SOUTH AFRICAN LAW COMMISSION

PROJECT 22

REVIEW OF THE LAW OF SUCCESSION

Intestate succession

REPORT

April 1985

To the Honourable H J Coetsee, MP, Minister of Justice

I am pleased to submit to you in terms of section 7(1) of the South African Law Commission Act, 1973 (Act 19 of 1973), for consideration the Commission's report on:

Review of the law of succession:

Intestate succession.

G VILJOEN
CHAIRMAN

16 April 1985

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 -

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The Honourable Mr Justice H J O van Heerden (Vice-Chairman)
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British Columbia Report	Law Reform Commission of British Columbia Report on statutory succession rights LRC 70 Victoria: Queen's Printer for British Columbia 1984 209p
Bouwer	A P J Bouwer Die beredderingsproses van bestorwe boedels 2de uitgawe Pretoria: Van der Walt 1978 654p
Corbett	M M Corbett, H R Hahlo & Gys Hofmeyr The law of succession in South Africa (with an appendix on the conflict of laws by Ellison Kahn) Cape Town: Juta 1980 739p
England Report	Report of the Committee on the law of intestate succession 1951 Cmd 8310 LONDON: Her Majesty's Stationery Office 1965 reprint 19p
Hahlo	H R Hahlo "Postponed intestacy" 1982 South African Law Journal 505-509
Kahn	Ellison Kahn "A trimestrial potpourri : Where there's a will there's a way; but sometimes a will won't" 1984 South African Law Journal 380-386
Ontario Report	Ontario Law Reform Commission Report on family law Part IV Family property law 1974 219p
Ontario Study	Ontario Law Reform Commission Study prepared by the Family Law Project Volume III Property subjects Toronto 1967 356-568
Queensland Report	Queensland Law Reform Commission Report on the law relating to succession QLRC 22 Brisbane 1978 93p
South Australia Report	Law Reform Committee of South Australia Twenty-eighth report relating to the reform of the law on intestacy and wills Government Printer South Australia 1974 12p
Spoor	Richard Spoor "Freedom of testation and social and economic development" 1983 Responsa Meridiana 305-310

Tasmania Working Paper	Law Reform Commission of Tasmania Working paper on the law relating to succession rights on intestacy by W G Briscoe 79p
Van der Merwe en Rowland	N J van der Merwe & C J Rowland Die Suid-Afrikaanse Erfreg 4de uitgawe Pretoria: Van der Walt 1983 662p
Van der Westhuizen	W M van der Westhuizen "Kodifiseer ons intestate erfreg" in Gedenkbundel H L Swanepoel Durban: Butterworths 1976 26-40
Van Warmelo	P van Warmelo "Die abintestaat erfopvolging" 1959 Tydskrif vir Hedendaagse Romeins-Hollandse Reg 91-111
Western Australia Report	Law Reform Commission of Western Australia Report on distribution on intestacy Perth 1973 15p
Working paper	South African Law Commission Working Paper 2 Law of succession: Intestate succession Pretoria: Government Printer 1983 49p

1. INTRODUCTION

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

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

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

During the second reading of the Matrimonial Property Bill[2] you announced[3] that the Commission had been requested to consider, as part of the review of the law of succession, the reintroduction of a legitimate portion for or the granting of a maintenance claim to the surviving spouse. The Commission has taken note of this request and the investigation has been extended accordingly. The intestate succession of Black persons is being dealt with as part of the investigation of Marriages and customary unions of Black persons.[4] The rights of succession of illegitimate children are being dealt with as part of the Commission's Investigation into the legal position of illegitimate children.[5]

1.2 This investigation embraces the review of the law of succession as a whole. One report to you on the completion of the whole investigation will have certain advantages. The legislation recommended by the Commission could consolidate all statutory provisions on the law of succession. The Investigation into the legal position of illegitimate children will, it is hoped, have been fina-

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1 The persons and bodies approached are listed in Annexure A to the working paper at 34. Cf par 2 below at 3.
2 Now Act 88 of 1984.
3 1984 Hansard 8584.
4 Project 51.
5 Project 38.

lised and proposals in connection with the law of succession will be able to take account of the results of that investigation. During the rest of the investigation of the law of succession aspects may emerge (for instance provision for a maintenance claim or a legitimate portion for a surviving spouse) which could justify an adaptation of the recommendations regarding intestate succession. However, the Commission has decided to submit an interim report on the law of intestate succession to you at this stage. The reason for this decision is that it is not desirable to defer a report on the results of this investigation for a number of years. The research done for this investigation could become obsolete and the persons and bodies who furnished comments might gain the impression that nothing is being done about their proposals. Consolidating legislation will be considered when a final report is submitted to you. Adjustments regarding matters which have come to light in the mean time will also be dealt with in the final report.

1.3 Van der Merwe and Rowland[6] define the law of intestate succession as follows:

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

1.4 Under common law only blood relations of the deceased qualified for intestate succession. The basic rules were laid down by enactments known as the Political Ordinance of 1580, the Interpretation of 1594 and the Octrooi of 1661.[7] The surviving spouse and an adopted child were later elevated by the legislature to the position of intestate heirs.

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6 At 21, our translation.

7 Van der Merwe and Rowland 24; Corbett 584; Van der Westhuizen Gedenkbundel Swanepoel 26, hereinafter "Van der Westhuizen".

2. PUBLICATION OF THE WORKING PAPER

At the April 1983 meeting of the Commission, Working Paper 2 Law of succession : Intestate succession (hereinafter the "working paper") was approved for publication. The working paper sets out the Commission's provisional proposals for the reform of the law of intestate succession. Owing to unavoidable delays the working paper was only distributed during February 1984. A list of the persons and bodies to whom the working paper was forwarded mero motu appears as Annexure A to this report. On 17 February 1984 the working paper was announced by a notice in the Government Gazette. In response to telephonic and written requests the working paper was sent to approximately 125 persons and bodies. On 27 August 1984 the Government Printer's reproduction of the working paper was forwarded to law libraries, contacts abroad and various individuals. Written comments were received from the 18 persons and bodies mentioned in Annexure B.

3. GENERAL GUIDELINES FOR REFORM

3.1 Van der Westhuizen[8] is correct in saying that it is impossible to devise a regime for intestate succession which would result in fair distributions in all cases. To ensure a fair distribution testators are at times obliged to make a will.[9] It has been remarked that a scheme of distribution on intestacy would seem to be inadequate if it results in the majority of people making wills to escape its consequences.[10] It is difficult to establish the percentage of all estates which devolve on intestacy. Estimates vary from 33 % during 1973[11] to 22 %[12] or 40 %[13] during 1979. The first mentioned two estimates are based on a comparison of the number of estates and wills registered during a certain period. However, more than one will (including revoked or invalid wills) can be registered in one estate. According to a sample of estates reported to the office of the Master of the Supreme Court, Pretoria, during 1979, 22,2 % of the estates devolved on intestacy.[14] However, not all estates are

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8 At 26, quoted in the working paper at 25.
9 Ibid; British Columbia Report 4 and 13.
10 Ontario Study 563.
11 1974 Hansard 6376.
12 Kahn 1984 SALJ 385.
13 1979 House of Assembly debates of Standing Committees 595.
14 Par 1.4 of the working paper at 2.

reported to the Master. In addition to dissatisfaction with the rules of intestate succession there are several other factors which determine whether a person will leave a valid will.[15] It does, however, appear from the sample, that it is the smaller estates that devolve on intestacy. The average balance for distribution in intestate estates was R6 050 as against an average of R32 000 for testate estates.[16] Since intestate estates are usually small, it is preferable to limit the intestate heirs to the few persons best entitled to the estate.[17]

3.2 Van der Westhuizen[18] suggests as guidelines for reform that the rules should be generally equitable,[19] not unduly complicated[20] and not more divergent from previous legislation than necessary. Van Warmelo[21] also emphasises simplicity and clarity and adds that possible remote ab intestato heirs should be limited. He states that intestate succession should take account of the family that forms a unit in society and the presumed intention of the deceased.[22] The intestacy regime should proceed from the normal and most common relationships.[23]

3.3 The Western Australia Report[24] sets the following aim:

> The broad aim of the legislation should be to achieve a just distribution of the estate of an intestate in the light of prevailing social attitudes.

The British Columbia Report[25] refers to the "collective view of the community as to what is fair and equitable in the circumstances". Spoor[26] is of opinion

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15 John M Astrachan MD "Easing the anxiety of will-making" (1982) 87(1) Case and comment 3 discussed by Kahn 1984 SALJ 386.
16 Par 1.4 of the working paper at 2.
17 Par 14 Western Australia Report 5.
18 At 26.
19 Western Australia Report 5; British Columbia Report 3.
20 In the England Report it is stated (in par 12 at 4) that the law of intestacy is "a law in which brevity and simplicity are particularly desirable" and (in par 31 at 11) "a law which should remain as simple and intelligible to the layman as possible".
21 1959 THRHR 91 at 95, hereinafter "Van Warmelo".
22 At 105.
23 Van Warmelo 99.
24 Par 12 at 5.
25 At 3. Cf Tasmania Working Paper par 1.7 at 2.
26 1983 Responsa Meridiana 305.

that the demands of society provide the driving force for the development of the law of succession. One way of ascertaining the attitude of the community towards succession is to go into the distribution directed by testators in their wills. A sample of 1 000 estates reported to the office of the Master of the Supreme Court, Pretoria, from 1 January to 15 October 1979, was examined.[27] The Ontario Study[28] criticises a similar sample used by an English committee because the period covered by the sample (five weeks) was too short and apparently also because this method places too much emphasis on the freedom of testation. One of the commentators on the working paper[29] supports this criticism and considers that the sample is subject to serious doubts. He submits that little, if any, value can be attached to the results of the sample. Although the results of the sample are not conclusive the Commission has taken cognisance thereof. Some of the commentators who frequently draw wills also indicated what they, in the light of their experience, regard as the normal wishes of testators.

3.4 The Commission accepts the following premise:

The rules of intestate succession should be clear and easy to apply. Although the ideal is that the rules should always operate fairly, rules should not be made for unusual cases if such rules are complicated or difficult to apply. The way in which testators dispose of their estates in their wills gives an indication of what the community regards as equitable rules for succession.

4. SURVIVING SPOUSE AS INTESTATE HEIR

4.1 The present position

4.1.1 Section 1(1) of the Succession Act,[30] which lays down the position, provides as follows:

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27 Working paper 35.
28 At 462 quoted in the working paper at 35.
29 Adv D H van Zyl (Pretoria bar).
30 Act 13 of 1934.

The surviving spouse of every person who after the commencement of this Act dies either wholly or partly intestate is hereby declared to be an intestate heir of the deceased spouse according to the following rules:

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

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

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

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

4.1.2 The heirs and their share of the inheritance are determined as at the date of death. Should the value of the estate, therefore, increase to more than R50 000 after the date of death, this will not change the position that the surviving spouse is the sole heir in a given case.[31]

4.1.3 If the estate devolved partly intestate, the portion which devolved testate is ignored in the calculation of the inheritances under the Act.[32]

4.2 Minimum share of the surviving spouse

4.2.1 Minimum share or preferential share

The present clause provides for a minimum share for the surviving spouse. If the balance for distribution is R50 000 or less, the survivor succeeds to the

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

32 In re MacGillivray's Will 1943 WLD 29.

whole estate. If the estate is more than R50 000 every stirps (a child of the deceased or a predeceased child's descendants) inherits the balance in excess of R50 000 in equal shares. The survivor does not inherit more than R50 000 until every stirps has inherited R50 000. If the estate is large enough to provide R50 000 for the survivor and each stirps, the survivor and stirpes inherit the estate in equal shares.[33]

The English law and most of the legal systems which have derived their rules from the English law provide for a preferential share (statutory legacy) in favour of the surviving spouse. Up to a certain amount the survivor succeeds to the intestate estate. The balance of the estate, if any, is distributed amongst the survivor and the other heirs. The survivor therefore usually inherits more than the other heirs.

Although the aim of the minimum share accords with the aim of the preferential share, a preferential share is more advantageous to a surviving spouse. The justification for a minimum share is considered in the next paragraph.

4.2.2 Justification for a minimum share

The aim of the minimum share is apparently that the surviving spouse should not have less than R50 000 to live on if the estate is large enough.[34] If the balance for distribution is less than R50 000 the surviving spouse is protected by the whole estate being awarded to him or her[35] but after sufficient provision has been made for the spouse the other heirs share in the estate.[36]

One of the clearing banks who commented on the working paper was of the opinion that there is no justification to prefer a surviving spouse above descendants. According to this bank the survivor should inherit only a child's share and not a guaranteed minimum.

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33 If the deceased leaves no descendant but leaves a parent or a brother or sister, the position is as follows: The surviving spouse inherits the first R50 000 and the other heirs inherit the next R50 000. If the estate is worth more than R100 000 the survivor inherits a half share and the other heirs inherit the balance.

34 Van der Merwe and Rowland 65.

35 Van der Westhuizen 37; Tasmania Working Paper par 5.2 at 12; Western Australia Report par 17 at 6.

36 British Columbia Report 25.

The South Australia Report[37] criticises the granting of a preferred share because it is too rigid. It does not take into account factors such as the duration of the marriage, the contribution made by the spouses or their families, the relationship between the spouses and whether the survivor remarries speedily. A preferred share is in some cases unfair to the surviving spouse and in some cases unfair to the children. That Committee is of opinion that it is preferable for a spouse to claim maintenance in deserving cases.

It cannot be denied that a minimum share can sometimes operate unfairly to the children. However, dependent children have a maintenance claim against the deceased's estate whereas a surviving spouse does not at present have such a claim. In the majority of cases the granting of a minimum share will operate fairly. A sample of estates in the office of the Master of the Supreme Court, Pretoria, indicates that there is a strong tendency for testators to appoint the surviving spouse sole heir, especially in the case of small estates.[38]

Another objection to a minimum share is that the stipulation of an amount in legislation forces the legislature, as a result of the continual depreciation in the value of money, to make statutory amendments more often than is considered desirable.[39] Apparently the surviving spouse cannot be protected effectively in the case of small estates without stipulation of an amount.

The Commission has considered whether a surviving spouse is not entitled to the larger benefits afforded by a preferential share.[40] The Commission is of opinion that a minimum share gives sufficient protection if the amount of the minimum share is kept at a realistic level[41] and that a survivor should not be preferred above the other heirs to a greater extent. This was also the view adopted in the working paper and only the one commentator referred to above criticised this view. The Commission recommends that a minimum share for the surviving spouse be retained.

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37 At 6.
38 Working paper at 11.
39 Van der Westhuizen 36; Van Warmelo 99.
40 Par 4.2.1. above at 6.
41 Par 4.2.4. below at 12.

4.2.3 Calculation of the minimum share

The question is whether the minimum share of the survivor should be reduced by the value of assets already owned by the survivor in his or her own right or assets received from the deceased in terms of the will or matrimonial property law, or whether all these other assets should be ignored and the total minimum share be made available in all cases. Several variations are possible as the minimum share is reduced by one or more of these types of assets or is not reduced at all. The present position is that in cases of a marriage in community of property where the surviving spouse inherits in competition with descendants, the half awarded to the spouse in terms of matrimonial property law is taken into account in the calculation of the share of the survivor's inheritance.[42] When the survivor inherits in competition with other relations[43] or in cases of a marriage out of community of property,[44] assets belonging to the survivor in his or her own right are not taken into consideration. In cases of partial intestacy the minimum share is not reduced by the benefit to the spouse under the will.[45]

It has been mentioned above[46] that the minimum share was probably introduced to ensure that, within the limits of the deceased's estate, the survivor has a certain amount to live on. If this principle is taken to its logical conclusion, the minimum portion must be reduced by all assets which the survivor already owns or inherits under the will or receives in terms of matrimonial property law. Similar principles were applied by a rule which was in force under Roman law.[47] This method would prevent a spouse who is already wealthy from claiming a part of the estate in preference to other heirs.[48] However, such an amendment would involve extra work for the executor, especially in the case of a marriage out of community of property. He would be obliged to determine the value of the survivor's assets and liabilities as well.[49] If valuations are necessary this may result in additional expenditure.

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42 Sec 1(1)(a) of the Succession Act 13 of 1934.
43 Ibid sec 1(1)(c).
44 Ibid sec 1(1)(b) and (c).
45 In re MacGillivray's Will 1943 WLD 29.
46 Par 4.2.2 at 7.
47 Glazer v Glazer 1963 4 SA 694 (A) 703A quoted in the working paper at 7.
48 Van der Westhuizen 37.
49 In the case of a marriage in community of property the executor calculates the nett value of the joint estate as a matter of course.

Another approach is that assets owned by the survivor in his or her own right or received in terms of matrimonial property law have nothing to do with succession and should be disregarded in all cases.[50] If a deceased dies partly intestate with a testamentary bequest to the survivor, it was the testator's intention that the survivor should receive this benefit and here, too, the benefit should be disregarded in the calculation of the intestate share, as is the position at present. This method is simple and cannot entail additional work or expense. This is the approach provisionally recommended in the working paper.

The persons and bodies who commented on the working paper supported the proposal that assets owned by the survivor in his or her own right or received in terms of matrimonial property law should be disregarded in all cases. Two commentators criticised the proposal that a surviving spouse (who may already have received a generous benefit in terms of the will) should in a case of partial intestacy inherit the first R50 000 of the intestate estate. Advocate Magid proposes that partial intestacies should be totally abolished by the application of an extended system of accrual or that a spouse's benefit under the will should be deducted from the minimum share. Advocate Laubscher supports the latter proposal that the testamentary benefit should be taken into account. He agrees with the following criticism of the present position by Mr Justice Millin:[51]

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

Thirteen of the commentators (expressly or by implication) supported the provisional recommendation in the working paper that the survivor should receive the full minimum share in addition to any benefit under the will. In Queensland, Tasmania, Australian Capital Territory, England and New Zealand the survivor's benefit under the will is deducted from the preferred share.[52] In Australian Capital Territory a child's benefit under the will is taken into account when

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50 1974 Hansard 6376.

51 In re MacGillivray's Will 1943 WLD 29 at 40, quoted in the working paper at 7.

52 South Australia Report 8; Western Australia Report par 40 at 11.

his intestate inheritance is calculated.[53] The South Australia Report[54] recommended that the surviving spouse should have an option to deduct the benefit under the will from the preferential share or to claim against the intestate estate in terms of their Inheritance (Family Provision) Act. The British Columbia Report[55] expresses the view that the basic premise of intestate legislation is that the surviving spouse should be preferred since this is what most people would intend. That Commission can see no reason to create a rule to limit the spouse's share. The Western Australia Report[56] recommended that the preferential share should not be reduced on the strength of criticism that "bringing into account benefits received under a will may well not accord with the wishes of the deceased and would also complicate the distribution of an estate". The Tasmania Working Paper[57] makes the valid point that it is unlikely that a testator would ever intend to leave a partial intestacy. Because testators do not intend to leave partial intestacies it is difficult to construe the intention of a testator in cases where partial intestacy occurs.

All the solutions to the problem discussed above (there are others as well) will sometimes operate fairly and sometimes not. The following factors are relevant. A sample indicates that testators leave the whole estate to the surviving spouse, especially if the estate is small.[58] A rule that the same minimum share should apply to all cases is simpler than a rule with exceptions. The majority of commentators on the working paper agree with the proposal that the minimum share should not be reduced by a benefit under the will. This proposal is in accordance with the present position.

The Commission recommends that the minimum share of the survivor should not be reduced by the value of assets already owned by the survivor in his or her own right or assets received from the deceased in terms of the will or matrimonial property law.

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53 Western Australia Report par 40 at 11.
54 At 8.
55 At 44.
56 At 11.
57 Par 5.154 at 58.
58 Working paper at 11.

4.2.4 Amount of the minimum share

The minimum share of the surviving spouse was fixed at R1 200 in 1934. In 1962 it was increased to R10 000 and in 1982 it was further increased to R50 000. Van der Westhuizen[59] and Van Warmelo[60] criticise the legislator's tardiness in adjusting the amount regularly. It is striking that law reform bodies often find it necessary to recommend that similar amounts be increased.[61] One commentator[62] considers that R50 000 is already insufficient. According to this commentator the minimum share should be sufficient to cover the price of a house and R100 000 is recommended. The main concern behind the introduction of a similar provision in Victoria was said to be to ensure that the matrimonial home was not lost to the spouse and children.[63]

The question is up to what amount is it fair for a survivor to inherit everything to the exclusion of other heirs? The normal cost of a house is one factor to be considered but it is not the deciding factor. The criterion should be that the amount must be sufficient (if the estate is large enough) to ensure that the surviving spouse will not suffer hardship. Although an exact calculation of such a vague concept is not possible the fluctuations in the consumer price index can be used as an aid to determine what a fair amount would be from time to time. If the R50 000 fixed in March 1982 is adjusted according to the index, it would have amounted to R66 584[64] in September 1984. In the light of the guidelines set out above the Commission is of opinion that a minimum share of R100 000 is fair at present.

The working paper[65] mentions a proposal that the Minister of Justice be authorised to increase the amount of the minimum share by promulgation of a regulation. The working paper goes on to comment that it does not appear advisable to regulate substantive law by regulation. In the Western Australia Report[66] a

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59 At 37.
60 At 99.
61 Queensland Report 23; Western Australia Report par 19 at 6; British Columbia Report 26; England Report 6.
62 Webber, Wentzel and Co.
63 Victoria Statute Law Revision Committee 1966 at 3 quoted in Tasmania Working Paper 12.
64 Government Gazette 8191 of 7 May 1982 at 24 and Government Gazette 9482 of 2 November 1984 at 22.
65 At 6.
66 Par 21 at 7.

majority of the Commission considered that the question of "adjustment of the amount of the statutory legacy is of sufficient consequence to merit Parliamentary consideration on each occasion that it arises". In England the Lord Chancellor can adjust the amount "by order".[67] The British Columbia Report[68] recommends that the Lieutenant Governor in Council be given the power to increase the amount by regulation, that the amount be reviewed regularly (but at least every five years) and that the increased amount apply only if the deceased died after the date of the regulation. In its recent Report on the review of preferent claims in insolvency[69] the South African Law Commission recommended that the State President be granted powers to adjust by proclamation the maximum amount of certain preferent claims.

Five of the commentators on the working paper expressly favoured non-parliamentary adjustment of the amount and another commentator was of opinion that it was necessary that the amount "be considered at regular intervals in the light of inflation". Another commentator suggested that the amount should be subject to adjustments in accordance with the consumer price index. Professor Sonnekus proposed that the amount of R50 000 should be adjusted to the consumer price index in every estate. He did not think that this would cause additional problems because section 4(1)(b)(iii) of the Matrimonial Property Act[70] would ensure that administrators of estates would become conversant with the application of the consumer price index. It is submitted that the considerations applicable to the matrimonial property law do not apply to the law of succession. In the case of the matrimonial property law there are a commencement value and a dissolution value for each marriage. It is not possible to fix an amount by legislation or by notice in the Government Gazette which would be appropriate to all marriages. In the case of intestate succession only the date of death is relevant. The minimum amount is suitable for all estates where the deceased dies within a reasonable time after the previous adjustment of the amount. The extra effort and uncertainty which this proposal would entail in an attempt to adapt intestate succession to each individual case is not justified.[71]

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67 Western Australia Report par 20 at 6.
68 At 26 and 28. Cf Tasmania Working Paper par 5.35 at 24.
69 At 53.
70 Act 88 of 1984.
71 Cf par 3.4 above at 5.

The Commission recommends that the Minister of Justice be empowered to adjust the minimum share by notice in the Government Gazette. The Commission does not recommend that statutory guidelines be prescribed for the Minister.

Certain legal systems provide that the surviving spouse shall be entitled to interest on the preferred share from death to the distribution of the estate.[72] In our law the nett income of the estate after death usually accrues to the heir who inherited the asset which generated the income.[73] Unless a redistribution agreement provides otherwise the intestate heirs receive the income after death in proportion to their inheritances. This rule is practical and fair and provision for interest on the minimum share does not seem to be an improvement on our existing system.

Certain systems[74] also provide that the survivor shall be entitled to "personal chattels".[75] This provision has the advantage that the value of the benefit keeps pace with inflation to a certain extent. However, the benefit which the survivor receives depends on the type of assets left by the deceased and this appears to be an arbitrary way of determining the value of the benefit. Apparently the provision also complicates the distribution of the estate. The same objections apply to a provision which awards an interest in the matrimonial home to the survivor.[76] Provision has already been made for a surviving spouse to take over estate assets at a valuation.[77] If the minimum share is fixed at a reasonable amount there is no justification to prefer a surviving spouse further above other heirs.

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72 England, New Zealand, Tasmania, Victoria and Western Australia. Cf Western Australia Report Appendix I.

73 Bouwer 488.

74 Victoria, Australian Capital Territory, England and New Zealand.

75 Vehicles, domestic animals, furniture and other defined personal effects. Cf Tasmania Working Paper 12 et seq.

76 In the light of several problems caused by the present position the British Columbia Report at 41 recommended that the spouse should no longer be entitled to a life interest in the matrimonial home.

77 Sec 38 of the Administration of Estates Act 66 of 1965.

4.3 Distribution of the residue after the award of the minimum share

4.3.1 Heirs who should compete with the surviving spouse

The present position is that descendants of the deceased compete first with the surviving spouse. If the deceased leaves no descendants but leaves a parent or a brother or sister, all the common law heirs in the second parentela[78] compete with the spouse.

Van Warmelo[79] recommends that the surviving spouse should be the sole heir on intestacy. He submits that in a normal marriage (especially if the parties are not wealthy) nothing is achieved if the deceased's estate is fragmented or devolves on persons other than the survivor. The survivor should retain the estate for the maintenance of the household. Should the matrimonial relationship be abnormal or should there be a large estate, the parties can easily modify the intestacy regime in a will.

The British Columbia Report[80] mentions the following reasons why testators usually (according to statistics almost 80 % of all cases where the deceased died testate leaving a spouse and children) appoint the surviving spouse sole heir. The spouse makes a valuable direct or indirect contribution to the deceased's estate. The spouse requires the bulk of the estate to maintain his or her standard of living. The deceased's children will often be the surviving spouse's heirs. One member of that Commission is of opinion that the surviving spouse should be the sole heir. His reasons are as follows. The statistics indicate that such a rule has overwelming support within the community. Since the fairly recent recognition of the spouse as intestate heir, the position of the spouse is periodically strengthened. The logical culmination of these developments is a rule that the spouse should be the sole heir. Rather than engaging in "a further 20 years of legislative tinkering" the spouse should now be declared the sole heir. This rule is simple. It is in any case not possible to provide for every conceivable circumstance. The spouses can make a will and the Wills Variation Act can be applied to unusual situations in a flexible way. The

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78 The parents of the deceased and their descendants. Cf par 5.1.2 and 5.1.3 below at 21 et seq.
79 At 99 quoted in the working paper at 10.
80 At 24 et seq and 159 et seq.

majority of the Law Commission of British Columbia is of opinion that it is sufficient if the preferred share is kept at a realistic level. For the same and further reasons the Ontario Report[81] rejected a tentative proposal in the Ontario Study[82] that the surviving spouse should be the sole heir.

The working paper[83] invited comments on Van Warmelo's proposal that the surviving spouse should be the sole heir. One commentator[84] is of opinion that the survivor should be the sole heir if there are no children from a previous marriage. The other commentators who dealt with the proposal were opposed to it, mentioning the following reasons: The surviving spouse can, it is true, make a will but there are many reasons like illness or negligence why this may not be done. If the surviving spouse, who usually has possession of the will, is made the sole intestate heir, the temptation to destroy a will which does not suit the survivor may be great. The Natal Law Society states in its comment that its experience of the drafting of wills indicates that testators, particularly those of means, are concerned to ensure that the survivor is provided for but also that their descendants will sooner or later benefit from their estates. A committee of the Association of Law Societies of the Republic of South Africa considers that R50 000 plus a child's share affords sufficient protection to the surviving spouse and that the appointment of the survivor as sole heir could have a detrimental effect on the estate duty position in large estates.

In the sample referred to above the survivor was appointed sole heir in 82 %[85] of the cases. There is nevertheless a trend not to appoint the survivor sole heir in large estates.[86] If the spouse were elevated to the position of sole heir this branch of the law would be greatly simplified and several problems would be eliminated.[87] However, the Commission is of opinion that there is not sufficient justification or support for the proposal that the surviving spouse should be the sole heir.

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81 At 165.
82 At 563.
83 At 13.
84 Webber, Wentzel and Co.
85 In 4 % of these cases the survivor was a fiduciary heir.
86 Working paper at 11.
87 Working paper at 13.

The working paper provisionally recommended[88] that only the descendants of the deceased should inherit in competition with the surviving spouse.

One of the clearing banks proposed in its comments on the working paper that a parent, brother or sister should compete with the surviving spouse. (This is the position at present.) If there are no descendants the surviving spouse should inherit a half, without the minimum share provided for at present, and the other half should devolve on the blood relations. The Natal Law Society also disagrees with the proposal that the surviving spouse should inherit the whole estate in the absence of descendants and appealed for the retention of the present position. In the light of its experience with the drafting of wills, estate planning and the administration of estates, the Society is of opinion that the working paper proposal overlooks those cases (especially cases of young persons) where the deceased's estate is in reality family money. It is not uncommon for testators, whilst making fair provision for a spouse, to leave family money to parents, brothers and sisters. In contrast to this, the Standing Committee on Estate Matters of the Association of Law Societies of the Republic of South Africa mentions that experience in practice has shown that cases where a married testator leaves something to his parents, brothers or sisters in a will are virtually non-existent. Indigent parents have a maintenance claim against the estate.

According to the sample the surviving spouse or descendants inherited the whole estate in all but 2 % of the cases where the deceased left a spouse or descendants.

According to the Western Australia Report[89] the surviving spouse competes only with descendants in Victoria and Tasmania whereas other relatives (mostly parents, brothers and sisters) also compete with the survivor in Western Australia, New South Wales, Queensland, South Australia, Australian Capital Territory, England and New Zealand. The British Columbia Report[90] and Ontario Report[91] recommended that only descendants compete with the surviving spouse. The rule (also applicable to us at present) in terms of which remote heirs, with whom the deceased may have had no contact, inherit in competition with the surviving spouse has been referred to as the "doctrine of the laughing heir".[92]

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88 At 13.
89 Appendix I.
90 At 28.
91 At 166.
92 British Columbia Report 27.

The Commission recommends that only descendants inherit in competition with the surviving spouse.[93]

4.3.2 The share of the residue which the surviving spouse should inherit

The working paper recommended provisionally[94] that (subject to provision for a minimum share) the surviving spouse inherit with descendants like an additional child.

The Master of the Supreme Court, Bloemfontein, proposed that the surviving spouse should inherit half of the estate because marriage amounts to a "partnership" and the survivor deserves to be in a more favourable position than a child. The Association of Trust Companies in South Africa proposed that the survivor should inherit a child's share plus 75 % of the joint estate or the deceased's estate. H Nijland proposed that the spouse should inherit a half plus a child's share and a usufruct on the residue.[95]

Eight of the nine systems discussed in the Western Australia Report[96] award a third of the estate (or the residue after a preferred share) to the survivor if there are descendants. Under three of these systems the survivor takes half if the deceased left only one child or a predeceased child with descendants. In Western and South Australia it was recommended that the latter rule apply there as well. The British Columbia Report[97] recommended that the spouse should always get half and not a third if there is more than one child.

If a minimum share for the surviving spouse is retained[98] the principle that the spouse be preferred above descendants has already been accepted. The question is whether a minimum share is sufficient or whether the spouse should be preferred further above descendants.

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93 If other heirs in addition to descendants compete with the surviving spouse, only heirs who exclude the surviving spouse as sole heir should inherit with the survivor. Cf the working paper at 11 et seq.
94 At 13 et seq.
95 Another commentator proposed that the surviving spouse take a usufruct if the spouses were separated or if it was not their first marriage.
96 Appendix I. See the discussion at 39 of the working paper.
97 At 26.
98 The Commission recommended this in par 4.2.2 above at 7.

A usufruct has the advantage that the control and use of the estate or the bulk thereof can be given to the surviving spouse while ensuring that the children inherit something eventually. However, a usufruct gives rise to practical problems and does not occur in wills so often that it should be made the rule in cases where there is no will. Although it is sometimes fair to equate a marriage with a partnership, such a rule would not always accord with realities. Marriage partners have long had the right to arrange their matrimonial property rights on the basis of a partnership. Since the introduction of the Matrimonial Property Act[99] it is easier to do so. Parties who are already married have the opportunity to make such a system applicable to their marriage.[1]

The provisional proposal in the working paper that the surviving spouse should inherit a child's share, received strong support from commentators. The Commission is of opinion that if the minimum share is large enough for the surviving spouse to live in comfort there is not sufficient justification to prefer the survivor further above descendants. The Commission recommends that the survivor inherit a child's share after provision for a minimum share.

4.4 Circumstances which should influence the surviving spouse's inheritance

4.4.1 Separation of spouses

The working paper[2] refers to a provision in a British Columbia Act that the surviving spouse of two spouses who have separated for not less than a year with the intention of living separate and apart shall not inherit on intestacy unless the court otherwise orders. Comments were invited on the advisability of such a provision in our law.

Quite a few commentators considered that a provision of this kind would be advisable. They argue that such a provision pays due regard to the unstated intention of the deceased and modern reality and that it would prevent intestate succession by an unworthy spouse. The majority of the commentators however who commented on this aspect were opposed to the adoption of such a provision, giving the following reasons for their view. Such a provision would complicate the administration of estates and oblige the executor to pry into the private

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99 Act 88 of 1984 sec 2.
1 Ibid sec 25.
2 At 14.

affairs of the spouses. The consequences of a marriage should continue to have effect until the dissolution of the marriage by an order of court. It is difficult to ascertain the reason for a separation after the death of one of the parties. The separation might not have been the surviving spouse's fault and it is unfair that he or she should be compelled to obtain a court order. Some couples who live together are in a certain sense more estranged from one another than couples who live apart. The provision would create a number of new problems like the following: What will the position be if one party intends to live apart but not the other? What evidence will be admissible? A testator can make a will to provide for changed circumstances. The British Columbia Report[3] points out that it is difficult to determine what criteria the courts consider and recommends that such cases should rather be dealt with under the general jurisdiction of their courts to order the just distribution of estates. That Commission recommends[4] that the provision should be deleted and that the separated spouse should succeed on intestacy unless a distribution of assets has been made under their Family Relations Act.

In the light of the general guidelines put forward above[5] and the comments received, the Commission does not recommend the introduction of such a provision into our law.

4.4.2 Children of the deceased from a previous marriage

In their comments on the working paper Webber, Wentzel and Co proposed that the survivor should inherit less than usual if there are children from a previous marriage. In their comments the Association of Trust Companies in South Africa proposed that a spouse of a later marriage should inherit less than the spouse of a first marriage.

The England Report[6] expresses the view that there is a danger that a surviving spouse may not treat the deceased's children from a previous marriage as well as if they had been his or her own children.[7] This consideration persuaded that Committee not to give the spouse a life interest in the whole estate. The Ame-

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3 At 33.
4 At 116.
5 Par 3.4 above at 5.
6 Par 29 at 11.
7 Cf par 5.10 of the Tasmania Working Paper at 14.

rican Uniform Probate Code[8] and a 1966 amendment to The Devolution of Estates Act in Ontario[9] provide that the surviving spouse is not entitled to a preferential share if there are children from a previous marriage. The Ontario Report[10] recommended that the last-mentioned provision be repealed because there can be no assurance that a survivor would neglect to care for the stepchildren. Provision for the children can be made in terms of The Dependants' Relief Act. The British Columbia Report[11] also expresses the view that such a provision is arbitrary and will not necessarily be appropriate. The courts' power to vary succession affords sufficient protection.

In our law dependent children have a claim for maintenance against a parent's estate. Bouwer[12] is of opinion that an executor has a duty to examine the possibility of a maintenance claim by minor children.

In this case too the Commission is of opinion that an exception to the general rule relating to provision for the surviving spouse is not advisable.

5. INTESTATE SUCCESSION IF THERE IS NO SURVIVING SPOUSE

5.1 The present position[13]

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

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

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

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8 British Columbia Report 27.
9 Ontario Report 165
10 Ibid.
11 At 27.
12 At 329.
13 In the discussion that follows Van der Merwe and Rowland 89 et seq are sometimes quoted without further acknowledgment.

5.1.3 If both parents are dead and there are descendants of a deceased parent, either of the whole or the half blood, within the fourth degree,[14] on both sides, the estate is divided into two halves and each half is divided by representation amongst the said relatives on each side (the deceased's brothers and sisters and their children and grandchildren). Collaterals of the fifth degree onwards are ignored. If the deceased is survived on both sides only by collateral relations of the fifth degree onwards, either of the whole or the half blood, the estate is divided into two and each half devolves amongst the relations mentioned, in accordance with the principle that the nearest relations take equally. If there are only collateral relations of the fifth degree onwards on one side, while there are relations within the fourth degree on the other side, the former succeed to their half in accordance with the principle that the nearest relations inherit equally, while the latter succeed to the other half by representation. If there are no collateral relations on one side the estate on that side ascends to the grandparents and their descendants. If there are no collateral relations on either side the estate is still divided into a moiety on the father's side and a moiety on the mother's side and each moiety ascends to the grandparents concerned and their descendants (the third parentela). If both parents are dead, brothers and sisters of the whole blood inherit from both parents while relatives of the half blood inherit only from the parent concerned. If one parent is dead, whole blood and half blood inherit equally from the deceased parent, while half blood of the surviving parent do not inherit.

5.1.4 If both grandparents on a side in question are living each takes one half of that side's half, in other words each grandparent inherits one quarter of the estate. If only one is alive, he or she and all persons related to the deceased through him or her only are excluded from the intestate inheritance. This half goes to the descendants of the deceased grandparent (equally to whole and half blood) by representation to relations of the fourth degree or nearer (uncles and aunts and their children). If there are no collaterals in the fourth degree or nearer, this half goes equally to the nearest relations in the further degrees. If both grandparents died without descendants, one half of the half which ascended to the grandparents goes to the relations on the grandfather's side and the other to the relations on the grandmother's side in accor-

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

dance with the same rules as those discussed above in connection with a deceased grandparent. Whole-blood relations inherit from both the deceased grandparents while half-blood relations inherit only from the grandparent concerned.

5.1.5 If a deceased grandparent left no descendants, his quarter goes to his parents and their descendants (the fourth parentela) in accordance with the rules set out in paragraph 5.1.4 above.

5.1.6 The same rules apply to further parentelae.

5.2 Proposals for reform

5.2.1 The persons and bodies approached during 1979 to identify defects in the law of succession[15] did not express much criticism. Three of the commentators proposed that one surviving grandparent should not be excluded.

Van der Westhuizen[16] and Van Warmelo[17] made reform proposals in articles in law journals. These proposals are quoted in full in the working paper[18] and are not repeated here. The position in certain other legal systems is set out in Annexure D to the working paper.[19]

5.2.2 A sample of 1 000 files in the office of the Master of the Supreme Court, Pretoria,[20] revealed the following. In the 504 cases where the deceased left a surviving spouse and a will the portion which was not inherited by the surviving spouse devolved on the descendants in all but four of the cases. In the 215 cases where the deceased left a will and descendants but no surviving spouse the descendants inherited the estate in 95 % of the cases. In about 80 % of these cases the descendants inherited the estate per stirpes. In the 284 cases where the deceased left a will but no spouse the estate or a share thereof devolved further than the second parantela (the deceased's parents and their descendants) in 14 % of the cases. In the total sample of 1 000 estates intestate succession further than the second parentela occurred in four cases only.

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15 Annexure A to the working paper at 34.
16 At 30 et seq.
17 At 110 et seq.
18 At 18 et seq.
19 At 41.
20 Annexure B to the working paper at 35.

5.2.3 The provisional proposals in the working paper agree substantially with clauses 1(1)(b), (d) and (e) of the Bill recommended in Annexure C to this report.[21] The present position, that descendants per stirpes are in the first place entitled to the estate, has been retained. In the second parentela (where the deceased did not leave descendants but did leave a parent or descendants of a parent) the rules have been simplified. The effect of the rules is the same as the present position[22] except for the rare cases where the deceased parent is not survived by children, grandchildren or great-grandchildren but is survived by other descendants. In the third and further parentelae (where the deceased is not survived by descendants, a parent or descendants of a parent) the present position[23] has been simplified considerably by providing that blood relations related to the deceased in the nearest degree inherit the estate in equal shares. In the total sample of 1 000 estates only four such cases of intestate succession occurred. The most important change brought about by this amendment is that the surviving ancestor[24] in these parentelae will inherit to the exclusion of other blood relations whereas the surviving ancestor does not inherit at present. The grandparent will always exclude relations such as uncles, aunts and cousins where at present this will only be the case if both grandparents on a particular side survived the deceased. If all four the grandparents are predeceased and there are no nearer surviving blood relations, the surviving great-grandparents will compete with uncles and aunts.

5.2.4 The Commission's proposals amount to a codification of the rules which indicate the intestate heirs. Van der Westhuizen[25] makes a plea for codification. His reasons are that the present rules are diffuse and obscure and are contained in three enactments in sixteenth and seventeenth century Dutch. He submits that it is difficult to ascertain the fundamental rules. Justice Training[26] made a plea against codification because the common law principles are reasonably clear and do not cause many problems. Codification may give rise to uncertainty and new problems of interpretation. The working paper

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21 At 33 et seq below.
22 Par 5.1.2 and 5.1.3 above at 21 et seq.
23 Par 5.1.4 to 5.1.6 above at 22 et seq.
24 Viz where the ancestor's spouse is predeceased.
25 At 29 quoted in the working paper at 23.
26 Through Dr N J van der Merwe, co-author of Van der Merwe and Rowland, quoted in the working paper at 23.

pointed out[27] that there is remarkable unanimity about the substance of the rules amongst the authors of law books and that the rules are set out quite clearly in short Afrikaans or English summaries in numerous modern textbooks. In their comments on the working paper Mr Justice Cloete and Advocates Van Zyl and Laubscher supported Justice Training's plea against codification.

It is submitted that only one of two solutions is acceptable. Either the rules should be left as they are or they should be enacted in a statute. If the rules are enacted in a statute they should at the same time be simplified. It is unthinkable that for instance an amendment to the Political Ordinance of 1580 and the Octrooi of 1661 could rectify the position of the grandparents. A statutory rule for the grandparents only, leaving the rest to the common law would moreover result in patchwork. The Commission is of opinion that a reformulation of the rules is justified. The cumbersome rules laid down at present for cases which occur rarely are not acceptable. Furthermore there are well-founded objections to the present position of a surviving grandparent. The rules which are to be re-formulated are not rules of the common law as developed by the old authors. The "codification" is merely a consolidation and revision of three old Dutch laws and one South African Act.

5.2.5 Only a few commentators criticised the proposals in the working paper. Mr Justice Cloete proposed that the present position be retained. Advocate Van Zyl criticised codification but added that the working paper's proposals for the cases which elicited criticism appear to be acceptable. Advocate Laubscher favoured Van Warmelo's proposals.[28] The proposal by Van Warmelo which would in practice differ most from the working paper's proposals is that a single surviving parent should inherit the whole estate and that one half should not devolve on the predeceased parent's descendants (brothers and sisters of the deceased and their descendants). One commentator proposed a system under which the relations inherit equally in the following order: children, grandchildren, parents, brothers and sisters, nephews and nieces, uncles and aunts, cousins, grandparents and lastly the State.

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27 At 24 et seq.
28 At 110 et seq quoted in the working paper at 20 et seq.

5.2.6 In the working paper[29] the view was expressed that it is reasonable that blood relations should inherit the assets and that certain relations should not be excluded by the State. If the heirs are absent or unknown the executor must pay their share of the inheritance into the Guardian's Fund.[30] Should the heir fail to claim the inheritance within 30 years it is forfeited to the State.[31] There has been debate on this aspect in other legal systems and some of them provide that the State excludes certain relations.[32] Van Warmelo[33] proposed that the State exclude certain collaterals outside the fourth degree. Apparently the absence of a limitation on intestate heirs in our law does not give rise to the practical problems experienced in certain other legal systems. The Commission does not recommend any change in the present position in this regard. No blood relation should be excluded as an heir by the State.

5.2.7 The Commission has carefully considered all the criticism of the present position and the comments received on the working paper. The Commission has decided that there is no reason to depart from the provisional proposals under items (i), (ii) and (iii) at 27 of the working paper. The Commission's recommendations are embodied in clauses 1(1)(b), (d) and (e) of the Bill recommended in Annexure C to this report.[34]

6. RENUNCIATION BY HEIRS AND DISQUALIFICATION FROM INHERITING

The working paper[35] points out that there is difference of opinion on the effect of renunciation by persons who succeed with the surviving spouse. Clause 1(3) of the draft legislation at 49 of the working paper provides that no succession shall take place through the line of a person if he renounced his intestate inheritance or is disqualified from inheriting from the deceased on intestacy. This proposal elicited lively interest and almost all the commentators commented specifically on it. The commentators were divided almost equally for and against the proposal. Representation in the law of succession (which in-

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29 Par 3.5.3 at 28.
30 Sec 43(6) of the Administration of Estates Act 66 of 1965.
31 Ibid sec 91.
32 Tasmania Working Paper par 5.53 to 5.70 at 28 et seq.
33 At 106.
34 At 33 et seq below.
35 At 9.

cludes testate and intestate succession) must still be examined in full by the Commission.[36] However, the Commission is of opinion that legislation recommended by it should not perpetuate the existing uncertainty regarding this matter. The Commission has accordingly decided to insert a clause in the Bill which clearly regulates the position. The provisions of clause 1(3)(b) and (e) of the Bill[37] accord with the rules applied in practice at present. If it emerges from the detailed investigation of representation in the law of succession that amendments are advisable the matter will be dealt with in a later report.

7. THE EFFECT OF ADOPTION ON INTESTATE SUCCESSION

At the time when the Commission considered the working paper section 74 of the Children's Act[38] dealt with the effect of adoption on intestate succession. This section provided that an adopted child shall inherit from his own parents and their blood relations and his adoptive parents but not from the blood relations of his adoptive parents. The section also provided that the adopted child's adoptive parents and their blood relations shall inherit from the adopted child but not his own parents and their blood relations. Section 74 gave rise to interpretation problems[39] and was also criticised for its unfair operation. Van der Westhuizen is of opinion[40] that the mere fact that a person and his descendants fall into two families is in itself undesirable. The adopted child inherits from his blood relations but they do not inherit from him. The adopted child obtains limited succession rights in his new family while the succession rights in his own family are often only empty shells. The trend in other legal systems is to detach the adopted child from his own family and to include him in the family of his adoptive parents.[41]

The Child Care Act[42] provides for the repeal of the Children's Act. The effect of section 20 of the Child Care Act appears to be the same as that of the provisional proposal in the working paper.[43] The relevant parts of section 20 read as follows:

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36 Par 1.1 above at 1.
37 At 35 et seq below of this report.
38 Act 33 of 1960.
39 Working paper at 29.
40 At 35 quoted in the working paper at 30.
41 Par 4.2.5 of the working paper at 31. Cf British Columbia Report 13.
42 Act 74 of 1983, not yet in operation.
43 Clause 1(2) of the draft legislation at 49 of the working paper.

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

(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.

...

(5) When an order is made for the adoption of any child, any order made in respect of that child under section 15 of this Act or section 290 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), shall lapse.

Section 17(c) provides that a child may be adopted by a married person of whose spouse the child is born. The rights and obligations existing between a child and his natural parent and that parent's relatives are therefore not terminated by an order of adoption if the adoptive parent was married to the natural parent at the time of adoption.

Only one commentator, Mr Justice Cloete, was totally opposed to the proposal in the working paper. He holds the view that the existing rules are logical in substance and operate more fairly in respect of adopted children without seriously detracting from the rights of other descendants. Advocate Van Zyl is of opinion that it is inconsistent to make an exception in a case where the natural parent is married to the adoptive parent even though this may in certain circumstances appear to be reasonable.

The Commission is satisfied with the provisions of section 20 regarding the effect of adoption on intestate succession and recommends that this section should regulate the position. The question whether section 20 of the Child Care Act offers a satisfactory solution to problems regarding adoption and testate succession will be considered in due course.[44]

8. A SEPARATE SYSTEM OF SUCCESSION FOR MUSLIMS

Advocates A B Mahomed and I M Bawa submitted a memorandum in which they proposed that a separate succession law system for Muslims be recognised. It has been

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44 Par 1.1 above at 1.

the experience of these commentators that an overwhelming number of Muslim testators desire that their estates devolve according to the Islamic law. A departure from the succession rules of the Quran is non-observance of Divine Law which is treated in a serious light by Muslims. The application of rules of intestate succession contrary to the Quran places the heirs "from the moral and ethical point of view in an extremely difficult, embarrassing and grievous position".

In another memorandum the commentators made an appeal for the recognition of Muslim marriages in South African law. The non-recognition of Muslim marriages affects succession. The Commission is of opinion that there appears to be a need for an investigation into the law relating to marriage and its legal consequences with a view to accommodating the needs of the different communities of the Republic to a greater extent. At present, however, the Commission is not in a position to undertake such an investigation because of limited manpower and money and an already demanding programme. The Commission would also like to complete its investigation into Marriages and customary unions of Black persons[45] first, considering the policy decisions which might arise from it.

The rules of intestate succession are not forced upon anyone. Any person has the right to regulate the distribution of his estate by will. In cases where intestate succession occurs the beneficiaries can arrange the position by redistribution agreements or renunciations (and if necessary by means of donations) to accord with their beliefs. The rules of intestate succession cannot be adjusted to ensure fair distribution in unusual cases,[46] especially if the rules are complicated and difficult to apply.[47] The Commission does not recommend the enactment of separate rules of intestate succession for Muslim estates.

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45 Project 51.

46 According to the Central Statistical Services approximately 19 % of the Indians and 6 % of the Coloureds in South Africa are Muslims. The figures for the other population groups are not significant.

47 Cf par 3.4 above at 5.

9. DRAFT LEGISLATION

Section 5(5) of the South African Law Commission Act[48] provides that if after investigating any matter the Commission is of the opinion that legislation ought to be enacted with regard to that matter, the Commission shall prepare draft legislation for that purpose. A Bill to give effect to the Commission's recommendations is attached as Annexure C. In order to prevent confusion the Commission recommends that the amending provisions or adjustments to the minimum share shall apply only to the estates of persons who died after the amendments. Two commentators on the working paper recommended that an express provision should indicate that the value of an estate shall be determined as at date of death. The Commission is of the opinion that such a provision is unnecessary and would cause more problems than it would solve. The other provisions of the Bill have been explained earlier in this report.

10. ACKNOWLEDGMENT

The Commission expresses its gratitude to the persons and bodies[49] who commented on the working paper and in so doing made their specialised knowledge on the subject available to the Commission.

48 Act 19 of 1973.
49 Annexure B to this report at 32.

ANNEXURE A

PERSONS AND BODIES TO WHOM THE WORKING PAPER WAS FORWARDED OF THE COMMISSION'S OWN ACCORD

Association of Trust Companies in South Africa
Chief Justice and Judges President (7)
Clearing Bankers Association of South Africa
N de Gruchy
Prof H J Erasmus
General Council of the Bar of South Africa
Justice Training
Law Journals (12)
Law Societies (6)
Magistrates' Association of South Africa
Masters of the Supreme Court (7)
Minister of Justice
J G Mowatt
Research Bulletin
A Skelton
South African Institute of Chartered Accountants
Southern African Institute of Chartered Secretaries and Administrators
State Attorneys (7)
Universities (21)
Prof F van Zyl

ANNEXURE B

PERSONS AND BODIES WHO COMMENTED ON THE WORKING PAPER

1 Association of Law Societies of the Republic of South Africa
2 Association of Trust Companies in South Africa
3 Chief Master of the Supreme Court
4 Clearing Bankers Association of South Africa (four of its members)
5 Mr Justice J D Cloete
6 Advocate H Laubscher (Bloemfontein bar)
7 Advocate P A M Magid SC (Durban bar)
8 Advocate A B Mahomed and Advocate I M Bawa
9 Master of the Supreme Court, Bloemfontein
10 Master of the Supreme Court, Cape Town
11 Natal Law Society
12 H Nijland
13 Prof J C Sonnekus (Rand Afrikaans University)
14 South African National Council for Child and Family Welfare
15 Standard Trust Limited
16 Advocate D H van Zyl SC (Pretoria bar)
17 Webber, Wentzel and Co
18 Woman's Legal Status Committee

ANNEXURE C - DRAFT LEGISLATION

BILL

To amend the law of intestate succession; and to provide for matters incidental thereto.

Introduced by the Minister of Justice

BE IT ENACTED by the State President and the Parliament of the Republic of South Africa, as follows:-

Rules of intestate succession.

1. (1) If a person dies wholly or partly intestate after the commencement of this Act and -

(a) is survived by a spouse but no descendant, such spouse shall be the sole heir of the intestate estate;

(b) is survived by descendants but no spouse, such descendants shall per stirpes be the sole heirs of the intestate estate;

(c) is survived by a spouse as well as descendants -

(i) such spouse shall succeed to the intestate estate to the extent of a child's share or so much as does not exceed R100 000 in value

(or such other amount as may be fixed by the Minister of Justice from time to time by notice in the Gazette) whichever is the greater; and

(ii) such descendants shall per stirpes be the sole heirs of the residue (if any) of the intestate estate;

(d) is not survived by a spouse or descendants, but is survived by a parent or descendants of a parent, the mother or, if she did not survive the deceased, her descendants per stirpes, shall succeed to one half of the intestate estate and the father or, if he did not survive the deceased, his descendants per stirpes, shall succeed to the other half of the intestate estate, and if there is no surviving parent or descendant of such parent on one side, the other parent or his descendants per stirpes shall succeed to the whole intestate estate;

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

(2) A notice referred to in subsection 1(c)(i) shall not apply in respect of the intestate estate of a person who died before the date of that notice.

(3) For the purposes of subsection (1)-

(a) an "intestate estate" shall include any share of an estate which does not devolve under a will or to which the provisions of section 23 of the Black Administration Act, 1927 (Act No. 38 of 1927), do not apply;

(b) any person who is disqualified from inheriting from the intestate estate of the deceased or who has renounced his right to succeed to the inte= state estate of the deceased or the descendants of such person (except descendants of the surviving spouse) shall be deemed not to have survived the deceased;

(c) the degree of consanguinity of a blood relation of the deceased -

(i) who is an ancestor of the deceased, shall be the number of generations from the ancestor to the deceased;

(ii) who is not an ancestor of the deceased, shall be the number of generations from the blood

relation to the nearest common ancestor of such blood relation and the deceased plus the number of generations from the said ancestor to the deceased;

(d) descent and consanguinity with reference to an adopted child shall be determined in terms of the provisions of section 20 of the Child Care Act, 1983 (Act No. 74 of 1983);

(e) the surviving spouse of the deceased shall be deemed to be a child when a child's share is calculated.

Repeal of laws.

2. The laws specified in the Schedule are hereby repealed to the extent set out in the third column of the Schedule.

Short title and commencement.

3. This Act shall be called the Intestate Succession Act, 198_, and shall come into operation on a date to be fixed by the State President by proclamation in the Gazette.

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SCHEDULE

LAWS REPEALED

Number and year of Law	Title or subject	Extent of repeal
The Political Ordinance of 1 April 1580	The Political Ordinance	Sections 20 to 28
Interpretation of 13 May 1594	Interpretation of the Political Ordinance	The whole
Octrooi of 10 January 1661	Octrooi	The whole
Act No. 13 of 1934	Succession Act, 1934	The whole
Act No. 93 of 1962	General Law Further Amendment Act, 1962	Section 15
Act No. 44 of 1982	Succession Admendment Act, 1982	The whole
Act No. 88 of 1984	Matrimonial Property Act, 1984	Section 27