Deceased Persons Family Maintenance Act defined the dependents who were entitled to claim maintenance from a deceased estate to mean the deceased person's surviving spouse or spouses; a divorced spouse of the deceased receiving maintenance in terms of a court order; a minor child of the deceased; a disabled child of the deceased incapable of maintaining himself or herself and who was being maintained by the deceased at the time of his death; and any of the parents of the deceased who were being maintained by the deceased at the time of his death, the Administration of Estates Amendment Act extends the categories of dependents by adding a new paragraph (f) to the definition of dependant which reads:

- (f) any other person who —
 - (i) was being maintained by the deceased at the time of his death; or
 - (ii) was entitled to the payment of maintenance by the deceased at the time of his death.

This broadening of the definition of those who can claim maintenance from a deceased estate means that other relatives, such as sisters, brothers, cousins and the like who were being maintained by the deceased during his lifetime are now entitled to claim maintenance. Even those who were not being maintained by the deceased during his/her lifetime but were entitled to be maintained in the sense that the deceased had an obligation to maintain them, such as grandparents, would be entitled to seek and be awarded maintenance under the new and more liberal definition of dependant.

The old definition excluded a major child, even if he was being maintained by the deceased during his/her lifetime.⁵⁵ Now a major child who was being maintained by the deceased will clearly be entitled to claim, so will a major child who was not being maintained but towards whom the deceased had a maintenance obligation, such as a major child attending an educational institution or one who is simply unemployed and is without the necessary means to support himself or herself.

The advisability of this extended definition is doubtful considering that an award of maintenance always diminishes or reduces the entitlement of the primary heirs, such as a surviving spouse and minor children, to the property in the estate since the maintenance award has to be paid first.⁵⁶

One particularly pervasive problem that has bedeviled African deceased estates in Zimbabwe is the practice of relatives of the deceased, particularly those of husbands, of

53 For a fuller discussion of the provisions of this statute and how they operate see J. Stewart, "The Dependents Live On: Protection of Deceased Estates and Maintenance Claims Against Deceased Estates" *Zimbabwe Law Review* 1989-90, Vols. 7-8, 104.

54 See section 68K of the Administration of Estates Act as inserted or introduced by section 3 of the Administration of Estates Amendment Act.

55 In estates governed by the common law a major dependent child could always claim and be awarded maintenance. See, for example, *Hoffman v Ilerdan N.O. and Another* 1982(2) SA 274 (TPD) and J. Stewart, note 53 above at pp 107-108.

56 Note, however, that the broadening of the definition seems to be an adoption of J. Stewart's argument to that effect in J. Stewart, note 53 above at p. 112.

raiding the deceased's home and either evicting the widow and her children and installing themselves in the home or looting and removing the movable property.⁵⁷

Such conduct, as J. Stewart observes can be "severely prejudicial to the integrity of the estate and can lead to the widow and the children of a deceased male being left without the necessary means of support, that they are entitled to expect from the estate."⁵⁸ To remedy this situation and discourage the practice of looting estates by relatives of deceased persons section 10 of the Deceased Persons Family Maintenance Act seeks to protect the integrity of an estate and to ensure the widow and her children continued support from the estate by granting them, notwithstanding anything contained in any law including customary law, the right to occupy the deceased's immovable property they were occupying before the deceased's death; the right to use any household goods and effects, implements, tools, vehicles, etc which they were using during the deceased's lifetime; the right to use and employ any animals which they used during the deceased's lifetime; and the right to any crops which immediately before the death of the deceased were growing or being produced on the immovable property to the extent that such use is reasonably necessary for the support of the surviving spouse and children.

CONCLUSION

It is clear that the reform of marriage and inheritance laws has not only been problematic and complicated but has also been controversial. The attempt to cling to some aspects of customary law and tradition while embracing and developing more modern ways of regulating marriage and inheritance rights has resulted in a muddle of complexities at the intersections of custom and tradition on the one hand and new and more modern notions of equality and fairness within the family as embodied in general law principles. It certainly has not been easy to find a consistent, balanced, logical and equitable mean between the two systems. The result is that some half-hearted reforms have appeared to be derailed in the quicksands of tradition. What is more, the way forward has remained hazy and often appeared slippery. No doubt, debate and reconsideration will continue and more reforms will come, being born out of the experiences of the present ones, which will undoubtedly cause numerous problems in their application due to their inherent weaknesses, and, in some cases, confusion as demonstrated above. However, a starting point has been made in eroding and moving away from the clearly unsatisfactory and inequitable customary laws of inheritance as reflected in the courts' version of customary law.

57 The former is precisely what had happened in the case of *Antonio v Antonio* 1991 (2) ZLR 42.

58 J. Stewart, note 53 above at p. 122.



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