SOUTH AFRICAN LAW COMMISSION

WORKING PAPER 2

PROJECT 22

LAW OF SUCCESSION: INTESTATE SUCCESSION

April 1983

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

The members of the Commission are -

The Honourable Mr Justice G Viljoen (Chairman)
The Honourable Mr Justice H J O van Heerden (Vice-Chairman)
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PREFACE

This working paper has been prepared by the research staff of the Commission to serve as a basis for the Commission's deliberations. The points of view, conclusions and recommendations contained herein should not at this stage be regarded as those of the Commission. The working paper is being published in full to provide persons and bodies wishing to comment or to make suggestions for the development, improvement, modernisation or reform of this particular branch of the law with sufficient background information to enable them to place substantiated submissions before the Commission.

Any person or body wishing to make oral representations to the Commission should submit a brief résumé of his or its proposed representations, together with a request to be heard by the Commission, to the Commission in writing.

It would be appreciated if written comments, representations or requests could reach the Commission not later than 30 April 1984. Please refer to the previous page for the address to which correspondence should be directed.

The researcher responsible for the project, who may be contacted for further information, is: Mr M Cronje.

HIERDIE STUK IS OOK IN AFRIKAANS BESKIKBAAR

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1 Introduction

1.1 Intestate succession is a subsection of the project on succession which was included in the Commission's programme during 1975. During 1979 the Secretariat invited several bodies and persons to identify defects in the law of succession and to give their views on the advisability of codification of the law of intestate succession.[1]

In the light of the comments received the Commission has decided to limit its investigation to the following subjects at this stage:

- Law of intestate succession.
- Formalities for a valid will and custody of wills.
- Alteration or revocation of a will.
- Disqualifications from inheriting.
- Succession rights of adopted children.
- Representation in the law of succession.

Several commentators proposed that provision should be made for a maintenance claim by a surviving spouse or for a legitimate portion which will preclude a testator, as far as a specific portion of his estate is concerned, from disinheriting his spouse or children. In its Report pertaining to the Matrimonial Property Law[2] the Commission concluded that it would not be advisable to recommend a maintenance claim by the surviving spouse or a legitimate portion. These matters will therefore not be included in the proposed programme at this stage.

This working paper deals with the law of intestate succession. The other subjects will be dealt with in a later working paper or working papers, to be distributed for comment in due course.

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1 The bodies and persons approached are listed in Annexure A.

2 RP 26/1982 at 28.

1.2 Van der Merwe and Rowland[3] define the law of intestate succession as follows:

> The law of intestate succession is a system of legal norms which determine the heirs of a deceased in so far as he did not lawfully do so himself or in so far as his lawful wishes cannot be carried out. In other words, a person dies partially or wholly intestate, i e the law of intestate succession determines the fate of a part or the whole of the deceased's assets, if he did not stipulate in a will or a contract what should happen to his assets after his death; or if his last will is invalid; or if his will has been revoked; or if he made a conditional disposition and the condition has not been fulfilled; or if he made an invalid disposition in his otherwise indisputable will; or if he did not dispose of all his assets; or if a beneficiary renounces his benefit and no provision was made for a substitution or a residuary heir.

1.3 This working paper deals only with the South African law of intestate succession. In so far as the indigenous law of intestate succession is in need of investigation, it is suggested that such investigation be incorporated in the proposed investigation of the matrimonial property law of Blacks.[4]

1.4 It is difficult to establish the percentage of all estates which devolve on intestacy. It has been averred that 40% of all persons die intestate.[5] According to a sample taken in the office of the Master of the Supreme Court, Pretoria,[6] 21.2% of the estates reported devolved on intestacy. However, not all estates are reported to the Master. If the deceased has left no assets or will, there is no obligation to report the estate. The estates of Blacks who die without a will are not reported to the Master either.[7] It does, however, appear from the sample, that it is the smaller estates that devolve on intestacy. The average balance for distribution in intestate estates was R6 050 as against an average of R32 000 for testate estates.

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3 21. Our translation.
4 Report pertaining to the Matrimonial Property Law RP 26/1982 at 78.
5 1979 House of Assembly Debates of Standing Committees 595.
6 Annexure B.
7 Meyerowitz 2.

1.5 Under common law only blood relations of the deceased qualified for intestate succession. The basic rules were laid down by enactments known as the Political Ordinance of 1580, the Interpretation of 1594 and the Octrooi of 1661.[8] Under the Succession Act 13 of 1934 and section 74 of the Children's Act 33 of 1960 the surviving spouse and adopted child, respectively, were elevated by the legislature to the position of intestate heirs.

The effect of adoption on intestate succession is discussed in paragraph 4 below. The rights of succession of illegitimate children are dealt with as part of the Commission's project on the legal position of illegitimate children.

1.6 Draft legislation embodying the Commission's tentative proposals on intestate succession is attached as Annexure E.

2. Surviving spouse as intestate heir

2.1 The present position

2.1.1 Section 1(1) of the Succession Act[9], which lays down the position, provides as follows:

> The surviving spouse of every person who after the commencement of this Act dies either wholly or partly intestate is hereby declared to be an intestate heir of the deceased spouse according to the following rules:
>
> (a) if the spouses were married in community of property and if the deceased spouse leaves any descendant who is entitled to succeed ab intestato, the surviving spouse shall succeed to the extent of a child's share or to so much as, together with the surviving spouse's share in the joint estate, does not exceed fifty thousand rand in value (whichever is the greater);

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8 Van der Merwe and Rowland 24; Van der Westhuizen Gedenkbundel Swanepoel 26; Corbett et al 584.

9 Act 13 of 1934.

(b) if the spouses were married out of community of property and the deceased spouse leaves any descendant who is entitled to succeed ab intestato, the surviving spouse shall succeed to the extent of a child's share or to so much as does not exceed fifty thousand rand in value (whichever is the greater);

(c) if the spouses were married either in or out of community of property and the deceased spouse leaves no descendant who is entitled to succeed ab intestato but leaves a parent or a brother or sister (whether of the full or half blood) who is entitled so to succeed, the surviving spouse shall succeed to the extent of a half share or to so much as does not exceed fifty thousand rand in value (whichever is the greater);

(d) in any case not covered by paragraph (a), (b) or (c), the surviving spouse shall be the sole intestate heir.

2.1.2 The heirs and their share of the inheritance are determined as at the date of death. Should the value of the estate, therefore, increase to more than R50 000 after the date of death, this will not change the position that the surviving spouse is the sole heir in a given case.[10]

2.1.3 If the estate devolves partly intestate, the portion which devolves testate is ignored in the calculation of the inheritances under the Act.[11]

2.1.4 The position in certain other legal systems is set out in Annexure C.

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10 Dales v Lello 1971 1 SA 141 (D); Ramsumer v The Master 1978 4 SA 877 (N); Administrators Estate Davies v Administrators Estate Glaisher 1982 4 SA 184 (W); Hahlo 1982 SALJ 505. Cf Swift v Pichanick 1982 1 SA 904 (Z).

11 In re MacGillivray's Will 1943 WLD 29.

2.2 Criticism of the present position

2.2.1 Minimum share of the survivor

When comments were invited the minimum share of the survivor was R10 000. The Succession Amendment Act[12] increased the amount to R50 000. Eleven of the persons and bodies who furnished comments recommended that the minimum share of the survivor should be increased. The amounts recommended ranged from R15 000 to R50 000. Four bodies recommended R50 000.

In connection with the minimum share Van der Westhuizen comments as follows:[13]

> Legislators usually avoid mention of such amounts in legislation on succession and for sound reasons. With the continual devaluation of money, such amounts become unrealistic and this forces the legislature to make statutory amendments more often than is considered desirable. Nevertheless it seems advisable that the surviving spouse should be protected in the case of small estates. The question remains whether this can be done without mentioning amounts. The only alternative method, namely the formulation of criteria whereby the court decides on a reasonable amount ad hoc for every case, appears to be unacceptable. This would result in too much expensive litigation. We can only hope that the legislator will in future review the amounts more often than in the past. The amount of R1 200 was in 1962, as the amount of R10 000 is at present, totally unrealistic.

Van Warmelo[14] had the following objection:[15]

> The second objection to the Succession Act is the amount of £600 which is intended as a kind of minimum for the surviving spouse in small estates. When the Act was passed £600 was worth about three times the present-day value. The probability at present of further fluctuations in the value of money in South Africa is irrelevant. It is clear, however, that by mentioning such an amount, the legislature did not consider the possibility of such fluctuations. And it would only be a partial solution to stabilise the amount by legislation from time to time.

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12 Act 44 of 1982.
13 Gedenkbundel Swanepoel 36. Our translation.
14 1959 THRHR 99. Our translation.
15 The article was written before the increase of the amount of R1 200 (£600) to R10 000 in 1962.

One commentator suggested that the Minister of Justice be authorised to increase the amount by promulgation of a regulation. It does not appear advisable to regulate substantitive law by regulation. The legislature might perhaps authorise the Minister to increase the amount after the consumer price index has shown a certain increase.

A random sample taken in the office of the Master of the Supreme Court in Pretoria revealed the following:[16]

The average balance for distribution in intestate estates with a surviving spouse was R8 787.[17] In all, 212 of the estates in the sample of 1 000 devolved under intestacy and of these 212 estates the balance for distribution exceeded R50 000 in three cases only. As the Act reads at present, a surviving spouse would therefore have been the sole heir in over 98% of the estates.

In cases of a marriage in community of property where the surviving spouse inherits in competition with descendants, the half awarded to the spouse in terms of matrimonial property law is taken into account when calculating the share of the survivor's inheritance.[18] When the survivor inherits in competition with other relations[19] or in cases of a marriage out of community of property[20], assets belonging to the survivor in his or her own right are not taken into consideration. In cases of partial intestacy the benefit under the will is not taken into consideration.[21]

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16 Annexure B.
17 The sample was taken from estates reported during 1979.
18 S 1(1)(a) Succession Act 13 of 1934.
19 Ibid s 1(1)(c).
20 Ibid s 1(1)(b) and (c).
21 Par 2.1.3 above.

Van der Westhuizen[22] Van Warmelo[23] and three of the persons and bodies who furnished comments criticise the present position. Mr Justice Millin made the following criticisms:[24]

> ... I can find no escape from the position that where a testator dies partly testate and partly intestate the widow, no matter how well provided for she may be in the will, is entitled, in the partial intestacy, to take, to the exclusion of the heirs ab intestato, up to £600. This seems to be the result of a particularly ill-considered legislative attempt to make the common law of succession more equitable.

The question is whether the minimum share of the survivor should be reduced by the value of assets already owned by the survivor in his or her own right or assets received from the deceased in terms of the will or matrimonial property law, or whether all these other assets should be ignored and the total minimum share be made available in all cases. Several variations are possible as the minimum share is reduced by one or more of these types of assets or is not reduced at all.

It has been contended that the minimum share was introduced to ensure that, within the limits of the deceased's estate, the survivor has a certain amount to live on.[25] If this principle is taken to its logical conclusion, the minimum portion must be reduced by all assets which the survivor already owns or inherits under the will or receives in terms of matrimonial property law. Similar principles were applied by a rule which was in force under Roman law:[26]

> In Nov. 53.6 Justinian concerned himself with wives who, having married without a dos or donatio antenuptialis, received nothing on the death of the husband, and who often had to live in extreme poverty. He provided that such a wife would be an heir together with the children. In the same way as, in terms of Nov. 22.18,

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22 Gedenkbundel Swanepoel 37.
23 1959 THRHR 99.
24 In re MacGillivray's Will 1943 WLD 29 at 40.
25 Van der Merwe and Rowland 65.
26 Glazer v Glazer 1963 4 SA 694(A) 703A.

> a wife without a dos who had wrongly been put out of the house by her husband, received a fourth share of his property, a wife in the circumstances stated would, without regard to the number of children, receive a fourth share in the deceased estate; and if the husband left her a legacy of less than that share, the shortfall had to be made good. This provision applied only where there had been no dos or donatio antenuptialis and where, in addition, the deceased husband was a man of substance while the surviving wife was indigent. If she was well provided for, then, even in the absence of a dos or such a donatio, the provision did not apply.

This method would prevent a spouse who is already wealthy from claiming a part of the estate in preference to other heirs.[27] However, such an amendment would involve extra work for the executor, especially in the case of a marriage out of community of property. He would be obliged to determine the value of the survivor's assets and liabilities as well.[28] If valuations are necessary this may result in additional expenditure.

Another approach is that assets owned by the survivor in his or her own right or received in terms of matrimonial property law have nothing to do with succession and should be disregarded in all cases. If a deceased dies partly intestate with a testamentary bequest to the survivor, it was the testator's intention that the survivor should receive this benefit and here too the benefit should be disregarded in the calculation of the intestate share, as is the position at present. This method is simple and cannot cause additional work or expense.

2.2.2 Calculation of a child's share

It has been contended that the calculation of a child's share causes difficulties[29], but in practice no problems are

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27 Van der Westhuizen Gedenkbundel Swanepoel 37.
28 In the case of a marriage in community of property the executor calculates the nett value of the joint estate as a matter of course.
29 Van Warmelo 1959 THRHR 99.

experienced.

2.2.3 Renunciation by heirs

There is difference of opinion on the effect of renunciation by persons who succeed with the survivor.

Bouwer[30] is of the opinion that the existence of descendants at the time of death of the deceased, notwithstanding their later renunciation, excludes parents and brothers and sisters. According to him the bequests to descendants who renounce accrue to the share of the survivor and other descendants, if any.

Joubert[31] is of the opinion that accrual in favour of the survivor is not possible. He suggests that the grandchildren (the children of the children who renounced) succeed in equal shares with the survivor, subject to the minimum share of the survivor.

Van der Westhuizen[32] is apparently also of the opinion that the share renounced by an heir does not accrue to the survivor, but devolves upon the common law heirs.

Lee, Honoré and Price[33] merely state:

> Apparently the Act applies if the persons in question are entitled to inherit but renounce.

Renunciation by children with the intention that the survivor should succeed to the whole estate occurs frequently in practice. It is desirable that legislative amendments (if any) should contain clear directions for such cases.

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30 406.
31 1958 THRHR 218.
32 Gedenkbundel Swanepoel 37.
33 173 Footnote 3.

2.2.4 Who should qualify for an inheritance in competition with the survivor

Van Warmelo[34] recommended that the survivor should be the sole intestate heir and justified his view as follows:[35]

> In short, we are of opinion that it is unreasonable for the surviving spouse to inherit a child's share or one half of the estate only, together with other descendants and even parents or brothers and sisters (always with a minimum of £600). It is desirable that the surviving spouse, whether the marriage was in or out of community of property, should inherit in preference to descendants and without any doubt before parents or brothers and sisters. In a normal marriage, especially if the parties were not wealthy, nothing is achieved if the deceased's estate is fragmented or awarded to persons other than the surviving spouse. Especially if the breadwinner should die, it is most desirable that the other spouse should retain the joint means for the maintenance of him/herself and the household. Here, too, should the matrimonial relationship be abnormal or should there be a wealthy estate, the parties can so easily exercise their right to make a will and modify the intestacy regime. But the intestacy regime should proceed from the normal and most common relationships and therefore it appears advisable to us that the surviving spouse should today be the primary heir. Only in the absence of a surviving spouse should the descendants get their turn.

One commentator supported this recommendation and a further three recommended that, in the absence of descendants who are able to inherit, the survivor should be the sole heir.

The sample referred to above[36] revealed the following where the estates devolved under a will. (For ease of reference the survivor is taken to be female.)

(a) There was a surviving spouse in 64% of the cases. (For intestate estates the percentage was 46%.)

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34 1959 THRHR 99. Our translation.

35 See also Crowther 1972 Meditationes Medii 42.

36 Annexure B.

(b) (i) The surviving spouse was the sole heir in 82% of the cases (411 out of 504).

(ii) In 4% of these cases she was the sole heir subject to fiduciary conditions.

(iii) In a further 4% she acquired a usufruct over, or a right to the income of the part of the estate not bequeathed to her.

(iv) In 2% of the cases she inherited nothing and received nothing in terms of matrimonial property law.

(v) In about 2% of the cases with a survivor or descendants (15 out of 719) the survivor or descendants did not inherit the whole estate.

(c) The average balance for distribution was R32 735 for the cases where the survivor was the sole heir, as against R55 916 for the cases where she was not the sole heir.

These figures indicate that it would not be a drastic departure from the trend in testate estates if the survivor were to be the sole intestate heir. There is nevertheless a trend not to appoint the survivor sole heir in larger estates. In cases where there are a survivor and descendants, testators seldom bequeath their estates to persons other than the survivor and descendants.

Van der Westhuizen[37] is not happy with the operation of section 1(1)(c)[38] and a few of the commentators agreed with him. Van der Merwe and Rowland[39] explained the operation

37 Gedenkbundel Swanepoel 37.
38 Succession Act 13 of 1934.
39 71. Our translation.

of the subsection as follows:

> It should also be noted that although the existence of a surviving parent, brother or sister of the deceased is a prerequisite for the operation of the subsection in question, the latter persons are not necessarily the sole heirs of the balance of the estate, after deduction of the surviving spouses share. The said persons performs, so to speak, a juridical magical catalysing function, in so far as their existence puts into action the method of computation of the surviving spouse's share. After determination of the surviving spouse's share, the subsection under discussion becomes functus officio with respect to the administration procedure on which it had a bearing; and the common law takes over the distribution of the balance of the deceased's estate. It is therefore possible that a person who would have been excluded from the inheritance in terms of subsection 1(1)(d), ... in the absence of a parent, brother or sister of the deceased, may inherit if one of the last-mentioned persons survived.

It appears to be fairer that only heirs who exclude the surviving spouse as sole heir[40] should inherit together with the survivor.

2.3 Résumé and recommendations

2.3.1 The increase in the survivor's minimum share of the inheritance from R10 000 to R50 000, has removed many of the objections against the present position.

2.3.2 The proposal that the survivor should be the sole intestate heir is drastic. After the increase of the survivor's minimum share in the inheritance from R10 000 to R50 000, however, the survivor will in fact be the sole heir in a considerable percentage of cases. A sample taken in the office of the Master of the Supreme Court, Pretoria, indicates that testators appoint the survivor sole heir in more than 80% of applicable cases. However, the same sample also indicates that the survivor is not appointed sole heir so often in larger estates. A vision of a spouse from a brief second marriage snatching away the

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40 S 1(1)(a),(b) and (c) Succession Act 13 of 1934.

whole estate from the deceased's children is disquieting. This sense of disquiet is allayed somewhat by the knowledge that the deceased had the right to benefit the newly-wed spouse or the children under his will and that this right is often exercised. The children may also claim maintenance from the estate until they are self-supporting.

Should the spouse be elevated to the position of sole intestate heir the advantages would be as follows:

(a) This branch of the law would be greatly simplified and all the problems referred to in paragraph 2.2 above would be solved. For instance, the legislature would no longer be obliged to consider an increase in the minimum share from time to time.

(b) The practical problems encountered by an executor who has to divide an estate into several (often peculiar) fractions would be avoided.

Although the proposal that the spouse should be the sole heir has not been incorporated in the draft legislation comments on this proposal would be appreciated.

2.3.3 A rule that descendants only should compete with the survivor as heirs ought to be acceptable. The following recommendations are made in conjunction with such a proposed regime:

(a) The amount of R50 000 appears reasonable for the present.

(b) The discrimination against a spouse married in community of property, in cases where the deceased is survived by descendants, is indefensible. It is proposed that property owned by the spouse in his or her own right should be disregarded in all cases. Assets inherited by the survivor in terms of a will or acquired in terms of

the matrimonial property law should also be disregarded in the calculation of the minimum share of the inheritance.

(c) The present rule that the survivor inherits like an additional child, with descendants, should be retained.

(d) Clear directions should be given for cases where an heir renounces. It is suggested that the heirs be determined as if the descendant(s) who renounced never was (were) an heir.

Cases occur where a man and wife have been estranged for years and have had virtually no contact with each other. Should one of the spouses die intestate, the other spouse will acquire R50 000 to the exclusion of the other relations. The Estate Administration Act of British Columbia,[41] for example, contains the following provisions:

> Separation as a bar
>
> 111. (1) The surviving spouse shall, in an intestacy, take no part of the deceased spouse's estate if the spouses had, immediately preceding the death of one spouse, separated for not less than one year with the intention of living separate and apart, and had not during that period lived together with the intention of resuming cohabitation, unless the court, on application, otherwise orders.
>
> (2) The court may, on the application of the surviving spouse, or of the executor or administrator, or of any person interested in the estate of the deceased spouse, and on evidence the court considers relevant, determine the matter, and the court may in its discretion direct the costs to be paid out of the estate of the deceased spouse.

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41 RSBC 1979 c114.

Although no comments have been received in this regard and a similar provision has not been included in the draft legislation, comments on the advisability of such a provision would be appreciated.

3. Common law rules of intestate succession (no surviving spouse)

3.1 The present position[42]

3.1.1 The estate is divided amongst the descendants *per stirpes ad infinitum*. The deceased and his descendants are known as the first *parentela*.

3.1.2 If the deceased died without descendants the estate ascends to the parents of the deceased who take the estate in equal shares. The deceased's parents and their descendants are known as the second *parentela*.

If one of the parents is deceased, the surviving parent takes one half, and the other half, of the deceased parent, is distributed *per stirpes* amongst the children, grandchildren and great grandchildren of the deceased parent. (The deceased's brothers and sisters and their children and grandchildren.) Failing the latter relatives the surviving parent takes the whole estate.[43]

3.1.3 If both parents are dead and there are descendants of a deceased parent, either of the whole or the half blood, within the fourth degree,[44] on both sides, the estate is divided into two halves and each half is divided by representation amongst the said relatives on each side. (The deceased's brothers and sisters and their children and grandchildren.)

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42 In the discussion that follows Van der Merwe and Rowland 89 et seq are sometimes quoted without further acknowledgement.

43 Octrooi of 1661.

44 The degree of relationship of a collateral to the deceased is reckoned by counting the number of generations from the one up to the nearest common ancestor(s) and then back to the other relative.

Collaterals of the fifth degree onwards are ignored. If the deceased is survived on both sides only by collateral relations of the fifth degree onwards, either of the whole or the half blood, the estate is divided into two and each half devolves amongst the relations mentioned, in accordance with the principle that the nearest relations take equally. If there are only collateral relations of the fifth degree onwards on one side, while there are relations within the fourth degree on the other side, the former succeed to their half in accordance with the principle that the nearest relations inherit equally, while the latter succeed to the other half by representation. If there are no collateral relations on one side the estate on that side ascends to the grandparents and their descendants. If there are no collateral relations on either side the estate is still divided into a moiety on the father's side and a moiety on the mother's side and each moiety ascends to the grandparents concerned and their descendants (the third parentela). If both parents are dead, brothers and sisters of the whole blood inherit from both parents while relatives of the half blood inherit only from the parent concerned. If one parent is dead, whole blood and half blood inherit equally from the deceased parent, while half blood of the surviving parent do not inherit.

3.1.4 If both grandparents on a side in question are living each takes one half of that side's half, in other words each grandparent inherits one quarter of the estate. If only one is alive, he or she and all persons related to the deceased through him or her only are excluded from the intestate inheritance. This half goes to the descendants of the deceased grandparent (equally to whole and half blood) by representation to relations of the fourth degree or nearer. (Uncles and aunts and their children.) If there are no collaterals in the fourth degree or nearer, this half goes equally to the nearest relations in the further degrees.

If both grandparents died without descendants, one half of the half which ascended to the grandparents goes to the relations on the grandfather's side and the other to the relations on the grandmother's side in accordance with the same rules discussed above in connection with a deceased grandparent. Whole-blood relations inherit from both the deceased grandparents while half-blood relations inherit only from the grandparent concerned.

3.1.5 If a deceased grandparent left no descendants, his quarter goes to his parents and their descendants (the fourth parentela) in accordance with the rules set out in paragraph 3.1.4 above.

3.1.6 The same rules apply to further parentelae.

3.1.7 The position in certain other legal systems is set out in Annexure D.

3.2 Criticism of the present position

The persons and bodies approached for comments did not offer much criticism.

3.2.1 Two bodies recomended that a surviving grandparent should inherit half of the estate if he comes into the picture and that everything should not go to the descendants of the predeceased grandparent. Justice Training recommended that the rules applicable to parents[45] should also apply in the case of grandparents and further parentelae.

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45 Par 3.1.2 above.

3.2.2 One commentator criticised the position that distribution takes place sometimes per capita and sometimes by representation.

3.2.3 Van der Westhuizen[46] expressed the following criticism in an article in a law journal:

At 26: By far the most modern statutes relating to succession appear to be generally reasonable, not unduly complicated and not more divergent from previous legislation than necessary. In the discussion that follows these standards will be borne in mind when evaluating our present law and suggesting changes.

At 30 et seq: To limit representation to a certain degree and allow succession per capita for further relations appears in any case to be inadvisable. It adds an unnecessary nuisance to the distribution of estates and does not really increase the general fairness of the succession regime. Unless a more meaningful application can be found for the principle of succession per capita it should rather be eliminated entirely. ... It should also be noted that economic and social conditions are such today that the supposed right of reversion does not form a valid foundation for the rules of intestate succession, in any case not so far as distant parentelae are concerned.

... The so-called Restrictie ende Limitatie of the Octrooi of 1661 has given rise to more discrepancies in our succession regime than is generally realised.

It makes no sense to allow the surviving ancestor in the important second parentela to inherit but to exclude the other surviving ancestors in the further parentelae entirely from the inheritance by virtue of the old presumption that nothing comes from one who lives. Even more important is the fact that in terms of the Octrooi the surviving parent inherits the whole estate in the absence of brothers and sisters and their children and grandchildren on the deceased side. This deviates from the overriding principle of the early Schependomsrecht and the Political Ordinance that assets which go to a particular side as a result of cleaving always stay in that side. A further discrepancy brought about by the Restrictie ende Limitatie is that relations in the second parentela exclude all other relations if a surviving parent is alive, but not if both parents are dead and there are surviving descendants of either the father or the mother. Therefore a half-brother of the deceased inherits only one half of the estate while the other half may possibly ascend to relations in remote parentelae.

46 Gedenkbundel Swanepoel. Our translation.

... From the above discussion it should be sufficiently clear that more needs to be done than merely to amalgamate the old rules in a new shape in one act. Certain amendments appear necessary.

Very tentatively, and for further consideration only, it is proposed that the fundamental rules of our law of intestate succession, which are at present contained in the Political Ordinance of 1580, the Interpretation of 1594 and the Octrooi of 1661, be formulated as follows, with certain desirable amendments, as section 2 of a new Succession Act:

'2. Subject to the provisions of sections 3 to 7, the estate of a person who died intestate, or, if he died partly intestate, that part of his estate which he did not dispose of mortis causa, shall be distributed as follows amongst his relations:

(a) Descendants shall inherit the property per stirpes to the exclusion of other relatives.

(b) Failing descendants, each parent or his or her descendants per stirpes shall inherit one half of the property: Provided that in the absence of a parent and descendants of that parent on one side, the other parent or the descendants of that parent shall inherit all the property.

(c) In the absence of all the relatives referred to in (a) and (b), each grandparent or his or her descendants shall inherit one quarter of the property according to the rule that the nearest in blood inherits per capita to the exclusion of relatives related to the deceased in further degrees: Provided that (i) in the absence of a grandparent as well as his or her descendants in one of the four lines the surviving grandparent of this marriage or his or her descendants shall inherit half of the assets; and (ii) in the absence of both grandparents as well as their descendants on the father's or the mother's side, the grandparents on the other side and/or their descendants shall inherit the assets.

(d) In the absence of all the relatives referred to in (a), (b) and (c), the property shall be divided into four parts and each group of relatives, consisting of two great-grandparents of the same marriage and persons related to the deceased through one or both of them, in the fourth or fifth parentelae, shall inherit a quarter of the property according to the single rule that the nearest in blood inherits the property per capita to the exclusion of relatives related to the deceased in further degrees: Provided that if none of the relatives in one

or more of the four groups survive, the other groups shall inherit all the property in equal shares.

(e) In the absence of all the relatives referred to in (a), (b), (c) and (d) the property shall go to the State as bona vacantia.'

Van Warmelo[47] made the following proposals:

At 93: In short, intestate succession is founded on the principle of a family that forms a unit in society.

At 95: It appears that the prerequisite of a succession regime today is: clarity, simplicity and a certain limitation of potentially distant intestate heirs. For in modern society the family is in fact much more limited than earlier.

At 105: In this regard there is a further difference of opinion, namely the question whether blood relations in the collateral line who can inherit ought to be limited. It is clear that blood relations who are related very distantly in the lateral line, and who therefore mean absolutely nothing to the deceased, may put in an appearance. This would be a situation contrary to two fundamental concepts of intestate succession, namely, that succession should take place according to the presumed intention of the deceased and, furthermore, that succession should take into account the family as a unit.

At 110 et seq: In line with this thinking the following order of intestate heirs may be proposed: ...

(b) If the marriage was dissolved by divorce or judicial separation before death, or if the other spouse is predeceased, or if there was no marriage, or if the surviving spouse renounced, then the children of the deceased (sons as well as daughters) should succeed. In this regard the principle that succession takes place per stirpes with the right of repraesentatio in infinitum may be retained ...

(c) Failing this group of descendentes, in the third place, the surviving parent or parents in equal shares, get their turn...

(d) Failing this group, the estate devolves on the brothers and sisters surviving at the time of death of the deceased, in equal shares ... The distinction between full and half-brothers and half-sisters should disappear ... There is no longer any place for representation here. In practice a person is far more removed from a nephew or niece than from a brother or sister.

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47 1959 THRHR. Our translation.

(e) Failing brothers and sisters the estate should go to the nearest adscendentes. Distribution amongst them should be per capita.

(f) Failing ancestors, the estate should devolve upon blood relations. However, the nearest in degree exclude more distant relatives and more than one in the same degree divide the estate per capita. Furthermore it appears to be advisable to limit a right of succession to those who are related within four degrees, but certainly not more than five degrees should be taken into account.

(g) Failing these blood relations, the State should succeed.

The Law Revision Committee existing at that time considered Van Warmelo's proposals but was of opinion that, although certain aspects of the existing regime were open to criticism, there was no necessity for change. Before a new regime of succession is adopted, there must be certainty that the new regime will function more satisfactorily than the existing one.[48]

3.3 Results of a sample taken in the Master's Office

A sample taken in the office of the Master of the Supreme Court, Pretoria, revealed the following:[49]

(a) In more than 98% of the cases that devolved intestate the survivor or relations in the first and second parentelae inherited the whole estate. (The deceased's parents and their descendants.)

(b) In the cases that devolved testate, the position was as follows:

(i) Testator survived by spouse

In 64% of the cases that devolved testate, the testator was survived by a surviving spouse. In 82%

48. 11th Report. See 1962 THRHR 151.

49 Annexure B.

of these cases the estate was bequeathed to the survivor. In 4% of these cases the estate was bequeathed to the survivor subject to fiduciary conditions and in a further 4% the survivor acquired a usufruct over, or the right to, the income from that portion of the estate not bequeathed to him or her. In the 14% of the cases where not everything was bequeathed to the survivor, the portion which the survivor did not inherit went to the descendants in 94% of the cases.

(ii) Testator not survived by a spouse

These constituted 36% of the cases which devolved testate. In 72% of these cases the whole estate went to descendants. In a further 14% the estate did not go further than the second parentela. In the other 14%, the estate or part of it went further than the second parentela.

The following appears from these figures:

(a) Intestate succession outside the second parentela rarely occurs. In the total sample of 1 000 estates only four such cases occurred and in these four cases no surviving grandparent was involved.

(b) In testate estates the estate is usually bequeathed within the first two parentelae. (86%.)

3.4 Is codification advisable

3.4.1 The bodies approached to identify defects were also asked to consider the desirability of codification of the law of intestate succession. Six of the bodies or persons favoured codification. No reasons were really given for this view, but apparently it was felt that the law should be clearer and more accessible.

Van der Westhuizen[50] made a plea for codification and

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50 Gedenkbundel Swanepoel 29. Our translation.

submitted the following reasons for his view:[51]

> Merely from the form in which these rules were couched by the enactments, it appears that new legislation is essential in this regard. Why should it be made so extremely difficult for the legal practitioner, the student, and also the person considering whether or not to make a will (and who subsequently has to give constant attention to the will!) to determine the fundamental rules of our law of intestate succession? Why not lay down the rules in one rather than three enactments? Why not do so in simple Afrikaans and English rather than sixteenth and seventeenth century Dutch? And why not indicate precisely and clearly how estates should be distributed rather than diffusely and obscurely?

Justice Training[52] made a plea against codification:

> I have misgivings about the advisability of codifying our law of intestate succession. The common law principles of this branch of the law of succession are reasonably clear and, so far as I could ascertain, they do not cause many problems in practice. Codification may give rise to uncertainty and new problems of interpretation and thus do more harm than good. Indeed the few obscurities in the sphere of the law of intestate succession originated mainly from statute law and not from common law.
>
> ... I wish to stress that legislative activity in the sphere of the law of succession should be limited to the minimum so as not to change our fine common law system more than necessary.

The main argument in favour of codification is that the rules are obscure and inaccessible.

3.4.2 Are the common law rules so obscure

Until a few decades ago litigation and articles in journals on obscurities in the common law rules occurred from time to time.[53] Apparently in the last few decades no

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51 In a memorandum giving his personal views Prof C Cilliers, of the University of the Orange Free State, noted that the proposals by Van der Westhuizen were in general worth following.

52 Through Dr N J Van der Merwe, co-author of Van der Merwe and Rowland. Our translation.

53 See eg Lee 1944 SALJ 447; Joubert 1954 SALJ 153; Caney v Estate Johnsson 1928 NPD 13; Spies v Spies (1846) 2 Menz 454; Raubenheimer v Executors of Van Breda 1880 Foord 111 at 115.

articles concerning obscurities in the common law rules, have appeared in legal journals. There was only one reported decision[54] in the South African law reports[55] which confirmed that the Octrooi of 1661 applies only in the second parentela.

Amongst the authors of law books there is remarkable unanimity about the substance of the rules.[56] The only remaining difference of opinion concerns the extremely rare occurrence where only a grandparent survives on one side, and relations on the other side lay claim to the estate. Corbett et al[57] submit that the surviving grandparent should inherit one half.[58] Van der Merwe and Rowland[59] deny the correctness of this view but concede that its reasonableness can hardly be challenged. (There are also differences of opinion on the application of the rules of representation in the case of renunciation by or disqualification of an heir, but this is not a matter which is confined to the law of intestate succession.)

Apparently the obscurities are not such as to warrant codification.

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54 Ex parte Wessels and Lubbe 1954 2 SA 225 (O).

55 I e after 1947.

56 Van der Merwe and Rowland 89 et seq; Corbett et al 581 et seq; Maasdorp's Institutes of South African Law Vol I 261 et seq in which the criticism in Lee's article supra was noted; Shrand 42 et seq; Bouwer 391 et seq; Meyerowitz 271 et seq; Lee, Honoré and Price 173 et seq.

57 588 Relying on Ex parte Spangenberg (1907) 24 SC 288.

58 The fact that the discussion on the law of intestate succession in this book agrees to a great extent with the discussion in Hahlo and Kahn The Union of South Africa: The Development of its Laws and Constitution, which appeared more than 20 years earlier, indicates that this area of the law does not present difficulties.

59 92 With reference to De Villiers 1967 Speculum Juris Vol 3 at 63.

3.4.3 Are the common law rules too inaccessible

Van der Westhuizen correctly states that the original enactments are contained in three separate pieces of legislation which set out the rules obscurely and diffusely in sixteenth and seventeenth century Dutch. However, the rules as interpreted by the courts and legal writers are set out quite clearly in short Afrikaans or English summaries in numerous modern textbooks.[60] Lawyers are in no doubt about the contents of the rules. It is doubtful whether a layman who would take the trouble to get hold of a statute setting out the rules, would have any great difficulty in obtaining a summary of the rules in a textbook. Furthermore, persons who concern themselves with such matters see to it that they die testate.

If there are no objections to the reasonableness of the substance of the rules, it is doubtful whether sufficient reasons for codification have been advanced.

3.5 Résumé and recommendations

3.5.1 Van der Westhuizen[61] was probably not exaggerating when he stated the position as follows:

> It is a foregone conclusion that, should ten lawyers be given the task of suggesting an ideal regime for intestate succession in South Africa independently of one another, ten divergent regimes would be proposed. And a selection committee, which might be called upon to make a choice from the various proposals would find it no easy task. Each one of the regimes would result in reasonable distributions in some cases, but not in others. To ensure reasonable distribution of their estates, many persons would therefore in any case still be obliged to make wills.

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60 Cf the textbooks quoted in footnote 56.

61 Gedenkbundel Swanepoel 26. Our translation.

3.5.2 The common law rules did not elicit much criticism from commentators. The matters which elicited comments were the position of one surviving grandparent and the rules that distribution takes place some times per capita and sometimes per stirpes. The sample taken in the office of the Master of the Supreme Court, Pretoria, indicates that all these cases occur rarely. The proposals by Van der Westhuizen in his draft legislation[62] would therefore in practice rarely influence the distribution because paragraphs (a) and (b) of his proposal cover the cases which occur most.[63] The proposals in (a) and (b) differ from the present position only if a deceased parent is not survived by children, grandchildren or great-grandchildren but is survived by other descendants.[64]

The following may be concluded from the above:

(a) The matters which elicit criticism occur so seldom that it is not necessary to consider them. The present position may be retained.

or

(b) Cases which occur rarely do not warrant the complex rules which exist for them. It is advisable to enact simple rules for these few cases.

or

(c) Only the matters which elicit criticism should be rectified.

Proposal (b) would alter the existing rules and it would be advisable to enact the rules in a statute. This creates the possibility that the existing certainty in the law might suffer.

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62 Par 3.2.3 above.
63 Par 3.3 above.
64 Par 3.1.2 and 3.1.3 above.

The following may be considered:

If the surviving spouse is not an intestate heir, that part of a deceased's estate which devolves under intestacy, shall devolve as follows:

(i) Descendants inherit the property per stirpes to the exclusion of all other relations.

(ii) Failing descendants, each parent, or his or her descendants per stirpes, inherit one half of the property: Provided that in the absence in one of the two sides of a parent as well as descendants of that parent, the other parent or the descendants of this parent, inherit all the property per stirpes.

(iii) Failing all relations referred to in (i) and (ii), the nearest blood relations inherit the property per capita.

(iv) A person fails if at the death of the deceased he is dead or is disqualified to inherit on intestacy or if after the death of the deceased he renounces his inheritance by virtue of intestate succession.

(v) No person is entitled to inherit per stirpes if any person whom he represents fails because he is disqualified to inherit or renounces the inheritance.

Regarding the proposal in (v) above, comments on possible alternatives would be appreciated. It might for instance be more advisable for the inheritance renounced by a person to go to his descendants who are able and willing to inherit.

Proposal (c) would also entail the enactment of the rules in a statute. It would probably not be advisable to amend only certain of the old rules. It would be necessary to rewrite the old diffuse rules in modern idiom with the necessary amendments. If the rules are in any case to be codified, it appears advisable at the same time to adjust the rules to modern circumstances and to simplify the rules applicable to rare cases. The end result would therefore not differ much from (i) to (v) above.

3.5.3 If there are relations it appears reasonable that they should inherit the property and that certain relations should not be excluded by the State. If the heirs are absent or unknown the executor must deposit their share of the inheritance into the Guardian's Fund.[65] Should the heir fail to claim the inheritance within 30 years it is forfeited to the State.[66]

4. The effect of adoption on intestate succession

4.1 The present position

Section 74 of the Children's Act[67] provides as follows:

> (2) ... an adopted child shall for all purposes whatsoever be deemed in law to be the legitimate child of the adoptive parent: Provided that an adopted child shall not by virtue of the adoption -
>
> ...
>
> (b) inherit any property ab intestato from any relative of his adoptive parent.
>
> (3) An order of adoption shall terminate all the rights and legal responsibilities existing between the child and his natural parents and their relatives, except the right of the child to inherit from them ab intestato.

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65 S 43(6) of the Administration of Estates Act 66 of 1965.

66 Ibid s 92.

67 Act 33 of 1960.

In short this section means that -

(a) an adopted child inherits from his own parents and their blood relations and his adoptive parents but not from the blood relations of his adoptive parents; and

(b) an adopted child's heirs are his adoptive parents and their blood relations but not his own parents and their blood relations.

4.2 Criticism of the present position

4.2.1 Six of the bodies who commented on defects in the law of succession were dissatisfied with the rules regarding adopted children. A good deal of criticism on obscurities regarding the provisions and the unfair operation of the rules has also appeared in textbooks and articles in journals.[68]

4.2.2 Obscurities in the provisions

Van der Merwe and Rowland give the following exposition of the problem:[69]

> The principle embodied in subsection 74(2)(b) of the Children's Act that an adopted child is not by virtue of adoption entitled to inherit on intestacy from a relative of his adoptive parent causes... no problem where a relative in the natural physiological sense ... is concerned. However, the question is whether "relative" in section 74 should not be interpreted extensively to include someone else who is related through adoption to the adoptive parent of a certain adopted child.

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68 Cf Joubert 1955 THRHR 140 and 1957 SALJ 331; Spiro 1961 SALJ 318; Van der Westhuizen Gedenkbundel Swanepoel 32 and 1949 THRHR 129; Van der Merwe and Rowland 76 et seq; Shrand 49 et seq; Bouwer 396 et seq.

69 79. Our translation.

Although such cases are rare in practice, it is advisable that draft legislation (if any), in this regard should not contain the same obscurity.

4.2.3 Unfair operation of the rules

Van der Westhuizen[70] gives the following exposition:

> A few of the most prominent anomalies and inequities resulting from these provisions will be pointed out.
>
> The mere fact that, for purposes of succession ab intestato, a person and his descendants permanently fall into two families is in itself undesirable.
>
> It is unfair to the relatives of a person adopted by others that such person and his descendants compete with the relatives when an estate in that family devolves, while the person's own estate or the estate of his descendant devolves on the family of the adoptive parent.
>
> It is unfair to the adopted child that he obtains only severely limited succession rights in his new family while the succession rights in his own family are often only empty shells. In terms of the usual adoption procedure which has come into being in this country since 1923 the adopted child is after all unaware of the identity of his own parents in most cases.
>
> It is also unfair to the adopted child's own family that the blood relations of the deceased adoptive parent inherit ab intestato when the adopted child or one of his descendants dies, but the first-mentioned family does not inherit when one of those blood relations dies.
>
> Since the adopted child inherits on intestacy from his adoptive parent and also from his own family, the anomolous position exists that if an adoptive parent is a blood relation of the adopted child, the said child will inherit twice in appropriate cases. If, for instance, a woman adopts her own illegitimate child, the child will inherit after her death, not only as an adopted child, but also as an own child. It is not fair that such a child should inherit twice as much as the ordinary legitimate children of the woman.

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70 Gedenkbundel Swanepoel 35. Our translation.

He suggests the following solution:[71]

> It is therefore proposed that the following principles be adopted and incorporated in the proposed new Succession Act and that the Children's Act be adapted to the provisions of the Succession Act:
>
> (a) an adopted child shall be treated as a relative of his adoptive parents for all purposes of succession ab intestato; and
>
> (b) an adopted child shall no longer be treated as a relative of his own parents.
>
> If these principles are adopted as a starting point, a very simple, generally reasonable and internationally popular statutory arrangement for the whole matter will be possible.

4.2.4 The Draft Child Care Bill[72] makes provision for the repeal of the Children's Act 33 of 1960. Clause 19 of the draft provides as follows:

> 19.(1) An order of adoption shall-
> (a) extinguish all rights and obligations between the child and the person who was his parent immediately before the adoption, and the relatives of such parent, except a parent mentioned in section 16(2)(b)(i), and the relatives of such parent;
>
> ...
>
> (d) cancel any order made and in force under this Act in respect of that child.
>
> (2) Subject to the provision of subsection (1)(b) an adopted child shall for all purposes whatsoever be deemed in law to be the legitimate child of the adoptive parent as if he was born from him during the existence of a lawful marriage.

The "parent mentioned in section 16(2)(b)(i)" is a natural parent married to an adoptive parent.

4.2.5 Position in other legal systems

In Germany an adopted child inherits under intestacy from his own family and from his adoptive parents (unless agreed to the

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71 Gedenkbundel Swanepoel 36. Our translation.

72 Government Gazette 7864 of 28 October 1981. Cf s 20 of the Child Care Act 74 of 1983.

contrary at the time of adoption) but he does not inherit from the family of his adoptive parents.[73]

The position in France is set out as follows by Amos and Walton's introduction to French law:[74]

> The child leaves his old family completely, except that the natural impediments to marriage continue to apply, and enters that of his adopters for all purposes, except that the ancestors of the adopter may refuse to accept him as a member of it unless they have adhered to the adoptive legitimation.

The following discussion appears in a working paper issued by the Law Reform Committee of Western Australia during 1970:[75]

At 1: Generally speaking, the law of all other Australian jurisdictions completely assimilates the position of the adopted child to that of a child born in lawful wedlock of the adopting parents and completely severs the relationship between himself and his natural parents and their kindred.

At 2: The United Kingdom (the Adoption Act 1958) and New Zealand (the Adoption Act 1955) have completely assimilated the position of the adopted child to a child born in lawful wedlock except that adopted children or their issue cannot take as 'children' or 'grandchildren' etc. under settlements, wills and intestacy unless the adoption was effected before the date of the settlement or the death of the testator or intestate.

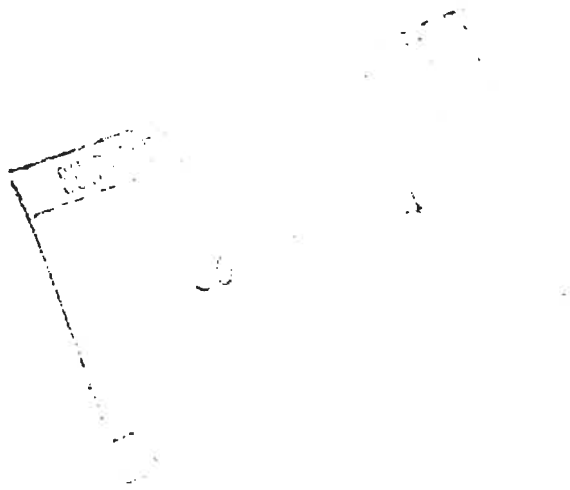
4.3 Résumé and recommendations

The present-day trend is to detach the adopted child from his own family and to include him in the family of his adoptive parents. This arrangement will be logical and fair in the great majority of cases. In the few cases where the arrangement may be unfair the parties are free to settle the succession by will. In cases where a child is adopted more than once or where a parent adopts his own child it would also seem advisable for the later adoption to determine the child's rights and his prior connections to be severed. The case where a child is adopted more than once

73 Manual of German law Vol I at 249.
74 79.
75 Succession Rights of Adopted Children.

is adequately covered by section 78(1) of the Children's Act 33 of 1960, which provides that the second adoption terminates all the legal consequences of the previous adoption.[76]

The question that arises is whether an exception should be made of the case where a natural parent is married to the person who adopts the child. In these cases it appears to be fair that the child's connections with his natural parent and the parent's family should be retained.[77]



76 Cf clause 19(1) of the Draft Child Care Bill quoted in par 4.2.4 above.

77 Ibid clause 19(1)(a).

Annexure A

Bodies and persons approached to identify defects in the law of succession

Association of Law Societies of the Republic of South Africa

Association of Trust Companies in South Africa

Clearing Bankers' Association of South Africa

General Council of the Bar of South Africa

Justice Training

Masters of the Supreme Court

National Council of Chartered Accountants (now The South African Institute of Chartered Accountants)

South African Universities

Southern African Institute of Chartered Secretaries and Administrators

Annexure B

Sample of 100 files in the office of the Master of the Supreme Court, Pretoria

Purpose

The purpose was to get an indication of the percentage of estates which devolve on intestacy. In testate estates it was noted whom were appointed heirs. It is assumed that testators provide for distributions which they regard as fair and that the results may be used to devise fair rules for the law of intestate succession.

In its working paper the Ontario Law Reform Commission[78] criticises a similar sample, used by an English committee,[79] as follows:

> The recommendations of the Committee have come in for some criticism. The recommendations were based on a census taken in the probate registers over five weeks, apparently with the idea that the kind of dispositions made by a majority of those who left wills over that short period of time should be considered as typical of the intentions of those who do not make wills, and should be enacted as the English law of intestacy. This seems little more than a peculiar reflection of the traditional principle of freedom of testation in English law.

The statistics would nevertheless appear to be of some value.

Method

The files in the Pretoria Master's office are divided randomly into 11 groups. All the files reported in one of these groups since the beginning of 1979 were checked until a sample of 1000 was completed. (The estates were reported from 1 January until 15 October 1979.) It was not possible to trace 28 files readily in this process and they were left out of account. In a few cases the administration of the estates had not been completed to such an extent that the balance for distribution appeared from the files. These cases were also

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78 Family Law Project Vol III 462.

79 Report of the Committee on the Law of Intestate Succession.

left out of account. Insolvent estates were taken as estates with no balance for distribution. In certain small estates with a value of less than R1 500[80], where the liabilities were not apparent from the file, the gross value was taken as the balance for distribution.

Estates of Blacks[81] and persons who at the time of their death were resident outside the Republic were left out of account, as were small legacies, renunciations by heirs and redistributions amongst heirs.

In testate estates, the Master does not require details of brothers or sisters or their descendants. In such cases where the existence of such relatives was not evident from the file, and the deceased was not survived by a parent, it was hypothetically assumed that the deceased was not survived by any relatives in the second parentela (parents of the deceased or their descendants).

The position in other master's offices might reflect a different trend owing to local conditions. Approximately 41% of all deceased estates in the Republic are dealt with in the Pretoria office.

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80 S 18(3) Administration of Estates Act 66 of 1965.

81 See par 1.3 above.

Result of the sample
(The average balance for distribution is given in brackets)
Total sample 1 000 (R26 500)

Testate (1) 788 (R32 000)						Intestate (2) 212 (R6 050)				
Testator survived by spouse 504 (R36 001)		Testator not survived by spouse 284 (R24 900)				Survived by spouse 98 (R8 787)			No surviving spouse 114 (R3 707)	
Survivor sole heir	Survivor not sole heir	Heirs appointed in will				Survivor inherits alone or with descendants (8)	Survivor inherits alone or with 2nd parentela (9)	Descendants	2nd parentela (10)	Further relatives
		Descendants per stirpes	Descendants not equally or per stirpes	2nd parentela (5) no descendants (6)	Further than 2nd parentela (5) (no descendants) (7)	Further than 2nd parentela (5) (although decendants)				
433(3) (R32 735)	71(4) (R55 916)	162	42	39	30	11	89	9	73	37	4

(1) In one case with a balance for distribution of R40 000, R3 815 devolved on partial intestacy because the heir was predeceased. This case was regarded as a testate estate for purposes of the statistics.

(2) In three of these cases the deceased left a valid will, but the estated devolved on intestacy because the heirs were disqualified from inheriting.

(3) In about 5% of these cases the survivor was the sole heir subject to fiduciary conditions.

(4) 1. In 20 of these cases the survivor acquired a usufruct over or a right to the income of the whole estate or the part she did not inherit.

2. In 10 of these cases the survivor inherited nothing and got nothing in terms of the matrimonial property law.

3. Except in 4 cases the estate or the part not inherited by the survivor went to descendants.

(5) The second parentela consists of the deceased's parents and their descendants, excluding the deceased's descendants, viz the deceased's parents, brothers, sisters and the descendants of the latter two.

(6) There were no cases in the sample where the whole estate was bequeathed to the second parentela although the deceased was survived by descendants.

(7) In five of these cases persons in the second parentela nevertheless received a part of the estate.

(8) Section 1(1)(a) or (b) of the Succession Act 13 of 1934.

(9) Section 1(1)(c) or (d) of the Succession Act 13 of 1934.

(10) In these four estates no heirs could be traced. Two of the estates had no balance for distribution. In the other two the values were R600 and R1 534.

Annexure C

Intestate succession by a surviving spouse in other legal systems

When considering the position of the surviving spouse in other systems, it is important to note that all these systems make provision for a maintenance claim by, or a legitimate portion in favour of, the survivor.

1. "Common law" systems

1.1 The following appears from a comparative table[82] dealing with Western Australia, New South Wales, Victoria, Queensland, South Australia, Tasmania, Australian Capital Territory, New Zealand and England (the position as it was in 1973):

1.1.1 Eight of the nine systems award a third of the estate to the survivor if there are descendants. (In three of these systems the survivor takes half if the deceased left only one child or a predeceased child with descendants.) Five of the systems award an amount ranging from 10 000 Dollars to 17 000 Dollars, plus interest to date of distribution, to the survivor beforehand. In three systems the survivor also takes "personal chattels". In England the survivor takes "personal chattels" plus £15 000 with interest to date of distribution and a "life interest" on half of the balance. (The survivor has an option to claim cash instead of the "life interest".)

1.1.2 In two of the systems the survivor takes the lot if there are no descendants. In another the survivor takes everything if there are no descendants or parents. A further four systems award the estate to the spouse only if there are no descendants, parents, brothers, sisters or their descendants (in one children of brothers and sisters). The survivor

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82 Law Reform Commission of Western Australia Report on Distribution on Intestacy.

usually gets a certain amount plus half of the balance together with heirs in the second parentela (parents, brothers, sisters and their descendants).

1.1.3 In the case of partially intestate estates three of the systems apply the same rules to the part. Five provide for the testate benefit to the survivor to be taken into account in the computation of the survivors share and the last system does not give the survivor a preferential portion in partial intestacy.

2. France[83]

2.1 The survivor is entitled (if not entitled to full ownership) to a usufruct of -

(a) ¼ if the deceased left children or illegitimate children not conceived during the marriage;

(b) ½ if the deceased left no such children but ancestors or brothers or sisters or their descendants or illegitimate children conceived during the marriage.[84]

2.2 If the deceased left no descendants and no ancestors, or brothers or sisters on either the father's or the mother's side, half goes to the survivor as owner.[85] If the deceased left no such heirs on father's or mother's side, the whole estate goes to the survivor.[86]

3. Germany[87]

The survivor inherits in competition with -

(a)	descendants of the deceased	1/4
(b)	parents or their descendants	1/2
(c)	four grandparents	1/2
(d)	three grandparents and the descendants of one predeceased	5/8
(e)	two grandparents and the descendants of two predecased	3/4
(f)	one grandparent and the descendants of three predeceased	7/8
(g)	further relatives	the whole estate.

The survivor is usually entitled to household effects and wedding presents before distribution of the estate.

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83 French Civil Code. Hereinafter "FCC".
84 FCC 767.
85 FCC 766.
86 FCC 765.
87 German Civil Code s 1931; Manual of German Law Vol I 261.

Annexure D

Intestate succession in other legal systems in cases where there is no surviving spouse

1. "Common law" systems

1.1 The Report on Distribution on Intestacy[88] contains a comparative table of the rules of intestate succession in nine systems, viz Western Australia, New South Wales, Victoria, Queensland, South Australia, Tasmania, Australian Capital Territory, New Zealand and England (as it was in 1973). According to this table the law of intestate succession in these nine systems is as follows:

(a) All the systems provide that the descendants per stirpes have a first claim to the estate. (In four of the systems there is the proviso that the heir must have married or reached a certain age. The estate is in the mean time held under "statutory trust".)

(b) In seven of the systems the parents are or the surviving parent is thereupon entitled to the estate. In Western and South Australia brothers and sisters and sometimes their children inherited a part of the estate with the parents. The law reform bodies of both these states recommended that there, also, parents should inherit the whole estate in such a case.[89]

(c) In four of the systems the brothers and sisters and their children per stirpes take the estate if there are no descendants or parents. (In three the children of a brother or sister inherit only if there is a brother or sister.) In a further three systems the brothers and sisters and their descendants per stirpes (having married or reached a certain age) take the estate. The other two systems have similar rules but half-brothers and half-sisters or their descendants inherit only in the absence of whole blood.

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88 Law Reform Commission of Western Australia.

89 Law Reform Commission of Western Australia Report on Distribution on Intestacy 9; 28th Report of the Law Reform Committee of South Australia to the Attorney General relating to the Reform of the Law on Intestacy and Wills 1974 at 4 and 5.

(d) If the deceased left no descendants, parents, brothers or sisters and their children or descendants (as the case may be) the estate is distributed as follows:

(i) Firstly to the surviving grandparents. (The table indicates for South and Western Australia that the estate devolves according to the Statute of Distributions of 1670. Apparently, if the deceased left no brothers or sisters, this means that the grandparents succeed next.)[90]

(ii) After that the general trend is that uncles and aunts are the next in line, sometimes with children of predeceased and sometimes with their descendants.

(e) In five of the systems the estate goes to the State if there are none of certain heirs within the first three parentelae (up to grandparents and their descendants).

(f) In seven of the systems heirs of the half blood apparently inherit equally with whole blood.[91] In the other two systems the half blood inherits only in the absence of whole blood in the same degree.

1.2 A study by the Ontario Law Reform Commission[92] gives the following exposition of the position in the United States of America:

> As in Ontario, children inherit subject to the interest of the surviving spouse, and descendants however remote take in preference to all other blood relatives. But unlike Ontario, most States favour a per capita division among descendants of the same generation, when taking in

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90 28th Report in footnote 89 at 4 and 5.
91 28th Report in footnote 89 at 5; 2(b) of the table referred to against footnote 88.
92 Family Law Project Vol III at 466 et seq.

their own right and not representing their dead parent. Thus, grandchildren take equal shares when there are no living children. In most States, parents inherit ahead of brothers and sisters, but in Illinois for instance, parents share with brothers and sisters (as in Ontario). In a few States, such as New Jersey, brothers and sisters are preferred to parents. In all States, children of deceased brothers and sisters share per stirpes with surviving brothers and sisters, and in most States where there are only nephews and nieces, they take per capita as in Ontario. These States, like Ontario, confine representation among collaterals to the one case of children of deceased brothers and sisters sharing together with surviving brothers and sisters. Some States, however, allow representation by grandchildren of brothers and sisters and in a few States representation is permitted in favour of any class of collaterals. Degrees of kinship are usually computed according to the Civil Law method and without any limitation on remoteness of blood relationship. Many States employ the rule found in Nova Scotia, that persons tracing their blood through the nearest common ancestor are to be preferred, so that a nephew or niece takes before an aunt or an uncle.

In most jurisdictions relatives of the half-blood share equally with the whole blood of the same degree, though in some States the half-blood takes a smaller portion.

In a few American jurisdictions relatives by marriage succeed in the absence of a spouse or blood relatives. Generally, however, relatives of a predeceased spouse do not take; the property escheats. Statutes occasionally provide for stepchildren and step-parents who were dependant on the intestate to share in the intestate's estate.

The Model Intestate Succession Act of the Conference of Commissioners, which applies to most of the "common law" systems in Canada,[93] provides as follows for the second and futher parentelae:

a. If an intestate dies leaving no widow or issue, his estate shall go to his father and mother in equal shares if both are living, but if either of them is dead the estate shall go to the survivor.

b. If an intestate dies leaving no widow, issue, father or mother, his estate shall go to his brothers and sisters in equal shares, and if any brother or sister is dead, the children of the deceased brother or sister shall take the share their parent would have taken if living.

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93 Ontario Law Reform Commission Report on Family Law Part IV Family Property Law at 166 and 169.

c. If an intestate dies leaving no widow, issue, father, mother, brother or sister, his estate shall go to his nephews and nieces in equal shares and in no case shall representation be admitted.

d. If an intestate dies leaving no widow, issue, father, mother, brother, sister, nephew or niece, his estate shall go in equal shares to the next of kin of equal degree of consanguinity to the intestate and in no case shall representation be admitted.

e. For the purposes of the laws of intestate succession, degrees of kindred shall be computed by counting upward from the intestate to the nearest common ancestor and then downward to the relative; and the kindred of the half-blood shall inherit equally with those of the whole-blood in the same degree.

2 France[94]

(a) Firstly the inheritance goes to descendants of the deceased per stirpes ad infinitum.[95]

(b) No descendants

(i) If the father and mother survive and there are no brothers and sisters or their descendants, the parents inherit the estate in equal shares.[96]

(ii) If the father and mother survive and there are brothers and sisters or their descendants, the father and mother inherit a quarter each and the other half goes to the brothers and sisters per stirpes.[97]

(iii) If one parent survives and there are brothers and sisters or their descendants, the parent takes a quarter and the brothers and sisters per stirpes take the balance.[98]

(iv) If no parent survives, the brothers and sisters and their descendants per stirpes take the estate.[99]

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94 Amos and Walton's Introduction to French Law 288-301; French Civil Code hereinafter "FCC".
95 FCC 745.
96 FCC 746.
97 FCC 748 and 751.
98 FCC 751.
99 FCC 749 and 750.

(v) If one parent survives but there are no brothers or sisters and their descendants, the surviving parent takes one half and the other half goes to the nearest ancestors in the other line per capita[1]. Failing ancestors in the other line the surviving parent takes the whole estate.[2]

(vi) If there are brothers and sisters of different marriages, the estate is split between the father's and the mother's line. Half-brothers and half sisters take only in their line, while brothers and sisters of the whole blood take in both lines. If there are brothers and sisters from only one marriage, they inherit equally.[3]

(c) No descendants, parents or brothers and sisters and their descendants

(i) The estate is divided into two lines and the nearest ancestor(s) in each line take(s) per capita[4]. Failing ancestors in one line everything goes to the ancestors in the other line.[5]

(ii) Failing ancestors, each half devolves on the nearest blood relation in that line per capita[6] within the 6th degree or within the 12th degree if the deceased was incapable of making a will.[7] If there are no heirs within the required degree in one line, this part goes to the other line.[8]

Amos and Walton's Introduction to French Law[9] sums up the position as follows:

> Nevertheless, the system of the Code is complicated enough ... and obscurities persist at some points.

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1 FCC 746.
2 FCC 753.
3 FCC 752.
4 FCC 746.
5 FCC 753.
6 Ibid.
7 FCC 755
8 Ibid.
9 289.

> The small proportion of Frenchmen who trouble to make a will indicates that the rules governing intestate succession are considered satisfactory. (In 1928 about four-fifths of all successions were intestate ...) But one must remember that in many cases marriage contracts or the matrimonial régime largely pre-determine the devolution of assets upon death.

3. Germany[10]

(a) First parentela

Firstly the descendants inherit per stirpes ad infinitum.[11]

(b) Second parentela. No descendants

If both parents survive they share the estate equally. If one or both parents are dead half goes to his or her descendants per stirpes ad infinitum. If there are no descendants of a predeceased parent and the other parent survives, the other parent inherits the whole estate.[12]

(c) Third parentela. No descendants or parents and their descendants

The estate is divided into four and goes to the grandparents or their descendants per stirpes ad infinitum. If one grandparent died without descendants, his share goes to the other grandparent or his descendants per stirpes on the same side. If there are no grandparents or their descendants in one line, their half goes to the other line.[13]

(d) Fourth parentela. No heirs within the first three parentelae

The surviving great-grandparents inherit in equal shares. Failing the great-grandparents their nearest descendants inherit equally per capita.[14]

(e) Further parentelae

In further parentelae the rules set out in (d) above apply.[15]

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10 Manual of German Law Vol I at 260; German Civil Code hereinafter "BGB".
11 BGB 1924.
12 BGB 1925.
13 BGB 1926.
14 BGB 1928.
15 BGB 1929.

Manual of German Law[16] comments as follows:

> The German system of Parentelen is similar to the Aasenschapssystem of Roman-Dutch law, which is familiar to South-African lawyers ... There is no end to the system of Parentelen and, if necessary, extensive search for relatives may be required. Unlike under the English Administration of Estates Act 1925 there is no limitation of succession to near relatives of the deceased. This rule is widely disapproved by German lawyers. As long as one relative of a nearer Parentel is living at the death of the testator he excludes all the relatives of the next Parentel, section 1930 BGB.

16 Vol I at 260.

Annexure E

Draft legislation on intestate succession

Intestate succession

1(1) Intestate succession shall take place in accordance with the rules set out below.

(a) Where the deceased is survived by a spouse, but not by any descendants, the spouse shall inherit the whole intestate estate.

(b) Where the deceased is survived by descendants, but not by a spouse, the descendants shall inherit the intestate estate per stirpes.

(c) Where the deceased is survived by a spouse as well as descendants, distribution shall take place as if the spouse were a surviving child of the deceased: Provided that the spouse shall inherit either a child's share or so much of the intestate estate as does not exceed R50 000, whichever is the greater.

(d) (i) Where the deceased is not survived by a spouse or any descendants, but is survived by a parent or a descendant of a parent, the intestate estate shall be divided into two equal shares:

One share shall go to the father of the deceased or, if he has not survived the deceased, to his descendants per stirpes, and the other share shall go to the mother of the deceased or, if she has not survived the deceased, to her descendants per stirpes.

(ii) Failing a surviving parent or descendants on one side, the intestate share of that parent's side shall accrue to the other parent's side.

(e) If the deceased is not survived by a spouse or a descendant or a parent or a descendant of a parent, the intestate estate shall be shared equally by the blood relations of the deceased related to him in the nearest degree.

(2) (a) For the purposes of subsection (1) an adopted child -

(i) shall be deemed to be a descendant of his adoptive parent or parents;

(ii) shall not be deemed to be a descendant of his natural parent or parents except in so far as a natural parent is also the adoptive parent of the child or is married to the adoptive parent at the time of the adoption.

(b) If for the purposes of paragraph (a) of this subsection a child shall be deemed to be a descendant of a parent or shall not be deemed to be a descendant of the parent, the parent concerned shall be deemed to be an ancestor of the child or shall not be deemed to be an ancestor of the child, as the case may be.

(3) If a person renounces his intestate heritage or is disqualified to inherit from the deceased on intestacy, no succession shall take place through the line of the said person.

(4) For the purposes of paragraph (e) of subsection (1) the degree of consanguinity with the deceased shall be -

(a) in the case of an ancestor of the deceased, the number of generations from the deceased to such ancestor;

(b) in the case of a relation who is not an ancestor, the number of generations from the said blood relation to the nearest common ancestor of such blood relation and the deceased plus the number of generations from the said ancestor to the deceased.