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Project 134
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ADMINISTRATION OF ESTATES

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Introduction

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

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The project leader is Professor Maithufi. The researcher responsible for the investigation is Mr Tienie Cronje.

Preface

This Paper has been prepared by the researcher to elicit responses and to serve as basis for the Commission's further deliberations. It contains the Commission's **preliminary** recommendations. The views, conclusions and recommendations which follow should not be regarded as the Commission's final views.

The Paper (which includes draft legislation) is published in full so as to provide persons and bodies wishing to comment with sufficient background information to enable them to place focused submissions before the Commission. **A summary of preliminary recommendations and questions for comment appear on page (vii). The proposed draft legislation is contained in Annexure 1 on page 75 of this Paper.**

The Commission will assume that respondents agree to the Commission quoting from or referring to comments and attributing comments to respondents, unless representations are marked confidential. Respondents should be aware that the Commission may in any event be required to release information contained in representations under the Promotion of Access to Information Act 2 of 2000.

Respondents are requested to submit written comment and representations to the Commission by 18 November 2005 at the address appearing on the previous page. Comment can be sent by post or fax, but comments sent by e-mail in electronic format are preferable.

This Discussion Paper is available on the Internet at www.doj.gov.za/salrc/index.htm.

Any enquires should be addressed to the Secretary of the Commission or the researcher allocated to the project, Mr Tienie Cronje. Contact particulars appear on the previous page.

Overview

(See page (vii) for a complete list of preliminary recommendations and questions for comment with cross-references to the discussion in the paper)

The main thrust of the review of administration of estates is to consider a unitary system for all South Africans. Measures to improve the administration process and reduce the work of the supervising authority and executors, as far as can be justified, are also considered.

It is recommended that all estates should be administered subject to the supervision of the Master and that beneficiaries should have a choice to report an estate to the Master or a service point with jurisdiction.

Estates of all persons who die leaving a will or property must be reported. Comment is invited on the question whether a role should be retained for traditional leaders or authorities and customary law.

Comments are invited on the Master's Policy and Procedural Manual: Administration of Intestate Deceased Estates at Service Points, in particular on designation of service points, the need for centralised records, the reporting of testate estates and the payment of funeral expenses before the appointment of an estate representative.

The Master should not be obliged to examine accounts or tax executor's remuneration if no estate duty is payable, beneficiaries have no objections or complaints, there are no disputes about the administration, and there are no absentee, unborn, or minor beneficiaries, or other beneficiaries with limited capacity.

Different types of appointment, namely appointments for small estates in terms of section 18(3) and for foreign estates in terms of sections 21 and 25 should be done away with. Special rules should be enacted for executors in small estates which dispense with all requirements once an appointment has been made. Before the appointment of the executor in a small estate, the beneficiaries must sign a statement of assets and liabilities, which shows the intended distribution of the balance and the appointment must set out the assets to be dealt with by the executor.

In estates which comply with specified conditions an executor should be exempted from complying with almost all the requirements of the Administration of Estates Act once the

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executor has advertised for creditors and advertised a final account for inspection free from objections.

Regulation 910 should be repealed. Security should be called for in all estates except if the executor is or will be assisted in the administration of the estate by an attorney, accountant, board of executors or trust company, bank, or any other category of person exempted by the Minister from furnishing security in the light of the capabilities of the category of persons and measures to ensure professional conduct by the category of persons. If an executor or agent fails to comply with requirements the Master may refuse further appointments unless security is lodged.

The allocation of funds to the Master should reflect the reality that the Masters' offices play an important role in the lives of people and that the ability of the Masters' offices to render an efficient and effective service must be enhanced.

Comments are invited on the question whether the Master should decide questions of fact and whether the Master should have wide powers to gather information, and appoint a joint executor?

The Chief Master or one of the Chief Master's staff designated by the Chief Master as Ombud should have authority to investigate the actions of a Master or designated official, consider the merits of a matter, take evidence, review a decision of the Master or designated official and give directions which the Ombud deems fit to a Master or designated official.

Newspaper notices in terms of sections 29 and 35 should be done away with. Notice in the Government Gazette should be done away with if a website with public access has been established where notices can be placed.

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The forms for death notices and inventories should be reviewed, death certificates should be lodged in all estates and it should be a criminal offence to wilfully furnish false information to the Master.

No changes to the calculation of executors' remuneration are recommended, but a fee charged by an agent should be noted with the executors' remuneration in the account if it differs from the remuneration.

Authority signed by an heir or creditor to effect payment by transfer of funds to a banking account identified in the authority and proof of transfer of funds to that account should be accepted as a receipt in terms of section 35(12) of the Administration of Estates Act. In cases where section 28 will apply the executor should be allowed to open any account with a bank or the Postbank and should not be obliged to open a cheque account.

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PRELIMINARY RECOMMENDATIONS AND QUESTIONS FOR COMMENT

1. The advantages of service points outweigh the disadvantage of the costs to run service points and the transfer of documents from service points to centralised offices (par 2.6).
2. The review of the administration of estates should continue on the basis of the majority order in the decision, but the rules for the administration of estates should be reconsidered if the law of succession is amended (par 2.10.1).
3. All estates should be administered subject to the supervision of the Master (par 2.10.2); and
4. Beneficiaries should have a choice to report an estate to the Master or a service point with jurisdiction (par 2.10.3).
5. The Administration of Estates Act should refer to service points or designated official where appropriate and for ease of reference “designated official” and “service point” should be defined in section 1 (par 2.10.4).
6. Section 4(1) of the Administration of Estates Act, which deals with jurisdiction of the Master, should refer to the area or jurisdiction of a “division” of the Supreme Court” and not a “provincial division” (par 2.13).
7. Estates of all persons who die leaving a will or property must be reported (par 3.4).
8. Comments are invited on the question whether an administrator in terms of customary law should in some cases be appointed in order to protect the interests of surviving family (par 3.5).
9. Should a role be retained for traditional leaders, traditional authorities and the customary law of the administration of estates (par 3.6)?
10. Comments are invited on the main features of the Master’s Policy and Procedural Manual (par 4.2.3)
11. The possibility of more service points should be considered from time to time. In some regions deaths are reported in the first place to traditional authorities, and the possibility to locate service points with traditional authorities should be considered. (Par 4.3.3.)
12. Pending the introduction of a central electronic database of deceased estates, a service point should obtain a reference number from the Master before opening a file and the Master’s records should indicate if a file is transferred from a service point. Alternatively

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the death notice should require confirmation that the estate has not been reported previously to a Master or service point. (Par 4.4.4.)

13. If it is impractical to have staff at service points with sufficient training and responsibility to consider whether a will is valid on the face of the document, the will and copies of other estate documents should be submitted to the Master. If the beneficiaries under the will are identical to the intestate heirs, the service point should communicate this conclusion to the Master and continue with the administration of the estate. The (provisional) decision whether the will is accepted should be endorsed on the will by the Master before a copy of the will is forwarded to the service point. (Par 4.5.6.)
14. Commentators are invited to indicate who are liable according to customary law for funeral expenses such as the slaughter of an ox or other beast (par 4.6.8).
15. Should urgent payments before the appointment of an executor be limited to the basic cost of a coffin and funeral expenses (par 4.6.9)?
16. Comments are invited on the addition of the following provision after section 11(1) of the Administration of Estates Act (par 4.6.10):
 - (1A) The Master or designated official may before the appointment of an executor (or Master's representative, if this is retained), in order to defray the costs of a basic coffin and funeral service of a deceased person, instruct a bank which holds available funds in the name of the person to pay a specified amount to a specified person.
17. The Master should not be obliged to examine accounts or tax the executor's remuneration if-
 - beneficiaries have no objections or complaints;
 - there are no disputes about the administration of the estate;
 - there are no absentee, unborn, or minor beneficiaries, or other beneficiaries with limited capacity; and
 - there is no reasonable possibility that estate duty is payable (par 5.2.18) .
18. Regulation 5 should not apply to the form of account required for estates dealt with in terms of the recommendation in paragraph 20 below. For these accounts a simple form should be prescribed, as proposed in Annexure 3 on page 127 of this paper (par 5.2.26).
19. Comments are invited on the question whether R125,000 is a suitable limit for estates to be regarded as "small" estates (par 5.2.30).
20. If it appears to the Master or designated official that-

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- the estate is solvent;
 - no estate duty is payable;
 - the value of the assets in the estate is less than an amount determined by the Minister by notice in the Government Gazette (say R125,000);
 - unborn beneficiaries, minors or other beneficiaries with limited legal capacity will not be prejudiced; and
 - the beneficiary or beneficiaries, or a legal representative of a beneficiary, have signed a statement of assets and liabilities, including the executor's remuneration, if any, which shows the intended distribution of the balance of the estate, the Master or designated official must appoint an executor with authority to deal with the assets set out in the appointment and exempt the executor from compliance with all other requirements under the Administration of Estates Act. The Master or designated official may hold a meeting of beneficiaries, but can dispense with such a meeting or a notice in the Government Gazette if in the Master's opinion it is not necessary or expedient to hold a meeting or publish a notice. The Master should retain the right to direct any executor to comply with any of the provisions of the Act and this should be stated on the certificate of appointment (par 5.2.33).
21. The Master should have authority to consent to a sale in execution in terms of section 30 after appointment of an executor in terms of section recommendation 20. Section 42(1) must make provision for transfer of immovable property to beneficiaries if the transfer is in accordance with the statement of assets and liabilities contemplated in recommendation 20. In terms of section 42(2) a certificate by the Master should be required by the executor appointed in terms of recommendation 20 to effect transfer of immovable property in pursuance of a sale. In accordance with section 50 of the Administration of Estates Act, any executor appointed in terms of recommendation 20 who makes a distribution contrary to the statement or distributes the estate before payment of a claim should be held personally liable to any heir and anyone whose claim is reflected in the statement or of whose claim the executor was aware when the assets were distributed (par 5.2.35).
22. Except for sections 35(13), 39, 40, 42, 49, 51(4) and 53 of the Administration of Estates Act, an executor who has advertised for creditors and advertised a final account for inspection free from objections, shall not be required to comply with any requirements in the Act in the following circumstances:
- No estate duty is payable; and

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- The estate is solvent; and
- There is no absentee beneficiary, minor beneficiary or other beneficiaries lacking full legal capacity, or an unborn heir who may become entitled to benefits in terms of a liquidation or distribution account.

Despite this recommendation, the Master may instruct an executor at any time to comply with any requirement of the Act and the Master's authority to do so should be noted on the certificate of appointment (par 5.2.44).

23. Comment is invited on the question whether persons who are allowed to act on behalf of minors or other persons should be limited to "legal representatives" (par 5.2.48).

Regulation 910 and security (see par 5.3.25 for items 24 to 29 below)

24. Regulation 910 should be repealed.
25. With the exception of a person appointed in accordance with recommendation 20, every executor, must lodge security to the satisfaction of the Master except
- if the executor is or will be assisted in the administration of the estate by
 - any person duly admitted to practise as an attorney in the Republic;
 - any accountant or auditor registered under the Public Accountants and Auditors Act 80 of 1991;
 - any board of executors or trust company which was not prohibited from administering an estate when this provision came into force;
 - any bank;
 - any category of persons exempted by the Minister under paragraph 26 below; or
 - if the Master is satisfied that the executor should be exempted from furnishing security in the light of the capabilities and trustworthiness of the executor or the person who will assist the executor.
26. If it appears to the Minister that a category of persons should be exempted from furnishing security in the light of their capabilities and measures to ensure professional conduct, the Minister may exempt that category by notice in the Gazette. The Minister may similarly revoke an exemption if it appears to the Minister that the category of persons should no longer be exempted.
27. The Master must keep a record of instances where a person appointed as executor fails to comply with legal requirements or to administer an estate properly and a record of

persons who indicated that they will assist such an executor in the administration of the estate.

28. Despite paragraph 25 the Master may, after notice to the executor or the person who assists the executor, refuse to appoint the executor in another estate or an estate where the executor will be assisted by such a person, unless security has been furnished. The notice must indicate the reason for the Master's notice and list instances where an executor failed to comply with legal requirements or to administer an estate properly.
29. The Master may revoke a notice in paragraph 28 if the Master is satisfied that the executor or person is capable to administer estates and will in future administer estates properly or see to it that estates are administered properly.
30. An executor should be appointed in all estates regardless of the value of the estate, although special rules may apply to executors appointed in estates under a prescribed value (par 5.4.6).
31. The Administration of Estates Act should not distinguish between the administration of foreign estates and the administration of other estates (par 5.4.15).
32. Special provisions for tutors or curators in proclaimed States should be deleted (par 5.4.16).
33. Sections 7(1)(a), 9(1) introduction, 18(1) after paragraph (f), 19(a) and (b), 38(1)(a) and (c) should be amended to make provision for more than one spouse in a polygamous union (par 5.5.2).
34. Section 23 of the Black Administration Act and Regulation 200 issued in terms of the Act should be removed (par 5.5.7).
35. The allocation of funds to the Master should reflect the reality that the Masters' offices play an important role in the lives of people and that the ability of the Masters' offices to render an efficient and effective service must be enhanced (par 6.2.6).
36. In order to estimate the effect on income from Master's fees if the tariff is changed substantially, statistics should be obtained for the values which will be considered as factors of the tariff's formula, for instance the gross value of assets in executors' accounts. Pending a substantial review of the tariff the tariff must be amended to provide that Master's fees should be payable in estates with a gross value according to the executor's account of at least R16, 000 at a rate of R6 for each completed R2,000 with a maximum of R600. No fees should be payable in estates where an executor is appointed

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in terms of recommendation 20 (par 6.2.9).

37. The following matters should be investigated:

- The advisability of legislation which authorises the Family Advocate to investigate, if requested by the Master—
 - the circumstances of a minor and any person who cares for the minor before payments are made from the guardian's fund on behalf of a minor;
 - a suitable person to be appointed to administer small estate where minors are involved;
 - the merits of applications in terms of section 60(5) of the Mental Health Care Act 17 of 2002 for the appointment of a person as administrator for a mentally ill person or a person with severe or profound intellectual disability.
- If it is found that the powers of the Family Advocate should be extended, adequate provisions should be made for resources and capacity to ensure that the extra duties can be dealt with efficiently (par 6.3.13).

38. Comments are invited on the following possibilities (par 6.3.19):

- Empower the Master to appoint a joint executor, but enact safeguards before the Master can use this power, for instance notice to the incumbent, or a precondition of a court order or that the incumbent failed to comply with legal requirements or that a serious conflict or interests has arisen.
- Give the Master a wide discretion to appoint a joint executor and trust that the Master will exercise the discretion in appropriate cases (Annexure 1: Section 18(5)(c)).
- Do not give the Master authority to appoint a joint executor, but rather rely on provisions to remove an executor from office expeditiously.

39. Comments are invited on the following questions (par 6.3.23):

- Should the Master decide questions of fact after gathering evidence, where necessary; or
- Should questions of fact be investigated and decided by magistrates; or
- Should the existing practice be retained?

40. The Master should have a wide discretion to gather information and the following provisions should be enacted (par 6.3.26):

- If the Master is of the opinion that the executor of the estate or any other person is able to give information or is in possession of books, documents or records which

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the Master considers desirable to obtain, concerning the deceased estate or the administration of the estate or concerning any demand made against the estate, the Master may by notice in writing delivered to the executor or such other person, summon him or her to appear before the Master or before a magistrate at a place and on a date and time stated in the notice, and to furnish all the information within his or her knowledge and be questioned by the Master or the magistrate concerning the deceased estate or the administration of the estate or a demand made against the estate and produce the books, documents or records specified in the notice or a further notice issued by the Master or magistrate.

- A person called upon to be questioned may be assisted by a representative and such representative may question the said person only in so far as it is necessary to clarify answers given by him or her.
- If a banker is summoned or ordered to produce documents, books or statements or give information, such banker shall, notwithstanding the law relating to privilege, be obliged to produce such documents, books or statements or give such information.
- Notwithstanding the provisions of any other law or the common law, but subject to the court's power to avoid questioning being conducted in an oppressive, vexatious or unfair manner, no person questioned in terms of this provision may refuse to answer a question because the answer may prejudice him or her in any criminal or disciplinary proceedings which have been or may be instituted against him or her or apply for a postponement of the questioning until the criminal or disciplinary proceedings have been finalised: Provided that evidence given by a person is not admissible against him or her in criminal or disciplinary proceedings, except in criminal proceedings where such person is charged in connection with evidence given during the questioning with perjury or the giving of false evidence under oath or affirmation or a for refusal or failure to answer lawful questions fully and satisfactorily. Subject to the above, any evidence given is admissible in any proceedings instituted against the person who gave such evidence and any record of a questioning introduced in such proceedings forms part of the record of the proceedings.
- A person other than the executor who in answer to a summons appears to be questioned or produce books, documents, or records is entitled to the witness fees to which he or she would have been entitled if he or she were a witness in civil proceedings before a court of law.
- A person who fails without reasonable excuse to comply with a summons, or, having

appeared in answer to such notice, refuses to submit to examination or to answer fully and satisfactorily any lawful question put to him or her, is guilty of an offence.

- The Master may at any time appoint a person to investigate the books, documents, records and vouchers of the executor and direct the executor or the agent of the executor to deliver to the person so appointed or to the Master any book, document, or record relating to or property belonging to the estate of which he or she is the executor or the administration of the estate. The reasonable costs incurred in performing such an investigation shall, unless the court otherwise orders, be regarded as part of the costs of administration of the estate and if the executor is removed from office consequent upon such an investigation, it shall be paid by the executor de bonis propriis. The Master may pay the reasonable costs incurred in performing the investigation out of the guardian's fund and any such costs recovered from an estate or an executor who has been removed from office shall be deposited in the guardian's fund.

41. A person who is required to hand over books to the Master should not be entitled to require payment of any money before books, records or documents are handed over to the Master (par 6.3.29).

42. **Impartial person or body**

Existing structures should be used as far as possible in order to save costs and streamline procedures. It is recommended as follows (par 6.3.35):

- So called "fire-walls" should be maintained administratively within the Master's office so that a person who had an involvement with an estate which may compromise the person's impartiality is not called upon to decide on objections, act as arbiter, or make other decisions which requires impartiality or a perception of impartiality. If the impartiality of the Master or Masters who must make a decision has been compromised to such an extent that the Master cannot act impartially and be perceived to act impartially the decision should be made by the Chief Master or one of the Chief Master's staff designated by the Chief Master as Ombud.
- The Chief Master or one of the Chief Master's staff designated by the Chief Master as Ombud should have authority, of his or her own accord or following on a complaint, to investigate the actions of a Master or designated official, consider the merits of a matter, take evidence, review a decision of the Master or designated official and give any directions which the Ombud deems fit to a Master or designated official.

43. Any person who provides proof of death of a person and who is obliged to submit an inventory in terms of section 9 should be entitled free of charge to information about the existence of assets, the estimated value of the assets, or the outstanding amount of a debt of the deceased person. The Master may at any time require any person with information about the existence of assets, the value of assets or the outstanding amount of a debt of a deceased person to make the information available free of charge to the Master or to a person indicated by the Master. Failure to comply with this requirement should be a criminal offence. (Par 6.4.4.)
44. Newspaper notices in terms of section 29 and 35 should be done away with. In respect of section 35 heirs should be given notice by delivery or by registered mail that a liquidation and distribution account will lie open for inspection. Notice in the Government Gazette can be done away with if a website with public access has been established which is reliable and has the capacity to handle requests, to place notices and to search the notices. (Par 6.5.5.)
45. It should not be required that forms are in affidavit form, but forms should indicate prominently that it is a criminal offence to willfully furnish false information. In addition to the existing offences concerning a false inventory, account or valuation, it should be an offence to willfully furnish false information to the Master. (Par 6.6.4.)
46. The question in item 14 of the Death Notice should be amended to read as follows: (a) If married outside South Africa state the place of marriage. (b) If the parties were domiciled outside South Africa at the time of the marriage, state the place of domicile of the parties at the time of the marriage.
47. A footnote to the death notice should indicate that —
 - “marriage” includes a customary marriage;
 - “spouse” includes a partner to a customary marriage; and
 - a marriage certificate is required if the deceased was married at the time of death (par 6.6.7.5.2).
48. Which of the following options is preferable (par 6.6.8.2):
 - Option 1: Item 18 of the Death Notice calling for full details of children or descendants of predeceased children should be omitted and where appropriate a next of kin declaration should be called for; or
 - Option 2: The form should be amended to indicate that details of the descendants are required if they qualify as heirs or qualify for maintenance claims.

49. Item 19 of the death notice which calls for information regarding the parents of the deceased should be omitted (par 6.6.9.2).
50. Section 7(4) and item 21 of the Death Notice and its footnote should be amended to require an abridged death certificate or a death certificate in all cases (par 6.6.10.3).
51. The prescribed form for a Death Notice should indicate prominently that it is a criminal offence to willfully furnish false information to the Master (par 6.6.10.4).
52. The form for the inventory should be reviewed to provide more guidance on the types of assets to be reflected and to provide that agents should co-sign the form and that assets subject to estate duty which are not reflected in the accounts should be reflected (par 6.6.12).
53. The prescribed form for the Inventory should not call for information on massed estates, assets in possession of the deceased (other than property of the deceased) and persons in whose presence the inventory was made (par 6.6.15).
54. No changes to the calculation of executors' remuneration is recommended, but it is recommended that a fee charged by an agent of an executor for the administration of an estate should be noted with the executors' remuneration in the liquidation account if the fee differs from the executors' remuneration (par 6.7.13).
55. It is submitted no distinction should be made between guardians under customary law and guardians under common law. Comments are invited on the question whether natural guardians only should be entitled to receive cash or other movables on behalf of minors in terms of section 43 of the Administration of Estates Act (par 6.8.5).
56. Authority signed by an heir or creditor to effect payment by transfer of funds to a banking account identified in the authority, and proof of transfer to that account should be accepted as a receipt in terms of section 35(12) of the Administration of Estates Act (par 6.9.4.1).
57. The bank statement must reflect the name of a payee and the cause of payment in respect of electronic transfers (par 6.9.4.2).
58. Comment is invited on the question whether banking practice will or should allow an executor authorised in accordance with recommendation 20 to deal with assets listed in the appointment as executor to pay the proceeds of the assets into a personal bank account of the executor or that the executor should be allowed to cash cheques in the name of the deceased or the deceased estate representing assets listed in the

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appointment. If not, can any solution be suggested to access payments to the estate other than to open an account in the name of the estate? (Par 6.9.9).

59. In cases where section 28 will apply, the executor should be allowed to open any account with a bank or the Postbank and should not be obliged to open a cheque account (par 6.9.10).
60. It should not be required of executors to lodge a bank reconciliation and explanations of entries on bank statements, unless directed to do so by the Master (par 6.9.17).
61. The Master should have a discretion to decide whether a meeting should be convened for the nomination of a tutor or curator where there is a failure of nominations, or death, incapacity or refusal to act (par 6.10.3).

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1. INTRODUCTION

1.1. The main thrust of the Commission's investigation of the administration of estates is to consider a unitary system of administration of estates for all South Africans. Measures to improve the administration process and reduce the work of the supervising authority and executors, as far as can be justified, are also considered.

1.2. In the budget speech by Ms Brigitte Mabandla, MP, Minister for Justice and Constitutional Development in the National Assembly of Parliament on 20 May 2005 the following was said:

1.2.1.1. The Masters' Offices play an important role in the social and economic lives of our people.

1.2.1.2. Each year the value of the estates under the supervision of the Masters amounts to approximately R18 billion, which includes about R2, 5 billion in the Guardians' Fund. It is essential that the Masters' offices are transformed and restructured to ensure that those, who are entitled to this service, receive it without unnecessary delays. This will not only stimulate our economy, but ensure that those who need support receive it promptly. Ways of ensuring that estates, both deceased and insolvent estates, are promptly wound up must be explored.

1.2.1.3. The ability of the Masters' offices to render an efficient and effective public service in the national interest must be enhanced.

Discussion paper and progress report

1.3. During December 2000 the Commission published Discussion Paper 95 **Customary Law: Administration of Estates** ("Discussion Paper 95") for comment. Comments were received from 34 persons or bodies,¹ including 11 magistrates and 6 Masters of the High Court.

1.4. In January 2002 the Commission submitted a progress report to the Minister for Justice and Constitutional Development. In this report the Commission requested the Department of Justice and Constitutional Development (the "Department") to advise the Commission as soon as possible of policy decisions on matters such as the involvement of magistrates in the administration of estates and the establishment of satellite offices to deal with the administration of estates.

1.5. The Department has published a document entitled **Policy and Procedural Manual: Administration of Intestate Deceased Estates at Service Points** which is discussed in paragraph 4 below.

¹ Annexure 4 on page 129 below.

2. DIFFERENT SYSTEMS OF ADMINISTRATION OF ESTATES

2.1. Different systems of administration of estates were reserved for different sectors of the community. The administration of estates of “black”² persons was governed by the Black Administration Act 38 of 1927 and its attendant regulations. The administration of estates of white persons and other sectors of the community was governed by the Administration of Estates Act 66 of 1965 (“Administration of Estates Act”) and regulations. The Administration of Estates Act also accommodated the administration of estates of black persons provided they had executed a valid will.

2.2. In the case of **Moseneke v The Master**³ the Constitutional Court declared section 23(7)(a) of the Black Administration Act 38 of 1927 inconsistent with the Constitution and invalid with immediate effect. This section provided that the appointment of an executor was not necessary nor did the Master of the High Court (“Master”) have any powers in connection with the administration and distribution of “the estate of any black” who died without leaving a valid will. The Constitutional Court also declared regulation 3(1) of R200 *Gazette* No 10601 of 6 February 1987 (“Regulation R200”) invalid, but suspended the order of invalidity until 6 December 2002. The Court ordered that the regulation should be interpreted so that beneficiaries of an intestate “black” estate had a choice to report the estate to a magistrate or the Master. (The reporting of the intestate “estates of a black” was previously confined to magistrates' offices.) The Court emphasised⁴ that the decision dealt with estates that devolved according to common law only and not with estates that devolved according to customary law.

2.3. The law of succession determines the beneficiaries of a deceased person and their rights, while the rules for the administration of estates prescribe the procedure to administer the estate, that is, how to pay creditors and transfer benefits to beneficiaries. Under customary law, where a beneficiary steps into the shoes of the deceased, there is no clear distinction between the rules for the administration of estates and the law of succession. Pending the finalisation of the South African Law Reform Commission’s review of the customary law of succession no change was made to the administration of estates that devolved according to customary law. The new section 4(1A) of the Administration of Estates Act⁵ states clearly that the Master does

² Racial terms like “black” and “white” are used to reflect the wording in legislation.

³ 2001 (2) SA 19 (CC).

⁴ Par [27].

⁵ Amended by the Administration of Estates Amendment Act 47 of 2002, which came into operation on 5 December 2002.

not have jurisdiction in respect of any property if the devolution of the property is governed by the principles of customary law. Regulation 3(1) was amended⁶ so that it applied to customary law estates only.

2.4. The **Moseneke** judgment concluded⁷ that the benefits of administering deceased estates by magistrates, such as convenience and low costs, can also be accomplished by a non-discriminatory provision. After considering all the possibilities, the Department of Justice and Constitutional Development concluded that the best way to reap the benefits of central records and control, as well as accessibility by and assistance for people at grass roots levels, was to administer all estates under the control of the Master, but to designate service points where officials of the Department exercised functions on behalf of the Master. In terms of a new section 2A of the Administration of Estates Act 66 of 1965⁸ the Minister for Justice and Constitutional Development designated all magistrates' offices as service points and the incumbents of posts at each magistrates office were designated to exercise powers and perform duties delegated to them on behalf of, and under the direction of, the Master.

2.5. Dealing with aspects of an estate at a service point and other aspects at the Master's office has the potential to cause confusion and delays, for instance, the allocation of reference numbers⁹ and the inherent problem of documents traveling to and fro. The practice of reporting estates to the magistrate, who submitted original documents to the Master,¹⁰ was probably discontinued because it caused delays and resulted in extra work and expenditure. There was nevertheless substantial support for the notion that aspects of the administration of estates could be dealt with at service points while other aspects could be dealt with at the Master's office. The service point may, for instance, issue appointments in small estates, hold meetings of beneficiaries and assist with the finalisation of small estates. If documents are submitted to centralised offices without much delay, the benefits of centralised records will be enjoyed while at the same time affording the convenience of reporting estates to service points.

2.6. ***It is submitted that the advantages of service points outweigh the disadvantage of the costs to run service points and the transfer of documents from service points to centralised offices.***

⁶ R1501 in Government Gazette No 24120 dated 3 December 2003.

⁷ Par [22] and [23].

⁸ Amended by the Administration of Estates Amendment Act 47 of 2002 which came into operation on 5 December 2002.

⁹ But see paragraph 4.3.

¹⁰ Under the Administration of Estates Act 24 of 1913 which was repealed on 2 October 1968.

2.7. In **Bhe and Others v Magistrate Khayelitsha and Others**¹¹ (the “**Bhe** decision”) a majority of the Constitutional Court declared section 23 of the Black Administration Act 38 of 1927 and Regulation R200 issued under it unconstitutional. The effect of the court’s order is that all estates which have not been distributed when the court made its order in October 2004 devolved in terms of section 1 of the Intestate Succession Act 81 of 1987, with the adjustments to make provision for more than one spouse indicated in paragraph 7 of the order of the court.

2.8. The court stressed¹² that the order should be regarded as an interim measure until appropriate legislation is put in place and not as a permanent fixture of the customary law of succession. The court also stated the following:¹³

The order made in this case must not be understood to mean that the relevant provisions of the Intestate Succession Act are fixed rules that must be applied regardless of any agreement by all interested parties that the estate should devolve in a different way. The spontaneous development of customary law could continue to be hampered if this were to happen. The Intestate Succession Act does not preclude an estate devolving in accordance with an agreement reached among all interested parties but in a way that is consistent with its provisions. There is, for example, nothing to prevent an agreement being concluded between both surviving wives to the effect that one of them would inherit all the deceased’s immovable property, provided that the children’s interests are not affected by the agreement. Having regard to the vulnerable position in which some of the surviving family members may find themselves, care must be taken that such agreements are genuine and not the result of the exploitation of the weaker members of the family by the strong. In this regard, a special duty rests on the Master of the High Court, the magistrates and other officials responsible for the administration of estates to ensure that no-one is prejudiced in the discussions leading to the purported agreements.

¹¹ 2005 (1) SA 580 (CC) at 633.

¹² Par [116].

¹³ Par [130].

2.9. The order of the majority in the Bhe decision regulates the position until appropriate legislation is put in place to reform the customary law of succession. The review of the administration of estate should be conducted on this basis, but the rules for the administration of estates must be reconsidered if the law of succession is amended. Because the rules of intestate succession do not at present distinguish between estates which devolve according to customary law and other estates the logical solution is to administer all estates according to the rules that apply at present for estates that devolve according to common law — in other words the estates are administered subject to the supervision of the Master. For the sake of convenience of beneficiaries the choice¹⁴ to report an estate to the Master or at the magistrates' office (service point) should be retained. Paragraph below invites comment on the question whether a role should be retained for traditional leaders or traditional authorities and also whether a role should be retained for customary law in the administration of estates.

2.10. ***It is recommended that—***

2.10.1. ***the review of the administration of estates should continue on the basis of the majority order in the Bhe decision, but the rules for the administration of estates should be reconsidered if the law of succession is amended;***

2.10.2. ***all estates should be administered subject to the supervision of the Master; and***

2.10.3. ***beneficiaries should have a choice to report an estate to the Master or a service point with jurisdiction; and***

2.10.4. ***the Administration of Estates Act should refer to service point or designated official where appropriate and for ease of reference “designated official” and “service point” should be defined in section 1.***

(Annexure 1: Sections 1, 2A, 4, 7, 8(1), 9, 11, 13A, 13B, 18, 27(2), 35(4) and (6), 73(1), 95(2), 97(1), 99, 100)

2.11. Section 4(1) of the Administration of Estates Act provides that jurisdiction in respect of the estate of a deceased person lies with the Master appointed in respect of the area of jurisdiction “of a provincial division of the Supreme Court” where the deceased was ordinarily resident at the date of death. In terms of section 3 of the Act the Minister may specify the seat of the High Court where the Master will have an office and provision may also be made for sub-offices. Master's offices have been opened at the seats of local divisions of the court and the

¹⁴ Paragraph 2.2 above.

reference in section 4(1) to “provincial division” is no longer appropriate. Sub-offices have been opened, but no jurisdiction problems are experienced in this regard.

2.12. Once the Superior Court Bill 52 of 2003 has been enacted the seats of Masters Offices would be aligned to the seats of the High Court. Jurisdiction of Masters would lose most, if not all, of its significance if centralised records become a reality.¹⁵

2.13. ***It is recommended that section 4(1), which deals with jurisdiction of the Master, should be amended to refer to a “division” of the Supreme Court and not to a “provincial division”.***

(Annexure 1: Section 4(1))

3. REPORTING OF ALL ESTATES

3.1. Discussion Paper 95 invited comment on a proposal that estates need not be reported unless the value of the estate was more than R100,000, or unless an interested party objected or there was a dispute regarding the administration of the estate. Commentators were almost unanimous in their rejection of this proposal. They gave the following reasons:

- 3.1.1. There will be a general lack of transparency, regulation and control.
- 3.1.2. It will open the way to fraud and erroneous distributions.
- 3.1.3. Heirs and partners in customary marriages or women may be prejudiced.
- 3.1.4. An appointment is necessary as proof of authority to deal with money in banks or other institutions, assurance policies, vehicles, shares, fire arms, member’s interests in a close corporation; immovable property or interests in houses.
- 3.1.5. Authority is required to institute or defend civil actions.
- 3.1.6. In general there will be uncertainty as to who may act as representative.
- 3.1.7. A deceased may have been a beneficiary of policies falling outside the estate, creating temptation to avoid estate duty.
- 3.1.8. By the time that an aggrieved party objects it might be too late as all the estate monies would have been squandered.
- 3.1.9. The Master when making appointments ensures that minors are not prejudiced.

¹⁵ Par 4.4.3 below.

3.1.10. Not all families can afford funeral expenses. In many cases the deceased is buried with his or her own money in the bank or due from the employer. A commentator submitted that all deceased estates must be reported in order that the rightful person is appointed to collect money due to the estate or request that money be made available in order to bury the deceased.

3.2. One commentator submits that estates need not be reported in all cases. He says that in cases where there is no money to the credit of the deceased but only movable property like livestock, there seems to be no need to report the estate if there is an agreement between the family members and in these instances a Chief can be approached for assistance to facilitate the transfer of property in the rural areas. The attraction of this proposal is that it avoids formalities. This advantage must be weighed against the considerations in paragraph 3.1 above.¹⁶ Livestock may be of considerable value and even seemingly insignificant assets may be of great value to interested persons. Family members are obliged to support each other in accordance with customary law and the interests of surviving children should be taken into account. Although it is advisable that all estates should be reported, the question arises whether an administrator in terms of customary law should in some cases be appointed instead of an executor. The view has been expressed that lay “elders” have in many cases proved to be more egalitarian in their decision-making in family disputes than magistrates and superior courts; adequate provision should be made for resources for capacity building and education of traditional leaders or authorities in constitutional and human rights values that underpin the administration of estates under the new constitutional dispensation in order not only to remove or reduce incidents of improper administration, but which would because of the flexible and changing nature of customary law influence the development of a system of administration of estates at local level that promotes both customary law institutions and constitutional values.

3.3. The Constitution of the Republic of South Africa¹⁷ recognises customary law and the development of customary law. The **Bhe** decision stresses that the order in that case is a temporary measure and that reform of the customary law of succession is envisaged.¹⁸ Pending such a review, the administration of estates should be based on the law as set out in the **Bhe** decision, but comments are invited on the role which customary law should play in the administration of estates. Examples of situations in which the application of customary law may

¹⁶ Item 3.1.4 will not be relevant if the only property is movable property like livestock.

¹⁷ Act 108 of 1996, sections 39 and 211.

¹⁸ Par 2.8 above.

be considered are agreements by heirs to apply customary law,¹⁹ a role for traditional leaders or authorities during the reporting of estates,²⁰ appointment of a customary law administrator instead of an executor in some cases,²¹ and the application of customary law to determine liability for costs in connection with the funeral of the deceased.²²

3.4. *It is recommended that estates of all persons who die leaving a will or property must be reported.*

(Annexure 1: Section 7(1))

3.5. *Comments are invited on the question whether an administrator in terms of customary law should in some cases be appointed in order to protect the interests of surviving family.*

3.6. *Should a role be retained for traditional leaders or authorities and the customary law of the administration of estates?*

4. POLICY AND PROCEDURAL MANUAL: ADMINISTRATION OF INTESTATE ESTATES AT SERVICE POINTS

4.1. INTRODUCTION

4.1.1. The Department of Justice and Constitutional Development has published a document entitled **Policy and Procedural Manual: Administration of Intestate Deceased Estates at Service Points** (referred to below as “Manual”, “Policy”, or “Practice Manual”). The third edition dated 5 November 2004 was adapted to take account of the **Bhe** decision.²³

4.1.2. The aim of the Manual is to implement a unified system of supervision of the administration of deceased estates that delivers the same quality of service to all South Africans.²⁴

¹⁹ Par 2.8 above.
²⁰ Par 4.3.3 above.
²¹ Par 3.2 above.
²² Par 4.6.8 above.
²³ Paragraph 2.7 above.
²⁴ Policy par 4.

4.1.3. The following are the main features:

4.1.3.1. All magistrates' offices have been designated as service points where delegated powers are exercised and duties performed by designated officials on behalf of and subject to the direction of the Master.²⁵

4.1.3.2. A file with a consecutive number, the year, and the name of the office is opened for every new case reported at a service point.²⁶

4.1.3.3. The estate is referred to the Master if any of the following conditions apply:²⁷

4.1.3.3.1. The deceased left a will; or

4.1.3.3.2. The value of the estate, before any debts are paid or deductions are made, is or appears to be above R50,000; or

4.1.3.3.3. One or more of the beneficiaries is a minor who is not assisted by a legal guardian; or

4.1.3.3.4. One of the assets in the estate is cash to the value of more than R20 000 and one or more of the beneficiaries is a minor; or

4.1.3.3.5. The estate is insolvent or there is a danger that it may be insolvent.

4.1.3.4. In other cases the delegated official may appoint a Master's representative in terms of section 18(3) of the Administration of Estates Act.²⁸

4.1.3.5. The file must also be referred to the Master if a maintenance claim is lodged,²⁹ or any complaint cannot be resolved at the service point.³⁰

4.1.3.6. Even if the file must be dealt with by the Master, before the file is forwarded to the Master the service point must assist family of the deceased who require money to pay for the funeral to obtain payment from the deceased's banking account.³¹

²⁵ Policy par 7.4.

²⁶ Policy par 12.3.

²⁷ Policy par 9.1; Practice Manual par 4.

²⁸ Policy par 7.4 item 7 of table; Practice Manual par 6.

²⁹ Practice Manual par 8.4.

³⁰ Practice Manual par 9.

³¹ Practice Manual par 8.2.

4.1.3.7. The file is closed after the appointment of a Master's Representative and forwarded to the Master three months later with notice to the Master's Representative.³²

4.2. **GENERAL DISCUSSION OF POLICY AND PROCEDURE MANUAL**

4.2.1. The legislation giving effect to the **Moseneke** decision³³ had to be implemented urgently. The distribution of the Manual to officials at service points and urgent training of the officials contributed to a successful transition to the new unified approach to estates subject to the common law. This experience also enabled a smooth transition when all estates had to be administered subject to the control of the Master after the **Bhe** decision.³⁴

4.2.2. It is desirable to reconsider the Manual with the benefit of a few years' experience and the opportunity to consult on the Manual.

4.2.3. **Comments are invited on the main features of the Manual set out in paragraph 4.1.3 above.** The following aspects of the Manual are discussed below: Designation of service points; centralised records; testate estates; and payment of funeral expenses.

4.3. **DESIGNATION OF SERVICE POINTS**

4.3.1. As was pointed out above,³⁵ all magistrates' offices have been designated as service points.

4.3.2. Making justice accessible to all is a high priority. The comment in paragraph 4.4.3.1 that more Master's offices are being opened and that the distance away from a Master's office will be reasonable, does not apply to all communities. Even magistrates' offices are not accessible with ease to people in some farming and deep rural areas who are also unlikely to have electronic access in the near future. More magistrates' offices will alleviate the problem. Access to magistrates' courts as such is also important.

4.3.3. **The possibility of more service points should be considered from time to**

³² Policy par 12.4 and Practice Manual par 6.4.7.

³³ Par 2.2 above.

³⁴ Par 2.7 above.

³⁵ Par 4.1.3.3.2.

time. In some regions deaths are reported in the first place to traditional authorities, and the possibility to locate service points with traditional authorities should be considered.

4.4. **POLICY AND PROCEDURE MANUAL: CENTRALISED RECORDS**

4.4.1. The risk of duplicate registrations and uncertainty regarding the authority that is responsible for a particular estate needs careful consideration. The benefits of centralised records are clear: It facilitates enquiries about estates by persons who are not aware of the office dealing with the matter and curbs duplicate registrations. The need for centralised records has increased with the establishment of a large number of service points which have concurrent jurisdiction with a Master's office. A magistrate commented that it happened many times that wills were lodged after distribution of the estate, too late to recover anything from intestate heirs. The magistrate said this could be avoided if estates were reported at one place.

4.4.2. The Manual contains the following in this regard:

4.4.2.1. When the Master appoints a Master's representative, the Master must inform the service point with concurrent jurisdiction of the appointment. The service point must ensure that it does not appoint a representative and inform the Master and forward its file to the Master if a representative has already been appointed.³⁶

4.4.2.2. The reporting documents include a declaration that the estate has not been reported to any other Master's Office or service point.³⁷

4.4.2.3. Each service point opens a file identifier with a number, the year, and the name of the office.³⁸ Service points retain closed files for a period of three months and then forward it to the Master.³⁹ The reason why the file is kept at the service point for three months is so that queries which arise shortly after the appointment can be dealt with by the service point. (The Manual does not explain how the Master should keep these files so that it can be traced again if the need arises.)

4.4.3. The ideal solution is a central electronic database and electronic connections

³⁶ Policy par 8.1.

³⁷ Practice Manual par 5.1 bullet 7 after 9.g; and par 6.1 bullet 6. This declaration was previously called for in terms of section 22(2)(c) of the Administration of Estates Act in matters where the deceased was not ordinarily resident in South Africa.

³⁸ Policy par 12.3.

between all Master's offices and service points. Public access to the database will be an added bonus. The development of such a system has commenced and pilot programs have been launched. In the absence, at this stage, of these technological aids, other solutions must be investigated. One possibility is that the Service Point must, before a file is opened, register the estate with the centralised office who will allocate a reference number. The cost of communication by telephone or fax for this purpose seems to be justified by the advantages of central registration. The central register should indicate the office where the matter was reported and note it if the file is transferred to the Master.

4.4.4. *It is submitted that, pending the introduction of a central electronic database of deceased estates, a service point should obtain a reference number from the Master before opening a file and that the Master's records should indicate if a file is transferred from a service point. Alternatively the death notice should require confirmation that the estate has not been reported previously to a Master or service point.*

4.5. *POLICY AND PROCEDURE MANUAL: TESTATE ESTATES*

4.5.1. According to the Manual, service points must refer cases where the deceased left a will to the Master.⁴⁰

4.5.2. Although acceptance of a will requires knowledge of the legal requirements for a valid will, it is unfortunate that no estate can be finalised by a service point if the deceased left a will, even if the value of the estate is negligible or the intestate heirs are identical to the heirs in terms of the will. It may be argued that if determination of intestate heirs can be left to a service point there is no compelling reason why a decision on the validity of the will cannot be taken at the service point. The final decision on the validity of a will rests with the High Court and not with the Master or a Master's representative at a service point.

4.5.3. It has been pointed out that —

4.5.3.1. more Masters' Offices are being opened and that the distance away from a Master's office will be reasonable;⁴¹

4.5.3.2. once all offices have been connected electronically it would be possible

³⁹ Policy par 12.4; Practice Manual par 6.4.7.

⁴⁰ Policy par 9.1 bullet 1 and Practice Manual par 4 bullet 1.

for a Master's office to attend to the acceptance of a will immediately; and

4.5.3.3. most wills are lodged by large institutions which have offices at the seats of the Masters.

4.5.4. Pending the installation of electronic connections, it seems that people may be discouraged from making wills by discriminating against the beneficiaries of testate estates because services are not as accessible as with intestate estates.

4.5.5. It is advisable that wills should be stored safely at a central point. In the Master's Office wills are stored in a strong room and a copy is placed on the file. The copy shows an endorsement which indicates that the will has been registered and whether it has been accepted for purposes of the Administration of Estates Act.⁴²

4.5.6. ***It is submitted that if it is impractical to have staff at service points with sufficient training and responsibility to consider whether a will is valid on the face of the document, the will and copies of other estate documents should be submitted to the Master. If the beneficiaries under the will are identical to the intestate heirs, the service point should communicate this conclusion to the Master and continue with the administration of the estate. The (provisional) decision whether the will is accepted should be endorsed on the will by the Master before a copy of the will is forwarded to the service point.***

4.6. **POLICY AND PROCEDURE MANUAL: PAYMENT OF FUNERAL EXPENSES**

4.6.1. Section 11 of the Administration of Estates Act authorises a person who at or immediately after the death of a person has possession or custody of property of the deceased person to (despite the duty to retain possession or custody until an executor is appointed) dispose of the property for the *bona fide* purpose of providing a suitable funeral for the deceased.⁴³

4.6.2. Not all families can afford funeral expenses. In many cases the deceased is buried with his or her own money in the bank or due from the employer. A commentator submits that all deceased estates must be reported in order that the rightful person is appointed to collect money due to the estate or request that money be made available

⁴¹ See par 4.3.2 above for a contrary view.

⁴² Section 8(3) of the Administration of Estates Act 66 of 1965.

⁴³ Or to provide for the subsistence of the deceased's family or household or the safe custody or preservation of property.

in order to bury the deceased.

- 4.6.3. The Practice Manual deals with the position where the estate must be referred to the Master to make an appointment, but the family requires money to pay for the funeral. The Manual provides, where the deceased held money in a bank account, that the service point may write to the bank to release part of the deceased's estate for funeral expenses in terms of section 11; a quotation of the funeral expenses, alternatively proof of payment of expenses should be required before the letter is written to the bank; the amount allowed to be claimed as funeral expense, should be reasonable, the interests of any minor entitled to maintenance should be considered before an extravagant amount is allowed for funeral expenses.⁴⁴
- 4.6.4. A procedure to assist families to obtain money which is needed urgently to pay for the funeral is laudable. A procedure with more structure and guidelines than section 11 seems to be advisable.
- 4.6.5. It is submitted that extravagant funeral expenses should not be paid in terms of section 11 or a similar provision, even if all the beneficiaries are majors. It is customary to regard as funeral expenses the cost of actual interment or cremation (including a coffin and funeral plot where applicable), religious ceremony, sentimental expressions of respect, refreshments for relatives and friends, some of whom may have traveled long distances, and a basic tombstone to mark the grave.⁴⁵ Payment of these costs should be considered by the executor after consultation with beneficiaries. The costs may vary considerably from one case to the other. For instance the cost of the coffin or tomb stone may be anything between moderate and extravagant and refreshments may include the slaughter and preparation of animals and a marquee tent for guests.
- 4.6.6. Payments in terms of section 11 should be limited to urgent matters which cannot wait for the appointment of the executor (or Master's representative). With the agreement of the heirs, persons who paid funeral expenses can be refunded from the estate. It is submitted that payments should be limited to the basic costs of a coffin and funeral service and that a bank should be authorised by the Master to make a specified payment.

⁴⁴
⁴⁵

Practice Manual par 8.2.

Commercial Union Assurance Co of SA Ltd v Mirkin and another NNO 1989(2) SA 584 (C) 588-594. The question whether funeral costs are allowable deductions for estate duty purposes is not relevant here.

4.6.7. It is mentioned in passing that consideration should be given to soften the bluntness of the provision in section 11(1)(a) which, read with section 102(1)(h), makes it a criminal offence if a person does not “immediately after the death report the particulars of such property, book or document to the Master”. It also seems drastic that a person in possession of property which was in possession of the deceased at the time of death is authorised by the proviso to section 11(1)(b) to dispose of the property for the purposes set out in the section, even if the property did not belong to the deceased.

4.6.8. ***Commentators are invited to indicate who are liable according to customary law for funeral expenses such as the slaughter of an ox or other beast.***

4.6.9. ***Should urgent payments before the appointment of an executor be limited to the basic cost of a coffin and funeral expenses?***

4.6.10. ***Comments are invited on the addition of the following provision after section 11(1) of the Administration of Estates Act 66 of 1965:***

(1A) The Master or designated official may before the appointment of an executor (or Master’s representative, if this is retained), in order to defray the costs of a basic coffin and funeral service of a deceased person, instruct a bank which holds available funds in the name of the person to pay a specified amount to a specified person (Annexure 1: Section 11(1A)).

5. CONCLUSIONS IN THE COMMISSION’S PROGRESS REPORT⁴⁶

5.1. INTRODUCTION

5.1.1. It is clear from comments that Masters have difficulty in coping with their work at present. Even one of the Masters who submits that the present Act should be retained in principle as it works well, makes reference to “the chaotic situation we find ourselves in”.⁴⁷ The fact that all estates, and not only common law estates, are subject to the supervision of the Master may overburden the Master, unless adjustments are made to

⁴⁶ Par 1.4 above.

the application of resources or the way in which estates are dealt with.

- 5.1.2. An attempt should be made to save resources by improving the administration process and by reducing, as far as can be justified, the work of the supervising authority and executors. It is submitted that the implementation of changes proposed in this paper would not require a lot of training. Most of the proposals build on present practices.
- 5.1.3. Several of the conclusions of the Commission in its progress report⁴⁸ have been overtaken by subsequent events. Further comments are invited on the matters discussed below.

5.2. **LEVEL OF CONTROL BY THE MASTER IN TERMS OF THE ADMINISTRATION OF ESTATES ACT**

- 5.2.1. The level of control exercised by the Master depends mainly on whether an executor has been appointed. In terms of sections 18(3) and 25 the Master may dispense with the appointment of an executor. Paragraph 5.4 below discusses the question whether provision should be made for different types of appointments.

Section 18(3) appointment

- 5.2.2. In terms of section 18(3) the Master may dispense with the appointment of an executor and give directions as to the manner in which an estate must be liquidated and distributed if the value of the estate does not exceed the amount determined by the Minister of Justice by notice in the **Government Gazette**. The Minister has determined the amount of R125 000 by notice in **Government Gazette** 25456 of 19 September 2003. (The Manual still works with a limit of R50,000 as far as service points are concerned.) In practice the Master, in terms of section 18(3), authorises the surviving spouse or one of the heirs to take control of the assets of the estate, as reflected in the inventory filed with the Master, to pay the debts and to transfer the residue of the estate to the heir or heirs entitled thereto by law. There is usually no accounting to the Master by the representative.⁴⁹ The following are special cases:⁵⁰

- 5.2.2.1. If the estate has substantial assets, but is insolvent, the Master will appoint an executor.

⁴⁷ This Master identifies as the cause for the position that a huge majority of estates are not reported, making it extremely difficult to embark on a meaningful statistical survey. Consequently future planning within public administration spheres is made extremely difficult.

⁴⁸ Par 1.4.

⁴⁹ Practice Manual par 6.4.

⁵⁰ Practice Manual paragraphs 4 and 9.

5.2.2.2. The Master may decide to appoint an executor (and a service point must refer the matter to the Master) in the following cases:

- 5.2.2.2.1. At least one of the beneficiaries is a minor, not assisted by a legal guardian.
- 5.2.2.2.2. At least one of the beneficiaries is a minor and the estate consists of cash of more than R20,000.
- 5.2.2.2.3. Disputes between heirs.

Section 25 appointment

5.2.3. Upon the death of a person who was neither ordinarily resident nor the owner of immovable property in South Africa, the Master may without observing the usual procedure:

- 5.2.3.1. sign and seal letters of executorship lodged with the Master in terms of section 21; or
- 5.2.3.2. if no such letters are produced, appoint an executor or direct the manner in which the estate shall be liquidated and distributed; and
- 5.2.3.3. subject to such conditions as the Master may determine, exempt the executor from compliance with section 35 (lodging and advertising account).

5.2.4. In cases under section 25 where the deceased's assets in South Africa are limited to shares, the representative is authorised to deal with the assets and there is usually no accounting to the Master.⁵¹ In cases under section 25 where assets include movable property other than shares, the appointee is exempted from complying with section 35 (lodging an account) and opening a banking account in terms of section 28, but must comply with section 27 (lodging an inventory) and section 29 (advertising for creditors). The exemption is in practice subject to the provision that "the position of this Estate as declared remains unchanged". In addition to the absence of immovable property and possible prejudice to persons in South Africa (prescribed in section 25), the Master takes into account whether heirs or creditors resident in South Africa (if any) have consented to the application of the section.⁵²

Appointment of executor

5.2.5. The main duties of an executor appointed by the Master are –

- 5.2.5.1. to advertise for creditors in a newspaper and in the Government

⁵¹ Justice College manual page 78 and 79.

⁵² Justice College manual page 69 to 78.

Gazette;⁵³

- 5.2.5.2. to determine solvency and to follow the prescribed procedure if the estate is insolvent;⁵⁴
- 5.2.5.3. to liquidate the estate in so far as it is appropriate;
- 5.2.5.4. to lodge a liquidation and distribution account and advertise it for inspection in a newspaper and the **Government Gazette**;⁵⁵
- 5.2.5.5. to distribute the estate in terms of the account; and
- 5.2.5.6. to lodge an estate duty return and pay any estate duty that may be payable.

Recognition of “foreign” executors in terms of section 21

- 5.2.6. Section 21 provides for the signing and sealing of duly authenticated letters of executorship granted in a state proclaimed in terms of section 20. This has the same effect as an appointment as executor. Section 21 is discussed in more detail below.

Level of control by Master

- 5.2.7. Even though the Master's role has been reduced somewhat,⁵⁶ the Master is still entitled to exercise extensive control over executors. Section 35(4) provides that the liquidation and distribution account shall lie open for inspection **after the Master has examined it**. In terms of section 35(9) the Master may, even in the absence of an objection to an account by interested parties, instruct the executor to amend the account if in the opinion of the Master the account is in any respect incorrect and should be amended. If an executor fails to lodge an account with the Master, or to lodge vouchers in support of the account, or to perform any of his or her duties, or to comply with any reasonable demand of the Master for information or proof, the Master or an interested person may apply to court for an order directing the executor to comply.⁵⁷ The supervisory role of the magistrate was more flexible than the Master's and depended largely on what the magistrate deemed fit or considered necessary.⁵⁸
- 5.2.8. The Master's office has difficulty coping with its workload, at least in some offices including the largest office situated in Pretoria. The effect of the heavy workload on the

⁵³ Section 29.

⁵⁴ Section 34.

⁵⁵ Section 35.

⁵⁶ Section 47 was amended in 1983 in order that the consent by the Master is not necessary for a sale if major heirs agree on the method. Pursuant to an amendment to section 35(12) in 1984, the Master may accept an affidavit by the executor that heirs have been paid and need not insist on receipts.

⁵⁷ Section 36.

morale of staff and everyone involved in the administration of estates should not be underestimated. Beneficiaries and other parties interested in estates endure inconvenience and frustration and suffer losses as a result of delays in the Master's office.

5.2.9. The Master's workload increased because estates previously dealt with under customary law, are now also dealt with under the supervision of the Master. In view of all the demands on public funds the deployment of substantial resources to prevent backlogs in the Master's office should be a last resort. This does not entail that the Master's office should not receive the necessary resources to fulfill its functions properly or that alternative sources of funding should not be pursued.⁵⁹ Control measures should not be relaxed merely in order to save money. Justified ways to ease the workload of the Master and other role-players, should, however, be investigated.

Examination of accounts by the Master

5.2.10. There is probably truth in the statement of a commentator that the greatest bottleneck in the Master's office is the examination of accounts. The examination of accounts and queries following on such examination probably represents a substantial percentage of the work of the Master's office and delays experienced in the Master's office.

5.2.11. One of the Masters submits that the Master should examine all accounts in order to guard against incorrect accounts, to tax the remuneration of an executor, and to accept redistribution agreements and other documents for purposes of deeds registry. He says it would be unfortunate and unsatisfactory if the Master would be obliged to ignore blatant errors if no objections are lodged. Another commentator says the Master has an important role as guardian of the legalities of the process and to ensure that the wishes of the testator are carried out. Still another commentator proposes that the Master should be left with a discretion to decide which accounts must be examined and cases in which accounts should be examined must not be mentioned in the Act. The matter can be dealt with by means of Master's directives. This commentator says that according to existing practice in the Pretoria office accounts are examined (in addition to cases mentioned below) if there is a redistribution agreement, adiation or repudiation, renunciations, if a trust is created and the trust is reflected as beneficiary, or the distribution is totally incorrect.

⁵⁸

R200 Government *Gazette* 10601 of 6 February 1987, regulations 3(1), 4(3) and 7(1).

⁵⁹

See par 6.2 below.

- 5.2.12. The reason for the practice of the Master to accept redistribution agreements for purposes of deeds registry, seems to be that the Master's acceptance serves as authentication of the agreement or the capacity of the parties.⁶⁰ In respect of "adiation", regulation 50(2)(b) of the Regulations in terms of the Deeds Registries Act⁶¹ provides for a certificate by the Master that the surviving spouse has adiated under the will, but provision is also made for a certificate by a conveyancer or a duly witnessed statement by the spouse. The deeds office practice cannot justify the continuation of duties by the Master if it is advisable that the Master should not fulfill those duties.
- 5.2.13. Advantages of the examination of all accounts must be weighed against the disadvantage of the delays and costs caused by the examination of all accounts by the Master. In principle, executors should be responsible for the administration of estates⁶² and beneficiaries or creditors, other than minors or incapable persons, should protect their own interests. This includes checking the remuneration claimed by the executor. Dependence on the Master to protect these interests creates a false sense of security and discourages beneficiaries and creditors from protecting their own interests.
- 5.2.14. Examination of accounts and vouchers by the Master can point out innocent (mostly stupid) mistakes. The role of the Master as independent adjudicator is compromised if the Master issues instructions on how the account should be drafted before an objection is received.⁶³ The Master cannot by checking the documents lodged with him or her guard against all errors and fraud. It is conceded that reliance on consent of interested parties or their vigilance may lead to distributions contrary to the wishes of a testator. It can be argued that limitation of a testator's ability to rule from the grave is not an unacceptable price to pay for more effective procedures. For instance, should the Master interfere if the testator provided that property should be sold after the testator's death and the heirs wished to retain the property?
- 5.2.15. Several commentators agree that in the absence of disputes or beneficiaries with limited legal capacity the Master's supervisory role should be reduced. It can mostly be determined at a glance whether minors or other persons with limited legal capacity may perhaps be prejudiced. Some agree that the Master need not examine all accounts. Reference is made to the English probate system and the Trust Property Control Act 57

⁶⁰ R J M Jones *Conveyancing in South Africa* third edition Cape Town: Juta 1985 at 81.

⁶¹ Act 47 of 1937.

⁶² Cf L A Kernick *The quiet revolution* @ *De Rebus* January 1991 at 31.

⁶³ The Master is also compromised if it is expected of him or her to give advice to the public, as suggested by A P J Bouwer *Die Beredderingsproses van Bestorwe Boedels* tweede uitgawe Pretoria: Van der Walt 1978 at 9.

of 1988 where government supervision is limited.

5.2.16. The role of the Master to accept wills, to act as guardian of the legalities of the process, to protect the interests of minors or other persons with limited capacity and to decide on objections against accounts or complaints against executors cannot be criticised. The Master will have more time to concentrate on these duties and other duties, such as supervision of the administration of insolvent estates, if responsibilities exercised on behalf of persons of full legal capacity are curbed. The question whether the Master's investigative and associated powers should be expanded is discussed below.⁶⁴

5.2.17. The Master should not be prohibited from examining any account, but the Master should be able to justify a decision to examine an account in the absence of an obligation to do so. It is submitted that guidelines in the Act are preferable to a wide discretion for the Master.⁶⁵

5.2.18. ***It is recommended that the Master should not be obliged to examine accounts or tax the executor's remuneration if-***

- § ***beneficiaries have no objections or complaints; and***
- § ***there are no disputes about the administration of the estate; and***
- § ***there are no absentee, unborn, or minor beneficiaries, or other beneficiaries with limited capacity***
- § ***there is no reasonable possibility that estate duty is payable.***

(Annexure 1: Sections 35(2A), 35(3A), 35(4), 35(9), and 51(1)(b))

“Small” estates

5.2.19. A “small” estate, is an estate with a value of less than the amount fixed by the Minister from time to time — at present R125,000.

5.2.20. It is recommended in paragraph 5.4.6 below that an executor should be appointed in all estates regardless of the value of the estate, although special rules may apply to executors appointed in estates under a prescribed value.

5.2.21. It is logical to enforce measures to protect beneficiaries in small estates because these beneficiaries are often less able to protect their own interests than beneficiaries in large estates. Formalities to protect beneficiaries may cost beneficiaries money. Protective measures have no merit if the cost thereof consumes a substantial part of

⁶⁴ Par 6.3.

⁶⁵ See par 5.2.39 below.

the estate. It is advisable that a regulating authority should spend more time to protect the interests of beneficiaries in small estates than to protect beneficiaries in large estates.

5.2.22. There is a practice in the Master's office and service points to assist beneficiaries to report and finalise small estates without any delay or costs. This is a good example of taking the law to the people.⁶⁶ If this practice can be afforded at all, such assistance should continue and protective measures in large estates should rather be relaxed in order to ease the Master's burden.

5.2.23. Some commentators say the authority to deal with the assets in small estates should list the estate assets reported by beneficiaries. There was a practice⁶⁷ to list assets in appointments in terms of section 18(3) which was probably discontinued because of problems or extra work where the assets listed in the authority do not agree with the actual assets. The practice nevertheless seems to be sensible because it maintains a record of the assets the executor is authorised to deal with.

5.2.24. Many commentators feel that there should be some sort of account in all estates. A commentator submits that some formalities should be dispensed with where the account has been signed by beneficiaries. In small estates a simple account signed by beneficiaries seems to be a practical solution, especially if officials at the Master's office or a service point can assist beneficiaries. A requirement that beneficiaries sign an account serves to protect the interest of beneficiaries more effectively than advertisement of the account. To avoid abuse the account should reflect the executor's remuneration, if any. In view of this protection security by the executor can be dispensed with in these cases.

5.2.25. Although compliance with regulation 5⁶⁸ goes some way to ensure that all relevant information is reflected in the liquidation and distribution account it is a formality which causes delay and extra work. All that is required is a list, signed by the heirs, with values of assets, liabilities (including executor's remuneration, if any), totals for the assets and liabilities and the balance for distribution with an indication how the balance will be distributed. The Master or designated official can assist. A commentator suggests that a user friendly pro forma liquidation and distribution account be devised along the lines of the South African Revenue Service ITS Return of Income: Individuals,

⁶⁶ Cf Arthur Nonyongo *Allow magistrates to administer all estates* October 2001 *De Rebus*.

⁶⁷ Cf L A Kernick *The quiet revolution* *De Rebus* January 1991 at 32.

⁶⁸ Regulations in terms of section 103 of the Administration of Estates Act *Government Gazette* 3425 dated 24 March 1972 as amended from time to time.

which contains helpful explanatory notes and an examination column. This is the income tax return completed by millions of salary earners each year. Another commentator suggests that an example of such a statement be included in the Act as a prescribed form.

5.2.26. *It is recommended that regulation 5 should not apply to the form of account required for estates dealt with in terms of the recommendation in paragraph 5.2.33 below. For these accounts a simple form should be prescribed, as proposed in Annexure 3 on page 127 of this paper.*

5.2.27. According to Master's office officials it does not give rise to problems to deal with immovable property in small estates in terms of section 18(3). If there are problems, like disagreement amongst heirs, the short procedure would in any case not be applicable. It seems that an estate should qualify for the procedure for small estates even if the estate includes immovable property. An amendment to section 42(1) of the Act will be required to enable the executor to pass transfer to beneficiaries without a liquidation and distribution account in terms of section 35 of the Act.

5.2.28. Most money amounts in legislation are arbitrary to a lesser or larger degree. The present cut off amount for "small" estates in section 18(3) has been fixed at R125,000. The amount was increased from R50,000 in 2003, presumably for the following reasons:

5.2.28.1. The amount was previously determined in 1993 and the value of money had decreased since then.

5.2.28.2. It seems that it is not profitable for professional institutions to administer estates worth less than about R120,000. Some institutions do not administer estates worth less than R250,000 or even higher figures.

5.2.29. In terms of the proposals in this paper the Master will be in a better position to act against a representative in a small estate who fails to administer an estate properly. The requirement that an account should be signed by beneficiaries protects beneficiaries and also justifies a higher amount for estates to be dealt with in a summary manner. According to the Manual, service points deal with estates only if the value is less than R50, 000.⁶⁹ There can be little doubt that many people do not regard R125,000 as a small amount.

5.2.30. *Comments are invited on the question whether R125,000 is a suitable limit for estates to qualify as "small" estates.*

5.2.31. Small estates in which minors or other incapacitated persons have an interest, deserve special consideration. There is no question that beneficiaries with limited capacity deserve protection. However, protective measures serve no purpose if the cost thereof consumes any benefit from an estate or a substantial part thereof. In many cases the interests of incapacitated persons are well protected by representatives like natural guardians or curators. It may benefit incapacitated beneficiaries that their inheritance should be paid into the Master's guardian's fund or kept by a guardian or other representative⁷⁰ without the need or advisability of other protective measures, such as advertising a full liquidation and distribution account. Circumstances differ from one case to the next and it seems highly desirable to leave the question of the protection of minors and other persons of limited legal capacity in the hands of the Master. The Master fulfils many functions on a level just below the court as upper guardian of all minors.

5.2.32. The Master, Cape Town, submits that perhaps a time limit should be set for executors to distribute assets in terms of the statement in order for creditors and heirs to protect their interests in terms of section 50(2). It seems that beneficiaries or creditors would be able to protect their interests if they become aware of an incorrect distribution. Alternatively, complaints may be lodged with the Master who can call for an account in terms of section 35 and insist on compliance with other requirements under the Act.

5.2.33. ***If it appears to the Master or designated official that—***

5.2.33.1. ***the estate is solvent;***

5.2.33.2. ***no estate duty is payable;***

5.2.33.3. ***the value of the assets in the estate is less than an amount determined by the Minister by notice in the Government Gazette (say R125,000);***

5.2.33.4. ***unborn beneficiaries, minors or other beneficiaries with limited legal capacity will not be prejudiced; and***

5.2.33.5. ***the beneficiary or beneficiaries, or a legal representative of a beneficiary,⁷¹ have signed a statement of assets and liabilities, including the executor's remuneration, if any, which shows the intended distribution of the balance of the estate,***

⁶⁹ Par 4.1.3.3.2 above.

⁷⁰ See the discussion of representatives of minors in paragraphs 5.2.45 to 5.2.48.

⁷¹ See the discussion of legal representative of a minor in paragraphs 5.2.45 to 5.2.48.

the Master or designated official must appoint an executor with authority to deal with the assets set out in the appointment and exempt the executor from compliance with all other requirements under the Administration of Estates Act. The Master or designated official may hold a meeting of beneficiaries, but can dispense with such a meeting or a notice in the Government Gazette if in the Master's opinion it is not necessary or expedient to hold a meeting or publish a notice. The Master should retain the right to direct any executor to comply with any of the provisions of the Act and this should be stated on the certificate of appointment.

(Annexure 1: Sections 13A and 35(15))

5.2.34. Section 42(1) (transfer of immovable property to heirs) and section 50 (liability of an executor making wrong distribution) applies only when a liquidation and distribution account has been lodged in terms of section 35. Section 30(b) (restriction on sale in execution) applies only after the expiry of the advertisement for creditors in terms of section 29. Transfer of immovable property should proceed as usual in a small estate if the property is reflected in the statement of assets and liabilities (and in the appointment as executor). For the protection of beneficiaries, section 42(2) should apply to executors in small estate (certificate by Master required before transfer of immovable property in pursuance of a sale). Executors in small estates should be personally liable if they do not distribute the assets in terms of the statement signed by the beneficiaries or fail to pay a claim which is reflected in the statement or of which the executor was aware when the assets were distributed. The Master should have authority to consent to the sale of property in execution in small estates.

5.2.35. ***The Master should have authority to consent to a sale in execution in terms of section 30 after appointment of an executor in terms of section 13A. Section 42(1) must make provision for transfer of immovable property to beneficiaries if the transfer is in accordance with the statement of assets and liabilities in a small estate. In terms of section 42(2) a certificate by the Master should be required by the executor appointed in terms of section 13A to effect transfer of immovable property in pursuance of a sale. In accordance with section 50 of the Administration of Estates Act, any executor appointed in terms of section 13A who makes a distribution contrary to the statement or distributes the estate before payment of a claim must be held personally liable to any heir and anyone whose claim is reflected in the statement or of whose claim the executor was aware when the assets were distributed.***

(Annexure 1: Sections 30, 42(1) and 50)

5.2.36. No Master's fees are payable unless an executor lodges a liquidation and distribution account in terms of the Administration of Estates Act. All estates under R15,000 are currently exempted from Master's fees. The payment of Master's fees in "small" and other estates is discussed below.⁷²

Dispense with formalities in all estates

5.2.37. The following guidelines were accepted above:

5.2.37.1. In principle, executors should be responsible for the administration of estates.

5.2.37.2. Beneficiaries, other than minor's or incapable persons, should protect their own interests.

5.2.37.3. Beneficiaries in large estates are better able to protect their own interests than beneficiaries in small estates.

5.2.38. Discussion Paper 95⁷³ invited comments on a provision that the Master should be given authority to exempt an executor from compliance with any or all the provisions of the Administration of Estates Act, once provision had been made for the payment of estate duty or it was clear that no estate duty was payable.

5.2.39. Some commentators feel uncomfortable with the possibility to afford the Master a wide discretion. Although a discretion is often a handy mechanism, some of the disadvantages of a discretion must be taken into account. The exercise of a discretion causes work for the Master and may accordingly cause delays. Uncertainty will also exist about the way in which the Master will exercise a discretion.

5.2.40. Some duties of an executor should not be dispensed with, namely:

5.2.40.1. The duty of an executor to deposit cash in the Master's Guardian's Fund if the executor is unable to pay out amounts in accordance with the account (section 35(13)).

5.2.40.2. The duty to register rights to immovable property in the names of beneficiaries (sections 39, 40 and 42).

5.2.40.3. The duty to distribute the estate before drawing remuneration (section 51(4)).

5.2.41. Compliance with these requirements should not cause much work for the Master because they are either not followed up by the Master or, in the case of deposits, there

⁷²

Par 6.2.7.

is rarely a need to comply with the requirement.

5.2.42. Some control measures should remain with the Master because of their dependence on the particular circumstances. They do not cause much work for the Master because the Master is rarely called upon to exercise these control measures:

5.2.42.1. Consent by the Master for the purchase of property by the executor, spouse, etc (section 49).

5.2.42.2. Consent by the Master for absence of executor from the Republic (section 53).

5.2.43. Should beneficiaries have complaints or should an executor act improperly, the Master must retain the right to enforce compliance with any requirements.

5.2.44. ***It is recommended that, except for sections 35(13), 39, 40, 42, 49, 51(4) and 53 of the Administration of Estates Act, an executor who has advertised for creditors and advertised a final account for inspection free from objections, shall not be required to comply with any requirements in the Act in the following circumstances:***

5.2.44.1. ***No estate duty is payable; and***

5.2.44.2. ***The estate is solvent; and***

5.2.44.3. ***There is no absentee beneficiary, minor beneficiary or other beneficiaries lacking full legal capacity, or an unborn heir who may become entitled to benefits in terms of a liquidation or distribution account.***

Despite this recommendation, the Master may instruct an executor at any time to comply with any requirement of the Act and the Master's authority to do so should be noted on the certificate of appointment.

(Annexure 1: Section 35(14) and (15))

5.2.45. This paper contains several references to representatives of minors or other persons, namely —

5.2.45.1. “a minor, not assisted by a legal guardian”;⁷⁴

5.2.45.2. “representatives like natural guardians or curators” and “guardian or other representative”;⁷⁵

5.2.45.3. “legal representative of a beneficiary”;⁷⁶ and

5.2.45.4. “guardians under customary law and guardians under common law” and

⁷³ Par 5.2.23.

⁷⁴ Par 5.2.2.2.1.

⁷⁵ Par 5.2.31.

⁷⁶ Par 5.2.33.5 and clause 13A(1)(e) in Annexure 1.

“natural guardians”.⁷⁷

5.2.46. The definition of “absentee” in section 1 of the Administration of Estates Act refers to a person “who has no legal representative in the Republic”.

5.2.47. The question has been asked whether assistance by a legal guardian should include assistance by other care-givers envisaged by the Children’s Bill. Clause 1(1) of the Children’s Bill⁷⁸ provides as follows:

“**care-giver**” means any person other than a parent or guardian, who factually cares for a child and includes—

- (a) a foster parent;
- (b) a kinship care-giver;
- (c) a person who cares for a child with the implied or express consent of a parent or guardian of the child;
- (d) a person who cares for a child whilst the child is in temporary safe care;
- (e) the person at the head of a child and youth care centre where a child has been placed;
- (f) the person at the head of a shelter;
- (g) a child and youth care worker who cares for a child who is without appropriate family care in the community; and
- (h) the child at the head of a child-headed household;

5.2.48. It seems unadvisable to allow all persons covered by this definition to act on behalf of minors. ***Comment is invited on the question whether persons who are allowed to act on behalf of minors or other persons should be limited to “legal representatives”.***

5.3. **REGULATION 910 AND SECURITY**

5.3.1. Regulation 910⁷⁹ was issued under section 30 of the Attorneys, Notaries and Conveyancers Admission Act 23 of 1934 “after consultation with the presidents of the several law societies”. The regulation refers to persons who are “permanently exempt”, or “exempt to the extent specified in each case” from the prohibition on anyone except attorneys, notaries, conveyancers or law agents to administer estates. Anyone, except a bank, who purchased a trust company or board of executors licensed before 27

⁷⁷ Par 6.8.4 and par 6.8.5.

⁷⁸ B70—2003.

⁷⁹ ΔRegulations prohibiting the liquidation or distribution of the estates of deceased persons by any person other than an attorney, notary, conveyancer or law agent@ **Government Gazette** 2080 of 22 May 1968 as amended.

October 1976⁸⁰ qualifies. A bank is disqualified unless it is appointed as executor in a will and provided that the Bank was registered as such on 27 October 1967. Any person in the full-time service of a trade union qualifies, provided the estate is not liquidated or distributed for direct or indirect reward. Any person liquidating or distributing the estate on the instructions of an attorney, notary, conveyancer or law agent qualifies. Any person (other than a banking institution) who on 27 October 1967 was licensed as a broker or agent under the Licences Act 44 of 1962 and carried on a business predominantly consisting in the liquidation or distribution of the estates of deceased persons qualifies to administer estates.

5.3.2. The Regulation does not contain a consistent approach to ensure that the public is protected. In addition to unqualified persons referred to above, any natural person nominated as executor in a will and the spouse of the deceased or any person related within defined degrees qualifies. It is purely incidental if such a person has any idea how to administer an estate.

5.3.3. Section 22 of the Constitution of the Republic of South Africa Act 108 of 1996 provides that every citizen has the right to choose their trade, occupation or profession freely and that the practice of a trade, occupation or profession may be regulated by law. Regulation 910 does not limit the right to choose a trade, occupation or profession.

5.3.4. Meyerowitz⁸¹ states that the regulations may possibly be unconstitutional. The Constitutional Court remarks in **S v Lawrence**⁸² that certain occupations call for particular qualifications prescribed by law, and one of the constraints of the economic sphere is that persons who lack such qualifications may not engage in such occupations. The court continues that such matters may be regulated provided always that the regulations are not arbitrary. Arbitrariness is inconsistent with "values which underlie an open and democratic society based on freedom and equality", and arbitrary restrictions would not pass constitutional scrutiny.

5.3.5. Regulation 910 does not limit the administration of estates to duly qualified persons because, for instance, skilled and experienced banking officials are excluded in the absence of a testamentary appointment, but individuals related to the deceased within certain degrees are not. Regulation 910 does little to protect against losses. On

⁸⁰ There are several references to 27 October 1967 in the Regulation 910. The significance of this date escapes me. The Regulation was published and came into effect on 22 May 1968 and the date of commencement of the Administration of Estates Act was 1 October 1968.

⁸¹ D Meyerowitz **The Law and Practice of Administration of Estates and Estate Duty** sixth edition Cape Town: Taxpayer CC 1998, paragraph 8.4 footnote 1. No reason is stated for this view.

the one hand banks which constitute hardly any risk are excluded in certain cases, but any individual appointed in a will qualifies. Protection against losses can be promoted by calling for security in appropriate cases rather than by excluding certain persons or entities from appointment as executor.

5.3.6. In terms of section 23 of the Administration of Estates Act the Master has a discretion to call for security, even if security has been dispensed with in a will or the person is not obliged to furnish security otherwise in terms of the Act. For many decades at least some of the Masters have followed a practice to call for security by an executor, who is not obliged to lodge security otherwise, if the executor is not assisted by a recognised agent such as an attorney, accountant or a trust company. In practice it is expensive or impossible for a lay person to obtain acceptable security (by a bank or insurance company) unless such a person is assisted by a recognised agent. In effect the person is forced to appoint such a competent agent to assist him or her before the Master will appoint him or her as executor. Meyerowitz⁸³ regards the practice of the Master to call for security if a nominated person has had little or no experience in the liquidation or distribution of estates as unjustified by any provisions in the Act and without legal basis.

5.3.7. Discussion Paper 95 invited comment on a proposal that every executors should lodge security unless the executor was or was assisted by an attorney, accountant, board of executors, bank, or any person exempted by the Minister in the light of the person=s capabilities, financial standing and trustworthiness. The Discussion Paper proposed that Regulation 910 should be repealed.

5.3.8. A group of Master's officials who commented jointly on the proposals do not support a proposal that the Master should have a discretion to dispense with security. They propose that security should be provided in each estate, even if the executor or person who assists the executor belongs to a recognised professional body. According to them most of the cases where estate monies are misappropriated occur where a professional person acts as executor or agent. They note that the Law Society of South Africa has negotiated cover for all its members for R5 million each. There is no cost involved for the estate or the attorney. They conclude that the Master should only dispense with security where professional persons act as executor or agent if professional bodies have entered into agreements with the Master and the Minister whereby the bodies stood in for their members' actions as executor or agent.

⁸² 1997 (4) SA 1176 (CC) paragraph [33].
⁸³ Paragraph 9.1 footnote 4

- 5.3.9. The Institute of Certified Public Accountants of South Africa says that the Institute is the only accounting institute in South Africa that has compulsory professional indemnity insurance for its members (which includes fidelity cover and covers work done by members, also the administration of estates).
- 5.3.10. Commentators' support for the retention of Regulation 910 is limited. The undesirable trade in trust company licences is but one of the disadvantages of Regulation 910. The argument by a commentator that Regulation 910 should be retained because beneficiaries should have freedom of choice to decide which professional administrator should deal with the estate is not convincing. If freedom of choice is favoured restrictive regulations should be abolished rather than retained. It is unacceptable to retain Regulation 910 "for the time being", as proposed by another commentator, without a time-table for its repeal.
- 5.3.11. One commentator says the limitation in paragraph 4(4) of Regulation 910 to banks registered on 27 October 1967 is inexplicably arbitrary.⁸⁴ Why should a bank registered before 1967 be entitled or more qualified to administer estates, but not a bank registered after 1967? The commentator adds that banks registered after 1967 employ highly qualified and skilled individuals and has the financial resources to ensure protection of the public, possibly even more so than, for instance a small attorney or accountant in private practice; such a bank would be in a financial position to provide bonds of security for the administration and distribution of estates for large amounts if and when called upon to do so; it would be to any bank's detriment to employ persons who are unskilled, incompetent and who would ultimately cause not only financial losses to the bank, but damage its goodwill and reputation.
- 5.3.12. Another commentator says the regulation has not kept pace with developments and promotes job discrimination and job reservation.
- 5.3.13. The persons proposed by commentators for inclusion in the list of persons who should be exempt from security indicate that rigid rules are undesirable. Imagine the writer of the standard work on administration of estates, D Meyerowitz SC, being instructed to lodge security, appoint an expert, or approach the Minister for a dispensation if, for instance, he wishes to administer the estate of a close relative who dispensed with security by Mr Meyerowitz in the will. Although not equally dramatic, the same applies to a recently retired attorney who is no longer admitted to practise or a

Master with thirty years of service with distinction in the Master's Office. On the other hand it would be undesirable to authorise all advocates to administer estates. It is coincidental if an advocate has noteworthy training for or specialised knowledge of the administration of estates.

- 5.3.14. Requiring security from the executor in every estate has the advantage that the risk of losses is curbed and the Master need not ever exercise a discretion whether to dispense with security or not.
- 5.3.15. Forcing executors to engage professional help by insisting on security has the advantage for the Master that it lessens the Master's burden to get executors to comply with requirements. The executor's duty to lodge a liquidation and distribution account will remain in some estates, particularly "large" estates. According to the proposal in paragraph 5.2.18 above many accounts will not be examined by the Master and according to the proposal in paragraph 5.2.44 most duties of executors in prescribed estates would be dispensed with once an account has been advertised free of objections.
- 5.3.16. The protection enjoyed by beneficiaries because of a requirement that security should be furnished and in practice therefore that a professional person should be engaged to assist with the administration of the estate, will not always weigh up against the cost involved for beneficiaries. To give but one example, why should a beneficiary who has been appointed as sole heir and executor be forced to employ and pay for a professional to assist with a simple estate which the beneficiary is capable of administering, with or without the help of a person who has the necessary skill and experience?
- 5.3.17. Despite objections to granting the Master a wide discretion to call for security,⁸⁵ the advantages of a discretion outweighs the disadvantages in this case. Such a discretion can be combined with a practice to list unreliable or incompetent persons and call for security by new entrants for a probation period. A discretion is consistent with the policy in the Trust Property Control Act 57 of 1988 where the Master is authorised to dispense with security even if the trust deed does not dispense with security. One Master submits that the Master does not have time to keep record of instances where a person fails to comply with requirements, but another Master says his office already keeps record of executors and their agents who have been removed from office. It is

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The reason for the limitation was probably the protection of the existing rights of banks at the time when the regulation came into force. As indicated in footnote 80 the significance of the date 27 October 1976 could not be established.

submitted that records should be kept of executors or their agents who are removed from office or do not respond to a final demand by the Master.

5.3.18. Professional indemnity insurance⁸⁶ is better than nothing, but does not match the protection given by a bond of security for a particular estate with provisions approved by the Master. The facility arranged for its members by the Law Society of South Africa to provide security for all its members without direct costs for estates is commendable and to the benefit of the public. Other professional bodies and institutions like banks and trust companies should be encouraged to adopt similar arrangements if, contrary to the recommendations in this paper, security by its members is required.

5.3.19. In order to assist the Master in the exercise of the discretion, categories of persons who qualify should be listed by the Minister. If this is not done, the Master will have to exercise a discretion before each appointment. The Minister can be given authority to add categories of persons to this list. It is submitted that trustworthiness is not an appropriate yardstick with reference to a category of persons and that the requirement should be “measures to ensure professional conduct”. This Minister’s list should not prevent the Master from calling for security in individual cases where the Master has listed a person because of failure to perform duties satisfactorily. Although a special qualification for administration of estates has merit, such a qualification seems to require further development before statutory recognition can be given to it. The Minister’s list should, at least initially, include existing exemptions, namely

5.3.19.1. attorneys;

5.3.19.2. accountants or auditors;

5.3.19.3. boards of executors or trust companies; and banks.

5.3.20. The South African Institute of Chartered Accountants has submitted that “associate general accountants” should also be allowed to administer estates. According to a submission during March 2004 by the Institute of Commercial and Financial Accountants the “associate general accountants” would disappear shortly from the accounting scene following a decision by the South African Institute of Chartered Accountants (SAICA) to disband this level of membership.

5.3.21. The Institute of Certified Public Accountants of South Africa (previously the Institute of Commercial and Financial Accountants) submits that Regulation 910 should be amended to allow its members to be appointed as executors or agents in respect of deceased estates. The Institute’s motivation includes the following:

⁸⁵ See for instance par 5.3.8.

⁸⁶ Par 5.3.9 above.

5.3.21.1. By discriminating against the Institute's members the regulation has not kept pace with developments, especially since South Africa became a democratic society.

5.3.21.2. All professional accountants receive the same basic training at university level which includes courses in the administration of estates. The South African Qualifications Authority (SAQA) has rated the practicing members of the Institute to be on a par with that awarded to chartered accountants and auditors, namely, at level 7.

5.3.21.3. The Institute has a large component of previously disadvantaged accountants amongst its membership who are being approached by their clients to assist with the administration of estates, but are precluded from acting in such a capacity by Regulation 910.

5.3.21.4. The Institute has compulsory professional indemnity insurance for its members and makes provision for continued professional education.

5.3.21.5. The Institute is a member of the International Federation of Accountants, the umbrella controlling body for professional accounting institutes in the world.

5.3.21.6. The Institute can and will provide a comprehensive training programme on the administration of estates for its members to ensure that those who do administer estates are suitably skilled. In terms of its rules of professional conduct, members are precluded from providing services to the public for which they are not skilled or suitably trained. The Institute does not hesitate to take strict action against members who transgress the code of ethics or the rules of professional conduct.

5.3.22. The Minister should give an opportunity for detailed motivation by professions to be included in the exemption.

5.3.23. Persons who have indicated that they will "assist" in the administration of an estate will be encouraged to attend to the administration personally. If they do not they will run the risk of being listed if the estate is not administered properly.

5.3.24. It is true, as indicated by a commentator, that much harm may have been done by the time that an executor is removed for criminal activity or failing to administer an estate properly. However, it is impractical to call for security when negligence is reported and hold the executor liable. Security cannot cover past actions and such an executor is unlikely to lodge security when called upon to do so. To authorise the Master to call for security after an appointment has been made will have more disadvantages than advantages.

5.3.25. **Recommendations**

5.3.25.1. ***Regulation 910 and section 13(2) and (3), which make provision for the prohibition of persons from liquidating or distributing estates, should be repealed.***

5.3.25.2. ***With the exception of a person appointed in terms of section 13A, every executor, must lodge security to the satisfaction of the Master except—***

5.3.25.2.1. ***if the executor is or will be assisted in the administration of the estate by***

5.3.25.2.1.1. ***any person duly admitted to practise as an attorney in the Republic;***

5.3.25.2.1.2. ***any accountant or auditor registered under the Public Accountants and Auditors Act 80 of 1991;***

5.3.25.2.1.3. ***any board of executors or trust company which was not prohibited from administering an estate when this provision came into force;***

5.3.25.2.1.4. ***any bank;***

5.3.25.2.1.5. ***any category of persons exempted by the Minister under paragraph 5.3.25.3 below; or***

5.3.25.2.2. ***if the Master is satisfied that the executor should be exempted from furnishing security in the light of the capabilities and trustworthiness of the executor or the person who will assist the executor.***

5.3.25.3. ***If it appears to the Minister that a category of persons should be exempted from furnishing security in the light of their capabilities and measures to ensure professional conduct, the Minister may exempt that category by notice in the Gazette. The Minister may similarly revoke an exemption if it appears to the Minister that the category of persons should no longer be exempted.***

5.3.25.4. ***The Master must keep a record of instances where a person appointed as executor fails to comply with legal requirements or to administer an estate properly and a record of persons who indicated that they will assist such an executor in the administration of the estate.***

5.3.25.5. ***Despite paragraph 5.3.25.2 the Master may, after notice to the executor or the person who assists the executor, refuse to appoint the executor in another estate or an estate where the executor will be assisted by***

such a person, unless security has been furnished. The notice must indicate the reason for the Master's notice and list instances where an executor failed to comply with legal requirements or to administer an estate properly.

5.3.25.6. The Master may revoke a notice in paragraph 5.3.25.5 if the Master is satisfied that the executor or person is capable to administer estates and will in future administer estates properly or see to it that estates are administered properly.

(Annexure 1: Sections 13(2) and (3) and 23)

5.4. **DIFFERENT TYPES OF APPOINTMENT**

5.4.1. The Discussion Paper submits that different types of appointments in terms of sections 13, 18, 21 and 25 of the Administration of Estates Act⁸⁷ should be standardised for the following reasons:⁸⁸

5.4.1.1. Financial institutions and deeds offices are not familiar with all the different types of appointment and refuse to accept an appointment of anyone other than an executor;

5.4.1.2. Less formal appointments, like those in terms of sections 18(3) and 25 of the Act, take longer because the requirements are unknown and inexperienced staff deal with them;

5.4.1.3. Training of the staff of attorneys, accountants and trust companies can be simplified; and

5.4.1.4. Delays can be avoided by simplification.

5.4.2. Paragraph 6.4 below discusses the question whether persons other than executors should be authorised to gather information about estates.

Appointments in terms of section 18(3)

5.4.3. When the Master gives directions in terms of section 18(3) (value of estate less than R125,000) no executor is appointed.⁸⁹ The Master usually regards the estates as finalised once directions have been given to a person to deal with estate assets. The position is the same if the Master issues directions in terms of section 25 without appointing an executor or without signing and sealing the appointment of a foreign

⁸⁷ See paragraph 3.2 above for a discussion of the different types of appointments. Section 13 deals with appointment of executors; section 18 with small estates and sections 21 and 25 with foreign estates.

⁸⁸ Discussion Paper 95 par 5.3.1.

⁸⁹ See the discussion in paragraph 5.2.2.

executor.

5.4.4. What is the position if heirs or creditors complain that they have not received their share, or if it appears that the Master has been misled, perhaps grossly, about the position in the estate? As a "creature of statute" the Master has the powers conferred upon him or her by the Act, either expressly or by necessary implication.⁹⁰ The 1965 Act endows the Master with wide powers to Act against executors, but contains no express powers to act against persons given directions in terms of sections 18(3) or 25.

5.4.5. Commentators agree with the principle that it is advisable to appoint an executor in all cases and dispense with compliance with requirements according to the circumstances. This enables the Master to use the extensive powers in the Act against executors who fail to fulfill their duties.

5.4.6. ***It is recommended that an executor should be appointed in all estates regardless of the value of the estate, although special rules may apply to executors appointed in estates under a prescribed value.***

(Annexure 1: Section 18(3), 20, 21 and most of section 25 repealed and cross-references removed)

Foreign estates

(i) Section 25 appointments or directions

5.4.7. Section 25 applies to the estate of a person who was neither ordinarily resident nor the owner of immovable property within the Republic. The section makes provision for the appointment of an executor (or signing and sealing of a foreign appointment which has the same effect) or the giving of directions.

5.4.8. If directions are given without the appointment of an executor the position is similar to appointments in terms of section 18(3), discussed above. The mechanism in section 25 to appoint an executor and exempt the executor from certain duties is satisfactory, but wording used to exempt executors is problematical and the scope of the Master's authority to exempt the executor from complying with requirements is limited.⁹¹ Section 25 is not limited to appointments in ***proclaimed*** states, but the affidavit prescribed in regulation 4 must be made by "the person referred to in section 21", who is a person in whose favour letters of executorship has been granted in a

⁹⁰ *Fourie's Poultry Farm (Pty) Ltd v Kwanatal Food Distributors (Pty) Ltd (In Liquidation)* 1991 (4) SA 514 (N) 522.

⁹¹ Discussion Paper 95 paragraphs 5.2.20 and 5.2.21.

proclaimed state (see the next paragraph).

(ii) Recognition of “foreign” executors in terms of section 21

5.4.9. Section 21 provides for the signing and sealing of duly authenticated letters of executorship granted in a state proclaimed in terms of section 20. This has the same effect as an appointment as executor.

5.4.10. In terms of Proclamation 341 of 1960 published in Government Gazette 6540 of 30 September 1960, sections 41 and 43 of the Administration of Estates Act 24 of 1913 (similar to section 21 of the 1965 Act) apply to letters of administration at any time granted in the following "territories":⁹²

- 5.4.10.1. Basutoland (Lesotho)
- 5.4.10.2. Bechuanaland Protectorate (Botswana)
- 5.4.10.3. British Columbia
- 5.4.10.4. British Guiana (Guiana)
- 5.4.10.5. Channel Islands
- 5.4.10.6. Eire, the Republic of
- 5.4.10.7. Kenya
- 5.4.10.8. New South Wales (New South Wales, Australia)
- 5.4.10.9. New Zealand
- 5.4.10.10. Northern Rhodesia (Zambia)
- 5.4.10.11. Nyasaland (Malawi)
- 5.4.10.12. Southern Rhodesia (Zimbabwe)
- 5.4.10.13. South West Africa (Namibia)
- 5.4.10.14. Swaziland
- 5.4.10.15. Tanganyika (Tanzania)
- 5.4.10.16. United Kingdom of Great Britain and Northern Ireland
- 5.4.10.17. Victoria (Victoria, Australia)

5.4.11. Proclamation 341 repealed 12 proclamations dating from 1913 to 1949. In terms of section 20(3) of the 1965 Act, proclamations in terms of the 1913 Act are deemed to have been issued under section 20 of the 1965 Act. The selection of these territories is illogical from today's perspective. Why, for instance, in this day and age, should two of the states of Australia, one of the Provinces of Canada and one state in South America be selected for special treatment?

⁹²

The words in brackets are contemporary names of the countries stated in the Proclamation.

5.4.12. The original purpose of the proclamation of some states was probably to facilitate the appointment of executors or other representatives in appropriate cases where a foreign element was involved. It should not be too difficult to deal with assets of a citizen of a foreign state situated in South Africa. Apparently the signing and sealing of letters of executorship gives rise to more problems than it solves and it is difficult to justify the proclamation of some states and not others.⁹³ It is easier to issue a new appointment as executor for the South African estate than to sign and seal a foreign appointment so that the representative can act in South Africa.

(iii) Ordinary rules for “foreign” estates

5.4.13. There was substantial support for the proposals in Discussion Paper 95⁹⁴ that ordinary letters of executorship in terms of section 13 should be issued for all “foreign” estates and that special provision should not be made in section 21 for certain proclaimed States.

5.4.14. The main reason for a distinction between foreign estates and other estates is that there are often no creditors or beneficiaries in the Republic in the case of foreign estates. There is no reason why special rules for small estates⁹⁵ should not apply to foreign estates. A practical difference regarding estates in terms of section 25 is that local executors lodge an account, advertise it for inspection and advertise for creditors, while foreign representatives instead lodge an affidavit that there are no local creditors or beneficiaries. Transparency is encouraged if an account lies for inspection and an advertisement appears for creditors instead of relying on an affidavit.

5.4.15. ***It is recommended that the Administration of Estates Act should not distinguish between the administration of foreign estates and the administration of other estates.***

(Annexure 1: Section 1 definitions of ‘letters of executorship’ and ‘state’; sections 20, 21 and 25; cross-references removed elsewhere)

5.4.16. Section 74 contains special provisions for tutors and curators appointed in proclaimed States. There is no reasons why such tutors or curators should not be subject to the ordinary rules, for instance to apply to court in appropriate cases. ***It is recommended that special provisions for tutors or curators in proclaimed States should be deleted.***

⁹³ Discussion Paper 95 paragraphs 5.3.6 to 5.3.8.

⁹⁴ Paragraph 5.3.8.

⁹⁵ Discussed below.

(Annexure 1: Section 74; cross-references removed elsewhere)

5.5. **DRAFT LEGISLATION AND REGULATIONS**

Administration of Estates Act

5.5.1. Numerous comments were received on the draft amendments to the Administration of Estates Act in the Annexure to Discussion Paper 95. Many of the comments fall away because of the **Bhe** decision⁹⁶ and changes to the recommendations. All other comments dealing with substantive issues have been dealt with above, except for the following.

5.5.2. A commentator says there is doubt about which spouse in a polygamous union will be considered to be the surviving spouse for purposes of the Administration of Estates Act. The references to *Aspouse@* or *Aspouses@* in sections 6(4)(a), 49(1), 81(1) and 105(3) will not give rise to problems in the case of more than one spouse. A marriage in community of property is between two spouses only⁹⁷ and the reference to “spouse” in sections 9(1)(a)(ii) and 9(2)(a)(ii) should remain as it is. ***It is recommended that sections 7(1)(a), 9(1) introduction, 18(1) after paragraph (f), 19(a) and (b), 38(1)(a)***⁹⁸ ***and (c) should be amended to make provision for more than one spouse in a polygamous union (sections in Annexure 1).***

Broadening the definition of “spouse”

5.5.3. A commentator submits that the Commission should broaden the definition of “spouse” to include, for instance, cases where it is claimed that there is no valid customary marriage as lobola has not been paid. The commentator points out that the reform of the law governing domestic partnerships is “a very long term process”.

5.5.4. The Commission’s report on the customary law of succession⁹⁹ in effect recommends that the following should be included in the meaning of a “spouse”:

- A woman other than the wife of the deceased with whom he had entered into a union in accordance with customary law for the purpose of raising seed of the house of his wife;

⁹⁶ Par 2.7.

⁹⁷ Cf: Section 22(6) of the Black Administration Act 38 of 1927 before its repeal by Act 3 of 1988; Section 7(2) Recognition of Customary Marriages Act 120 of 1998.

⁹⁸ A proposal that section 38 should be scrapped because it is impractical is not discussed in this paper.

⁹⁹ April 2004, clauses 2(2) on page 92.

- A woman who was married to another woman under customary law for the purpose of providing children to the deceased's house.

5.5.5. The report recommends¹⁰⁰ that if a civil marriage was contracted before 2 December 1988¹⁰¹ during the subsistence of any customary marriage between the husband and any woman other than the wife in the civil marriage, the civil marriage shall not affect the material rights of any spouse of the customary marriage or any issue thereof and the widow of the civil marriage and the issue thereof shall have no greater rights in respect of the estate of the deceased spouse than she or they would have had if the civil marriage had been a customary marriage.

Section 23 of the Black Administration Act and Regulation 200

5.5.6. The **Bhe** decision¹⁰² declared section 23 and Regulation 200 for the administration and distribution of the estates of deceased blacks¹⁰³ invalid.

5.5.7. *It is recommended that these provisions be removed.*

Regulation 910

5.5.8. It was recommended in paragraph 5.3 above that regulation 910 should be repealed.

6. MATTERS FOR FURTHER CONSIDERATION

6.1. INTRODUCTION

6.1.1. The main aim of this review is the introduction of a unitary system for the administration of estates of all South Africans. Measures to improve the administration process and reduce the work of the supervising authority and executors as far as can be justified, are also considered.

6.2. DEPLOYMENT OF RESOURCES IN THE MASTER'S OFFICE AND ELSEWHERE

Introduction

6.2.1. It is clear that Masters' offices, or at least some of the offices, have problems to

¹⁰⁰ Clause 4 on page 93.

¹⁰¹ The date when the Marriage and Matrimonial Property Law Amendment Act 3 of 1988 came into operation.

¹⁰² Par 2.7 above.

¹⁰³ R200 *Government Gazette* 10601 dated 6 February 1987.

cope with their workload. Recommendations in this report will lessen the Master's workload, but some may increase it, for instance assistance with small estates. The creation of a Master's Office Branch in the Department of Justice and Constitutional Development and the post of Chief Master can assist in service delivery. The appointment of administrators and Master's office staff at magistrates' offices opens up opportunities to improve service delivery.

6.2.2. Although the core business of the Department of Justice and Constitutional Development is the courts, service delivery in general is important.¹⁰⁴ Many people who never have contact with the courts are exposed, personally or through their agents, to structures which deal with the administration of estates. This happens at a time when they may be emotionally and financially distressed. Especially in difficult economic times it is important that money should be available to be used and should not be entangled in tiresome and time consuming procedures.

6.2.3. In the budget speech by Ms Brigitte Mabandla, MP, Minister for Justice and Constitutional Development in the National Assembly of Parliament on 20 May 2005 she indicated the following:

6.2.3.1. The Masters' Offices play an important role in the social and economic lives of our people.

6.2.3.2. Each year the value of the estates under the supervision of the Masters amounts to approximately R18 billion, which includes about R2, 5 billion in the Guardians' Fund. It is essential that the Masters' offices are transformed and restructured to ensure that those, who are entitled to this service, receive it without unnecessary delays. This will not only stimulate our economy, but ensure that those who need support receive it promptly. Ways of ensuring that estates, both deceased and insolvent estates, are promptly wound up must be explored.

6.2.3.3. The ability of the Masters' offices to render an efficient and effective public service in the national interest must be enhanced.

6.2.4. According to the Master Cape Town an investigation done by the Master Grahamstown indicated that the income generated during the year 2000 in respect of master's fees, registration fees for trusts, fees for photocopies, commission on money in the Master's Guardian's Fund and estate duty amounted to R311 958 000 while

¹⁰⁴

Introduction to *The Department of Justice and Constitutional Development: The Millennium 10 point plan*.

actual expenditure for the 1999/2000 financial year for the Masters Offices of Bloemfontein, Cape town, Grahamstown, Kimberley, Pietermaritzburg and Pretoria only amounted to R42 085 000.

6.2.5. Commentators submit that Master's fees should be increased to generate funds for service improvements and that the Master should be paid for the collection of estate duty.

6.2.6. It stands to reason that due to other priorities, the funds that can be allocated to the Masters' offices and service points are limited. ***It is submitted that the allocation of funds to the Master should reflect the reality that the Masters' offices play an important role in the lives of people and that the ability of the Masters' offices to render an efficient and effective service must be enhanced.***

Master's fees

6.2.7. Several commentators submit that the tariff for Master's fees should be adjusted. The tariff is based on the gross value of assets according to the executor's account. The following criticisms can be raised:

6.2.7.1. Although no rocket science is required to calculate the fees, the calculation can be simplified. Approximately the same results will follow if fees are calculated for estates with a gross value of at least R16, 000 at a rate of R6 for each completed R2,000 with a maximum of R600.

6.2.7.2. The increase in the value of assets keeps up with inflation to a certain extent. The limit where the maximum fees of R600 is reached, namely R203,000, has remained unchanged for a long time as has the value of R15,000 under which Master's fees are exempt.

6.2.8. No Master's fee is levied in estates dealt with in terms of section 18(3) because no executor is appointed and the tariff refers to the gross value according to the executor's account. If the recommendation in paragraph 5.2.33 is accepted the Master will appoint an executor in "small" estates, but the statement of assets and liabilities is not an executor's account and Master's fees should not be payable in these estates with a value of up to R125 000. It is advisable that Master's fees should be exempt in these estates and the position should be stated clearly.

6.2.9. ***In order to estimate the effect on income from Master's fees if the tariff is changed substantially, it is submitted that statistics should be obtained for the values which will be considered as factors of the tariff's formula, for instance the gross value of assets in executors' accounts. Pending a substantial review of the***

tariff it is submitted that the tariff must be amended to provide that Master's fees should be payable in estates with a gross value according to the executor's account of at least R16, 000 at a rate of R6 for each completed R2,000 with a maximum of R600. No fees should be payable in estates where an executor is appointed in terms of the recommendation in paragraph 5.2.33.

6.2.10. At present the money recovered for Master's fees is paid into the general revenue of the State. If it is intended to obtain resources for the improved operation of the Master's office and satellite offices from the proceeds of Masters fees, some adjustments will be required. This aspect is not considered in this review. The route followed by the deed=s office was the establishment of a "trading entity" as defined in section 1 of the Public Finance Management Act 1 of 1999.¹⁰⁵

Estate duty

6.2.11. Most of the powers and duties of the Commissioner for the South African Revenue Services under the Estate Duty Act 45 of 1955 are carried out under delegation by Master's office staff. A senior official of the Master's office in Pretoria says that estate duty is levied in ,028% of the estates in the Pretoria office.

6.2.12. The view is held that, because of the Master's involvement in the collection of estate duty, the Master calls for requirements, such as vouchers, in all estates, causing unnecessary delays. A commentator submits that the Commissioner should take over all duties for the recovery of estate duty. He adds the following:

The Master has no previous records to work on and really just has to accept what the executor presents to him, as long as it is supported by vouchers. As the discussion paper says on page 33, "all the scrutiny one can muster cannot tell us if there are assets fraudulently omitted from the account". The receiver at least has the history of the deceased's income tax returns and is therefore in a better position to pick up anything untoward, but, in any case, if the receiver wants to levy estate duty, let him do the work for it.

6.2.13. If duties to ensure the proper collection of estate duty remain with the Master, the possibility that the Commissioner should pay for services rendered by the Master could be investigated.

6.2.14. These policy matters are not considered in this document.

¹⁰⁵

Defined as an entity operating within the administration of a department for the provision or sale of goods or services, and established ... with the approval of the National Treasury@. See also Chapter 19 of the Treasury Regulations for departments, constitutional institutions and trading entities in **Government Gazette** 21249 published on 31 May 2000.

6.3. **EXTENT OF MASTER'S INVESTIGATIVE AND ASSOCIATED POWERS**

Introduction

6.3.1. Regulation 3(2)¹⁰⁶ (part of the regulations which have been declared invalid) made provision for an inquiry before a magistrate, where it appeared to the magistrate that an enquiry should be instituted to determine the person or persons entitled to property of an estate. Persons who failed to appear without lawful excuse were guilty of an offence.¹⁰⁷ The Commission's **Report on Customary Law of Succession** recommends¹⁰⁸ that provision should be made for an inquiry by a magistrate and a determination by the Master to resolve a dispute or remove uncertainty about the status of a person, or a claim by a person against an estate, the nature or content of any asset, or the devolution of family property.

6.3.2. The **Bhe** decision¹⁰⁹ remarks as follows:¹¹⁰

The Intestate Succession Act does not preclude an estate devolving in accordance with an agreement reached among all interested parties but in a way that is consistent with its provisions. There is, for example, nothing to prevent an agreement being concluded between both surviving wives to the effect that one of them would inherit all the deceased's immovable property, provided that the children's interests are not affected by the agreement. Having regard to the vulnerable position in which some of the surviving family members may find themselves, care must be taken that such agreements are genuine and not the result of the exploitation of the weaker members of the family by the strong; In this regard, a special duty rests on the Master of the High Court, the magistrates and other officials responsible for the administration of estates to ensure that no one is prejudiced in the discussions leading to the purported agreements.

6.3.3. At present there are three measures which the Master can use to gather information:

6.3.3.1. Section 32 of the Administration of Estates Act provides, in the case of disputed claims, for affidavits which deal with specified questions and examination under oath before the Master or a magistrate. The Master or Magistrate does not

¹⁰⁶ R200 in Government Gazette 10601 of 6 February 1987 Regulations for the Administration and Distribution of the Estates of Deceased Blacks.

¹⁰⁷ Reg 3(3).

¹⁰⁸ April 2004 page 86.

¹⁰⁹ Par 2.7 above.

¹¹⁰ Par [130].

make a ruling on the evidence.

6.3.3.2. Section 36 provides that if an executor fails to lodge any voucher or vouchers in support of an account or any entry therein in accordance with a provision of or a requirement imposed under the Act, or to comply with any reasonable demand of the Master for information or proof required by the Master in connection with the liquidation or distribution of the estate, the Master or any person having an interest in the liquidation and distribution of the estate may, after giving the executor not less than one month's notice, apply to the Court for an order directing the executor to lodge such account or voucher or vouchers in support thereof or of any entry therein or to perform such duty or to comply with such demand.

6.3.3.3. Section 54(1)(b)(v) provides for the removal of an executor by the Master if the executor does not comply with a lawful request by the Master and fails to go to court within 30 days after notice by the Master to stop the Master from removing the executor.

6.3.4. Section 381 of the Companies Act 61 of 1973¹¹¹ provides that—

6.3.4.1. the Master may at any time appoint a person to investigate the books and vouchers of a liquidator (this can be very expensive);

6.3.4.2. the Court may, upon the application of the Master, order that any costs reasonably incurred by the Master in performing duties under the section be paid out of the assets of the company or regarded as part of the costs of the winding-up of the company.

6.3.5. Section 152 of the Insolvency Act 24 of 1936 provides for the Master to summon the trustee or any other person able to give information which the Master considers desirable to obtain to appear before the Master or a magistrate and to furnish the Master or magistrate with information, books or documents specified in the notice.

6.3.6. In terms of section 57(5) of the Insolvency Act the Master may whenever the Master considers it desirable appoint a person as co-trustee with the trustee or trustees of an insolvent estate. Section 374 of the Companies Act and section 7(2) of the Trust Property Control Act 57 of 1988 are similar.

6.3.7. The question arises whether the Master's investigative and associated powers in deceased estates should be extended to deal with cases where investigations are justified. Several possibilities were mentioned during a meeting with officials of the

Masters' offices and other persons:

- 6.3.7.1. Give the Master a general power to appoint a joint executor who can do investigations.
- 6.3.7.2. Authorise the Master (see section 381 of the Companies Act 61 of 1973) to appoint a person to investigate the books, documents, etc, of the executor.
- 6.3.7.3. Authorise the Master to hear evidence and decide questions of fact regarding the validity of claims or wills and other matters or institute a body similar to the small claims court to do this.
- 6.3.7.4. Create a special investigative unit within the Master's office. If the Master retains a role as arbiter and as first instance adjudicator to rule on objections, the investigative unit should act independently from the Master.
- 6.3.7.5. An informal process to do investigations with decisions by a board or other body.
- 6.3.7.6. Create an ombudsman for estate matters.
- 6.3.8. The following points require consideration in this regard:
 - 6.3.8.1. From the Master's point of view it is desirable to have measures with wide application and which are easy to apply. It can be argued that there is no reason why measures available for insolvent estates should not be available for deceased estates.
 - 6.3.8.2. Insolvent estates are public matters with substantial government involvement while deceased estates are mostly private matters where the wishes of the deceased and interested parties are respected.
 - 6.3.8.3. The possible need for urgent action must be weighed against the desirability of protective measures like a requirement of a court order or to give adequate warning before steps are taken.
- 6.3.9. If the Master becomes actively involved in investigations the Master's impartiality may be compromised in cases where the Master must act as arbiter, for instance, giving decisions on objections against accounts.
- 6.3.10. Officials of the Master's Office Branch and the Family Advocate have discussed the possibility of the Family Advocate assisting with matters such as the following:
 - 6.3.10.1. Investigating the circumstances of minors and persons who care for minors before payments are made on behalf of a minor from the guardian's fund.
 - 6.3.10.2. Giving advice on a suitable person to be appointed to administer a small

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There is a similar provision in section 16(2) of the Trust Property Control Act 57 of 1988.

estate where orphaned minors are involved (cases of orphaned minors are on the increase).

6.3.10.3. Investigations in terms of section 60(5) of the Mental Health Care Act 17 of 2002 before the appointment of a person as administrator for a mentally ill person or a person with severe or profound intellectual disability.

Involvement of the Family Advocate

6.3.11. The Family Advocate is appointed in terms of section 2 of the Mediation in Certain Divorce Matters Act 24 of 1987 to exercise the powers and perform the duties granted or assigned under that Act or any other law. In terms of section 4(1) of the Act the Family Advocate must in the case of a divorce action or application for the variation, rescission, or suspension of an order with regard to the custody or guardianship of, or access to a child in terms of the Divorce Act 70 of 1979 institute an enquiry concerning the welfare of minors.

6.3.12. Time is of the essence in most matters where the Master deals with the interests of minors. The number of cases where orphaned minors have an interest in “small” estates or payments are made to minors out of the guardian’s fund are substantial. It is important to protect the interests of vulnerable minors. The Master uses the services of social workers, but social work services are under substantial pressure because of lack of resources. The Family Advocate has indicated that steps are under way to appoint social workers to assist with investigations by the Family Advocate.

6.3.13. ***It is recommended that the following matters should be investigated:***

6.3.13.1. ***The advisability of legislation which authorises the Family Advocate to investigate if requested by the Master—***

6.3.13.1.1. ***the circumstances of a minor and any person who cares for the minor before payments are made from the guardian’s fund on behalf of a minor;***

6.3.13.1.2. ***a suitable person to be appointed to administer small estate where minors are involved;***

6.3.13.1.3. ***the merits of applications in terms of section 60(5) of the Mental Health Care Act 17 of 2002 for the appointment of a person as administrator for a mentally ill person or a person with severe or profound intellectual disability.***

6.3.13.2. ***If it is found that the powers of the Family Advocate should be extended, adequate provisions should be made for resources and capacity to***

ensure that the extra duties can be dealt with efficiently.

Appointment of joint executor or removal of executor

- 6.3.14. In the case of insolvent estates, companies under liquidation and trusts the Master has a wide discretion to appoint a joint trustee or liquidator if the Master considers it desirable.
- 6.3.15. One of the reasons why the Master issues joint appointments is to investigate the administration of the incumbent and to ensure continuity when an incumbent is removed from office. This practice can lead to problems:
- 6.3.15.1. The original executor remains in office and the joint executors must act jointly and share the remuneration. The original executor is unlikely to cooperate.
- 6.3.15.2. It is improbable that the executor would return the original appointment for the endorsement of a joint appointment in which case the original appointment would stay in circulation in addition to a new joint appointment issued by the Master.
- 6.3.16. It may be preferable to appoint a person to attach the books and records and investigate the administration of the estate where necessary¹¹² and to remove the executor before a new executor is appointed. An executor who has been removed from office is obliged to return letters of executorship to the Master¹¹³ and the Master may disallow remuneration if an executor failed to discharge duties or discharged them in an unsatisfactory manner.¹¹⁴
- 6.3.17. It has been suggested that it takes too long for the Master to remove an executor from office in terms of section 54 of the Administration of Estates Act because of the 30 days notice required in subsection (2) of the Administration of Estates Act. In practice this notice must be added to the one month's notice usually given in terms of section 36(1).¹¹⁵ Although "final demands" in terms of section 36 are issued regularly, cases where application is made to court to force compliance are probably rare. It seems that adapting existing practice could go some way in reducing delays. If worded carefully, there is no reason why the notice in terms of section 36(1) could not be combined with a notice in terms of section 54(2) leaving the Master the choice to apply to court for an

¹¹² See par 6.3.26.7 below.

¹¹³ Section 54(5) of the Administration of Estates Act.

¹¹⁴ Section 51(3)(b) of the Administration of Estates Act.

¹¹⁵ Section 36 provides for application to court for an order directing an executor to comply with legal requirements.

order directing compliance or removing the executor from office.¹¹⁶

6.3.18. In insolvent estates another reason for joint appointments is to promote the appointment of previously disadvantaged individuals. With the issue of freedom of testation and a close relationship between the executor and beneficiaries, joint appointment of executors does not seem to be an appropriate measure to promote affirmative action in the field of administration of deceased estates.

6.3.19. **Comments are invited on the following possibilities:**

6.3.19.1. ***Empower the Master to appoint a joint executor, but enact safeguards before the Master can use this power, for instance notice to the incumbent, or a precondition of a court order or that the incumbent failed to comply with legal requirements or that a serious conflict of interests has arisen.***

6.3.19.2. ***Give the Master a wide discretion to appoint a joint executor and trust that the Master will exercise the discretion in appropriate cases (Annexure 1: Section 18(5)(c)).***

6.3.19.3. ***Do not give the Master authority to appoint a joint executor, but rely on provisions to remove an executor from office expeditiously.***

Deciding questions of fact

6.3.20. In terms of existing practice the Master does not decide questions of fact. For instance, if a question of fact arises in connection with the Master's consideration of an objection against an account the Master will not decide the question but leave it to the parties to go to court if they wish.¹¹⁷ When the Master considers the validity of a will the Master bases the decision on the appearance of the will, but will not decide questions of fact such as whether the witnesses and testator were present simultaneously when the will was signed.

6.3.21. Some, if not most, of the decisions of the Master qualify as "administrative action" in terms of section 1 of the Promotion of Administrative Justice Act 3 of 2000. In terms of section 3(3) the Master (as "administrator") may, in the Master's discretion, in order to give effect to the right to procedurally fair administrative action give a person whose rights or legitimate expectations are materially affected by the decision of the Master an

¹¹⁶ The passing reference in existing final reminders which threaten action in terms of section 36 (forms J179 and J267) to removal of the executor in terms of section 53 is not enough.

¹¹⁷ ***Fourie's Poultry Farm (Pty) Ltd v Kwanatal Food Distributors (Pty) Ltd (in liquidation)*** 1991 (4) SA 514 (N) at 522-523; ***Brodryk v Die Meester*** 1991 (4) SA 825 (C) 828.

opportunity to present and dispute information and arguments.

6.3.22. Should the present practice be retained or should the Master investigate questions of fact and make a decision?

6.3.22.1. An argument against such authority is that the Master does not have the machinery and experience to decide such questions. The machinery to make such a decision can be enacted and the Master will gain experience as does any person who is expected to decide factual questions. Another possibility is to have magistrates investigate questions of fact. It counts against this possibility that questions of fact and other questions are often intertwined with other questions and that magistrates complain about heavy workloads.

6.3.22.2. An argument in favour of a practice that the Master decides questions of fact is that it is often not affordable for parties to have such questions decided by a court. A decision by the Master is a cheap remedy which should not involve too much delay. The Master's decisions are subject to review by the high court.

6.3.23. ***Comments are invited on the following questions:***

6.3.23.1. ***Should the Master decide questions of fact after gathering evidence, where necessary; or***

6.3.23.2. ***Should questions of fact be investigated and decided by magistrates; or***

6.3.23.3. ***Should the existing practice be retained?***

Gathering information

6.3.24. The existing provisions which allow the Master to gather information in deceased estates are set out in paragraph 6.3.3 above. The wider powers in terms of the Insolvency and Companies Act are set out in paragraphs 6.3.4 and 6.3.5. The options of safeguards or a wide discretion for the Master¹¹⁸ are relevant in this regard.

6.3.25. Experience with section 381 of the Companies Act 61 of 1973 and section 16(2) of the Trust Property Control Act 57 of 1988 has shown that lack of funds to pay a person appointed by the Master to carry out an investigation inhibits essential investigations from being carried out. It is impossible to budget accurately in advance for funds which may be required for such investigations and the appointed person cannot be expected to wait until funds have been recovered from the estate or elsewhere. Provision should be made to pay such cost from the guardian's fund until

¹¹⁸

Par 6.3.19 above.

such time as costs have been recovered from an estate or an executor who has been removed from office.

6.3.26. ***It is recommended that the Master should have a wide discretion to gather information and that the following provisions should be enacted***¹¹⁹:

6.3.26.1. ***If the Master is of the opinion that the executor of the estate or any other person is able to give information or is in possession of books, documents or records which the Master considers desirable to obtain, concerning the deceased estate or the administration of the estate or concerning any demand made against the estate, the Master may by notice in writing delivered to the executor or such other person, summon him or her to appear before the Master or before a magistrate at a place and on a date and time stated in the notice, and to furnish all the information within his or her knowledge and be questioned by the Master or the magistrate concerning the deceased estate or the administration of the estate or a demand against the estate and produce the books, documents or records specified in the notice or a further notice issued by the Master or magistrate.***

6.3.26.2. ***A person called upon to be questioned may be assisted by a representative and such representative may question the said person only in so far as it is necessary to clarify answers given by him or her.***

6.3.26.3. ***If a banker is summoned or ordered to produce documents, books or statements or give information, such banker shall, notwithstanding the law relating to privilege, be obliged to produce such documents, books or statements or give such information.***

6.3.26.4. ***Notwithstanding the provisions of any other law or the common law, but subject to the court's power to avoid questioning being conducted in an oppressive, vexatious or unfair manner, no person questioned in terms of this provision may refuse to answer a question because the answer may prejudice him or her in any criminal or disciplinary proceedings which have been or may be instituted against him or her or apply for a postponement of the questioning until the criminal or disciplinary proceedings have been finalised: Provided that evidence given by a person is not admissible against him or her***

¹¹⁹

Some of the recommendations are adapted from recommendation in clause 68 of the South African Law Reform Commission's **Report on the review of the law of insolvency** February 2000, Volume 2 page 133.

in criminal or disciplinary proceedings, except in criminal proceedings where such person is charged in connection with evidence given during the questioning with perjury or the giving of false evidence under oath or affirmation or a for refusal or failure to answer lawful questions fully and satisfactorily. Subject to the above, any evidence given is admissible in any proceedings instituted against the person who gave such evidence and any record of a questioning introduced in such proceedings forms part of the record of the proceedings.

6.3.26.5. *A person other than the executor who in answer to a summons appears to be questioned or produce books, documents, or records is entitled to the witness fees to which he or she would have been entitled if he or she were a witness in civil proceedings before a court of law.*

6.3.26.6. *A person who fails without reasonable excuse to comply with a summons, or, having appeared in answer to such notice, refuses to submit to examination or to answer fully and satisfactorily any lawful question put to him or her, is guilty of an offence.*

6.3.26.7. *The Master may at any time appoint a person to investigate the books, documents, records and vouchers of the executor and direct the executor or the agent of the executor to deliver to the person so appointed or to the Master any book, document, or record relating to or property belonging to the estate of which he or she is the executor or the administration of the estate. The reasonable costs incurred in performing such an investigation shall, unless the court otherwise orders, be regarded as part of the costs of administration of the estate and if the executor is removed from office consequent upon such an investigation, it shall be paid by the executor de bonis propriis. The Master may pay the reasonable costs incurred in performing the investigation out of the guardian's fund and any such costs recovered from an estate or an executor who has been removed from office shall be deposited in the guardian's fund.*

(Annexure 1: Sections 35A, 97(2) and 102(1)(i))

Right of retention in respect of books or documents

6.3.27. According to Master's office officials problems are experienced when a new executor is appointed if the old executor or the agent of the executor refuses to hand over documents before fees allegedly due in connection with work on the administration

have been paid. The same problems can be experienced if a joint executor is appointed. It is unacceptable that an executor or the agent of an executor who has not performed duties satisfactorily insists on payment before books and documents are released.

6.3.28. Section 47 of the Insolvency Act provides that a right to retain any book or document of account which belongs to the insolvent estate or relates to the insolvent's affairs does not afford any security or preference in connection with any claim against the estate. If the Master calls for documents and books the holder should not be allowed to require payment before the documents and books are handed over, especially if a person or the agent has failed to administer the estate properly.

6.3.29. ***It is recommended that a person who is required to hand over books to the Master should not be entitled to require payment of any money before books, records or documents are handed over to the Master.***

(Annexure 1: Section 35A (9))

Impartial person or body

6.3.30. Proposals were received¹²⁰ that provision should be made for an ombudsman, or a special investigative unit within the Master's office, or a body similar to the small claims court to hear evidence on questions of fact, or another impartial board or other body.

6.3.31. It must be borne in mind that the Master's impartiality as arbitrator or decider of objections may be compromised if the Master gave directions or was involved in investigations or decisions regarding the estate.

6.3.32. Provision is already made for supervision of the actions of a Master. Section 2(1)(c) of the Administration of Estates Act provides that Deputy Masters and Assistant Masters may do anything which may be lawfully done by the Master subject to the control, direction and supervision of the Master. Section 2(1)(a) provides that the Chief Master is the executive officer of the Master's offices and exercises such supervision over all the Masters as may be necessary in order to bring about uniformity in their practice and procedure.

6.3.33. Amended provisions are proposed in the Judicial Matters Amendment Bill 2 of 2005:

6.3.33.1. In addition to the provision of section 2(1)(c) discussed in the previous

¹²⁰

Paragraph 6.3.7.

paragraph,¹²¹ the definition of “Master” in section 1 is amended to read as follows:

“**Master**”, in relation to any matter, property or estate, means the Master, Deputy Master or Assistant Master of a High Court appointed under section 2, who has jurisdiction in respect of that matter, property or estate and who is subject to the control, direction and supervision of the Chief Master:”.

6.3.33.2. The provision in section 2(1)(a) paraphrased above is replaced by the following:¹²²

The Chief Master—

(i) is subject to the control, direction and supervision of the Minister;

(ii) is the executive officer of the Masters’ offices; and

(iii) shall exercise control, direction and supervision over all the Masters.

6.3.34. Section 95 of the Administration of Estates Act makes provision for the review of the Master’s decisions by the High Court. This is expensive and time consuming. It seems that provision should also be made for an Ombud.

6.3.35. ***It is submitted that existing structures should be used as far as possible in order to save costs and streamline procedures. It is recommended as follows:***

6.3.35.1. ***So called “fire-walls” should be maintained administratively within the Master’s office so that a person who had an involvement with an estate which may compromise the person’s impartiality is not called upon to decide on objections, act as arbiter, or make other decisions which requires impartiality or a perception of impartiality. If the impartiality of the Master or Masters who must make a decision has been compromised to such an extent that the Master cannot act impartially and be perceived to act impartially the decision should be made by the Chief Master or one of the Chief Master’s staff designated by the Chief Master as Ombud.***

6.3.35.2. ***The Chief Master or one of the Chief Master’s staff designated by the Chief Master as Ombud should have authority, of his or her own accord or following on a complaint, to investigate the actions of a Master or designated official, consider the merits of a matter, take evidence, review a decision of the Master or designated official and give any directions which the Ombud deems fit to a Master or designated official.***

¹²¹

Renumbered in the Bill as section 2(1)(a)(iii).

¹²²

Proposed section 2(1)(b).

(Annexure 1: Section 95(1))

6.4. **AUTHORITY TO RECEIVE INFORMATION ABOUT AN ESTATE**

- 6.4.1. Information about an estate is often needed before the estate is reported to the Master because the way in which the estate will be administered depends on matters such as the value of the assets and whether the estate is solvent. Some institutions, like insurance companies, refuse to give information about an estate before an executor has been appointed which can create a catch-22 situation.
- 6.4.2. One option is to make provision for the Master to give authority to a person to receive information before an executor is appointed. The Master should have a wide discretion to decide on the person who should be authorised to receive information or to require that the information be made available to the Master. Any person who needs the information to report an estate or assist with the reporting of an estate should qualify. The letter of authority should make it clear that the person is entitled to information and not to deal with assets or documents. In order to enforce this requirement failure to comply with it should be a criminal offence. Section 101(2) of the Administration of Estates Act provides that a court convicting any person for failure to perform any act required to be performed by or under this Act may, in addition to any penalty which it imposes, order such person to perform such act within such period as the court may fix.
- 6.4.3. A disadvantage of the option that the Master should authorise a person to receive information is that it will place a burden on the Master and cause delays. It could be provided that any person who provides proof of death and has a duty to report an estate should be entitled to information.
- 6.4.4. It seems advisable to make provision for both options. ***It is recommended that any person who provides proof of death of a person and who is obliged to submit an inventory in terms of section 9 should be entitled free of charge to information about the existence of assets, the estimated value of the assets, or the outstanding amount of a debt of the deceased person. It is recommended further that the Master may at any time require any person with information about the existence of assets, the value of assets or the outstanding amount of a debt of a deceased person to make the information available free of charge to the Master or to a person indicated by the Master. Failure to comply with this requirement should be a criminal offence.***

(Annexure 1: Sections 9(4) and (5) and 102(1)(g))**6.5. ADVERTISEMENTS IN NEWSPAPERS**

6.5.1. Discussion Paper 95¹²³ submits that the usefulness of newspaper advertisements in terms of section 29, and for that matter, in terms of section 35 of the Administration of Estates Act, is doubtful. A simple exercise to look for a particular advertisement in one paper will prove the futility of trying to find advertisements in the mass of unsystematic notices in several daily newspapers that appear in certain areas.

6.5.2. Some commentators say it would be a mistake to do away entirely with newspaper notices to creditors or that the account is lying for inspection and give the following reasons:

6.5.2.1. The present system may not give much publicity, but it is better than nothing.

6.5.2.2. The Government Gazette is not accessible to all members of the public, for instance many African people.

6.5.2.3. If the notices in newspapers are done away with, personal notice should be considered as in the case of insolvency proposals.

6.5.3. The majority of commentators agree that notices in newspapers should be dispensed with, because it has no practical effect. Some point out that the Government Gazette is also inaccessible, but one says that large companies apparently have staff that scrutinise the Government Gazette for debtors in order to lodge claims.

6.5.4. The premise that beneficiaries should protect their own interests was accepted above.¹²⁴ Personal notices in general are not recommended because of the added expense which cannot be justified in the case of deceased estates. In the case of liquidation and distribution accounts which lie for inspection, it seems advisable that beneficiaries should receive personal notice.

6.5.5. ***It is proposed that newspaper notices in terms of section 29 and 35 should be done away with. In respect of section 35 heirs should be given notice by delivery or by registered mail that a liquidation and distribution account will lie open for inspection. Notice in the Government Gazette can be done away with if a website with public access has been established which is reliable and has the capacity to handle requests, to place notices and to search the notices.***

¹²³

Paragraph 5.6.2.2.

¹²⁴

Par 5.2.13 and 5.2.37.2.

(Annexure 1: Sections 29(1) and 35(5)(a))**6.6. FORMS FOR REPORTING ESTATES****Introduction**

- 6.6.1. The information called for in forms such as the death notice and inventory, is in need of a review to adjust to changes in the law and practice. The introduction of new forms will not be expensive because the forms can be made available in electronic format on the Master's website.
- 6.6.2. Estate forms should not be burdened with information which may be required for purposes other than the administration of estates.
- 6.6.3. It has been suggested that some of these forms should be in affidavit form. This is a burdensome requirement and will probably add little to the accuracy of documents. It is an offence to make a false inventory or valuation or to lodge a false account with the Master.¹²⁵ The prescribed form for an inventory indicates prominently that it is an offence if a person willfully makes a false inventory.
- 6.6.4. ***It is submitted that it should not be required that forms are in affidavit form, but forms should indicate prominently that it is a criminal offence to willfully furnish false information. In addition to the existing offences concerning a false inventory, account or valuation, it should be an offence to willfully furnish false information to the Master.***

(Annexure 1: Section 101(1)(da) and (ii))**Death notice¹²⁶**

- 6.6.5. Item 4 asks for the nationality of the deceased. This would not often be relevant, but it is not a burdensome question and would be of value if the choice of law rules in section 3*bis* (1)(a)(iii), (2) or (4) of the Wills Act 7 of 1953 with reference to citizenship or nationality comes into play.
- 6.6.6. The value of the following information is also marginal for the administration of the estate, but supplying this information is not burdensome and it can serve as background information:
- 6.6.6.1. Item 5 — occupation.
- 6.6.6.2. Item 7 — date of birth (would be of real value if the deceased did not

¹²⁵ Section 101(2)(b), (c) and (d).

have an identity number).

6.6.6.3. Item 8 — place of birth.

6.6.6.4. Item 14 — occupation of spouse.

6.6.7. Item 13 asks for the place of marriage, if the deceased was married and item 14 asks whether the marriage was in or out of community of property.

6.6.7.1. The place of marriage is important to decide the rules which determine validity of a marriage.¹²⁷ As a general rule if the marriage took place in South Africa the place of marriage would not be important to decide the validity of the marriage.

6.6.7.2. An equally important matter is the law which determines the proprietary consequences of the deceased's marriage. The general rule is that the proprietary consequences are determined by the husband's domiciliary law at the time of the marriage.¹²⁸ If the consequences are regulated by South African law, including customary law, the consequences will depend on the date of the marriage and the type of marriage.

6.6.7.3. In days gone by the Master did not call for marriage certificates as a general rule, but accepted, in the absence of an ante-nuptial contract, that marriages concluded in South Africa were in community of property. This approach was logical because, except for the estates of blacks who left a will or weddings where a foreign element was involved, the Master dealt with marriages according to the South African common law where marriage in community of property was the norm. If the Death Notice indicated that a marriage was out of community of property the Master required a properly registered ante-nuptial contract or other proof of the consequences of the marriage.

6.6.7.4. According to the Manual a marriage certificate or proof of the existence of a customary union is required.¹²⁹ Because all estates are now dealt with by the Master and discrimination between different types of estates on the ground of race is not an option, it is advisable to call for marriage certificates in all estates (marriage certificates are available now for customary marriages).

6.6.7.5. ***It is recommended that —***

6.6.7.5.1. ***the question in item 14 should be amended to read as follows: (a) If married outside South Africa state the place of marriage.***

¹²⁶ See paragraph 4.4.4 for a proposal that the death notice require confirmation that the estate has not been reported previously to the Master of a service point.

¹²⁷ C Forsyth ***Private International Law*** fourth edition Lansdowne: Juta 2003 at 263.

¹²⁸ C Forsyth ***Private International Law*** fourth edition Lansdowne: Juta 2003 at 278.

¹²⁹ Policy par 9.2 last bullet and par 10; Procedure Manual par 6.1 last bullet.

(b) If the parties were domiciled outside South Africa at the time of the marriage, state the place of domicile of the parties at the time of the marriage.

6.6.7.5.2. ***a footnote to the death notice should indicate that —***

6.6.7.5.2.1. ***“marriage” includes a customary marriage;***

6.6.7.5.2.2. ***“spouse” includes a partner to a customary marriage; and***

6.6.7.5.2.3. ***a marriage certificate is required if the deceased was married at the time of death.***

6.6.8. Items 18 calls for full details of children and descendants of predeceased children.

6.6.8.1. There is no longer an estate duty rebate for children or descendants of predeceased children. Details of the children will not be necessary except perhaps for maintenance claims if —

6.6.8.1.1. the deceased is survived by a spouse or spouses and the net estate is less than R125 000; or

6.6.8.1.2. the estate devolves to persons identified in a valid will.

6.6.8.2. ***The following two options seem worthy of consideration and views on the appropriate choice would be appreciated:***

6.6.8.2.1. ***This item should be removed from the form and where appropriate a next of kin declaration should be called for; or***

6.6.8.2.2. ***The form should be amended to indicate that details of the descendants are required if they qualify as heirs or qualify for maintenance claims.***

6.6.9. Item 19 calls for information regarding the parents of the deceased.

6.6.9.1. Cases where information regarding the parents of the deceased is relevant for the administration of the estate is the exception rather than the rule. If, as rumour has it, the information is required for the study of family trees (genealogy), the information should be obtained elsewhere and the persons who complete a death notice should not be burdened with replies to unnecessary questions.

6.6.9.2. ***It is recommended that item 19 should be omitted from the death notice.***

6.6.10. Item 21 asks whether the signatory was present at death and if not whether the signatory identified the deceased after death. A footnote indicates, in accordance with section 7(4) of the Administration of Estates Act, that a death certificate must be submitted with the death notice if the answers to both questions are “no”:

6.6.10.1. The manual requires a death certificate in all cases¹³⁰ and explains that an original or certified copy of the death certificate or preliminary death certificate is acceptable as proof of death.¹³¹ Section 13A(3) of the Births, Marriages and Deaths Registration Act 81 of 1963 made provision for a provisional death certificate in the case of a person who did not die of natural causes. The Births and Deaths Registration Act 51 of 1992, which repealed the 1963 Act, does not make provision for a provisional or preliminary death certificate, but provides for a death certificate with a waiting period of 6 to 8 weeks, or for an abridged death certificate which can be issued on the day that the death is registered. An abridged death certificate complies with the requirements for which a death certificate is required. The original is issued to the next of kin free of charge and the cost of further copies was R8.00 and the cost of a death certificate (unabridged) was R43.00 at the time of writing this paper.¹³² An employee of the Department of Home Affairs says that the certificates indicate the cause of death as “natural causes”, “unnatural causes” or “under investigation”.

6.6.10.2. The blanket requirement of a death certificate is probably intended to curb fraudulent reporting of the death of persons in order to claim insurance or other assets. Section 7(4), noted in paragraph 6.6.10 above, will have to be amended if a death certificate is required in all cases.

6.6.10.3. ***It is recommended that section 7(4) and item 21 of the Death Notice and its footnote should be amended to require an abridged death certificate or a death certificate in all cases.***

6.6.10.4. ***In line with the recommendation in paragraph 6.6.4, the prescribed form for a Death Notice should indicate prominently that it is a criminal offence to willfully furnish false information to the Master.***

Inventory

6.6.11. A commentator proposes that—

6.6.11.1. an agent who assists with the completion of the inventory must co-sign it (this would be similar to the requirement on income tax returns);

6.6.11.2. the inventory must reflect all assets, even if the assets are not reflected

¹³⁰ Par 9.2 Policy and par 6.1 Practice Manual.
¹³¹ Practice Manual par 7.2.

on an account or cash recapitulation (attached to the comment is a form used by a trust company with a lot more detail of assets to be reflected than the prescribed form);

6.6.11.3. the form must provide for personal details of the deceased, details of the spouse or spouses, contact and personal details of the person completing the inventory, personal details of the agent assisting with the completion of the inventory, and children's details.

6.6.12. ***It is agreed that the form for the inventory should be reviewed to provide more guidance on the types of assets to be reflected and to provide that agents should co-sign the form and that assets subject to estate duty which are not reflected in the accounts should be reflected. Section 9 must be adjusted to reflect substantial changes.***

6.6.13. A death notice must be lodged in all cases where an estate is reported. The question whether children and other descendants should be reflected on the death notice is discussed in paragraph 6.6.8 above. There seems to be no reason why details about children should be reflected in the inventory.

6.6.14. In accordance with section 9 of the Administration of Estates Act, the existing form provides for details about massed estates, property in possession of the deceased at specified premises (in addition to property of the deceased); and persons in whose presence the inventory was made.

6.6.14.1. Although it may be advisable for all family members to be present when the inventory is completed, in practice the names of other persons present are not reflected.

6.6.14.2. Cases where massing occurs in respect of assets which are not part of a joint estate are exceptional and this information can be reflected in the liquidation account in the few cases where it occurs.

6.6.14.3. In practice, property in possession of the deceased is not reflected in addition to property belonging to the estate.

6.6.15. ***It is recommended that the inventory form should be amended as indicated in Annexure 2 on page 122 of this paper and that section 9 of the Administration of Estates Act should be amended accordingly as indicated in Annexure 1.***

6.7. **EXECUTORS' REMUNERATION**

6.7.1. A commentator favours a tariff for executor's remuneration on a sliding scale which should not be subject to review, either upwards or downwards. Another commentator comments on the Master's discretion to reduce or increase executor's fees and submits that the extremes where an executor receives too much and too little cancel out over time.

6.7.2. In comments by a group of Masters in one of the offices it is proposed that executors' fees that are allowed by the Act should also be binding on the agent that will administer under power of attorney.

6.7.3. A proposal for an increase in executors fees¹³³ contains the following:

6.7.3.1. It has been argued that inflation increases the value of assets, but expenses have outstripped growth in asset values.¹³⁴

6.7.3.2. An executor is unlikely to be successful in charging at full tariff on the large estates where fees are negotiated downwards.

6.7.3.3. Additional onerous responsibilities have been placed on executors for which they are not rewarded. By allowing the executor to charge a fee over these additional assets a more accurate estate duty return will be rendered with the resultant increase of estate duty collected. Bearing in mind that the Master would continue to have the ultimate power to reduce any unreasonable fee, they believe that additional assets over which fees are levied should include the following (brief comments on the proposals appear between brackets):

6.7.3.3.1. **Foreign assets:** The heirs would look to the local executor to account for the actions of the foreign executor with the attendant costs of foreign communication. The local executor is required to deal with the foreign estate for income tax, capital gains tax and estate duty purposes even though the proceeds may not find their way back to South Africa. A tariff of 3.5% is proposed.

(According to this proposal double remuneration would be payable on foreign assets.)

6.7.3.3.2. **Life assurance, group life and other lump sums:** Benefits are paid directly to nominated beneficiaries, but the executor is obliged to recover

¹³³

Apparently dated around the end of 2002.

¹³⁴

Reference was made to the depressed bear market at the time and that markets generally were lower than preceding years.

cash shortfalls from beneficiaries and to account for the proceeds for estate duty and recover in respect of estate duty attributable to the payments. A tariff of 3.5% is proposed.

(It is a particular benefit of these types of assets that they are not paid to the estate which expedites matters and saves costs. All that is required from the executor in most cases is to determine the amount and add the figure to the estate duty calculations. Charging 3.5% for this would often be excessive.)

6.7.3.3.3. **Marriages in terms of the accrual regime:** The executor is legally bound and obliged to pursue vigorously any claim against a spouse for the benefit of heirs and likewise to defend any claim by a spouse, particularly where the estate may devolve upon persons other than the spouse. The degree of investigation is similar to that where spouses are married in community of property and they do not believe an executor will attend to this investigation adequately unless properly rewarded. They propose that assets of the spouse married in terms of the accrual regime should be included in the tariff of 3.5% as is the current position where spouses are married in community of property.

(In most estates where there is a surviving spouse, the spouse is the sole heir and a claim for accrual is academic in which case it would be ridiculous to include the assets of the spouse for purposes of remuneration. If an accrual claim against a spouse is successful, the executor will be entitled to 3.5% on the amount of the claim. Marriage in community of property is a special case because it is impractical to deal with one half of the assets and liabilities separately.)

6.7.3.3.4. **Capital Gains Tax:** The executor is expected to compute accurately Capital Gains Tax in the hand of the deceased and also over the period of administration. Often the deceased has kept minimal records necessitating extensive investigation by the executor. They propose that the executor be allowed to bill on a time spent basis at R500 per hour.

(If an hourly tariff for time spend is considered the remuneration as a whole must be taken into account to cater for cases where the executor has been rewarded amply by 3.5% on the assets.)

6.7.3.3.5. **Calculation of ceasing/passing usufructs or similar interests:** An executor is allowed to charge where a fiduciary interest of a deceased is dealt with. To deal with a usufructuary interest entails as much

effort and exposes the executor to as much risk for which the executor is not rewarded. The valuation of the interest passing may in instances exceed the value of the estate. They propose that the value of the limited interest be included in the tariff fee of 3,5%.

(The responsibilities in connection with a usufruct are not the same as with fiduciary interests where the estate is the owner. For the usufruct values must be obtained and a calculation made. Section 51(3)(c) of the Administration of Estates Act provides that the Master may direct that executors' remuneration or part thereof must be paid by a person who became entitled to property when the deceased's limited interest in the property terminated at the deceased's death.)

6.7.3.3.6. **Section 18(3) estates:** They propose that the limit be increased to a realistic amount to allow for smaller estates to be dealt with efficiently with the least cost.

6.7.4. As appears from the tables below with house and share price indexes, house prices increased markedly in the last number of years with an increase on the longer term for share prices:

FTSE/JSE Index		
Date	Value	% annual increase or decrease
June 2005	14,154.73	40.03
June 2004	10,108.61	21.03
June 2003	8,352.20	-21.63
June 2002	10,657.73	

ABSA House Price Index		
Date	Value	% annual increase
April 2005	245.6	23.60
April 2004	198.7	30.04
April 2003	152.8	21.17
April 2002	126.1	14.01
April 2001	110.6	

6.7.5. Although property values fluctuate from time to time the general tendency seems to be that values increase over the medium to long term. This will result in a nominal increase in executors' remuneration over time.

6.7.6. Costs also tend to increase with time. As indicated by the commentator,¹³⁵ simplified procedures like the existing section 18(3) reduce costs. In addition to a procedure similar to section 18(3) other proposals in this paper will save time and money, namely that the Master should not examine all accounts and that some estates should be regarded as finalised once the final account has been advertised free of

objections.

- 6.7.7. Proposed amendments to the inventory form¹³⁶ require that information of property other than estate assets must be reflected for estate duty purposes.
- 6.7.8. The proposed increases seem to be excessive. Rather than allow larger fees with the right of the Master to reduce fees, the existing fees could be retained subject to the Master's authority to increase fees where this is reasonable.¹³⁷
- 6.7.9. Section 51(3)(a) provides that the Master may, if there are in any particular case special reasons for doing so, reduce or increase the remuneration according to the tariff (or fixed in the will). Despite criticism of the Master's authority to adjust fees, it should be retained because the tariff is merely a somewhat rudimentary and arbitrary guide which cannot in all cases determine a reasonable remuneration.
- 6.7.10. With reference to the comment that the extremes where an executor receives too much or too little cancel out over time, the Supreme Court of Appeal has with reference to the similar provision in section 384 of the Companies Act 61 of 1973 held in **Nel and another NNO v the Master (ABSA Bank Ltd and others intervening)**¹³⁸ that there is no acceptable authority for the "swings-and-roundabouts" principle based on the premise that a liquidator may administer a substantial number of small and relatively unprofitable estates and should be compensated in a large and particularly profitable estate for poor returns on "unprofitable" estates; there is no reason why creditors in large estates should, albeit indirectly, fund the administration of smaller, less profitable estates. It seems impractical to launch a detailed investigation in every estate to determine whether the tariff remuneration is reasonable. Reductions or increases should not be ordered lightly. It was recommended above¹³⁹ that in the absence of objections, complaints, or beneficiaries with limited capacity the Master should not be obliged to tax the executors' remuneration.
- 6.7.11. The existing tariff provides for remuneration of 3.5% on the gross value of assets, 6% on income collected after death and minimum remuneration of R350. A sliding scale with a larger percentage in small estates, might provide a more accurate guide to reasonable remuneration, but will place a larger burden on heirs who can ill afford it in small estates. Heirs in large estates are better able as a rule to protect their own

¹³⁵

Par 6.7.3.3.6 above.

¹³⁶

Proposal in par 6.6.12 above.

¹³⁷

If the Master's right to increase or reduce the tariff fee is retained as is proposed below.

¹³⁸

2005 (1) SA 276 (SCA).

¹³⁹

Par 5.2.18.

interests by negotiating the tariff fees downwards.¹⁴⁰

6.7.12. It would no doubt protect beneficiaries against abuse if it was provided that the fee allowed in the liquidation account was binding on the executor's agent. At present nothing prevents an agent to agree on the payment of a fee which is higher than the remuneration in the account and this is in accordance with the parties' freedom of contract. It would enhance transparency if a different fee charged by an agent was noted in the liquidation and distribution account.

6.7.13. ***No changes to the calculation of executors remuneration is recommended, but it is recommended that a fee charged by an agent of an executor for the administration of an estate should be noted with the executors' remuneration in the liquidation account if the fee differs from the executors' remuneration.***

(Annexure 1: Section 51(5))

6.8. **RECOGNITION OF GUARDIANS OF MINORS ACCORDING TO CUSTOMARY LAW**

6.8.1. A commentator says that until recently the Master, Pretoria, was prepared to pay out funds deposited for minors against security given by the guardians according to customary law, but that the Master is no longer prepared to do this. She feels that a part of the population is being prejudiced - it is unacceptable in certain cultures to adopt a child, especially if the child falls under one's care in any case.

6.8.2. In terms of section 43 of the Administration of Estates Act a natural guardian of a minor is entitled, subject to the provisions of the section, to receive cash or other movable property on behalf of the minor. A cautious approach by the Master in so far as moneys of minors are concerned, cannot be rejected outright. Discussion Paper 95 invited comment¹⁴¹ on a proposal that a magistrate may certify that a person is a guardian of a minor according to customary law, and that the Master may thereupon treat such a person as a natural guardian in terms of the Administration of Estates Act.

6.8.3. The Commission's recommendations on the customary law of succession have now been finalised.¹⁴² One of the recommendation is¹⁴³ that if a dispute or uncertainty arises in connection with the status of any person or a claim by any person in relation to

¹⁴⁰ Par 6.7.3.2 above.

¹⁴¹ Par 4.5 on page 27.

¹⁴² South African Law Reform Commission **Report on the customary law of succession** April 2004.

¹⁴³ Clause 5 on page 93.

a deceased who died intestate, the Master may make a determination as seems to him or her just and equitable in order to resolve the dispute or remove the uncertainty. Before making a determination the Master may direct that an inquiry into the matter should be held by a magistrate.

6.8.4. Upon reconsideration, it seems that no distinction should be made between guardians under customary law and guardians under common law. The question arises why section 43 should be limited to natural guardians, especially in view of the prevalence of orphaned minors. Why do other legal representatives of minors not qualify? The view has been expressed that consideration should be given to include care-givers as defined in the Child Care Bill. See the discussion in paragraphs 5.2.45 to 5.2.48.

6.8.5. ***It is submitted no distinction should be made between guardians under customary law and guardians under common law. Comments are invited on the question whether natural guardians only should be entitled to receive cash or other movables on behalf of minors in terms of section 43 of the Administration of Estates Act.***

6.9. ***ELECTRONIC TRANSFERS AND BANKING ACCOUNTS***

Electronic transfers

6.9.1. A commentator mentions the high incidence of cheque fraud and proposes an amendment to allow electronic funds transfer. Two of the Masters signified support for the use of electronic fund transfers subject to the amendment of the relevant legislation. One of them gives the following reasons:

6.9.1.1. It would be easy for executors to distribute cash to creditors or beneficiaries through electronic fund transfer.

6.9.1.2. Fraud would be eliminated.

6.9.1.3. It would be easy for the Master to determine from bank statements whether beneficiaries have received their inheritances and creditors have been paid. The Master would not be obliged to request proof of distribution to beneficiaries and proof of payment of creditors.

6.9.2. The benefits of electronic transfers are obvious — speed, low cost and reliability.

6.9.3. Bank statements alone cannot constitute proof of payment by means of electronic transfer. Proof is required that an heir or creditor has nominated a banking account for the transfer. When an electronic transfer is made the bank statement

should reflect the name of the payee and the cause of payment (similar to the requirements for cheques in section 28(4) of the Administration of Estates Act).

6.9.4. ***It is recommended as follows:***

6.9.4.1. ***Authority signed by an heir or creditor to effect payment by transfer of funds to a banking account identified in the authority, and proof of transfer to that account should be accepted as a receipt in terms of section 35(12) of the Administration of Estates Act; and***

6.9.4.2. ***It should be required that the bank statement must reflect the name of a payee and the cause of payment in respect of electronic transfers. (Annexure 1: Sections 28(4A) and 35(12)(iii))***

Banking accounts

6.9.5. Section 28(1) of the Administration of Estates Act provides that, unless the Master otherwise directs, an executor must as soon as he or she has in hand moneys in excess of R1,000, open a cheque account in the name of the estate and deposit therein moneys which the executor has in hand or may from time to time receive for the estate. The executor may by transfer from the cheque account open a savings account with a bank or place such money on interest-bearing deposit with a bank. In terms of section 1 “bank” means a public company registered as a bank in terms of the Banks Act 94 of 1990.

6.9.6. Bank charges have increased considerably since the enactment of the Administration of Estates Act in 1965 and also since the amount of R1,000 was substituted for R100 in 2001. In particular the cost to operate a cheque account and issue cheques has escalated and other types of accounts have been developed with facilities to draw cheques, pay accounts, or transfer funds to other accounts.

6.9.7. A further development was the launch in October 2004 of Mzansi accounts which require a minimum balance of R20 and has low bank charges. Account holders are entitled to one free statement per month. Customers issued with a card can use it to deposit and withdraw funds and to make balance enquiries, have their salary or government grant paid into their account; and pay for purchases using the card instead of cash. No electronic transfers, bill payments or inter-account transfers are allowed.¹⁴⁴ These accounts are offered by the four major banks and the Postbank.

6.9.8. If, as proposed in paragraph 5.2.33 above, an executor is appointed in “small”

¹⁴⁴

Cf http://www.standardbank.co.za/SBIC/Frontdoor_02_01/0,2354,10293765_10297113_0,00.html.

estates which qualify and the executor is exempted from compliance with all the provisions of the Act, such an executor will not be obliged to comply with the requirements of section 28 dealing with the opening and operation of a banking account. How will such an executor deal with monies payable to the estate? Mzansi accounts are probably not available to an executor of an estate, but a person appointed as executor in a “small” estate who does not have a banking account would probably qualify to open such an account in his or her own name. Problems may be encountered if entities insist to pay funds into a bank account in the name of the estate or to issue a non-transferable cheque payable to the deceased or the deceased’s estate. The attitude to insist on payment into an estate banking account in order to avoid fraud cannot be faulted, but what should be done in cases where it is not economical to open a bank account in the name of the estate?

6.9.9. ***Comment is invited on the question whether banking practice will or should allow an executor authorised in accordance with section 13A to deal with assets listed in the appointment to pay the proceeds of the assets into a personal bank account in the name of the executor or that the executor should be allowed to cash cheques in the name of the deceased or the deceased estate representing assets listed in the appointment. If not, can any solution be suggested to access payments to the estate other than to open an account in the name of the estate?***

6.9.10. ***In cases where section 28 will apply, it is submitted that the executor should be allowed to open any account with a bank or the Postbank and should not be obliged to open a cheque account.***

(Annexure 1: Definition of “bank” in section 1 and section 28(1))

Bank reconciliation

6.9.11. A group of employees at a Master’s office commented that in all estates a clearly specified cash recapitulation statement should be submitted. No discharge should be given unless a cash recapitulation statement was submitted reflecting all cash received, including monies received from heirs and family members outside the estate but which were estate related.

6.9.12. It is customary to lodge a bank reconciliation with accounts in insolvent estates. This account reconciles (balances) the amount in the banking account, plus outstanding deposits and the totals of monies invested, with payments still to be made and money to be transferred to a next account, if any.

6.9.13. For accounts in deceased estates Regulation 5(1)(d) prescribes a “Recapitulation

Statement". This is a cash statement reflecting the cash position of the estate and not a bank reconciliation.

- 6.9.14. The Master usually calls for bank statements, especially the final bank statement reflecting a nil balance upon closing of the account. Bank statements alone do not serve much purpose except to prove that a banking account has been opened. A final bank statement indicates that all the money in the banking account has been withdrawn. In order for bank statements to serve as vouchers which prove something a complete set of statements must be obtained and all the entries in the statements must be reconciled with assets, liabilities, income, expenditure and cash distributions reflected in the liquidation and distribution account. It is submitted without fear of contradiction that the Master rarely if ever reconciles all the entries in bank statements with entries in the liquidation and distribution accounts in deceased estates. In all but the simplest of estates it is difficult or impossible for the Master to do so without detailed explanations by the executor. The position is somewhat different for accounts lodged in insolvent estates where the liquidation account must reflect the dates of receipts and payments, and a bank reconciliation is lodged as a matter of course.
- 6.9.15. It is advisable for an executor to draw up a bank reconciliation at the date of the drafting of the account to check that the figures balance. It is also advisable for an executor to draw up a further reconciliation when the final distribution is made to heirs to reconcile the amount awarded according to the distribution account with further receipts and payments not reflected in the account and the amount eventually paid to beneficiaries.
- 6.9.16. Section 35(1) of the Administration of Estates Act was amended and subsection (2A) added by Act 12 of 1984 to provide that an executor should lodge such vouchers in support of the account as the Master may require to examine the account when directed to do so by the Master. Previously vouchers had to be lodged as a matter of course when the account was lodged. It was recommended in paragraph 5.2.18 above that the Master should not be obliged to examine accounts in prescribed circumstances. It would place a heavy burden on Masters and executors if the Master examined bank statements in all cases in order to reconcile entries with the accounts. It would be unproductive to call for bank reconciliation statements if the Master does not examine the statements.
- 6.9.17. ***It is submitted that it should not be required of executors to lodge a bank reconciliation and explanations of entries on bank statements, unless directed to do so by the Master.***

(Annexure 1: Section 35(2A))**6.10. FAILURE OF NOMINATIONS OF TUTORS OR CURATORS OR DEATH, INCAPACITY OR REFUSAL TO ACT**

6.10.1. A commentator points out that the Master is obliged to convene a meeting and call for nominations if there is a failure of nominations, or death, incapacity or refusal to act of a tutor or curator. This may be a waste of time and effort.

6.10.2. Section 18 was amended in 1983 to give the Master a discretion in similar circumstances to decide whether a meeting should be convened for the nomination of an executor.

6.10.3. *It is recommended that the Master should have a discretion to decide whether a meeting should be convened for the nomination of a tutor or curator where there is a failure of nominations, or death, incapacity or refusal to act.*

(Annexure 1: Section 73(1))**6.11. MATTERS RAISED BY COMMENTATORS BUT NOT DEALT WITH IN THIS PAPER**

Commentators mentioned the following matters for consideration:

Income tax clearance

6.11.1. It is a major cause of delay to wait for the clearance certificate for income tax from the receiver. This is a practical matter which should be taken up with SARS if it is prevalent.

Insolvent deceased estates

6.11.2. A commentator says insolvent deceased estates are an utter pain. He says the nettle should be grasped and perhaps form the subject matter of a separate discussion paper. The commentator does not suggest any improvements to the present system contained in section 34 of the Administration of Estates Act and none springs to mind. Insolvencies are unpleasant and changes to the law will not alleviate this.

Conservation of wills during the lifetime of testators

6.11.3. A commentator proposes a voluntary system for the confidential preservation of wills during the lifetime of the deceased. Wills can be downloaded or inspected via an Internet link after the lifetime of the deceased when the original will could be forwarded to the Master's office having jurisdiction.

6.11.4. Section 15 of the Administration of Estates Act 24 of 1913 provided as follows:

(1) Any person may lodge with any Master, either open or enclosed, any will executed by such person; and the Master with whom that will is lodged shall cause to be kept a register of the name and address of every person so lodging a will and the date when it was lodged.

(2) Every will so lodged shall be accompanied by a duplicate or fair and true copy thereof which, together with the original, shall be kept in the custody of the said Master until the death of the person executing the will unless re-delivery thereof be demanded by him, or in his lifetime by his agent specially authorized for that purpose, and when any such will is re-delivered the said person or his said agent (as the case may be) shall sign a receipt for the same.

6.11.5. This provision was not repeated in the 1965 Act which came into force in October 1968. One of the reasons was probably that wills were lodged with the Master and forgotten. The Master is still supposed to check for “live wills” whenever a new estate is reported, but a will lodged with another Master will not be traced.

6.11.6. Although central electronic records would alleviate problems, storage of large numbers of wills would be a problem and keeping record and checking the records when an estate is reported, albeit electronically, would cause extra work for the Master. Even some banks are not prepared to keep wills of former clients in safe custody forever without charging the client for storage.

6.11.7. ***It is submitted that provision should not be made for safe custody of wills of living persons with the Master.***

Recovery of estate duty and payment of Master’s fees into general revenue fund

6.11.8. These matters are referred to in paragraphs 6.2.10 to 6.2.14 above but are not dealt with further in this paper.

ANNEXURE 1: PROPOSED AMENDMENTS TO ADMINISTRATION OF ESTATES ACT 66 OF 1965

These amendments are not framed in the format of an amendment Act, but in a way that highlights the effect of the amendments. Selected provisions in respect of which no amendment is proposed are reproduced for ease of reference

1 Definitions

In this Act, unless the context otherwise indicates-

'absentee' means any person of whom the Master, after enquiry, believes that his or her whereabouts are unknown and that he or she has no legal representative in the Republic;

'bank' means a public company registered as a bank in terms of the Banks Act, 1990 (Act No. 94 of 1990) or the Postbank referred to in section 51 of the Postal Services Act 1998 (Act No. 124 of 1998);¹⁴⁵

'curator' means any person who is authorized to act under letters of curatorship granted ~~or signed and sealed~~¹⁴⁶ by a Master, or under an endorsement made under section seventy-two;

'designated official' means any person appointed to or acting in a post designated by the Minister in terms of section 2A;¹⁴⁷

'executor' means any person who is authorized to act under letters of executorship granted ~~or signed and sealed~~¹⁴⁸ by a Master, or under an endorsement made under section fifteen;

~~'letters of executorship' includes any document issued or a copy of any such~~

¹⁴⁵ Par 6.9.10.

¹⁴⁶ Par 5.4.16.

¹⁴⁷ Par 2.10.4.

~~document duly certified by any competent public authority in any State by which any person named or designated therein is authorized to act as the personal representative of any deceased person or as executor of the estate of any deceased person;~~¹⁴⁹

'**magistrate**' includes an additional magistrate and an assistant magistrate and, in relation to any particular act to be performed or power or right exercisable or duty to be carried out by the magistrate of a district, includes an additional magistrate or assistant magistrate permanently carrying out at any place other than the seat of magistracy of that district the functions of the magistrate of that district in respect of any portion of that district, whenever such act, power, right or duty has to be performed, exercised or carried out by virtue of any death occurring, thing being or deceased having resided or carried on business, as the case may be, in such portion of that district;

'**Master**', in relation to any matter, property or estate, means the Master, Deputy Master or Assistant Master of a High Court appointed under section two, who has jurisdiction in respect of that matter, property or estate;

'service point' means a place designated by the Minister in terms of section 2A;¹⁵⁰

~~'State' means any state in respect of which a proclamation has been issued under section twenty;~~¹⁵¹

'**tutor**' means any person who is authorized to act under letters of tutorship granted ~~or signed and sealed~~¹⁵² by a Master, or under an endorsement made under section seventy-two.

...

2A Designation by Minister of service points and of posts of persons to exercise functions on behalf of Master

¹⁵³

(1) The Minister may designate posts in, or additional to, the fixed establishment of the Department of Justice and Constitutional Development for the purpose of this section.

¹⁴⁸ Par 5.4.15.

¹⁴⁹ Par 5.4.15.

¹⁵⁰ Par 2.10.4.

¹⁵¹ Par 5.4.15.

¹⁵² Par 5.4.16.

(2) Persons appointed to, or acting in, posts which have been designated by the Minister, must exercise the powers and perform the duties delegated to them on behalf of, and under the direction of, the Master.

(3) The Minister may designate places within the area of jurisdiction of a Master as service points where the powers are exercised and the duties are performed on behalf of the Master in terms of subsection (2).

(4) The Minister may delegate any power conferred on him or her in terms of this section to the Director-General: Justice and Constitutional Development or to a person in the Department holding the rank of a deputy Director-General.

...

4 Jurisdiction of Masters and designated officials

(1) In respect of the estate of a deceased person, or of any portion thereof, jurisdiction shall lie-

(a) in the case of a deceased person who was, at the date of his or her death, ordinarily resident-

(i) within the area of jurisdiction of a ~~provincial~~¹⁵⁴ division of the Supreme Court, with the Master appointed in respect of that area; and

(ii) within the area of jurisdiction of a district, with a designated official designated in respect of that district; and

Provided that on written application by any person having an interest in a deceased estate, a Master or designated official who would otherwise have no jurisdiction in respect of that estate may, with the consent of the Master, or designated official who has such jurisdiction, assume jurisdiction in respect of that estate.¹⁵⁵

(b) in the case of a deceased person who was not at that date so resident, with the Master to whom application is made to grant letters of executorship ~~or to sign and seal any~~

¹⁵³ Par 2.10.

¹⁵⁴ Par 2.13

¹⁵⁵ Par 2.10.4.

~~such letters already granted in respect of the estate concerned.~~¹⁵⁶

~~Provided that on written application by any person having an interest in a deceased estate, a Master who would otherwise have no jurisdiction in respect of that estate may, with the consent of the Master who has such jurisdiction, assume jurisdiction in respect of that estate.~~

(2) In respect of the property belonging to a minor, or to a person under curatorship or to be placed under curatorship, jurisdiction shall lie-

(a) in the case of any such person who is ordinarily resident within the area of jurisdiction of a High Court, with the Master appointed in respect of that area; and

(b) in the case of any such person who is not so resident, with the Master appointed in respect of any such area in which is situate the greater or greatest portion of the property of that person:

Provided that-

(i) a Master who has exercised jurisdiction under paragraph (a) or (b) shall continue to have jurisdiction notwithstanding any change in the ordinary residence of the person concerned or in the situation of the greater or greatest portion of his or her property; and

(ii) in the case of any mentally ill person who under the Mental Health Act, 1973 (Act No.18 of 1973), has been received or is detained in any place, jurisdiction shall lie with the Master who, immediately prior to such reception or detention, had jurisdiction in respect of his or her property under paragraph (a) or (b).

¹⁵⁶ Par 5.4.15.

(3) No act performed by a Master or designated official in the *bona fide* belief that he or she has jurisdiction shall be invalid merely on the ground that it should have been performed by another Master or designated official.¹⁵⁷

(4) If more than one Master or designated official has in such belief exercised jurisdiction in respect of the same estate or property, that estate or property shall, without prejudice to the validity of any act already performed by or under the authority of any other Master or designated official, as soon as it becomes known to the Masters or designated officials concerned, be liquidated, distributed or administered as the case may be, under the supervision of the Master or designated official who first exercised such jurisdiction, and any appointment made and any ~~grant, signing and sealing or~~¹⁵⁸ endorsement of letters of executorship, tutorship or curatorship, by any other Master or designated official in respect of that estate or property, shall thereupon be cancelled by such other Master or designated official.¹⁵⁹

...

7 Death notices

(1) Whenever any person dies within the Republic leaving any property or any document being or purporting to be a will therein-

(a) the surviving spouse of such person or more than one surviving spouse jointly¹⁶⁰, or if there is no surviving spouse, his or her nearest relative or connection residing in the district in which the death has taken place, shall within fourteen days thereafter give a notice of death substantially in the prescribed form, or cause such a notice to be given to the Master or designated official;¹⁶¹ and

(b) the person who at or immediately after the death has the control of the premises at which the death occurs shall, unless a notice under paragraph (a) has to his or her knowledge already been given, within fourteen days after the death, report the death or cause the death to

¹⁵⁷ Par 2.10.4.

¹⁵⁸ Par 5.4.15.

¹⁵⁹ Par 2.10.4.

¹⁶⁰ Par 5.5.2.

¹⁶¹ Par 2.10.4.

be reported to the Master or designated official.¹⁶²

(2) Whenever any person dies outside the Republic leaving any property or any document being or purporting to be a will therein, any person within the Republic having possession or control of any such property or document, shall, within fourteen days after the death has come to his or her knowledge, report the death to the Master or designated official¹⁶³ who shall take such steps as may be necessary and practicable to obtain a correct death notice.

(3) The Master may by written notice require any person who may, in his or her opinion, be able to furnish the information required-

(a) if no death notice has been given or obtained, to submit to ~~him~~ the Master within a period specified in the notice, a death notice substantially in the prescribed form; and

(b) if a death notice has been given or obtained or has been submitted under paragraph (a) and the Master desires any further information, to answer in writing to the best of his or her knowledge, within a period so specified, such questions as may be set forth in the notice.

(4) ~~If the person signing any death notice was not present at the death, or did not identify the deceased after death, such~~ The person signing any death notice shall furnish the Master or designated official with proof of the death.¹⁶⁴

8 Transmission or delivery of wills to Master and registration thereof

(1) Any person who has any document being or purporting to be a will in his or her possession at the time of or at any time after the death of any person who executed such document, shall, when such person gives notice of death to a Master or designated official in terms of section 7 transmit or deliver such document to the Master or designated official, or if such person does not give notice of death, such person shall as soon as the

¹⁶² Par 2.10.4.

¹⁶³ Par 2.10.4.

¹⁶⁴ Par 6.6.10.3.

death comes to ~~his~~ the person's knowledge, transmit or deliver such document to the Master.¹⁶⁵

(2) Every person shall, at the expense of the estate and when required by the Master to do so, transmit the original minute of any notarial will passed before him or her or in his or her possession, to the Master, and shall at the same time file a certified copy thereof in his or her protocol and endorse thereon that the original has been transmitted to the Master.

(3) Any such document which has been received by the Master, shall be registered by him or her in a register of estates, and he or she shall cause any such document which is closed to be opened for the purpose of such registration.

(4) If it appears to the Master that any such document, being or purporting to be a will, is for any reason invalid, he or she may, notwithstanding registration thereof in terms of sub-section (3), refuse to accept it for the purposes of this Act until the validity thereof has been determined by the Court.

(4A) In taking a decision concerning the acceptance of a will for the purposes of this Act, the Master shall take into account the revocation of a will by a later will, but not the common law presumptions concerning the revocation of a will.

(4B) The Master may for the purposes of this Act also accept a duplicate original will.

(5) If the Master is satisfied that the person who executed any will transmitted or delivered to ~~him~~ the Master ~~in terms of sub-section (1)~~,¹⁶⁶ has not left any property in the Republic, ~~he~~ the Master may release such will to any person lawfully requiring it for the purpose of liquidating and distributing the estate of the deceased person outside the Republic.

9 Inventories¹⁶⁷

(1) If any person dies within the Republic or if any person ordinarily resident in the Republic at the time of his death dies outside the Republic leaving any property therein, the

¹⁶⁵ Par 2.10.4.

¹⁶⁶ This is deleted because the service point may have submitted the will to the Master.

¹⁶⁷ Par 6.6.15.

surviving spouse of such person or more than one surviving spouse jointly,¹⁶⁸ or if there is no surviving spouse, his or her nearest relative or connection residing in the district in which such person was ordinarily resident at the time of his or her death shall, within fourteen days after or within such further period as the Master or designated official¹⁶⁹ may allow-

(a) make an inventory in the prescribed form, ~~in the presence of such persons having an interest in the estate as heirs as may attend~~, of all property known by him or her to have belonged, at the time of the death-

(i) to the deceased; or

(ii) in the case of the death of one of two spouses married in community of property, to the joint estate of the deceased and such surviving spouse; ~~or~~

~~(iii) in the case of the death of one of two or more persons referred to in section thirty-seven, to the massed estate concerned;~~

(b) subscribe such inventory in his or her own hand and ~~endorse thereon the names and addresses of the persons in whose presence it was made~~ have it signed by any person who assisted as agents or otherwise with the completion of the inventory except the Master, a designated official, or staff of the Master or designated official; and

(c) deliver or transmit such inventory to the Master or designated official.¹⁷⁰

(2) The Master or designated official¹⁷¹ may at any time, notwithstanding the provisions of sub-section (1), by written notice-

(a) require any person to make, ~~in the presence of such persons referred to in paragraph (a) of the said sub-section as may attend~~, to subscribe and ~~endorse~~ have it signed as provided in paragraph subsection (1)(b) of the said sub-section and to deliver or

¹⁶⁸ Par 5.5.2.

¹⁶⁹ Par 2.10.4.

¹⁷⁰ Par 2.10.4.

¹⁷¹ Par 2.10.4.

transmit to ~~him,~~ **the Master or designated official¹⁷²** within the period specified in the notice, an inventory in the prescribed form of all property known by such person to have belonged at the time of the death-

(i) to the deceased; or

(ii) in the case of the death of one of two spouses married in community of property, to the joint estate of the deceased and the surviving spouse; ~~or~~

~~——(iii)—— in the case of the death of one of two or more persons referred to in section thirty-seven, to the massed estate concerned;~~

~~(b)—— require any person who at or immediately after the death had control of the premises where the death occurred or of any premises where the deceased was living or staying or carrying on any business at the time of his death, to make, in the presence of the said persons, to subscribe and endorse as provided in paragraph (b) of the said sub-section, and to deliver or transmit to him, within the period specified in the notice, an inventory in the prescribed form of all the property known by him to have been in the possession of the deceased upon the said premises at the time of his death.~~

(3) Any person required by sub-section (1) or under paragraph (a) of sub-section (2) to make an inventory shall include therein a list specifying-

(a) all immovable property registered in the name of the deceased or in which he **or she** knows that the deceased had any interest at the date of his **or her** death; and

(b) all particulars known to such person, concerning any such property or interest.

(4) Any person who provides proof of death of a person and who is obliged to submit an inventory in terms of this section is entitled free of charge to information about the existence of assets, the estimated value of the assets and the outstanding amount of a debt of the deceased person.

(5) The Master may at any time require any person with information about

assets, the value of assets or the outstanding amount of debts of a deceased person to make the information available free of charge to the Master or to a person indicated by the Master.¹⁷³

...

11 Temporary custody of property in deceased estates

(1) Any person who at or immediately after the death of any person has the possession or custody of any property, book or document, which belonged to or was in the possession or custody of such deceased person at the time of his or her death-

(a) shall, immediately after the death, report the particulars of such property, book or document to the Master or designated official¹⁷⁴ and may open any such document which is closed for the purpose of ascertaining whether it is or purports to be a will;

(b) shall, unless the Court or the Master or designated official¹⁷⁵ otherwise directs, retain the possession or custody of such property, book or document, other than a document being or purporting to be a will, until an interim curator or an executor of the estate has been appointed ~~or the Master has directed any person to liquidate and distribute the estate.~~¹⁷⁶ Provided that the provisions of this paragraph shall not prevent the disposal of any such property for the *bona fide* purpose of providing a suitable funeral for the deceased or of providing for the subsistence of his or her family or household or the safe custody or preservation of any part of such property;

(c) shall, upon written demand by the interim curator, or executor ~~or person directed to liquidate and distribute the estate~~, surrender any such property, book or document in his or her possession or custody when the demand is made, into the custody or control of such executor, or curator ~~or person~~. Provided that the provisions of this paragraph shall not affect the right of any person to remain in possession of any such property, book or document under any contract, right or retention or attachment.

¹⁷³ Par 6.4.4.

¹⁷⁴ Par 2.10.4.

¹⁷⁵ Par 2.10.4.

¹⁷⁶ Par 5.4.6.

(1A) The Master may before the appointment of an executor (or Master's representative, if this is retained), in order to defray the costs of a basic coffin and funeral service of a deceased person, instruct a banking institution or building society which holds available funds in the name of the person to pay a specified amount to a specified person.¹⁷⁷

(2) Any person who fails to comply with the provisions of paragraph (b) of subsection (1) shall, apart from any penalty or other liability he **or she** may incur thereby, be liable for any estate duties payable in respect of the property concerned.

12 Appointment of interim curator

(1) The Master may appoint an interim curator to take any estate into his **or her** custody until letters of executorship have been granted ~~or signed and sealed, or a person has been directed to liquidate and distribute the estate.~~¹⁷⁸

(2) Every person to be so appointed shall, before a certificate of appointment is issued to him **or her**, find security to the satisfaction of the Master in an amount determined by the Master for the proper performance of his **or her** functions.

(3) An interim curator may, if specially authorized thereto by the Master-

(a) collect any debt and sell or dispose of any movable property in the estate, wherever situate within the Republic;

(b) subject to any law which may be applicable, carry on any business or undertaking of the deceased; and

(c) release such money and such property out of the estate as in his **or her** opinion are sufficient to provide for the subsistence of the deceased's family or household.

(4) If any interim curator is authorized under sub-section (3) to carry on any business or

¹⁷⁷ Par 4.6.8.

undertaking he **or she** shall not, without the special authority of the Master, purchase any goods which he **or she** may require for that business or undertaking otherwise than for cash and out of the takings of that business or undertaking.

(5) The reference in section 118 (1) of the Liquor Act, 1989 (Act No. 27 of 1989), to a curator, shall include a reference to an interim curator appointed under subsection (1), who has under subsection (3) been authorized to carry on the business of the licence or person referred to in the said sections.

(6) An interim curator shall account for the property in respect of which he **or she** has been appointed, in such manner as the Master may direct.

(7) Sections 23(3), (4), and (5), 26, 28, 36 and 46 and 54(1)(b)(ii) shall with the necessary changes apply with reference to interim curators.

13 Deceased estates not to be liquidated or distributed without letters of executorship ~~or direction by Master~~

~~(1) No person shall liquidate or distribute the estate of any deceased person, except under letters of executorship granted **or signed and sealed**¹⁷⁹ under this Act, or under an endorsement made under section *fifteen*, **or in pursuance of a direction by a Master.**¹⁸⁰~~

~~(2) **No letters of executorship shall be granted or signed and sealed and no endorsement under section *fifteen* shall be made to or at the instance or in favour of any person who is by any law prohibited from liquidating or distributing the estate of any deceased person.**~~

~~(3) **The provisions of sub-section (2) shall not apply to any person nominated as executor by the will of a person who dies before the first day of July, 1966.**~~¹⁸¹

13A Letters of executorship dispensing with requirements¹⁸²

¹⁷⁸ Par 5.4.6 and 5.4.15.

¹⁷⁹ Par 5.4.15.

¹⁸⁰ Par 5.4.6.

¹⁸¹ Par 5.3.25.1.

(1) The designated official, after registering the estate with the Master,¹⁸³ or the Master shall, subject to the provisions of section 18(1), grant letters of executorship to any person and dispense with compliance by the person with all the requirements of this Act if it appears to the Master or designated official that-

(a) the estate is solvent;

(b) no estate duty is payable;

(c) the value of the assets in the estate is less than the amount determined by the Minister by notice in the Gazette [say R125,000];

(d) unborn beneficiaries, minors or other beneficiaries with limited legal capacity will not be prejudiced; and

(e) each beneficiary or a legal representative of a beneficiary¹⁸⁴ on behalf of a beneficiary has signed a statement or an amended statement of assets and liabilities, including executor's remuneration if any, and which reflects the intended distribution of the balance of the estate.

(2) The letters of executorship must authorise the executor to liquidate and distribute the assets set out in the appointment according to the statement referred to in subsection (1)(e).

(3) The designated official or Master may dispense with a notice in the Gazette in terms of section 18(1) if in his or her opinion it is not necessary or expedient to publish such a notice.

13B Transmission of documents to Master by designated official¹⁸⁵

(1) If letters of executorship are not granted by a designated official, he or she must submit documents received in terms of section 7, 8 or 9 to the Master.

(2) A designated official who has granted letters of executorship in terms of section 13A must three months after the granting of the letters of executorship submit all documents regarding the estate in possession of the designated official to the Master under the reference obtained from the Master when the estate was registered with the

¹⁸² Par 2.10.4 and 5.2.33.

¹⁸³ Par 4.4.4.

¹⁸⁴ Paragraphs 5.2.45 to 5.2.48.

Master in terms of section 13A(1).

14 Letters of executorship to executors testamentary

(1) The Master shall, subject to subsection (2) and sections **13A,¹⁸⁶** 16, and 22, on the written application of any person who-

(a) has been nominated as executor by any deceased person by a will which has been registered and accepted in the office of the Master; and

(b) is not incapacitated from being an executor of the estate of the deceased and has complied with the provisions of this Act,

grant letters of executorship to such person.

(2) For the purposes of paragraph (a) of sub-section (1), the Master may-

(a) if the will of any deceased person is not in the Republic, register and accept a copy thereof certified by a competent public authority in the country or territory in which such will is; or

(b) if the will is also the will of any other deceased person and has been registered and accepted by any other Master, register and accept a copy thereof certified by such Master.

15 Endorsement of appointment of assumed executors on letters of executorship

(1) The Master shall, subject to subsection (2) and sections 16 and 22-

(a) on the written application of any person who has been duly nominated as an assumed executor, is not incapacitated from being an executor of the estate of the deceased and has complied with the provisions of this Act; and

¹⁸⁵ Par 2.10.4.

¹⁸⁶ Par 5.2.33.

(b) on production of the deed of assumption duly signed by the person so nominated and the executor who has so nominated him or her,

endorse the appointment of such person as assumed executor on the letters of executorship granted to the executor testamentary.

(2) No endorsement under sub-section (1) shall be made after the executor vested with the power of assumption, of if there are two or more executors jointly vested with the said power, after every such executor has for any reason ceased to be executor.

(3) The appointment of any person in terms of sub-section (1) shall not be affected by the subsequent incapacity or death of the executor by whom he or she was assumed.

...

18 Proceedings on failure of nomination of executors or on death, incapacity or refusal to act, etc

(1) The Master shall, subject to the provisions of subsections ~~(3)~~, (5) and (6) and section 13A⁻¹⁸⁷

(a) if any person has died without having by will nominated any person to be his or her executor; or

(b) if the whereabouts of any person so nominated to be sole executor or of all the persons so nominated to be executors are unknown, or if such person or all such persons are dead or refuse or are incapacitated to act as executors or when called upon by the Master by notice in writing to take out letters of executorship within a period specified in the notice, fail to take out such letters within that period or within such further period as the Master may allow; or

(c) if, in the case of two or more persons being so nominated to be executors, the whereabouts of one or some of them are unknown, or one or some of them are dead or refuse or are incapacitated to act as executors or when so called upon by the Master fail so to take out

¹⁸⁷ Par 5.2.33.

letters of executorship, and in the interests of the estate, one or more executors should be joined with the remaining executor or executors; or

(d) if the executors in any estate are at any time less than the number required by the will of the testator to form a quorum; or

(e) if any person who is the sole executor or all the persons who are executors of any estate, cease for any reason to be executors thereof; or

(f) if, in the case of two or more persons who are the executors of any estate, one or some of them cease to be executors thereof, and in the interests of the estate, one or more executors should be joined with the remaining executor or executors,

appoint and grant letters of executorship to such person or persons whom he **or she** may deem fit and proper to be executor or executors of the estate of the deceased, or, if he **or she** deems it necessary or expedient, by notice published in the *Gazette* and in such other manner as in his **or her** opinion is best calculated to bring it to the attention of the persons concerned, call upon the surviving spouse **or surviving spouses**¹⁸⁸ (if any), the heirs of the deceased and all persons having claims against the estate, to attend before him **or her** or, if more expedient, before any other Master ~~or any magistrate~~ **or designated official**¹⁸⁹ at a time and place specified in the notice, for the purpose of recommending to the Master for appointment as executor or executors, a person or a specified number of persons.

(2) If the Master has published a notice under sub-section (1) he **or she** shall, on receipt of the recommendation in question or when it appears that the persons concerned have failed to make any recommendation, subject to the provisions of ~~subsection (3) and~~ sections **13A**,¹⁹⁰ 19, 22 and 23, unless it appears to him **or her** to be necessary or expedient to postpone the appointment and to publish another notice under subsection (1), appoint and grant letters of executorship to such person or persons as he **or she** deems fit and proper to be executor or executors of the estate of the deceased.

~~(3) If the value of any estate does not exceed the amount determined by the~~

¹⁸⁸ Par 5.5.2.

¹⁸⁹ Par 2.10.4.

~~Minister by notice in the Gazette, the Master may dispense with the appointment of an executor and give directions as to the manner in which any such estate shall be liquidated and distributed.~~¹⁹¹

(4)

(5) The Master may at any time-

(a) if, in the case of two or more persons-

(i) who have been nominated by will to be executors, the whereabouts of one or some of them are unknown, or one or some of them are dead or refuse or are incapacitated to act as executors, or when called upon by the Master by notice in writing to take out letters of executorship within a period specified in the notice, fail to take out such letters within that period or within such further period as the Master may allow; or

(ii) who are the executors in any estate, one or some of them cease to be executors thereof,

grant letters of executorship to the remaining executor or executors, or authorize the remaining executor or executors to liquidate and distribute the estate, as the case may be; or

(b) if after the discharge of any executor it appears that there is property in the estate which has not been distributed by such executor, appoint and grant letters of executorship to such person as he or she deems fit and proper to liquidate and distribute such property; or

(c) when the Master considers it desirable, notwithstanding the provisions of any will, appoint as co-executor of any serving executor any person whom the Master deems fit.¹⁹²

(6) Nothing in this section contained shall authorize the Master to grant letters of executorship to any person who is legally incapacitated to act as executor of the estate of the

¹⁹⁰ Par 5.2.33

¹⁹¹ Par 5.4.6.

deceased.

(7) The provisions of section *sixteen* shall *mutatis mutandis* apply with reference to the grant of letters of executorship under this section.

19 Competition for office of executor

If more than one person is nominated for recommendation to the Master, the Master shall, in making any appointment, give preference to-

- (a) the surviving spouses or¹⁹³ spouse or his or her nominee; or
- (b) if no surviving spouse is so nominated or the surviving spouses or¹⁹⁴ spouse has not nominated any person, an heir or his or her nominee; or
- (c) if no heir is so nominated or no heir has nominated any person, a creditor or his or her nominee; or
- (d) the tutor or curator of any heir or creditor so nominated who is a minor or a person under curatorship, in the place of such heir or creditor:

Provided that the Master may-

- (i) join any of the said persons as executor with any other of them; or
- (ii) if there is any good reason therefor, pass by any or all of the said persons.

20 ~~Application of section 21 to foreign letters of executorship~~¹⁹⁵

~~(1) The Minister may by notice in the Gazette declare that the provisions of section~~

¹⁹² Par 6.3.19.2.

¹⁹³ Par 5.5.2.

¹⁹⁴ Par 5.5.2.

¹⁹⁵ Par 5.4.13.

~~twenty-one shall, as from the date fixed by such notice or during a period specified in such notice, apply to letters of executorship granted in any State so specified, and may by like notice withdraw or amend any such notice.~~

~~——(2) The provisions of the said section applying to letters of executorship granted in any State, shall apply also to letters of executorship granted by any consular court of that State.~~

~~——(3) Any proclamation issued under section forty of the Administration of Estates Act, 1913 ([Act 24 of 1913](#)), shall be deemed to have been issued under sub-section (1).~~

~~21 Sealing and signing of letters granted in a State~~

~~Whenever letters of executorship granted in any State and authenticated as provided in the rules made under section forty-three of the Supreme Court Act, 1959 ([Act 59 of 1959](#)), are produced to or lodged with the Master by the person in whose favour those letters have been granted or his duly authorized agent, those letters may, subject to the provisions of sections *twenty-two* and *twenty-three*, be signed by the Master and sealed with his seal of office, and such person shall thereupon with respect to the whole estate of the deceased situate in the Republic, for the purposes of this Act be deemed to be an executor to whom letters of executorship have been granted by the Master: Provided that before any such letters are signed and sealed a duly certified and authenticated copy of the will (if any) of the deceased and an inventory of all property known to belong to him within the Republic shall be lodged with the Master.¹⁹⁶~~

22 The Master may refuse to grant or, endorse or sign and seal letters of executorship in certain cases

(1) If it appears to the Master or if any person having an interest in the estate lodges with the Master in writing an objection that the nomination of any person as executor testamentary or assumed executor is or should be declared invalid, letters of executorship or an endorsement, as the case may be, may be refused by the Master until-

¹⁹⁶ Par 5.4.13.

- (a) the validity of such nomination has been determined by the Court; or
- (b) the objection has been withdrawn; or
- (c) the person objecting has had a period of fourteen days after such refusal or such further period as the Court may allow, to apply to the Court for an order restraining the grant of letters of executorship, or the making of the endorsement, as the case may be.

(2) The Master may-

(a) if any person to whom letters of executorship are to be granted or in whose favour an endorsement is to be made under section *fifteen*, ~~or at whose instance letters of executorship are to be signed and sealed under section *twenty-one*,~~¹⁹⁷ resides or is outside the Republic and has not chosen *domicilium citandi et executandi* in the Republic; or

(b) if any such person could, if he or she is appointed as executor, be removed from his or her office under sub-paragraph (ii), (iii) or (iv) of paragraph (a) of sub-section (1) of section *fifty-four* or sub-paragraph (iii) of paragraph (b) of that subsection; or

(c) if any such person fails to satisfy the Master by a declaration under oath that letters of executorship have not already been granted ~~or signed and sealed~~¹⁹⁸ by any other Master in the Republic,

refuse to grant letters of executorship or to make the endorsement ~~or to sign and seal the letters of executorship~~¹⁹⁹, as the case may be.

23 Security for liquidation and distribution²⁰⁰

(1) With the exception of a person appointed in terms of section 13A, ~~section *twenty-five*,~~²⁰¹ every person ~~who has not been nominated by will to be an executor~~ shall, before

¹⁹⁷ Par 5.4.15.

¹⁹⁸ Par 5.4.15.

¹⁹⁹ Par 5.4.15.

²⁰⁰ Par 5.3.25.

²⁰¹ Par 5.4.15.

letters of executorship are granted or endorsed, ~~or signed and sealed~~,²⁰² and thereafter as the Master may require, find security to the satisfaction of the Master in an amount determined by the Master for the proper performance of his or her functions, ~~except Provided that-~~

~~(a) if such person is a parent, spouse or child of the deceased, he shall not be required to furnish security unless the Master specially directs that he shall do so or will be assisted in the administration of the estate by -~~

~~(i) any person duly admitted to practise as an attorney in any part of the Republic;~~

~~(ii) any accountant or auditor registered under the Public Accountants and Auditors Act, 1991 (Act No. 80 of 1991);~~

~~(iii) any board of executors or trust company which was not prohibited from administering an estate [on the date when the amending legislation came into force];~~

~~(iv) any bank;²⁰³~~

~~(v) any category of persons exempted by the Minister under subsection (2); or~~

~~(b) if the Master is satisfied that the person should be exempted from furnishing security in the light of the capabilities and trustworthiness of the person or the person who will assist him or her.~~

~~(1A) The Master shall keep a record of instances where a person appointed as executor fails to comply with legal requirements or to administer an estate properly and a record of persons who indicated that they will assist such executor in the administration of the estate.~~

~~(1B) Despite subsection (1)(a), the Master may, after notice to the executor or the person who assists the executor, refuse to appoint the executor as executor in another estate or an executor who will be assisted by such person, unless security has been furnished to the satisfaction of the Master in an amount determined by the Master.~~

~~(1C) The notice in subsection (1B) must indicate the reason for the notice and a list instances where an executor failed to comply with legal requirements or to administer~~

²⁰²

Par 5.4.15.

²⁰³

Bank is defined in clause 1.

an estate properly.

(1D) The Master may revoke a notice in subsection (1B) if the Master is satisfied that the executor or person is capable to administer estates and will in future administer estates properly or see to it that estates of executors assisted by such person will be administered properly.

(2) The Minister may by notice in the Gazette exempt a category of persons from furnishing security if it appears to the Minister that the category of persons should be exempted from furnishing security in the light of the capabilities of the category of persons and measures to ensure professional conduct by the category of persons. ~~Subject to the provisions of section twenty-five, every person nominated by will to be an executor and every person to be appointed assumed executor shall be under the like obligation of finding security unless-~~

~~—— (a) — he is the parent, child or surviving spouse of the testator or has been assumed by such parent, child or spouse; or~~

~~—— (b) — he has been nominated by will executed before the first day of October, 1913, or assumed by the person so nominated, and has not been directed by the will to find security; or~~

~~—— (c) — he has been nominated by will executed after the first day of October, 1913, or assumed by the person so nominated, and the Master has in such will been directed to dispense with such security; or~~

~~—— (d) — the Court shall otherwise direct:~~

~~Provided that if the estate of any such person has been sequestrated or if he has committed an act of insolvency or is or resides or is about to reside outside the Republic, or if there is any good reason therefor, the Master may, notwithstanding the provisions of paragraph (a), (b) or (c), refuse to grant or to sign and seal letters of executorship or to make any endorsement under section fifteen until he finds such security.~~

(3) The Master may by notice in writing require any executor (including any executor who

would not otherwise be under any obligation of finding security) whose estate or whose surety's estate has been sequestrated, or who or whose surety has committed an act of insolvency, or who is about to go or has gone to reside outside the Republic, to find, within a period specified in the notice, security or additional security, as the case may be, to the satisfaction of the in an amount determined by the Master, for the proper performance of his or her functions.

(4) The Master shall allow the reasonable costs of finding security to be paid out of the estate.

(5) If any default is made by any executor in the proper performance of his or her functions, the Master may enforce the security and recover from such executor or his or her sureties the loss to the estate.

24 Reduction of security given by executors

If any executor who has given security to the Master for the proper performance of his or her functions, has accounted to the satisfaction of the Master for any property, the value of which was taken into consideration when the amount of such security was assessed, the Master may reduce the amount of the security to an amount which would, in his or her opinion, be sufficient to cover the value of the property which such executor has been appointed to liquidate and distribute, and which has not been so accounted for.

25 Estates of persons who upon their death are not resident in the Republic and do not own any property other than movable property in the Republic²⁰⁴

~~(1)~~ Upon the death of any person who is ~~neither~~ not ordinarily resident within the Republic ~~nor the owner of any property therein other than movable property~~, the Master may, subject to the provisions of ~~subsection (2)~~ section 13A-

~~(a) — without observing the usual procedure or requiring security-~~

~~—— (i) — sign and seal letters of executorship produced to or lodged with him under section 21; or~~

~~—— (ii) — if no such letters are produced or lodged, appoint an executor to liquidate and distribute the estate, or direct the manner in which the estate shall be liquidated and distributed; and~~

~~—— (b) — by writing under his hand and subject to such conditions as he may determine, exempt the executor from compliance with the provisions of section 35.~~

~~—— (2) The Master shall not exercise his powers under subsection (1) unless-~~

~~—— (a) — an affidavit made by such person and containing such particulars as may be prescribed has been lodged with him in the place of the documents required in terms of the proviso to section 21~~

~~(b) — the estate duty payable in respect of the said movable property has been paid or the payment thereof has been secured to the satisfaction of the proper authority; and~~

~~—— (c) — he is satisfied that no person in the Republic will be prejudiced.~~

26 Executor charged with custody and control of property in estate

(1) Immediately after letters of executorship have been granted to him **or her** an executor shall take into his **or her** custody or under his **or her** control all the property, books and documents in the estate and not in the possession of any person who claims to be entitled to retain it under any contract, right of retention or attachment.

(1A) The executor may before the account has lain open for inspection in terms of

section 35 (4), with the consent of the Master, release such amount of money and such property out of the estate as in the executor's opinion are sufficient to provide for the subsistence of the deceased's family or household.

(2) If the executor has reason to believe that any such property, book or document is concealed or otherwise unlawfully withheld from him or her, ~~he~~ the executor may apply to the magistrate having jurisdiction for a search warrant mentioned in sub-section (3).

(3) If it appears to a magistrate to whom such application is made, from a statement made upon oath, that there are reasonable grounds for suspecting that any property, book or document in any deceased estate is concealed upon any person or at any place or upon or in any vehicle or vessel or receptacle of any nature, or is otherwise unlawfully withheld from the executor concerned, within the area of the magistrate's jurisdiction, he or she may issue a warrant to search for and take possession of that property, book or document.

(4) Such a warrant shall be executed in like manner as a warrant to search for stolen property, and the person executing the warrant shall deliver any article seized thereunder to the executor concerned.

27 Inventories by executors and valuation at instance of Master

(1) An executor who has been ordered thereto by the Master or who in terms of section 23 was required to find security, shall-

(a) within thirty days after letters of executorship have been granted to him or her, or within such further period or periods as the Master may allow, lodge with the Master an inventory in the prescribed form signed by him or her in person showing the estimated value of all property in the estate; and

(b) thereafter, whenever he or she comes to know of any such property which is not mentioned in any inventory lodged by him or her with the Master, within fourteen days after he or she has come to know of such property, or within such further period as the Master may allow, lodge with the Master an additional inventory so signed by him or her showing the

estimated value thereof.

(2) If in any inventory lodged with the Master **or designated official**²⁰⁵ in terms of section 9 or subsection (1) of this section, any estimate has been made of the value of any property which the Master has reason to believe is not a reasonably correct estimate thereof, the Master may, at the expense of the estate, order that property to be appraised by an appraiser or any other person approved by the Master.

28 Banking accounts

(1) An executor-

(a) shall, unless the Master otherwise directs, as soon as he or she has in hand moneys in the estate in excess of R1 000, open ~~a cheque~~ **an** account²⁰⁶ in the name of the estate with a bank in the Republic and shall deposit therein the moneys which he or she has in hand and such other moneys as he or she may from time to time receive for the estate;

(b) may open a savings account in the name of the estate with a bank and may transfer thereto so much of the moneys deposited in the account referred to in paragraph (a) as is not immediately required for the payment of any claim against the estate;

(c) may place so much of the moneys deposited in the account referred to in paragraph (a) as is not immediately required for the payment of any claim against the estate on interest-bearing deposit with a bank.

(2) Every executor shall whenever required by the Master to do so, notify the Master in writing of the bank and the office or branch thereof with which he or she has opened an account referred to in subsection (1), and furnish the Master with a bank statement or other sufficient evidence of the position of the account.

(3) No executor who in compliance with a request of the Master under subsection (2),

²⁰⁵ Par 2.10.4.

has notified the Master of the office or branch of the bank with which he or she has opened an account referred to in subsection (1) shall transfer any such account from any such office or branch to any other such office or branch, except after written notice to the Master.

(4) All cheques or orders drawn upon any such account shall contain the name of the payee and the cause of payment and shall be drawn to order and be signed by every executor or his duly authorized agent.

(4A) The bank statements shall contain the name of the payee and the cause of payment in respect of all electronic transfers from an account.²⁰⁷

(5) The Master and any surety of the executor shall have the same right to information in regard to any such account as the executor himself or herself possesses, and may examine all vouchers in relation thereto, whether in the hands of the bank or of the executor.

(6) The Master may in writing direct the manager of any office or branch with which an account has been opened under subsection (1), to refuse, except with the consent of the Master, any further withdrawals of money from that account or to pay over into the guardian's fund all moneys standing to the credit of the account at the time of the receipt, by the said manager, of that direction, and all moneys which may thereafter be paid into that account, and shall notify the executor of any such direction.

29 Notice by executors to lodge claims

(1) Every executor shall, as soon as may be after letters of executorship have been granted to him **or her**, cause a notice to be published in the *Gazette* ~~and in one or more newspapers circulating in the district in which the deceased ordinarily resided at the time of his death and, if at any time within the period of twelve months immediately preceding the date of his death he so resided in any other district, also in one or more newspapers circulating in that other district, or if he was not ordinarily so resident in any district in the Republic, in one or more newspapers circulating in a district where the deceased owned~~

²⁰⁶ Par 6.9.10.

²⁰⁷ Par 6.9.4.2.

property,²⁰⁸ calling upon all persons having claims against **his the** estate to lodge such claims with the executor within such period (not being less than thirty days or more than three months) from the date of the latest publication of the notice as may be specified therein.

(2) All claims which would be capable of proof in case of the insolvency of the estate may be lodged under sub-section (1).

30 Restriction on sale in execution of property in deceased estates

No person charged with the execution of any writ or other process shall-

(a) before the expiry of the period specified in the notice referred to in section twenty-nine; or

(b) thereafter **or after letters of executorship have been issued in terms of section 13A,**²⁰⁹ unless, in the case of property of a value not exceeding R5 000, the Master or, in the case of any other property, the Court otherwise directs,

sell any property in the estate of any deceased person which has been attached whether before or after his death under such writ or process: Provided that the foregoing provisions of this section shall not apply if such first-mentioned person could not have known of the death of the deceased person.

...

35 Liquidation and distribution accounts

(1) **Subject to section 13A,**²¹⁰ an executor shall, as soon as may be after the last day of the period specified in the notice referred to in section 29 (1), but within-

(a) six months after letters of executorship have been granted to him **or her**; or

(b) such further period as the Master may in any case allow,

²⁰⁸ Par 6.5.5.
²⁰⁹ Par 5.2.35.
²¹⁰ Par 5.2.33.

submit to the Master an account in the prescribed form of the liquidation and distribution of the estate.

(1A) If at any time after the account contemplated in subsection (1) was submitted to the Master additional assets are found in the estate and the account is not amended in terms of this section so as to provide for the application or distribution of the proceeds of those assets, the executor shall in respect of those assets submit to the Master a supplementary account in the prescribed form.

(2) The Master may at any time in any case in which he **or she** has exercised his **or her** powers under paragraph (b) of subsection (1) or in which an executor has funds in hand which ought, in the opinion of the Master, to be distributed or applied towards the payment of debts, direct the executor in writing to submit to him **or her** an interim account in the prescribed form within a period specified.

(2A) The Master may in respect of an account contemplated in subsection (1), (1A) or (2) direct the executor to submit to him **or her** within a period determined by him **or her** such voucher or vouchers in support of the account or any entry therein as he **or she** may require for the purpose of performing his **or her** functions in connection with the ~~examination or amendment of the~~²¹¹ account **or a bank reconciliation with explanations of all or some of the entries on bank statements as the Master may require.**²¹²

(3) The executor shall set forth in any interim account all debts due to the estate and still outstanding and all property still unrealized, and the reasons why such debts or property, as the case may be, have not been collected or realized.

(3A) Without limiting the right of the Master to examine any account, there is no duty on the Master to examine an account unless the Master has received an objection or complaint by an interested party, there is a dispute about the administration of the estate, or it appears to the Master that an absentee or person without full legal capacity may be prejudiced.²¹³

²¹¹ Par 5.2.18.

²¹² Par 6.9.17.

(4) Every executor's account shall, ~~after the Master has examined it,~~²¹⁴ lie open at the office of the Master, and if the deceased was ordinarily resident in any district other than that in which the office of the Master is situate, a duplicate thereof shall lie open at the office of the **magistrate designated official**²¹⁵ of such other district for not less than twenty-one days, for inspection by any person interested in the estate.

(5) (a) The executor shall give notice that the account will be so open for inspection by advertisement in the *Gazette* ~~and in one or more newspapers circulating in the district in which the deceased was ordinarily resident at the time of his death and, if at any time within the period of twelve months immediately preceding the date of his death he was so resident in any other district, also in one or more newspapers circulating in that other district,~~ **and by personal delivery or registered mail to heirs**²¹⁶ and shall state in the notice the period during which and the place at which the account will lie open for inspection.

(b) If, in the case of a supplementary account contemplated in subsection (1A), the value of the assets concerned is in the opinion of the Master too small to justify the cost of publication of the notices contemplated in paragraph (a) of this subsection, that paragraph shall not apply in respect of such supplementary account and the Master may, if he **or she** finds it necessary, direct the executor to give notice, in such manner and to such persons as the Master may determine, of the place at which and the period during which the account will lie open for inspection in terms of subsection (4).

(6) The ~~magistrate~~ **designated official** shall cause to be affixed in some public place in or about ~~his~~ **the designated official's**²¹⁷ office, a list of all such accounts lodged in his **or her** office, showing the date on which **a copy of** each such account will be transmitted to the Master, and, upon the expiry of the period allowed for inspection, shall endorse on each account his **or her** certificate that the account has lain open in his **or her** office for inspection in accordance with this section and transmit the account to the Master.

(7) Any person interested in the estate may at any time before the expiry of the period allowed for inspection lodge with the Master in duplicate any objection, with the reasons

²¹³ Par 5.2.18.

²¹⁴ Par 5.2.18.

²¹⁵ Par 2.10.4.

²¹⁶ Par 6.5.5.

²¹⁷ Par 2.10.4.

therefor, to any such account and the Master shall deliver or transmit by registered post to the executor a copy of any such objection together with copies of any documents which such person may have submitted to the Master in support thereof.

(8) The executor shall, within fourteen days after receipt by him or her of the copy of the objection, transmit two copies of his or her comments thereon to the Master.

(9) If, after consideration of such objection, the comments of the executor and such further particulars as the Master may require, the Master is of opinion that such objection is well-founded or if the Master is, apart from any objection, of opinion that minors or persons without full legal capacity may be prejudiced and²¹⁸ ~~he~~ is of opinion that the account is in any respect incorrect and should be amended, he or she may direct the executor to amend the account or may give such other direction in connection therewith as he or she may think fit.

(10) Any person aggrieved by any such direction of the Master or by a refusal of the Master to sustain an objection so lodged, may apply by motion to the Court within thirty days after the date of such direction or refusal or within such further period as the Court may allow, for an order to set aside the Master's decision and the Court may make such order as it may think fit.

(11) If any such direction affects the interests of a person who has not lodged an objection and the account is amended, the account as so amended shall, unless the said person consents in writing to the account being acted upon, again lie open for inspection in the manner and with the notice and subject to the remedies hereinbefore provided.

(12) When an account has lain open for inspection as hereinbefore provided and-

(a) no objection has been lodged; or

(b) an objection has been lodged and the account has been amended in accordance with the Master's direction and has again lain open for inspection, if necessary, as provided in sub-section (11), and no application has been made to the Court within the period referred to in sub-section (10) to set aside the Master's decision; or

²¹⁸ Par 5.2.18.

(c) an objection has been lodged but withdrawn, or has not been sustained and no such application has been made to the Court within the said period,

the executor shall forthwith pay the creditors and distribute the estate among the heirs in accordance with the account, lodge with the Master the receipts and acquittances of such creditors and heirs and produce to the Master the deeds of registration relating to such distribution, or lodge with the Master a certificate by the registration officer or a conveyancer specifying the registrations which have been effected by the executor: Provided that-

(i) a cheque purporting to be drawn payable to a creditor or heir in respect of any claim or share due to him or her and paid by the banker on whom it is drawn; ~~or~~

(ii) an affidavit by the executor in which he or she declares that a creditor was paid or that an heir received his or her share in accordance with the account, or

(iii) authority signed by an heir or creditor to effect payment by transfer of funds to a banking account identified in the authority and proof of transfer to such account.²¹⁹

may be accepted by the Master in lieu of any such receipt or acquittance.

(13) The executor shall not later than two months after the estate has become distributable in terms of sub-section (12), pay to the Master for deposit in the guardian's fund on behalf of the persons entitled thereto, all moneys which he or she has for any reason been unable to distribute in accordance with the account.

(14) If the estate appears to be solvent and no absentee beneficiary, minor beneficiary or other beneficiaries without full legal capacity are entitled to and no unborn heir may become entitled to a benefit in terms of an account, an executor who has complied with section 29(1) and has advertised a final account for inspection free from objections, shall not without a direction by the Master be required to comply with any requirements of this Act, except subsection (13) and sections 39, 40, 42, 49, 51(4) and

²¹⁹ Par 6.9.4.1.

53.²²⁰

(15) Despite the provisions of subsection (14) and section 13A(1) the Master may at any time direct any executor to comply with any of the provisions of this Act.²²¹

35A Lodging documents and questioning by or on behalf of the Master²²²

(1) If the Master is of the opinion that the executor of the estate or any other person is able to give information or is in possession of books, documents or records which the Master considers desirable to obtain, concerning the deceased estate or the administration of the estate or concerning any demand made against the estate, the Master may by notice in writing delivered to the executor or such other person, summon him or her to appear before the Master or before a magistrate at a place and on a date and time stated in the notice, and to furnish all the information within his or her knowledge and be questioned by the Master or the magistrate concerning the deceased estate or the administration of the estate or a demand made on the estate and produce the books, documents or records specified in the notice or a further notice issued by the Master or magistrate.

(2) A person called upon to be questioned may be assisted by a representative and such representative may question the said person only in so far as it is necessary to clarify answers given by him or her.

(3) If a banker is summoned or ordered to produce documents, books or statements or give information, such banker shall, notwithstanding the law relating to privilege, be obliged to produce such documents, books or statements or give such information.

²²⁰ Par 5.2.44.

²²¹ Par 5.2.33 and 5.2.44.

²²² Par 6.3.26.

(4) Notwithstanding the provisions of any other law or the common law, but subject to the court's power to avoid questioning being conducted in an oppressive, vexatious or unfair manner, no person questioned in terms of this provision may refuse to answer a question because the answer may prejudice him or her in any criminal or disciplinary proceedings which have been or may be instituted against him or her or apply for a postponement of the questioning until the criminal or disciplinary proceedings have been finalised: Provided that evidence given by a person is not admissible against him or her in criminal or disciplinary proceedings, except in criminal proceedings where such person is charged in connection with evidence given during the questioning with perjury or the giving of false evidence under oath or affirmation or a for refusal or failure to answer lawful questions fully and satisfactorily.

(5) Subject to the subsection (4), any evidence given is admissible in any proceedings instituted against the person who gave such evidence and any record of a questioning introduced in such proceedings forms part of the record of the proceedings.

(6) A person other than the executor who in answer to a summons appears to be questioned or to produce books, documents, or records is entitled to the witness fees to which he or she would have been entitled if he or she were a witness in civil proceedings before a court of law.

(7) The Master may at any time appoint a person to investigate the books, documents, records and vouchers of the executor and direct the executor or the agent of the executor to deliver to the person so appointed or to the Master any book, document, or record relating to or property belonging to the estate of which he or she is the executor or the administration of the estate.

(8) The reasonable costs incurred in performing an investigation in terms of subsection (7) shall, unless the court otherwise orders and subject to the provisions of section 97(2), be regarded as part of the costs of administration of the estate and if the executor is removed from office consequent upon such an investigation, it shall be paid by the executor de bonis propriis.

(9) No person is entitled to require the payment of any money before books, records or documents are handed in or handed over in terms of this section.²²³

...

38 Taking over by surviving spouse of estate or portion thereof

(1) The Master may, if-

(a) one of two **or more**²²⁴ spouses, whether ~~they were~~ married in or out of community of property, has died; and

(b) the deceased has made no provision to the contrary in any will; and

(c) **the other spouse if any.**²²⁵ the major heirs and any claimants against the estate consent; and

(d) it appears to him **or her** that no person interested would be prejudiced thereby, authorize the executor, subject to security being given *mutatis mutandis* as provided in sub-section (2) of section *forty-three* for the payment of any minor's share, and to such conditions as the Master may determine, to make over any property or all the property of the deceased, or the whole or any part of that portion of his **or her** property in respect of which he **or she** has made no testamentary provision to the contrary, to the surviving spouse at a valuation to be made by an appraiser or any other person approved by the Master, and to frame his **or her** distribution account on the basis of such valuation.

(2) Sub-sections (3), (4) and (5) of section *forty-three* shall *mutatis mutandis* apply in respect of any security given under sub-section (1).

...

42 Documents to be lodged by executor with registration officer

(1) Except as is otherwise provided in subsection (2), an executor who desires to have any immovable property registered in the name of any heir or other person legally entitled to

²²³ Par 6.3.29.

²²⁴ Par 5.5.2.

²²⁵ Par 5.5.2.

such property or to have any endorsement made under section 39 or 40 shall, in addition to any other deed or document which he **or she** may be by law required to lodge with the registration officer, lodge with the said officer a certificate by a conveyancer that the proposed transfer or endorsement, as the case may be, is in accordance with the liquidation and distribution account **or a statement provided for in section 13A(1)(e).**²²⁶

(2) An executor who desires to effect transfer of any immovable property in pursuance of a sale shall lodge with the registration officer, in addition to any such other deed or document, a certificate by the Master that no objection to such transfer exists.

43 Movable property to which minors and moneys to which absentees or persons under curatorship are entitled

(1) The natural guardian of a minor shall, subject to the provisions of subsections (2) and (3) and to the terms of the will (if any) of the deceased, be entitled to receive from the executor for and on behalf of the minor, any movable property to which the minor is, according to any liquidation and distribution account in any deceased estate, entitled.

(2) Subject to any express provision to the contrary in the will-

(a) no sum of money shall be paid to any such guardian in terms of subsection (1);
and

(b) if the Master so directs, no other movable property shall be delivered to any such guardian under that subsection,

unless payment of such sum of money or payment, in default of delivery, of the value of such movable property according to a valuation by an appraiser or any other person approved by the Master, as the case may be, to the minor, at the time when he **or she** is to become entitled to the payment of such sum of money or delivery of such property, has been secured to the satisfaction of the Master.

(3) Any such guardian shall, if called upon to do so by the Master by notice in writing,

²²⁶ Par 5.2.35.

lodge with the Master, within a period specified in the notice or within such further period as the Master may allow, a statement in writing, signed by him or her in person and verified by an affidavit made by him or her, giving such particulars in respect of any such property or sum of money as may be indicated in the notice.

(4) If the estate of any such guardian or of his or her surety is sequestrated, or if such guardian or surety commits an act of insolvency, or is about to go or has gone to reside outside the Republic, or if in the opinion of the Master the security given under sub-section (2) has become inadequate, the Master may, by notice in writing, require such guardian to provide within the period stated in the notice, such additional security as the Master may specify, and if the guardian fails to comply with the notice within the said period or within such further period as the Master may allow, the amount in question shall, unless the notice has been withdrawn by the Master, forthwith become payable into the hands of the Master.

(5) The Master may-

(a) if any payment or delivery referred to in sub-section (2) has been made to any minor entitled thereto; or

(b) if any minor entitled to any such payment or delivery at any time after his or her majority, consents thereto in writing after he or she has attained majority,

reduce the amount of the security to an amount which would, in his or her opinion, be sufficient to secure any other such payment or delivery still to be made by the guardian.

(6) Subject to the provisions of sub-section (1) and to the terms of the will (if any) of the deceased, an executor shall pay into the hands of the Master any money to which any minor, absentee, unknown heir or person under curatorship is entitled according to any liquidation or distribution account in the estate of the deceased: Provided that the Court may, upon consideration of a report by the Master and of the terms of the will (if any) of the deceased, make such order exempting the executor from compliance with the provisions of this sub-section as it may deem fit.

...

50 Executor making wrong distribution

(1) Any executor, other than an executor appointed in terms of section 13A,²²⁷ who makes a distribution otherwise than in accordance with the provisions of section *thirty-four* or *thirty-five*, as the case may be, shall-

(a) be personally liable to make good to any heir and to any claimant whose claim was lodged within the period specified in the notice referred to in section *twenty-nine*, any loss sustained by such heir in respect of the benefit to which he **or she** is entitled or by such claimant in respect of his **or her** claim, as a result of **his the executor's** failure to make a distribution in accordance with the said provisions; and

(b) be entitled to recover from any person any amount paid or any property delivered or transferred to him **or her** in the course of the distribution which would not have been paid, delivered or transferred to him **or her** if a distribution in accordance with the said provisions had been made: Provided that no costs incurred under this paragraph shall be paid out of the estate.

(2) Any executor appointed in terms of section 13A who makes a distribution contrary to the statement provided for in that section or distributes the estate before payment of a claim reflected in the statement or before payment of a claim of which the executor was aware when the executor distributed the assets-

(a) shall be personally liable to make good to any heir and to any such claimant any loss sustained by such heir in respect of the benefit to which he or she is entitled or by such claimant in respect of his or her claim, as a result of the executor's failure to distribute the assets in terms of the statement or to pay the claim; and

(b) shall be entitled to recover from any person any amount paid or any property delivered or transferred to him or her in the course of the distribution which would not have been paid, delivered or transferred to him or her if a distribution in accordance with the said statement had been made or the said claim had been paid: Provided that no costs incurred under this paragraph shall be paid out of the estate.²²⁸

²²⁷ Par 5.2.35.

²²⁸ Par 5.2.35.

51 Remuneration of executors and interim curators

(1) Every executor (including an executor liquidating and distributing an estate under sub-section (4) of section *thirty-four* shall, subject to the provisions of sub-sections (3) and (4), be entitled to receive out of the assets of the estate-

(a) such remuneration as may have been fixed by the deceased by will; or

(b) if no such remuneration has been fixed, a remuneration which shall be assessed according to a prescribed tariff and shall be taxed by the Master **if the Master has received an objection or complaint by an interested party, there is a dispute about the administration of the estate, or it appears to the Master that an absentee or person without full legal capacity may be prejudiced.**²²⁹

(2) An interim curator appointed under section *twelve* shall, subject to the provisions of sub-section (3), be entitled to receive out of the assets of the estate a remuneration which shall be so assessed and taxed.

(3) The Master may-

(a) if there are in any particular case special reasons for doing so, reduce or increase any such remuneration;

(b) disallow any such remuneration, either wholly or in part, if the executor or interim curator has failed to discharge his **or her** duties or has discharged them in an unsatisfactory manner; and

(c) if the deceased had a limited interest in any property which terminated at his **or her** death, direct that so much of such remuneration as the Master considers equitable, or the whole thereof if there are no other assets available for the payment of such remuneration, shall be paid in such proportion as he **or she** may determine by the persons who became entitled to the property at the death of the deceased.

(4) An executor shall not be entitled to receive any remuneration before the estate has been distributed as provided in section 34 (11) or 35 (12), as the case may be, unless payment of such remuneration has been approved in writing by the Master.

(5) If an agent of an executor charges a fee for the administration of an estate which differs from the remuneration of the executor this fee must be noted with the remuneration of the executor in the liquidation and distribution account.²³⁰

...

71 Certain persons not to administer property as tutor or curator without letters of tutorship or curatorship

(1) No person who has been nominated, appointed or assumed as provided in section seventy-two shall take care of or administer any property belonging to the minor or other person concerned, or carry on any business or undertaking of the minor or other person, unless he is authorized to do so under letters of tutorship or curatorship, as the case may be, granted ~~or signed and sealed~~²³¹ under this Act, or under an endorsement made under the said section.

...

73 Proceedings on failure of nomination of tutors or curators, or on death incapacity or refusal to act, etc)

(1) The Master may, subject to the provisions of subsections (2), (3) and (4)-

- (a) if it comes to his knowledge-
 - (i) that any minor is the owner of any property in the Republic which is not under the care of any guardian, tutor or curator; or
 - (ii) that any absentee is the owner of any property in the Republic,

and he is satisfied that the said property should be cared for or administered on behalf of such minor or absentee; or

²³⁰

Par 6.7.13.

(b) in any case in which it would, in terms of the proviso to section 56 (1) of the Mental Health Act, 1973 (Act 18 of 1973), be competent for a judge in chambers to appoint a curator, or in any case in which the Master would be competent to appoint a curator in terms of section 56A of the said Act; or

(c) if any eventuality referred to in paragraph (b), (c), (d), (e) or (f) of section 18 (1) occurs with reference to any person who has been nominated or appointed as provided in paragraph (a), (b), (c) or (d) of section 72 (1), or to whom letters of tutorship or curatorship have been granted under the latter section or under this subsection,

appoint and grant letters of curatorship or tutorship as provided in section 76 to such person or persons as the Master may deem fit and proper, or, if the Master deems it necessary or expedient,²³² by notice published in the Gazette and in such other manner as in **his the Master's** opinion is best calculated to bring it to the attention of the persons concerned, call upon the relatives of the minor, absentee or other person concerned, and upon all persons having an interest in the care or administration of his **or her** property to attend before **him the Master** or, if more expedient, before any other Master or any **magistrate designated official**²³³ at a time and place specified in the notice, for the purpose of recommending to the Master for appointment as tutor or tutors or as curator or curators, a person or a specified number of persons.

(2) Subsections (2), (5) and (6) of section 18 shall *mutatis mutandis* apply with reference to tutors and curators: Provided that for the purposes of the application under this subsection of the said subsection (2), the reference to **section 18 (3) and to**²³⁴ section 19 shall be deemed to be omitted.

~~74 Foreign letters of tutorship or curatorship~~

²³¹ Par 5.4.16.

²³² Par 6.10.3.

²³³ Par 2.10.4.

²³⁴ Par 5.4.6.

~~Whenever the provisions of section *twenty-one* apply, in terms of section *twenty*, to letters of executorship granted in any State, the said provisions shall *mutatis mutandis* apply also to letters of tutorship or curatorship so granted.~~²³⁵

75 Notifications in respect of tutors and curators

The Master shall, whenever he **or she** has granted ~~or signed and sealed~~²³⁶ letters of tutorship or curatorship or has made an endorsement under section *seventy-two*, to or in favour of any person, and whenever any such person ceases to be a tutor or curator, cause to be published in the *Gazette* and in one or more newspapers circulating in the district in which the minor or person under curatorship is ordinarily resident, or if he **or she** is not so resident in any district in the Republic, in one or more newspapers circulating in the area in which such minor or person owns property, a notice stating that a tutor or curator has been appointed to such minor or person, and specifying the names and addresses of the tutor or curator and of such minor or person, or stating that the tutor or curator has ceased to be a tutor or curator and specifying the names and addresses aforesaid, as the case may be.

...

77 Security by tutors and curators

(1) Every person appointed or to be appointed tutor or curator as provided in section 72 (1) (d) or (2) or under section 73 or 74, shall, subject to the proviso to section 57 (3) of the Mental Health Act, 1973 (Act No.18 of 1973), before letters of tutorship or curatorship are granted ~~or signed and sealed, or~~²³⁷ any endorsement is made, as the case may be, and at any time thereafter when called upon by the Master to do so, find security or additional security to the satisfaction of the Master in an amount determined by the Master, for the proper performance of his **or her** functions.

...

95 Review of Master's appointments, etc

(1) The Chief Master or one of the Chief Master's staff designated by the Chief

²³⁵ Par 5.4.16.

²³⁶ Par 5.4.16.

Master as Ombud may, of his or her own accord or following on a complaint, investigate the actions of a Master or designated official, consider the merits of a matter, take evidence, review a decision of the Master or designated official and give any directions which the Ombud deems fit to the Master or designated official.²³⁸

(2) Every appointment by the Master or designated official of an executor, curator or interim curator, and every decision, ruling, order, direction or taxation by the Master or designated official²³⁹ under this Act shall be subject to appeal to or review by the Court upon motion at the instance of any person aggrieved thereby, and the Court may on any such appeal or review confirm, set aside or vary the appointment, decision, ruling, order, direction or taxation, as the case may be.

...

97 Master's and designated official's costs

(1) All costs incurred by the or designated official in the exercise of his or her powers and the performance of his or her duties under this Act or in any proceedings in pursuance of the provisions of this Act which cannot be recovered from any other source may, unless the Court has ordered that they be paid by ~~him~~ the Master or designated official *de bonis propriis*, be paid out of the guardian's fund: Provided that the Minister may specially authorize that any costs ordered to be paid by the Master or designated official²⁴⁰ *de bonis propriis* be refunded to him or her or be paid out of the said fund.

(2) When the Master appoints a person to do an investigation in terms of section 35A(7) the Master may pay the reasonable costs incurred in performing the investigation out of the guardian's fund and any such costs recovered in terms of section 35A(8) from an estate or an executor removed from office shall be deposited in the guardian's fund.²⁴¹

...

99 Master or designated official incapacitated from being executor, etc

²³⁷ Par 5.4.16.

²³⁸ Par 6.3.35.2.

²³⁹ Par 2.10.4.

²⁴⁰ Par 2.10.4.

²⁴¹ Par 6.3.26.7.

No Master or designated official²⁴² shall in his or her official capacity be capable of acting as executor, tutor or curator.

100 Exemption from liability for acts or omissions in Master's or designated official's office

No act or omission of any Master or designated official or of any officer employed in a Master's or designated official's office shall render the State or such Master or designated official, or officer liable for any damage sustained by any person in consequence of such act or omission: Provided that if such act or omission is *mala fide* or if such Master or designated official,²⁴³ or officer has, in connection with such act or omission in the course of his or her duties or functions, not exercised reasonable care and diligence, the State shall be liable for the damage aforesaid.

101 Evidence

~~(1) A copy certified by the Master of any letters of executorship, tutorship or curatorship lodged with him under section 21, or under the said section read with section 74, or of a copy of any such letters, shall be admissible in evidence as if it were the original letters.~~

[Sub-s. (1) substituted by s. 26 (1) of Act 57 of 1988.]

~~(2) A certificate under the hand of the Master that any person named in the certificate has under any such letters signed and sealed by him been authorized-~~

~~(a) in the case of an executor, to liquidate and distribute the estate in the Republic of the deceased person named in the certificate;~~

~~(b)~~

[Para. (b) deleted by s. 26 (1) of Act 57 of 1988.]

²⁴² Par 2.10.4.

²⁴³ Par 2.10.4.

~~—— (c) — in the case of a tutor or curator, to perform any act in respect of or to take care of or administer the property in the Republic of the minor or other person so named, or to carry on any business or undertaking in the Republic of such minor or person, as the case may be,~~

~~shall be admissible in evidence as *prima facie* proof that such first-mentioned person has been so authorized.~~²⁴⁴

—— (3) A certificate under the hand of the Master shall be *prima facie* proof of any loss referred to in section 23 (5) or in section 77 (5), and of any value referred to in section 35 (1) or in section 46 or in the last-mentioned section as applied by section 85.

102 Penalties

(1) Any person who-

- (a) steals or wilfully destroys, conceals, falsifies or damages any document purporting to be a will; or
- (b) wilfully makes any false inventory under this Act; or
- (c) wilfully submits to or lodges with a Master any false account under this Act; or
- (d) wilfully makes any false valuation for the purposes of this Act; or
- (da) wilfully furnishes false information to the Master; or**²⁴⁵
- (e) when being interrogated under oath under section 32, makes, relative to the subject in connection with which he or she is interrogated, any statement whatever which he or she knows to be false or which he or she does not know or believe to be true; or

²⁴⁴ Par 5.4.15 and 5.4.16,
²⁴⁵ Par 6.6.4.

- (f) being an executor, wilfully distributes any estate otherwise than in accordance with the provisions of section 35 (12), or of the relevant will; or
- (g) contravenes or fails to comply with the provisions of section 9 (1), ~~or~~ (3), or (4),²⁴⁶ 13, 27 (1), 35 (13), 47, 71, 78, 83, 93 (1) or (3), or with any notice under section 9 (2); or
- (h) contravenes or fails to comply with the provisions of section 6 (4), section 8 (1) or (2), section 11 (1), section 26 (1) or of the last-mentioned section as applied by section 85, section 28 (1), (2) or (3) or of the last-mentioned section as applied by section 12 (7) or by section 85, section 30, section 35 (1), or with any direction under section 35 (2) or any notice under section 43 (3) or (4); or
- (i) contravenes or fails to comply with the provisions of section 7 (1) or (2), section 35 (8), section 41 (1), section 54 (5) or of the last-mentioned section as applied by section 85, or with any notice under section 7 (3) or any direction under section 28 (6) or of the last-mentioned section as applied by section 85, or fails without reasonable excuse to comply with a notice under section 32 (1) (b), or, having appeared in answer to such notice, refuses to take the oath or to submit to examination or to answer fully and satisfactorily any lawful question put to him or her, or fails without reasonable excuse to comply with a notice under section 35A, or, having appeared in answer to a summons, refuses to submit to examination or to answer fully and satisfactorily any lawful question put to him or her.²⁴⁷

shall be guilty of an offence and liable on conviction-

- (i) in the case of an offence referred to in paragraph (a), to a fine or to imprisonment for a period not exceeding seven years;

²⁴⁶
²⁴⁷

Par 6.4.4.
Par 6.3.26.6.

- (ii) in the case of an offence referred to in paragraph (b), (c), (d), **(da)**²⁴⁸ or (e), to a fine or to imprisonment for a period not exceeding five years;
- (iii) in the case of an offence referred to in paragraph (f) or (g), to a fine or to imprisonment for a period not exceeding twelve months;
- (iv) in the case of an offence referred to in paragraph (h), to a fine or to imprisonment for a period not exceeding six months; and
- (v) in the case of an offence referred to in paragraph (i), to a fine or to imprisonment for a period not exceeding three months.

(2) The court convicting any person for failure to perform any act required to be performed by him by or under this Act may, in addition to any penalty which it imposes, order such person to perform such act within such period as the Court may fix.

ANNEXURE 2: AMENDMENTS PROPOSED TO INVENTORY FORM²⁴⁹

INVENTORY

Delete which is not applicable where marked ***

In terms of section ~~9(1)(a)/9(2)(a)/9(2)(b)~~27/78 of the Administration of Estates Act, 1965.

Attention is directed to the provisions of section 102(1)(b) of the Act which provides that any person who wilfully makes any false inventory under the Act shall be guilty of an offence and liable on conviction to a fine ~~not exceeding R1 000~~ or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

***Full name of deceased.....

***Full name of surviving spouse (in a case where spouses were married in community of property)

**Address of surviving spouse

Massed estate of.....

or

***Full name(s) of minor(s) under tutorship or person in respect of whose property letters of curatorship have been granted

Full address.....

I (full name)

of (full address)

Telephone numbers

in my capacity as **(state relationship to deceased or whether instructed by the Master)**.....

hereby declare that to the best of my knowledge and belief the **estate is *solvent/insolvent and the** within mentioned is a true and correct inventory—

*** (a) of all property known to me to have belonged, at the time of death, to the *abovenamed deceased/joint estate of the abovenamed deceased and surviving spouse ~~abovenamed massed estate;~~

~~*(b) of all property known to me to have been in the possession of the abovenamed deceased upon the premises at..... at the time of *his/her death;~~

*(c) showing the value of all property in the abovenamed estate;

*** ~~(d)~~(b) of all the property taken care of or administered by me.

Place Date Signature
Names **telephone numbers** and addresses of persons ~~having an interest in the estate as heirs in whose presence this inventory was made. (To be furnished in the case of an inventory under section 9 of the Act) except the Master a designated official or staff of the Master or designated official who assisted as agents or otherwise with the completion of this inventory:~~

.....
.....
.....
.....

Place Date Signature

* ~~Delete which is not applicable.~~

1. Immovable property

Description of property according to the title deed (also state number and date thereof)	Value	
	R	c
<u>Residential (including sectional title)</u>		
<u>Agricultural (Farm)</u>		
Total.....R		

2. Movable property

Description	Value	
	R	c
<u>Furniture and household appliances</u>		
<u>Jewellery and clothing</u>		
<u>Vehicles, equipment, machinery</u>		
<u>Firearms</u>		
<u>Livestock</u>		
<u>Shares in companies quoted on stock exchange</u>		
<u>Unit trust investment</u>		
<u>Shares not quoted on stock exchange</u>		
<u>Interest in partnership or close corporation</u>		
<u>Other movable property</u>		
Total.....R		

3. Cash and claims in favour of the estate

Description	Value	
	R	c
<u>Cash and money in bank accounts</u>		
<u>Fixed deposits, bonds and similar investments</u>		
<u>Loan accounts</u>		
<u>Policies payable to the estate</u>		
<u>Other claims in favour of the estate</u>		
Total.....R		
SUMMARY		
	R	c
1. Immovable property		
2. Movable property		
3. <u>Cash and c</u> laims in favour of estate		
Total.....R		

**Property deemed to be property in terms of the Estate Duty Act 45 of 1955
(only property not included above)**

Description	Value	
	R	c
<u>Proceeds of policies not payable to estate</u>		
<u>Pension or provident fund payments as a result of death of deceased</u>		
<u>Property over which the deceased could dispose of prior to death</u>		
<u>Fiduciary, usufructuary or other like interest in property held by the deceased immediately prior to death (reflect value of property)</u>		
<u>Any right to an annuity enjoyed by the deceased immediately prior to death which accrued to some other person on the death of the deceased (reflect annual payment)</u>		
<u>Property outside South Africa if the deceased was ordinarily resident in South Africa</u>		
Total.....R		

ANNEXURE 4: COMMENTATORS WHO FURNISHED COMMENTS ON DISCUSSION PAPER 95

1. Association of Trust Companies in South Africa: Mr D G Knott
2. Mr A E Bester
3. G L de Wet Practising Independent Insurance Broker, Financial Advisor and Appraiser
4. First National Asset Management and Trust Company (Pty) Limited
5. L A Kernick (Attorney)
6. Prof A J Kerr Rhodes University
7. Law Society of South Africa
8. Magistrate, Adelaide: S C Murphy
9. Magistrate, Bloemfontein: Mr T J Raulinga
10. Magistrate, Cape Town: H J Venter
11. Magistrate, Durban: Chief Magistrate R E Laue
12. Magistrate, Grahamstown
13. Magistrate, Johannesburg (Family Court): Mr R Dama
14. Magistrate, Johannesburg (Family Court): Mr M C Zikalala
15. Magistrate, Kimberley
16. Magistrate, Port Elizabeth: M M Mapipa
17. Magistrate, Witbank: Additional Magistrate G E du Plooy
18. Magistrate, Wynberg, Cape: M M Dimbaza
19. Magistrates Commission
20. Maitland Trust Limited: Mr J R P Doidge
21. Master, Bloemfontein: Mr Strauss
22. Master, Cape Town: Mr A Hoogendijk
23. Master, Grahamstown: Mr L Keyter
24. Master, Grahamstown: S S Moodley
25. Master, Grahamstown: Mr V R Reynolds
26. Master, Grahamstown, Mr H P J van der Merwe
27. National Council of Women South Africa: Dr J C Beenhakker
28. Provincial Administration: Western Cape - Ms Prevanya Moodley
29. South African Revenue Service: Ms C J Marx
30. Standard Trust Limited
31. Mr S F Voges of Dundee
32. Webber Wentzel Bowens Attorneys: Mr H J Barker
33. Prof N Wiechers UNISA - Administrator of Estates
34. Women's Legal Centre: Attorney Lulama Nongogo