SOUTH AFRICAN LAW COMMISSION

WORKING PAPER 19

PROJECT 22

REVIEW OF THE LAW OF SUCCESSION: DISQUALIFICATION FROM INHERITING, SUBSTITUTION, SUCCESSION RIGHTS OF ADOPTED CHILDREN

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INTRODUCTION

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)
Prof D J Joubert
Mr P A J Kotzé
Mr J E Knoll
The Honourable Mr Justice P J J Olivier
Mr G G Smit.

The Secretary is Mr Gerhard van Zyl. The Commission's offices are on the 8th Floor, NG Kerk Sinodale Sentrum, 228 Visagie Street, Pretoria. Correspondence should be addressed to:

The Secretary
South African Law Commission
Private Bag X668
0001 PRETORIA

Telephone: (012) 322 6440*

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 request to treat comments or parts of comments on the working paper as confidential will be respected. If no request for confidentiality or anonymity is made the Commission will assume that commentators agree to the Commission's quoting from or referring to comments and attributing comments to commentators.

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 by 30 April 1988. Please refer to the previous page for the address to which correspondence should be directed. Please communicate with the researcher if you are unable to submit your comments in time.

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

HIERDIE STUK IS OOK IN AFRIKAANS BESKIKBAAR

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Van der Merwe and Rowland	N J van der Merwe & C J Rowland *Die Suid-Afrikaanse erfreg* 5e uitgawe Pretoria: Van der Walt 1987
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Working Paper 14 on formalities of a will	South African Law Commission Working Paper 14 *Review of the law of succession: Formalities of a will* 1986

1. INTRODUCTION

1.1 The Commission included a review of the law of succession in its programme in 1975. In the light of comments received the Commission has decided to limit its investigation of the law of succession to the following subjects:

- Law of intestate succession.
- Formalities for a valid will and custody of wills.
- Alteration or revocation of a will.
- The introduction of a legitimate portion or the granting of a right to maintenance to the surviving spouse.
- Disqualifications from inheriting.
- Substitution in the law of succession.
- Succession rights of adopted children.

1.2 The Commission has already submitted its reports on the law of intestate succession and on the introduction of a legitimate portion or the granting of a right to maintenance to the surviving spouse to the Minister of Justice.[1]

1.3 Working papers on the formalities of a will[2] and the alteration and revocation of wills[3] have already been published.

1.4 This working paper contains a discussion of the remaining subjects, namely, disqualifications from inheriting, substitution, and the succession rights of adopted children.

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1 South African Law Commission <u>Report on the review of the law of succession: Intestate succession</u> 1985; South African Law Commission <u>Report on the review of the law of succession: The introduction of a legitimate portion or the granting of a right to maintenance to the surviving spouse</u> 1987.

2 Working Paper 14 <u>Review of the law of succession: Formalities of a will</u> June 1986.

3 Working Paper 17 <u>Review of the law of succession: Alteration and revocation of wills</u> April 1987.

1.5 On the completion of all the relevant investigations the Commission intends making proposals for the consolidation of all legislation relating to the law of succession.

2. DISQUALIFICATIONS FROM INHERITING

(a) Introduction

2.1 In principle all persons have the capacity to inherit. However, certain persons are absolutely disqualified from inheriting from a certain deceased person. Sometimes a person is only disqualified from inheriting as an intestate heir. Sometimes the disqualification from inheriting is relevant only if the deceased left a will (for instance beneficiaries who witnessed the will).

2.2 After discussing all the disqualifications from inheriting it will be considered what reform, if any, of the disqualifications from inheriting is desirable.

(b) Benefit from a crime

2.3 No one may benefit himself by his own crime or profit from conduct which is punishable.[4]

2.4 There must be a causal connection between the misdeed and the potential enrichment. This causal connection is clear where the person killed the person whose estate he will inherit. The question of causation presents problems where the murderer inherits not from his victim but from another person who has inherited from the victim.

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4 Taylor v Pim (1903) 24 NLR 484 at 491; Ex parte Steenkamp and Steenkamp 1952 1 SA 744 (T) 752D; Caldwell v Erasmus 1952 4 SA 43 (T) 49E; Ex parte Vonzell 1953 1 SA 122 (C) 126B; Nell v Nell 1976 3 SA 700 (T) 702E.

2.5 In Ex parte Steenkamp and Steenkamp[5] a person murdered his parents-in-law. One of his children (a grandchild of the parents-in-law) inherited from the parents-in-law. When this child (born after the death of the parents-in-law) died subsequently, the question arose whether there was a sufficient causal connection between the murder of the parents-in-law and the devolution of the child's estate on his father. Steyn J held[6] that the devolution of the inheritance was neither a direct consequence nor the ordinary, natural or reasonably foreseeable consequence of the murder. According to Steyn J it could hardly be predicted that a child still to be born would in the ordinary course of events die before his parents or that a person while committing the crime could have foreseen that he would inherit assets belonging to his victim from his child who had not yet been born.[7] Steyn J held the view that the requirements of causation should in this case be the same as for delictual liability.[8]

2.6 Professor H R Hahlo[9] criticised the finding by Steyn J regarding the question of causation as follows:

> With respect, it is submitted that this part of the judgment is not convincing. True, the birth and death of the third child were the immediate causes of the 'enrichment' of the first petitioner. If the child conceived by the second petitioner before the murder would not have been born alive, or if, having been born alive, it would not have died, there would have been no question of succession as far as the first petitioner was concerned. But, on the other hand, if he had not murdered the testators, they would almost certainly have outlived the third child, and the first petitioner would not have succeeded, directly or indirectly, to any part of their estate; on their eventual death the estate would have gone in its entirety to the surviving two children of the petitioners. How, then, can it be said that the murder was not the direct cause of his enrichment?

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5 1952 1 SA 744 (T).

6 753C.

7 753E.

8 753G.

9 H R H "De bloedige hand erft niet" 1952 South African Law Journal 136 to 138 at 138.

2.7 N J van der Merwe and C J Rowland[10] made the following comments:

> If this argument put forward by Hahlo were accepted by the courts the effect could hardly be other than that a person who had caused the death of another in an illegal and culpable way could never inherit from the victim's heir whatever the heir had inherited intestate or under a will from the victim's estate. ...
>
> If this disqualification from inheriting is to be retained in our law, it is suggested that the only criterion for the application thereof should be a causal connection between the crime and the devolution of the benefit, especially since there is no sense in allowing "directness" of the causal connection, whatever that may mean, to play a part in this regard.

2.8 If by "causal connection" is meant here the "factual causation",[11] the criminal will be able to take the benefit from his crime from the estate of another only if he would also have inherited the benefit in the absence of the crime.

2.9 In a memorandum published for comment the Scottish Law Commission remarked as follows on a similar common law rule:[12]

> The test of benefit accruing from the crime might allow someone who attempts to kill a person to inherit from him or her if that person dies naturally a few months later; it also introduces difficult questions of causation as for example where the deceased was terminally ill at the time of the crime or where he or she died as a result of some other subsequent act or circumstance.

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10 Die Suid-Afrikaanse erfreg 5e uitgawe Pretoria: Van der Walt 1987, hereinafter "Van der Merwe and Rowland", at 108 (our translation).

11 As determined by the sina qua non test.

12 Some miscellaneous topics in the law of succession Consultative Memorandum No. 71 September 1986, hereinafter the "Scotland Memorandum", par 2.7 at 6.

The view is expressed in the memorandum that the common law rule and an old statutory provision[13] should be replaced by a reformulated rule of forfeiture.

2.10 In Ex parte Vonzell[14] Hall J held that the principle that a person should not derive a benefit from his crime did not deprive a murderer of his share of the joint estate which had accrued to him at the time of the marriage. In Nell v Nell[15] Human J held that there was no causal connection between the murder and the benefit derived in terms of the matrimonial property law. According to Human J the murder did accelerate the dissolution of the marriage with its attendant consequences but the spouse received nothing more than what he or she had been entitled to at the time of the marriage.

2.11 Professor H R Hahlo criticised these two decisions.[16] He argues that "a man who has put an end to the marriage by murdering his wife cannot be in a better position than one who had brought about the same result by the gentler means of adultery or malicious desertion". He considers that the guilty spouse should forfeit the excess (if any) of the innocent spouse's contributions to the joint estate over his own. He argues that there is indeed a causal connection between the murder and the taking of the financial benefits. The murder put a premature end to the marriage. If this had not happened the innocent spouse might have obtained a divorce, with forfeiture of benefits, or might have survived the murderer. H Schwartz[17] agreed with Professor Hahlo and called for legislation without

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13 The Parricide Act 1594. See par 2.39 below.

14 1953 1 SA 122 (C) 126E.

15 1976 3 SA 700 (T) 704H.

16 H R H "Forfeiture by murder" 1953 South African Law Journal 1 to 3; H R Hahlo "Murder rewarded" 1976 South African Law Journal 376 at 377.

17 "Law of persons" in 1953 Annual Survey of South African Law 66 to 67 at 67.

giving details of the provisions recommended by him. Ian B Murray[18] states that the result in Nell's case seems an unsatisfactory one from the broad point of view. Other authors do not criticise the two decisions and stress the difference between the matrimonial property law and the law of succession.[19] Matthaeus[20] mentions in passing that a person who deserts his wife who suffers from pestilence forfeits all benefits of the marriage and his inheritance.

2.12 The principle that a person cannot benefit from his own crime is not limited to the law of succession. The murderer cannot claim the proceeds of an insurance policy on the life of his victim.[21]

2.13 Professor P Q R Boberg[22] introduces his discussion of causation in connection with delict as follows:

> In the morass of controversy that surrounds this element of liability, the only two propositions on which there is complete unanimity shine like beacons in the darkness. These are: (a) the defendant is not liable unless his conduct in fact caused the plaintiff's harm; and (b) the defendant is not liable merely because his conduct in fact caused the plaintiff's harm - such liability would be too wide, and some means of limiting it must be found. ...
>
> The test of factual causation favoured by most writers and now authoritatively adopted in Minister of Police v Skosana 1977 (1) SA 31 (A) is the sine qua non or 'but for' test. To apply it one asks whether the plaintiff's harm would have occurred in any event without

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18 "Law of succession" in 1976 Annual Survey of South African Law 233 to 288 at 254.

19 Van der Merwe and Rowland 106; Lee and Honoré Family, things and succession second edition by H J Erasmus, C G van der Merwe & A H van Wyk Durban: Butterworths 1983, hereinafter "Lee and Honoré", footnote 3 par 593 at 402; Lila E Isakow The law of succession through the cases Cape Town: Juta 1985, hereinafter "Isakow", at 64.

20 Antonius Matthaeus Zinspreuken by de Nederlandsche rechtsgeleerden gebruikelyk Amsterdam: Van Esveldt 1775, hereinafter "Matthaeus Zinspreuken", par 4 at 132.

21 Cf Nell v Nell 1976 3 SA 700 (T) 705A.

22 The law of delict Vol 1 Cape Town: Juta 1984, hereinafter "Boberg", at 380.

(but for) the defendant's conduct. If it would, that conduct is not a cause of the harm. The question is entirely one of fact.

2.14 The proponents of factual causation concede that the notions of adequate cause and direct consequences may perhaps be of value in cases of strict liability.[23] By tradition the "direct consequences test" or "foreseeability test" is used.[24] In the Steenkamp case[25] Steyn J gave preference to neither of these tests but held that there was no causal connection between the crime and the benefit according to either of them. The Vonzell and Nell cases[26] did not refer to any particular test of causation.

2.15 Professor Boberg[27] concludes that no test of so-called legal causation can claim logical superiority over another. According to him the policy question in the case of delict is what the ambit of liability should be. The merit of a test of remoteness depends on its ability to yield the results which are desirable in terms of the policy decision. The policy question which must be answered here is which preconditions ought to apply before a criminal is denied a benefit. When this question has been answered, the best way of arriving at the desired result will be considered.

2.16 One possibility is that factual causation between the crime and the benefit should be the only precondition for disqualification. The criminal would receive a benefit from another person's estate only if he would also have received the benefit in the absence of the crime. If factual causation only were required the consequences of an act would be unlimited in time

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23 N J van der Merwe en P J J Olivier Die onregmatige daad in die Suid-Afrikaanse reg 5de uitgawe Pretoria: Van der Walt 1985, hereinafter "Van der Merwe and Olivier", at 202. Cf Boberg 389 and 440.

24 Van der Merwe and Olivier 198 et seq; Boberg 440 et seq.

25 Par 2.5 above.

26 Par 2.10 above.

27 440.

and number.[28] It is suggested that this precondition for disqualification is too wide and would give rise to problems in practice.

2.17 A second possibility is to abolish the disqualification. This solution is not satisfactory. Society would certainly not tolerate the fact that a criminal was allowed manifestly to benefit from his crime.

2.18 The last possibility is that a criminal should sometimes be disqualified from receiving a benefit from his crime. The question is, when should a criminal be disqualified and when not? There is no simple answer to this question.

2.19 In the Steenkamp case[29] Steyn J held that the requirement of causation should in this case be the same as for delictual liability. Objections can be levelled against this solution. First, the application of the requirement of causation in delict is not clear. Secondly, fault and wrongfulness limit liability in delict while it is clear that fault and wrongfulness cannot play the same role in the disqualification of a criminal as an heir. Lastly, the courts' application of the requirement of causation has been criticised because it does not yield the desired results.[30]

2.20 In the light of the objections against the present position it will be considered below whether a reformulation of the rules is not desirable.

2.21 It is unrealistic to expect that a statutory reformulation of the rules will solve the problem of causation to everyone's satisfaction. However, effect could be given to the rules of so-called legal causation as according to the weight of authority they apply to-day in the case of delict. Accordingly, a person who committed a crime would not inherit any benefit if he committed the crime with the intention of gaining the benefit[31]

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28 Van der Merwe and Oliver 193; Boberg 386.

29 Par 2.5 above.

30 Par 2.5 to 2.11 above.

31 Boberg 440; Van der Merwe and Olivier footnote 21 at 210.

or if at the time of the commission of the crime it was reasonably foreseeable that the person who committed the crime would receive a benefit from the crime.[32] This solution might not dispose of criticism that a criminal should not be allowed to receive a benefit in terms of the matrimonial property law.[33] The courts have decided that these benefits accrue at the time of the marriage and not as a result of the murder.[34] If criticism of this aspect of the present law is justified, an express reference to the forfeiture of benefits in terms of the matrimonial property law will be necessary. Views are invited on a provision on the following lines:

> No person shall as a result of a crime committed by him receive any benefit in terms of the matrimonial property law or any other benefit as a result of any person's death if he committed the crime with the intention of receiving the benefit or if it was reasonably foreseeable at the time of the commission of the crime that he would receive the benefit as a result of the crime.

2.22 The present position that benefits in terms of the matrimonial property law are not forfeited as a result of a crime has been criticised by a few commentators only.[35] Apart from these cases there was so far as the law of succession is concerned only one reported decision on the principle that a person may not enrich himself by his own wrongful act or benefit from an act or omission which is punishable. If the present position regarding benefits in terms of the matrimonial property law is satisfactory, it might be argued that problems are so rare that the enactment of statutory rules is undesirable. The enactment of statutory rules creates a risk that interpretation problems and uncertainty may arise. The Commission invites comments on the proposal that the present position should, notwithstanding the criticism discussed above, be maintained.

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32 Boberg 447 et seq.

33 Par 2.11 above.

34 Par 2.10 above.

35 Par 2.11 above.

2.23 The Commission would appreciate views on the question whether the solution in paragraph 2.21 or the solution in paragraph 2.22 is preferable.

2.24 The last question to be discussed under this heading is whether a conviction of the offence is or ought to be a precondition for forfeiture of benefits.

2.25 Although the impression has been created that a conviction is required before the heir is unworthy,[36] an heir is apparently unworthy until the contrary is proved if on the face of it (prima facie) there is a case that he committed the crime.[37]

2.26 The Scotland Memorandum[38] refers to the following: some legal systems require a conviction others do not; if no conviction were necessary the position of the executor would be uncertain and civil proceedings might be necessary; if the civil standard of proof were applicable a person could be categorised as a murderer or killer on a balance of probabilities; even if the criminal standard of proof beyond reasonable doubt were adopted the offender would be "convicted" in the absence of a jury; requiring a conviction might lead to injustice - the killer might die before being brought to trial, for example, by committing suicide - he might not be prosecuted for technical reasons such as having fled abroad. The Scotland Memorandum expresses the tentative view that a conviction should be a necessary precondition.

2.27 If a suspect is charged and acquitted on the merits of the case the executor will usually accept this ruling. However, the question

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36 Gafin v Kavin 1980 3 SA 1104 (W) 1107A.

37 Caldwell v Erasmus 1952 4 SA 43 (T) 49G; Ex parte Vonzell 1953 1 SA 122 (C) 125B. Cf J C van der Walt en J C Sonnekus "Die nalatige bloedige band - neem dit 'erffenis'?" 1981 Tydskrif vir die Suid-Afrikaanse Reg 30 to 45, hereinafter "Van der Walt and Sonnekus 1981 TSAR", 44; Estate Heinamann v Heinamann 1919 AD 99 at 101, 103 et seq, 121 et seq and 132.

38 Par 2.9 at 8.

whether a person is able to inherit remains a civil matter which ought to be decided on a balance of probabilities. If for technical reasons a suspect is not charged or convicted the executor should investigate the question of fact whether the suspect was guilty like any other question of fact and make his decision. The executor's decision is subject to review or objections by interested parties.

2.28 It is suggested that a conviction should not be required and that the position be left unchanged.

(c) A person who caused the death of the deceased or his conjunctissimus

(i) The murderer of the deceased

2.29 Voet[39] regards the murderer as the person "most of all unworthy"[40] to inherit. This unworthiness also follows from the rule that no one may benefit from his own crime.[41] This unworthiness is expressed by the maxim: "De bloedige hand en neemt geen erffenis." There is no doubt or difference of opinion regarding this disqualification as such.[42]

2.30 Blackwell J made the following comments with reference to this disqualification:[43]

> Personally I would prefer to arrive at the same conclusion on the principle followed in the English law, namely, that it is against public

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39 The selective Voet being the Commentary on the pandects (Paris edition of 1829) by Johannes Voet (1647-1713) and the supplement to that work by Johannes van der Linden (1756-1835) translated with explanatory notes and notes of all South African reported cases by Percival Gane Durban: Butterworths 1956, hereinafter "Voet", 34 9 6.

40 Gane's translation.

41 Par 2.3 et seq above.

42 Ex parte Steenkamp and Steenkamp 1952 1 SA 744 (T) 748A; Nell v Nell 1976 3 SA 700 (T) 702C.

43 Caldwell v Erasmus 1952 4 SA 43 (T) 49E.

policy that a person who is guilty of feloniously killing another should take any benefit from that person's estate or under that person's will.

2.31 Is the rule that a person who has killed the person whose estate is involved is unworthy to inherit necessary in addition to the general principle that no one may benefit from his own crime?

2.32 The general principle does not cover the case where someone unsuccessfully attempted to kill the deceased and the deceased died naturally later.[44] Under the common law someone who is guilty of attempted murder is disqualified but not someone who injured a person without the intention of killing him.[45] It is suggested that the common law rule that a person who murdered or attempted to murder a person is disqualified from inheriting from such person should be retained in addition to the principle that no person may benefit from his own crime.

2.33 Under the common law forgiveness by the deceased does not affect the assailant's unworthiness.[46] The provisional view in the Scotland Memorandum[47] is that the deceased should not in the case of murder or culpable homicide be able to confer a benefit on the offender by a will made after the crime was committed. The Property Law and Equity Reform Committee (New Zealand)[48] recommended that a person who caused the deceased's death should not be disqualified from inheriting if the bequest was made or confirmed in a will by the deceased executed between wounding and his death. It is argued that if the injured person is prepared to forgive his assailant the law should not prevent him from doing so.[49]

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44 Cf Scotland Memorandum par 2.7 at 6.

45 Matthaeus Zinspreuken par 10 at 141.

46 Ibid par 11 at 142.

47 Par (c) at 11.

48 Report on the effect of culpable homicide on rights of succession 1976, hereinafter the "New Zealand Report", clause 68C at 25.

49 New Zealand Report par (g) at 10.

2.34 Notwithstanding the approach that disinheriting should if possible be left to the testator,[50] it is suggested that there is insufficient justification for providing by statute that a testator may benefit his assailant in a will made between the attack and the testator's death. Comments on this view would be appreciated. A possible alternative is an enactment such as the following:

> No person shall be disqualified from taking a benefit under a will as a result of an act done by him if the will was executed after the commission of the act.

(ii) Negligent killing

2.35 A person who negligently killed a deceased was under common law unworthy to inherit from the deceased.[51] The courts have not to date decided whether such a person is unworthy to inherit in terms of South African law. It cannot be said that this principle is generally applied in practice. No case could be traced where the driver of a motor vehicle who negligently caused a collision and in so doing caused the death of a passenger was declared to be unworthy to inherit from the passenger.[52] Certain writers submit that the disqualification applies to recklessness but that the extension of the rule to death caused negligently may be obsolete.[53] Professors Van der Walt and Sonnekus hold the view[54] that, in addition to negligence, morally reprehensible conduct ("'n moreel afkeurenswaardige gedragswyse") is required before the heir becomes unworthy.

2.36 The position of a person as the heir of someone whose death he caused negligently has received attention in other legal systems.

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50 Par 2.109 below.

51 Van der Walt and Sonnekus 1981 TSAR 43.

52 Van der Merwe and Rowland 106.

53 Lee and Honoré footnote 2 par 593 at 402; Isakow 64 et seq.

54 1981 TSAR 43.

2.37 The New Zealand Report[55] states that the principle that a person cannot profit from his crime has been applied in cases involving manslaughter but that the limits of the principle and the consequences of its application are ill-defined. In the United States of America 26 States have legislation relating to the subject.[56] Although problems related to the effect of culpable homicide on rights of succession are rare,[57] the New Zealand Report recommended legislation in order to remove uncertainty and also because it would be unjust if the guilty party in cases of negligent driving were to be deprived of his rights of succession.[58] The detailed legislation recommended in the report[59] spells out when a person guilty of culpable homicide is disqualified from inheriting and the effect of the disqualification. Cases where a person did not intend to kill or cause grievous bodily injury are exceptions to the general rule that a person who committed manslaughter cannot inherit.

2.38 In England there is also a common law rule based on public policy which provides that under certain circumstances a person who "unlawfully killed another" cannot benefit. Section 2(2) of the Forfeiture Act 1982 empowers the court to modify the effect of that rule if "it is satisfied that, having regard to the conduct of the offender and of the deceased and to such other circumstances as appear to the court to be material, the justice of the case requires the effect of the rule to be so modified in that case". In terms of section 5 there is to be no relaxation of the rule in the case of a person who stands convicted of murder.[60]

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55 Par 2 at 1.

56 Par 5 at 3.

57 Par 7 and 8 at 4 et seq.

58 Par 10 at 7.

59 In the report this runs to more than 12 pages.

60 Cf P D Glavovic "De bloedige hand: An English perspective" 1984 South African Law Journal 730 to 733, hereinafter "Glavovic 1984 SALJ".

2.39 The common law rule and the Forfeiture Act 1982 also apply in Scotland. In addition the Parricide Act 1594 provides that any person convicted of killing his parent or grandparent shall be disinherited. The disherison applies to the convicted person's descendants as well. The tentative view expressed in the Scotland Memorandum is that the common law rule and the Parricide Act 1594 should be replaced by a narrow rule disinheriting an offender after conviction of murder or culpable homicide. The memorandum invites views on minor amendments to the Forfeiture Act 1982.[61]

2.40 P D Glavovic[62] makes the following suggestion with regard to South African Law:[63]

> There is thus a judicially expressed preference for a public-policy test, and some uncertainty as to whether the extension of the rule to negligent killing is or is not obsolete. But these are not the only elements of uncertainty in the issue. Voet says that where there is no blame there ought to be no penalty. What is blame? ...
>
> It is to avoid this sort of uncertainty, which undoubtedly exists in our law at present, and to permit of mitigation by the courts of the harsh operation of the forfeiture rule, that it is suggested that legislation similar to the United Kingdom Forfeiture Act of 1982 should be introduced in South Africa. A person convicted of murder is clearly not entitled to any benefit from the estate of his victim. In all other cases, however, justice would best be served by giving the courts discretion to assess the extent of forfeiture according to the degree of the beneficiary's moral turpitude vis-à-vis the deceased and the circumstances of the case.

2.41 It is surprising that to date no one has apparently contended that an heir is disqualified because he caused the deceased's death through his negligence in a motor vehicle accident. Under common law a person who negligently caused the death of another was unworthy to inherit and the courts have not decided that this ground of unworthiness does not apply in

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61 Par 2.2 to 2.18 at 3 et seq.

62 1984 SALJ 732.

63 The "judicially expressed preference" referred to is that of Blackwell J quoted in par 2.30 above.

South African law. Even if this ground as such does not apply in our law it is certainly a crime to cause the death of another person wrongfully and negligently. The principle that no one may benefit from an act or omission which is punishable applies in South African law.[64]

2.42 The absence of claims that a person who negligently caused the death of a deceased is disqualified from inheriting is probably due to ignorance or a feeling that the heir is not unworthy to inherit.

2.43 A rule that a murderer is disqualified from inheriting from his victim but that someone who committed manslaughter should not be disqualified is open to criticism. Cases come to mind where society will strongly condemn a person's actions although he has been convicted of culpable homicide only and not of murder. Suppose a husband assaults his wife and she dies as a result of the attack. Although a reasonable man would have foreseen the death of the wife, it is found that the husband did not foresee the death of his wife or reconcile himself to this possibility. The husband is convicted of culpable homicide. On the other hand, cases of murder occur where society does not strongly condemn the murderer's actions: for instance, a case where a son gives his father who suffers from incurable cancer the coup de grâce. The light sentences imposed in such cases of murder indicate that society does not strongly condemn such actions. It would seem that a rule which disqualifies the murderer from inheriting in all cases but never disqualifies a person found guilty of culpable homicide does not satisfy society's sense of justice. Perhaps society's sense of justice could be satisfied by giving the court the power to allow succession if this is fair in the circumstances.

2.44 The Commission invites comments on a provision on the following lines giving the court a discretion:

> Any person who causes the death of another wrongfully and intentionally or negligently shall be disqualified from taking any benefit from such deceased person's estate, unless a competent court finds upon the application of the perpetrator or some other interested

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64 Par 2.3 et seq above.

person that the perpetrator is not morally blameworthy to such an extent that he should be excluded from taking such benefit.

If such a clause is enacted and a clause such as the one recommended in paragraph 2.22 above is accepted, the interaction between the two clauses will require attention.

2.45 Such a provision could be criticised on the grounds that it would give rise to uncertainty and litigation. There are also some who contend that recklessness or morally reprehensible conduct is already a precondition for disqualification as an heir.[65] It might be argued that a murderer should never be allowed to inherit from his victim and that giving a discretion to the court or enacting a statutory rule would do more harm than good. Decided cases do not point to any problems in this regard.

2.46 The Commission invites comments on the question whether the present position should be left unchanged or whether the proposal in paragraph 2.44 above is preferable.

(iii) A person who killed the *conjunctissimus* of the deceased

2.47 In general a person is disqualified from inheriting only from a person wrongfully killed by him in a culpable way, and he is not disqualified from inheriting from any other person. The first exception, that a person cannot benefit from his own crime, has been discussed above. A further exception is that a person who has wrongfully killed the *conjunctissimus* of the deceased in a culpable way is disqualified from inheriting from the deceased. For purposes of this rule the deceased's *conjunctissimi* are his spouse, parents and children.[66] In the *Steenkamp* case[67] Steyn J was not disposed to add to the cases of unworthiness by

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65 Par 2.35 above.

66 *Ex parte Steenkamp and Steenkamp* 1952 1 SA 744 (T) 749F-750E.

67 Ibid 750F-752C.

way of interpretation and refused to extend it to a grandparent murdered before the birth of a grandchild.

2.48 The rule that the murderer of a deceased's spouse, parent or child is disqualified is somewhat arbitrary. It is conceivable that some other person such as a brother, sister or friend may in a particular case have been closer to the deceased than his parents, spouse or children from whom he may have been estranged. As the rule cannot provide for all appropriate cases it is perhaps better to leave the decision to disinherit to the testator.[68] On the other hand, the person concerned might not have the legal capacity to make a will (a person under the age of 16 years or a mentally incapable person) or he might have been unaware of the murder or the identity of the murderer.

2.49 It is suggested that these cases are so rare that there is insufficient justification for changing this rule.

(iv) Justified killing

2.50 A person who was justified in killing the deceased, for instance in reasonable self-defence, is not disqualified from inheriting.[69]

(v) Killing by a person who is not criminally responsible

2.51 If the deceased was killed by a person who is not criminally responsible, that person is not unworthy to inherit[70] even if he was capable of appreciating the wrongfulness of his act but was not capable of acting in accordance with such appreciation.[71]

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68 Par 2.109 below.

69 Voet 34 9 7.

70 Ex parte Meier 1980 3 SA 154 (T).

71 Gafin v Kavin 1980 3 SA 1104 (W) 1108A.

2.52 The rule that a murderer who is not criminally responsible is not disqualified from inheriting has been criticised:[72]

> There is a fundamental distinction between self-defence and insanity. In the former case, the act is no longer wrongful, whereas in the latter it remains a wrongful act and the only reason for the killer not being found guilty is his insane state of mind ...
>
> In the given circumstances of the case, therefore, it does not seem that there was any justification for allowing A to inherit from his father whom he had killed - he was in fact allowed to benefit by his wrongful act ...

Some other writers do not criticise the rule.[73] The Irish Succession Act 1965 refers expressly to a sane person.[74] In legal systems where a conviction is required[75] a person who is not criminally responsible is not disqualified.[76]

2.53 <u>A person who is not criminally responsible is not for that reason disqualified from inheriting. It is suggested that such a person should not be disqualified from inheriting from a person killed by him.</u>

(d) Extra-marital children

2.54 In accordance with the maxim "een moeder maakt geen bastaard" an extra-marital ("illegitimate") child is for purposes of the law of intestate succession regarded as a relation of his mother but not of his father. This principle applies in any case where succession takes place through an

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72 A C Beck "Ex parte Meier 1980 3 SA 154 (T)" 1982 De Rebus 162-163. Cf Glavovic 1984 SALJ 732.

73 Cf Van der Merwe and Rowland footnote 16 at 106; Lee and Honoré footnote 2, par 593 at 402; Van der Walt and Sonnekus 1981 TSAR 43 et seq.

74 Scotland Memorandum par 2.4 at 5.

75 Cf par 2.24 et seq above.

76 Cf also "Descent and distribution" in American Jurisprudence 2d Vol 23 par 98 at 831.

extra-marital child. In common law this principle was qualified by the rule that children born of adultery (adulterini) or incest (incestuosi) could not inherit from their mother or her relations or the mother or her relations from the children. In Green v Fitzgerald[77] it was held that an adulterine child could inherit from its mother, inter alia because adultery is no longer a crime.[78]

2.55 In its Report on the investigation into the legal position of illegitimate children[79] the Commission recommended that any extra-marital (illegitimate) child should be able to inherit from his mother and father and their relatives and they from him. In terms of section 1(2) of the Intestate Succession Act[80] illegitimacy shall as a rule[81] not affect the capacity of one blood relation to inherit the intestate estate of another blood relation.

2.56 In the same report the Commission expresses the opinion[82] that the courts will most probably in future hold that incestuous children[83] are able to inherit under their father's or mother's wills and the fathers and mothers from them. The Commission considers that intervention by legislation is undesirable at this stage.

2.57 The Commission's view was also[84] that a presumption should be created by legislation that the word "children" or any similar term used in a will included extra-marital (illegitimate) children unless the testator's

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77 1914 AD 88.

78 South African Law Commission Report on the investigation into the legal position of illegitimate children October 1985 par 8.51 to 8.57 at 98 et seq.

79 Par 8.65 at 105.

80 81 of 1987.

81 An exception is made for certain cases of artificial insemination.

82 Par 8.72 at 109.

83 And of course any other extra-marital children.

84 Par 8.73 at 110.

intention to the contrary appeared. Legislation was not recommended then because it was felt that it would be better to wait and see what legislation would result from the rest of the review of the law of succession.[85]

2.58 Comments are invited on a proposal on the following lines, and also the question whether a rule of construction is desirable at all:[86]

> In construing the will of any person who dies after the commencement of this Act the fact that a person was born out of wedlock shall be ignored when ascertaining the identity of any person as a relation of any other person, unless a contrary intention appears.

In terms of the definition in section 1 of the Wills Act, "will" includes a codicil or any other testamentary writing. Compare also the definition of "will" in paragraphs 3.72 and 4.52 below.

(e) Persons involved in the execution of the will

(i) Introduction

2.59 The present position will be discussed first after which the following options for reform will be considered:

- Maintenance of the present position.
- Amendment of the disqualification of persons involved in the execution of the will.
- Abolition of the disqualification of persons involved in the execution of the will.

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85 Par 8.74 at 110.

86 It is not the intention to affect the admissibility of extrinsic evidence.

(ii) The present position

(aa) The notary, his spouse and children

2.60 The notary in whose presence a notarial will is executed, and apparently his spouse and children as well, are disqualified from taking any benefit in terms of that will. Similar rules apply in France, the Netherlands and Germany.[87] Notarial wills are extremely rare in South Africa.

(bb) Writer of the will[88]

7.61 Subject to two exceptions a person who writes out a will cannot take any benefit under the will. The first exception is where the testator expressly confirms the bequest to the writer. The confirmation need not be made on the will and may even be made orally. Confirmation may, however, take place only after the execution of the will. The second exception is that the writer may at most take as much as he would have been entitled to upon intestacy.

2.62 The prohibition on benefiting the writer also applies to the surviving testator of a reciprocal will, a person to whom the testator dictates the will and a person who completes parts of a printed will form. The prohibition does not apply to a person who dictates the will to another or the children or an employee of the writer. The writer's spouse is affected only in the case of a marriage in community of property. An appointment of a person as executor or trustee constitutes a benefit for the purposes of this disqualification.

(cc) Witness and the person who signed the will

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87 J C G Kamfer Testamentsformaliteite in verskeie regstels Leiden: 1961 at 364.

88 Van der Merwe and Rowland 233 et seq; Lee and Honoré par 595 and 596 at 403; M M Corbett, H R Hahlo & Gys Hofmeyr The law of succession in South Africa Cape Town: Juta 1980, hereinafter "Corbett", 74 et seq.

2.63 Section 3 of Act 22 of 1876 (Cape) provided as follows:

> If any person shall attest the execution of any will or other testamentary instrument, to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift or appointment of or affecting any property (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, or legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will or other testamentary instrument, or the wife or husband of such person, or any person claiming under such person or wife or husband, be null and void.

This provision was clearly copied from section 15 of the Wills Act 1837 (England). Section 4 of the Cape Act provided that the appointment of the witness or his spouse as executor, administrator, or guardian was null and void.

2.64 Similar provision was made in the legislation of the Transvaal, the Orange Free State and South-West Africa.

2.65 Unlike the Cape legislation the legislation in Natal[89] did not enumerate the various benefits. This Law declared "any benefit" to the witness or his spouse null and void and added that the appointment as "trustee, executor, guardian, curator, or the like", or the payment of a legal debt, was not regarded as a "benefit" in this regard.

2.66 The Wills Act 7 of 1953 repealed the provincial Laws in respect of wills executed on or after 1 January 1954. Sections 5 and 6 of the Wills Act provide as follows:

> 5. A person who attests the execution of any will or who signs a will in the presence and by direction of the testator or the person who is the spouse of such person at the time of attestation or signing of the will or any person claiming under such person or his spouse, shall be incapable of taking any benefit whatsoever under that will.
>
> 6. If any person attests the execution of a will or signs a will in the presence and by direction of the testator under which that

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89 Sec 7 of Law 2 of 1868.

person or his spouse is nominated as executor, administrator, trustee or guardian, such nomination shall be null and void.

2.67 The provision regarding a person who signs a will by direction of the testator is new. Section 5 provides expressly that the disqualification applies only to a spouse at the time of attestation or signing. This principle was not extended to section 6 (nomination as executor etc). Section 5 does not give examples of benefits which are null and void and does not define "any benefit" either.

2.68 A witness forfeits benefits under the will attested by him only, and not the benefits under another will.[90]

2.69 The nomination of a trust company as executor in a will attested by the company's secretary is null and void.[91]

2.70 The provision that a person "claiming under" the disqualified person or his spouse cannot take appears to be unnecessary.[92] A person who is disqualified cannot under South African law be represented by another. If a bequest is made in the will to the children of the witness or his spouse, either directly or as substitutes, the bequest is valid because the children take their benefit from the will itself.[93]

2.71 Where more than two persons signed the will as witnesses all the witnesses are disqualified from inheriting.[94] Not all persons who sign a will are disqualified. Persons who sign as "also present" after the two witnesses are not disqualified from inheriting if they did not intend to act

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90 Doman and Lewis v The Master (1903) 20 SC 257.

91 Smuts v The Master 1930 CPD 227.

92 Van der Merwe and Rowland 229.

93 Estate Swanepoel v Swanepoel 1911 CPD 328.

94 Louw v Engelbrecht 1979 4 SA 841 (O) 854B.

as witnesses.[95] If beneficiaries have signed as witnesses they can inherit if the will has been re-executed in the presence of other witnesses.[96]

(ii) Options for reform

(aa) Maintenance of the present position

2.72 In a survey of 6 374 wills accepted by the Master of the Supreme Court, Pretoria,[97] he indicated on 29 (0,45%) that the witness was disqualified from inheriting and on 18 (0,28%) that the writer was disqualified. (Further details of this survey appear in Annexure A at the end of this working paper.)

2.73 Disqualification of the writer or witness as heir occurred in less than 1% of the cases. Reported decisions on such cases are also rare. It might be argued that a change of the present position is not justified. However, it is suggested in the light of the discussion which follows that there is sufficient reason to change the present position.[98]

(bb) Amendment of the disqualification of persons involved in the execution of the will

2.74 It is suggested below that this disqualification should be abolished.[99] For purposes of the discussion under this heading it is assumed that the disqualification will not be abolished in its entirety.

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95 Ibid 854E to 856A.

96 Burton-Moore v The Master 1983 4 SA 419 (N).

97 South African Law Commission Working Paper 14 Review of the law of succession: Formalities of a will 1986, hereinafter "Working Paper 14 on the formalities of a will", Annexure at 134.

98 Cf Manitoba Law Reform Commission Report on "The Wills Act" and the doctrine of substantial compliance Report 43 Winnipeg: Queen's Printer Office 1980, hereinafter "Manitoba Report on substantial compliance", at 12.

99 Par 2.88 et seq below.

2.75 Van der Merwe and Rowland[1] and Corbett[2] consider it anomalous that the writer of a will is in a more favourable position than the witness. The writer of the will can probably act fraudulently with greater ease than the witness but nevertheless the writer inherits if the will is confirmed by the testator after its execution or he can take the benefit to the amount of his intestate share. There is no exception to the rule that a witness cannot take any benefit under the will. The spouse of the witness is disqualified while the spouse of the writer is disqualified only in the case of a marriage in community of property. The difference between the rules is due to the fact that the disqualification of the writer was derived from Roman law while the statutory disqualification of the witness and his spouse was derived from English law.[3] A person who has signed the will by direction of the testator is in the same position as a witness. Van der Merwe and Rowland[4] also criticise the difference between the position of the writer and that of the person who signed the will.

2.76 The writer of a will can take a benefit if the testator expressly confirmed the benefit after the execution of the will. If the confirmation was made in a later will the writer (and also the witness and the person who signed the previous will) will be entitled to the benefit. If the confirmation is not made in a will the writer will not be able to inherit until the Supreme Court has declared that he is entitled to inherit.[5] The Master of the Supreme Court does not decide questions of fact such as these.

2.77 Van der Merwe and Rowland[6] ask why confirmation before execution is required even in circumstances where it is clearly evident that

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1 238.

2 79.

3 Cf B Beinart "Testamentary form and capacity and the Wills Act, 1953" 1953 South African Law Journal 159-179, 280-298, at 285 et seq.

4 232.

5 Ex parte Thole 1968 1 SA 155 (N) 155G.

6 Footnote 88 at 234.

no fraud took place. This objection can be put in general terms: Why should a person involved in the execution of a will be disqualified if the Supreme Court is satisfied that there was no fraud or undue influence? In Working Paper 14 on the formalities of a will a power to condone was recommended for the court in cases of wills not complying with the formalities. A number of overseas law reform bodies have recommended that the witness to a will or his spouse (and where applicable the person who signed the will) should be able to inherit if the court is satisfied that the witness or his spouse did not exercise undue influence upon the testator.[7] Such provisions have already been incorporated in legislation in Manitoba, Ontario and Victoria. It is suggested that a power to condone should apply to the disqualification of persons involved in the execution of a will as well.[8]

2.78 In Victoria the Wills (Interested Witnesses) Act provides that the witness shall receive only an amount of the benefit not exceeding the share which he would have received upon intestacy. The reason is that the limitation of the disqualification eliminates unnecessary injustice without materially impairing the purposes of the section.[9] The Tasmania Report[10] recommended such a provision. The British Columbia Report[11] rejects this solution because it awards a "consolation prize" where fraud has been unsuccessful. This solution furthermore does nothing for a witness who is not an intestate heir. In Louw v Engelbrecht[12] Flemming J referred to the possible argument that the disqualification should fall away only if the

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7 Manitoba Report on substantial compliance 29; Law Reform Commission of British Columbia Report on the making and revocation of wills LRC 52 Victoria: Queen's Printer for British Columbia 1982, hereinafter the "British Columbia Report", at 79; Law Reform Commission of Tasmania Report on reform in the law of wills Report No 35 Government Printer, Tasmania 1983, hereinafter the "Tasmania Report", at 11.

8 See, however, par 2.97 below.

9 British Columbia Report 79.

10 At 11 and 12.

11 At 79.

12 1979 4 SA 841 (O) 852A.

testamentary benefit does not exceed the intestate share. Accordingly the beneficiary will either receive the full benefit or nothing at all.

2.79 It is submitted that a person who is aware of the rules will probably see to it that he is not disqualified in any way. A "consolation prize" would not induce him to become involved in the execution of the will. It appears more reasonable that the beneficiary should receive at least his intestate share and should not sometimes receive nothing. The rule that a witness, unlike the writer, is not entitled to at least an intestate share is unfair.

2.80 It is suggested that the same exceptions as those that apply to the writer of a will should apply to a witness and any person who signs the will by direction of the testator.[13]

2.81 Under common law the writer of the will is in general disqualified from inheriting. The writer's spouse is disqualified only in the case of marriage in community of property. In terms of the Wills Act 7 of 1953 the witness, a person who signs the will by direction of the testator, the person who is the spouse of such person at the time of attestation or signing or any person claiming under such person or his spouse, is incapable of taking any benefit. The person who dictates the will or advises the testator on the contents of the will is not disqualified. A person is not disqualified either if his child or employee wrote out the will, signed as a witness, or signed by direction of the testator.

2.82 The Tasmania Report[14] says the reason for including the spouse of a witness within the rule was that a wife's estate vested in her husband. Because this reason has been removed the report recommends that the reference to the spouse of the witness should be omitted. The Law Reform

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13 See, however, par 2.97 below.

14 At 11.

Committee (England)[15] refers to a suggestion that the rule could safely be abolished in its application to the spouses of witnesses on the basis that it is anomalous to single out the spouse when abuse can come from others such as partners or close friends of the witnesses. The Committee rejected this suggestion because it would open greatly the possibilities for abuse. Van der Merwe and Rowland[16] submit that it is unfair to disqualify the spouse of the witness even though the spouses were divorced after the execution of the will.

2.83 Although it is somewhat arbitrary to exclude only the spouse of the witness, it is submitted that a bequest to the spouse of the witness is the indirect benefit most likely to benefit the witness. It is also submitted that the position should be judged as at the time of the execution of the will and that the spouse of the person at that time should be disqualified from inheriting. It is suggested that the same rule as that applying to a benefit to the spouse of a witness or a person who signed the will should apply to the spouse of the writer of the will and the nomination of the spouse of the writer as executor etc.[17]

2.84 It is submitted that the disqualification should not be extended to an employee, partner or child etc of the person concerned or to a person who dictated the will or gave advice on the making of the will. It is unnecessary expressly to exclude "any person claiming under such person"[18] as was done in section 5 of the Wills Act.[19]

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15 Twenty-second report (the making and revocation of wills) Cmnd 7902 London: Her Majesty's Stationery Office 1980, hereinafter the "England Report", par 2.16 at 7.

16 230.

17 See, however, par 2.97 below.

18 Van der Merwe and Rowland 229.

19 Par 2.66 above.

2.85 In Louw v Engelbrecht[20] Flemming J held that all the witnesses were disqualified if more than two witnesses had signed the will. In England,[21] Victoria,[22] British Columbia[23] and Manitoba[24] the witness or his spouse can inherit if the will was also witnessed by two disinterested witnesses. Such a provision avoids the necessity of establishing the intention with which the beneficiary signed the will.[25] The argument that some of the disinterested witnesses may perhaps predecease does not carry much weight because this can occur in cases where there are only two witnesses as well.[26] It is suggested that beneficiaries who have acted as witnesses and their spouses should be able to inherit if two disinterested witnessess have also attested the execution of the will.[27]

2.86 Notarial wills are so rare these days that special rules for the notary and his family are not justified.

2.87 The question whether the disqualification of persons involved in the execution of a will should be retained at all is discussed in the following paragraph. If the disqualification is to be retained it is recommended that sections 5 and 6 of the Wills Act be deleted and that the following be substituted therefor:

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20 1979 4 SA 841 (O) 845B.

21 Wills Act 1968.

22 Wills (Interested Witnesses) Act 1977.

23 Sec 11(2) Wills Act 1979.

24 Sec 12(2) Wills Act (Chapter W150).

25 Queensland Law Reform Commission Report on the law relating to succession QLRC 22 1978, hereinafter the "Queensland Report", par 15 at 9. In Louw v Engelbrecht 1979 4 SA 841 (O) 854E Flemming J described this as a difficult question.

26 Louw case 853F.

27 See, however, paragraph 2.97 below.

5. Beneficiary who signs, writes out or attests the exexution of a will -

(1) Any person who attests the execution of a will, or signs a will in the presence of and by direction of the testator, or who writes out the will or any part thereof with his own hand, and any person who is the spouse of any such person at the time of the execution of the will shall, subject to the provisions of subsections (2), (3) and (4), be incapable of taking any benefit under that will.

(2) Any person who is incapable as contemplated in subsection (1) and who would have inherited ab intestato from the deceased shall be entitled to either the testamentary bequest to him or to so much as he would have inherited ab intestato whichever is the lesser.

(3) If a will has been attested by two competent witnesses who receive no benefit under the will and whose spouses at the time of the execution of the will receive no benefit, then any other witness or the spouse of such other witness at the time of the execution of the will shall not be incapable of taking any benefit under the will merely because such other witness also attested the execution of the will.

(4) If a court is satisfied that any person referred to in subsection (1) did not defraud or unduly influence the testator during the execution of the will, the court shall condone the disqualification contemplated in that subsection.

(cc) Abolition of the disqualification of persons involved in the execution of the will

2.88 The aim of the disqualification from inheriting of persons involved in the execution of the will is the prevention of fraud and undue influence.[28] In the case of witnesses it is desirable that they should be objective and independent.[29]

2.89 In favour of the abolition of the disqualification it may be argued that the rules frustrate the intention of the testator while rarely succeeding

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28 See eg Corbett 75; Van der Merwe and Rowland footnote 88 at 234; England Report par 2.15 at 7; Tasmania Report 11.

29 See eg Louw v Engelbrecht 1979 4 SA 841 (O) 853D; British Columbia Report 79; England Report par 2.15 at 7.

in preventing fraud. The persons who are usually available to write out the will or act as witnesses are precisely the friends and family whom the testator would wish to benefit. Those who intend forging a will will usually see to it that they are not disqualified by the rules. The witnesses or a writer whose benefit appears from the will is penalised while persons who may covertly receive a benefit are not affected.[30] The disqualification has been described as unfair[31] and "a trap for the unwary".[32] (Once when a beneficiary was told that the "gemene reg" (common law) disqualified him from inheriting because he had written out the will he agreed that this was "gemeen" (mean).)

2.90 Originally a witness was deprived of a testamentary benefit not to penalise the witness but to ensure the validity of the will. Although the rule rendering interested witnesses incompetent was abolished the rule barring a benefit to a witness remained.[33] Doubt has been expressed about the value of the role played by witnesses in ensuring the authenticity of wills.[34]

2.91 The Law Reform Committee of South Australia and the Uniform Probate Code in the United States of America recommended the repeal of the prohibition of a benefit to the witness. If attestation of the will by beneficiaries creates suspicion of undue influence and this suspicion cannot be dispelled, there is a danger that the whole will would be invalidated.[35]

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30 4th Report of the Real Property Commissioners (England) 1833 at 19 to 20, quoted at 76 of the British Columbia Report.

31 Louw v Engelbrecht 1979 4 SA 841 (O) 853H.

32 Law Reform Committee of South Australia Sixth report on section 17 of the Wills Act, 1936-1966 Adelaide: Government Printer 1969.

33 British Columbia Report 75 to 77.

34 Cf Working Paper 14 on the formalities of a will par 7.82 at 35.

35 British Columbia Report 78.

2.92 The Law Reform Commission of British Columbia[36] rejected this solution on the following grounds: the invalidation of the whole will may result in the failure of bequests to innocent beneficiaries; the estate will bear the expense of disputes regarding the validity of the will; the risk of gifts to someone other than the witness being tainted by undue influence by the witness is less than the risk of frustrating the testator's intention to benefit innocent third parties.

2.93 Unlike English law[37] in South African law the presumption of validity is not rebutted if suspicion is raised. Proof on a balance of probabilities is required.[38] The question is whether it should be accepted that a beneficiary involved in the execution of the will committed fraud or unduly influenced the testator or whether the presumption that the will had been duly executed should remain.

2.94 It may be argued that the abolition of the disqualification will encourage beneficiaries to become involved in the execution of the will. It is suggested, however, that few persons who do not involve beneficiaries in the execution of a will at present would do so if the disqualification were deleted.

2.95 The disqualification from inheriting of persons involved in the execution of the will is somewhat arbitrary. Although a professional adviser and a person who dictates the will[39] are also in a position to influence the testator unduly, they are not disqualified. The spouse of a witness is disqualified even if the couple is divorced later.[40] However, a child, partner or close friend of the witness is not penalised.[41]

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36 Ibid.

37 Working Paper 14 on the formalities of a will par 7.126 at 48.

38 Sterban v Dixon 1968 1 SA 322 (C) 325G.

39 England Report par 2.15 at 7.

40 Van der Merwe and Rowland 230.

41 England Report par 2.16 at 7.

2.96 The practical application of the rules is also somewhat arbitrary. If the beneficiary types the will instead of writing it out there is no disqualification so far as the Master of the Supreme Court is concerned. Because the Master does not decide questions of fact[42] he relies on statements of the person who is administering the estate on the question of who wrote out the will or signed as witnesses. If the signature of the witness is illegible the Master will not even make enquiries.

2.97 The tentative view of the Commission is that the present rules on the disqualification of persons involved in the execution of a will do more harm than good. It is suggested that these rules should be abolished. This can be done by repealing sections 5 and 6 of the Wills Act 7 of 1953 and by substituting the following therefor:

> 5. Beneficiary who signs, writes out or attests the execution of a will -
>
> No person shall be incapable of taking a benefit under a will merely because he or his spouse attested the execution of the will or signed it in the presence of and by direction of the testator or wrote out the will or any part thereof with his own hand.

2.98 If this disqualification is retained the rules should be adapted as suggested above.[43]

(f) Perpetual Edict of 1540

2.99 Section 17 of the Perpetual Edict of 4 October 1540 provided that a person who had persuaded a minor to marry him without the necessary consent could derive no testamentary or any other benefit from the minor, even if consent were obtained after the contracting of the marriage.

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42 South African Law Commission Working Paper 17 Review of the law of succession: Alteration and revocation of wills par 2.44 at 16.

43 Par 2.87.

Section 17 of the Edict has been repealed by section 37 of the Matrimonial Property Act 88 of 1984.

2.100 In terms of section 12 of the Perpetual Edict[44] the disposition of immovable property by a minor (at that stage a person under the age of 25 years) in a will or during his life-time is invalid if made in favour of his curator, guardian or administrator[45] or their children or in favour of godparents or a concubine.

2.101 There were conflicting views as to whether the prohibition related to movable property as well. Voet stated further that the prohibition should be extended to the wife of a minor's guardian, that the beneficiaries could take to the extent to which they would have taken upon intestacy[46] and that the prohibition did not apply to dispositions made after the guardianship had come to an end.[47] In Spies v Smith[48] Steyn J A left open the question whether the Edict was still part of South African law. On the assumption that the Edict applied, he held that it did not apply to the curator of a person over the age of 21 years.

2.102 Van der Merwe and Rowland comment as follows:[49]

> Whether section 12 still forms part of South African law and if so, to what extent, is uncertain. The parts thereof relating to the forfeiture of the benefits mentioned to a minor's godparents and concubine definitely appear to be archaic and it could probably be argued successfully that these parts of the section have fallen into desuetude. Perhaps our courts would also on the authority of Voet (28.5.11), allow a person affected by the prohibition in the section to inherit if it were proved that no undue influence had been exerted on the minor.

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44 Van der Merwe and Rowland 224; Lee and Honoré par 592 at 401; Corbett 71.

45 "Curateurs, bewaerders oft andere heure Administrateurs".

46 28 5 8.

47 28 5 11.

48 1957 1 SA 539 (A).

49 At 225 (our translation).

2.103 This disqualification is relevant only in the exceptional case where someone between the age of 16 and majority makes a will in favour of the persons mentioned.[50] In the few cases which may occur the court will probably have sufficient latitude to arrive at a fair decision. It is suggested that there is no good reason for laying down this ground for disqualification by statute. If a codification is desirable[51] this ground for disqualification may be omitted because dispositions as a result of undue influence are already invalid.

(g) Adopted children and substitution

2.104 The succession rights of an adopted child are discussed in paragraph 4 below. The effect of a disqualification from inheriting or substitution in the law of succession is discussed in paragraph 3 below.

(h) Other disqualifications from inheriting

(i) Introduction

2.105 It is not clear which of the other grounds of unworthiness known to common law still apply:[52]

> Some of the prohibitions would probably be now regarded as obsolete and inconsistent with the more enlightened spirit of modern times ...

2.106 In Taylor v Pim[53] Bale C J held a person to be unworthy to inherit because he caused the deceased's fall from a virtuous and honourable life to a degraded and immoral one, had an adulterous

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50 Par 2.100 above.

51 Par 2.125 et seq below.

52 Taylor v Pim (1903) 24 NLR 484 at 492. Cf the translator Gane's note to Voet 34 9 at 281 of Vol 5.

53 Ibid 495.

relationship with her,[54] contrary to medical advice supplied her with intoxicating liquors which caused her death, neglected to provide her with medical attention and endeavoured to raise money on the strength of the testamentary provisions in his favour in the expectation of her early demise to which he was contributing. The learned judge did not decide whether any of these grounds as such made the person unworthy. In Ex parte Steenkamp and Steenkamp[55] Steyn J was reluctant to add to the cases of unworthiness by way of interpretation. The character or moral standards of a person as such cannot bring about unworthiness.[56]

2.107 Voet[57] mentions 22 cases of unworthiness to inherit, applicable in terms of common law.[58] These cases may be divided loosely into four categories.

(ii) Conduct towards the testator which makes a person unworthy to inherit

2.108 For convenience testator is used to denote any person (whether he died testate or intestate) who left an estate. The following examples may be mentioned here: deadly enmity with the testator; an attack on the status of the testator; bringing the testator into danger by accusing him; preventing a person from making a will; murdering the testator. The unworthiness of a murderer has been discussed in full above.

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54 In Estate Heinamann v Heinamann 1919 AD 99 it was held that persons who commit adultery are now capable of inheriting from each other because adultery has ceased to be a crime.

55 1952 1 SA 744 (T) 751H.

56 Van der Merwe and Rowland 239 with reference to Smith v Bird 1924 NPD 381. Cf Yassen v Yassen 1965 1 SA 438 (N) 441D.

57 34 9.

58 Cf Ex parte Steenkamp and Steenkamp 1952 1 SA 744 (T) 748B; Taylor v Pim (1903) 24 NLR 484 at 491 et seq.

2.109 In connection with deadly enmity Voet mentions[59] that the benefit is taken away by an implied wish of the testator.[60] The other cases mentioned above are similar. In Working Paper 17 on the alteration and revocation of wills the Commission adopted the approach that the revocation of testamentary provisions by operation of law should be limited to the minimum and that revocation by operation of law should not apply generally in the case of changed circumstances.[61] It is nowadays easy for a testator to make a will or to change an old will if he is no longer satisfied with his heirs. It is suggested that in cases where the testator is able to disinherit his heirs this should be done expressly by the testator and that disinheritance by operation of law should be limited to the minimum.

2.110 If this approach is adopted the only case mentioned above which deserves further attention is where a person prevented someone from making a will. Society would probably today still hold the view that a person who prevents someone from making a will or a new will should be disqualified from inheriting upon intestacy or in terms of a previous will. Cases of a person effectively preventing someone from making a will are probably rare today.

2.111 The Commission nevertheless invites comments on the question whether it should be clearly laid down that a person who prevents another from making a will should be disqualified from inheriting from that person. It is suggested that there is no need for the other grounds of unworthiness discussed under this heading. The probability of any attempt to invoke any of these grounds succeeding is so small that it is suggested that there is no justification for statutory intervention.

(iii) Conduct after the death of the deceased which makes a person unworthy to inherit

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59 34 9 2 5.

60 Cf Matthaeus Zinspreuken par 6 at 132.

61 The working paper suggested at 83 that revocation by operation of law should at most apply to the changed circumstances of a person getting married or divorced or the annulment of a marriage.

2.112 The following examples may be mentioned here: A person who unsuccessfully disputes the will of the deceased; a person who fails to carry out the terms of the will; a deceased's wife who remarries within a year after his death; a person who has not avenged the deceased's death; a person who hides the deceased's will.

2.113 Because the testator is deceased he cannot in such cases disinherit the unworthy person himself.

2.114 If a person disputes the validity of a will without sufficient cause he will be liable for costs. There appears to be no need to regard such a person as unworthy to inherit. It is in any case doubtful whether this disqualification still applies. A provision in a will which purports to oust the jurisdiction of the court is invalid because it is contrary to public policy.[62]

2.115 If a person fails to carry out the provisions of a will the general law of succession will determine the effect of such a failure. The beneficiary will be disinherited for failing to carry out the provisions of the will if the will so provides. If the will does not provide for the vesting of assets in the case of failure to comply with a condition or for someone to enforce the condition, the condition will be ignored.[63] In South African law an executor can be forced to carry out valid directions to him contained in a will. It is doubtful whether this disqualification as such still applies. There is in any case no need for such a disqualification.

2.116 There is no longer a prohibition of remarriage within a year after a spouse's death. The law also no longer permits one to avenge a person's death.[64] It is clear that these disqualifications no longer apply.

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62 Yenapergasam v Naidoo 1932 NLR 96.

63 Corbett 113.

64 Cf Matthaeus Zinspreuken par 12 at 144.

2.117 It is a crime to conceal a will.[65] In Yassen v Yassen,[66] in view of the facts of the particular case, it was not necessary to decide whether a person who had concealed a person's will was disqualified.[67] Harcourt J, nevertheless, remarked that proof of a valid will was required.[68] The Commission is of the opinion that this disqualification should be set out clearly in a provision such as the following:

> Any person who conceals or destroys a will with the intention of therby inheriting a benefit to which he is not entitled from some person's estate, shall be disqualified from inheriting from such person either in terms of a will or upon intestacy.

2.118 It is suggested that the other grounds for unworthiness discussed under this heading probably no longer apply as such. It is submitted that there is in any case no need for any of these grounds for unworthiness.

(iv) Persons who are unworthy because the State or society condemns their conduct

2.119 Examples of these cases are deserters, exiles, or a person who tarries among the enemy; a person who accepts a gift subject to a secret fideicommissum to hand it over to someone disqualified from inheriting; a person with whom the testator committed adultery[69] or incest; a person who in defiance of the law has married a wife in the province in which he is performing his duty. Cases such as a murderer under item (ii) above and a person who conceals the testator's will under item (iii) above can also be classified under this heading.

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65 Sec 102 (1)(a) of the Administration of Estates Act 66 of 1965.

66 1965 1 SA 438 (N).

67 Voet 34 9 2.

68 At 440G.

69 In Estate Heinamann v Heinamann 1919 AD 99 it was held that persons who commit adultery are now capable of inheriting from each other because adultery has ceased to be a crime.

2.120 In these cases the unworthiness to inherit is not based on the implied wish of the testator. The disqualification is a penalty inflicted on the person guilty of unworthy conduct.[70] Voet[71] and Matthaeus[72] state that the forgiveness of his assailant by a testator who has for some time survived an attack on his life cannot enable the assailant to inherit because it is the law itself and not the wish of the testator which makes the person unworthy. Matthaeus[73] also states that a person who disposes of an inheritance before the testator's death is unworthy not because he committed a minor wrong against the testator but because he acted contrary to public policy. In terms of Roman law[74] a benefit forfeited by an unworthy heir as a rule[75] passed to the State.

2.121 The principle that no one may enrich himself by his own crime or benefit from conduct which is punishable has been discussed above.[76] A person who is guilty of socially unacceptable conduct is subject to social sanctions. If his conduct constitutes a crime he may be punished under criminal law. The question is whether a person who has been denied any possible benefit from his crime and has already been punished for unacceptable conduct should be penalised further by being declared unworthy to inherit. It is submitted that the law of succession should not be used to punish a person for conduct which has already rendered him liable to punishment. It is suggested that apart from the rule that no person is allowed to benefit by his own crime, there is no need for any of these disqualifications and that the position should be left unchanged.

(v) Conduct which affects the validity of the will

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70 Voet 34 9 7.

71 34 9 6.

72 *Zinspreuken* par 11 at 142.

73 *Zinspreuken* par 8 at 138.

74 Voet 34 9 1.

75 Voet 34 9 2 discusses the exceptions.

76 Par 2.3 et seq.

2.122 The common law provided that a person who had compelled the testator to make a will was disqualified from inheriting. This is not really a case of disqualification because the will is invalid. The common law also provided that a person was disqualified from inheriting if the testator had cut his name out of the will. Such a case amounts to revocation of the benefit by the testator. Since these cases are not really disqualifications they will not be discussed further.

(vi) Summary

2.123 The only disqualifications from inheriting applied in practice are the case of a murderer and of persons involved in the execution of the will. In Taylor v Pim,[77] decided over eighty years ago, the court mentioned a few grounds which made an heir unworthy. One of the grounds was that the heir had caused the deceased's death.

2.124 It is not clear which of the other disqualifications still apply. Some are clearly obsolete and none of them are applied in practice. It is suggested that, except in the case of the proposals in paragraphs 2.111 and 2.117 above, there is no clear need for any of these disqualifications.

(i) Codification of the disqualifications

2.125 The work required by codification, the inflexibility of statutory provisions, and the possibility of interpretation problems must be weighed against lack of clarity in the present position and criticism of the present position.

2.126 If lack of clarity is judged by the frequency of judicial decisions, the present position appears to give rise to few problems. The disqualification applied most in practice is the disqualification of persons involved in the execution of the will. The disqualification of a murderer occurs from time to time. The other disqualifications occur so rarely that it would make little difference in practice if they were to be abolished.

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77 Par 2.106 above.

2.127 In theory there is lack of clarity as to whether the disqualifications which do not occur in practice do in fact still exist. This theoretical problem could of course become of practical significance any time a person were to invoke one of these disqualifications.

2.128 The criticism levelled against the present position has been discussed above and comments are invited on the following questions:

- Should the rule that no person shall benefit from a crime committed by him be enacted in a statute with special reference to benefits in terms of matrimonial property law[78] or should the present position be maintained?[79]

- Should a conviction be required as a prerequisite before the commission of a crime plays a role in the law of succession?[80]

- Should a person who has attempted to kill the testator be disqualified from inheriting or is the principle that no person may benefit from his own crime sufficient?[81]

- Should a testator be allowed to benefit his assailant in a will made between the attack and the testator's death?[82]

- Should the court be empowered to decide whether a person who wrongfully and intentionally or negligently caused the death of

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78 Par 2.21 above.

79 Par 2.22 above.

80 Par 2.28 above.

81 Par 2.32 above.

82 Par 2.34 above.

the testator is entitled to a benefit[83] or should the present position be maintained?[84]

- Should the rule disqualifying a person who has killed a conjunctissimus of the testator be changed?[85]

- Should a person who is not criminally responsible be disqualified from inheriting from a person killed by him?[86]

- Should there be a rule of construction that the fact that a person was born out of wedlock shall be ignored in construing a will?[87]

- Should the disqualification of persons involved in the execution of a will be modified[88] or should the disqualification be abolished?[89]

- Is legislation necessary regarding the provision in the Perpetual Edict that dispositions by a minor in favour of curators, guardians, administrators and others are invalid?[90]

- Is there a need for any other disqualification and is legislation necessary to provide clearly whether the other disqualifications still apply?[91]

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83 Par 2.44 above.

84 Par 2.45 above.

85 Par 2.49 above.

86 Par 2.53 above.

87 Par 2.58 above.

88 Par 2.87 above.

89 Par 2.97 above.

90 Par 2.103 above.

91 Par 2.124 above.

2.129 The Commission will consider the desirability of a codification of the rules after studying the comments on the questions above. Such a codification would fit in with an eventual consolidation of all legislation on the law of succession contemplated by the Commission.[92] If desirable, the provisions could in the mean time be incorporated in the Wills Act 7 of 1953 under the heading "Disqualification from inheriting".

3. SUBSTITUTION[93]

(a) Introduction

3.1 A testator can indicate in his will that a beneficiary will in certain circumstances take the place of another beneficiary. The circumstance usually provided for is the death of the original beneficiary.

3.2 Direct substitution and fideicommissary substitution occur. An example of direct substitution is where the testator provides that A is his beneficiary but that B will be the beneficiary if A dies before the testator. An example of fideicommissary substitution is where the testator bequeaths a benefit to A (the fiduciary heir) subject to the condition that at A's death the benefit will pass to B (the fideicommissary heir). In the case of direct substitution either A or B gets the benefit while in the case of fideicommissary substitution A gets the benefit first whereafter B gets the benefit.[94] The question whether a substitution is direct or fideicommissary sometimes gives rise to difficult questions of interpretation.

3.3. Substitution is usually relevant at the death of the beneficiary but it can also occur if the beneficiary renounces the benefit or is disqualified from inheriting.

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92 Par 1.5 above.

93 Van der Merwe and Rowland 285 et seq; Corbett 196 et seq; Lee and Honoré 424 et seq.

94 Provided that A survives the testator and B survives A.

3.4 If a testator did not expressly provide for substitution the common law sometimes made use of presumptions in terms of which substitution took place according to the presumed intention of the testator. The common law was amended by section 24 of the General Law Amendment Act 32 of 1952 which provides for direct substitution in certain circumstances.

3.5 Where a potential beneficiary cannot inherit and there is no substitution, the fate of the bequest depends on the circumstances. The bequest can accrue to co-beneficiaries, a special bequest can lapse and devolve as part of the residue, a testamentary inheritance can devolve upon intestacy, a fiduciary heir can become the unconditional owner, or the right of the beneficiary (for instance a usufruct or the right to income from a trust) can merely lapse. Sometimes the accrual of a beneficiary's benefit is accelerated as a result of the lapsing of another beneficiary's right. For instance, the capital beneficiary who would have been entitled to a benefit upon the death of an income beneficiary can become entitled to the benefit when the income beneficiary renounces his benefit.

(b) Predecease of a potential beneficiary

(i) Intestate

3.6 The predecease of a potential beneficiary does not give rise to problems in the case of intestate succession. The rules indicate whether a predeceased relative's descendants succeed in his place (succession *per stirpes*) or whether substitution does not take place (succession *per capita*).

(ii) Testate under common law

3.7 The testator can expressly provide for substitution in his will. Interpretation problems may arise when the testator mentions other persons in conjunction with the original beneficiary. Sometimes there is doubt whether the beneficiaries were appointed jointly, whether there was a direct substitution, whether there was a fideicommissary substitution, or whether

words such as "and his heirs, executors and administrators" were added merely to emphasise that the bequest was unconditional.[95]

3.8 If a testator did not provide expressly for substitution the common law sometimes rebuttably presumed that a predeceased heir should be represented by his descendants.[96] This presumption applied if descendants of the testator were instituted as heirs generally (without mentioning names or number). C P Joubert submitted that the presumption also applied if relatives in the collateral line had been instituted.[97] If an outsider was instituted as heir[98] or in the case of a fideicommissum[99] the predeceased heir, fiduciary heir or fideicommissary heir was not represented by his descendants. The common law rule was gradually shifted into the background. In Galliers v Rycroft[1] Sir Henry De Villiers stated in a judgment of the Privy Council that "children" refers to descendants of the first degree only unless the contrary appears from the will. This statement has been interpreted as a binding decision as to the meaning of "children", irrespective of whether the bequest is a direct or fideicommissary one.[2]

3.9 The result was that representation of a predeceased heir was allowed only if such an intention appeared from the will.

(iii) Section 24 of Act 32 of 1952

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95 Corbett 210 et seq.

96 C P Joubert "Artikel 24 Algemene Regswysigingswet 32 van 1952" 1954 Tydskrif vir Hedendaagse Romeins-Hollandse Reg 1-43, hereinafter "Joubert 1954 THRHR". Cf Van der Merwe and Rowland 244 et seq.

97 C P Joubert 1954 THRHR 23.

98 Ibid 24.

99 Ibid 27.

1 (1900) 17 SC 569 (PC) 575.

2 Van der Merwe and Rowland 245 et seq; Corbett 215; Joubert 1954 THRHR 39.

3.10 Section 24 of the General Law Amendment Act 32 of 1952 (hereinafter "section 24") provides as follows:

> Whenever according to the terms of the will of a testator who dies after the date of commencement of this Act (4 June, 1952), a predeceased child of that testator would have become entitled to any benefit under that will if he had survived the testator, the lawful descendants of that child shall be entitled per stirpes to that benefit, unless the terms of the will indicate a contrary intention.

3.11 The enactment of section 24 was probably intended to alter the principle laid down in Galliers v Rycroft[3] and to restore the common law. It is clear that section 24 did not restore the common law. Section 24 does not like the common law distinguish between heirs instituted generally and heirs instituted with reference to name and number. Section 24 applies to children only while under common law a presumption that representation should take place applied in the case of at least other descendants as well.[4]

(iv) Criticism of the present position and suggestions for reform

3.12 Further legislation will be necessary to restore the common law. It is suggested that the emphasis should not be on the restoration of the common law but that an attempt should be made to give effect to the wishes of the testator. If the will contains express provisions regarding substitution effect should be given thereto. If the will does not contain express provisions the rules should accord with the provisions which the average testator would have chosen if he had addressed his mind to the question of substitution and explicitly provided for it.[5] Criticism of the

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3 Reek v Registrateur van Aktes, Transvaal 1969 1 SA 589 (T) 594G; Nel v The Master 1975 3 SA 271 (T) 272C.

4 Par 3.8 above.

5 Manitoba Law Reform Commission Report on sections 33 and 34 of "The Wills Act" Report 67 Winnipeg: Queen's Printer Office 1986, hereinafter the "Manitoba Report on sections 33 and 34", at 12.

present position will be discussed with reference to the provisions of section 24.

"Whenever according to the terms of the will"

3.13 Section 24 applies only to succession "according to the terms of the will". The rules of intestate succession have been reviewed recently.[6] No change to the rules of representation in the law of intestate succession is recommended for cases where the relative is predeceased.[7]

3.14 C P Joubert[8] submits that section 24 does apply to testamentary provisions in an antenuptial contract except in so far as they relate to "fideicommissa inter vivos". In Scotland the rule applies to marriage contracts with testamentary provisions but not to other lifetime deeds.[9]

3.15 It is not clear whether section 24 applies to testamentary provisions in terms of an antenuptial contract or a trust created by contract. Section 24 will probably apply where a will bequeaths a benefit to an existing trust.[10]

3.16 It is suggested that all benefits intended by a person to take effect after his death should be treated in the same way whether the benefit is provided for in a will or not.

"of a testator who dies after the date of commencement of this Act"

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6 South African Law Commission Report on the review of the law of succession: Intestate succession 1985.

7 See par 3.6 above.

8 1954 THRHR par 5 at 42.

9 Scotland Memorandum footnote 1 at 52.

10 Cf Kohlberg v Burnett 1986 3 SA 12 (A).

3.17 A will takes effect upon the testator's death. It is not desirable for an estate to be distributed in terms of an Act which did not apply at the time of the testator's death. It is suggested that amending legislation (if any) should apply only to the wills of persons who die after the date of commencement of the legislation.

"predeceased"

3.18 Section 24 applies if the heir predeceased but not if he repudiates or is disqualified from inheriting. Substitution where an heir repudiates or is disqualified from inheriting is discussed below.[11]

"child of that testator"

3.19 Although in common law there was a presumption that any descendant of the testator was represented by his descendants,[12] section 24 provides that representation takes place only in the case of a predeceased child of the testator.

3.20 After a comparative survey the Scotland Memorandum[13] describes section 24 as the "narrowest version" of the rule. In a number of jurisdictions representation is allowed in the case of the predecease of any descendant of the testator. For instance England, where section 33 of the Wills Act 1837 applies, Germany,[14] Nova Scotia, Prince Edward Island, Australia and New Zealand.[15] Most Canadian jurisdictions, for instance Manitoba[16] and British Columbia,[17] allow representation for bequests to a

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11 Par 3.73 et seq.

12 The presumption probably applied to a predeceased relative in the collateral line as well. See par 3.8 above.

13 Par 4.6 at 52 et seq.

14 Scotland Memorandum par 4.6 at 53.

15 Manitoba Report on sections 33 and 34 par 1(a) at 12 et seq.

16 Sec 34 Wills Act.

(Footnote continued)

child or other descendant, brother or sister. The Uniform Probate Code of the United States of America allows representation where the beneficiary is the testator's grandparent or a descendant of the grandparent.[18] In Scotland the rule applies to descendants and "also to bequests to nephews and nieces if the bequests are similar to those which parents would make for their own children".[19]

3.21 Given the lack of sufficient empirical research on the wishes of the average testator the Manitoba Law Reform Commission recommends[20] that the present position[21] should be maintained. This recommendation maintains uniformity with most Canadian jurisdictions. The Scotland Memorandum[22] expresses the view that the rule should be confined to reasonably close blood relationships. The tentative preference in the Memorandum is for an extension of the rule to the testator's grandparents and their descendants but the Memorandum proposes as an alternative that the rule should be limited to the testator's descendants, his collaterals (brothers and sisters?) and descendants of collaterals. The Memorandum also invites views on the question whether step-children should be included.

3.22 In an attempt to establish the attitude of the average testator 180 wills lodged with the Master, Pretoria, were examined. The idea is that legislation should provide for substitution in cases where testators usually do so.[23] The results of this survey cannot be regarded as conclusive.

(Footnote continued)

17 Sec 29 Wills Act. Cf sec 32 Uniform Wills Act (Uniform Law Conference of Canada) and Manitoba Report on sections 33 and 34 footnote 26 at 12.

18 The Scotland Memorandum describes this as the "widest version" of the rule. Cf Manitoba Report on sections 33 and 34 at 12 et seq.

19 Scotland Memorandum par 4.5 at 52.

20 Report on sections 33 and 34 at 13 et seq.

21 The rule applies to gifts to a descendant, brother or sister.

22 Par 4.13 et seq at 56 et seq.

23 Annexure B to this Working Paper.

Many of the wills were executed on the standard forms of banks and trust companies. The fact that a standard form was used as a starting-point probably played a role. The Manitoba Report on sections 33 and 34[24] notes a conflict between the results of a survey of wills on the one hand and the results of a poll on the other. Since the surviving spouse or descendants are usually benefited it would be time-consuming to obtain a significant number of bequests in favour of other persons.

3.23 The survey suggests that provision for substitution in the case of bequests to close relatives is more common than in the case of bequests to other persons.[25] The percentages are as follows: surviving spouse 81,3%; children 58,3%; other 31,3%. Many of the substitutions for a spouse do not apply to any case of predecease but only if the spouse dies simultaneously or shortly after the testator, or dies after the testator without making a new will.

3.24 If, as is usual, the spouse is the sole heir, the spouse's inheritance will in the event of predecease devolve in terms of intestate succession on the descendants of the testator per stirpes. One possibility is to continue to limit the application of section 24 to a predeceased child. The survey suggests that children are the only other relatives of the testator for whom alternative heirs are usually appointed. Although a number of jurisdictions allow substitution in the case of other descendants too,[26] such bequests and substitutions for such bequests apparently occur infrequently.[27]

3.25 A second possibility is to extend the relatives to whom a tacit substitution applies. It is perhaps logical to allow substitution for all relatives for whom substitution is allowed in the case of intestate

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24 At 17 et seq.

25 Annexure B Table 1.

26 Par 3.20 above.

27 Annexure B Table 1.

succession.[28] Like intestate succession the tacit substitution is intended for cases where the testator has failed to make the necessary provision. In accordance with the Commission's recent recommendation[29] substitution is in the case of intestate succession allowed up to the second parentela - in other words the testator's descendants and his parents and their descendants.

3.26 A third possibility is to abolish completely tacit substitution in the case of a predeceased heir. The inheritance[30] will devolve on the intestate heirs of the testator unless a contrary intention appears from the will - the will may for instance expressly provide for substitution or an intention that the benefit should accrue to co-beneficiaries may appear from the will.

3.27 The Commission invites comments on the best solution. It is suggested that there is no justification for a drastic change to the present position - either the present position should be maintained or the rule could be extended to apply to any descendant of the testator. This extension would bring the position more into line with intestate succession, the common law and certain common law systems. It is suggested that the section should apply to all descendants of the testator.

3.28 In common law the presumption of substitution applied only if the heirs were instituted generally or as a class, for instance "my children". The presumption did not apply if heirs were instituted by name or with reference to number, for instance "my five children". Section 24 does not make this distinction.[31] In practice section 24 is applied to children irrespective of whether they have been instituted generally or by name or number.

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28 Cf Manitoba Report on sections 33 and 34 at 16.

29 Report on the review of the law of succession: Intestate succession 1985.

30 The position of legacies is discussed in par 3.41 et seq below.

31 Joubert 1954 THRHR par 2 at 41; Corbett 216.

3.29 The average testator would probably be surprised to learn that it makes a vast difference to the effect of a bequest whether or not the children are named.[32] Class bequests are rare in wills.[33] Although a survey suggests that substitution for class bequests occurs more often than for other bequests[34] the law would be complicated if a distinction were made between class bequests and other bequests in this regard. There is insufficient empirical data to indicate that such a distinction accords with the wishes of the average testator.

3.30 It is suggested that section 24 should apply to class bequests and any other bequests.

"would have become entitled to any benefit under that will if he had survived the testator"

3.31 In Reek v Registrateur van Aktes, Transvaal[35] a child instituted as a fideicommissary heir[36] died after the execution of the will but before the death of the testator. Hill J pointed out[37] that the term "bemaking" (translated rather widely in the Act as "any benefit") is comprehensive but that it is not clear whether the Legislature intended it to include "fideikommissêre verwagtings" (fideicommissary expectations). Hill J held[38] that section 24 applied to direct bequests and not to fideicommissary substitutions.[39] Boshoff J and Rabie J based their finding that section 24 did not apply on the fact that the section applied only if the predeceased

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32 Manitoba Report on sections 33 and 34 at 21.

33 Annexure B Table 1.

34 Ibid.

35 1969 1 SA 589 (T).

36 See par 3.2 above.

37 594D.

38 595A.

39 See par 3.2 above.

child would have obtained a vested right if he had survived.[40] As a rule a fideicommissary heir obtains no "vested right".[41]

3.32 E L Rogers[42] suggested that section 24 should be extended to apply to a child who would have become entitled to a benefit "if he had not died before the date on which such benefit would have vested in him". Lila E Isakow[43] supports this suggestion.

3.33 In the Reek case Hill J remarked as follows:[44]

> The limitation of fideicommissary succession to children of the first generation has always been regarded by our courts as an established basic principle of the common law and there appears to be no reason whatsoever why that principle should have been changed.

3.34 In the course of a survey of wills testamentary bequests postponing vesting were examined.[45] A few of these cases were simple fideicommissary substitutions but most were cases where the benefit vested in the trustees of a trust and vested in the beneficiaries only at a later stage. It appears from this survey that in 11 of the 17 cases (64,7%) provision was made for substitution of his descendants for the remote beneficiary. Although these cases are perhaps too few to indicate a clear trend, 64,7% of these cases are in line with the proposal made by Rogers.

3.35 It is suggested that section 24 should apply not only if the beneficiary dies before the testator but also if he dies after the testator's death but before the later date when the bequest would have vested in him.

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40 596D; 599B.

41 597C-F; 598B-G.

42 "The rule in Galliers v Rycroft" 1953 South African Law Journal 418.

43 "Some problem areas in the law of succession" 1982 South African Law Journal 304.

44 Above 594H (our translation).

45 Annexure B Table 3.

3.36 In Reek v Registrateur van Aktes, Transvaal[46] the fideicommissary heir was predeceased. Rabie J remarked in passing[47] that it was most unlikely that section 24 applied in the case of a predeceased fiduciary heir.[48] To illustrate with an example: The testator bequeaths his farm to his son A (fiduciary beneficiary) subject to the condition that at A's death the farm will pass to his son B (fideicommissary beneficiary). A dies before the testator and is survived by his children B, C and D. If section 24 applies, A's benefit will pass to his children B, C and D. According to Rabie J, however, section 24 does not apply and A's benefit passes to B alone in terms of the will.

3.37 Legislation in common law countries provides explicitly that statutory substitution applies only to a benefit "not determinable at or before the death of (the beneficiary) ...".[49] In respect of an "estate tail" or "in quasi entail" (which is similar to a fideicommissum) the legislation provides that the predeceased beneficiary is deemed to have died immediately after the death of the testator.[50] This fiction is not necessary in South African law. Should a fiduciary heir die before the testator the benefit will upon the death of the testator pass to the fideicommissary heir unless a contrary intention appears from the will.[51]

3.38 It is suggested that section 24 should refer to a bequest except a bequest which lapses upon the death of the beneficiary.

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46 1969 1 SA 589 (T).

47 598E.

48 Cf Ian B Murray "Law of succession" in 1969 Annual Survey of South African Law 212 et seq.

49 Cf Wills Act England sec 33 before the 1982 amendment; Manitoba sec 34; British Columbia sec 29.

50 England sec 32; Manitoba sec 33. The Manitoba Report on sections 33 and 34 discusses this section in detail.

51 Corbett 299.

3.39 As remarked by Hill J in Reek v Registrateur van Aktes, Transvaal[52] the term "bemaking" is comprehensive and the meaning of the English term "benefit" is even wider. The problem is to decide to which of the bequests conceivable by a testator section 24 applies. In Verseput v De Gruchy[53] Franklin J left open the question whether section 24 applies to income payable from a trust but it has been suggested that there is no reason why section 24 should not apply to such a bequest.[54]

3.40 There is no limit to the type of benefit that a testator can bequeath to a beneficiary. Provided that the terms of the will are clear, enforceable and not illegal or against public policy the law gives free rein to a testator's imagination.[55] Bequests subject to fideicommissary conditions have been referred to above. A testator may also in his will bequeath a right of pre-emption, an option, an annuity, a usufruct, a right to occupy (usus) or a right to reside (habitatio). A bequest may be made subject to an obligation (modus) or the payment of a bequest price, or the enjoyment of a bequest may be postponed for a certain time. A testator creating a trust may lay down detailed provisions regarding the application of the income from the trust.

3.41 It is not feasible to draw up closed lists of the types of bequests covered by section 24 and those not covered by section 24. A possible qualification is that section 24 should apply only in the case of a bequest of the residue of the estate or part of the residue of the estate. This type of bequest is known as an inheritance. As distinct from this a legacy is a bequest of a specific thing or things.[56]

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52 1969 1 SA 589 (T) 594D.

53 1977 4 SA 440 (W) 447B.

54 Ian B Murray "Law of succession" in 1977 Annual Survey of South African Law 293.

55 Van der Merwe and Rowland 621; Corbett 33.

56 Van der Merwe and Rowland 254; Corbett 222.

3.42 Section 24 does not distinguish between a legacy and an inheritance. The common law did not in this regard distinguish between a legacy and an inheritance either.

3.43 The results of a survey of wills suggested that testamentary substitutions occur more often in the case of inheritances than in the case of legacies. The following comparative percentages emerged from the survey: (Because legacies in favour of a surviving spouse are so rare, these cases have been omitted.)[57]

PERCENTAGE OF SUBSTITUTIONS IN WILLS

PRIMARY BENEFICIARY	HEIR	LEGATEE
Children	58,3%	35,3%
Grandchildren	40,0%	10,0%
Other	29,6%	26,7%
TOTAL	47,5%	26,2%

3.44 The following arguments may be advanced in support of the maintenance of the present position. A distinction between a legacy and an inheritance has never been made in this regard and apparently other legal systems do not make this distinction either. The introduction of a new rule would cause disruption and make the law on this point more complicated than it is at present. A rule that statutory substitution applies to inheritances only could operate unfairly. For instance, the testator may decide to leave his estate to his son and daughter in equal shares. The value of his farm is approximately one half of the value of his estate. The testator bequeaths his farm to his son (legacy) and the residue of his estate to his daughter (inheritance). Why should substitution be allowed in the case of the daugher but not the son? The results of the survey cannot be taken as conclusive.

57 Annexure B Table 1 and Table 2.

3.45 The following arguments may be advanced in favour of a rule that statutory substitution should apply to heirs only and not to legatees as well. It is illogical for a statutory substitution to apply to a legacy. A legacy is usually a special bequest to a specific person. The average testator would prefer the benefit to accrue to a co-legatee (if such an intention appears from the will) or to accrue to the residuary heirs. Should a testator wish a legacy to accrue to the descendant of the legatee upon predecease of the legatee this is an exceptional case for which the testator should provide expressly in his will. Although a distinction between an inheritance and a legacy might create problems, in certain cases it would remove doubt as to whether section 24 applied, for instance in the case of annuities, bequest prices etc. Statutory substitution can never replace express testamentary substitution and the ambit of a statutory substitution should not be too wide. If section 24 is not limited to inheritances another way of defining the ambit of section 24 will have to be considered.

3.46 The Commission invites views on the question whether the solution in paragraph 3.44 or that in 3.45 above is desirable.

3.47 In Nel v The Master[58] Eloff J held that section 24 did not apply where the child had died before the execution of the will.

3.48 Section 34 of the Wills Act in Manitoba applies "where a person dies in the lifetime of a testator, either before or after the testator makes the will".[59] This rule applies in several legal systems.[60] The Manitoba Law Reform Commission[61] recommended that this provision be retained.

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58 1975 3 SA 271 (T).

59 Our underlining.

60 Eg in New Zealand, Queensland, the United States Uniform Probate Code and in Canada except Nova Scotia and Prince Edward Island. See Manitoba Report on sections 33 and 34 footnote 65 at 24.

61 Report on sections 33 and 34 at 24.

3.49 The corresponding rule in Scotland applies only if the person concerned was alive at the date when the will was made. The tentative view in the Scotland Memorandum[62] is that the existing rule should be retained because it seems somewhat artificial to make a bequest to a dead person in reliance on a rule of construction which will transfer the bequest to the children of the dead person.

3.50 If a relative is dead and the testator knows it, one would expect the testator to benefit the descendants of the relative if this is his intention. A testator would presumably refer to a relative who is already dead only in error.[63]

3.51 It is suggested that section 24 should not apply where the relative is already dead when the will is made.

"the lawful descendants of that child shall be entitled per stirpes to that benefit"

3.52 Some legal systems provide that the bequest devolves on the intestate heirs including the surviving spouse of the predeceased relative.[64] The documents of law reform bodies which have been studied[65] are in favour of a rule that only the descendants of a predeceased relative shall receive a benefit.

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62 Par 4.17 at 59.

63 Cf Manitoba Report on sections 33 and 34 at 24.

64 Manitoba Report on sections 33 and 34 at 14 et seq.

65 Manitoba Report on sections 33 and 34 at 14 et seq; Tasmania Report 15; Scotland Memorandum 18(c) at 58.

3.53 According to a survey of wills the substitution of a person's descendants per stirpes is the most popular substitution. In the case of children of the testator this substitution was made in 92,9% of the cases.[66]

3.54 The reference to lawful descendants is in conflict with the Commission's recommendation[67] that extra-marital children should be able to inherit from their father and their mother. This qualification should clearly be deleted. Although the Latin "per stirpes" can be replaced in the Afrikaans by "staaksgewyse" there does not appear to be a well-known substitute in English.[68]

3.55 It is suggested that the descendants of a predeceased relative should be entitled to the benefit per stirpes.

"unless the terms of the will indicate a contrary intention"

3.56 The statutory substitution is intended for cases where the testator himself did not provide for substitution. Where a contrary intention appears from the will the statutory substitution should not apply.

3.57 It was suggested in paragraph 3.16 above that the statutory substitution should not apply only to a will but also to any benefit intended by a person to take effect after his death.

3.58 A substitution is not the only provision which can indicate a contrary intention in a will. In Galliers v Rycroft[69] the testator referred to "my children or such of them as may be then alive". Such a provision is sufficient to rebut the presumption in section 24.[70]

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66 Annexure B Table 1.

67 Cf par 2.55 above.

68 Cf section 1(4)(a) of the Intestate Succession Act 81 of 1987.

69 (1900) 17 SC 569 (PC).

70 H R Hahlo and Ellison Kahn "Two important changes in the common law" 1952 South African Law Journal 398; Corbett 217.

3.59 In Reek v Registrateur van Aktes, Transvaal[71] Rabie J pointed out that the contrary intention could appear by implication and not only from express provisions.

3.60 An example of an implied fideicommissary substitution is where a benefit is bequeathed to a person subject to a prohibition on alienation coupled with a provision that the benefit will pass to a third person in the event of a breach of the prohibition. It can also be provided that alienation is permitted only to specified persons. In such cases it is accepted that, where the property has not been alienated, a fideicommissary substitution is implied with the persons in whose favour the prohibition on alienation was made as fideicommissary heirs.[72]

3.61 Where a descendant is appointed a fiduciary heir subject to the condition that the inheritance will upon his death pass to someone who is not a descendant, a condition is implied that the inheritance will pass only if the fiduciary heir dies without issue (si sine liberis decesserit).[73] There are conflicting views on whether there is a fideicommissum in favour of the descendant's children if he is survived by children. Corbett[74] states that the fideicommissum would lapse and the property would normally devolve as part of the estate of the descendant. Van der Merwe and Rowland[75] conclude that it would appear that the positive law, despite departures, still supports the view that the clause in question creates an implied fideicommissum in favour of the children. The same difference of opinion is evident where the testator expressly includes a si sine liberis decesserit clause in the will with reference to a bequest to a descendant.[76]

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71 1969 1 SA 589 (T) 600A.

72 Van der Merwe and Rowland 312 et seq; Corbett 351 et seq; Lee and Honoré par 646 at 429.

73 Lee and Honoré par 662 at 437.

74 299 et seq.

75 309 et seq.

76 Van der Merwe and Rowland 290 et seq and 309 et seq; Corbett 200 et seq and 263 et seq.

3.62 It is appropriate to refer here to interpretation problems which, although they do not have a direct bearing on section 24, arise in this regard. There is uncertainty as to whether a reference to children of a close blood relation includes children born after the death of the testator. (In respect of the children of strangers it is clear that children born after the testator's death are excluded.)[77] It is often difficult to determine whether a substitution in a will is a direct or a fideicommissary one.[78]

3.63 The first question is whether statutory intervention to solve interpretation problems is desirable. Although the courts' interpretation of certain wills have been criticised there do not appear to be objections in principle to justify legislation. Commentators who think that legislation is desirable are requested to indicate clearly the nature of legislation recommended by them.[79]

3.64 The second question, which is directly relevant here, is whether the interaction between section 24 and contrary provisions in a will gives rise to problems which ought to be solved by legislation.

3.65 In Reek v Registrateur van Aktes, Transvaal[80] Rabie J implied that a contrary intention can appear from a rule of law applicable to the type of bequest in the will: In the case in question that a fideicommissary heir must survive the fiduciary heir in order to take a benefit in terms of the will. Ian B Murray[81] comments as follows:

> While the view is accepted that there can be an implied as well as an express "contrary intention" in a will so as to defeat the operation of section 24, it is submitted, with respect, that this would have to appear in some form other than a rule of law such as that for a

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77 Van der Merwe and Rowland 548 et seq and sources quoted there; Corbett 536 et seq; Lee and Honoré par 606 at 408.

78 Corbett 198 et seq; Van der Merwe and Rowland 296 et seq.

79 Cf par 3.75 below.

80 1969 1 SA 589 (T) 600A.

81 "Law of succession" in 1969 Annual Survey of South African Law 214.

fideicommissum to take effect the fideicommissary must survive the fiduciary. What the section (it is conceived) refers to is an intention to be inferred from the language of the testator in the will that should a child-beneficiary predecease the testator, the latter would not wish such child's children to succeed in his place.

3.66 A further illustration of the problem is the following: The testator bequeaths his estate to an existing trust subject to a usufruct in favour of his son for a period of ten years following the death of the testator. The son predeceases the testator. According to a literal interpretation of section 24 the descendants of the son will be entitled to the benefit (a usufruct for ten years) to which the son would have become entitled had he survived. There is, however, a rule of law that a usufruct is a personal servitude which is extinguished by the death of the usufructuary.[82]

3.67 If the recommendations in this working paper are accepted the two examples above will not cause any problems. The benefit of the fideicommissary heir will accrue to his descendants unless a contrary intention appears from the will. This follows from the suggestion that section 24 should expressly apply to cases where vesting has been postponed to a date later than the death of the testator.[83] The right of the usufructuary will not pass to his descendants because this is a bequest which lapses upon the death of the beneficiary,[84] and also (if this solution is preferable) because this is not a bequest of the residue of the estate or part of the residue of the estate.[85] There do not appear to be obvious cases which will give rise to problems if these recommendations are accepted.

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82 Corbett 379; Van der Merwe and Rowland 265 et seq.

83 Par 3.35 above.

84 Par 3.38 above.

85 Par 3.45 above.

3.68 Where substitutions are implied as a result of the terms of the will[86] a contrary intention will appear from the will.

3.69 If the recommendations which may obviate this problem are not accepted, it is submitted that it is still not desirable to distinguish between an intention appearing from the wording of the will and an intention which appears from rules of law which apply to the bequest in the will.

3.70 It is suggested that section 24 should apply unless a contrary intention appears from the will or from another document which provides for the devolution of a benefit after the death of the testator.

(v) Suggested amendments to section 24

3.71 If the suggestions above[87] are accepted section 24 will have to be amended. The Commission intends to make proposals for the consolidation of all legislation relating to the law of succession, including section 24, in due course.

3.72 It is suggested that the following section be substituted for section 24 of the General Law Amendment Act 32 of 1952:

(1) Whenever according to the terms of the will of a testator who dies after the date of commencement of (the Amendment Act) -

(a) a descendant of the testator, whether as a member of a class or otherwise, would have become entitled to the residue of the testator's estate or any part of the residue of his estate (or substitute bequest for the underlined part with, see par 3.46 above) if he had been alive at the time of death of the testator or the later date when the estate (bequest) would have vested in the descendant; and

(b) the descendant's right to the estate (bequest) would not have lapsed upon his death; and

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86 Par 3.60 and 3.61 above.

87 Par 3.16, 3.17, 3.27, 3.30, 3.35, 3.38, 3.45, 3.51, 3.55 and 3.70.

(c) the descendant dies after the execution of the will but before the time of death of the testator or the later date when the estate (bequest) would have vested in him,

the descendants of that descendant shall be entitled per stirpes to the estate or such part of the estate (bequest), unless the terms of the will indicate a contrary intention.

(2) For the purposes of subsection (1) "will" shall mean any writing by a person which validly disposes of his property or any part thereof after his death and "testator" shall mean any person who executed the writing.

The question whether section 24 should apply where a descendant repudiates or has been disqualified is discussed below.[88]

(c) Substitution where a potential beneficiary repudiates or is disqualified

(i) Testate

3.73 The testator can indicate in his will what the position will be if a potential beneficiary repudiates a benefit or is disqualified from inheriting. It is advisable for testators to provide expressly for such eventualities.[89]

3.74 In practice testators rarely make provision for the possibility that an heir will repudiate his inheritance or be disqualified from inheriting.[90] Testators do provide for the predecease of a beneficiary. Sometimes provision is made for remarriage or neutral expressions are used such as "to my children or their descendants" or "failing her".

3.75 In the case of substitution in the event of predecease, the courts do not hesitate to construe the substitution broadly and apply it to a

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88 Par 3.97 et seq.

89 Lila E Isakow "Some problem areas in the law of succession" 1982 South African Law Journal 300.

90 No such substitution was traced in the 180 wills examined. See Annexure B.

nominated beneficiary who has repudiated the benefit or is incapacitated from taking the inheritance.[91] The position is not so simple if a testator bequeathed successive interests in property (for instance a fideicommissum, successive usufructs or successive beneficiaries in terms of a trust). Difficult questions arise particularly where the testator provided for the substitution of a beneficiary whose interest has not yet vested at the time when the original beneficiary repudiates or is disqualified. The question that must then be answered is "whether or not the deceased in providing for a termination of the trust on, inter alia, the death or re-marriage of his (beneficiary), intended to include in that expression a renunciation".[92] The same question arises where the beneficiary is incapacitated from taking the inheritance. The courts tend to prefer an interpretation that the substitution in the event of predecease applies also to cases of beneficiaries who refuse to adiate or are disqualified.[93] Corbett[94] says that there "is clearly an element of disharmony in the judicial decisions". The question is essentially one of the construction of the particular will.[95] Although the courts' interpretation of particular wills has been criticised there do not appear to be objections in principle which justify legislation. Commentators who think that legislation is desirable are again[96] requested to indicate clearly the nature of legislation recommended by them.

3.76 It is suggested that statutory intervention regarding substitutions in wills is not desirable.

(ii) Intestate

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91 Van der Merwe and Rowland 287; Corbett 219 et seq; Lee and Honoré footnote 1 par 637 at 424.

92 Ex parte Govender 1984 4 SA 217 (D) 222A.

93 Van der Merwe and Rowland 329 et seq and 388; Corbett 136 et seq especially at 140.

94 140.

95 Corbett 142.

96 Cf par 3.63 above.

(aa) Position before the Intestate Succession Act 81 of 1987

3.77 There was difference of opinion on the effect of repudiation by persons who succeeded on intestacy with the surviving spouse. It was accepted in practice that the inheritance of the heir who repudiated it accrued to his co-heirs and the surviving spouse. If all other person who would have shared with the surviving spouse repudiated, the surviving spouse in practice inherited the whole estate.

3.78 C P Joubert[97] submitted that the inheritance of a repudiating heir did not accrue to the surviving spouse because the spouse had not been an heir under common law.

3.79 The majority of commentators on a working paper[98] were in favour of a rule that the share of heirs who have repudiated should accrue to the surviving spouse. Commentators said that such a rule accorded with the wishes of the repudiating heirs.

3.80 In cases where there is no surviving spouse the position is that an heir who has repudiated his inheritance cannot be represented by his descendants. His share accrues to heirs who would have competed with him on an equal footing. Failing such heirs the estate devolves upon the next tier of intestate heirs. The repudiating heir's descendants can according to the writers compete in their own right (per capita). The same rules apply where an heir is disqualified from inheriting.[99]

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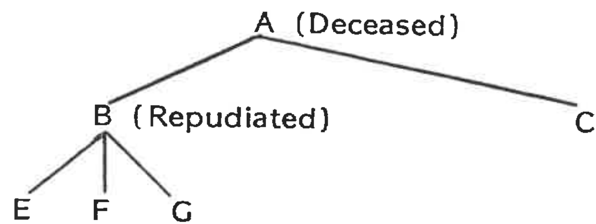
97 "Repudiasie deur 'n erfgenaam van 'n erfenis ab intestato" 1958 Tydskrif vir Hedendaagse Romeins-Hollandse Reg 183-219, hereinafter "C P Joubert 1958 THRHR", 218 et seq.

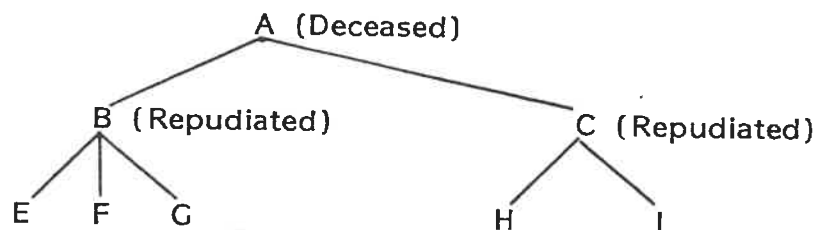
98 South African Law Commission Working Paper 2 Law of succession: Intestate succession 1983, hereinafter "Working Paper 2 on intestate succession".

99 Van der Merwe and Rowland 112 et seq; Corbett 590; Lee and Honoré footnote 1 par 539 at 375.

3.81 Two simple examples serve to illustrate the principles:[1]



Because B is still alive his children E, F and G cannot inherit in his place. The inheritance of the Child B accrues to A's other child C, who would have inherited with him. C inherits the whole estate.



The grandchildren E, F, G, H and I cannot inherit in the place of their parents B and C and there is also no heir who would have inherited together with B and C who have repudiated. The next tier of intestate heirs, the grandchildren, would according to the writers inherit the estate <u>in their own right</u>. Each would receive one-fifth. (In practice the descendants of a person who has repudiated are not allowed to inherit at all.)

3.82 Cases where the position is uncertain are conceivable.[2] The following case is quoted as an example:[3]

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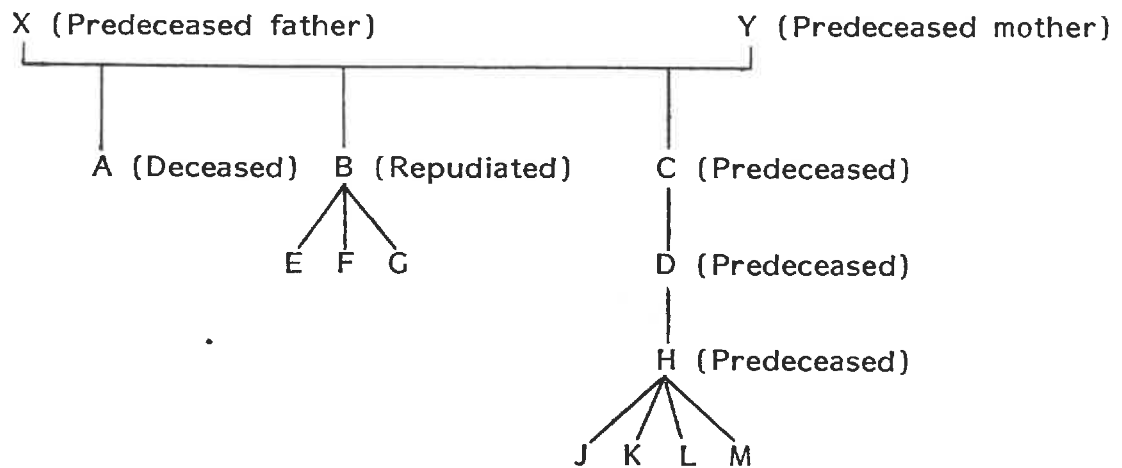
1 Joubert 1958 <u>THRHR</u> Casus 1 and 2 at 198 et seq.

2 Cf Joubert 1958 <u>THRHR</u> Casus 4, 11, 12, 13 and 14 at 201 et seq. In passing a typing error in line 9 on 206 may be pointed out - H receives 1/4 and not 1/2.

3 Joubert 1958 <u>THRHR</u> Casus 11 at 206.



There is no heir who would have inherited together with the brother B who has repudiated. Representation is allowed to the fourth degree only and J, K, L and M cannot inherit in the place of C. C P Joubert suggests that E, F, G, J, K, L and M each inherit $^1/7$. However, it may also be argued that E, F and G are the nearest relatives and that they ought to inherit in their own right. Alternatively it may be argued that E, F, G and D should be regarded as original stirpes and that E, F and G should each inherit $^1/4$ and J, K, L and M each $^1/16$.[4]

3.83 The examples above show that the position where a potential heir is predeceased differs considerably from cases where the same heir has repudiated or is disqualified. It is also clear that difference of opinion on the exact application of the principles is to be expected.[5]

3.84 The following example illustrates the dramatic results if accrual to a surviving spouse is not allowed.[6]

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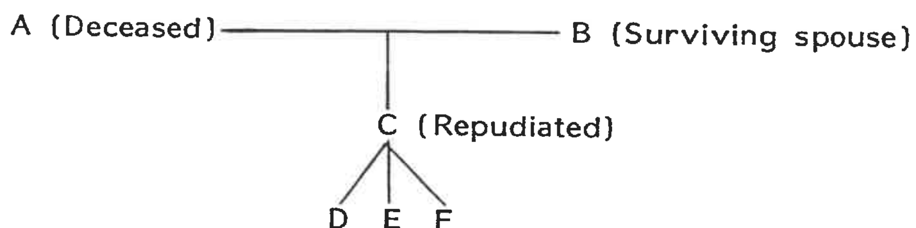
4 Cf Van der Merwe and Rowland 114.

5 Ibid.

6 Joubert 1958 THRHR Casus 19 at 216.



(The estate is large enough to ensure that the surviving spouse will receive more than the minimum share in any case.)

Although the grandchildren D, E and F cannot inherit in the place of C there is no other heir who would have inherited together with the child C. The grandchildren in their own right are the following tier of heirs. According to C P Joubert the surviving spouse B and the grandchildren D, E and F each inherits $^1/_4$. It is notable that C himself would have inherited $^1/_2$ but if he repudiates his inheritance his children inherit $^3/_4$ of the estate. In practice accrual is allowed and the surviving spouse B will inherit the whole estate. Even if the deceased were not survived by a spouse the descendants of C would in practice not be allowed to inherit at all. The last-mentioned practice is clearly not in keeping with common law.

(bb) Intestate Succession Act 81 of 1987

3.85 In a working paper on intestate succession[7] it was suggested that the existing practice be confirmed in legislation - the descendants of a person who has renounced his right or is disqualified from inheriting are excluded from the inheritance and accrual to the surviving spouse is allowed. The working paper[8] invited comments on possible alternatives. For example that the inheritance renounced by a person should go to his descendants *per stirpes*. The commentators were divided almost equally for and against the proposal in the working paper. The Commission recommended that the present practice be clearly laid down in legislation

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7 Working Paper 2 on intestate succession par 2.2.3 at 9 and par (d) at 14.

8 Ibid 27.

until substitution in the law of succession had been investigated in detail.[9] Pursuant to this recommendation section 1(4)(c) of the Intestate Succession Act provides as follows:

> (In the application of this section) any person who is disqualified from being an heir of the intestate estate of the deceased, or who has renounced his right to be such an heir, or any person who, by representing such first-mentioned person, would have been entitled to inherit had such person not been so disqualified or had he not so renounced his right, shall be deemed not to have survived the deceased.

3.86 Criticism may be levelled against this section as indicated below.

3.87 It is unfair to visit the sins of the fathers upon the children. As Voet[10] puts it:

> ... every single person only renders his own self unworthy ... but that he in no way prejudices others ... This is because wrongdoings bind the authors of them, and no one is to be overloaded with illwill towards another, or be created a successor to another's crime.

3.88 Even if it is accepted that the descendants of a disqualified heir should not inherit, it is not clear why the descendant of an heir who has repudiated his inheritance should not inherit. Sometimes the heir is not in need of the inheritance and it merely entails an unnecessry tax burden if he is compelled to take the benefit first and the benefit subsequently devolves upon or is donated to his descendants.

3.89 If a testator expressly provides for substitution in the event of the predecease of a potential heir the same substitution usually applies by implication where the heir is disqualified or has repudiated the inheritance.[11] The reason is that it is assumed that the testator included

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9 South African Law Commission Report on the review of the law of succession: Intestate succession par 6 at 26 et seq.

10 34 9 11 (Gane's translation).

11 Par 3.75 above.

the other circumstances by implication. Since the law of intestate succession regulates the position according to the presumed intention of the deceased it is illogical for the law of intestate succession to lay down different rules for the case of predecease on the one hand and repudiation or disqualification on the other hand.

3.90 The tentative suggestion in the Scotland Memorandum[12] is that the descendants of the criminal should not be barred from inheriting. The reason is that a descendant who has taken an active part in the commission of the crime would also be guilty and therefore disqualified. If the descendant is innocent the testator would probably not have wished him to be disqualified. The recommendation in the Scotland Memorandum is that the criminal heir should be deemed to be predeceased while not being disqualified. An exception is made for cases where the title in property passes to the survivor of the deceased and the criminal heir so that the heir's title will not pass to the deceased's estate.

(cc) Options for reform

3.91 The practice that the deceased's children may repudiate their inheritance in order that the surviving spouse may inherit the whole estate is well settled and usually accords with the wishes of the persons concerned.[13] It is not acceptable for a child to be able to reduce the share to be inherited by the surviving spouse by repudiating his inheritance.[14]

3.92 Section 1(4)(c) of the Intestate Succession Act confirms this practice. If major children who would have inherited together with the surviving spouse renounce their right, the surviving spouse inherits the estate.

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12 Par 2.12 et seq at 11 et seq.

13 Par 3.79 above.

14 Par 3.84 above.

3.93 If minors inherit together with the surviving spouse this practice cannot be followed. Even if the minor is assisted by an independent guardian it is usually clear that the repudiation will not be to the benefit of the minor. If the surviving spouse is the child's guardian there will furthermore be a conflict of interests. Although the Intestate Succession Act will not always eliminate this problem the problem would arise more often if a grandchild were entitled to inherit when his parent renounces his right.

3.94 The first possibility is to retain section 1(4)(c) of the Intestate Succession Act.[15] This solution confirms the existing practice and removes uncertainties which existed. If an heir prefers his inheritance to go to his descendants, it is realistic for him to achieve this by making donations.

3.95 Even if the criticism against section 1(4)(c) is valid,[16] it is submitted that a return to the former position is not desirable.[17] The position was uncertain and the difference between the effect of predecease on the one hand and repudiation or disqualification on the other hand cannot be justified. The logical alternative to section 1(4)(c) is a rule that the same position as that which applies where an heir is predeceased should apply where an heir is disqualified or repudiates. In other words the heir who is disqualified or repudiates should be deemed to be predeceased.[18] This alternative is not without precedent.[19] It was pointed out above,[20]

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15 Par 3.85 above.

16 Par 3.86 to 3.90 above.

17 Par 3.77 to 3.84 above.

18 An argument that the Political Ordinance of 1580 should be interpreted in this way was rejected in Ex parte Wessels and Lubbe 1954 2 SA 225 (O) 232A. Cf J E Scholtens "'De bloedige hand erft niet' and the order of succession" 1954 South African Law Journal 216 to 220.

19 See par 3.90 above. Van Someren (1635-1706) Tractatus de representatione Cap 3 sect 1 nr 2, as quoted by C P Joubert 1958 THRHR 192, refers to such a view held by Berlichius, Forsterus and Mevius - "mortis vicem suppleat repudiatio".

20 Par 3.93.

however, that such a rule may interfere with the practice of children repudiating their inheritance in favour of the surviving spouse. If this alternative is accepted, it is suggested that a special arrangement should be made for descendants who repudiate their inheritance in favour of the surviving spouse. The "survivorship destination" for which the Scotland Memorandum makes special provision[21] seldom, if ever, occurs in South African law. Comments on a provision on the following lines to replace section 1(4)(c) would be appreciated:

(i) If every descendant of a deceased who would have been entitled to an intestate estate together with a surviving spouse has renounced his right to be such an heir, the surviving spouse shall inherit the intestate estate.

(ii) In the case of a person who is disqualified from being an heir of the intestate estate of the deceased or has renounced his right to be such an heir, any benefit which he would have received if he had not been so disqualified or had not so renounced his right shall, subject to subsection (i), devolve as if he had died immediately before the death of the deceased while he was not so disqualified.

3.96 There is a clear choice between the proposals in paragraph 3.94 and 3.95 above and the Commission invites views on the desirable solution.

(iii) Section 24 of Act 32 of 1952

3.97 The substitution in section 24 is, like intestate succession, intended for cases where the testator has failed to make provision himself. At present section 24 applies if the heir is predeceased but not if the heir is disqualified or has renounced his right.

3.98 It is suggested that the position in terms of section 24 should be in consonance with the rules of intestate succession. If representation is allowed for intestate succession when a potential heir is disqualified or has repudiated his inheritance[22] section 24 should apply in the case of

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21 Par 2.13 at 13. Cf par 3.90 above.

22 Par 3.95 above.

disqualification and repudiation too. If representation is allowed in the case of predecease only, section 24 should be limited to a predeceased heir as well.

4. SUCCESSION RIGHTS OF ADOPTED CHILDREN

(a) Introduction

4.1 In its Report on the review of the law of succession: Intestate succession[23] the Commission intimated that the question whether section 20 of the Child Care Act offered a satisfactory solution to problems regarding adoption and testate succession would be considered in due course.

(b) Intestate succession

(i) Section 20 of the Child Care Act 74 of 1983

4.2 Section 20(2) of the Child Care Act 74 of 1983 provides as follows:

> (2) An adopted child shall for all purposes whatever be deemed in law to be the legitimate child of the adoptive parent, as if he was born of that parent during the existence of a lawful marriage.

It is clear that the adopted child is in law completely integrated into his new family. This applies to intestate succession as well. Subsection (4) provides that marriage or carnal intercourse which was prohibited before the adoption shall not become permissible as a result of the adoption.

4.3 Section 20(1) provides as follows (numbered subparagraphs have been inserted for ease of reference):

> (1) An order of adoption shall terminate all the rights and obligations existing between

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23 1985 at 28.

1. the child and

2. any person who was his parent (other than a spouse contemplated in section 17(c)) immediately prior to such adoption, and

3. that parent's relatives.

Section 17(c) which is referred to provides as follows:

17. A child may be adopted -

...

(c) by a married person of whose spouse the child is born.

4.4 Section 20(1) may be paraphrased as follows:

(i) An order of adoption shall terminate all the rights and obligations existing between -

1. the adopted child and

2. the natural parent or any person who was the adoptive parent before the adoption (except a natural parent whose spouse adopted the child), and

3. "that parent's" relatives.

4.5 According to a possible interpretation of the punctuation (with regard to the comma at the end of subparagraph 2) the subsection terminates all the rights existing between the child and his parent before the adoption on the one hand, and that parent's relatives on the other hand. Such an interpretation leads to such absurd results that this could not have been the intention of the legislature.[24] It would mean that if one of two children were adopted by a stranger the other child could no longer inherit from his natural parent. The intention is clearly to terminate all

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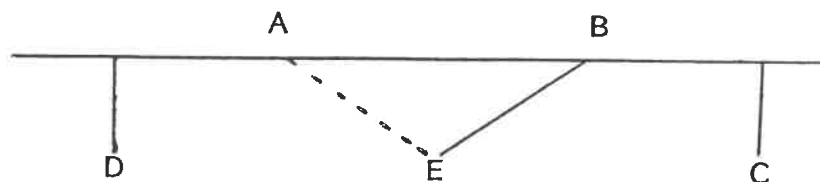
24 L C Steyn Die uitleg van wette vyfde uitgawe deur S I E van Tonder, N P Badenhorst, C H Volschenk & J N Wepener Kaapstad: Juta 1981 at 32 et seq.

rights and obligations existing between the adopted child on the one hand and his parent before the adoption and that parent's relatives on the other hand. Although the subsection is inherently ambiguous it is clear which construction will prevail.

4.6 A further ambiguity is the meaning of "that parent" in the part indicated as subparagraph 3. These words refer to the former parent in subparagraph 2. The question is whether it refers to any such parent or to such parent with the exception of the parent excluded in brackets in subparagraph 2.

4.7 To illustrate with an example:

B, who has two children C and E from a previous marriage, marries A, who has a child D from a previous marriage. A adopts E. A and B die and subsequently E dies.



Who are E's intestate heirs?

4.8 Van der Merwe and Rowland submit[25] that the exception provided for in section 20(1) does not apply to the relatives of the spouse concerned as well and that C cannot inherit from E but D can. The effect of this interpretation appears to be unsatisfactory.[26] A and B and their children D, E and C form a new family. Why should E's stepbrother D inherit from him but not his own brother C? If B is still regarded as E's parent there

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25 The first example on page 99.

26 Since doubt exists, the question whether this interpretation is correct is not conclusive for the purposes of law reform.

is no reason why B's relatives should not still be regarded as E's relatives.[27]

4.9 There is difference of opinion on the question whether section 20 applies to a child adopted before the commencement of the Child Care Act. The Child Care Act was not expressly made retrospective. Since the Act expressly applies to children adopted in terms of previous legislation, Van der Merwe and Rowland conclude[28] that the legislature probably intended that the Act should have retrospective effect.[29] Linda Schoeman[30] and Professor J C Sonnekus[31] doubt whether the Act will be applied retrospectively in cases where it would prejudice the adopted child.[32] (In terms of the previous legislation an adopted child could inherit from his own parents and their blood relations but not from the blood relations of his adoptive parents.)

4.10 The uncertainty which exists is not desirable. In respect of intestate succession amending legislation should apply in all cases where the deceased died after the commencement of the amending legislation.

(ii) Section 1 of the Intestate Succession Act 81 of 1987

4.11 Section 1(4) and (5) of the Act provides as follows:

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27 Cf South African Law Commission Report on the review of the law of succession: Intestate succession 1985 at 28.

28 99.

29 See also J H van Schalkwyk "Erfreg en boedelbereddering" in Regsontwikkelings: 1986 en 1987 Bloemfontein: UOVS 1987 at 148.

30 "Artikel 20 van die nuwe Wet op Kindersorg 74 van 1983 - Die gevolge van aanneming" 1985 Tydskrif vir Hedendaagse Romeins-Hollandse Reg 225.

31 "Belange-afweging by aannemingsaangeleenthede" 1985 Tydskrif vir Regswetenskap 76.

32 Cf Susan Bedil "Law of persons" in 1983 Annual Survey of South African law 73 and see par 4.26 below.

(4) In the application of this section -

...

(e) an adopted child shall be deemed -

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

(ii) not to be a descendant of his natural parent or parents, except in the case of a natural parent who is also the adoptive parent of that child or was, at the time of the adoption, married to the adoptive parent of the child; and

(5) If an adopted child in terms of subsection (4)(e) is deemed to be a descendant of his adoptive parent, or is deemed not to be a descendant of his natural parent, the (adoptive) parent concerned shall be deemed to be an ancestor of the child, or shall be deemed not to be an ancestor of the child, as the case may be.

It would appear that the word "adoptive", which has for ease of reference been placed in brackets above, could be omitted - an adoptive parent is in fact deemed to be an ancestor but usually only a natural parent is deemed not to be an ancestor.

Section 1(1) provides that the Act applies only to a person who dies after the commencement of the Act.

4.12 The uncertainties which exist in connection with section 20 of the Child Care Act[33] do not exist in connection with section 1 of the Intestate Succession Act. These uncertainties will arise if a person dies between the commencement of the Child Care Act and the commencement of the Intestate Succession Act. Any attempt to solve the few cases which might give rise to uncertainty would do more harm than good.

(iii) Recommendation

4.13 It is submitted that section 1(4) and (5) of the Intestate Succession Act will deal adequately with cases of intestate succession where

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33 Par 4.5 to 4.9 above.

adopted children are involved. The Commission nevertheless invites comments on the question whether "adoptive" should be omitted where it appears for the second time in subsection (5).

(c) Testate succession

(i) Section 74(2) and (3) of the Children's Act 33 of 1960

4.14 Section 74(2) and (3) provided as follows:

> (2) Subject to the provisions of section eighty-two (prohibition of marriage and carnal intercourse), 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 -
>
> (a) become entitled to any property devolving on any child of his adoptive parent by virtue of any instrument executed prior to the date of the order of adoption (whether the instrument takes effect inter vivos or mortis causa), unless the instrument clearly conveys the intention that that property shall devolve upon the adopted child ...
>
> (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.

These provisions have been repealed by the Child Care Act 24 of 1983.

4.15 The main provision creates a fiction that an adopted child is the child of his adoptive parents and is no longer the child of his natural parents. Although a fiction may undoubtedly have its uses, it is once again evident from the decisions on this section that a fiction can lead to difficult problems of interpretation.[34]

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34 See eg the conflicting interpretations given by the court a quo, the appellant's counsel, the respondent's counsel and the Appellate Division in Boswell v Van Tonder 1975 3 SA 29 (A).

4.16 In Venter v Die Meester[35] Nicholas J held that the fiction applied "for all purposes whatsoever" and therefore also for purposes of the interpretation of a document. Accordingly, the use of the words "born of the marriage" by testators was not of fundamental importance.

4.17 In Boswell v Van Tonder[36] Jansen J A conceded that it was apparent from the proviso to section 74(2) that the fiction had a role to play in the interpretation of a will.[37] The legislature would, however, according to Jansen J A,[38] have used wording similar to legislation in England and Scotland if it had intended the provision to be a rule of interpretation.[39] Jansen J A held that section 74(2) was not essentially a rule of interpretation but that "substantive-law-wise" ("substantief-regtelik") an adopted child had been equated with a blood relation.[40] The fact that the fiction usually applies to instruments executed after the adoption appears to be based on the assumption by the legislature that the person who executed the instrument was aware of the adoption and accepted the artificially created relationship.[41]

4.18 In Serfontein v Walton[42] Van Heerden J held that section 74(3) terminated only rights and obligations which arose purely by operation of law (that is which flowed from the family relationship) the operation of which could not be carried back to an agreement, declaration of will or

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35 1971 4 SA 482 (T) 486A.

36 1975 3 SA 29 (A).

37 36G.

38 38E.

39 Cf contra Ian B Murray "Law of succession" in 1975 Annual Survey of South African Law 289.

40 39E.

41 40E.

42 1979 1 SA 1059 (O).

other action.[43] A claim which an adopted child has acquired against his natural parent from an instrument executed before the date of adoption is not affected by section 74(2).[44]

(ii) Section 20 of the Child Care Act 74 of 1983

4.19 Section 20 was quoted in full in paragraphs 4.2 and 4.3 above. The section came into effect on 1 February 1987 and no decisions on this section have been reported to date. The differences between section 20 of the Child Care Act and section 74 of the Children's Act[45] will be examined to determine to what extent section 20 changed the previous position regarding testate succession.

4.20 Section 74(3)[46] terminated "all the rights and legal responsibilities" while section 20(1)[47] terminates "all the rights and obligations". (In the Afrikaans "alle regte en wetlike verantwoordelikhede" was replaced by "alle regte en verpligtinge".) In Serfontein v Walton[48] Van Heerden J speculated on the difference in meaning between "responsibilities" and "obligations" and mentioned the possibility that "responsibilities" was used to indicate that only concrete or existing obligations were terminated and not latent obligations as well. (Van Heerden J discussed the Afrikaans equivalents quoted above.) Van Heerden J regarded the use of "legal" ("wetlike") as an indication that the legislature intended to terminate obligations which arose ex lege only.[49] Van Heerden J had no doubt that the intention of the legislature could never have been that rights which had arisen from delict or contract should

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43 1064E to 1065E.

44 1066C to 1067E.

45 Par 4.14 above.

46 Par 4.14 above.

47 Par 4.3 above.

48 1979 1 SA 1059 (O) 1064F.

49 1064H.

be terminated by an adoption order.[50] Was the intention of the legislature in omitting "legal" to bring about a change which was totally unacceptable ("heeltemal onaanvaarbaar") to Van Heerden J?[51] For instance, that a natural parent's liability to his child for delict or in terms of a deed of donation should be extinguished by an adoption order? Was it the intention of the legislature in substituting "obligations" for "responsibilities" to terminate concrete or existing obligations only? Must it be inferred from this that concrete or existing rights only are terminated?[52] In the case of amendments such as these it may be inferred that the legislature intended the words used to have the meaning attached to them in court decisions.[53]

4.21 Section 74(3)[54] terminated the rights and legal responsibilities between the adopted child and his natural parents and their relatives. Section 20(1)[55] replaced the underlined part with "any person who was his parent (other than a spouse contemplated in section 17(c)) immediately prior to such adoption, and that parent's relatives". The intention of this amendment is clear. The legislature intended to provide expressly for the adoption of a child who had been adopted previously and for cases where the spouse of a natural parent adopted the child.[56] Obscurities in connection with the wording of this provision have been discussed above.[57]

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50 1065E.

51 1065D.

52 Ibid 1065C.

53 R v Nhlanhla 1960 3 SA 568 (T) 573C.

54 Par 4.14 above.

55 Par 4.3 above.

56 Par 4.4 above.

57 Par 4.5 to 4.9.

4.22 Section 20(2)[58] provides, as section 74(2) did previously,[59] that an "adopted child shall for all purposes whatever be deemed in law to be the legitimate child of the adoptive parents".

4.23 Section 20(2) strengthened the integration of the adopted child into his new family by adding "as if he was born of that parent during the existence of a lawful marriage". The integration was strengthened further by the omission of the proviso in paragraph (a) of section 74(2). This proviso provided that an adopted child shall not by virtue of the adoption become entitled to any property devolving on any child of his adoptive parent by virtue of any instrument executed prior to the date of adoption, unless the instrument clearly conveys the intention that that property shall devolve upon the adopted child. In terms of section 20 it no longer makes any difference whether the child was adopted before or after the execution of the instrument.

4.24 In Boswell v Van Tonder[60] Jansen J A held that section 74(2) was not essentially a rule of interpretation but provided "substantive-law-wise" that an adopted child was equated with a blood relation.[61] It appeared from proviso (a) that the fiction had a role to play in the interpretation of a will.[62] This proviso has now been deleted. As a result of the deletion of proviso (a) and the extension of the fiction as if the adopted child "was born of that parent during the existence of a lawful marriage" section 20 can even less be regarded as a rule of interpretation than was the case with section 74.[63]

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58 Par 4.2 above.

59 Par 4.14 above.

60 1975 3 SA 29 (A).

61 39E.

62 36G.

63 Cf Van der Merwe and Rowland footnote 4 at 569.

4.25 The fiction in section 74(2) that an adopted child was deemed to be the legitimate child of his adoptive parent was qualified by proviso (a).[64] In Serfontein v Walton[65] Van Heerden J held that the rule that an adopted child is no longer the child of his natural parent was also qualified by proviso (a). A claim which a child acquired from an instrument executed before the date of adoption is therefore not affected by section 74. Proviso (a) has been omitted from the new section 20. The rule that a child is no longer the child of his natural parent therefore now applies irrespective of whether the will was made before or after the adoption.

4.26 The effect of adoption on testate succession was essentially the same in the Adoption of Children Act 25 of 1923, the Children's Act 31 of 1937 and the Children's Act 33 of 1960.[66] As was shown above, the Child Care Act 74 of 1983 differs considerably from its predecessors in this regard. The Child Care Act, which came into operation on 1 February 1987, contains no transition clause. There is difference of opinion on the question whether this Act always applies to a child adopted in terms of repealed legislation.[67] Section 12(2) of the Interpretation Act 33 of 1957 provides as follows:

> (2) Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not -
>
> ...
>
> (b) affect the previous operation of any law so repealed or anything duly done or suffered under the law so repealed; or
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed.

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64 Par 4.23 above.

65 1979 1 SA 1059 (O) 1066E to 1067E.

66 Boswell v Van Tonder 1975 3 SA 29 (A) 36A.

67 Par 4.9 above.

Benefits in terms of a will vest upon the death of the testator unless vesting has been postponed in the will. Where a testator has postponed the vesting of certain benefits only, it may happen that two different Acts apply to the same will. This is clearly not desirable.

4.27 For the purposes of this investigation the effect of section 20 of the Child Care Act on testate succession must be determined. The interesting and important question whether section 20 terminates the delictual and contractual rights and obligations between the adopted child and his natural parent[68] does not form part of this investigation.

4.28 Section 20 took the integration of the adopted child into his new family and the severing of ties between the adopted child and his old family further than previous legislation. However, no intention to inhibit freedom of testation appears from section 20. Since a testator can disinherit his own children it is still possible for a testator to "disinherit" his adopted children.

4.29 If a testator benefits his own children or some other person's children as a class, children adopted subsequently by the testator or the other person would be included as if they were born of such person. It makes no difference whether the children were adopted before or after the execution of the will,[69] or whether the testator used words such as "children born of the marriage".[70] Where the testator expressly provides that his own children only and not adopted children are included, there is a conflict between the terms of the will and the fiction in section 20. It is submitted that the terms of the will shall prevail because freedom of testation is not limited by section 20.

4.30 If the testator benefits his own children as a class, any of his children who have been adopted by someone else will be excluded

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68 Par 4.20 above.

69 Par 4.23 above.

70 Par 4.16 and 4.23 above.

irrespective of whether they are adopted before or after the execution of the will.[71] The same rule will apply where children of some person other than the testator have been benefited as a class and the children are adopted by a third person.

4.31 Where an adopted child is benefited by name in a will executed after the adoption, section 20 cannot have any effect. If a testator benefits his own child by name and the child is adopted after the execution of the will, section 20(1) provides that the order of adoption terminates all the rights existing between the child and his natural parent. The "right" of the child to inherit vests at the earliest upon the death of the testator and it is not clear whether this "right" will be terminated by the adoption order.[72] There is, however, an exception for the case where the spouse of the child's natural parent adopts the child. In such a case the rights between the child and his natural parents are not terminated.[73] Where the testator benefits some other person's child by name in a will and the testator adopts the child later,[74] section 20 cannot affect the bequest.

4.32 Where a testator appoints all his own children or all the children of some other person by number and the testator or the other person also has an adopted child at the time of his death, the result of the application of the fiction in section 20 will be that the testator or other person will have more children than provided for in the will. If the testator has made an error regarding the number of his own children, there is a possibility that the court will rectify the will and insert the correct number.[75] Does the application of the fiction result in the addition of the adopted children notwithstanding the number stated in the will? It is submitted that the

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71 Par 4.25 above.

72 Par 4.20 above.

73 Par 4.4 above.

74 In terms of section 17 of the Child Care Act a parent can no longer adopt his own child. Cf sec 70(2) of the Children's Act 33 of 1960.

75 Cf the English case of In re Alcock Deceased (1945) Ch 264 discussed by Corbett at 500.

number of children stated in the will will inherit and that adopted children will be "disinherited".[76] If a testator has benefited all his children by number in a will and one of them is subsequently adopted by some other person it is again not clear whether the child's "right" is terminated by the adoption order.[77]

4.33 Susan Bedil[78] concludes that it is not clear whether the far-reaching implications of section 20 were considered and intended. This section does indeed have far-reaching results. It is submitted that the effect of the section on testate succession is not clear.

(iii) Options for reform and recommendations

4.34 The first question is whether it is desirable to limit freedom of testation. Section 20 provides that an adopted child "shall for all purposes whatever" be the legitimate child of the adoptive parent. The question is whether the testator should be obliged to treat his adopted child in the same way as his own children.

4.35 In principle there is complete freedom of testation in South Africa.[79] A testator is not obliged to treat all his own or any other person's natural children in the same way.

4.36 It is suggested that there is no justification for a rule obliging a testator to treat adopted children in the same way as natural children.

4.37 The next question is whether the use of a fiction is justified or whether a rule of interpretation would be a better solution.

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76 Par 4.28 above.

77 Par 4.31 above.

78 "Law of persons" in 1983 Annual Survey of South African Law 72.

79 Van der Merwe and Rowland 621; Corbett 33.

4.38 Section 20 contains a fiction which can hardly be worded more strongly. Although a fiction may have its uses in other branches of the law,[80] it is not appropriate in testate succession. In the case of testate succession the primary object is to give effect to the intention of the testator. Section 20 is not a rule of interpretation but it provides "substantive-law-wise" that an adopted child is a child of his adoptive parents.[81] There is bound to be conflict between this fiction and the provisions of some wills. Even a testator who is aware of the fiction may still attempt to include contrary provisions in his will. Section 20 gives no guidance as to whether the fiction or the provisions of the will should prevail.

4.39 Legislation in Scotland and England is worded as a rule of construction[82] - for instance, any reference to a child of an adoptive parent shall, unless the contrary intention appears, be construed as including a reference to the adopted child. Although a rule of interpretation does not solve all problems, it is better suited to testate succession than a fiction.

4.40 It is suggested that a rule of interpretation is preferable to a fiction.

4.41 The purpose of a canon of construction is to ascertain the intention of the testator in cases of doubt. A rule of interpretation should accord with the wishes of the average testator.[83]

4.42 It is suggested that the average testator does not wish to favour his or someone else's natural children above adopted children. If a testator

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80 Even in the case of intestate succession (par 4.11 et seq above) a fiction appears to be useful.

81 Par 4.24 above.

82 Scotland Memorandum par 4.4 at 50; Boswell v Van Tonder 1975 3 SA 29 (A) 38E.

83 Corbett 526; Van der Merwe and Rowland 558.

wishes to do so he can make express provision in his will. There is justification for a rule of interpretation that a reference to a person's children includes his adopted children. In order to obviate difficulties it should be clear when this rule of interpretation is to yield to the provisions of the will.

4.43 Before the Child Care Act 74 of 1983 legislation distinguished between benefits in instruments executed before the adoption and those in instruments executed after the adoption.

4.44 In Boswell v Van Tonder[84] Jansen J A stated that the application of the fiction to instruments executed after the adoption appears to be based on the assumption that the person who executed the instrument was aware of the adoption and accepted the artificially created relationship. Although a careful testator would expressly provide for the adopted child, the assertion made by Jansen J A can be supported in cases where the testator did not expressly provide for the adoption.

4.45 Where a child is adopted after execution of the instrument a careful testator will also redraw his will to provide for this event. The first problem is that testators tend to neglect to adapt their wills to changed circumstances. The second problem is that it is not the adopted children of the testator himself who give rise to most of the problems but cases where a benefit vests in the children of someone else than the testator long after the testator's death. For instance, the testator bequeaths his estate to his children subject to the condition that the benefit will pass to a child's descendants upon the child's death. The testator's children may adopt children after the testator's death. It must be added immediately, however, that grandchildren may also be born after the testator's death. If the average testator does not wish to favour his own children above his adopted children[85] it may be assumed that he would not wish to favour someone else's own children above the adopted children of such a person either.

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84 1975 3 SA 29 (A) 40E.

85 Par 4.42 above.

4.46 The Commission would welcome comments on the question whether a distinction should be made between benefits bestowed before and those bestowed after the adoption. The tentative view of the Commission is that no such distinction should be made. If a testator adopts a child after the execution of the will the adopted child should receive the same benefit as the benefit the testator's own child would have received at birth unless a contrary intention appears from the will or the position is changed by the testator in a later will. A bequest to the children of some person other than the testator should include adopted children unless the contrary appears from the will. It should include children adopted after the death of the testator if children born after his death are included.

4.47 If children are appointed by name or number it will usually be clear whether adopted children are included or not. In cases of doubt the rule that adopted children are included will apply.

4.48 The rules of interpretation should apply only if the contrary does not appear from the will. The contrary will appear if a testator distinguishes clearly between adopted children and his own children. At present an expression such as "born of the marriage" is not sufficient to exclude adopted children.[86] It is not clear whether the average testator intends such an expression to exclude adopted children or whether the intention is merely to exclude children of another marriage. It is suggested that such expressions should not exclude adopted children.

4.49 The aim of the Child Care Act is to sever the family ties between the adopted child and his own parents and to create family ties between the child and his adoptive parents. It is suggested that the rules of interpretation should have the same point of departure. If a child is included as a child of his adoptive parents, he should be excluded as a child of his natural parents or his previous adoptive parents.

4.50 If the present position is changed substantially is is desirable that a transition clause should indicate clearly to which cases the

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86 Par 4.16 and 4.23 above.

amendment applies. A convenient cut-off point is the death of the person whose estate is involved. In this case such a cut-off point has the disadvantage that the problem may not arise until years after the testator's death. Cases where the previous rules apply will therefore occur for decades to come. It also happens, however, that vesting does not take place on the same date for all the beneficiaries. In the example above,[87] for instance, vesting in each group of grandchildren takes place upon the death of their parent. It is not desirable that different rules should apply to the interpretation of one and the same will. It is suggested that amendments should apply only to a benefit accruing from the estate of a person who dies after the commencement of the amending Act.

4.51 Any amendments will fit into a consolidation Act relating to the law of succession.[88] If it is desirable, the amending provisions could in the mean time be included in the Wills Act 7 of 1953 under the heading "Interpretation of documents where adopted children are involved".

4.52 The following provisions are recommended

(1) In the construction of a will executed by a person who dies after the commencement of this Act, any reference to any person as a relation of any other person or as born of any other person shall, unless a contrary intention appears from the will, be construed as if any adopted child is a child of his adoptive parent or parents and is not a child of his natural parent or parents except a natural parent who is also the adoptive parent of that child or who was married to the adoptive parent at the time of the adoption.

(2) For the purposes of subsection (1) "will" means any writing by a person which validly disposes of his property or any part thereof after his death.

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87 Par 4.45.

88 Par 1.5 above.

In cases where this provision conflicts with section 20 of the Child Care Act this provision will prevail. Section 20 will still apply when a "descendant" of a person has to be determined in terms of section 24.[89]

CLOSING OBSERVATIONS

5.1 This is the last working paper in connection with the review of the law of succession which the Commission has in mind at present.

5.2 The Commission intends making proposals for the consolidation of all legislation relating to the law of succession in due course. The Commission has already reported on intestate succession and the introduction of a legitimate portion or the granting of a right to maintenance to the surviving spouse.[90] After studying the comments on working papers not yet reported on,[91] the Commission will consider whether further interim reports are desirable or whether a final report with a consolidation Bill is desirable.

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89 Par 3.52 et seq above.

90 Par 1.2 above.

91 Par 1.3 and 1.4 above.

ANNEXURE A

SURVEY OF DISQUALIFICATION OF PERSONS INVOLVED IN THE EXECUTION OF WILLS

	BANK/ TRUST	ATTORNEY	OTHER					TOTAL
			Home-made				Rest	
			Written	Printed	Army wills	Rest		
Wills accepted (percentage of all wills in brackets)	3 492 (54,8%)	1 553 (24,4%)	126 (1,9%)	237 (3,7%)	59 (0,9%)	79 (1,2%)	833 (13,1%)	6 374 (100%)
Witness disqualified	5	5	5	2	1	2	9	29 (0,45%)
Writer disqualified	0	0	6	11	1	0	0	18 (0,28%)

ANNEXURE B

SURVEY OF SUBSTITUTIONS IN WILLS

1. In the survey 180 wills lodged with the Master of the Supreme Court, Pretoria, during 1986 were examined. The survey was inspired by a similar survey in Manitoba.[1]

2. Substitutions for persons appointed heirs are listed in Table 1. Substitutions for legatees are listed in Table 2 and substitutions for beneficiaries for whom vesting has been postponed in Table 3. An heir is entitled to the residue of the estate or a part of the residue. A legatee is entitled to a specified thing or things. A beneficiary for whom vesting has been postponed acquires no "vested right" before the date of vesting.

3. Where a will had bequeathed the same type of benefit to a number of beneficiaries of the same class the benefit and the accompanying substitutions were counted once only.

4. Where a person's relationship was not apparent from the will he was counted as "Other".

5. Further details of the survey appear in paragraphs 3.22 and 3.34 above. The difference between "Name and number" and "Class" is explained in paragraph 3.28 above.

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1 Manitoba Report on sections 33 and 34 at 31.

TABLE 1

TESTAMENTARY SUBSTITUTIONS FOR HEIRS

Primary beneficiary		Substitution in will		Will benefits only those surviving		Nothing on substitution in will		Substitutes appointed in will	
								Descendants per stirpes	Other
Surviving spouse	91	74		1		16		54	20
		Name or number	Class	Name or number	Class	Name or number	Class		
Children	48	22	6	2	1	17		26	2
Grandchildren	5	2				3		1	1
Brother/sister or their children	6	3				3		2	1
Other	21	5		4		12		2	3
Total without spouse	80	38		7		35		31	7
TOTAL	171	112		8		51		85	27

TABLE 2

TESTAMENTARY SUBSTITUTIONS FOR LEGATEES

Primary beneficiary		Substitution in will		Will benefits only those surviving		Nothing on substitution in will		Substitutes appointed in will	
								Descendants per stirpes	Other
Surviving spouse	3	1				2		1	
		Name or number	Class	Name or number	Class	Name or number	Class		
Children	17	6			1	10		4	2
Grandchildren	10	1		3	1	5		1	
Brother/sister or their children	3					3			
Other	12	4				8		2	2
TOTAL	45	12		5		28		8	4

TABLE 3

SUBSTITUTION FOR BENEFICIARIES FOR WHOM VESTING HAS BEEN POSTPONED

Immediate beneficiary		Descendants substituted for remote beneficiaries	Others substituted for remote beneficiaries	Only remote beneficiaries who are living	Nothing on substitution for remote beneficiaries
Surviving spouse (Fiduciary)	5	4			1
Trust	12	7	2	1	2
TOTAL	17	11	2	1	3